

20636

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

ORIGINAL

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Circuit Court Judge

Case No. 2008-CP-10-6947

RECEIVED
SEP 30 2013
SC Court of Appeals

Pinepoint Associates, LP,

Respondents,

vs.

Vanevery Enterprises, Inc., Sandy Vanevery, GTH
Enterprises, Inc. and Timothy R. Seibold,

Defendants,

Of Whom

Vanevery Enterprises, Inc. and Sandy Vanevery are

Appellants.

RECORD ON APPEAL

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OTHER COUNSEL OF RECORD:
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RECEIVED
SEP 30 2013
SC Court of Appeals

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PINEPOINT ASSOCIATES, LP,
Plaintiff,

vs.

VANEVERY ENTERPRISES, INC; SANDY
VANEVERY; GTH ENTERPRISES, INC.;
and TIMOTHY R. SEBOLD,
Defendants.

IN THE CIRCUIT COURT

Case No. 2008-CP-10-6947

ORDER

FILED
2010 MAR 30 AM 10:00
JULIE L. ARMSTRONG
CLERK OF COURT

This matter came before the Court for a hearing on March 2, 2009, on Defendant Sandy Vanevery's ("Vanevery") Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) SCRPC, on the ground that the Summons and Complaint was not served on Vanevery until after the three-year statute of limitations had expired.

Rule 3(a)(1), SCRPC, states that a civil action is commenced when a summons and complaint is filed with the Clerk of Court if "the summons and complaint are served within the statute of limitations in any manner prescribed by law [.]". Under South Carolina Code Annotated §15-3-30, the statute of limitations is tolled if a defendant "shall depart from and reside out of this State."

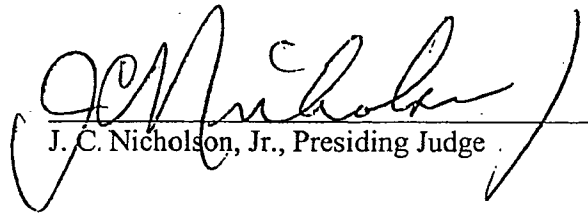
The Affidavit of Plaintiff's counsel reflects that Vanevery moved out of South Carolina and lives in North Carolina. At the hearing it was unrefuted that Plaintiff's repeated and extensive efforts to locate and serve Vanevery in both North Carolina and South Carolina were unsuccessful. Vanevery did not claim mail sent to his last known address in South Carolina, he did not leave a forwarding address, private process servers could not locate him at his former

addresses in South Carolina, and his current address in North Carolina was not known to or available to Plaintiff. Numerous attempts and due diligence were made to locate Vanevery in both North Carolina and South Carolina using private process servers in both states.

In short, Plaintiff did not know Vanevery's address in North Carolina, Plaintiff could not reasonably have known his address, and he was located and served only after extensive due diligence by Plaintiff's counsel. Therefore, the statute of limitation was tolled under § 15-3-30. See Tirarango vs. Balfry, 355 S.C. 359, SE2d 430 (1999) (holding the statute of limitations is not tolled under Section 15-3-30 unless the Defendant lives out-of-state and Plaintiff did not know, and could not reasonably have known, the whereabouts of the defendant.) Moreover, as the registered agent for Vanevery Enterprises, Inc., Vanevery's failure to list his proper and current address with the South Carolina Secretary of State equitably tolled the statute of limitations. See Hooper vs. Ebenezer Senior Services and Rehabilitation Center, 386 S.C. 108, 687 SE2d 29 (2009) (holding nursing home's failure to properly list its registered agent for service with the Secretary of State's Office equitably tolled the statute of limitations).

For the foregoing reasons, Plaintiff's Motion to Dismiss is DENIED.

SO ORDERED.


J. C. Nicholson, Jr., Presiding Judge

Charleston, South Carolina
March 29, 2010

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PINEPOINT ASSOCIATES, LP,
Plaintiff,

vs.

VANEVERY ENTERPRISES, INC; SANDY
VANEVERY; GTH ENTERPRISES, INC.;
and TIMOTHY R. SEBOLD,
Defendants.

IN THE CIRCUIT COURT

Case No. 2008-CP-10-6947

**ORDER DENYING VANEVERY'S
MOTION TO RECONSIDER**

FILED
2011 MAR 22 PM 2:50
BY JULIE J. ARMSTRONG
CLERK OF COURT

This matter came before the Court for a hearing on January 28, 2011, on Defendant Sandy Vanevery's ("Vanevery") Motion to Reconsider this Court's Order filed denying his motion to dismiss Plaintiff's Complaint based on the statute of limitations.

DISCUSSION

Plaintiff's Summons and Complaint was filed on December 8, 2008. Thereafter, approximately 180 days expired while Plaintiff attempted to locate and eventually successfully served Vanevery in person in North Carolina, where he was attending college. Plaintiff's counsel previously filed an Affidavit with the Court reflecting that a timely and diligent effort was made to locate and serve Vanevery.

A. Service under Rule 3(a), SCRPC.

Vanevery contends that under Rule 3(a), SCRPC, the Summons and Complaint had to be served within 120 days from the date of filing and, according to Vanevery, Plaintiff's inability to accomplish service within that time period requires dismissal of the Complaint. That argument misconstrues the clear and unambiguous language of Rule 3(a), which states:

RULE 3. COMMENCEMENT OF ACTION

(a) Commencement of Civil Action. A civil action is commenced when the summons and complaint are filed with the clerk of court if:

(1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or [emphasis added]

(2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

Vanevery's attempt to combine the 120-day provision in Rule 3(a)(2) with the provision for service in Rule 3(a)(1) ignores the "or" language that separates those provisions, and the effect of combining these provisions would be to impermissibly create an ambiguity in what is a clear and unambiguous Rule. See Williams v. Smalls, 390 S.C. 375, 378, 701 S.E.2d 772, 773 (Ct. App. 2010) ("[If] the statute's language is plain and unambiguous, and conveys a definite meaning, the rules of statutory construction are not needed and the court has no right to impose another meaning."); State v. Patterson, 220 S.C. 269, 66 S.E.2d 875 (1951) (stating that when construing a statute, it is proper for the court to look to the effects and consequences of the interpretation urged). In the present matter, service was timely and properly accomplished on a defendant located out-of-state in accordance with Rule 3(a)(1).

B. Service by publication under SC Code Ann. 15-9-710.

Vanevery also contends that because he was located out-of-state when the lawsuit was filed, Plaintiff should have dispensed with attempting to obtain personal service on him and instead immediately moved to serve him by publication under S.C. Code Ann. § 15-9-710 in order to obtain service (by publication) with the statute of limitations.

As a threshold matter, that argument would render § 15-3-30 (which provides for tolling of the statute of limitations when a defendant is out of state) meaningless because there would be no need to toll the statute for out-of-state defendants if service by publication was the required

procedure for obtaining service on such defendants. See Adoptive Parents v. Biological Parents, 315 S.C. 535, 543, 446 S.E.2d 404, 409 (1994) ("Statutes in apparent conflict should be construed, if possible, to allow both to stand and give effect to each."); State v. Patterson, 220 S.C. 269, 66 S.E.2d 875 (1951) (when construing a statute, it is proper for the court to look to the effects and consequences of the interpretation urged); Davis v. School Dist. of Greenville County, 374 S.C. 39, 647 S.E.2d 219 (2007) (refusing to recognize a proposed interpretation that would create a significant conflict between two statutes).

Further, § 15-9-710 provides that service by publication is permitted only when service cannot be made "after due diligence." Section 15-9-710 does not provide a time limit for the "due diligence" period, and any attempt by Vanevery to argue that a time limit applies would impermissibly add an additional requirement and change the meaning of what is a plain and unambiguous statute. See Williams v. Smalls et. al, supra. As reflected in the Affidavit submitted by Plaintiff's counsel, Plaintiff timely exercised due diligence in locating and successfully serving Vanevery. Plaintiff's due diligence efforts to locate and serve Vanevery revealed that he may be in North Carolina and allowed Plaintiff to accomplish personal service on him in North Carolina. Given that Plaintiff learned the location of Vanevery and was attempting to serve him in North Carolina, Plaintiff could not represent to the Court that he could not be located, as is required to obtain an order of service by publication.

In addition, the conditions for obtaining service by publication as enumerated in § 15-9-710 does not appear to apply to the facts presented here. For example, § 15-9-710(2) provides for service by publication when the defendant is a resident of this State and has departed from the State "with intent to fraud his creditors or to avoid service of a Summons." It appears that Vanevery is a resident of South Carolina who is attending college in North Carolina, and

5

Vanevery has not submitted any affidavit to the Court indicating that he is now a permanent resident of North Carolina. There is no evidence in record indicating that he was attending college in North Carolina "with intent to fraud his creditors or to avoid service of a Summons." Similarly, § 15-9-710(4) provides for service by publication when the defendant is not a resident of South Carolina, but has property in South Carolina and the Court has jurisdiction of the subject matter of the action. There is no evidence in the record indicating that Vanevery is not a resident of South Carolina. As such, the conditions for obtaining service by publication as enumerated in § 15-9-710 are not applicable here.

C. Meyer v. Paschal and Tiralango v. Balfry.

Finally, Vanevery cites Meyer v. Paschal, 330 S.C. 175, 498 S.E.2d 635 (S.C. 1998), in support of his contention that Plaintiff was required to serve Vanevery by publication. In Meyer the location of the defendant was at all times known to the plaintiff. The limitation of the holding in Meyer was subsequently recognized in Tiralango v. Balfry, 335 S.C. 359, 517 S.E.2d 430 (1999), which is the most recent decision on this topic. In Tiralango the South Carolina Supreme Court adopted the following rule regarding tolling of the statute of limitations under § 15-3-30:

In accordance with the above authority, we construe the language in Meyer as requiring an objective test of knowledge, i.e., *the statute is tolled when the plaintiff did not, and could not reasonably have known the whereabouts of the defendant.* [emphasis added]

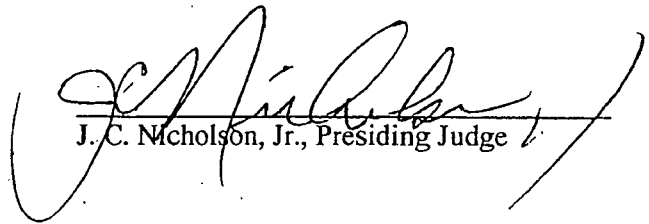
Tiralango, at 361, 517 S.E.2d 431. Tiralango did not adopt a requirement, as asserted by Vanevery, that service of publication must be made on an out-of-state defendant. Plaintiff made a diligent and good faith effort to timely serve Vanevery in person, which resulted in Vanevery receiving personal service of this lawsuit and an opportunity to defend the claim, and as opposed to the entry of a default judgment against him that would have almost surely followed service

upon him by publication. This case does present the situation that was of concern to the Court in Meyer, "whereby a plaintiff would allow suits to be postponed indefinitely, for no good purpose, and to be brought in some cases at the virtually unlimited pleasure of the plaintiff." Id. at 183, 498 S.E.2d at 639. To the contrary, the record in the case indicates that Plaintiff filed this action within the statute of limitations and thereafter promptly and diligently worked to locate and serve Vanevery in person.

CONCLUSION

For all of the above reasons, Vanevery's Motion to Reconsider is DENIED.

SO ORDERED.


J. C. Nicholson, Jr., Presiding Judge

March 24, 2011
Charleston, South Carolina

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2008-CP-10-6947

Pinepoint Associates, LP
PLAINTIFF(S)

Vanevery Enterprises, Inc., Sandy Van Every, GTH
Enterprises, Inc., and Timothy R. Sebold
DEFENDANT(S)

Submitted by: David J. Parrish

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

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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

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

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

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

Order and Judgment

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Plaintiff Pinepoint Associates	Defendants Van Every Enterprises, Inc., Sandy Van Every, GTH Enterprises, Inc. & Timothy R. Sebold	\$139,291.00
		\$
		\$

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

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

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE CIRCUIT COURT

PINEPOINT ASSOCIATES, LP,
Plaintiff,

Case No. 2008-CP-10-6947

vs.

ORDER AND JUDGMENT

VANEVERY ENTERPRISES, INC; SANDY
VANEVERY; GTH ENTERPRISES, INC.;
and TIMOTHY R. SEBOLD,
Defendants.

This matter came before the Court for a hearing on the cross-motions for summary judgment filed by the Plaintiff and by Defendants Sandy Van Every and VanEvery Enterprises, Inc. Defendants Timothy R. Sebold and GTH Enterprises, Inc. were served with timely notice of motion and notice of the hearing, but they did not appear at the hearing or otherwise respond to the motion and the Court proceeded with the hearing in their absence.¹

FILED
2012 MAY 23 PM 3:00
JULIE J. BISHOP
CLERK OF COURT

FINDINGS OF FACT²

1. This is a commercial landlord-tenant matter.
2. Plaintiff, as the Landlord, and Defendant VanEvery Enterprises, Inc., as the Tenant, entered into a lease agreement (the "lease") dated June 1, 2005, for commercial retail space (the "premises") in the Pine Point Plaza shopping center located at 1964 Ashley River Road in Charleston County, South Carolina.

¹ Mr. Sebold filed a *pro se* answer in this case on behalf of himself and his company, GTH Enterprises, Inc., but since then he has not appeared or participate in the case.

² To the extent that any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such and, conversely, to the extent that any Conclusions of Law constitute Findings of Fact, they are also adopted as such.

3. Defendant Sandy Van Every ("Van Every") is the sole owner and manager of VanEvery Enterprises, Inc.

4. Under the terms of the lease, the Tenant was required to construct improvements, open, and operate a health club/fitness facility in the premises.

5. Van Every intended to open and operate a "Lifequest" health club franchise in the leased premises.

6. Timothy R. Sebold ("Sebold") and/or or his company, GTH Enterprises, Inc., was the owner of the Lifequest name and brand.

7. In connection with the execution of the lease, Van Every, Sebold, and Sebold's company, GTH Enterprises, Inc., signed personal guarantees in which they jointly and severally guaranteed the full performance of all of the Tenant's obligations under the lease.

8. Under the term of the lease, the Commencement Date for delivery of the premises by the Landlord to the Tenant began on August 1, 2005, and the Rent Start Date for the Tenant to begin paying rent began on December 1, 2005.

9. The Landlord and Tenant subsequently entered into a First and Second Amendment to the Lease, the pertinent portions of which changed the lease Commencement Date to October 17, 2005, and the Rent Start Date to March 15, 2006.

10. The Tenant took possession of the premises on or around the amended Commencement Date (i.e., October 17, 2005) and began construction of the upfits to open a health club facility in the space.

11. In a letter from his attorney dated December 16, 2005, Mr. Van Every informed the Landlord that he desired to "rescind" his lease. The Landlord responded in a letter dated December 19, 2005, and indicated that Mr. Van Every could not rescind the lease. The Landlord

also indicated that, under the term of the lease, he could assign the lease, subject to the Landlord's consent and subject to all of the guarantors agreeing to the assignment.

12. The Landlord prepared a proposed an agreement for Van Every to assign the lease to Sebold, but the Defendants never returned the signed agreement to the Landlord. The Tenant remained in possession of the premises, and work continued on the Tenant's upfits to the space. Van Every contends that at this point Sebold was in charge of the upfits to the space.

13. The monthly rent payments owed by the Tenant under the lease commenced on March 15, 2006. Around that same time the Landlord learned that a lawsuit had been filed between Sebold and Van Every.

14. In a letter dated March 17, 2006, the landlord notified the Defendants and their counsel that the rent payment that was due on March 15, 2006, had not been received, and the letter requested adequate assurances from the Defendants concerning performance of the Tenant's obligations under the lease, including payment of rent.

15. In a letter dated April 5, 2006, the Landlord notified the parties and their counsel that the Tenant was in default under the lease based on failure to deliver the rent payments, and the letter requested a meeting between all parties and counsel to discuss a resolution of the situation.

16. Following a meeting between the parties and their counsel, the Landlord sent the Defendants a "Surrender of Tenant's Leasehold Interest Agreement" under which the Tenant and guarantors would voluntarily surrender the Tenant's possession of the leasehold to the Landlord so the Landlord could attempt to re-lease the premises. The Landlord requested that the Defendants return the signed surrender agreement to the Landlord by no later than May 9, 2006. The Defendant's did not return the signed agreement to the Landlord.

17. On May 12, 2006, the Landlord filed an action in the Magistrate's Court to evict the Tenant from the premises.

18. Following the eviction action, the Landlord took possession of the premises and eventually leased the premises to another tenant.

19. The Landlord subsequently filed this action on December 8, 2008, seeking to collect the unpaid rent and other sums owed under the lease and under the personal guarantees of the lease.

20. The Landlord and Van Every filed cross-motions for summary judgment.

STANDARD OF REVIEW

Rule 56(c), SCRCP, provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." S.C. Prop. & Cas. Guar Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 558, 671 S.E.2d 79, 85 (Ct. App. 2008). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Id. Once the party moving for summary judgment meets the initial burden of showing the

absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Id. at 558-59, 671 S.E.2d at 85. Rather, the nonmoving party must present specific facts showing a genuine issue for trial. Id. at 559, 671 S.E.2d at 85.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

21. This Court has jurisdiction over the parties and subject-matter of this case for purposes of this motion.

22. Defendants Sebold and GTH Emprises, Inc. were served with timely notice of the hearing on the motions for summary judgment. They did not request a continuance or submit anything in response to the motions, and no one appeared on their behalf at the hearing. Accordingly, the Court properly proceeded with the hearing in their absence.

23. Van Every presented two arguments in opposition to the Landlord's motion for summary judgment, one based on the statute of limitations, and the other based on Van Every's purported rescission of the lease.

24. As to Van Every's statute of limitations argument, this action is governed by the three-year statute of limitations applicable to contract actions under S.C. Code Ann. § 15-3-530(1); accord Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 609 S.E.2d 548 (Ct. Ap. 2005) (holding three-year statute of limitations for contract actions applies to action based on breach of a commercial lease).

25. The Landlord's Complaint was filed on December 8, 2008, which was (a) less than three years before Van Every notified the Landlord on December 16, 2005, that he wanted to rescind the lease; (b) was less than three years from the Tenant's failure to deliver the first rent payment that became due on March 15, 2006; and (c) was less than three years from the date the

Landlord obtained possession of the premises by way of the eviction action the Landlord filed on May 12, 2006. The Landlord timely filed this action within the three-year statute of limitations.

26. As to Van Every's arguments concerning the Landlord's alleged delay in locating and serving the Complaint on Van Every, who had moved to North Carolina, this Court has previously examined and rejected that argument twice in two separate detailed written Orders³, and those Orders are incorporated herein by reference.

27. As to Van Every's other argument in opposition to the Landlord motion for summary judgment, Van Every contends that his notifying the Landlord in December 2005 that he desired to rescind the lease somehow operated to relieve him of his obligations under his personal guarantee of his company's lease with the Landlord. The lease and guarantees do not contain any provision allowing him to rescind the lease or his guarantee, and he has not cited any case law or statute granting him a unilateral right to do so.

28. Van Every did not sign or return the assignment agreement that the Landlord prepared for him to assign the lease to Sebold. He also failed to sign and return the Landlord's proposed leasehold surrender agreement, which required the Landlord had to file an eviction action to regain possession of the premises.

29. Van Every also contends that Sebold was in charge of the upfits to the space and that the Landlord agreed to his "oral assignment" of the lease to Sebold. The information presented to the Court reflects that the Landlord requested a written lease assignment signed by all guarantors, which the Landlord never received, and Van Every has not identified any exchange of consideration or any other benefit or value received by the Landlord in consideration of the purported oral assignment. See, e.g., Layman v. State, 368 S.C. 631, 640,

³ Order filed on March 30, 2010, and Order Denying Van Every's Motion to Reconsider filed on March 22, 2011.

630 S.E.2d 265, 269-270 (2006) ("Once the bargain is formed, and the obligations set, a contract may only be altered by mutual agreement and for further consideration.").

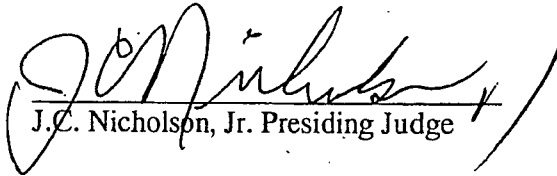
30. The facts material to this matter are not in dispute and the landlord is entitled to summary judgment against the Defendants based on a breach of their obligations to the Landlord under the lease and their personal guarantees of the lease.

31. Accordingly the Landlord is entitled to a judgment against the Defendants for the following sums: Rent due from March 15, 2006, through July 1, 2006, when the Landlord re-leased the preemies, which equates to \$33,226.00 per month x 3.5 months = \$116,291.00, plus \$23,000.00 for the real estate leasing commission paid by the Landlord, for a total judgment of \$139,291.00.

ACCORDINGLY, IT IS HEREBY ORDERED that the Plaintiff's motion for summary judgment is granted, and the Plaintiff is entitled to, and hereby awarded, a judgment against the Defendants, jointly and severally, in the amount of \$139,291.00

IT IS SO ORDERED.

4/30, 2012
Charleston, South Carolina


J.C. Nicholson, Jr. Presiding Judge

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2008-CP-10-6947

Pinepoint Associates
PLAINTIFF(S)

Vanevery Enterprises
DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Motion to Alter/Amend or New Trial is **Denied**.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

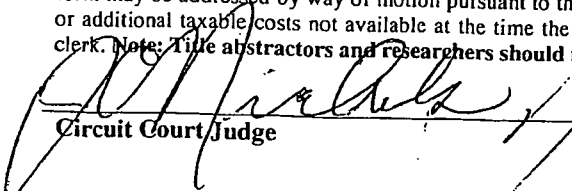
INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$

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

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


Circuit Court Judge

2117
Judge Code

2/1/12
Date

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PINEPOINT ASSOCIATES, LP,
Plaintiff,

vs.

VANEVERY ENTERPRISES, INC; SANDY
VANEVERY; GTH ENTERPRISES, INC.;
and TIMOTHY R. SEBOLD,
Defendants.

IN THE CIRCUIT COURT

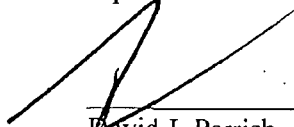
Case No. 08-CP-10-6947

SUMMONS

FILED
2008 DEC -8 PM 4:15
JULIE J ARMSTRONG
CLERK OF COURT
BY _____

TO THE DEFENDANTS NAMED ABOVE:

82-081-00
YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in the
above entitled action, a copy of which is herewith served upon you, and to serve a copy of your
Answer upon the subscribers at Post Office Box 486, Charleston, South Carolina 29402 within
thirty (30) days after the date of such service, exclusive of the day of service; and if you fail to
answer the said Complaint within the time aforesaid, judgment by default will be rendered
against you for the relief demanded in the Complaint.



David J. Parrish
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
843.577.9440
Attorney's for Plaintiff

December 8, 2008

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PINEPOINT ASSOCIATES, LP

Plaintiff,

vs.

VANEVERY ENTERPRISES, INC; SANDY
VANEVERY; GTH ENTERPRISES, INC.;
and TIMOTHY R. SEBOLD,

Defendants.

IN THE CIRCUIT COURT

Case No. 2008-CP-10-6947

COMPLAINT

Non-Jury

(breach of lease / collection)

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2008 DEC -8 PM 4:15

FILED

Plaintiff would show as follows:

1. Plaintiff is a South Carolina limited partnership with its headquarters and principle place of business located in Charleston County, South Carolina.
2. Upon information and belief, Defendant VanEvery Enterprises, Inc. is a South Carolina corporation with its headquarters and principle place of business located in Charleston County, South Carolina.
3. Upon information and belief, Defendant GTH Enterprises, Inc. is a South Carolina corporation with its headquarters and principle place of business located in Charleston County, South Carolina.
4. Upon information and belief, Defendant Sandy Van Every is a citizen and resident of Charleston County, South Carolina.
5. Upon information and belief, Defendant Timothy R. Sebold is a citizen and resident of a state other than South Carolina.

6. Plaintiff, as the Landlord, and Defendant VanEvery Enterprises, Inc., as the Tenant, entered into a lease agreement (the "lease") for commercial retail space (the "premises") in the Pine Point Plaza shopping center located at 1964 Ashley River Road in Charleston County, South Carolina, as more particularly described in the Lease, a copy of which is attached as Exhibit A and incorporated by reference. The parties subsequently entered into a First Amendment to the Lease and a Second Amendment to the Lease executed on December 5, 2005, copies of which are included in Exhibit A.

7. Under the terms of the lease, the Tenant was required to construct improvements, open, and operate a health club/fitness facility in the premises.

8. At part of the lease, the Plaintiff provided the Tenant with a tenant improvement allowance to assist the Tenant with the cost of upfitting the premises.

9. In connection with execution of the lease, Defendants Sandy Van Every, Timothy R. Sebold, and GTH Enterprises, Inc. signed personal guarantees in which they jointly and severally guaranteed the full performance of all of the Tenant's obligations under the lease. Copies of their guaranties are included in Exhibit A.

10. The Tenant breached and defaulted on the lease by, without limitation, failing to pay the rent and other sums owed under the lease, by failing to complete and open a business in the premise as required under the lease, and by abandoning the premises with the improvements only partially complete.

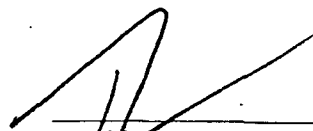
11. The Tenant is in default under the lease and has breached the lease.

12. Despite notice and demand, the Defendants failed to the rent and other payments owed by the Tenant under the lease.

13. The damages incurred by Plaintiff as a result of the Tenant's breach of the lease include without limitation \$92,971 for lease commissions paid by Plaintiff; plus \$44,174 in tenant improvement allowances paid by Plaintiff on behalf of Defendants; plus \$82,500 paid by Plaintiff to Palmetto Contrustruction Group in settlement of upfit work/mechanic's lien claims for work it performed in the premises on behalf of Defendants; plus \$50,375 in rent and other sums owed under the lease through 4/06; plus additional rent and other sums thereafter accrued; plus late fees and interest; and plus attorney's fees and the costs of this action.

WHEREFORE, the Plaintiff prays for the following relief:

- (a) a judgment against the Defendants, jointly and severally, for damages incurred by Plaintiff as a result of the Tenant's breach of the lease;
- (b) prejudgment interest;
- (c) attorney's fees;
- (d) the costs of this action;
- (e) and such other and further relief as this Court deems just and proper.



David J. Parrish
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
843.577.9440
Attorneys for Plaintiff

December 8, 2008

LEASE AGREEMENT

THIS LEASE is made and entered into at Charleston, South Carolina as of this 21 day of June, 2005, by and between PINEPOINT ASSOCIATES, LP, a South Carolina Corporation ("Landlord") and VanEvery Enterprises, LLC d/b/a LIFEQUEST FITNESS CENTER ("Tenant"). In consideration of the covenants and provisions of this Lease and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, Landlord and Tenant agree as follows:

1. **BASIC LEASE PROVISIONS.** Each reference in this Lease to this Section 1 or any portion hereof shall mean and refer to the following terms, the application of which shall be governed by the provisions in the remaining Sections of this Lease:

- | | | |
|------|---|--|
| 1.1 | Landlord: | Pinepoint Associates, LP |
| 1.2 | Landlord's Mailing Address: | Attn: Property Management
211 King Street, Suite 300
Charleston, South Carolina 29401 |
| 1.3 | Landlord's Phone Number: | (843) 722-2615 |
| | Landlord's Facsimile Number: | (843) 722-6449 |
| 1.4 | Rent Payment Address: | Property Manager
The Beach Company
Post Office Box 607
Charleston, South Carolina 29402 |
| 1.5 | Tenant: | VanEvery Enterprises, LLC., a South Carolina, LLC. d/b/a Lifequest Fitness Center |
| 1.6 | Tenant's Mailing Address: | 1303 Eaglet Lane
Charleston, SC 29406 |
| 1.7 | Tenant's Phone Number: | (843) 460-5749 |
| | Tenant's Facsimile Number: | N/A |
| | Tenant's E-Mail Address: | N/A |
| 1.8 | Tenant's Trade Name: | Lifequest Fitness Center |
| 1.9 | Premises Address: | 1964 Ashley River Road
Charleston, South Carolina 29407 |
| 1.10 | Premises Square Footage:
Tenant's Share: | Deemed 25,650 square feet of a 52,765 square foot center.
Deemed 48.61% |
| 1.11 | Initial Term: | Seven (7) years and Five (5) months |
| 1.12 | Commencement Date: | Date of Delivery by Landlord but not before
August 1, 2005. If Landlord delivers premises prior to August 1, 2005,
Tenant may start construction but Lease Commencement shall be
August 1, 2005 or later. |
| 1.13 | Anticipated Delivery Date: | August 1, 2005 |
| 1.13 | Rent Start Date: | December 1, 2005 |

EXHIBIT

A

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providing forty-five (45) tons of service. Tenant is responsible for all ductwork. The floors will be delivered in "as is" condition except for the patchwork to create a smooth surface for new floor coverings. Tenant is responsible for all floor coverings. No ceiling grid is provided. The under deck of the metal roof will be insulated. The space will be delivered unpainted. Any deviations from the above description requested by Tenant will be at Tenant's expense less any applicable credits from Landlord not performing a portion of Landlord's work.

- EXHIBITS:**
- A-1** Site Plan
 - A-2** Premises Plan
 - B** Legal Description of Center
 - C** Construction Rider
 - D** Sign Criteria
 - E** Rules and Regulations
 - F** Guaranty

2. DEFINITIONS

2.1 **Definitions.** The capitalized terms set forth below, unless the context clearly requires otherwise, shall have the following meanings in this Lease:

"Agents" means a party's authorized agents, representatives, consultants, contractors, partners, members, shareholders, subsidiaries, affiliates, directors, officers and employees, including without limitation, any additional insureds Landlord designates and any property manager, in the case of Landlord, and including Tenant's customers, subtenants, licensees and concessionaires in the case of Tenant.

"Additional Rent" means any and all sums (whether or not specifically called "Additional Rent" in this Lease) other than Minimum Rent and Percentage Rent for which Tenant is or becomes obligated to pay to Landlord under this Lease. Unless otherwise indicated in this Lease, any Additional Rent is payable within ten (10) days of Landlord's demand.

"Alterations" means any alterations, decorations, modifications, additions or improvements made in, on, about, under or contiguous to the Premises after the Commencement Date, including, but not limited to, lighting, HVAC and electrical fixtures, pipes and conduits, transfer, storage and disposal facilities, partitions, drapery, wall coverings, shelves, cabinetwork, carpeting and other floor coverings, ceiling tiles, fixtures and carpentry installations.

"Applicable Laws" means the laws, rules, regulations, guidelines, ordinances, statutes and restrictions or requirements of any governmental authority, board of insurance underwriters, utility companies or other similar bodies now or hereafter in effect relating to or attesting the condition, use or occupancy of the Premises.

"Applicable Rate" means the highest permitted nonusurious rate in the State or, if there is none, fifteen percent (15%) per annum.

"Casualty" is defined in Section 20.1.

"Center" means that certain real property, and all improvements thereon, located within the boundaries of such property, shown on the Center Site Plan.

"Center Site Plan" means Exhibit A-1.

"City" means the city in which the Premises are located.

"Common Area" means all areas and facilities within the Center exclusive of the Premises and other portions of the Center leased (or to be leased) exclusively to other tenants. The Common Area includes, but is not limited to, parking areas, access and perimeter roads, sidewalks, landscaped areas and similar areas and facilities.

"Common Area Cost" is defined in Section 9.5.

"Construction Rider" means the rider between Landlord and Tenant regarding the construction of the Tenant's Work and the Landlord's Work, if any, in the form of Exhibit B.

~~"Consumer Price Index" is for purposes of this Lease. "Index" means the Consumer Price Index for All Urban Consumers, all items, U.S. City Average (1982-84 = 100) issued by the Bureau of Labor Statistics of the United States Department of Labor. If the manner in which such Index is determined by the Bureau of Labor Statistics is substantially revised, then the Bureau of Labor Statistics shall be requested to furnish a statement converting the Index published most recently prior to the start of the immediately preceding Lease Year (as hereinafter defined) to a figure that would be comparable to the revised Index published most recently prior to the start of the new Lease Year. If the 1982-84 average shall no longer be used as an index of 100, such change shall constitute a substantial revision. If the Consumer Price Index published by the Bureau of Labor Statistics is discontinued, then the Index shall be the Consumer Price Index published by the U.S. Department of Commerce with appropriate adjustment. If the U.S. Department of Commerce Index is discontinued, then Landlord and Tenant shall agree on a reasonable substitute.~~

"County" means the county in which the Premises are located.

"Gross Sales" is defined in Section 8.5.

"HVAC" means the heating, ventilating and air conditioning system serving the Premises and/or the Center.

"Landlord's Work" means those certain initial improvements, if any, to be constructed by Landlord on the Premises as provided in the Construction Rider.

"Lease" means this instrument together with all exhibits, amendments, addenda and riders attached hereto and made a part hereof.

"Lease Year" means individually the period of twelve (12) full calendar months (plus any initial partial month) beginning on the Commencement Date, and each such succeeding twelve (12)-month period thereafter during the Term, except the last Lease Year shall end when the Term ends.

"Mortgagee" means any mortgagee of a mortgage, beneficiary of a deed of trust or lender having a lien on or covering the Premises or any part thereof.

"Notice" means each and every notice, communication, request, demand, reply or advice, or duplicate thereof, in this Lease provided or permitted to be given, made or accepted by either party to any other party, which shall be in writing and given in accordance with the provisions of Section 23.

"Plans" means the final working drawings for the construction of the Tenant's Work to be prepared and approved as set forth in the Construction Rider.

"Premises" means the premises shown on Exhibit A-2.

"Premises Square Footage" means the entire area included within the Premises, being the area bounded by the inside surface of any exterior glass walls (or the centerline of the permanent exterior wall where there is no glass) of the Center bounding the Premises, the centerline of all walls separating the Premises from any public corridors or such other public areas on the same floor. The Premises Square Footage as of the execution of this Lease is set forth in Section 1.10.

"Real Estate Taxes" is defined in Section 9.4.

"Rent" means Minimum Rent, Percentage Rent and Additional Rent, collectively.

"Restrictions" means, collectively, any reciprocal easement agreement, covenants, conditions and restrictions, or any other easement or restriction affecting the Premises, the Center or any portion thereof, as the same may be amended from time to time.

"Rules and Regulations" means the rules and regulations described in Exhibit D and any modifications thereto promulgated by Landlord or Landlord's Agents from time to time, provided such modifications do not unreasonably interfere with Tenant's use and enjoyment of the Premises.

"Substantial Completion" and "substantially completed" means the Landlord's Work, if any, or Tenant's Work, or repair of the Premises following a Casualty, having been fully completed except for minor details of construction, mechanical adjustments or decoration which do not materially interfere with Tenant's use and enjoyment of the Premises (items normally referred to as "punch list" items).

"Tenant's Work" means those certain initial improvements, if any, to be constructed by Tenant on the Premises as provided in the Construction Rider.

"Tenant's Personal Property" means Tenant's removable trade fixtures, furniture, equipment, inventory and other personal property located in or on the Premises.

"Tenant's Share" as set forth in Section 1.10 and defined in Section 9.3.

"Term" means the Initial Term and any extensions.

"Unavoidable Delay" means any delays beyond the control of Landlord or Tenant, as the case may be, including, but

not limited to, delays due to inclement weather, natural disaster, labor strikes, unavailability of materials, national emergency, acts of God, governmental restrictions, fire, explosion, war, invasion, insurrection, rebellion or riots.

2.2 Other Definitions. Terms defined in the Basic Lease Provisions in Section 1 or elsewhere in this Lease or the exhibits, riders, schedules and attachments, unless the context clearly requires otherwise, shall have the meanings as there given.

3. PREMISES. Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, the Premises upon the terms, covenants, and conditions set forth in this Lease. By entering into any occupancy of the Premises, Tenant, shall be deemed to acknowledge that it has inspected the Premises and that the Premises are in good order and repair with any Landlord's Work substantially completed. Tenant further agrees that the Premises are being leased in their "as is" condition, unless otherwise specified in the Construction Rider.

4. TERM AND DELIVERY OF PREMISES. The initial term of the Lease ("Initial Term") is the period set forth in Section 1.11, plus any initial partial calendar month, commencing on the Commencement Date (as defined in Section 1.12). Tenant and Landlord acknowledge and agree that the Commencement Date may change due to Landlord's construction delay, or Unavoidable Delays, and that Landlord shall not be subject to any liability as a result of any such delay. If Landlord fails for any reason to deliver possession of the Premises to Tenant by the Anticipated Delivery Date as set forth in Section 1.13, (i) Landlord shall not be liable to Tenant for any direct or consequential losses resulting to Tenant from the delay, (ii) this Lease shall not terminate, and (iii) the Commencement Date shall be extended as appropriate to take into account when Landlord actually delivers possession of the Premises to Tenant. If Landlord is unable to deliver possession to Tenant by the date one hundred twenty (120) days after the Anticipated Delivery Date, Landlord or Tenant, at its election, may terminate this Lease without further liability.

5. EARLY ACCESS. At Landlord's discretion, Tenant and its Agents may enter the Premises before the Commencement Date following Landlord's written consent. Such entry shall constitute the agreement of Tenant that (i) none of such parties nor their work, equipment, or materials shall interfere with any work or construction by Landlord or any other tenant of the Center; (ii) that Tenant will indemnify, protect, defend, and hold harmless Landlord and Landlord's Agents of and from any and all claims, liabilities, damages, costs and expense (including attorneys' fees) for personal injury (including death) and/or property damage and/or other injuries, losses or damages attributable directly or indirectly to any act or omission of Tenant or Tenant's Agents; (iii) that Tenant will pay all utility charges with respect to the Premises that accrue on and after such entry; and (iv) such entry shall be subject to all terms, conditions, and covenants of the Lease other than those relating to the payment of Minimum Rent and Percentage Rent.

6. OPERATION OF TENANT'S BUSINESS.

6.1 Use. The Premises shall be used only for the Permitted Use set forth in Section 1.23 and for no other purpose. Tenant shall conduct its business at the Premises only under the Tenant's Trade Name set forth in Section 1.8 or under such other trade name as Landlord may approve in writing. Violation of any of the provisions of this Section 6 shall, at Landlord's option, be an Event of Default.

6.2 Tenant's Business Operations. Tenant shall open the Premises for business by the Commencement Date and thereafter continuously operate its business at the Premises with due diligence and efficiency so as to produce the maximum Gross Sales that may be produced by such manner of operation throughout the Term. Tenant shall carry and display at all times in the Premises a stock of merchandise of character, quality and quantity reasonably designed to accomplish the purposes of this Section 6. Tenant shall keep display windows well lighted during such hours as Landlord may designate from time to time, but in any event from 9:00 a.m. to 11 p.m., seven (7) days a week. Displays shall be changed regularly. Tenant shall conduct its business in a lawful manner, obtain any required permits, and observe any reasonable requirements of any insurer under any policy affecting any part of the Premises.

6.3 Hours of Operation. Tenant shall keep the Premises open for business to the public and cause such business to be conducted during the Required Business Hours set forth in Section 1.21, as the same may be amended by the Landlord from time to time. Tenant shall not extend its business days and hours beyond those business days and hours established by Landlord without Landlord's prior consent. To the extent that Landlord incurs additional costs and expenses as a result of Tenant's extended days and hours of operation, Tenant shall promptly reimburse Landlord upon demand for such additional costs and expenses. If Tenant fails to operate its business at the Premises during any month or portion of a month as required by this Section 6, then Tenant's Gross Sales during such month when Tenant is not operating its business shall be deemed to be the greater of: (i) actual Gross Sales from the Premises during such month; (ii) Gross Sales during the previous

month; or (iii) Gross Sales of Tenant during the corresponding month for the previous year.

6.4 Landlord's Damages. Tenant acknowledges that its failure to operate its business at the Premises during the Required Business Hours shall result in Landlord incurring costs, expenses, and damages that are not contemplated by this Lease both as a result of the direct impact such violation shall have under this Lease but also as a result of the adverse impact such violation shall have on other tenants in the Center. The costs, expenses, and damages that Landlord is likely to incur include, among other things, increased administrative and personnel costs, ~~decreased payments of percentage rent~~, and like costs and expenses. Tenant also acknowledges that the exact amount of such costs, expenses, and damages are extremely difficult to ascertain. Accordingly, for each day, or part of a day, that Tenant violates the requirements contained in this Section, from and after the Commencement Date that Tenant fails to operate during the Required Business Hours, Tenant shall pay immediately on demand the sum of fifty percent (50%) of daily Minimum Rent as liquidated damages, which sum shall be payable in addition to all other sums payable under this Lease to all other rights and remedies available to Landlord. The parties agree that such amount of liquidated damages represents a fair and reasonable estimate of the costs, expenses, and damages that Landlord shall incur by reason of Tenant violating the provisions of this Section.

6.5 Prohibited Acts. Tenant covenants that neither Tenant nor Tenant's Agents will (i) place any merchandise, displays or other articles in any entry to the Premises or in any area outside of the Premises; (ii) erect or maintain any barricade or scaffolding which may obscure the signs, entrances or show window of any other Tenant in the Center or tend to interfere with any such other Tenant's business; (iii) create or maintain, or allow others to create or maintain, any nuisances, including without limitation, loud noises, sound effects, other objectionable advertising media (including, loud speakers, phonographs, public address system, sound amplifiers, televisions, or radios audible outside the Premises), offensive odors and smoke or dust in or about the Premises; (iv) place or maintain any signs or distribute handbills in any parking area; (v) commit any waste; (vi) maintain or allow to be maintained any excessively bright lights, or changing, flashing, flickering or lighting or similar devices, the effect of which will be visible from the exterior of the Premises; or (vii) conduct or permit any activity, practice, sales or use in violation of any Applicable Law.

6.6 Rules and Regulations. Tenant's use of the Premises shall be subject, at all times during the Lease Term, the Rules and Regulations set forth in Exhibit D as the same may be amended from time to time by Landlord. Tenant shall comply with any modified Rules and Regulations upon notice to Tenant from Landlord.

6.7 Signage. No sign shall be placed in or about the Premises which states any financial difficulty, such as a liquidation, need for cash, or going out of business. Tenant is required to install Landlord approved signs on the Tenant's sign bands that identify the Tenant's Trade Name within ninety (90) days from the Commencement Date. Tenant may erect, but only with Landlord's prior written approval such other signage as it allowable under the applicable laws. Landlord, in connection with such signage approval, shall have the right to determine the size, shape, type, color, lighting, location, and style of all lettering and/or logos in connection with such signage. In addition, Landlord shall have the right to limit any use by Tenant of any windows, and areas of the Premises visible outside the Premises, for signage, advertising, or other materials intended to attract attention to the Premises. Landlord may from time to time inaugurate or modify a uniform signage policy for all tenants, with which Tenant agrees to comply.

6.8—Retail Restriction Limit. Landlord and Tenant acknowledge that the realization of the benefits of a percentage rent lease is dependent upon Tenant's maximization of Gross Sales and that self-competition is inconsistent with the generation of maximum Gross Sales. Landlord and Tenant further acknowledge that the Minimum Rent was negotiated together with and giving consideration to the Percentage Rent and anticipated Gross Sales of Tenant and that self-competition by Tenant shall deprive Landlord of a bargained-for consideration. Accordingly, Tenant agrees that during the Term, neither Tenant nor Tenant's Agents shall directly or indirectly engage in any business that is substantially similar to or in competition with that for which the Premises are let, within the radius of the Radius Restriction set forth in Section 1.22. The word "radius" as used herein shall mean a straight line measurement and not measured along existing streets and highways. If Tenant breaches the covenant contained in this Section, then in addition to the rights and remedies provided in Section 18.2 of this Lease, Landlord may include all Gross Sales generated by Tenant's violative store in calculating Percentage Rent due under this Lease.

7. MINIMUM RENT AND RENT PAYMENT.

7.1 Minimum Rent. Tenant shall pay Minimum Rent in monthly installments, payable on the first (1st) day of each calendar month, in the amount set forth in Section 1.14. Should the Term begin or end on other than the first or last day of a calendar month, the amount of Minimum Rent for the first partial month shall be prorated. Tenant shall pay Minimum Rent and Additional Rent for the first full calendar month (and for any initial partial month) and the Security Deposit upon execution of this Lease. Minimum Rent shall increase as set forth in Section 1.14.

7.2 **Payment of Rent.** Tenant shall pay all Rent to Landlord at the Rent Payment Address specified in Section 1.4, or at such other address as Landlord may designate from time to time. Minimum Rent, Percentage Rate (if applicable) and Additional Rent shall not be withheld for any reason, and they are not subject to prior notice, demand, deduction or offset. Without prejudice to Landlord's rights to declare Tenant in default for failure to make timely payment, Landlord may, at its option, accept Rent after the due date. The acceptance of Rent by Landlord at any time shall not constitute a waiver of any right of Landlord.

7.3 **Late Payment Charge.** Tenant hereby acknowledges that late payment by Tenant to Landlord of Rent will cause Landlord to incur costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. Such costs include, but are not limited to, processing and accounting charges, personnel costs, and late charges which may be imposed on Landlord by the terms of any mortgage or trust deed covering the Center. A payment by Tenant of a five (5%) percent late charge shall be due as Additional Rent for any Rent not paid within five (5) days after the same is due. Landlord and Tenant hereby agree that such late charge represents a fair and reasonable estimate of the cost Landlord shall incur by reason of late payment by Tenant. Acceptance of such late charge by Landlord shall in no event constitute a waiver of Tenant's default with respect to such overdue amount, nor prevent Landlord from exercising any other rights and remedies. Notwithstanding the foregoing, should any payment of Rent by check be rejected for insufficient funds, Landlord shall have the right, upon notice to Tenant, to require that all future payments by Tenant under this Lease be made by cashier's check acceptable to Landlord.

6. ~~PERCENTAGE RENT:~~

~~8.1 **Tenant's Obligation.** In addition to Minimum Rent, Tenant shall pay as "Percentage Rent" an amount equal to Tenant's "Gross Sales" (as defined in Section 8.5) for each Lease Year (as defined in Section 2.1) in excess of the Annual Breakpoint set forth in Section 1.15, multiplied by the percentage set forth in Section 1.15. On or before the fifteenth (15th) day of the second month following the end of each Lease Year, Tenant shall pay to Landlord the Percentage Rent payable for such Lease along with its annual Gross Sales statement. Landlord's acceptance of Percentage Rent from Tenant shall not constitute a waiver of Landlord's right to additional Percentage Rent justified by an inspection and/or audit.~~

~~8.2 **Gross Sales Statements.** On or before the fifteenth (15th) day of the second month after the end of each Lease Year or portion thereof during the Term, Tenant shall furnish Landlord at the Rent Payment Address a sworn statement duly certified by Tenant, showing the Gross Sales during the preceding Lease Year or portion thereof. The statement shall be in detail, and in form and content, acceptable to Landlord. Following Landlord's request, Tenant shall also provide Landlord a monthly statement of Gross Sales on or before the fifteenth (15th) day following the end of each calendar month. If a partial Lease Year should occur at either the beginning or end of the Term, Percentage Rent for that partial Lease Year shall be annualized based upon an adjusted Annual Breakpoint, which shall be arrived at by multiplying the applicable Annual Breakpoint set forth in Section 1.15 by a fraction, the numerator which is the number of days during such partial Lease Year and the denominator which is three hundred sixty-five (365).~~

~~8.3 **Tenant's Books and Records.** For the purpose of ascertaining the amount of Percentage Rent payable, Tenant agrees to prepare and keep on the Premises or at Tenant's principal offices for a period of not less than three (3) years following the end of each Lease Year or portion thereof adequate books and records, which shall show inventories and receipts of merchandise at the Premises and receipts from all sales and other transactions on the Premises by Tenant and any other persons conducting any business upon the Premises. Tenant shall record at the time of sale, in the presence of the customer, all receipts from sales or other transactions, whether for cash or credit, in a cash register or registers having a sealed cumulative total and having such other features as Landlord may require or with other equipment acceptable to Landlord. The books and records Tenant is to keep under this Section 8.3 shall include gross income, sales and occupation tax returns and all pertinent original sales records. Pertinent original sales records shall include: (i) cash register tapes, including tapes from temporary registers; (ii) serially numbered sales slips; (iii) the originals of all mail orders at and to the Premises; (iv) the original records of all telephone orders at and to the Premises; (v) settlement report sheets of transactions with subtenants, concessionaires, licensees and others; (vi) the original records showing that merchandise returned by customers was in fact purchased at the Premises by such customers; (vii) memorandum receipts or other records of merchandise taken out on approval; (viii) such other sales records, if any, which would normally be examined by an independent accountant pursuant to generally accepted auditing standards in performing an audit of Tenant's sales; and (ix) the records specified in (i) through (viii) above of subtenants, concessionaires, licensees and/or others doing business on or from the Premises.~~

~~8.4 **Landlord's Right to Audit.** Landlord or its Agents may, on regular business days and during~~

reasonable office hours, inspect or audit Tenant's books, records of sales made in the Premises, either at the Premises or at Tenant's principal offices, provided that such inspection or audit is made within three (3) years after Tenant furnishes, or is to furnish, Landlord a statement of Gross Sales for the period being audited. If Landlord's inspection or audit discloses a deficiency in Percentage Rent paid for any Lease Year, Tenant shall promptly pay to Landlord the amount of such deficiency. In addition, if Landlord's inspection or audit discloses a deficiency in Gross Sales reported for any Lease Year or portion thereof of two percent (2%) or more, Tenant shall promptly pay to Landlord the cost of such audit. Landlord will hold in confidence all sales figures and other information obtained from Tenant's records except in any litigation or arbitration proceedings between the parties, and except further that Landlord may divulge such information to a prospective buyer or lender for the Center or a portion of the Center, and to Landlord's attorneys, accountants, consultants and other Agents:

~~8.5~~ **Definition of Gross Sales.** The term "Gross Sales" shall mean the total gross dollar amount of the actual sales price, whether for cash or on credit or partly for cash and partly on credit, of all sales of merchandise and services and of any and all other receipts of business conducted in or from the Premises, including but not limited to, all gift and merchandise certificates, mail or telephone orders received or filled at or from the Premises, deposits not refunded to purchasers including all sums paid on lay-away sales which are or shall become forfeited to Tenant, orders taken in and from the Premises whether or not filled elsewhere, commissions received on vending machines or other coin-operated devices, also by any sub-Tenant, concessionaire or licensee of Tenant or otherwise in the Premises, and the retail value of any goods, services, food or merchandise received by employees in lieu of earnings:

~~Gross Sales, however, shall not include any sums collected from customers and paid out by Tenant for any sales, use, occupation or retail excise tax imposed by any duly constituted governmental authority upon retail purchases, nor the amount of returns to shippers or manufacturers, exchanges, refunds and discounts, and transfers of merchandise from the Premises to other stores of Tenant. Each sale upon installment or credit shall be regarded as a sale for the full price in the month during which the sale shall be made, irrespective of the time when or whether Tenant shall receive payment from its customer, but lay-away sales shall not be taken into account until they shall become actual sales, except for forfeited lay-away payments as provided above. No deduction shall be allowed for uncollected or uncollectible credit accounts.~~

9. ADDITIONAL RENT.

9.1 Tenant's Obligation. In addition to the Minimum Rent and Percentage Rent, Tenant shall pay as Additional Rent "Tenant's Share" (as set forth in Section 1.10 and defined in Section 9.3) of: (i) all Real Estate Taxes (as defined in Section 9.4) imposed or levied against the Center during the Term; (ii) premiums for all insurance including liability, fire, rent loss and casualty on the improvements and Common Areas of the Center ("Insurance Premiums"); (iii) all Common Area Costs (as defined in Section 9.5).

9.2 Payment and Adjustment. Tenant shall pay to Landlord Tenant's Share of items of Additional Rent under this Section 9 in estimated monthly installments, in advance, on the first day of each month together with Minimum Rent. The initial estimated monthly installments of Real Estate Taxes, Insurance Premiums, and Common Area Costs are set forth in Section 1.16, Section 1.17 and Section 1.18. Landlord may adjust these estimated installments from time to time based on actual or reasonably projected costs. After notice from Landlord, Tenant shall pay the adjusted installment amount. Within a reasonable period of time after the end of each calendar year, Lease Year or fiscal year (in no event less than one hundred twenty (120) days after the end of each calendar or fiscal year unless sooner completed by Landlord) Landlord shall furnish Tenant a statement showing in reasonable detail Tenant's Share of the actual Real Estate Taxes, Insurance Premiums, and Common Area Costs incurred for the period in question. If Tenant's payments for that year are less than Tenant's Share of the actual amount Tenant shall pay the difference to Landlord within ten (10) days thereafter. If Tenant shall have overpaid Landlord, Landlord shall credit such overpayment toward Tenant's next installment payments under this Section 9.2. When the final determination is made at the end of the Term, Landlord shall rebate any overpayment to Tenant. Any delay or failure by Landlord in delivering any estimate or statement pursuant to this Section 9.2 shall not constitute a waiver of its right to require Tenant to pay Tenant's Share of Real Estate Taxes, Insurance Premiums or Common Area Costs. At the time of billing, upon request, Landlord shall provide Tenant with copies of invoices or statements for specifically requested items included in calculating Tenant's Share of Additional Rent under this Section 9.2.

9.3 Definition of Tenant's Share. The term "Tenant's Share" means that portion of Real Estate Taxes, Insurance Premiums, and Common Area Costs determined by multiplying the cost of such item by a fraction, the numerator of which is the Premises Square Footage and the denominator of which is the total square footage of the floor area in the Center built and leasable (which total square footage may change from time to time). For the years in which the Term commences and terminates, the provisions of this Section shall apply but Tenant's liability for Tenant's Share of any such costs for such year shall be subject to a pro rata adjustment based upon the number of full or partial calendar months of such year included in the Term.

9.4 Definition of Real Estate Taxes. The term "Real Estate Taxes" means any form of tax, general or special assessment, charge, license, fee, rent tax, levy, penalty (if a result of Tenant's delinquency), real property, transfer or other tax (other than Landlord's net income, estate, succession, inheritance, or franchise taxes), now or hereafter imposed with respect to the Center or any part thereof (including any improvements), this Lease, or any Rent payable under this Lease by an authority having the direct or indirect power to tax, or by any City, County, State or Federal government or any improvement district or other district or division thereof, whether such tax or any portion thereof: (i) is determined by the area of the Center or any part thereof or the Rent payable under this Lease by Tenant including, but not limited to, any gross income or excise tax levied by any of the foregoing authorities with respect to receipt of the Rent due under this Lease; (ii) is levied or assessed in lieu of, in substitution for, or in addition to, existing or additional taxes with respect to the Center or any part thereof whether or not now customary or within the contemplation of Landlord or Tenant; or (iii) is based upon any legal or equitable interest of Landlord in the Center or any part thereof. If the Center is assessed as part of a larger parcel, then Landlord shall equitably apportion the Real Estate Taxes and reasonably determine the amount of Real Estate Taxes attributable to the Center. Landlord's reasonable determination of such apportionment shall be conclusive. For the purposes of determining Real Estate Taxes, figures supplied by the local assessing authority as to any amount so assessed shall be conclusive as between Landlord and Tenant.

9.5 Definition of Common Area Costs. The term "Common Area Costs" means all costs and expenses incurred by Landlord or Landlord's Agents in connection with the operation of the Center including, but not limited to, the following: repair, replacement and maintenance of the roofs, foundations and exterior walls of the buildings in the Center; periodic painting of the buildings in the Center; periodic cleaning of the exterior windows of the buildings in the Center; landscaping services; pest control; maintenance, repair and replacement of the HVAC through maintenance contracts or otherwise; sweeping, maintenance services, repairs to and replacement of asphalt paving, bumpers, striping, light bulbs, light standards, monument and directional signs and lighting systems, perimeter walls, retaining walls, sidewalks, planters, landscaping and sprinkler system in planting area, any and all assessments levied against the Center pursuant to the Restrictions, water, electrical and other utility services supplied to tenants, removal of trash, rubbish and other refuse from the Center, cleaning of and replacement of signs of the Center, including relamping, replacements and repairs made as required; repair, operation and maintenance of the Common Area, including, but not limited to, removal of any obstructions not reasonably required for the Common Area uses, prohibition and removal of the sale or display of merchandise or the storing of materials and/or equipment in the Common Area, and payment of all electrical, water and other utility charges or fees for services furnished to the Common Area; costs of security equipment personnel, if any, Landlord elects to provide; fees for required licenses and permits; costs incurred in connection with compliance of any laws or changes in laws applicable to the Center, including, without limitation, any laws or changes in laws regarding Hazardous Materials; establishment of reasonable reserves for replacement and/or repair of Common Area improvements, equipment and supplies; employment of such personnel as Landlord may deem reasonably necessary, if any, to direct parking and police the Common Area and facilities; depreciation or rental costs of machinery and equipment used in connection with the maintenance and operation of the Common Area; service agreements on equipment used in connection with maintenance and operation of the Common Area; employment of personnel used in connection with any of the foregoing, including, but not limited to, payment or provision for unemployment insurance, workers' compensation insurance and other employee costs; the cost of bookkeeping, accounting and auditing and legal services provided in connection with any of the foregoing; management fees; the cost of any environmental consultant or other services used in connection with Landlord's monitoring of the Center with respect to Hazardous Materials; the cost of any tax, insurance or other consultant utilized in connection with the Center; any other items reasonably necessary from time to time to properly repair, replace, maintain and operate the Center, the center's pro rata share of property owner association dues and costs (if applicable) and any interest in connection therewith. If Landlord elects to perform any maintenance, replacement or repair herein described in conjunction with properties other than the Center, and if a common maintenance contractor is contracted with for such purpose, the contract amount allocable to the Center, as reasonably determined by Landlord, shall be added to and deemed a part of the Common Area hereunder. Increases in Common Area Costs by reason of a disproportionate impact by Tenant thereon (for example, and not by way of limitation, increases in costs of trash collection because of Tenant's excessive generation of trash, or increases in costs of Common Area maintenance because of Tenant's unpermitted storage of inventory or materials in the Common Area), in Landlord's reasonable judgment, may be billed by Landlord, as an item of Additional Rent, directly to Tenant. Notwithstanding, the renovation costs incurred by Landlord in 2005 shall not be Common Area Costs.

9.6 Personal Property Taxes. Tenant shall pay before delinquency to the appropriate governmental authority any and all taxes, assessments, license fees and public charges levied, assessed or imposed at any time and which become payable during the Term of this Lease upon Tenant's Personal Property whether or not such assessment is made against Tenant or against Landlord, either separately or as a part of the assessment of the Center, and whether any such item was installed by Landlord or Tenant. Tenant shall indemnify, protect, defend and hold harmless Landlord and Landlord's Agents from and against any liability, claim, demand, cost or expense (including, but not limited to, reasonable attorneys' fees and cost of suit) in

connection with Tenant's responsibilities under this Section 9.6.

10. **UTILITIES.** Tenant shall contract for and pay, before delinquency, directly to the provider thereof, all charges for natural gas, electricity, water, sewage disposal, telephone and other utility charges used or consumed at the Premises, including without limitation, impact fees, connection fees, hook-up fees, standby fees, meter set charges and deposits. Landlord shall not be obligated in any way to contract for or provide any utility services other than making available a reasonable hook-up point for the Premises. If any such utilities or services are not separately metered, Tenant shall pay the charges Landlord reasonably allocates to the Premises. Landlord shall not be liable for, and Tenant shall not be entitled to any abatement or reduction of Rent by reason of any interruption or cessation of any utility service.

11. TENANT'S MAINTENANCE AND REPAIR OF PREMISES.

11.1 **Landlord's Maintenance and Repair Obligations.** Landlord shall, subject to receiving Tenant's Share of Common Area Costs, and subject to Section 20 and Section 21, maintain the exterior of the building, including the roof, walls, foundations, walks, driveways, parking areas, and the structural portion of the Premises, in good condition and repair, except when damaged by Tenant or Tenant's Agents. Landlord shall not be required to make any repairs unless and until Tenant has notified Landlord in writing of the need of such repair and Landlord shall have a reasonable period of time thereafter to commence and complete such repair, if warranted. Landlord's obligation to so repair and maintain the Premises shall be limited to the cost of effecting such repair and maintenance and in no event shall Landlord be liable for any other amounts, including, but not limited to, any consequential damages, opportunity costs or lost profits Tenant suffers.

11.2 **Tenant's Maintenance and Repair Obligations.** Tenant shall, subject to Landlord's obligations set forth in Section 11.1, at all times during the Term of this Lease, and at Tenant's sole cost and expense, clean, keep, maintain, repair and make necessary improvements and replacements to, the Premises and every portion thereof and all improvements therein or thereto, in good and sanitary order and condition to the reasonable satisfaction of Landlord and in compliance with all Applicable Laws. Without limiting the generality of the foregoing, Tenant shall be responsible for the maintenance, replacement and repair of all HVAC, plumbing, and electrical installations servicing the Premises as well as all floor surfaces within the Premises. Tenant shall provide Landlord with a copy of Tenant's contract for preventive maintenance for the HVAC system within thirty (30) days of the Commencement Date of this Lease. This contract shall provide for at least two (2) preventive checks on the system per year. Tenant shall at all times keep the Premises (including maintenance and cleaning of exterior entrances, all glass and show window moldings, signs and bulkheads) and all partitions, doors, floor surfaces, fixtures, equipment and appurtenances thereof in good order, condition and repair, and in a reasonably satisfactory condition of cleanliness, including reasonably periodic painting of the interior of the Premises and Tenant shall make such other necessary repairs in and to the Premises.

11.3 **Waiver.** Tenant hereby waives all rights provided for by any present or future laws regarding Tenant's right to make repairs or replacements at the expense of Landlord or to terminate this Lease because of the condition of the Premises. Any repairs or replacement necessitated by Casualty damage or condemnation shall be governed by Section 20 and Section 21.

12. COMMON AREA AND PARKING

12.1 **Grant of Nonexclusive License and Right.** Landlord hereby grants to Tenant and its successors and assigns, a nonexclusive license and right for Tenant and its permitted subtenants, in common with Landlord and all persons, firms and corporations conducting business in the Center and their respective customers, guests, licensees, invitees, subtenants, employees and agents, to use the Common Area for vehicular parking, for pedestrian and vehicular ingress, egress and travel.

12.2 **Control of Common Area.** The Common Area shall at all times be subject to the exclusive control and management of Landlord. Landlord shall have the right to: (i) construct, maintain, replace and operate lighting facilities within the Common Area; (ii) police the Common Area from time to time; (iii) change the area, level, location and arrangement of the parking areas and other improvements within the Common Area and otherwise repair, alter, delete, relocate, expand and replace any Common Area; (iv) restrict parking by tenants, their officers, agents, and employees to employee parking areas; (v) enforce parking charges (by operation of meters or otherwise); (vi) close all or any portion of the Common Area or improvements therein to such extent as may, in the opinion of counsel for Landlord, be legally sufficient to prevent a dedication thereof or the accrual of any rights to any person or to the public therein; (vii) close temporarily all or any portion of the Common Area and/or the improvements thereon; (viii) discourage noncustomer parking; (ix) designate other areas not currently part of the Common Area as Common Area (including expansion of the Common Area to property which is adjacent to the Center); (x) select a person(s), firm(s) or corporation(s) (which may be an entity related to Landlord) to maintain and operate all or any part of the

Common Area; (xi) designate from time to time certain portions of the Common Area as exclusively for the benefit of certain tenants in the Center; and (xii) do and perform such other acts in and to the Common Area and improvements thereon as Landlord shall determine to be advisable. Landlord reserves the right to install, use, maintain, repair, relocate and replace pipes, ducts, conduits, wires and appurtenant meters and equipment included in the Premises or outside the Premises, Tenant acknowledges that Landlord makes no representation or warranty whatsoever concerning the safety of the Common Area or the adequacy of any security system that is or may be instituted for the Common Area.

12.3 Parking. Landlord shall at all times provide the parking facilities required by Applicable Laws for the Premises. All parking spaces shall be used only for parking by vehicles no larger than full size passenger automobiles or pick-up trucks. Tenant shall not permit or allow any vehicles that belong to or are controlled by Tenant or Tenant's Agents, suppliers, or shippers, to be loaded, unloaded, or parked in areas other than those designated by Landlord for such activities. Parking within the Common Area shall be limited to striped parking stalls. No parking shall be permitted in any driveways, accessways or in any which would prohibit or impede the free flow of traffic within the Common Area. There shall be no overnight parking of any vehicles of any kind. If Tenant or its employees fail to park their vehicles in designated parking areas, then Landlord, in addition to any other rights or remedies Landlord might have, may charge Tenant Twenty Dollars (\$20) per day for each day or partial day per vehicle parked in such nondesignated areas, which amount Tenant shall pay to Landlord as Additional Rent. In addition, if Tenant permits or allows any of the prohibited activities described above, then Landlord shall have the right, without notice, in addition to such other rights and remedies, to remove or tow away the vehicle involved and charge the cost to Tenant as Additional Rent.

13. SUBORDINATION AND ESTOPPEL CERTIFICATES.

13.1 Subordination. The rights of Tenant shall be and remain, at the election of Landlord or any ground Landlord or Mortgagee, subordinate to the lien of and rights under any current or future mortgage, deed of trust, ground lease or other security instrument affecting the Premises and/or the Center during the Term. This subordination shall be effective without the necessity of any additional document being executed by Tenant; however, if requested by Landlord or any Mortgagee, Tenant shall execute and deliver within fifteen (15) days after such request in the form requested by Landlord, or any Mortgagee or ground Landlord, any additional documents evidencing the priority or subordination of this Lease with respect to any such ground leases of underlying leases or the lien of any such mortgage or deed of trust. Tenant's failure to timely execute and deliver such additional documents shall, at Landlord's option, constitute an Event of Default hereunder. Furthermore, if Tenant fails to execute and deliver any such additional documents within fifteen (15) days of Landlord's request, Tenant's failure to execute and deliver such additional document shall be conclusively deemed to constitute irrevocable appointment of Landlord as Tenant's special attorney-in-fact to execute and deliver those additional documents. If Landlord's interest in the Premises is acquired by any ground Landlord or Mortgagee, or in the event any foreclosure or in the event a conveyance in lieu of foreclosure is made for any reason, Tenant shall, notwithstanding any subordination and upon the request of the resulting successor-in-interest to Landlord, attorn to and become the tenant of such successor-in-interest and recognize such successor-in-interest as the Landlord under this Lease. In such event and provided that Tenant is not in default, this Lease shall not terminate so far as the Tenant continues to pay the Rents required by this Lease and otherwise performs and observes all of the terms, covenants, conditions and provisions of this Lease to be performed and observed by or on behalf of Tenant.

13.2 Estoppel Certificates. Within fifteen (15) days of request by Landlord or any Mortgagee, Tenant shall, from time to time, execute and deliver estoppel certificates in the form and certifying such matters with respect to this Lease, as Landlord or any such Mortgagee may reasonably request. Tenant's failure to timely execute and deliver any such estoppel certificates shall be deemed Tenant's certification of the statements in such certificate and, at Landlord's option, shall constitute an Event of Default hereunder. Furthermore, if Tenant's failure to timely execute and deliver any such estoppel certificate shall be conclusively deemed to constitute irrevocable appointment of Landlord as Tenant's special attorney-in-fact to execute and deliver such estoppel certificate.

14. SECURITY DEPOSIT. Tenant has deposited with Landlord the amount set forth in Section 1.20 (the "Security Deposit") as security for the full and faithful performance of each term, provision, covenant, and condition of this Lease. At Landlord's request, Tenant shall from time to time increase the Security Deposit commensurate with any increase in Minimum Rent. If Tenant defaults in respect of any of its obligations under this Lease, including, but not limited to, payment of Rent, Landlord may use, apply or retain all or part of the Security Deposit for the payment of any Rent in default or for any other sum that Landlord may spend or be required to spend by or on behalf of Tenant's default. Within ten (10) days of demand Tenant shall repay to Landlord the amount of the Security Deposit so used. Tenant's failure to do so shall, at Landlord's election, constitute an Event of Default by Tenant. Tenant shall not assign, transfer or encumber the Security Deposit, and any attempt to do so shall not be binding upon Landlord. Landlord shall not be required to keep the Security Deposit separate from its general funds, and no trust relationship is created with respect to the Security Deposit. If Landlord sells, ground leases or assigns the Center or a

portion of the Center containing the Premises, or otherwise terminates its interest in this Lease, then Landlord may assign the Security Deposit to its purchaser, ground Landlord, successor or assignee without further liability to Tenant. Should Tenant faithfully and fully comply with all of the terms, provisions, covenants, and conditions of this Lease, the Security Deposit or any balance thereof shall be returned to Tenant, or at the option of Landlord, to the last assignee of Tenant's interest in this Lease at the expiration of the Term. Tenant shall not be entitled to any interest on the Security Deposit.

15. ALTERATIONS, CHANGES, AND ADDITIONS.

15.1 Consent Required. Tenant shall not make any Alterations to the Premises without the prior, written consent of Landlord. Any Alterations to or on the Premises shall, at the option of Landlord, remain for the benefit of and become the property of Landlord upon the termination of this Lease or be removed (with any damage resulting from such removal repaired) at Tenant's cost and expense. Tenant shall not remove any Alterations without Landlord's written permission.

15.2 Permitted Alterations. Subject to the following provisions of this Section 15, Tenant may install, at its expense and without Landlord's written consent, trade fixtures, movable partitions, furniture, equipment, and other personal property with accumulative cost of no more than Ten Thousand Dollars (\$10,000), and may remove the same at any time prior to the termination of this Lease provided Tenant always maintains the Premises fully stocked, equipped and fixtured and professional in appearance. If any damage is caused to the Premises by Tenant's removal of any property, Tenant shall bear the cost of repair of such damage.

15.3 Requirements. All work performed by or on behalf of Tenant in or about the Premises shall be done in a good and workmanlike manner and, once started, diligently prosecuted to completion. Tenant covenants to only use contractors that are either: (i) included in a listing of Landlord's "approved" contractors; or (ii) if not in such listing, a contractor approved in writing by Landlord prior to the commencement of Tenant's work. Tenant and any contractors or subcontractors of Tenant shall carry insurance meeting the requirements of Section 19 and any other insurance Landlord may require covering any Alterations and related work. Tenant shall have all work on or about the Premises performed in such a manner so as not to interfere with or obstruct the access of any other tenant of the Center or any other work thereon. Tenant shall not install or maintain any equipment, partitions, furniture, or apparatus, the weight or operation of which would tend to injure or be detrimental to the Premises or (in Landlord's reasonable judgment) be loud or offensive to other tenants. All work done by or on behalf of Tenant shall be performed in full compliance with all Applicable Laws. Any such work, whether such work was approved by Landlord or not, which violates any such Applicable Laws shall be corrected at Tenant's sole cost and expense, including any required structural alterations. Tenant shall require its contractors (including all employees, agents, subcontractors and material suppliers of such contractors) to conduct their work and employ labor in such manner as to maintain harmonious labor relations at the Center.

15.4 Mechanics' Liens. Tenant shall not permit any mechanics', materialmen's or other liens to be filed against the Premises, any portion of the Center, nor against Tenant's leasehold interest. If by reason of any Alteration, repair, labor performed or material furnished to the Premises for or on behalf of Tenant any mechanics' or other lien shall be filed, claimed, perfected or otherwise established as provided by law against the Premises, Tenant shall discharge or remove the lien by bonding or otherwise at Tenant's cost and expense, within ten (10) days after notice from Landlord to Tenant of the filing of same. Landlord shall have the right at all reasonable times to post and keep posted on the Premises any notices which it deems necessary for protection from such liens. If any such liens are filed, Landlord may, without waiving its rights and remedies based on such breach by Tenant and without releasing Tenant from any of its obligations, cause such liens to be released by any means it shall deem proper, including payment in satisfaction of the claim giving rise to such liens. Tenant shall pay to Landlord at once, upon notice by Landlord, any sum paid by Landlord to remove such liens, together with interest at the Applicable Rate from the date of such payment by Landlord.

15.5 Compliance with Laws. Tenant, at Tenant's expense, shall comply with all Applicable Laws, now in force or which may hereafter be in force, which shall impose any duty (including without limitation, structural work) with respect to the use, occupation, condition or alteration of the Premises.

16. ENTRY BY LANDLORD. Landlord, and Landlord's Agents, shall have the right, but not the duty, to enter the Premises at reasonable times to inspect the Premises; to take samples and conduct environmental investigations, to post notices of nonresponsibility and similar notices and signs indicating the availability of Premises for sale, to show the Premises to interested parties such as prospective lenders and purchasers, to make necessary Alterations or perform maintenance, replacement and repairs, to perform Tenant's obligations as permitted herein when Tenant has failed to do so, all without liability to Tenant. Landlord shall give Tenant twenty-four (24) hours notice of any entry, except no notice shall be required in the event of an emergency. Within one hundred eighty (180) days before the expiration of the Term, Landlord may place upon the Premises

reasonable signs indicating the availability of Premises for lease and to show the Premises to prospective tenants by appointment only. Landlord shall at all times have the right to retain a key which unlocks all of the doors in the Premises, excluding Tenant's vaults and safes. Landlord and Landlord's Agents shall have the right to use any and all means which Landlord may deem proper in an emergency to obtain entry to the Premises. No entry to the Premises by Landlord or Landlord's Agents shall under any circumstances be deemed to be a forcible or unlawful entry into, or a detainer of the Premises, or an eviction of Tenant, or to give rise to an abatement of Rent.

17. ASSIGNMENT AND SUBLETTING.

17.1 **Prohibition.** Neither this Lease nor any interest in it or the Premises may be assigned, sublet or mortgaged by Tenant in whole or part, voluntarily or otherwise. Any assignment, mortgage, pledge, hypothecation, subletting, or license of this Lease or the Premises or any portion thereof, either voluntary or involuntarily, whether by operation of law or otherwise without the prior, written consent of Landlord shall be null and void and shall, at Landlord's election, constitute an Event of Default under this Lease. To the extent not prohibited by provisions of the Bankruptcy Code of 1978, 11 U.S.C. Section 101 et seq. (the "Bankruptcy Code"), Tenant on behalf of itself, creditors, administrators and assigns waives the applicability of Sections 541(c) and 365(e) of the Bankruptcy Code unless the proposed assignee of the trustee for the estate of the bankrupt meets Landlord's standards for consent as set forth below. Landlord has entered into this Lease with Tenant in order to obtain for the benefit of the Center the unique attraction of Tenant's name and business; the foregoing prohibition on assignment or subletting is expressly agreed to by Tenant in consideration of such fact. If this Lease is assigned to any person or entity pursuant to the provisions of the Bankruptcy Code, any and all monies or other considerations payable or otherwise to be delivered in connection with such assignment shall be paid or delivered to Landlord, shall be and remain the exclusive property of Landlord and shall not constitute property of Tenant or the estate of Tenant within the meaning of the Bankruptcy Code. Any and all monies or other considerations constituting Landlord's property under the preceding sentence not paid or delivered to Landlord shall be held in trust for the benefit of Landlord and be promptly paid or delivered to Landlord. Any person or entity to which this Lease is assigned pursuant to the provisions of the Bankruptcy Code shall be deemed without further act or deed to have assumed all of the obligations arising under this Lease on and after the date of such assignment. Any such assignee shall upon demand execute and deliver to Landlord an instrument confirming such assumption.

17.2 **Landlord's Consent.** In the event Landlord consents to any assignment or subletting, such consent shall not constitute a waiver of any of the restrictions of this Section 17, which shall apply to each successive assignment of this Lease or subletting of the Premises (or portion of the Premises), if any. In no event shall Landlord's consent to an assignment or subletting affect the continuing primary liability of Tenant (which, following assignment, shall be joint and several with the assignee(s)), or relieve Tenant of any of its obligations hereunder. In the event that Landlord shall consent to an assignment or subletting under this Section 17, such assignment or subletting shall not be effective until the assignee or subTenant shall execute, acknowledge and deliver to Landlord an agreement, in form and substance satisfactory to Landlord, whereby assignee or subTenant shall assume all of the Tenant's obligations of this Lease and whereby the assignee or subTenant shall agree that the provisions contained in this Lease shall, notwithstanding such assignment or subletting, continue to be binding upon it with respect to all future assignments and sublettings. Such assignment or sublease agreement shall be duly executed and a fully executed original thereof shall be delivered to Landlord, and Landlord may collect Minimum Rent, Percentage Rent and Additional Rent due hereunder directly from the assignee or subTenant. Collection of Minimum Rent, Percentage Rent and Additional Rent directly from an assignee or subTenant shall not constitute a consent or a waiver of the necessity of consent to such assignment or subletting, nor shall such collection constitute a recognition of such assignee or subTenant as the Tenant hereunder or a release of Tenant from the performance of all of its obligations hereunder.

17.3 **Landlord's Actions.** Tenant shall notify Landlord in writing of Tenant's intent to assign the Lease or any right or interest hereunder, or to sublease the Premises or any part of the Premises, and of the name of the proposed assignee or subTenant, the nature of the proposed assignee's or subTenant's business to be conducted on the Premises, the terms and provisions of the proposed assignment or sublease, a copy of the proposed assignment or sublease form and such other information as Landlord may reasonably request concerning the proposed assignee or subTenant, including, but not limited to, net worth, income statements and other financial statements for a two-year period preceding Tenant's request for consent, evidence of insurance complying with the requirements of Section 19, any other information Landlord may reasonably request, and the fee described in Section 17.6. Landlord shall, within thirty (30) days of receipt of such written notice and all additional information requested by Landlord concerning the proposed assignee or subTenant, elect to take one of the following actions:

- (a) Consent to such proposed assignment or sublease;
- (b) Refuse to consent to such proposed assignment or sublease;

(c) Landlord may, at its option exercised by thirty (30) days written notice to Tenant, elect to recapture the Premises and as of the thirtieth (30th) day after Landlord so notifies Tenant of its election to recapture, this Lease shall terminate. If Landlord fails to elect any of the alternatives (a), (b) or (c) above within the thirty (30)-day period, Landlord shall be deemed to have refused its consent to such assignment or subletting by Tenant.

17.4 Bonus Value. In the event greater than 50% of the Premises is subleased or assigned, Tenant agrees that seventy-five percent (75%) of any amounts paid by the assignee or subTenant, however described (including, but not limited to, the value of any nonmonetary consideration), in excess of: (i) the Minimum Rent payable by Tenant (or, in the case of a sublease of a portion of the Premises, in excess of the Minimum Rent reasonably allocable to such portion); plus (ii) Tenant's direct out-of-pocket costs which Tenant certifies to Landlord have been paid to provide occupancy related services to such assignee or subTenant of a nature commonly provided by landlords of similar space, shall be the property of Landlord and such amounts shall be payable directly to Landlord by the assignee or subTenant. At Landlord's request, a written agreement shall be entered into by and among Tenant, Landlord and the proposed assignee or subTenant confirming the requirements of this Section 17.

17.5 Certain Transfers. The sale of all or substantially all of Tenant's assets (other than bulk sales in the ordinary course of business), or, if Tenant is a corporation, a limited liability company, an unincorporated association, or a partnership, the transfer, assignment or hypothecation of any stock or interest in such corporation, company, association or partnership in the aggregate (cumulative during the Term) in excess of twenty-five percent (25%) of the total ownership interest in such entity shall be deemed an assignment within the meaning and provisions of this Section 17.

17.6 Landlord's Fee and Expenses. If Tenant requests Landlord's consent to an assignment or subletting by Tenant under this Lease, Tenant shall pay to Landlord a fee of One Thousand Dollars (\$1,000.00) and all of Landlord's out-of-pocket expenses, including, but not limited to, actual attorneys' fees reasonably incurred related to such assignment or subletting by Tenant, whether or not the assignment or subletting is approved.

17.7 Transfer of the Premises by Landlord. Upon any conveyance of the Premises and assignment by Landlord of this Lease, Landlord shall be and is hereby entirely released from all liability under any and all of its covenants and obligations contained in or derived from this Lease accruing after the date of such conveyance and assignment, and Tenant agrees to attorn to any entity purchasing or otherwise acquiring Landlord's interest in the Premises.

17.8 Tenant has the right to sublease to businesses complimentary to Lifequest Fitness operations up to 30% of the Premises without adhering to the provisions of this Section 17. However, Tenant will notify and provide Landlord pertinent sublease terms as subleases are executed.

18. DEFAULT AND REMEDIES.

18.1 Tenant's Default. At the option of Landlord, a default under this Lease by Tenant shall exist if any of the following events occur (each is called an "Event of Default"): (a) If Tenant fails to pay Minimum Rent, Additional Rent, or any other payment required by this Lease, and such failure continues for ten (10) days after same is due; (b) Tenant vacates or abandons the Premises; (c) Tenant is dismissed or expelled from the Premises by or under any authority other than Landlord; (d) Tenant files a voluntary petition or institutes any proceedings in bankruptcy or under any insolvency laws seeking to effect a reorganization or a composition with its creditors; (e) any bankruptcy or insolvency proceedings are commenced, a receiver or trustee is appointed for the agents of Tenant; or Tenant's leasehold estate is taken on execution or by any process of law; (f) Tenant admits in writing its inability to pay its obligations as they become due; (g) Tenant fails to observe or perform any other provision under this Lease and such failure is not cured before thirty (30) days elapse after notice to Tenant; (h) Tenant attempts to make or suffers to be made any transfer, assignment or subletting, except as provided in Section 17; or (i) Tenant fails to timely comply with the provisions of Section 13 ("Subordination and Estoppel Certificates). The notices required by this Section 18.1 shall be in lieu of, and not in addition to, any notice required under law. The provisions of this Section 18.1 to the contrary notwithstanding, if Tenant commits a default of its obligations under this Lease, and if the same default has previously occurred two (2) or more times during the Term (regardless of whether cured), such default shall be conclusively deemed to constitute a noncurable default and give Landlord the immediate right to exercise any or all of its available rights and remedies. In the event of a Tenant default Landlord will provide notice of such default to GTH Enterprises, Inc. at 35 Folly Road., Charleston, SC 29407.

18.2 Landlord's Remedies. Upon the occurrence of an Event of Default and Tenant fails to cure default within thirty (30) days, then, in addition to and without waiving any other rights and remedies available to Landlord in law or in equity or otherwise provided in this Lease, Landlord may, at its option, cumulatively or in the alternative, exercise the following remedies:

(a) Landlord may terminate Tenant's right to possession of the Premises, in which case this Lease shall terminate and Tenant shall immediately surrender possession of the Premises to Landlord. No act by Landlord other than giving written notice to Tenant of Landlord's election to terminate Tenant's right to possession shall terminate this Lease. Acts of maintenance, efforts to relet the Premises, or the appointment of a receiver on Landlord's initiative to protect Landlord's interest under this Lease shall not constitute a termination of Tenant's right to possession. Termination shall terminate Tenant's right to possession of the Premises but shall not relieve Tenant of any obligation under this Lease that has accrued prior to the date of such termination nor of the obligation for Rent that would have accrued but for such termination. Upon such termination, Landlord shall have the right to re-enter the Premises, and remove all persons and property, and Landlord shall also be entitled to recover from Tenant:

(i) The worth at the time of the award of any unpaid Rental which had been earned at the time of termination;

(ii) The worth at the time of the award of the amount by which the unpaid Rental which would have been earned after termination until the time of the award exceeds the amount of the loss of such Rental that Tenant proves could have been reasonably avoided;

(iii) The worth at the time of the award of the amount by which the unpaid Rental for the balance of the Term after the time of the award exceeds the amount of the loss of such Rental that Tenant proves could have been reasonably avoided;

(iv) Any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform its obligations under this Lease or which in the ordinary course of things would be likely to result from Tenant's default, including, but not limited to, the cost of recovering possession of the Premises, commissions and other expenses of reletting, including necessary repair, renovation, improvement and alteration of the Premises for a new tenant, the unamortized portion of any Tenant Improvements and brokerage commissions funded by Landlord in connection with this Lease, the cost of rectifying any damage to the Premises occasioned by the act or omission of Tenant, reasonable attorneys' fees, and any other reasonable costs; and

(v) At Landlord's election, all other amounts in addition to or in lieu of the foregoing as may be permitted by law.

As used in subparagraphs (i) and (ii) above, the "worth at the time of the award" is computed by allowing interest at the Applicable Rate. As used in subparagraph (iii) above, the "worth at the time of the award" is computed by discounting such amount at the discount rate of the Federal Reserve Bank for the District in which the Shopping Center is located at the time of the award plus one percent (1%).

(b) Landlord may elect not to terminate Tenant's right to possession of the Premises, in which event this Lease will continue in full force and effect as long as Landlord does not terminate Tenant's right to possession, and Landlord may continue to enforce all of its rights and remedies under this Lease, including the right to collect all Rent as it becomes due. In addition, if Tenant has entered into a sublease which is valid under the terms of this Lease, Landlord may also, at its option, cause Tenant to assign to Landlord the interest of Tenant under the sublease, including, but not limited to, Tenant's right to the payment of Rent as it becomes due. Landlord may elect to enter the Premises and relet them, or any part of them, to third parties for Tenant's account. Tenant shall be liable immediately to Landlord for all costs Landlord incurs in reletting the Premises, including, but not limited to, brokers' commissions, expenses of cleaning and remodeling the Premises required by the reletting, attorneys' fees and like costs. Reletting can be for a period shorter or longer than the remaining Term of this Lease and for the entire Premises or any portion thereof. Landlord shall have no obligation to prefer the letting of the Premises over any vacant space in the Shopping Center nor to accept any replacement tenant that would result in the violation of any use restrictions in the Shopping Center, not be desirable for the Shopping Center's tenant mix, or otherwise not meet Landlord's leasing criteria. Tenant shall pay to Landlord the Minimum Rent, and Additional Rent due under this Lease on the dates the Minimum Rent, and such Additional Rent are due, less the rent Landlord actually collects from any reletting. Except as provided in the preceding sentence, if Landlord relets the Premises or any portion thereof, such reletting shall not relieve Tenant of any obligation hereunder. Notwithstanding the above, no act by Landlord allowed by this Section 18.2(h) shall terminate this Lease unless Landlord notifies Tenant in writing that Landlord elects to terminate this Lease.

18.3 No Surrender. Tenant waives any right of redemption or relief from forfeiture under any present or

future law, in the event Tenant is evicted or Landlord takes possession of the Premises by reason of an Event of Default. No act or thing done by Landlord or Landlord's Agents during the Term shall be deemed an acceptance of a surrender of the Premises and no agreement to accept a surrender shall be valid unless in writing and signed by Landlord. No employee of Landlord or of Landlord's Agents shall have any power to accept the keys to the Premises prior to the termination of this Lease, and the delivery of the keys to any such employee shall not operate as a termination of this Lease or a surrender of the Premises.

18.4 Landlord's Default. Landlord shall not be deemed to be in default in the performance of any obligation required to be performed by it under this Lease unless and until it has failed to perform such obligation within thirty (30) days after receipt of written notice by Tenant to Landlord (and the Mortgagees who have provided Tenant with notice) specifying the nature of such default; provided, however, that if the nature of Landlord's obligation is such that more than thirty (30) days are required for its performance, then Landlord shall not be deemed to be in default if it shall commence such performance within such thirty (30) day period and thereafter diligently prosecutes the same to completion.

18.5 Mortgagee Protection. Upon any default on the part of Landlord, Tenant will give notice by registered or certified mail to any Mortgagee who has provided Tenant with notice of its interest together with an address for receiving notice, and shall offer such Mortgagee a reasonable opportunity to cure the default (which, in no event shall be less than sixty (60) days), including time to obtain possession of the Premises by power of sale or a judicial foreclosure, if such should prove necessary, to effect a cure. Tenant agrees that each of the Mortgagees to whom this Lease has been assigned by Landlord is an express third party beneficiary of this Lease. Tenant shall not make any prepayment of Minimum Rent, Percentage Rent or Additional Rent more than one (1) month in advance without the prior written consent of such Mortgagee. Tenant waives any right under any present or future law to the collection of any deposit from such Mortgagee or any purchaser at a foreclosure sale of such Mortgagee's interest unless such Mortgagee or such purchaser shall have actually received and not refunded the deposit. Tenant agrees to make all payments under this Lease to the Mortgagee with the most senior encumbrance upon receiving a direction, in writing, to pay said amounts to such Mortgagee. Tenant shall comply with such written direction to pay without determining whether an event of default exists under such Mortgagee's loan to Landlord.

18.6 Landlord's Right to Perform. If Tenant shall at any time fail to make any payment or perform any other act on its part to be made or performed under this Lease, Landlord may (but shall not be obligated to), at Tenant's expense, and without waiving or releasing Tenant from any obligation of Tenant under this Lease, make such payment or perform such other act to the extent Landlord may deem desirable, and in connection therewith, pay expenses and employ counsel. All sums paid by Landlord and all penalties, interest and costs, including, but not limited to, collection costs and attorneys' fees reasonably incurred in connection therewith, plus twenty percent (20%) of any such sums for Landlord's administrative costs shall be due and payable by Tenant to Landlord, as an item of Additional Rent, on demand by Landlord, together with interest thereon at the Applicable Rate from the date of such demand until paid by Tenant.

18.7 Interest on Late Payments. Should Tenant fail to pay when due any installment of Minimum Rent, Additional Rent, Percentage Rent or any other sum payable to Landlord under the terms of this Lease within ten (10) days following the due date, then interest at the Applicable Rate, shall accrue from and after the due date until paid, and such interest shall be paid by Tenant to Landlord at the time of payment of the overdue sum.

19. INDEMNITY AND INSURANCE.

19.1 Indemnification. Tenant agrees to defend (with attorneys acceptable to Landlord), protect, indemnify, and hold harmless Landlord and Landlord's Agents from any and all claims, liabilities, demands, causes of action, attorney's fees, damages, judgments, and expenses of any nature arising from or related to (a) the conduct or management of the Premises or of any business therein, or any work or thing whatsoever done, or any condition created in or about the Premises during the Term; (b) any act, omission or negligence of Tenant or any of Tenant's Agents; (c) any accident, injury or damage whatsoever occurring in or at the Premises; (d) any breach or default by Tenant under this Lease; (e) all damages sustained by Landlord as a result of any holdover by Tenant in the Premises including, but not limited to, any claims by another tenant resulting from a delay by Landlord in delivering possession of the Premises to such tenant; and, (f) any liens or encumbrances arising out of any work performed or materials furnished by or for Tenant, including any work Landlord may have performed or caused to be performed for Tenant for which Tenant has not paid Landlord. In the event Landlord, without fault on Landlord's part, is made a party to any litigation commenced by or against Tenant, then Tenant shall protect, defend, indemnify, and hold Landlord harmless and shall pay all costs, expenses and attorneys' fees incurred or paid by Landlord in connection with such litigation. Tenant hereby waives all claims against Landlord for damage to goods, wares or supplies or for injury or death to persons in and upon the Premises from any cause whatsoever, except such as result solely from the grossly negligent act or willful misconduct of Landlord.

19.1 Mutual Indemnification. Tenant agrees to defend (with attorneys reasonably acceptable to Landlord), protect, indemnify, and hold harmless Landlord and Landlord's Agents from any and all claims, liabilities, demands, causes of action, attorney's fees, damages, judgments, and expenses of any nature arising from or related to (a) the conduct or management of the Premises or of any business therein, or any work or thing whatsoever done, or any condition created in or about the Premises during the Term by or at the direction of Tenant; (b) any act, omission or negligence of Tenant or any of Tenant's Agents; (c) any accident, injury or damage whatsoever occurring in or at the Premises unless the same is a result of the act or omission of Landlord or a breach of Landlord's obligations hereunder; (d) any breach or default by Tenant under this Lease; (e) all damages sustained by Landlord as a result of any holdover by Tenant in the Premises including, but not limited to, any claims by another tenant resulting from a delay by Landlord in delivering possession of the Premises to such tenant; and, (f) any liens or encumbrances arising out of any work performed or materials furnished by or for Tenant, including any work Landlord may have performed or caused to be performed for Tenant for which Tenant has not paid Landlord. In the event Landlord, without fault on Landlord's part, is made a party to any litigation commenced by or against Tenant, then Tenant shall protect, defend, indemnify, and hold Landlord harmless and shall pay all costs, expenses and attorneys' fees incurred or paid by Landlord in connection with such litigation. Tenant hereby waives all claims against Landlord for damage to goods, wares or supplies or for injury or death to persons in and upon the Premises from any cause whatsoever, except such as result solely from the grossly negligent act or willful misconduct of Landlord. Likewise, Landlord agrees to defend, protect, indemnify and hold harmless Tenant and Tenant's Agents from any and all claims, liabilities, demands, causes of action, attorney's fees, damages, judgments and expenses of any nature arising from or related to (a) any act, omission or negligence of Landlord or any of Landlord's Agents; (b) any breach or default by Landlord under this Lease. In the event Landlord, without fault on Tenant's part, is made a party to any litigation commenced by or against Landlord, then Landlord shall protect, defend, indemnify and hold Tenant harmless and shall pay all costs, expenses and attorney's fees incurred or paid by Tenant in connection with such litigation.

19.2 Tenant's Insurance. Tenant shall at all times during the Term, and at its sole expense, obtain and keep in effect the following insurance: (a) commercial general liability insurance in the names of and for the benefit of Tenant and Landlord and other parties Landlord designates (as additional insureds), with a minimum combined single limit of Two Million Dollars (\$2,000,000); (b) fire insurance with special form endorsement covering all furniture, fixtures, inventory and equipment, whether supplied or owned by Tenant or by Landlord, Tenant's improvements to the Premises, Tenant's Personal Property and all glass forming a part of the Premises, including but not limited to plate glass to the extent of its full insurable value; (c) business interruption coverage in amounts sufficient to pay the Minimum Rent and Additional Rent hereunder for a period of at least twelve (12) months; (d) workers' compensation insurance as required under Applicable Laws; and (e) such other insurance in such form and amounts as Landlord or Landlord's Mortgagees may require from time to time.

19.3 Deductibles. Any policy of insurance specified to be carried by Tenant pursuant to this Lease which contains a deductible in excess of Five Thousand Dollars (\$5,000.00) per occurrence must be approved in writing by Landlord prior to the issuance of such policy. Tenant shall be solely responsible for the payment of any and all such deductibles.

19.4 Increased Coverage. Upon demand, Tenant shall provide Landlord, at Tenant's expense, with such increased amount of existing insurance, and such other insurance as Landlord or any Mortgagees may reasonably require.

19.5 Sufficiency of Coverage. Neither Landlord nor any of Landlord's Agents makes any representation that the types of insurance and limits specified to be carried by Tenant under this Lease are adequate to protect Tenant. If Tenant believes that any such insurance coverage is insufficient, Tenant shall provide, at its own expense, such additional insurance as Tenant deems adequate. Nothing contained herein shall limit Tenant's liability under this Lease, and Tenant's liability under any provision of this Lease, including without limitation under any indemnity provision, shall not be limited to the amount of any insurance obtained.

19.6 Insurance Requirements. Any policy of Tenant's insurance: (i) shall be in a form satisfactory to Landlord and the Mortgagees; (ii) shall be issued by insurance companies licensed and authorized to do business in the State, which are rated "A" or better in Best's Key Rating Guide and which are determined by Landlord, as financially sound on a current basis; (iii) shall provide that such policies, shall not be subject to material alteration or cancellation except after at least thirty (30) days prior written notice to Landlord and others Landlord may designate; and (iv) shall be primary, and any insurance carried by Landlord or Landlord's Agents shall be noncontributing. Tenant's liability insurance shall contain a cross liability endorsement, shall include fire legal liability coverage in the amount of at least One Hundred Thousand Dollars (\$100,000.00), and shall include contractual liability coverage specifically insuring performance of Tenant's obligations under Section 19.1 and Tenant's other indemnification obligations under this Lease. Tenant's fire insurance shall contain an agreed amount endorsement and

include boiler and machinery coverage, if applicable, in amounts acceptable to Landlord and any Mortgagees. Tenant's policy or policies, or duly certified copies of such policies, together with satisfactory evidence of payment of premiums, shall be deposited with Landlord prior to the Commencement Date, and at least thirty (30) days prior to each renewal of such policies. If Tenant fails to procure and maintain the insurance required to be procured by Tenant under this Lease, Landlord may, but shall not be required to, order such insurance at Tenant's expense. All sums reasonably disbursed, deposited or incurred by Landlord in connection therewith, including, but not limited to, all costs, expenses and actual attorneys' fees, shall be due and payable by Tenant to Landlord, as an item of Additional Rent, on demand by Landlord, together with interest thereon at the Applicable Rate from the date of such demand until paid by Tenant.

19.7 Waiver of Subrogation. Tenant agrees that any insurance required under this Lease and all other insurance carried by Tenant shall contain a waiver of subrogation by the insurer against Landlord, any Mortgagees, and Landlord's Agents. Tenant does hereby waive all rights of recovery or causes of action against Landlord, any Mortgagee, and Landlord's Agents for any damage or loss covered by Tenant's insurance, or by the type of insurance required by this Lease, or for which Tenant may otherwise be reimbursed.

19.8 Loss or Damage to Tenant's Property. Landlord shall not be liable for any damage to property of Tenant or of others located on the Premises, nor for the loss of or damage to any property of Tenant or of others by theft or otherwise. Landlord shall not be liable for any injury or damage to persons or property resulting from fire, explosion, falling plaster, steam, gas, electricity, water, rain, snow or leaks from any part of the Premises or from the pipes, appliances or plumbing works or from any other place or by dampness or by any other cause of whatsoever nature. Landlord shall not be liable for any such damage caused by other tenants or persons, occupants of property adjacent to the Center or the public, or from damage caused by operations in construction of any private, public or quasi-public work. Landlord shall not be liable for any latent defect in the Premises or in the building of which they form a part. All property of Tenant kept or stored on the Premises shall be so kept or stored at the risk of Tenant only, and Tenant shall hold Landlord harmless from any claim arising out of damage to the same, including subrogation claims by Tenant's insurance carriers, unless such damage shall be caused solely by the willful act or gross negligence of Landlord.

20. DAMAGE AND DESTRUCTION BY FIRE OR OTHER CASUALTY.

20.1 Landlord's Obligation to Rebuild. Subject to Landlord's right to terminate this Lease as provided below, if the Premises are damaged or destroyed by fire, wind storm, or other casualty (a "Casualty"), Landlord shall repair all such damage and restore the Premises within a reasonable time to the extent of the insurance proceeds received (net of collection expenses) subject to delays due to adjustment of insurance claims, strikes and other causes beyond Landlord's control. Landlord's obligation, should it elect or be obligated to repair the Premises following a Casualty, shall be limited to the basic building shell. Tenant shall, at its expense, replace or fully repair all Tenant's Personal Property and any Alterations or other leasehold improvements installed by Tenant existing at the time of such Casualty. In the event of damage or destruction to the Premises, the Rent shall not be abated wholly or proportionately.

20.2 Landlord's Right to Terminate. Landlord shall have the right to terminate this Lease following a Casualty if any of the following occurs: (i) insurance proceeds (together with any additional amounts Tenant elects, at its option, to contribute) are not available to Landlord to pay one hundred percent (100%) of the cost to fully repair the Premises, excluding the deductible (for which Tenant shall be fully responsible); (ii) Landlord determines that the Premises and/or any other damaged portions of the Center cannot, with reasonable diligence, be fully repaired by Landlord (or cannot be safely repaired because of the presence of hazardous factors, including, but not limited to, hazardous materials, radiation, chemical waste and other dangers) within one hundred eighty (180) days after the date of such Casualty or at a cost of less than thirty-five percent (35%) of the then replacement cost thereof; (iii) the Premises are destroyed or damaged during the last twenty-four (24) months of the Term; (iv) thirty-five percent (35%) or more of the area of the building in which the Premises are located is damaged or destroyed, regardless of whether the Premises are damaged; or (v) an Event of Default has occurred and is continuing at the time of such Casualty. If Landlord elects to terminate this Lease following a Casualty pursuant to this Section 20.2, Landlord shall give Tenant written notice of its election to terminate within thirty (30) days after Landlord has knowledge of such Casualty, and this Lease shall terminate fifteen (15) days after the date of such notice.

20.3 Waiver of Statutes. It is the parties intent that the provisions of this Section 20 govern their rights and obligations with respect to any Casualty. Tenant hereby waives any right to terminate this Lease following a Casualty pursuant to any present or future statute or other law.

21. CONDEMNATION.

21.1 Effect of Taking. In the event that a substantial part of the Premises shall be taken or condemned through the exercise of the power of eminent domain, with or without litigation (or a sale in lieu thereof), and Tenant shall determine that the remaining portion of the Premises is not reasonably suitable for Tenant's use and occupation, Tenant may, upon given written notice to Landlord within ten (10) days after the date of such taking, terminate this Lease, and Landlord shall refund any unearned Rent paid in advance by Tenant. If Tenant does not terminate this Lease, it shall continue in force as to the remaining portion of the Premises, and all Rent shall continue unabated. In the event of a total taking of the Premises by eminent domain or a sale in lieu thereof, this Lease shall terminate, and Landlord shall be due all of any condemnation award. In the event that part of the common areas or parking areas of the Center shall be taken, there shall be no abatement or reduction of Tenant's Rent; however, should the partial taking of the common areas or parking areas render the Premises untenable, then either the Landlord or the Tenant may elect to terminate the Lease upon delivery of thirty (30) days prior written notice to the other party.

21.2 No Apportionment of Award. No award for any partial or total taking shall be apportioned, it being agreed and understood that Landlord shall be entitled to the entire award for any partial or entire taking, whether for the value of the leasehold, the real estate, or otherwise. Tenant assigns to Landlord its interest in any award which may be made in such taking or condemnation, together with any and all rights of Tenant arising in or to the same or any part thereof. Nothing contained in this Section 21.2 shall be deemed to give Landlord any interest in or require Tenant to assign to Landlord any separate award made to Tenant for the taking of Tenant's Personal Property or its moving costs; provided, that any such separate award to Tenant does not diminish any award to which Landlord is entitled.

21.3 Waiver of Statutes. Tenant hereby waives the provisions of any present or future statute or law allowing either party to terminate this Lease in the event of a partial taking of the Premises.

22. QUIET ENJOYMENT. Landlord agrees that Tenant, upon keeping and performing the covenants of this Lease, shall at all times during the term of this Lease peaceably and quietly have, hold, and enjoy the Premises subject to the provisions hereof.

23. NOTICES. Any notice, demand, or communication called for hereunder shall be in writing and be given, served, or delivered either in person, by first-class, certified mail, return receipt requested; by Federal Express (or other nationally recognized overnight courier) with postage or delivery charge prepaid, or by facsimile transmission, and if to Tenant, addressed to Tenant at the Tenant's mailing address set forth in Section 1.6 and if to Landlord, addressed to the Landlord's mailing address set forth in Section 1.2, or to such other address as either may designate by notice to the other. Any such notice, demand, or communication so sent shall be deemed given at the time that it was placed in the U.S. mails or with the overnight courier, and any other notice shall be deemed given when delivered.

24. SURRENDER OF PREMISES; HOLDING OVER.

24.1 Surrender of Premises. Tenant agrees to turn over all keys and to surrender the Premises at the expiration or termination of this Lease, leave the Premises in the same condition (or as altered pursuant to the provisions of the Lease) as when delivered to Tenant (ordinary wear and tear excepted) and subject to the provisions of Section 11.1, Section 20 and Section 21 with all debris and Tenant's Personal Property removed and with all interior walls in good repair, all carpets shampooed and cleaned, the HVAC equipment, plumbing, electrical and other mechanical installations in good operating order and all noncarpeted floors cleaned and waxed, all to the reasonable satisfaction of Landlord. Any damage or deterioration of the Premises shall not be deemed ordinary wear and tear if the same could have been prevented by good maintenance practices by Tenant. Tenant shall pay a reasonable repair and/or cleaning charge should it be necessary for the Landlord to repair and/or clean the Premises. Landlord may apply the Security Deposit to such purposes. If, after default in payment of rent or violation of any other provision of this Lease, or upon the expiration of this Lease, Tenant moves out or is dispossessed and fails to remove any trade fixtures or other property prior to such removal, or prior to the execution of the warrant of eviction, then and in that event, the fixtures and property shall be deemed abandoned by the Tenant and shall become the sole property of the Landlord. If Tenant fails to remove Tenant's Personal Property after the expiration or termination of this Lease, Landlord may retain such property and all rights of Tenant with respect to such property shall cease, or Landlord may place all or any portion of such property in public storage for Tenant's account. Tenant shall pay to Landlord, upon demand, the costs of removal of any such Alterations and Tenant's Personal Property and storage and transportation costs of same, and the cost of repairing and restoring the Premises, and all attorneys' fees and interest on said amounts at the Applicable Rate from the date of expenditure by Landlord.

24.2 Holding Over. If Tenant shall retain possession of the Premises or any portion of the Premises without Landlord's consent following the expiration or termination of this Lease, then Tenant shall pay to Landlord for each day

of such retention one and one-half times the amount of daily Rent for the last month prior to the date of expiration or termination. Tenant shall also indemnify and hold Landlord harmless from any loss or liability resulting from delay by Tenant in surrendering the Premises, including, without limitation, any claims made by any succeeding tenant founded on such delay. Alternatively, if Landlord gives written notice of Landlord's consent to Tenant's holding over, such holding over shall constitute renewal of the Lease on a month to month basis, and otherwise on the terms of this Lease. Acceptance of Rent by Landlord following expiration or termination of this Lease shall not constitute a renewal of this Lease, and nothing contained in this Section 24.2 shall waive Landlord's right of reentry or any other right. Unless Landlord gives its written consent as provided above, Tenant shall be only a Tenant at sufferance, whether or not Landlord accepts any Rent from Tenant while Tenant is holding over without Landlord's written consent.

25. — RELOCATION. Landlord shall have the right at any time, and from time to time, before or during the Term of this Lease or renewal or extension hereof to require Tenant to relocate to other space in the Center (the "Substitution Space"). The Substitution Space shall have approximately the same square footage as the Premises. If Landlord desires to exercise such right, it shall give Tenant at least sixty (60) days prior written notification that Tenant is to relocate to the Substitution Space. If Landlord elects to relocate Tenant to the Substitution Space, such move shall be at the sole expense of Landlord including all reasonable costs and expenses related to improving the Substitution Space with leasehold improvements substantially equivalent to those then in Tenant's Premises. Landlord shall have the right to reuse leasehold improvements and other alterations from the original Premises. After such relocation, all terms, covenants, conditions, provisions, and agreements contained in this Lease shall continue in full force and effect and shall apply to the Substitution Space except that (a) if the then unexpired balance of the Term of this Lease shall be less than one (1) year, the Term of this Lease shall be extended so that the unexpired balance of the Term shall be one (1) year from the date of the relocation, and (b) if the Substitution Space contains more square footage than the presently leased Premises, the Rent shall be increased proportionately (provided that such Rent increase shall not be in excess of ten percent (10%) of the Rent in effect immediately preceding such increase).

— If Tenant retains possession of the Premises, or any part thereof, following the date set for relocation or termination, Tenant shall be liable to Landlord, for each day of such retention, at double the amount of the daily Rent in effect immediately prior to the date set for relocation or termination, plus the actual damages incurred by Landlord resulting from Tenant's delay in surrendering the Premises, including without limitation, any claims made against Landlord by any succeeding tenant to the Premises and Landlord's costs in taking any action to evict Tenant from the Premises.

26. REAL ESTATE INVESTMENT TRUSTS. During the Term or any extension thereof, should a real estate investment trust ("REIT") become Landlord under this Lease the provisions of this Section 26 shall pertain, and all provisions of this Lease shall remain in full force and effect except as specifically modified by this Section 26. The provisions of this Section 26 shall have no force or effect except during such period as a REIT is Landlord under this Lease.

26.1 Management of Center. The parties to this Lease agree that Landlord need not itself directly manage or otherwise service all or any part of the Premises, Common Area or the Center but may cause such management, maintenance, operation and other services to Tenant to be performed by Landlord's agent (hereafter "Project Manager"). Landlord shall notify Tenant in writing of the name and address of the Project Manager, but Landlord shall have the absolute right to designate from time to time another person, association, corporation or partnership (general or limited) as Project Manager upon ten (10) days' written notice to Tenant.

26.2 Amendment to Section 7.1. Notwithstanding any provision to the contrary in Section 9, the following provisions shall apply:

(a) Tenant shall continue to pay all Additional Rent under this Lease to Landlord, subject to the provisions of Section 9, as modified below by Section 26.3. If the portion of Additional Rent due under Section 9 which constitute Common Area Costs are not paid at the time and in the manner provided in this Lease, the portion shall nevertheless be collectible with the next installment of Minimum Rent and Additional Rent becoming due, but nothing contained in this Section 26 shall be deemed to suspend or delay the payment of any amount of money or charge at the time the same becomes due and payable under this Lease, or limit any other remedy of Landlord; and

(b) Tenant shall pay all Rent and other charges to Landlord at such place as Landlord may from time to time designate in writing at least ten (10) days prior to the next ensuing payment date; provided, however, the payments made by Tenant pursuant to Section 9 for Common Area Costs shall be made to Landlord for the administrative convenience of the parties to this Lease and to further the efficient operation of the Center and shall remain the sole and separate property of the Project Manager for its services described in this Lease.

26.3 Amendment to Other Sections. This Lease is hereby amended, modified and supplemented as follows:

(a) Landlord shall cause the Project Manager to render to Tenant, other tenants and occupants of the Center the services required or permitted to be performed by Landlord under this Lease in connection with the maintenance, repair, management and operation of the Common Area or the Center and the Project Manager shall be reimbursed by Tenant for its expenses in connection with said Common Area or the Center in the manner provided below;

(b) Tenant shall continue to pay to the order of Landlord Tenant's Share of Common Area Costs due under Section 9 concurrently with its payment of Monthly Rent under this Lease, but Landlord shall disburse such portion of Tenant's Additional Rent to and for the benefit of the Project Manager; and

(c) Notwithstanding that such payments shall be made by Tenant to the order of Landlord, the parties agree that all such payments for Tenant's Share of Common Area Costs under Section 9 shall be retained by the Project Manager as its sole and separate property.

26.4 REIT Tax Provisions. If Landlord in good faith determines that its status as a REIT under the provisions of the Internal Revenue Code will be jeopardized because of any provision of this Lease, Landlord may request reasonable amendment to this Lease and Tenant will not unreasonably withhold, delay, defer or condition its consent to such amendments, provided that such amendments do not: (i) increase the monetary obligation of Tenant pursuant to the terms of this Lease; or (ii) in any other manner have a material adverse affect on Tenant's interest in the Premises.

27. MISCELLANEOUS PROVISIONS.

27.1 Rights of Successors and Assigns. The covenants and agreements contained in this Lease shall apply to, inure to the benefit, and be binding upon the parties, their heirs, permitted assigns, legal representatives, and other successors in interest, except as otherwise provided in this Lease.

27.2 Waiver. The failure of either party to require strict compliance with the provisions of this Lease shall not constitute a waiver of any rights or otherwise prevent either party from subsequently requiring strict compliance with any provisions hereof. No waiver of any provision of this Lease shall be effective unless it is in writing and signed by the waiving party.

27.3 Whole Agreement. This Lease constitutes the whole agreement between the parties, and may not be amended unless by a written agreement signed by both parties. No representation, condition, term or provision not contained in this Lease shall be binding upon either party. When appropriate, words of any gender shall mean and include the other genders, and singular shall mean and include the other plural, and vice versa.

27.4 Counterparts. This Lease may be executed in two or more counterparts, each of which shall be deemed to be an original, and all of which together shall constitute one and the same instrument.

27.5 No Recording. Tenant shall not record this Lease or any memorandum of this Lease without Landlord's prior written consent, but if Landlord so requests, Tenant agrees to execute, have acknowledged and deliver a memorandum of this Lease in recordable form which Landlord thereafter may file for record.

27.6 Attorneys' Fees. If any action at law or in equity shall be brought to recover any Rent under this Lease, on account of any breach, of, or to enforce or interpret any of the covenants, terms, or conditions of this Lease, or for the recovery of the possession of the Premises, or otherwise in connection with this Lease the prevailing party shall be entitled to recover from the other party as part of the prevailing party's cost, reasonable attorneys' fees, the amount of which shall be fixed by the court and shall be made a part of any judgement rendered.

27.7 Landlord's Security Interest. Landlord reserves, and is hereby granted, a first and superior lien and security interest (which shall be in addition to and not in lieu of any statutory lien or security interest) on all of Tenant's Alterations, equipment, and Tenant's Personal Property (tangible and intangible) now or hereafter located in or on the Premises, to secure all sums due from and all obligations to be performed by Tenant under this Lease, which lien and security interest may be enforced by Landlord in any manner provided by law, including, without limitation, under and in accordance with the Uniform Commercial Code applicable in the State. At Landlord's request, Tenant shall execute and file, where appropriate, all documents required under such Uniform Commercial Code to perfect the security interest granted in this Section.

27.8 Captions. The captions and headings used in this Lease are for the purpose of convenience only and shall not be construed to limit or extend the meaning of any part of this Lease.

27.9 Time. Time is of the essence for the performance of each term, condition and covenant of this Lease.

27.10 Survival. All covenants and indemnities set forth herein which contemplate the payment of sums, or the performance by Tenant after the expiration or termination of the Term or following an Event of Default, including all obligations to indemnify Landlord.

27.11 Unavoidable Delay. Landlord nor Tenant shall not be chargeable with, liable for, or responsible to the other for anything or in any amount for any Unavoidable Delay, and any Unavoidable Delay shall not be deemed a breach of or default in the performance of this Lease, it being specifically agreed that any time limit provision contained in this Lease, at Landlord's option, shall be extended for the same period of time lost by Unavoidable Delay; provided, however, in no event shall any Unavoidable Delay excuse or delay Tenant's obligation to timely pay Rent under this Lease.

27.12 Authority. If Tenant is a corporation, a limited liability company or a partnership (general or limited), each individual executing this Lease on behalf of the corporation, limited liability company or partnership, as the case may be, represents and warrants that: (i) he or she is duly authorized to execute and deliver this Lease on behalf of such entity in accordance with its corporate bylaws, appropriate limited liability company documentation, statement of partnership or certificate of limited partnership, as the case may be; (ii) this Lease is binding upon said entity in accordance with its terms; (iii) Tenant is a duly organized and legally existing corporation, limited liability company or partnership in good standing in the State; and (iv) the execution and delivery of the Lease shall not result in any breach of or constitute a default under any mortgage, deed of trust, lease, loan, credit agreement, partnership agreement or other contract or instrument to which Tenant is a party or by which Tenant may be bound. If Tenant is a corporation, Tenant shall, if requested by Landlord, within thirty (30) days after execution of this Lease and prior to entering into possession of the Premises, deliver to Landlord a certified copy of a resolution of the board of directors of the corporation authorizing or ratifying the execution of this Lease. If Tenant is a limited liability company or partnership, Tenant shall, if requested by Landlord, within thirty (30) days after execution of this Lease and prior to entering into possession of the Premises, deliver to Landlord a certified copy of its limited liability company, partnership agreement authorizing such execution.

27.13 Guaranty. As a condition to the execution of this Lease by Landlord, the obligations, covenants and performance of the Tenant as provided in this Lease shall, if required by Landlord, be guaranteed in writing by the Guarantor set forth in Section 1.24 on the form of guaranty set forth in Exhibit E.

27.14 Security Measures. Tenant hereby acknowledges that Landlord shall have no obligation whatsoever to provide guard service or other security measures for the benefit of the Premises, Common Area or the Center. Tenant assumes all responsibility for the protection of Tenant, its Agents and the property of Tenant and of Tenant's agents and invitees from acts of third parties. Nothing contained in this Section 27.14 shall prevent Landlord, at Landlord's sole option, from providing security protection for the Center or any part thereof, in which event the cost thereof shall be included within the definition of Common Area Costs and paid by Tenant in the manner set forth in Section 9.

27.15 Covenants and Conditions. All provisions of this Lease, whether covenants or conditions, on the part of Tenant shall be deemed to be both covenants and conditions.

27.16 Waiver of Trial by Jury. To the fullest extent permitted by law, Landlord and Tenant hereby waive the right to trial by jury in connection with any action suit or other proceeding arising out of or relating to this lease.

27.17 Landlord's Property. Tenant shall look only to Landlord's estate and interest in the land and buildings comprising the Center for the satisfaction of Tenant's remedies for any alleged failure to perform any of Landlord's obligations under this Lease, whether express or implied herein or under the law. Neither Landlord nor Landlord's Agents shall have any personal liability under this Lease and no other property or assets of the Landlord or Landlord's Agents shall be subject to levy, execution, or the enforcement procedure for the satisfaction of any of Tenant's remedies or any judgement obtained by Tenant.

27.18 Landlord's Consent. Whenever in this Lease Landlord's consent is required, Landlord may not unreasonably withhold its consent.

27.19 No Partnership. Landlord does not in any way or for any purpose become a partner of Tenant in the conduct of its business or otherwise or a joint venturer with Tenant.

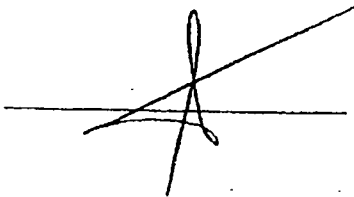
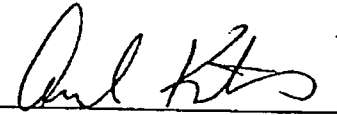
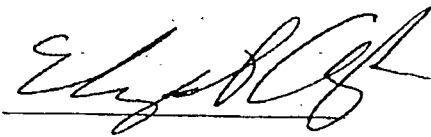
27.20 Governing Law. This Lease shall be governed exclusively under the provisions hereof and by the laws of South Carolina.

27.21 Exhibits. The Exhibits referenced at the end of Section 1 or elsewhere in this Lease and attached hereto are incorporated in and made a part of this Lease.

27.22 Absence of Option. The submission of this Lease for examination does not constitute a reservation of or option for the Premises, and this Lease becomes effective only upon execution and delivery thereof by Landlord.

IN WITNESS WHEREOF, the parties have caused these presents to be executed the day and year first above written.

WITNESS:

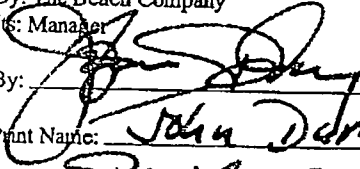


LANDLORD:

Pinepoint Associates, LP

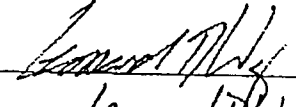
By: The Beach Company

Its Manager

By: 

Print Name: John Derry

Title: President

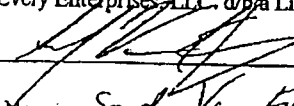
By: 

Print Name: Leonard Dwyer

Title: Asset Manager

TENANT:

VanEvery Enterprises, LLC, d/b/a Lifequest Fitness

By: 

Print Name: Sandy Van Every

Title: Owner

EXHIBIT A-1
CENTER SITE PLAN

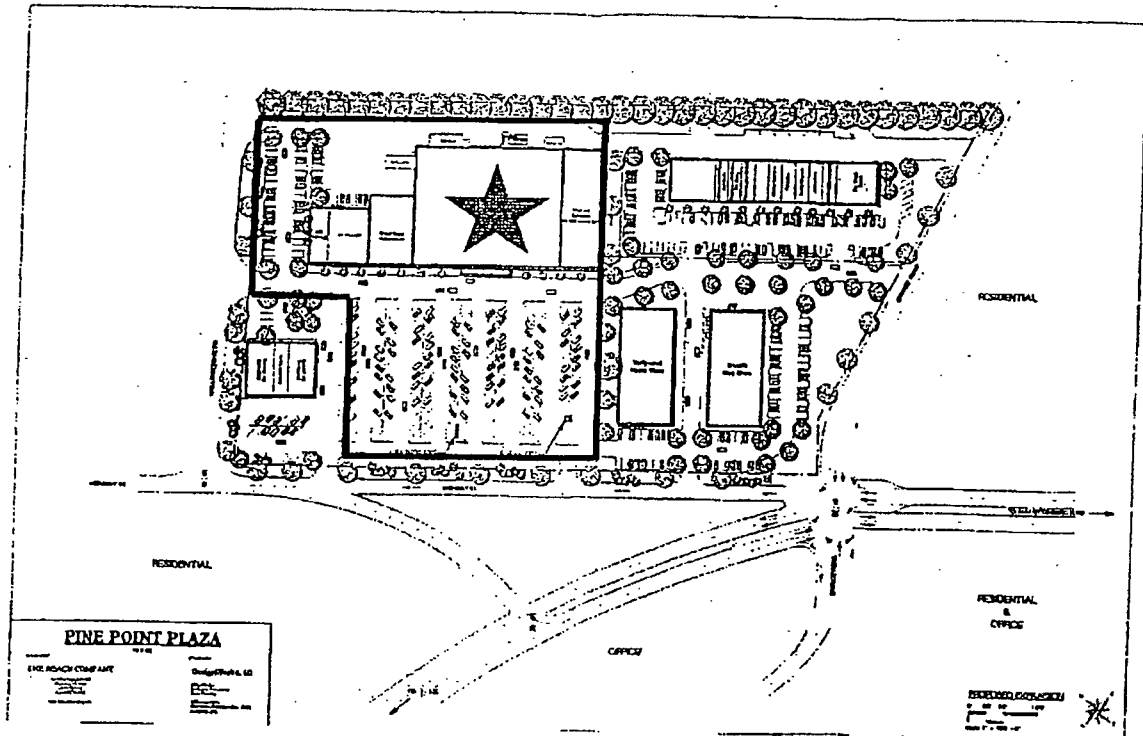
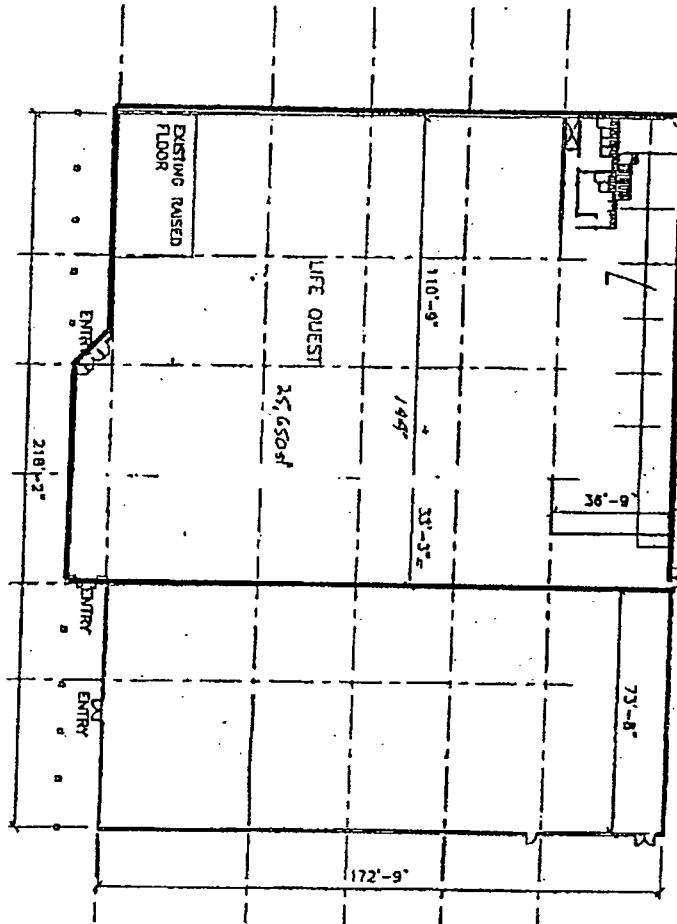


EXHIBIT A-2
PREMISES



APPROXIMATE TOTAL SQUARE FOOTAGE - 38,560

EXHIBIT B

LEGAL DESCRIPTION OF CENTER

1964 Ashley River Road, Charleston, South Carolina 29407. TMS# 351-03-00-002.

EXHIBIT C

CONSTRUCTION RIDER

LANDLORD'S WORK

Landlord shall be responsible for supplying Tenant with a demised vanilla shell. Landlord shall be responsible for all exterior "systems" including new HVAC units. Tenant shall be responsible for the management of all construction considered as part of Tenant's improvements to the Premises.

TENANT'S WORK

Plans and specifications for Tenant's Work and a construction budget and a draw schedule must be submitted by Tenant to Landlord for approval and shall be accordance with Section 15. All such Tenant's Work shall be subject to Landlord's approval and acceptance, which shall be a condition to any reimbursement herein provided. Tenant's portion of the construction budget must be expensed before the Landlord's allowance is expended. Tenant may hire a construction manager to perform a bid process and assist Tenant in the construction process. Such fees will be included in the budget and may be included in the Tenant Improvement Allowance.

The cost of any and all work in addition to that specifically delineated as Landlord's Work, or any increase in cost resulting from subsequent changes, shall be the responsibility of and paid by the Tenant.

EXHIBIT D.

SIGNAGE CRITERIA

- 1) Tenant shall comply with uniform signage criteria designated by Landlord from time to time. Detailed criteria for the uniform signage will be provided to Tenant prior to construction completion of the Premises or occupancy of Tenant.
- 2) It is the sole responsibility of Tenant, at its expense, to provide its premises with identification and under canopy signage prior to opening for business.
- 3) The construction and installation of all signage must conform to all applicable codes and ordinances having jurisdiction over the Center. There shall be no exposed wiring on the facade of the building.
- 4) Tenant shall, prior to fabrication and installation of proposed sign, submit shop drawings and color samples to the Landlord for approval.
- 5) The following criteria shall be followed in the fabrication and installation of all Tenant identification signs:
 - A) Tenant shall maintain all sign(s) neon tubes, sign accessories supports or associated material in good condition and repair. If Landlord determines that any sign presents a threat of injury to person or property, or causes obstruction to the use of the sidewalk, parking, roadway, or interferes with the operation of any municipal departments (fire, police, etc.), other Tenant's, or Landlord's activities, it shall be the responsibility (at Tenant's sole cost and expense) of Tenant or Tenant's agents to remove, install, or repair the same property, immediately upon notice from any such municipal departments, or from Landlord (or Landlord's representative).
 - B) If Landlord deems it necessary to remove any of Tenant's signs in order to paint, redecorate, or make repairs, alterations or improvements in or to the leased premises or any part of the building to which Tenant's sign(s) may be affixed, Landlord shall have the right to do so, provided the same be removed and replaced at Landlord's initial cost and expense, unless the necessity therefore shall have been occasioned through the acts of Tenant. Landlord shall have the right, without notice to Tenant, to remove any sign installed by Tenant in violation of this Exhibit or Lease Agreement and to charge Tenant the cost of such removal, storage and/or destruction, and/or repairs necessitated thereby, without liability to the Tenant for any damage caused by such removal. Tenant shall pay Landlord the cost immediately thereof upon presentation to Tenant by Landlord of a statement showing the costs so incurred by the Landlord. Tenant shall indemnify and hold Landlord harmless from any claims arising from such removal.
- 6) The following shall not be permitted:
 - A) Exposed neon, exposed lamps, moving character (animated), flashing actions, intermittent (blinking) illumination, scintillating, audible signs, panel, flat cut-out letters, or cabinet signs.
 - B) Identification tags, marking signs, designations, or other descriptive placements which identify the manufacturer or fabricator of the sign, whether such tags are on Tenant's sign(s) (unless located on the top of the sign letter "non-readable" from Center's common areas), on the building structure, or elsewhere on the Center.

This criteria may be modified, changed, or added to, from time to time by notice from Landlord or Landlord's authorized representative.
 - C) Free standing signs and portable signs.
 - D) Electric signs in storefront windows.
 - E) Sign boxes.
 - F) Paper signs and stickers.
 - G) Banners

NOTE: The above is the minimum specification for sign criteria. Specifications in excess of the criteria will be accepted upon written approval of the Landlord.

Tenant shall provide two completed sets of sign drawings to the Landlord for review by the Landlord before fabrication. Tenant's sign drawings must include the following:

1. Elevation view of storefront showing sign (drawn to accurate scale) with dimensions of height of letters and length of sign.
2. All color samples of the metal sign return.
3. A cross-section view of the sign letter and sign panel showing the dimensioned projection of the face of the letter from face of the sign panel.

THE LANDLORD SHALL NOT BE RESPONSIBLE FOR THE COST OF REFABRICATION OF SIGNS FABRICATED, ORDERED, OR CONSTRUCTED THAT DO NOT CONFORM TO THE SIGN CRITERIA.

EXHIBIT E

RULES AND REGULATIONS

1. The sidewalks, halls, passages, and/or stairways shall not be obstructed by any Tenant or used by any Tenant for any purposes other than for ingress and egress from and to their respective leased spaces. The halls, passages, entrances, elevators, stairways, and roof are not for the use of the general public, and Landlord shall in all cases retain the right to control and prevent access thereto to all persons whose presence, in the sole judgment of Landlord or its employees, shall be prejudicial to the safety, character, reputation and interests of the Building and interests of the Center, its Tenants and occupants.
2. The toilet rooms, water closets and other water apparatus shall not be used for any purpose other than those for which they were constructed, and no sweepings, rubbish, rags, ashes, chemicals or refuse or other injurious substances shall be thrown therein. Any damage resulting from such misuse or abuse shall be borne and immediately paid by the party by whom or by whose employees it shall have been caused.
3. No sign, placard, picture, advertisement or notice shall be inscribed, painted or affixed on any part of the outside or inside of the Building unless first consented to in writing by Landlord. No neon signs are allowed unless specific written approval by Landlord is granted.
4. No additional locks shall be placed upon any doors of the Premises. Each Tenant must, upon the termination of its Lease, leave the windows and doors in the Premises in like condition as of the Commencement Date of the Lease, and must then surrender to Landlord all keys to the Premises.
5. Tenant shall not cause unnecessary labor by reason of carelessness and indifference to the preservation of good order and cleanliness in its Premises, surrounding area and the Center. In order that the Common Areas may be kept in a good state of preservation and cleanliness, Tenant may, during the continuance of its Lease, permit the janitor of Landlord to take charge of and clean the Common Areas. Any associated expense shall be borne and immediately paid by the party by whom or by whose employees it shall have been caused.
6. No Tenant shall employ any person or persons, other than the janitor of Landlord for the purpose of cleaning, or taking charge of the Common Areas, and it is understood and agreed that Landlord shall not be responsible to any Tenant for any damage not arising out of the gross negligence of Landlord done to the furniture or other effects of Tenant by the janitor or any of his employees, or any other person, or for any loss of property of any kind whatever from the Common Areas, however occurring. Tenant will see each day that the doors to the Premises are securely locked before leaving the Center or space.
7. Tenant, its employees, clerks, or servants, shall not make or commit any improper noises or disturbances of any kind in the Building, Premises, surrounding area, or in the elevators, or make or defile the water closets, or toilet rooms, or the walls, windows or doors of the Building, or interfere in any way with other Tenants or those having business with them.
8. No Tenant shall do or permit anything to be done in the Premises, or bring or keep anything therein, which will in any way increase the rate of fire insurance on the Center or on property kept therein, or obstruct or interfere with the rights of other Tenants, or in any other way injure or annoy them, or conflict with the laws relating to fires, or with the regulations of the Fire Department, or any insurance policy upon the Center or any part thereof, or conflict with any of the rules and ordinances of the Board of Health.
9. Each Tenant shall promptly, at its expense, execute and comply with all laws, rules, orders, ordinances and regulations of the City, County, State, or Federal Government, and of any department or bureau of any of them, and of any other governmental authority having jurisdiction over the Premises, affecting the Tenants' occupancy of the Premises or Tenants' business conducted thereon.
10. Nothing shall be thrown or allowed to be dropped by Tenant, its employees, clerks or servants out of the windows or doors, through the passages of the Building, or from any balcony in the Building. No Tenant shall sweep or throw, or permit to be swept or thrown from the Premises, any dirt or other substances into any of the corridors, passages, sidewalks, stairwells, halls, elevators or stairways of the Building.
11. No animals, birds, grills, bicycles or other vehicles shall be kept in or about the Premises or permitted therein.
12. If any Tenant desires to introduce signaling, telegraphic, satellite dishes, telephonic or other wires and instruments into the Premises, Landlord shall direct the electricians as to where and how the same are to be placed, and without such

directions no placing, boring, cutting for wires will be permitted. Landlord shall in all cases retain the right to require the placing and using of electrical protecting devices to prevent transmission of excessive currents of electricity into or through the Building and to require the changing of wires and of their placing arrangement as Landlord may deem necessary, and further to require compliance on the part of all using or seeking access to such wires and such rules as Landlord may establish relating thereto; and in event of noncompliance with such requirements and rules, Landlord shall have the right to immediately cut and prevent the use of such wires.

13. If applicable, a directory in a conspicuous place on the first floor of the Building may be provided by Landlord, on which the names of the Tenants in the Building will be placed by Landlord at its discretion.
14. Tenants shall not use or keep in Building any explosives, kerosene, gasoline, benzine, camphene, burning fluid or other flammable material, or any hazardous or toxic substance or material, other than minor quantities thereof for cleaning purposes only, as permitted by or exempt from applicable governmental regulations.
15. No Tenants or employees of any Tenant shall go upon the roof of the Building without the written consent of Landlord.
16. No mechanics shall be allowed in or about the Building other than those employed by the Landlord or Its Agents without the written consent of Landlord first having been obtained, which consent shall not be unreasonably withheld or delayed; provided, however, Tenant may permit technicians, servicemen and repairmen to enter the Premises for the purpose of maintaining, servicing or repairing office machines, equipment and computer systems used by Tenant.
17. Subject to the terms of the Lease and other reasonable limitations, Tenants may have access to the halls, corridors, elevators and stairways in the building and to the Premises at any time or times. Access to the Building may be refused unless the person seeking admission is known to the watchman in charge, or has a pass or is properly identified. Landlord shall in no case be liable for damages for the reasonable admission or exclusion of any person from the Building. In the case of invasion, mob riot, public excitement, or other commotion, Landlord reserves the right to prevent entrance to the Building during continuance of the same by closing the doors or otherwise for the safety of the tenants and protection of property in the Building.
18. Landlord in all cases shall prescribe the method and manner in which any merchandise, heavy furniture, large packages or safes shall be brought in or taken out of the Building and also the hours at which such moving shall be done. Landlord shall in all cases have the right to prescribe the weight and proper position of such heavy furniture and safes; and all damage done to the Building by taking out of such merchandise, heavy furniture, large packages or safes or any damage done to the Building while said property shall be positioned shall be made good and paid for by Tenant by, through or under whom the said damage may have done. All furniture, equipment or fixtures shall be provided with supports, glides or castors approved by the Management of the Building.
19. Tenant and its employees or agents shall refrain from parking in parking spaces directly in front of the Premises and other retail shops unless Landlord authorizes in writing for Tenant to do so.
20. If Tenant's business use creates "wet trash" (trash from food, beverages, and other materials utilized in a restaurant or food services operation) Tenant shall bag such trash in bags designated by Landlord and/or any appropriate authority. In the event of noncompliance with such requirement, Landlord may pursue all avenues available through the Lease, including but not limited to monetary reimbursement for cleaning up such trash in the proper manner.

EXHIBIT F

GUARANTY

Sandy VanEvery ("Guarantor") whose address is 1303 Eaglet Lane, Charleston, SC 29406, as a material inducement to and in consideration of PINEPOINT ASSOCIATES, LP ("Landlord") entering into a written lease (the "Lease") with VanEvery Enterprises, LLC d/b/a LIFEQUEST FITNESS ("Tenant"), dated the same date as this guaranty, pursuant to which Landlord leased to Tenant, and Tenant leased from Landlord, premises located at 1964 Ashley River Road, Charleston, South Carolina 29407, unconditionally guarantees and promises to and for the benefit of Landlord that Tenant shall pay all obligations and perform the provisions of the Lease that Tenant is to perform, including but not limited to payment of rent and other sums payable thereunder.

If Guarantor is more than one person, Guarantor's obligations are joint and several. Guarantor's obligations are independent of Tenant's obligations. A separate action may be brought or prosecuted against any Guarantor whether the action is brought or prosecuted against any other Guarantor or Tenant, or all, or whether any other Guarantor or Tenant, or all, are joined in the action. This guaranty is a guaranty of payment and not of collection.

Guarantor waives the benefit of any statute of limitations affecting Guarantor's liability under this guaranty.

The provisions of the Lease may be changed by written agreement between Landlord and Tenant at any time without the consent or written notice to Guarantor. This guaranty shall guarantee the performance of the Lease as changed from time to time. Assignment of the Lease (as permitted by the Lease) shall not affect this guaranty.

This guaranty shall not be affected by Landlord's failure or delay to enforce any of its rights.

If Tenant defaults under the Lease, and Tenant fails to cure within the time period allowed within the Lease, Landlord may proceed immediately, thereafter, against Guarantor or Tenant, or both, or Landlord can enforce against Guarantor or Tenant, or both, by rights that it has under the Lease, or pursuant to applicable laws. If the Lease terminates and Landlord has any rights it can enforce against Tenant after termination, Landlord can enforce those rights against Guarantor without giving previous notice to Tenant or Guarantor, or without making any demand on either of them.

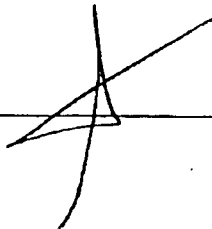
Guarantor waives the right to require Landlord to (1) proceed against Tenant; (2) proceed against or exhaust any security that Landlord holds from Tenant; or (3) pursue any other remedy in Landlord's power. Guarantor waives any defense by reason of any disability of Tenant, and waives any other defense based on the termination of Tenant's liability from any cause. Until all Tenant's obligations to Landlord have been discharged in full, Guarantor has no right of subrogation against Tenant. Guarantor waives its right to enforce any remedies that Landlord now has, or later may have, against Tenant. Guarantor waives any right to participate in any security now or later held by Landlord. Guarantor waives all presentments, demands for performance, notices of nonperformance, protests, notices of protest, notices of dishonor, and notices of acceptance of this guaranty, and waives all notices of the existence, creation, or incurring of new or additional obligations.

If Landlord disposes of its interest in the Lease, "Landlord", as used in this guaranty, shall mean Landlord's successors.

If Landlord is required to enforce Guarantor's obligations by legal proceedings, Guarantor shall pay to Landlord all costs incurred, including, without limitation, reasonable attorney's fees.

Guarantor's obligations under this guaranty shall be binding on Guarantor's successors.

WITNESS:



GUARANTOR:

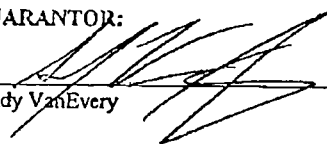

Sandy VanEvery

EXHIBIT F

GUARANTY

GTH Enterprises, Inc. ("Guarantor") whose address is 35 Folly Road, Charleston, SC 29407 as a material inducement to and in consideration of PINEPOINT ASSOCIATES, LP ("Landlord") entering into a written lease (the "Lease") with VanEvery Enterprises, LLC, d/b/a LIFEQUEST FITNESS ("Tenant"), dated the same date as this guaranty, pursuant to which Landlord leased to Tenant, and Tenant leased from Landlord, premises located at 1964 Ashley River Road, Charleston, South Carolina 29407, unconditionally guarantees and promises to and for the benefit of Landlord that Tenant shall pay all obligations and perform the provisions of the Lease that Tenant is to perform, including but not limited to payment of rent and other sums payable thereunder.

If Guarantor is more than one person, Guarantor's obligations are joint and several. Guarantor's obligations are independent of Tenant's obligations. A separate action may be brought or prosecuted against any Guarantor whether the action is brought or prosecuted against any other Guarantor or Tenant, or all, or whether any other Guarantor or Tenant, or all, are joined in the action. This guaranty is a guaranty of payment and not of collection.

Guarantor waives the benefit of any statute of limitations affecting Guarantor's liability under this guaranty.

The provisions of the Lease may be changed by written agreement between Landlord and Tenant at any time without the consent or written notice to Guarantor. This guaranty shall guarantee the performance of the Lease as changed from time to time. Assignment of the Lease (as permitted by the Lease) shall not affect this guaranty.

This guaranty shall not be affected by Landlord's failure or delay to enforce any of its rights.

If Tenant defaults under the Lease, and Tenant fails to cure within the time period allowed within the Lease, Landlord may proceed immediately, thereafter, against Guarantor or Tenant, or both, or Landlord can enforce against Guarantor or Tenant, or both, by rights that it has under the Lease, or pursuant to applicable laws. If the Lease terminates and Landlord has any rights it can enforce against Tenant after termination, Landlord can enforce those rights against Guarantor without giving previous notice to Tenant or Guarantor, or without making any demand on either of them.

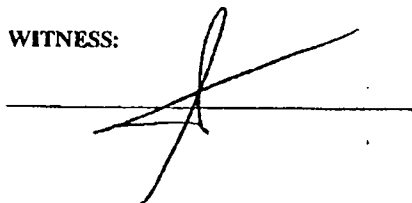
Guarantor waives the right to require Landlord to (1) proceed against Tenant; (2) proceed against or exhaust any security that Landlord holds from Tenant; or (3) pursue any other remedy in Landlord's power. Guarantor waives any defense by reason of any disability of Tenant, and waives any other defense based on the termination of Tenant's liability from any cause. Until all Tenant's obligations to Landlord have been discharged in full, Guarantor has no right of subrogation against Tenant. Guarantor waives its right to enforce any remedies that Landlord now has, or later may have, against Tenant. Guarantor waives any right to participate in any security now or later held by Landlord. Guarantor waives all presentments, demands for performance, notices of nonperformance, protests, notices of protest, notices of dishonor, and notices of acceptance of this guaranty, and waives all notices of the existence, creation, or incurring of new or additional obligations.

If Landlord disposes of its interest in the Lease, "Landlord", as used in this guaranty, shall mean Landlord's successors.

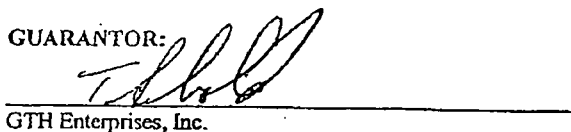
If Landlord is required to enforce Guarantor's obligations by legal proceedings, Guarantor shall pay to Landlord all costs incurred, including, without limitation, reasonable attorney's fees.

Guarantor's obligations under this guaranty shall be binding on Guarantor's successors.

WITNESS:



GUARANTOR:



GTH Enterprises, Inc.

EXHIBIT F
GUARANTY

Timothy R. Sebold ("Guarantor") whose address is 35 Folly Road, Charleston, SC 29407 as a material inducement to and in consideration of PINEPOINT ASSOCIATES, LP, ("Landlord") entering into a written lease (the "Lease") with VanEvery Enterprises, LLC, d/b/a LIFEQUEST FITNESS ("Tenant"), dated the same date as this guaranty, pursuant to which Landlord leased to Tenant, and Tenant leased from Landlord, premises located at 1964 Ashley River Road, Charleston, South Carolina 29407, unconditionally guarantees and promises to and for the benefit of Landlord that Tenant shall pay all obligations and perform the provisions of the Lease that Tenant is to perform, including but not limited to payment of rent and other sums payable thereunder. Notwithstanding, this Guaranty shall be in full force for the first twelve months of the initial term. Thereafter, it will be in force covering a rolling twelve-month period. The guaranty will be cancelled after the initial twelve months upon guarantor providing Landlord satisfactory documentation that Tenant's membership is at a level that provides an operating breakdown point. This level is not to be less than 1500 members.

If Guarantor is more than one person, Guarantor's obligations are joint and several. Guarantor's obligations are independent of Tenant's obligations. A separate action may be brought or prosecuted against any Guarantor whether the action is brought or prosecuted against any other Guarantor or Tenant, or all, or whether any other Guarantor or Tenant, or all, are joined in the action. This guaranty is a guaranty of payment and not of collection.

Guarantor waives the benefit of any statute of limitations affecting Guarantor's liability under this guaranty.

The provisions of the Lease may be changed by written agreement between Landlord and Tenant at any time without the consent or written notice to Guarantor. This guaranty shall guarantee the performance of the Lease as changed from time to time. Assignment of the Lease (as permitted by the Lease) shall not affect this guaranty.

This guaranty shall not be affected by Landlord's failure or delay to enforce any of its rights.

If Tenant defaults under the Lease, and Tenant fails to cure within the time period allowed within the Lease, Landlord may proceed immediately, thereafter, against Guarantor or Tenant, or both, or Landlord can enforce against Guarantor or Tenant, or both, by rights that it has under the Lease, or pursuant to applicable laws. If the Lease terminates and Landlord has any rights it can enforce against Tenant after termination, Landlord can enforce those rights against Guarantor without giving previous notice to Tenant or Guarantor, or without making any demand on either of them.

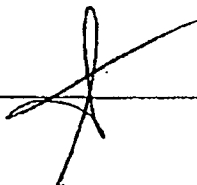
Guarantor waives the right to require Landlord to (1) proceed against Tenant; (2) proceed against or exhaust any security that Landlord holds from Tenant; or (3) pursue any other remedy in Landlord's power. Guarantor waives any defense by reason of any disability of Tenant, and waives any other defense based on the termination of Tenant's liability from any cause. Until all Tenant's obligations to Landlord have been discharged in full, Guarantor has no right of subrogation against Tenant. Guarantor waives its right to enforce any remedies that Landlord now has, or later may have, against Tenant. Guarantor waives any right to participate in any security now or later held by Landlord. Guarantor waives all presentments, demands for performance, notices of nonperformance, protests, notices of protest, notices of dishonor, and notices of acceptance of this guaranty, and waives all notices of the existence, creation, or incurring of new or additional obligations.

If Landlord disposes of its interest in the Lease, "Landlord", as used in this guaranty, shall mean Landlord's successors.

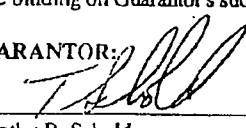
If Landlord is required to enforce Guarantor's obligations by legal proceedings, Guarantor shall pay to Landlord all costs incurred, including, without limitation, reasonable attorney's fees.

Guarantor's obligations under this guaranty shall be binding on Guarantor's successors.

WITNESS:



GUARANTOR:



Timothy R. Sebold

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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON) AMENDMENT TO LEASE AGREEMENT

WHEREAS, HERETOFORE, on, June 21, 2005, Pinepoint Associates, LP, ("Landlord") and VanEvery Enterprises, LLC, d/b/a Lifequest Fitness Center, ("Tenant") entered into a written Lease Agreement ("Lease Agreement") for property located at 1964 Ashley River Road, Charleston, SC (the "Premises") and being the property commonly known as Pinepoint Plaza.

WHEREAS, the Landlord and the Tenant deem it appropriate and necessary to amend the aforesaid Lease Agreement by this written Amendment to the Lease Agreement ("Amendment").

NOW, THEREFORE, in consideration of the rents hereinafter specified to be paid by Tenant to Landlord and in further consideration of the covenants of the respective parties hereto, each to the other, to be performed by them at the time and in the manner hereinafter provided, Landlord does hereby rent and lease to Tenant, and Tenant does hereby rent and lease from Landlord, upon the following terms and conditions.

1. Premises Address. As defined in Section 1.9 of the Lease Agreement, shall be amended to include a designated suite number which shall be referred to as Suite D1.
2. Premises Square Footage. As defined in Section 1.10 of the Lease Agreement, shall be amended to 26,285 square feet of a 52,519 square foot center.
3. Tenant's Share. As defined in Section 1.10 of the Lease Agreement, shall be amended to be 50.05%.
4. Minimum Rent. As defined in Section 1.14 of the Lease Agreement, shall be amended to be as follows:

<u>Term</u>	<u>Annually</u>	<u>Monthly</u>	<u>PSF</u>
Years 1-7	\$226,839.55	\$18,803.30	\$8.63

5. Initial Monthly Installment of Real Estate Taxes. As defined in Section 1.16 of the Lease Agreement, shall be amended to be \$1,842.10.
6. Initial Monthly Installment of Insurance Premiums. As defined in Section 1.17 of the Lease Agreement, shall be amended to be \$832.36.
7. Initial Monthly Installment of Common Area Cost. As defined in Section 1.18 of the Lease Agreement, shall be amended to be \$2,475.18.
8. Total Initial Monthly Payment. As defined in Section 1.19 of the Lease Agreement, shall be amended to be \$23,952.94.
9. Security Deposit. As defined in Section 1.20 of the Lease Agreement, shall be amended to be \$18,803.30.
10. Tenant Improvement Allowance. As defined in Section 1.26 of the Lease Agreement, shall be confirmed to be Two Hundred Sixty-Two Thousand and Eight Hundred Fifty Dollars (\$262,850.00) which represents Ten Dollars (\$10.00) per square foot.
11. Except as amended in this Amendment, all other terms and conditions of the Lease Agreement shall remain in full force and effect throughout the Extension Term.

IN WITNESS WHEREOF, the said Landlord and Tenant have caused this Amendment to Lease Agreement to be executed this 19th day of July, 2025, by and through their duly authorized officers and the corporate seals to be affixed hereto.

WITNESS:

[Signature]
[Signature]

[Signature]

LANDLORD:

Pinepoint Associates, LP

BY:

ITS:

BY:

ITS:

[Signature] *By: The Beach Company, its partner*

President

Leonard D. Way

Assistant Corporate Secretary

TENANT:

VanEvery Enterprises LLC.

d/b/a Lifequest Fitness Center

BY:

BY:

owner

Title

[Signature]
Signature

Sandy Van Every
Name (Print)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

SECOND AMENDMENT TO LEASE AGREEMENT

WHEREAS, HERETOFORE, on, June 21, 2005, Pinepoint Associates, LP, ("Landlord") and VanEvery Enterprises, LLC, d/b/a Lifquest Fitness Center, ("Tenant") entered into a written Lease Agreement ("Lease Agreement") for property located at 1964 Ashley River Road, Charleston, SC (the "Premises") and being the property commonly known as Pinepoint Plaza.

WHEREAS, the Landlord and the Tenant deemed it appropriate and necessary to amend the aforesaid Lease Agreement by the written Amendment to the Lease Agreement ("Amendment") dated July 19, 2005.

WHEREAS, the Landlord and the Tenant deem it appropriate and necessary to further amend the aforesaid Lease Agreement by this written Second Amendment to the Lease Agreement ("Amendment").

NOW, THEREFORE, in consideration of the rents hereinafter specified to be paid by Tenant to Landlord and in further consideration of the covenants of the respective parties hereto, each to the other, to be performed by them at the time and in the manner hereinafter provided, Landlord does hereby rent and lease to Tenant, and Tenant does hereby rent and lease from Landlord, upon the following terms and conditions.

1. Commencement Date. As defined in Section 1.12 of the Lease Agreement, shall be amended to October 17, 2005.

2. Anticipated Delivery Date. As defined in Section 1.13 of the Lease Agreement, shall be amended to be October 17, 2005.

3. Rent Start Date. As defined in Section 1.131 of the Lease Agreement, shall be amended to March 15, 2006.

4. Except as amended in this Amendment, all other terms and conditions of the Lease Agreement shall remain in full force and effect throughout the Extension Term.

IN WITNESS WHEREOF, the said Landlord and Tenant have caused this Amendment to Lease Agreement to be executed this 5th day of December, 2005, by and through their duly authorized officers and the corporate seals to be affixed hereto.

WITNESS:

[Signature]
[Signature]

LANDLORD:

Pinepoint Associates, LP
By: The Beach Company,
Its: Partner

BY: [Signature]

ITS: CHAIRMAN

BY: [Signature]

ITS: [Signature]

TENANT:

VanEvery Enterprises LLC.
d/b/a Lifequest Fitness Center

BY: [Signature]
Signature

Sandy Van Every
Name (Print)

Owner
Title

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Pinepoint Associates, LP)
)
Plaintiff(s))
)
Vanevery Enterprises, Inc.; Sandy)
Vanevery; GTH Enterprises, Inc.)
And Timothy R. Sebold)
)
Defendant(s))
_____)

IN THE COURT OF COMMONS PLEAS
CIVIL ACTION NUMBER: 2009-CP-10-6947

ANSWER OF VAN EVERY ENTERPRISES
INC., and SANDY VAN EVERY
(JURY TRIAL DEMANDED)

TO: DAVID J. PARRISH, ESQ., ATTORNEY FOR THE PLAINTIFF:

DEFENDANTS VAN EVERY ENTERPRISES, INC. AND SANDY VAN EVERY,
SPECIFICALLY DISCLAIMING THE COURT'S JURISIDCTION OVER THEM ON
THE GROUNDS SET FORTH IN THE DEFENDANTS' MOTION TO DISMISS OR
FOR SUMMARY JUDGMENT, ANSWER THE COMPLAINT TO PROTECT THEIR
RIGHTS AS FOLLOWS:

FOR A FIRST DEFENSE

1. Each and every allegation of the complaint not hereinafter specifically admitted is denied and strict proof thereof demanded.

FOR A SECOND DEFENSE
SCRCP RULE 12(b)

2. These defendants assert the defendants set for in SCRCP Rule 12 as bars to the instant action and specifically incorporate by reference their Motion to Dismiss and/or for Summary Judgment filed contemporaneously herewith.

FOR A THIRD DEFENSE

3. Defendants lack information or belief as to paragraph 1 and, therefore deny the same.
4. Paragraph two of the complaint is denied and strict proof thereof demanded.

FILED

2009 AUG -4 PM 2:51
JULIE J. ARMSTRONG
CLERK OF COURT

64

5. These defendants lack information and belief as to paragraph three of the complaint and, therefore, deny the same.
6. Paragraph four of the complaint is denied and strict proof thereof demanded.
7. Defendants lack information and belief as to paragraph five of the complaint and, therefore, deny the same.
8. Defendants deny paragraph six of the complaint and demand strict proof thereof.
9. Defendants deny paragraph seven of the complaint and demand strict proof thereof.
10. Defendants deny paragraph eight of the complaint and demand strict proof thereof.
11. Defendants deny paragraph nine of the complaint and demand strict proof thereof.
12. Defendants deny paragraph ten of the complaint and demand strict proof thereof.
13. Defendants deny paragraph eleven of the complaint and demand strict proof thereof.
14. Defendants deny paragraph twelve of the complaint and demand strict proof thereof.
15. Defendants deny paragraph thirteen of the complaint and demand strict proof thereof.
16. As for the paragraph that begins "WHEREFORE", these defendants deny any damage has been suffered by the plaintiff.

FOR A FOURTH AND AFFIRMATIVE DEFENSE
STATUTE OF LIMITATIONS

17. The instant claim was served more than 120 days after filing of the complaint and beyond the applicable statute of limitations. Accordingly, it should be dismissed with prejudice

FOR A FIFTH AND AFFIRMATIVE DEFENSE
LACHES

18. The plaintiff's claims are barred by the doctrine of laches.

FOR A SIXTH AND AFFIRMATIVE DEFENSE
MODIFICATION

19. The plaintiff's claims are barred as the agreement between the parties was modified by the offer of the defendant and acceptance of the plaintiff.

**FOR A SEVENTH AND AFFIRMATIVE DEFENSE
PAYMENT**

20. The plaintiff's claims are barred by the doctrine of payment.

**FOR AN EIGHTH AND AFFIRMATIVE DEFENSE
RELEASE**

21. The plaintiff's claims are barred by the doctrine of release.

**FOR A NINTH AND AFFIRMATIVE DEFENSE
ESQUITABLE ESTOPPEL**

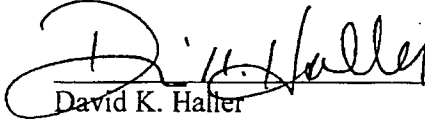
22. The plaintiff's claims are barred by the doctrine of equitable estoppel.

**FOR A TENTH AND AFFIRMATIVE DEFENSE
WAIVER**

23. The plaintiff's claims are barred by the doctrine of waiver.

WHEREFORE the defendants pray for the dismissal with prejudice of the plaintiff's complaint, for judgment in the favor, for actual and punitive damages, for attorneys fees and litigation costs, and such other relief as the court may deem just, prudent, and proper.

RESPECTFULLY SUBMITTED,



David K. Haller

HALLER LAW FIRM, PC
180 Meeting Street, Suite 230
Post Office Box 937
Charleston, South Carolina 29402
843-577-7244
843-577-7288 (fax)
dhaller@hallerlawfirm.com
*Attorney for Defendants Van Every Enterprises, Inc.
And Sandy Van Every*

4th day August, 2009

Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Pinepoint Associates, LP)
)
Plaintiff(s))
)
Vanevery Enterprises, Inc.; Sandy)
Vanevery; GTH Enterprises, Inc.)
And Timothy R. Sebold)
)
Defendant(s))
_____)

IN THE COURT OF COMMONS PLEAS
CIVIL ACTION NUMBER: 2009-CP-10-6947

**DEFENDANTS' VAN EVERY ENTERPRISES
INC., and SANDY VAN EVERY'S MOTION
TO DISMISS FOR LACK OF PERSONAL
JURISDICTION and/or SUMMARY
JUDGMENT
(PRIORITY MATTER)**

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2009 AUG -4 PM 5:57
JULIE J. ARMSTRONG
CLERK OF COURT

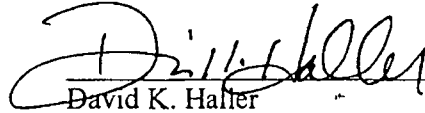
YOU WILL PLEASE TAKE NOTICE that defendants Van Every Enterprises, Inc. and Sandy Van Every will move, in ten (10) days at the Charleston County Courthouse, or at such other time and place as the court deems proper, for an order pursuant to SCRPC Rule 12(b)(2),(4) and/or (5) or for judgment as a matter of law pursuant to SCRPC Rule 56.

The grounds for the motion are that the pending action was served on the defendants beyond the limitations set forth in SCRPC Rule 3; S.C. Code Ann.15-3-20 (2009); and *Hooper v. Ebenezer Senior Services and Rehab Center*, 377 S.C. 217, 659 S.E.2d 213 (2008). The face of the complaint states it was filed on December 8, 2008 and that that the contract was breached no later than April of 2006 (paragraph 13). Defendants were served with the complaint on or about July 7, 2009.

Accordingly, the court lacks personal jurisdiction over these parties inasmuch as they have not been properly served with a pending summons and complaint. Furthermore, because the statute of limitations has elapsed on the claims of the plaintiff, the causes of action alleged against the defendants, even if valid, have been extinguished.

WHEREFORE the defendants pray for an order dismissing the plaintiff's complaint against them with prejudice.

RESPECTFULLY SUBMITTED,



David K. Haller
HALLER LAW FIRM, PC
180 Meeting Street, Suite 230
Post Office Box 937
Charleston, South Carolina 29402
843-577-7244
843-577-7288 (fax)
dhaller@hallerlawfirm.com

Attorney for Defendants VanEvery
Enterprises, Inc., and Sandy VanEvery

4th day August, 2009

Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE CIRCUIT COURT

PINEPOINT ASSOCIATES, LP,
Plaintiff,

Case No. 2008-CP-10-6947

vs.

VANEVERY ENTERPRISES, INC; SANDY
VANEVERY; GTH ENTERPRISES, INC.;
and TIMOTHY R. SEBOLD,
Defendants.

**AFFIDAVIT OF
DAVID J. PARRISH**

FILED
2010 FEB 24 PM 3:19
JULIE J. ARMSTRONG
CLERK OF COURT

PERSONALLY APPEARED before me, David J. Parrish, who being first duly sworn,
deposes and says as follows:

1. I am the attorney for Plaintiff in this case.
2. The Summons and Complaint in this case was filed on December 8, 2008.
3. The tax records for Charleston County indicated that Mr. Sandy Vanevery ("Vanevery") owns a condominium in the Montclair development located at 1854 Montclair Drive in Mt. Pleasant, South Carolina. The tax records also listed that address as the mailing address for tax bills for the property (Exhibit A).
4. We attempted to serve a filed copy of the Summons and Complaint on Vanevery at his Montclair condominium via Certified Mail/Return Receipt Requested. The service letter the letter was returned by the Post Office as "unclaimed". (Exhibit B).
5. We then hired a private process server, John Gamble, to attempt personal service on Vanevery at his Montclair condominium. As indicated on the Mr. Gamble's Amended Affidavit of Non-Service attached as Exhibit C, he attempted service numerous times at that address but he was never able to locate Vanevery or anybody else at that address.
6. We asked Mr. Gamble to attempt to service on Vanevery at 1303 Eaglet Lane in Hanahan, South Carolina, which is the address listed for him as the registered agent of his company, Vanevery Enterprises, LLC, as indicated in the records of the South Carolina Secretary of State (Exhibit D). Upon attempting service there, Mr. Gamble learned that is address of Vanevery's mother. She indicated that Vanevery not live there and had moved to North Carolina, but she would not provide his current address.

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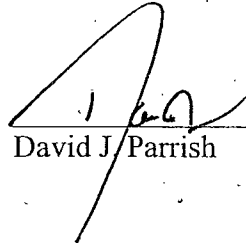
7. We then attempted to locate and serve Vanevery in North Carolina. Searches of tax records, property records, and other databases indicated two possible addresses for Vanevery in North Carolina: 9197 Potters Road in Matthews, North Carolina, and 7101 Saidis Road in Charlotte, North Carolina. We hired a North Carolina process server to attempt service on Vanevery at those addresses. He was unable to locate Vanevery at either address, and he could not locate a current address for Vanevery in North Carolina. A copy of the North Carolina process server's Affidavit of Due and Diligent Attempt to locate Mr. Vanevery in North Carolina is attached as Exhibit E.

8. Thereafter I discovered that, apparently while we were attempting to locate and serve him, Vanevery changed the mailing address on his tax bill for his Montclair condominium to reflect a post office box in Charlotte, North Carolina (Exhibit F). At that point in time I sent the process server (John Gamble) back to Vanevery's Montclair condominium in Mount Pleasant, South Carolina, with the instructions to attempt to locate and talk to the occupants of the property an effort to obtain Vanevery's current address or telephone number in North Carolina. Mr. Gamble could never find anyone at the condominium, and after a total of 13 attempts at service he left a note asking whoever lived there to call my paralegal. (See Exhibit B).

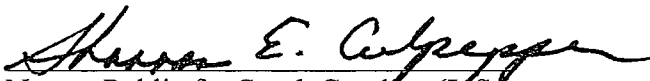
9. On July 2, 2009, a renter in Vanevery's Montclair condominium called my paralegal and gave her Vanevery's cell phone number. My paralegal called Vanevery on his cell phone, he answered the phone, and she obtained his address in North Carolina. At that point we immediately effected service on Mr. Vanevery at his current home address in Charlotte, North Carolina, via both certified mail (Exhibit G) and via personal service (Exhibit H).

10. In summary, repeated and extensive efforts to locate Vanevery in both North Carolina and South Carolina were unsuccessful. He did not live in his condominium in South Carolina, he did not leave a forwarding address, and he changed his mailing address for the tax bills on the condominiums to a Post Office Box in North Carolina while we were attempting to locate and serve him. Vanevery did not live in South Carolina and his address was unknown and difficult to obtain.

FURTHER AFFIANT SAYETH NOT.


David J. Parrish

SWORN TO AND SUBSCRIBED before
me this 22 of February, 2010


Notary Public for South Carolina (L.S.)
My Commission Expires: 2/2/2011

70

CHARLESTON COUNTY

Online Tax System

* MAIN MENU
* CONTACTS
* EXIT

- Billing Information -

Account 557-00- Appraised 140,200
(PID): 00-253 (FMV):
Tax Year: 2008 Assessment: 5610
Prior Year: NA Mills: x0.2156

Status: Current
(Nulla Bona)

Receipt: 2008- Base Tax: 1209.53
154941

Previous Receipt: NA Penalties: + 0.00

Next Receipt: 2008- Interest: + 0.00
174345

Billed: 09-30- Credits: - 723.35
2008

Paid Date: NA User Fee: + 99.00

Actual Date: NA SW Fee: + 0.00

Net Tax: 585.18

Amount Paid: - 0.00

Nulla Bona Amount: - 585.18

Refund Amount: - 0.00

Transfer Amount: - 0.00

CURR Due: 0.00

Mortgage Co: CITIMORTGAGE INC

MLOD Factor: No

- Property Information -

Legal Description: 1854 MONTCLAIR 1854-A - UNIT 1854-A
Subdivision: MONTCLAIR
Deed: 06-06-2007 C628-244
Plat: B475669
Land Use: RESIDENTIAL
General Use: CNU
Parcel: 10R

Buildings	Appraisal	Assessment
Qualified Residential (4%)	140,200	5,610
Totals:	140,200	5,610

Acreage	Appraisal
High: 0.00	Land: 37200
Marsh: 0.00	Improvements: 0
Swamp: 0.00	Buildings: 103000
Total: 0.00	Total: 140200

- Owner Information -

Current Owner: VAN EVERY SANDY C Tax Address: 1854 MONTCLAIR 1854

Current Co-Owner: NA

Tax District: 21

Jurisdiction: 01

Mail Address: 1854 MONTCLAIR DR UNIT A

City State Zip: MT PLEASANT SC 29464

[Selections](#) [Credits](#) [Main Menu](#)

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EXHIBIT "B"

David J. Parrish
Member
Admitted in SC

December 19, 2008

Certified Mail / Return Receipt Requested
Restricted Delivery
Forwarding and Address Correction Requested

Sandy C. Vanevery
1854 Montclair Dr.
Mt. Pleasant, SC 29464

Re: Pinepoint Associates, LP v. Vanevery Enterprises, Inc; Sandy
Vanevery; GTH Enterprises, Inc. and Timothy R. Sebold
Case No. 2008-CP-10-6947

Dear Mr. Vanevery:

Charleston

Charlotte

Columbia

Greensboro

Greenville

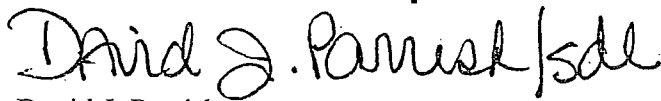
Hilton Head

Myrtle Beach

Raleigh

Enclosed is a filed copy of the Summons and Complaint filed in the above-captioned case, which I am hereby serving upon you both individually and as registered agent for Vanevery Enterprises, Inc.

Sincerely,



David J. Parrish

DJP/sdl
enc.

205 King Street
Suite 400 (29401)
PO Box 486
Charleston, SC 29402
www.nexsenpruet.com

T 843.720.1771
F 843.414.8214
E DParrish@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

72

OF THE RETURN ADDRESS, FOLD AT DOTTED LINE
CERTIFIED MAIL™



7006 2150 0003 0255 2826

NEXSEN PRUET

P. O. Box 486
Charleston SC 29402

Certified Mail / Return Receipt Requested
Restricted Delivery
Forwarding and Address Correction Requested

- ☐ A
☐ C
☐ S
- ☐ INSUFFICIENT ADDRESS
☐ ATTEMPTED NOT KNOWN
☐ NO SUCH NUMBER/ STREET
☐ NOT DELIVERABLE AS ADDRESSED
☐ UNABLE TO FORWARD
- ☐ OTHER

RTS
RETURN TO SENDER

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Sandy Vanevery
1854 Montclair
Mt. Pleasant SC
29464

2. Article Number
(Transfer from service label)

7006 2150 0003 0255 2826

PS Form 3811, February 2004

Domestic Return Receipt

UNCLAIMED

COMPL

A. Sign

X

B. Recd

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type

- ☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☒ Yes

102595-02-M-1540

913M38J08/49

\$07.090

12/19/2008

PS Form 3811, February 2004
US POSTAGE

4870

73

AMENDED AFFIDAVIT OF NON-SERVICE

State of South Carolina

County of Charleston

Common Pleas Court

Case Number: 2008-CP-10-6947

EXHIBIT "C"

Plaintiff:

PINEPOINT ASSOCIATES, LP

vs.

Defendant:

**VANEVRY ENTERPRISES, INC; SANDY VANEVRY; GTH
ENTERPRISES, INC.; AND TIMOTHY R. SEBOLD**

For:

David J. Parrish, Esq.
NEXSEN PRUET, LLC
205 King Street, Suite 400
P. O. Box 486
Charleston, SC 29402

Received by PROCESS SERVICE, INC. to be served on **SANDY VANEVRY**, 1854 Montclair Drive, Unit A, Mt. Pleasant, SC 29464.

I, John R. Gamble, being duly sworn, depose and say that on the **6th day of May, 2009** at 9:15 am, I:

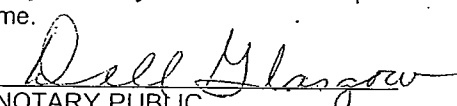
DISCONTINUED ATTEMPTING SERVICE of the CIVIL ACTION COVERSHEET, SUMMONS, COMPLAINT AND EXHIBITS A, B, C, D, E AND F for the reasons detailed in the comments below.

Additional Information pertaining to this Service:

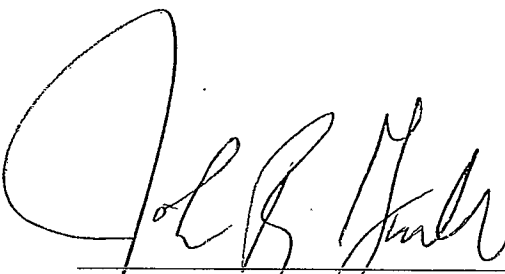
Have attempted service thirteen times and never found anyone at home. Have also left notes on door but never received a call from anyone. Sending back per Denise. Current occupants contacted her.

I am over eighteen and have no interest in the above action.

Subscribed and Sworn to before me on the 2nd day of July, 2009 by the affiant who is personally known to me.


NOTARY PUBLIC

Commission Expires: 5-6-19


John R. Gamble
PROCESS SERVER

PROCESS SERVICE, INC.
P.O. Box 792
Charleston, SC 29402
(843) 577-2355

Our Job Serial Number: 2009001049

EXHIBIT 7

**VAN EVERY ENTERPRISES, LLC**

Note: This online database was last updated on 12/7/2008 6:05:22 PM.
See our Disclaimer.

DOMESTIC / FOREIGN:	Domestic
STATUS:	Good Standing
STATE OF INCORPORATION	SOUTH CAROLINA
/ ORGANIZATION:	Profit

REGISTERED AGENT INFORMATION

REGISTERED AGENT NAME:	SANDY V EVERY
ADDRESS:	1303 EAGLET LN
CITY:	HANAHAN
STATE:	SC
ZIP:	29406
SECOND ADDRESS:	

FILE DATE:	04/04/2005
EFFECTIVE DATE:	04/04/2005
DISOLVED DATE:	//

Corporation History Records

CODE	FILE DATE	COMMENT	Document
Domestic LLC	04/04/2005	AT WILL	

Disclaimer: The South Carolina Secretary of State's Business Filings database is provided as a convenience to our customers to research information on business entities filed with our office. Updates are uploaded every 48 hours. Users are advised that the Secretary of State, the State of South Carolina or any agency, officer or employee of the State of South Carolina does not guarantee the accuracy, reliability or timeliness of such information, as it is the responsibility of the business entity to inform the Secretary of State of any updated information. While every effort is made to insure the reliability of this information, portions may be incorrect or not current. Any person or entity who relies on information obtained from this database does so at his own risk.

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EXHIBIT "E"

Service of Process by:
The Bister Agency
14 Saltwind Drive
St. Helens Island, SC 29920
Phone: 843-838-2307

PINEPOINT ASSOCIATES, L.P.

Plaintiff

VS

VANEVERY ENTERPRISES, INC.; SANDY
VANEVERY; GTH ENTERPRISES, INC. AND
TIMOTHY R SEBOLD

Defendant

AFFIDAVIT OF DUE AND DILIGENT ATTEMPT

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
COMMON PLEAS COURT

Service of Process on: VANEVERY ENTERPRISES, INC.

Case Number: 2008 CP 10 6947

State of : North Carolina) ss.
County of: Gaston)

Name of Server: JEAN SPANGLER, undersigned, being duly sworn, deposes and says that at the time of service, she was over the age of twenty-one, was not a party to this action.

Documents Served: The undersigned attempted to serve the documents described as:
SUMMONS, COMPLAINT, LETTER AND ATTACHMENTS
(Name of document)

Service of Process on: The undersigned attempted to serve the documents on:
SANDY VANEVERY AND VANEVERY ENTERPRISES, INC.
(Party named as defendant)

and after due and diligent efforts, was unable to effect service.

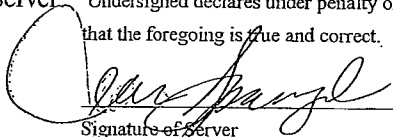
Attempts: The following is a list of the attempts made to effect service:

Dates/Time/Address Attempted: 2-3-09 7:35 p.m 9197 Potters Road Matthews, NC

Reason for Non-Service: White male answered door said he did not live there, get off property or he would call the police.

Based upon the above stated facts, Affiant believes the defendant is avoiding service.

Signature of Server: Undersigned declares under penalty of perjury
that the foregoing is true and correct.


Signature of Server (Date)
Jean Spangler 2-12-09

Subscribed and sworn to before me this
12 day of February, 2009


Notary Public
KITTY P COOPER
My Commissions Expires: 8-12-2013

Service of Process by:
The Bister Agency
14 Saltwind Drive
St. Helens Island, SC 29920
Phone: 843-838-2307

PINEPOINT ASSOCIATES, L.P.

Plaintiff

VS

VANEVERY ENTERPRISES, INC.; SANDY
VANEVERY; GTH ENTERPRISES, INC. AND
TIMOTHY R SEBOLD

Defendant

AFFIDAVIT OF DUE AND DILIGENT ATTEMPT

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
COMMON PLEAS COURT

Service of Process on: **VANEVERY ENTERPRISES, INC.**
SANDY VANEVERY

Case Number: 2008 CP 10 6947

State of: **North Carolina) ss.**
County of: **Gaston)**

Name of Server: JEAN SPANGLER, undersigned, being duly sworn, deposes and says that at the time of service, she was over the age of twenty-one, was not a party to this action.

Documents Served: The undersigned attempted to serve the documents described as:
SUMMONS, COMPLAINT, LETTER AND ATTACHMENTS
(Name of document)

Service of Process on: The undersigned attempted to serve the documents on:
SANDY VANEVERY AND VANEVERY ENTERPRISES, INC.
(Party named as defendant)

and after due and diligent efforts, was unable to effect service.

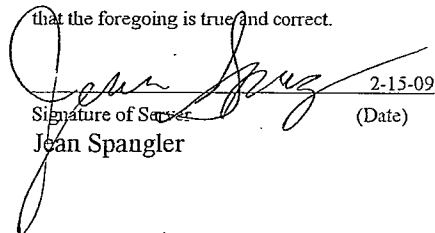
Attempts: The following is a list of the attempts made to effect service:

Dates/Time/Address Attempted: 2-14-09 10:30 A.M. 7101 Sardis Road, Charlotte, NC

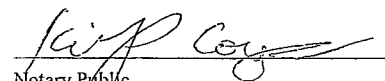
Reason for Non-Service: Black male answered door. Name unknown

Based upon the above stated facts, Affiant believes the defendant is avoiding service.

Signature of Server: Undersigned declares under penalty of perjury
that the foregoing is true and correct.


Signature of Server (Date)
Jean Spangler

Subscribed and sworn to before me this
15 day of February, 2009


Notary Public
KITTY P COOPER
My Commissions Expires: 8-12-2013

Service of Process by:
The Bister Agency
14 Saltwind Drive
St. Helens Island, SC 29920
Phone: 843-838-2307

PINEPOINT ASSOCIATES, L.P.

Plaintiff

VS

VANEVERY ENTERPRISES, INC.; SANDY
VANEVERY; GTH ENTERPRISES, INC. AND
TIMOTHY R SEBOLD

Defendant

AFFIDAVIT OF DUE AND DILIGENT ATTEMPT

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
COMMON PLEAS COURT

Service of Process on: **VANEVERY ENTERPRISES, INC.**
SANDY VANEVERY

Case Number: 2008 CP 10 6947

State of: North Carolina) ss.
County of: Gaston)

Name of Server: JEAN SPANGLER, undersigned, being duly sworn, deposes and says that at the time of service, she was over the age of twenty-one, was not a party to this action.

Documents Served: The undersigned attempted to serve the documents described as:
SUMMONS, COMPLAINT, LETTER AND ATTACHMENTS
(Name of document)

Service of Process on: The undersigned attempted to serve the documents on:
SANDY VANEVERY AND VANEVERY ENTERPRISES, INC.
(Party named as defendant)
and after due and diligent efforts, was unable to effect service.

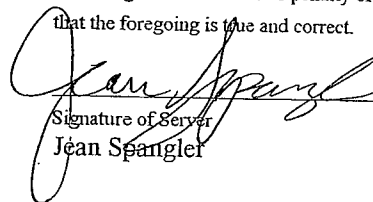
Attempts: The following is a list of the attempts made to effect service:

Dates/Time/Address Attempted: 2-14-09 9:38 A.M. 711 Sardis Road, Charlotte, NC

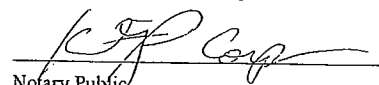
Reason for Non-Service: White female answered door. Name unknown

Based upon the above stated facts, Affiant believes the defendant is avoiding service.

Signature of Server: Undersigned declares under penalty of perjury that the foregoing is true and correct.


Signature of Server: Jean Spangler
(Date) 2-15-09

Subscribed and sworn to before me this
15 day of February, 2009


Notary Public
KITTY P COOPER
My Commissions Expires: 8-12-2013

Service of Process by:
The Bister Agency
14 Saltwind Drive
St. Helens Island, SC 29920
Phone: 843-838-2307

PINEPOINT ASSOCIATES, L.P.

Plaintiff

VS

VANEVERY ENTERPRISES, INC.; SANDY
VANEVERY; GTH ENTERPRISES, INC. AND
TIMOTHY R SEBOLD

Defendant

AFFIDAVIT OF DUE AND DILIGENT ATTEMPT

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
COMMON PLEAS COURT

Service of Process on: VANEVERY ENTERPRISES, INC.
SANDY VANEVERY

Case Number: 2008 CP 10 6947

State of : North Carolina) ss.
County of: Gaston)

Name of Server: JEAN SPANGLER, undersigned, being duly sworn, deposes and says that at the time of service, she was over the age of twenty-one, was not a party to this action.

Documents Served: The undersigned attempted to serve the documents described as:
SUMMONS, COMPLAINT, LETTER AND ATTACHMENTS
(Name of document)

Service of Process on: The undersigned attempted to serve the documents on:
SANDY VANEVERY AND VANEVERY ENTERPRISES, INC.
(Party named as defendant)

and after due and diligent efforts, was unable to effect service.

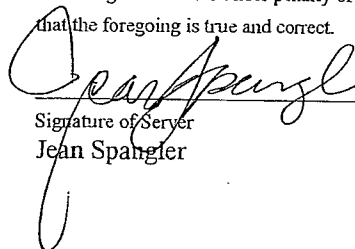
Attempts: The following is a list of the attempts made to effect service:

Dates/Time/Address Attempted: 2-13-09 7:30 P.M. 1700 QUEENS ROAD, CHARLOTTE, NC 28207

Reason for Non-Service: White female answered door. Name unknown to her

Based upon the above stated facts, Affiant believes the defendant is avoiding service.

Signature of Server: Undersigned declares under penalty of perjury
that the foregoing is true and correct.


Signature of Server (Date)
Jean Spangler 2-15-09

Subscribed and sworn to before me this
15 day of February, 2009


Notary Public
KITTY P COOPER
My Commissions Expires: 8-12-2013

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CHARLESTON COUNTY

Online Tax System

- * MAIN MENU
- * CONTACTS
- * EXIT

- Billing Information -		- Property Information -	
Account 557-00-	Appraised 140,200	Legal Description:	1854 MONTCLAIR 1854-A - UNIT 1854-A
(PID): 00-253	(FMV):	Subdivision:	MONTCLAIR
Tax Year: 2009	Assessment: 8410	Deed:	06-06-2007 C628-244
Prior Year: NA	Mills: x 0.2196	Plat:	B475669
Status: Current		Land Use:	RESIDENTIAL
(Paid)		General Use:	CNU
Receipt: 2009-157161	Base Tax: 1846.85	Parcel:	10R
Previous Receipt: NA	Penalties: + 0.00	Buildings	
Next Receipt: NA	Interest: + 0.00	Others (6%)	
Billed: 09-30-2009	Credits: - 143.00	Totals: 140,200	
Paid Date: 12-14-2009	User Fee: + 99.00	Appraisal 140,200	
Actual Date: 12-15-2009	SW Fee: + 0.00	Assessment 8,410	
	Net Tax: 1802.85	Totals: 140,200	
	Amount Paid: -1802.85	Appraisal	
	Nulla Bona Amount: - 0.00	Land: 37200	
	Refund Amount: - 0.00	Improvements: 0	
	Transfer Amount: - 0.00	Buildings: 103000	
	CURR Due: 0.00	Total: 140200	
- Owner Information -			
Current Owner: VAN EVERY SANDY C		Tax Address: 1854 MONTCLAIR 1854	
Current Co-Owner: NA		Mail Address: PO BOX 12238	
Tax District: 21		City State Zip: CHARLOTTE NC 28220	
Jurisdiction: 01			

[Selections](#)
[Credits](#)
[Main Menu](#)

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EXHIBIT "G"

NEXSEN|PRUET

July 2, 2009

Via Certified Mail, Return Receipt Requested

Sandy C. Vanevery
2800 Sharon Road
Charlotte, NC 28211

Re: *Pinepoint Associates, LP v. Vanevery Enterprises, Inc; Sandy Vanevery; GTH Enterprises, Inc. and Timothy R. Sebold Case No. 2008-CP-10-6947*

Dear Mr. Vanevery:

Charleston

Charlotte

Columbia

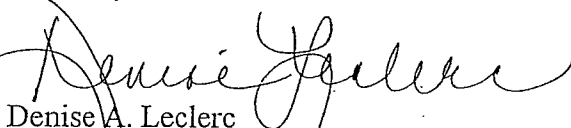
Greensboro

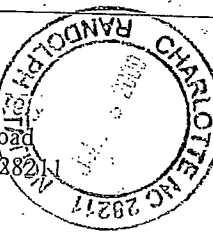
Greenville

Hilton Head

Myrtle Beach

Sincerely,


Denise A. Leclerc
Paralegal for David J. Parrish



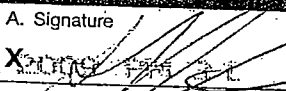
SENDER: COMPLETE THIS SECTION

- 1. Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- 2. Print your name and address on the reverse so that we can return the card to you.
- 3. Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Sandy C. Vanevery
2800 Sharon Road
Charlotte, NC 28211

COMPLETE THIS SECTION ON DELIVERY

A. Signature
 ☒ Agent ☐ Addressee

B. Received by (Printed Name) Sandy Van Every C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☒ Yes

2. Article Number

(Transfer from service label)

7006 3450 0002 9314 6398

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	

Postmark Here

Sandy C. Vanevery
2800 Sharon Road
Charlotte, NC 28211

Sent To
Street, Apt. No., or PO Box No.
City, State, ZIP+4

PS Form 3800, August 2006 See Reverse for Instructions

7006 3450 0002 9314 6398

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AFFIDAVIT OF PROCESS

IN THE COURT OF COMMON PLEAS

CASE NO.: 2008-CP-10-6947

PINEPOINT ASSOCIATES, LP,

PLAINTIFF,

VS..

**VANEVRY ENTERPRISES; SANDY VANEVRY,
GTH ENTERPRISES, INC. and TIMOTHY R. SEBOLD**

DEFENDANT(S).

State of North Carolina }
 } SS
County of Mecklenburg }

I, Monty Clrk, is a Private Investigator, licensed by the North Carolina Private Protective Services, who being duly sworn, deposes and says that at the time of service, he was over the age of twenty-one, am not a party to this action and am not related by blood or marriage to a party to this action or to the person upon service was made.

On the 14th day of July, 2009, at 7:08, A.M.

At 2800 Sharon Road (Private residence) city of Charlotte State of North Carolina 28211, Mecklenburg County the above respondent served the, Civil Action Cover Sheet, Summons and Complaint (Non-Jury) personally on the defendant Sandy Vanevery.

The person receiving documents is described as follows:

Sex: M Race W Age 25-27 Height 6'2"

Weight 180 Hair Dark Brown Hair Other clean shaven-"baby face"

To the best of my knowledge and belief, said person was not engaged in the U.S. Military at the time of this service.

Undersigned declares under penalty of perjury that the foregoing is true and correct.

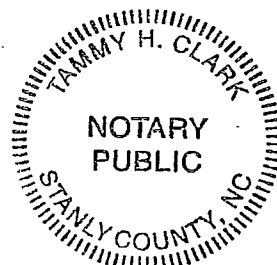

Signature of Server

Subscribed and sworn to before me this
14th day of July, 2009

James A. Clark

Notary Public

My Commission Expires: May 11, 2012



7
8
9
10
11

2009 JUL 20 PM 12:14
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Pinepoint Associates, LP)
Plaintiff(s))
Vanevery Enterprises, Inc.; Sandy)
Vanevery; GTH Enterprises, Inc.)
and Timothy R. Sebold)
Defendant(s))

IN THE COURT OF COMMONS PLEAS
CIVIL ACTION NUMBER: ²⁰⁰⁸~~2009~~-CP-10-6947

**DEFENDANTS' VAN EVERY ENTERPRISES
AND SANDY VANEVERY MOTION TO
ALTER OR AMEND THE JUDGMENT**

FILED
2010 MAR 15 PM 12:59
CLERK OF COURT
J. ARMSTRONG

YOU WILL PLEASE TAKE NOTICE that defendants Vanevery Enterprises and Sandy Vanevery will move, in ten (10) days at the Charleston County Courthouse, or at such other time and place as the court deems proper, for an order pursuant to SCRCP Rule 59(e), altering or amending the court's order denying the plaintiff's motion to dismiss that was heard by J.C. Nicholson, Jr. at 11:30 A.M. on March 2, 2010 at the Charleston County Courthouse. The court is asked to consider the following grounds:

1. In contrast to plaintiff's argument, the language of S.C. Code Ann. § 15-3-20 does not incorporate an "and" or an "or" between subparts (1) and (2). *See* S.C. Code Ann. § 15-3-20 (2010). Rather, it unequivocally states that the latest an action may be properly "commenced" is when the summons and complaint are filed with the clerk of court if actual service is achieved within one hundred and twenty (120) days of filing. *See id.* The plaintiff filed his complaint on December 8, 2008 and did not serve Vanevery Enterprises and Sandy Vanevery until July 14, 2009, over eighty (80) days after the one hundred and twenty (days) allowed by law. Therefore, the complaint served was void for failure to serve it in the time prescribed by law.

10-4417

2. Furthermore, any irreconcilability between S.C. Code Ann. § 15-3-20 and S.C. Code Ann. § 15-3-30 should be resolved by § 15-3-20 serving as the controlling statute. The South Carolina legislature last amended § 15-3-30 in 1962 whereas § 15-3-20 was last amended in 2002. *Compare* S.C. Code Ann. § 15-3-20 (2010), *with* S.C. Code Ann. § 15-3-30 (2010). Therefore, because South Carolina's rules of statutory construction state that newly enacted or amended law controls over older legislation, any conflict between these two statutes should be resolved by § 15-3-20.

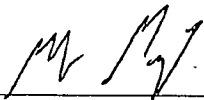
3. South Carolina Supreme Court precedent clearly indicates that, if substitute service of process is available, such as by service of publication, then the tolling statute is inapplicable. In *Meyer v. Paschal*, 330 S.C. 175 (1998), the South Carolina Supreme Court stated that S.C. Code Ann. § 15-3-30's reference to a defendant who is "out of the State" describes "a defendant who is beyond the personal jurisdiction and process of the court and not simply a defendant who is physically absent from the state." *Paschal*, 330 S.C. at 182. Furthermore, the Court outlined that the purpose of the tolling statute is served when the long-arm statute or substitute service statute brings the defendant within the personal jurisdiction of the court and that, when such circumstances exist, "the tolling statute is inapplicable because the need to delay the running of the statute of limitations no longer exists." *Id.* at 183. Thus, the Court held that "the tolling statute is inapplicable when the nonresident defendant is amenable to personal service of process and the defendant can be brought within the personal jurisdiction of our courts." *Id.* at 184.

Therefore, applied to this case, because such substitute service of process as S.C. Code Ann. § 15-9-710's service by publication was available to the plaintiffs, the tolling statute does not apply under *Meyer*. The plaintiffs did not avail themselves of this method of service, nor did they either serve these defendants within the three (3) year statute of limitations or within one

hundred and twenty (120) days after filling the complaint. Thus these defendants were never properly served and any causes of action brought against them are void. Accordingly, the court's failure to follow this precedent that the tolling provision does not apply when substitute service is available is, respectfully, in error.

WHEFORE these defendants pray for the relief requested herein and such other relief as the court deems just, prudent, and proper.

HALLER LAW FIRM



David K. Haller
Matthew E. Pecoy
180 Meeting Street, Suite 230
P.O. Box 937
Charleston, SC 29402
Phone: (843) 577-7344
Fax: (843) 577-7288

Attorneys for the Defendants Vanevery Enterprises
And Sandy Vanevery

March 15, 2010

Charleston, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Pinepoint Associates, LP)
)
Plaintiff(s))
)
Vanevery Enterprises, Inc.; Sandy)
Vanevery; GTH Enterprises, Inc.)
And Timothy R. Sebold)
)
Defendant(s))
)

IN THE COURT OF COMMONS PLEAS

CASE NUMBER: ²⁰⁰⁸2009-CP-10-6947

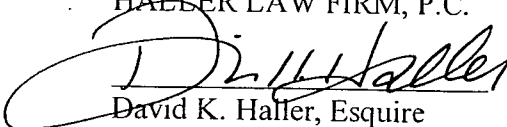
**Defendant Vanevery Enterprises, Inc. and
Sandy Vanevery's Motion for Summary
Judgment**

2011 SEP -2 PM 12:28
J. ARMSTRONG
CLERK OF COURT

YOU WILL PLEASE TAKE NOTICE that defendants VanEvery Enterprises and Sandy VanEvery will move, in ten (10) days at the Charleston County Courthouse, or at such other time and place as the court deems proper, for an order pursuant to SCRPC Rule 56 granting these defendants judgment as a matter of law on all of the plaintiff's claims. The grounds for the motion are that the plaintiff failed to commence this action within the prescribed statute of limitations and the plaintiff's claims are barred as a matter of law.

WHEREFORE the defendants pray for the relief prayed for herein and for such other relief as the court deems just, prudent, and proper.

HALLER LAW FIRM, P.C.


David K. Haller, Esquire

115 River Landing Drive, Suite 102
Charleston, SC 29492
(843) 849-1384
(843) 853-9377 FACSIMILE

31st day of August, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE CIRCUIT COURT

PINEPOINT ASSOCIATES, LP,
Plaintiff,

Case No. 2008-CP-10-6947

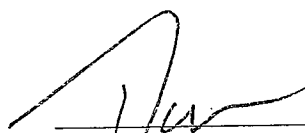
vs.

**PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT**

VANEVERY ENTERPRISES, INC; SANDY
VANEVERY; GTH ENTERPRISES, INC.;
and TIMOTHY R. SEBOLD,
Defendants.

PLEASE TAKE NOTICE THAT the Plaintiff, through its undersigned counsel, moves the Court for Summary Judgment on pursuant to Rule 56, SCRCp. The ground for this motion is that there is no genuine issue of material fact and Plaintiff is entitled to a judgment for the sums owed to it as referenced in its Complaint as a matter of law.

This motion is based on the pleadings, deposition testimony, discovery, and other matters of record in the case, and such other and further materials and memorandum of law that may be submitted to the judge at or before the hearing on this motion.



David J. Parrish
NEXSEN PRUET, LLC
P.O. Box 486
Charleston, South Carolina 29402
Phone: (843) 720-1771
Email: dparrish@nexsenpruet.com
Attorney for Plaintiff Pinepoint Associates, LP

October 13, 2011

87

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Pinepoint Associates, LP)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2008-CP-10-6947

Plaintiff,

vs.

Vanevery Enterprises, Inc.; Sandy
Vanevery; GTH Enterprises, Inc.
and Timothy R. Sebold

Defendants.

**DEFENDANTS' SANDY VAN EVERY
VANEVERY ENTERPRISES, INC.'S
RECORD FOR AND AGAINST
SUMMARY JUDGMENT**

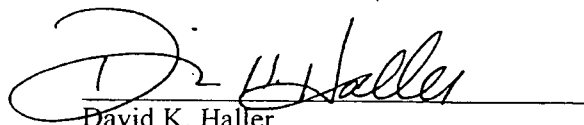
JULIE J. ARMSTRONG
CLERK OF COURT

2011 OCT 24 AM 8:52

FILED

Defendants Vanevery Enterprises and Sandy Van Every submit the following
(exclusive of the entire deposition of Leonard D. Way) to the court in favor of their
motion for summary judgment and in opposition to the plaintiff's motion for summary
judgment. Defendants will provide the original deposition of Mr. Way to the Court at the
hearing.

RESPECTFULLY SUBMITTED,



David K. Haller
HALLER LAW FIRM, PC
115 River Landing Drive, Suite 102
Charleston, SC 29492
dhaller@hallerlawfirm.com
Attorney For Defendants

Oct. 24, 2011

EXHIBIT 1

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2008-CP-10-6947

Pinepoint Associates, LP)
)

Plaintiff,)
)

vs.)

AFFIDAVIT OF SANDY VAN EVERY

Vanevery Enterprises, Inc.; Sandy)
Vanevery; GTH Enterprises, Inc.)
and Timothy R. Sebold)
)

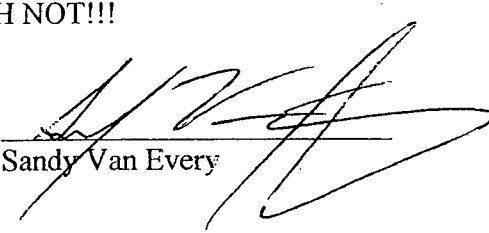
Defendants.)
)
)

Appeared before me, SANDY VAN EVERY, who, being duly sworn, deposes and states as follows:

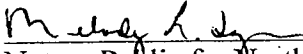
1. I am an adult and am competent to make the statements contained in this affidavit. The statements made herein are of my own knowledge or belief.
2. I was the sole member and manager of Vanevery Enterprises, LLC. The only purpose of Vanevery Enterprises was to operate "Lifequest" personal fitness franchises in the Charleston area in or about 2005 and 2006. One of those franchises was to be operated in Pinepoint Plaza, which is owned by Pinepoint Associates, LLC.
3. Timothy R. Seibold was, at the time, the owner of the Lifequest name and brand. We worked together on starting these locations. Seibold is a personal guarantor on the lease between Pinepoint and Vanevery Enterprises, LLC.
4. In late 2005, it became clear that Seibold's business dealings were not clean and I elected to cease my relationship with him. I informed Pinepoint in December of 2005 that Vanevery Enterprises would not abide by the terms of the lease. Pinepoint told me that they would release Vanevery Enterprises from the lease and me as a guarantor if Seibold would accept an assignment of the lease. It prepared a document to that effect.

5. I do not know whether . . . old signed the document. However, . . . know that after December of 2005, I had nothing to do with Lifequest or the Pinepoint space where it was to be operated. Tim Seibold was granted access at all times by Pinepoint to the property and worked with contractors and Pinepoint personnel on upfit for the space. I had no involvement whatsoever. Any expenses were incurred after that date were the responsibility of Seibold. Pinepoint clearly knew I was no longer involved and had no intention of leasing the space. Vanevery Enterprises ceased functioning.
6. In late December of 2007, I moved to Charlotte, North Carolina to attend Queen's College for classes that began January of 2008. I had not heard anything from Pinepoint about the lease matter, but knew that it had found a replacement tenant, so I believed that it had dropped the matter since it had not lost any money.
7. Sometime in 2008, however, I learned that more than one process server was looking for me. One was someone from the lawyers for Pinepoint and another was from a bank foreclosing on a piece of property I owned in Charleston. The bank's process server personally served me at my home in Charlotte. I called the offices of Pinepoint's lawyers and told them how to find me and they then mailed it to me.

FURTHER THE AFFIANT SAYETH NOT!!!


Sandy Van Every

SWORN TO BEFORE ME THIS
19 day of October, 2011


Notary Public for North Carolina
My Commission Expires: March 11, 2013

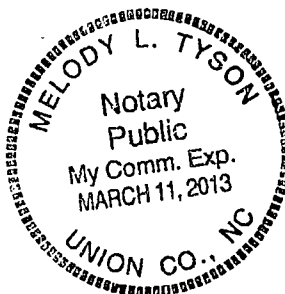


EXHIBIT 2

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

DEPOSITION OF LEONARD D. WAY

PINEPOINT ASSOCIATES, LP,

Plaintiff,

Case No. 2008-CP-10-6947

vs.

VANEVERY ENTERPRISES, INC., SANDY VANEVERY, GTH
ENTERPRISES, INC., and TIMOTHY R. SEBOLD,

Defendants.

DEPONENT: LEONARD D. WAY

DATE: May 31, 2011

TIME: 10:00 A.M.

LOCATION: NEXSEN PRUET
205 King Street, Suite 400
Charleston, South Carolina 29401

REPORTED BY: TERI L. HORIHAN
NCRA REGISTERED PROFESSIONAL REPORTER
CLARK & ASSOCIATES, INC.
P.O. Box 73129
Charleston, SC 29415
843-762-6294
WWW.CLARK-ASSOCIATES.COM
Teri@Clark-Associates.com

1 lease. You see that?

2 A. I do.

3 Q. All right. And how much -- generally, what
4 is the tenant improvement allowance?

5 A. That is an allowance from the landlord to
6 offset the cost that a tenant incurs to renovate
7 the space for their use.

8 Q. And how much had the landlord promised to
9 provide to the tenant for this property?

10 A. It was \$10 per square foot, and in the first
11 amendment, it sets out the specific -- \$262,000 --
12 262,850. It's in item 10 of the first amendment.

13 Q. Okay. Did Pinepoint actually pay out
14 262,800 --

15 A. Not entirely, no.

16 Q. Is it your position that Pinepoint has
17 abided by all terms of the lease and the two
18 amendments?

19 A. It is.

20 Q. Tell me what you contend that Vanevery
21 Enterprises and Sandy Vanevery did to breach this
22 lease.

23 MR. PARRISH: Object to the form. Go
24 ahead and answer it.

25 A. They never paid rent. They never occupied

1 the space for operations. They started the
2 build-out to suit their needs but never completed
3 it.

4 Q. Anything else?

5 A. No.

6 Q. All right. What is the first day on which
7 you believe rent was paid but not -- was to be paid
8 under the lease but was not paid?

9 A. It would have been March 15th of 2006.

10 Q. All right. And at what point do you
11 believe -- did you come to know or understand that
12 there would be a -- potentially be a problem with
13 the payment of rent by Vanevery Enterprises?

14 MR. PARRISH: Object to the form. Go
15 ahead and answer it.

16 A. I anticipated that rent was going to be
17 paid. In December of 2005, Mr. Vanevery, through
18 an attorney, sent us notice that he wished to not
19 move forward with the lease, but we reminded him
20 that he didn't have that right to terminate.

21 Q. Do you know the date of that?

22 A. It was mid-December of 2005.

23 Q. And what was your understanding as to why he
24 did not want to move forward?

25 MR. PARRISH: Object to the form. Go

1 ahead and answer it.

2 A. I don't know why.

3 Q. Well, this letter that you received, what
4 did it say?

5 A. Best of my recollection, that he did not
6 wish to move forward with the tenant improvement
7 allowance or with the tenant build-outs. He wished
8 to rescind the lease. Didn't go into specifics as
9 to why.

10 Q. All right. And did you respond to that?

11 A. I did.

12 Q. Did you personally do it, or did somebody
13 else?

14 A. I personally..

15 Q. And what did you say?

16 A. That as much as we could understand he might
17 not wish to move forward, he didn't have that right
18 under the lease and that we were looking to hold
19 him to that obligation. Tenants always have the
20 right to assign or sublease a space, and I
21 generally will put that in the letter, that you
22 have that right. If you don't want to move
23 forward, find someone else to move forward.

24 Q. Okay. Have you seen those letters?

25 A. Yes. They were in the lease file I reviewed

1 before coming here.

2 Q. Okay. I don't -- did you provide a copy of
3 that to your lawyer?

4 A. It's been five years since I've handed over
5 that file.

6 Q. Okay. Do you give a copy of it, or did you
7 give --

8 A. It was -- it was in that lease file.

9 Q. Can I get a copy of those letters?

10 A. That's fine.

11 Q. All right. Great.

12 MR. PARRISH: You don't have the
13 letter?

14 MR. HALLER: Huh-uh.

15 A. I believe I wrote it to his attorney at the
16 time.

17 Q. Who would have been -- I saw Bill Swope or
18 William Swope.

19 A. Yeah, Swope.

20 Q. All right. Who is Tim Sebold?

21 A. Tim Sebold was the primary owner, operator
22 of Lifekquest Fitness.

23 Q. And when was the last time you talked to
24 Mr. Sebold?

25 A. Early 2006.

1 Q. And what was his role with the lease?

2 A. He was going -- it's my understanding this
3 location was going to be the first franchise of
4 Lifequest or one of the first. So Mr. Vanevery
5 would run it. Mr. Sebold was going to be giving
6 him guidance as the head of Lifequest. But he --
7 Lifequest was handling or overseeing the build-out
8 and the layouts and the design.

9 Q. And that would -- when you talk about
10 Lifequest, you mean that would be Mr. Sebold?

11 A. Correct.

12 Q. Okay. So Mr. Sebold is the one who had --
13 who made all the plans -- to the best of your
14 knowledge, made all the plans as to what the upfit
15 would look like, retaining contractors?

16 A. Yes.

17 Q. I'm going to show you a document that was
18 produced to me. Tell me if you recognize this.

19 A. I've seen it.

20 Q. Did you prepare this document?

21 A. We would have provided those numbers to
22 Mr. Parrish.

23 MR. HALLER: Okay. I'm going to go
24 ahead and mark this as Exhibit Number --
25 Defendants' Exhibit Number 2.

EXHIBIT 3

December 2008

November 2008	December 2008	January 2009
S M T W T F S	S M T W T F S	S M T W T F S
1	1 2 3 4 5 6	1 2 3
2 3 4 5 6 7 8	7 8 9 10 11 12 13	4 5 6 7 8 9 10
9 10 11 12 13 14 15	14 15 16 17 18 19 20	11 12 13 14 15 16 17
16 17 18 19 20 21 22	21 22 23 24 25 26 27	18 19 20 21 22 23 24
23 24 25 26 27 28 29	28 29 30 31	25 26 27 28 29 30
30		

Calendar

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1	2	3	4	5	6
7	8 Summons and complaint filed	9 1	10 2	11 3	12 4	13 5
14 6	15 7	16 8	17 9	18 10	19 11	20 12
21 13	22 14	23 15	24 16 17 18 19	25 17	26 18	27 19
28 20	29 21	30 22	31 23			

January 2009

December 2008

S	M	T	W	T	F	S
1	2	3	4	5	6	
7	8	9	10	11	12	13
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21	22	23	24	25	26	27
28	29	30	31			

January 2009

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25	26	27	28	29	30	31

February 2009

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1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28

101

Calendar

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				24	25	26
27	28	29	30	31	32	33
34	35	36	37	38	39	40
41	42	43	44	45	46	47
48	49	50	51	52	53	54

February 2009

January 2009

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18	19	20	21	22	23	24
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February 2009

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March 2009

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15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

Calendar

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1 55	2 56	3 57	4 58	5 59	6 60	7 61
8 62	9 63	10 64	11 65	12 66	13 67	14 68
15 69	16 70	17 71	18 72	19 73	20 74	21 75
22 76	23 77	24 78	25 79	26 80	27 81	28 82

March 2009

February 2009	March 2009	April 2009
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4 5 6 7	1 2 3 4 5 6 7	1 2 3 4
8 9 10 11 12 13 14	8 9 10 11 12 13 14	5 6 7 8 9 10 11
15 16 17 18 19 20 21	15 16 17 18 19 20 21	12 13 14 15 16 17 18
22 23 24 25 26 27 28	22 23 24 25 26 27 28	19 20 21 22 23 24 25
	29 30 31	26 27 28 29 30

Calendar

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1 83	2 84	3 85	4 86	5 87	6 88	7 89
8 90	9 91	10 92	11 93	12 94	13 95	14 96
15 97	16 98	17 99	18 100	19 101	20 102	21 103
22 104	23 105	24 106	25 107	26 108	27 109	28 110
29 111	30 112	31 113				

April 2009

Calendar

March 2009							April 2009							May 2009								
S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S		
1	2	3	4	5	6	7				1	2	3	4						1	2		
8	9	10	11	12	13	14		5	6	7	8	9	10	11		3	4	5	6	7	8	9
15	16	17	18	19	20	21		12	13	14	15	16	17	18		10	11	12	13	14	15	16
22	23	24	25	26	27	28		19	20	21	22	23	24	25		17	18	19	20	21	22	23
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																31						

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
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118	119	5/1 120	121	122	123	124
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132	133	134	135	136	137	4/25 138
139	140	141	142	143		

May 2009

April 2009

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May 2009

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31						

June 2009

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14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30				

601

Calendar

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1 144	2 145
3 146	4 147	5 148	6 149	7 150	8 151	9 152
10 153	11 154	12 155	13 156	14 157	15 158	16 159
17 160	18 161	19 162	20 163	21 164	22 165	23 166
24 167	25 168	26 169	27 170	28 171	29 172	30 173
31 174						

June 2009

Calendar

May 2009

S	M	T	W	T	F	S
						1 2
3	4	5	6	7	8	9
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17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

June 2009

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28	29	30				

July 2009

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19	20	21	22	23	24	25
26	27	28	29	30	31	

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1 175	2 176	3 177	4 178	5 179	6 180
7 181	8 182	9 183	10 184	11 185	12 186	13 187
14 188	15 189	16 190	17 191	18 192	19 193	20 194
21 195	22 196	23 197	24 198	25 199	26 200	27 201
28 202	29 203	30 204				

July 2009

June 2009

S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30				

July 2009

S	M	T	W	T	F	S
			1	2	3	4
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12	13	14	15	16	17	18
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26	27	28	29	30	31	

August 2009

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16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

Calendar

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
			1 205	2 206	3 207	4 208
5 209	6 210	7 211	8 212	9 213	10 214	11 215
12 216	13 217	14 Date of Personal Service	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

EXHIBIT 4

12/16/05

SWOPE LAW FIRM, P.A.

1535 Sam Rittenberg Blvd., Suite E
Charleston, SC 29407
(843) 852-4925
Fax: (843) 852-4929

FAX TRANSMISSION COVER SHEET

Date: 12/16/05
To: Mr. Leonard Way - The Beach Company
Fax: 722-6449
Re: Lifequest Fitness site @ 1964 Ashley River Road, Charleston, SC 29407
Sender: WILLIAM K. SWOPE, ESQUIRE

YOU SHOULD RECEIVE 1 PAGE(S), INCLUDING THIS COVER SHEET.
IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL (843)852-4925.

Dear Mr. Way:

Please be advised that I have been retained by Mr. Sandy Van Every to represent his interests herein. He has invested me with the unfortunate task of advising you that the build-out of the above referenced premises will not be going forward. In addition, please accept this as formal notice of his intent to rescind the lease agreement, which he has guaranteed, for this site. He regrets having to reach this business decision, but he believes it to be in his best financial interest. Any correspondence or contact concerning this situation should be addressed to me as his attorney. He will forward all notices and conduct any of the affairs attendant to this matter with or through me. Sincerely, William K. Swope.

William K. Swope

The information contained in this facsimile is subject to attorney-client privilege, and/or attorney work product privilege, and is confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone at (843) 852-4925 and return the original message to us at the above address via the U.S. Postal service. Thank you.

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THE BEACH COMPANY

REAL ESTATE DEVELOPMENT • SALES • LEASING • MANAGEMENT
Building Traditions Since 1945

December 19, 2005

Mr. William K. Swope
Swope Law Firm, PA
1535 Sam Rittenberg Blvd, Suite E
Charleston, SC 29407

Re: Van Every Enterprises, LLC & LifeQuest Fitness Site

Dear Mr. Swope:

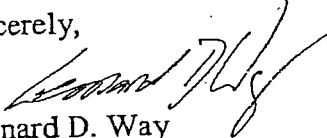
I have received your facsimile dated December 16 in reference to the above location and Sandy Van Every's desire to rescind his lease. While it is unfortunate that Mr. Van Every does not believe that this lease is in his best interest, he has no rights within the lease to rescind the agreement. The lease dated June 21, 2005 and amended on July 19, 2005 and December 5, 2005 does not provide the Tenant any rights to terminate the lease as a result of build-out issues.

Pinepoint Associates, LP, an affiliate of The Beach Company, has invested considerable time and money into the LifeQuest premises to make it ready for the Tenant. In addition, renovations for the overall center have commenced as a direct result of securing LifeQuest as the lead tenant. As far as Pinepoint Associates, LP is concerned the referenced lease is in full effect, the premises have been accepted, and the rent payments start March 15, 2006.

Your client may always assign the lease as provided in Lease Section 17 with the Landlord's consent. Please understand that all of the guarantors must be in agreement to such an assignment.

Please call me at your earliest opportunity to discuss.

Sincerely,



Leonard D. Way
Vice President, Asset Management

C: Sandy Van Every, Van Every Enterprises, LLC
Timothy R. Sebold, LifeQuest Fitness, Guarantor
GTH Enterprises, Inc., Guarantor ✓
Michael Elmore, Anchor Commercial Real Estate Services
Jeff Vinzani, Nexsen Pruet
Margo Pate, Beach Management

110

EXHIBIT 5

CONTINUATION SHEET

AIA DOCUMENT G703

PAGE 2 OF 2 PAGES

AIA Document G702, APPLICATION AND CERTIFICATION FOR PAYMENT, containing Contractor's signed certification is attached.

In tabulations below, amounts are stated to the nearest dollar.

Use Column I on Contracts where variable retainage for line items may apply.

APPLICATION NO: 2

APPLICATION DATE: March 20, 2006

PERIOD TO: March 31, 2006

ARCHITECT'S PROJECT NO:

A ITEM NO.	B DESCRIPTION OF WORK	C SCHEDULED VALUE	D WORK COMPLETED		F MATERIALS PRESENTLY STORED (NOT IN D OR E)	G		H BALANCE TO FINISH (C - G)	I RETAINAGE (IF VARIABLE RATE)
			FROM PREVIOUS APPLICATION (D + E)	THIS PERIOD		TOTAL COMPLETED AND STORED TO DATE (D+E+F)	% (G + C)		
1	General Conditions	\$14,700.00	\$4,410.00	\$4,000.00		\$8,410.00	57.21%	\$6,290.00	\$420.50
2	Demolition	\$8,300.00	\$6,640.00	\$1,660.00		\$8,300.00	100.00%	\$0.00	\$415.00
3	Concrete Place and Materials	\$8,011.70					0.00%	\$8,011.70	\$0.00
4	Gypsum Board/ Metal Studs	\$44,070.00	\$31,730.00	\$12,340.00		\$44,070.00	100.00%	\$0.00	\$2,203.50
5	Fire Protection	\$23,165.00	\$11,582.00	\$9,266.50		\$20,848.50	90.00%	\$2,316.50	\$1,042.43
6	Plumbing	\$15,877.80					0.00%	\$15,877.80	\$0.00
7	HVAC	\$53,505.50	\$32,638.00	\$10,890.00		\$43,528.00	81.35%	\$9,977.50	\$2,176.40
8	Electrical	\$55,370.00		\$6,780.00		\$6,780.00	12.24%	\$48,590.00	\$339.00
GRAND TOTALS		\$223,000.00	\$87,000.00	\$44,936.50	\$0.00	\$131,936.50	59.16%	\$91,063.50	\$6,596.83

Users may obtain validation of this document by requesting of the license a completed AIA Document D401 - Certification of Document's Authenticity

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APPLICATION AND CERTIFICATION FOR PAYMENT

AIA DOCUMENT G702

PAGE ONE OF 2 PAGES

TO OWNER: GTH Corporation
35 Folly Road
Charleston, SC 29407

PROJECT: Lifequest Upfit- Phase I

APPLICATION NO: 2

Distribution to:

☐ OWNER
☐ ARCHITECT
☐ CONTRACTOR

FROM CONTRACTOR:

VIA ARCHITECT:

Palmetto Construction Group, LLC
405-B Jessen Lane
Wando, SC 29492

LS3P Associates, Ltd
205 1/2 King Street
Charleston, SC 29401

CONTRACT FOR: New Construction

PERIOD TO: March 31, 2006

PROJECT NOS:

CONTRACT DATE:

CONTRACTOR'S APPLICATION FOR PAYMENT

Application is made for payment, as shown below, in connection with the Contra
Continuation Sheet, AIA Document G703, is attached

1. ORIGINAL CONTRACT SUM	\$	\$223,000.00
2. Net change by Change Orders	\$	
3. CONTRACT SUM TO DATE (Line 1 + 2)	\$	223,000.00
4. TOTAL COMPLETED & STORED TO DATE (Column G on G703)	\$	131,936.50
5. RETAINAGE:		
a. 5 % of Completed Work (Column D + E on G703)	\$	6,596.83
b. 0 % of Stored Material (Column F on G703)	\$	0
Total Retainage (Lines 5a + 5b)		
Total in Column I of G703	\$	6,596.83
6. TOTAL EARNED LESS RETAINAGE (Line 4 Less Line 5 Total)	\$	125,339.68
7. LESS PREVIOUS CERTIFICATES FOR PAYMENT (Line 6 from prior Certificate)	\$	82,650.00
8. CURRENT PAYMENT DUE	\$	42,689.68
9. BALANCE TO FINISH, INCLUDING RETAINAGE (Line 3 less Line 6)	\$	97,660.33

CHANGE ORDER SUMMARY	ADDITIONS	DEDUCTIONS
Total changes approved in previous months by Owner		
Total approved this Month		
TOTALS	\$0.00	\$0.00
NET CHANGES by Change Order	\$0.00	

The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid the Contractor for Work for which previous Certificates for Payment were issued at payments received from the Owner, and that current payment shown herein is now due

CONTRACTOR: Palmetto Construction Group, LLC

By: _____ Date: _____

State of: South Carolina
Subscribed and sworn to before me this
Notary Public
My Commission expires

County of: Charleston
day of

ARCHITECT'S CERTIFICATE FOR PAYMENT

In accordance with the Contract Documents, based on on-site observations and the data comprising the application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED

AMOUNT CERTIFIED \$ _____

(Attach explanation if amount certified differs from the amount applied. Initial all figures on this Application and on the Continuation Sheet that are changed to conform with the amount certified.)
ARCHITECT:

By: _____ Date: _____

This Certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the Contractor named herein. Issuance, payment and acceptance of payment are without prejudice to any rights of the Owner or Contractor under this Contract

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CONTINUATION SHEET

AIA DOCUMENT G703

PAGE 2 OF 2 PAGES

AIA Document G702, APPLICATION AND CERTIFICATION FOR PAYMENT, containing

Contractor's signed certification is attached.

In tabulations below, amounts are stated to the nearest dollar.

Use Column I on Contracts where variable retainage for line items may apply.

APPLICATION NO: 1

APPLICATION DATE: February 28, 2006

PERIOD TO: February 28, 2006

ARCHITECT'S PROJECT NO:

A ITEM NO.	B DESCRIPTION OF WORK	C SCHEDULED VALUE	D. WORK COMPLETED		F MATERIALS PRESENTLY STORED (NOT IN D OR E)	G		H BALANCE TO FINISH (C - G)	I RETAINAGE (IF VARIABLE RATE)
			FROM PREVIOUS APPLICATION (D ÷ E)	THIS PERIOD		TOTAL COMPLETED AND STORED TO DATE (D+E+F)	% (G ÷ C)		
1	General Conditions	\$14,700.00		\$4,410.00		\$4,410.00	30.00%	\$10,290.00	\$220.50
2	Demolition	\$8,300.00		\$6,640.00		\$6,640.00	80.00%	\$1,660.00	\$332.00
3	Concrete Place and Materials	\$8,011.70					0.00%	\$8,011.70	\$0.00
4	Gypsum Board/ Metal Studs	\$44,070.00		\$31,730.00		\$31,730.00	72.00%	\$12,340.00	\$1,586.50
5	Fire Protection	\$23,165.00		\$11,582.00		\$11,582.00	50.00%	\$11,583.00	\$579.10
6	Plumbing	\$15,877.80					0.00%	\$15,877.80	\$0.00
7	HVAC	\$53,505.50		\$32,638.00		\$32,638.00	61.00%	\$20,867.50	\$1,631.90
8	Electrical	\$55,370.00					0.00%	\$55,370.00	\$0.00
GRAND TOTALS		\$223,000.00	\$0.00	\$87,000.00	\$0.00	\$87,000.00	39.01%	\$136,000.00	\$4,350.00

Users may obtain validation of this document by requesting of the license a completed AIA Document D401 - Certification of Document's Authenticity.

AIA DOCUMENT G703 - CONTINUATION SHEET FOR G702 - 1992 EDITION - AIA® - © 1992
THE AMERICAN INSTITUTE OF ARCHITECTS, 1735 NEW YORK AVENUE, N.W., WASHINGTON, D.C. 20006-5232

G703-1992

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TO OWNER GTH Corporation
35 Folly Road
Charleston, SC 29407

PROJECT: Lifequest Upfit- Phase I

AIA DOCUMENT G702

APPLICATION NO:

PAGE ONE OF 2 PAGES

FROM CONTRACTOR:

Palmetto Construction Group, LLC
405-B Jessen Lane
Wando, SC 29492

VIA ARCHITECT:

LS3P Associates, Ltd
205 1/2 King Street
Charleston, SC 29401

CONTRACT FOR: New Construction

PERIOD TO:

February 28, 2006

PROJECT NOS:

CONTRACT DATE:

Distribution to:

OWNER
ARCHITECT
CONTRACTOR

CONTRACTOR'S APPLICATION FOR PAYMENT

Application is made for payment, as shown below, in connection with the Contract Continuation Sheet, AIA Document G703, is attached.

1. ORIGINAL CONTRACT SUM
2. Net change by Change Orders
3. CONTRACT SUM TO DATE (Line 1 + 2)
4. TOTAL COMPLETED & STORED TO DATE (Column G on G703)
5. RETAINAGE:
 - a. 5 % of Completed Work (Column D + E on G703)
 - b. 0 % of Stored Material (Column F on G703)Total Retainage (Lines 5a + 5b or Total in Column I of G703)
6. TOTAL EARNED LESS RETAINAGE (Line 4 Less Line 5 Total)
7. LESS PREVIOUS CERTIFICATES FOR PAYMENT (Line 6 from prior Certificate)
8. CURRENT PAYMENT DUE
9. BALANCE TO FINISH, INCLUDING RETAINAGE (Line 3 less Line 6)

\$ 223,000.00
\$ 223,000.00
\$ 87,000.00

\$ 4,350.00
\$ 0

\$ 4,350.00
\$ 82,650.00

\$ 0
\$ 82,650.00
\$ 140,350.00

CHANGE ORDER SUMMARY		
	ADDITIONS	DEDUCTIONS
Total changes approved in previous months by Owner		
Total approved this Month		
TOTALS		
NET CHANGES by Change Order	\$0.00	\$0.00
	\$0.00	

The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.

CONTRACTOR:

Palmetto Construction Group, LLC

By:

State of South Carolina
Subscribed and sworn to before me this
Notary Public:
My Commission expires:

Date:

County of Charleston
day of

ARCHITECT'S CERTIFICATE FOR PAYMENT

In accordance with the Contract Documents, based on on-site observations and the data comprising the application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

AMOUNT CERTIFIED \$

(Attach explanation if amount certified differs from the amount applied. Initial all figures on this Application and on the Continuation Sheet that are changed to conform with the amount certified.)

By:

Date:

This Certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the Contractor named herein. Issuance, payment and acceptance of payment are without prejudice to any rights of the Owner or Contractor under this Contract.

AIA DOCUMENT G702 - APPLICATION AND CERTIFICATION FOR PAYMENT - 1992 EDITION - AIA® - © 1992
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THE AMERICAN INSTITUTE OF ARCHITECTS, 1735 NEW YORK AVE., N.W., WASHINGTON, DC 20003-5282



Haines & McNeill, L.L.C.
Attorneys at Law

John F. McNeill* **
Robert W. Haines

Amy M. Haines

April 24, 2006

* L.L.M. (Taxation)

** Admitted in SC and NC

GTH Corporation
35 Folly Road
Charleston, South Carolina 29407

ATTN: Tim Sebold

Re: Monies Due under Contract Between Palmetto Construction Group and
GTH Corporation for Refitting Building Located at 1964 Ashley River
Road, Charleston, South Carolina

Dear Mr. Sebold:

Please be advised that we represent Palmetto Construction Group, LLC, (PCG). They have advised us that they have invoiced you two (2) invoices (see attached) for a total of approximately \$125,000. It is our understanding that you no longer have a lease on the property located at 1964 Ashley River Road, Charleston, South Carolina, and that you may be experiencing some financial difficulties. Please be advised that my clients would like to receive payment for the work done according to the contract between GTH Corporation and PCG.

If my clients have not received a substantial payment towards this outstanding invoice of \$125,000 by May 15, 2006, they will have no other option but to file a Mechanic's Lien against the property where they have performed the improvements.

Please contact either Mr. Jay Handegan or myself at your earliest possible convenience so that we may work through this matter in the hopes of avoiding the possibility of having to file a Mechanic's Lien.

Telephone
(843) 881-1066
(843) 884-1593
Facsimile
(843) 884-1084

1510 Mathis Ferry Road
P.O. Box 1099
Mt. Pleasant, SC 29464

www.hainesandmcneill.com

File
Beaul Co - Pinpoint
LIFE-Saver

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Pinepoint Associates, LP,

Plaintiff,

vs.

Vanevery Enterprises, Inc.; Sandy Vanevery;
GTH Enterprises, Inc. and Timothy
R. Sebold,

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2008-CP-10-6947

FILED
2012 JUN -8 PM 1:25
JULIE J. ARMSTRONG
CLERK OF COURT

DEFENDANTS VANEVERY
ENTERPRISES AND SANDY
VANEVERY'S MOTION TO ALTER
OR AMEND AND/OR FOR NEW TRIAL

TO: DAVID PARRISH, ESQ., ATTORNEY FOR THE PLAINTIFF

Defendants Vanevery Enterprises, Inc. and Sandy Vanevery respectfully request the court alter or amend its Order and Judgment dated May 22, 2012, received by the movants on June 4, 2012.

Respectfully, the movants assert that:

1. The plaintiff's claims are barred by the statute of limitations.
2. The claimed lease upon which the plaintiff sued was assigned to defendants GTH Enterprises, Inc. and Seibold and the movants have no liability under the lease.
3. Movants were not the cause of any damages suffered by the plaintiff.

For the forgoing reasons, the movants pray the court alter or amend its order and for such other relief as the court deems just, prudent, and proper.

RESPECTFULLY SUBMITTED,



David K. Haller, Esquire
HALLER LAW FIRM, PC
115 River Landing Drive, Suite 102
Charleston, South Carolina 29492
(843) 849-1384
dhaller@hallerlawfirm.com

June 7, 2012

Charleston, South Carolina

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Pinepoint Associates, LP

c/o David J. Porrihl, Its Attorney

Nexsen Pruet, LLC Po Box 486, Charleston, SC 29402

Phone # (843) 577-9440

VS

VanEvery Enterprises, LLC

c/o Sandy Van Every, Registered Agent

1303 Eaglet Lane, Hanahan, SC 29406

Phone # _____

Defendant

I, the Plaintiff in this action, being sworn, state ^{upon information and belief} that I am the landlord - lessor of the premises herein described. I further state that the premises are within the magisterial jurisdiction of Charleston County located at:

Pinepoint Plaza @ 1964 Ashley River Rd

and that a landlord - tenant relationship exist between the parties described as evidenced by the following facts:

See attached copy of Lease

Grounds for this ejectment are one or more of the following: (See attached copy of April 5, 2006 letter to Tenant)
(X) The tenant fails or refuses to pay the rent when due or demanded; or
() The term of tenancy or occupancy has ended; or
() A term or condition of the lease has been violated, to-wit _____

SWORN TO BEFORE ME THIS

12th DAY OF May 2006

Sharon Logan (10/12/10)

MAGISTRATE

BONNIE KOONTZ - STICKELS /

OR NOTARY PUBLIC

David J. Porrihl as attorney
PLAINTIFF
For the Landlord

TO THE DEFENDANT NAMED ABOVE:

Upon application for ejectment, above, filed by the Plaintiff, you the Defendant and lessee, of the premises noted above, are ordered to vacate the said premises immediately or to show cause before me at this court located at 1720 SAM RITTENBERG BLVD., UNIT 11 within ten (10) days from the date of service of this affidavit and rule why you should not be ejected from the said premises. FAILURE TO VACATE THE PREMISES OR TO RESPOND TO THIS COURT WITHIN THE TIME PERIOD SET ABOVE, MAY RESULT IN THE ISSUANCE OF A WARRANT OF EJECTMENT.

DATED _____

MAGISTRATE
BONNIE KOONTZ-STICKELS

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NEXSEN | PRUET

David J. Parrish
Member
Admitted in SC

April 5, 2006

HAND DELIVERED

Mr. Sandy Van Every,
Individually and Registered Agent for
VanEvery Enterprises, LLC
1303 Eaglet Lane
Hanahan, SC 29406

Timothy R. Sebold,
Individually and as Registered Agent for
GTH Enterprises, Inc.
35 Folly Road
Charleston, SC 29407

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

NOTICE OF DEFAULT

Re: Lease Agreement between Pinepoint Associates, LP, as the Landlord,
and VanEvery Enterprises, Inc., as the Tenant, dated June 21, 2006,
for commercial retail space in the Pine Point Plaza shopping center
located at 1964 Ashley River Road in Charleston County, South
Carolina.

Dear Mr. Van Every and Mr. Sebold:

Because of the nature of this notice and the requirements of the Lease, I am delivering
this letter directly to each of you, with a copy to your attorneys.

My March 17, 2006 letter to each of you demanded payment of the rent due on March
15th and requested adequate assurances and other information regarding the ability
and willingness of the Tenant, VanEvery Enterprises, Inc., to comply with its Lease
obligations by paying the rent, completing the space, and opening a business in the

205 King Street
Suite 400 (29401)
PO Box 486
Charleston, SC 29402
www.nexsenpruet.com

T 843.720.1771
F 843.720.1777
E DParrish@nexsenpruet.com
Nexsen Pruet Adams Kleemeier, LLC
Attorneys and Counselors at Law

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Ms. Sandy VanEvery
Mr. Tim Sebold
April 5, 2006
Page 2

space. I never received a response to that letter and the Tenant thereafter failed to deliver the next monthly rent payment due on April 1st. Accordingly, the Landlord, Pinepoint Associates, LP, hereby declares the Tenant in default for failing to deliver the rent payments that were due on March 15 and April 1, 2006. The Landlord is prepared to file an action to evict the Tenant from the premises in order to terminate the Tenant's right of possession and allow the Landlord to re-take possession of the property so it can attempt to mitigate its damages by re-leasing the property to another tenant. Pursuant to the terms of the Lease, the Landlord's eviction and termination of the Tenant's right of possession will not terminate the liability of the Tenant and personal guarantors for payment of past due and future rent and other expenses that will continue to accrue while the Landlord attempts to re-lease the space.

The Tenant currently owes approximately \$39,000 in past due rent and related charges and incurring additional rent and other charges at the rate of approximately \$24,000 per month. The personal guarantees that each of you signed make you personally liable for the Tenant's obligations under the Lease, and the Landlord is prepared to file a lawsuit against each of you individually to collect the past due and future accrued rents. You have significant personal exposure for the Tenant's financial obligations under the Lease.

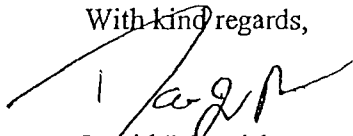
The Beach Company is acting as the Landlord's property manager and authorized agent in connection with this matter. Prior to filing an eviction action and collection lawsuit, The Beach Company has requested that both of you appear and attend a meeting with representatives of The Beach Company at 10:00 a.m. on next Tuesday, April 11, 2006, to discuss a resolution of this matter. The meeting will be held in my firm's office located at 205 King Street, Fourth Floor, in downtown Charleston, South Carolina. Your attorneys are invited and encouraged to attend the meeting. If you fail to appear, then the Landlord will move forward with eviction and collection proceedings without further notice.

This letter should not be deemed a waiver of any of the Landlord's rights under the Lease, and the Landlord specifically reserves all rights.

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Ms. Sandy VanEvery
Mr. Tim Sebold
April 5, 2006
Page 3

With kind regards,

A handwritten signature in black ink, appearing to read "DJP", is written over the text "With kind regards,".

David J. Parrish

DJP/sdl

Cc: Stephen Futeral, Esquire (via fax and mail)
William Swope, Esquire (via fax and mail)
George J. Gatgounis, Esquire (via fax and mail)

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LEASE AGREEMENT

THIS LEASE is made and entered into at Charleston, South Carolina as of this 21 day of June, 2005, by and between PINEPOINT ASSOCIATES, LP, a South Carolina Corporation ("Landlord") and VanEvery Enterprises, LLC d/b/a LIFEQUEST FITNESS CENTER ("Tenant"). In consideration of the covenants and provisions of this Lease and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, Landlord and Tenant agree as follows:

1. **BASIC LEASE PROVISIONS.** Each reference in this Lease to this Section 1 or any portion hereof shall mean and refer to the following terms, the application of which shall be governed by the provisions in the remaining Sections of this Lease:

- | | | |
|------|--|---|
| 1.1 | Landlord: | Pinepoint Associates, LP |
| 1.2 | Landlord's Mailing Address: | Attn: Property Management
211 King Street, Suite 300
Charleston, South Carolina 29401 |
| 1.3 | Landlord's Phone Number:
Landlord's Facsimile Number: | (843) 722-2615
(843) 722-6449 |
| 1.4 | Rent Payment Address: | Property Manager
The Beach Company
Post Office Box 607
Charleston, South Carolina 29402 |
| 1.5 | Tenant: | VanEvery Enterprises, LLC., a South Carolina, LLC. d/b/a Lifequest Fitness Center |
| 1.6 | Tenant's Mailing Address: | 1303 Eaglet Lane
Charleston, SC 29406 |
| 1.7 | Tenant's Phone Number:
Tenant's Facsimile Number:
Tenant's E-Mail Address: | (843) 460-5749
N/A
N/A |
| 1.8 | Tenant's Trade Name: | Lifequest Fitness Center |
| 1.9 | Premises Address: | 1964 Ashley River Road
Charleston, South Carolina 29407 |
| 1.10 | Premises Square Footage:
Tenant's Share: | Deemed 25,650 square feet of a 52,765 square foot center.
Deemed 48.61% |
| 1.11 | Initial Term: | Seven (7) years and Five (5) months |
| 1.12 | Commencement Date: | Date of Delivery by Landlord but not before August 1, 2005. If Landlord delivers premises prior to August 1, 2005, Tenant may start construction but Lease Commencement shall be August 1, 2005 or later. |
| 1.13 | Anticipated Delivery Date: | August 1, 2005 |
| 1.13 | Rent Start Date: | December 1, 2005 |

- | | | | | | |
|------|---------------|--------------------|------------------------|------------------------|---------------|
| 1.14 | Minimum Rent: | Term:
Years 1-7 | Annual
\$221,359.56 | Monthly
\$18,446.63 | PSF
\$8.63 |
|------|---------------|--------------------|------------------------|------------------------|---------------|
-
- | | | | |
|------|------------------|-----------------------------------|--------------------------|
| 1.15 | Percentage Rent: | Percentage:
Annual Breakpoint: | <u>N/A</u>
<u>N/A</u> |
|------|------------------|-----------------------------------|--------------------------|
-
- | | | |
|------|--|---|
| 1.16 | Initial Monthly Installment of Real Estate Taxes: | \$1,795.50 ✓ |
| 1.17 | Initial Monthly Installment of Insurance Premiums: | \$812.25 |
| 1.18 | Initial Monthly Installment of Common Area Cost: | \$2,415.38 |
| 1.19 | Total Initial Monthly Payment:
*Subject to final measurements | \$23,469.76 |
| 1.20 | Security Deposit: | \$18,446.63 |
| 1.21 | Required Business Hours: | Minimum 9:00 AM- 6:00 PM Monday through Friday, not more than 5:30 AM-10:00 PM Monday-Friday; 7:00 AM-3:00 PM Saturday and Sunday. |
| 1.22 | Radius Restriction: | |
| 1.23 | Permitted Use: | Operation of a fitness center. Subleases are allowed to any business not in direct conflict with any other tenant in this center |
| 1.24 | Guarantor: | Sandy VanEvery and GTH Enterprises, Inc., and Timothy R. Sebold, joint and several. |
| 1.25 | Option(s) to Renew: | Provided Tenant is not and has not been in default, Tenant is granted two (2) five (5) year options to renew the Lease with Tenant providing written notice to Landlord eight (8) months in advance. Tenant and Landlord shall then have two (2) months to negotiate a mutually acceptable renewal rental rate, such rate to be at market rate for similarly situated shopping centers. Should Tenant and Landlord not agree on the renewal rental rate within the sixty (60) days, Tenant may revoke its notice exercising said option. |
| 1.26 | Tenant Improvement Allowance: | Landlord shall provide Tenant with a tenant improvement allowance in the amount up to Ten Dollars (\$10.00) PSF to be used for Tenant upfit. Landlord shall pay Tenant Improvement Allowance directly to General Contractor on an agreed-to-draw schedule and construction amount as work is completed. If total construction amount is greater than the allowance amount, the Tenant shall fund the difference prior to any Landlord funding. Tenant is to hire a construction manager (Anchor Commercial) to perform a bid process and assist. Tenant in the construction process. Such fees may be included in the Tenant Improvement Allowance. |
| 1.27 | Condition on Delivery: | Landlord agrees to provide the space in a renovated condition to the following extent: The space will be demised with separate electric and water systems. Tenant will be responsible for installing all electrical and plumbing systems from the meters into the space. New HVAC will be installed consisting of three (3) units of fifteen (15) tons |

providing forty-five (45) tons of service. Tenant is responsible for all ductwork. The floors will be delivered in "as is" condition except for the patchwork to create a smooth surface for new floor coverings. Tenant is responsible for all floor coverings. No ceiling grid is provided. The under deck of the metal roof will be insulated. The space will be delivered unpainted. Any deviations from the above description requested by Tenant will be at Tenant's expense less any applicable credits from Landlord not performing a portion of Landlord's work.

EXHIBITS:	A-1	Site Plan
	A-2	Premises Plan
	B	Legal Description of Center
	C	Construction Rider
	D	Sign Criteria
	E	Rules and Regulations
	F	Guaranty

2. DEFINITIONS

2.1 **Definitions.** The capitalized terms set forth below, unless the context clearly requires otherwise, shall have the following meanings in this Lease:

"Agents" means a party's authorized agents, representatives, consultants, contractors, partners, members, shareholders, subsidiaries, affiliates, directors, officers and employees, including without limitation, any additional insureds Landlord designates and any property manager, in the case of Landlord, and including Tenant's customers, subtenants, licensees and concessionaires in the case of Tenant.

"Additional Rent" means any and all sums (whether or not specifically called "Additional Rent" in this Lease) other than Minimum Rent and Percentage Rent for which Tenant is or becomes obligated to pay to Landlord under this Lease. Unless otherwise indicated in this Lease, any Additional Rent is payable within ten (10) days of Landlord's demand.

"Alterations" means any alterations, decorations, modifications, additions or improvements made in, on, about, under or contiguous to the Premises after the Commencement Date, including, but not limited to, lighting, HVAC and electrical fixtures, pipes and conduits, transfer, storage and disposal facilities, partitions, drapery, wall coverings, shelves, cabinetwork, carpeting and other floor coverings, ceiling tiles, fixtures and carpentry installations.

"Applicable Laws" means the laws, rules, regulations, guidelines, ordinances, statutes and restrictions or requirements of any governmental authority, board of insurance underwriters, utility companies or other similar bodies now or hereafter in effect relating to or attesting the condition, use or occupancy of the Premises.

"Applicable Rate" means the highest permitted nonusurious rate in the State or, if there is none, fifteen percent (15%) per annum.

"Casualty" is defined in Section 20.1.

"Center" means that certain real property, and all improvements thereon, located within the boundaries of such property, shown on the Center Site Plan.

"Center Site Plan" means Exhibit A-1.

"City" means the city in which the Premises are located.

"Common Area" means all areas and facilities within the Center exclusive of the Premises and other portions of the Center leased (or to be leased) exclusively to other tenants. The Common Area includes, but is not limited to, parking areas, access and perimeter roads, sidewalks, landscaped areas and similar areas and facilities.

"Common Area Cost" is defined in Section 9.5.

"Construction Rider" means the rider between Landlord and Tenant regarding the construction of the Tenant's Work and the Landlord's Work, if any, in the form of Exhibit B.

"Consumer Price Index" is for purposes of this Lease. "Index" means the Consumer Price Index for All Urban Consumers, all items, U.S. City Average (1982-84 = 100) issued by the Bureau of Labor Statistics of the United States Department of Labor. If the manner in which such Index is determined by the Bureau of Labor Statistics is substantially revised, then the Bureau of Labor Statistics shall be requested to furnish a statement converting the Index published most recently prior to the start of the immediately preceding Lease Year (as hereinafter defined) to a figure that would be comparable to the revised Index published most recently prior to the start of the new Lease Year. If the 1982-84 average shall no longer be used as an Index of 100, such change shall constitute a substantial revision. If the Consumer Price Index published by the Bureau of Labor Statistics is discontinued, then the Index shall be the Consumer Price Index published by the U.S. Department of Commerce with appropriate adjustment. If the U.S. Department of Commerce Index is discontinued, then Landlord and Tenant shall agree on a reasonable substitute.

"County" means the county in which the Premises are located.

"Gross Sales" is defined in Section 8.5.

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"HVAC" means the heating, ventilating and air conditioning system serving the Premises and/or the Center.

"Landlord's Work" means those certain initial improvements, if any, to be constructed by Landlord on the Premises as provided in the Construction Rider.

"Lease" means this instrument together with all exhibits, amendments, addenda and riders attached hereto and made a part hereof.

"Lease Year" means individually the period of twelve (12) full calendar months (plus any initial partial month) beginning on the Commencement Date, and each such succeeding twelve (12)-month period thereafter during the Term, except the last Lease Year shall end when the Term ends.

"Mortgagee" means any mortgagee of a mortgage, beneficiary of a deed of trust or lender having a lien on or covering the Premises or any part thereof.

"Notice" means each and every notice, communication, request, demand, reply or advice, or duplicate thereof, in this Lease provided or permitted to be given, made or accepted by either party to any other party, which shall be in writing and given in accordance with the provisions of Section 23.

"Plans" means the final working drawings for the construction of the Tenant's Work to be prepared and approved as set forth in the Construction Rider.

"Premises" means the premises shown on Exhibit A-2.

"Premises Square Footage" means the entire area included within the Premises, being the area bounded by the inside surface of any exterior glass walls (or the centerline of the permanent exterior wall where there is no glass) of the Center bounding the Premises, the centerline of all walls separating the Premises from any public corridors or such other public areas on the same floor. The Premises Square Footage as of the execution of this Lease is set forth in Section 1.10.

"Real Estate Taxes" is defined in Section 9.4.

"Rent" means Minimum Rent, Percentage Rent and Additional Rent, collectively.

"Restrictions" means, collectively, any reciprocal easement agreement, covenants, conditions and restrictions, or any other easement or restriction affecting the Premises, the Center or any portion thereof, as the same may be amended from time to time.

"Rules and Regulations" means the rules and regulations described in Exhibit D and any modifications thereto promulgated by Landlord or Landlord's Agents from time to time, provided such modifications do not unreasonably interfere with Tenant's use and enjoyment of the Premises.

"Substantial Completion" and "substantially completed" means the Landlord's Work, if any, or Tenant's Work, or repair of the Premises following a Casualty, having been fully completed except for minor details of construction, mechanical adjustments or decoration which do not materially interfere with Tenant's use and enjoyment of the Premises (items normally referred to as "punch list" items).

"Tenant's Work" means those certain initial improvements, if any, to be constructed by Tenant on the Premises as provided in the Construction Rider.

"Tenant's Personal Property" means Tenant's removable trade fixtures, furniture, equipment, inventory and other personal property located in or on the Premises.

"Tenant's Share" as set forth in Section 1.10 and defined in Section 9.3.

"Term" means the Initial Term and any extensions.

"Unavoidable Delay" means any delays beyond the control of Landlord or Tenant, as the case may be, including, but

not limited to, delays due to inclement weather, natural disaster, labor strikes, unavailability of materials, national emergency, acts of God, governmental restrictions, fire, explosion, war, invasion, insurrection, rebellion or riots.

2.2 Other Definitions. Terms defined in the Basic Lease Provisions in Section 1 or elsewhere in this Lease or the exhibits, riders, schedules and attachments, unless the context clearly requires otherwise, shall have the meanings as there given.

3. PREMISES. Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, the Premises upon the terms, covenants, and conditions set forth in this Lease. By entering into any occupancy of the Premises, Tenant, shall be deemed to acknowledge that it has inspected the Premises and that the Premises are in good order and repair with any Landlord's Work substantially completed. Tenant further agrees that the Premises are being leased in their "as is" condition, unless otherwise specified in the Construction Rider.

4. TERM AND DELIVERY OF PREMISES. The initial term of the Lease ("Initial Term") is the period set forth in Section 1.11, plus any initial partial calendar month, commencing on the Commencement Date (as defined in Section 1.12). Tenant and Landlord acknowledge and agree that the Commencement Date may change due to Landlord's construction delay, or Unavoidable Delays, and that Landlord shall not be subject to any liability as a result of any such delay. If Landlord fails for any reason to deliver possession of the Premises to Tenant by the Anticipated Delivery Date as set forth in Section 1.13, (i) Landlord shall not be liable to Tenant for any direct or consequential losses resulting to Tenant from the delay, (ii) this Lease shall not terminate, and (iii) the Commencement Date shall be extended as appropriate to take into account when Landlord actually delivers possession of the Premises to Tenant. If Landlord is unable to deliver possession to Tenant by the date one hundred twenty (120) days after the Anticipated Delivery Date, Landlord or Tenant, at its election, may terminate this Lease without further liability.

5. EARLY ACCESS. At Landlord's discretion, Tenant and its Agents may enter the Premises before the Commencement Date following Landlord's written consent. Such entry shall constitute the agreement of Tenant that (i) none of such parties nor their work, equipment, or materials shall interfere with any work or construction by Landlord or any other tenant of the Center; (ii) that Tenant will indemnify, protect, defend, and hold harmless Landlord and Landlord's Agents of and from any and all claims, liabilities, damages, costs and expense (including attorneys' fees) for personal injury (including death) and/or property damage and/or other injuries, losses or damages attributable directly or indirectly to any act or omission of Tenant or Tenant's Agents; (iii) that Tenant will pay all utility charges with respect to the Premises that accrue on and after such entry; and (iv) such entry shall be subject to all terms, conditions, and covenants of the Lease other than those relating to the payment of Minimum Rent and Percentage Rent.

6. OPERATION OF TENANT'S BUSINESS.

6.1 Use. The Premises shall be used only for the Permitted Use set forth in Section 1.23 and for no other purpose. Tenant shall conduct its business at the Premises only under the Tenant's Trade Name set forth in Section 1.8 or under such other trade name as Landlord may approve in writing. Violation of any of the provisions of this Section 6 shall, at Landlord's option, be an Event of Default.

6.2 Tenant's Business Operations. Tenant shall open the Premises for business by the Commencement Date and thereafter continuously operate its business at the Premises with due diligence and efficiency so as to produce the maximum Gross Sales that may be produced by such manner of operation throughout the Term. Tenant shall carry and display at all times in the Premises a stock of merchandise of character, quality and quantity reasonably designed to accomplish the purposes of this Section 6. Tenant shall keep display windows well lighted during such hours as Landlord may designate from time to time, but in any event from 9:00 a.m. to 11 p.m., seven (7) days a week. Displays shall be changed regularly. Tenant shall conduct its business in a lawful manner, obtain any required permits, and observe any reasonable requirements of any insurer under any policy affecting any part of the Premises.

6.3 Hours of Operation. Tenant shall keep the Premises open for business to the public and cause such business to be conducted during the Required Business Hours set forth in Section 1.21, as the same may be amended by the Landlord from time to time. Tenant shall not extend its business days and hours beyond those business days and hours established by Landlord without Landlord's prior consent. To the extent that Landlord incurs additional costs and expenses as a result of Tenant's extended days and hours of operation, Tenant shall promptly reimburse Landlord upon demand for such additional costs and expenses. If Tenant fails to operate its business at the Premises during any month or portion of a month as required by this Section 6, then Tenant's Gross Sales during such month when Tenant is not operating its business shall be deemed to be the greater of: (i) actual Gross Sales from the Premises during such month; (ii) Gross Sales during the previous

month; or (iii) Gross Sales of Tenant during the corresponding month for the previous year.

6.4 Landlord's Damages. Tenant acknowledges that its failure to operate its business at the Premises during the Required Business Hours shall result in Landlord incurring costs, expenses, and damages that are not contemplated by this Lease both as a result of the direct impact such violation shall have under this Lease but also as a result of the adverse impact such violation shall have on other tenants in the Center. The costs, expenses, and damages that Landlord is likely to incur include, among other things, increased administrative and personnel costs, ~~decreased payments of percentage rent~~, and like costs and expenses. Tenant also acknowledges that the exact amount of such costs, expenses, and damages are extremely difficult to ascertain. Accordingly, for each day, or part of a day, that Tenant violates the requirements contained in this Section, from and after the Commencement Date that Tenant fails to operate during the Required Business Hours, Tenant shall pay immediately on demand the sum of fifty percent (50%) of daily Minimum Rent as liquidated damages, which sum shall be payable in addition to all other sums payable under this Lease to all other rights and remedies available to Landlord. The parties agree that such amount of liquidated damages represents a fair and reasonable estimate of the costs, expenses, and damages that Landlord shall incur by reason of Tenant violating the provisions of this Section.

6.5 Prohibited Acts. Tenant covenants that neither Tenant nor Tenant's Agents will (i) place any merchandise, displays or other articles in any entry to the Premises or in any area outside of the Premises; (ii) erect or maintain any barricade or scaffolding which may obscure the signs, entrances or show window of any other Tenant in the Center or tend to interfere with any such other Tenant's business; (iii) create or maintain, or allow others to create or maintain, any nuisances, including without limitation, loud noises, sound effects, other objectionable advertising media (including, loud speakers, phonographs, public address system, sound amplifiers, televisions, or radios audible outside the Premises), offensive odors and smoke or dust in or about the Premises; (iv) place or maintain any signs or distribute handbills in any parking area; (v) commit any waste; (vi) maintain or allow to be maintained any excessively bright lights, or changing, flashing, flickering or lighting or similar devices, the effect of which will be visible from the exterior of the Premises; or (vii) conduct or permit any activity, practice, sales or use in violation of any Applicable Law.

6.6 Rules and Regulations. Tenant's use of the Premises shall be subject, at all times during the Lease Term, the Rules and Regulations set forth in Exhibit D as the same may be amended from time to time by Landlord. Tenant shall comply with any modified Rules and Regulations upon notice to Tenant from Landlord.

6.7 Signage. No sign shall be placed in or about the Premises which states any financial difficulty, such as a liquidation, need for cash, or going out of business. Tenant is required to install Landlord approved signs on the Tenant's sign bands that identify the Tenant's Trade Name within ninety (90) days from the Commencement Date. Tenant may erect, but only with Landlord's prior written approval such other signage as it allowable under the applicable laws. Landlord, in connection with such signage approval, shall have the right to determine the size, shape, type, color, lighting, location, and style of all lettering and/or logos in connection with such signage. In addition, Landlord shall have the right to limit any use by Tenant of any windows, and areas of the Premises visible outside the Premises, for signage, advertising, or other materials intended to attract attention to the Premises. Landlord may from time to time inaugurate or modify a uniform signage policy for all tenants, with which Tenant agrees to comply.

6.8 ~~Retail Restriction Limit.~~ Landlord and Tenant acknowledge that the realization of the benefits of a percentage rent lease is dependent upon Tenant's maximization of Gross Sales and that self-competition is inconsistent with the generation of maximum Gross Sales. Landlord and Tenant further acknowledge that the Minimum Rent was negotiated together with and giving consideration to the Percentage Rent and anticipated Gross Sales of Tenant and that self-competition by Tenant shall deprive Landlord of a bargained-for consideration. Accordingly, Tenant agrees that during the Term, neither Tenant nor Tenant's Agents shall directly or indirectly engage in any business that is substantially similar to or in competition with that for which the Premises are let, within the radius of the Radius Restriction set forth in Section 1.22. The word "radius" as used herein shall mean a straight line measurement and not measured along existing streets and highways. If Tenant breaches the covenant contained in this Section, then in addition to the rights and remedies provided in Section 1.8.2 of this Lease, Landlord may include all Gross Sales generated by Tenant's violative store in calculating Percentage Rent due under this Lease.

7. MINIMUM RENT AND RENT PAYMENT.

7.1 Minimum Rent. Tenant shall pay Minimum Rent in monthly installments, payable on the first (1st) day of each calendar month, in the amount set forth in Section 1.14. Should the Term begin or end on other than the first or last day of a calendar month, the amount of Minimum Rent for the first partial month shall be prorated. Tenant shall pay Minimum Rent and Additional Rent for the first full calendar month (and for any initial partial month) and the Security Deposit upon execution of this Lease. Minimum Rent shall increase as set forth in Section 1.14.

7.2 **Payment of Rent.** Tenant shall pay all Rent to Landlord at the Rent Payment Address specified in Section 1.4, or at such other address as Landlord may designate from time to time. Minimum Rent, Percentage Rate (if applicable) and Additional Rent shall not be withheld for any reason, and they are not subject to prior notice, demand, deduction or offset. Without prejudice to Landlord's rights to declare Tenant in default for failure to make timely payment, Landlord may, at its option, accept Rent after the due date. The acceptance of Rent by Landlord at any time shall not constitute a waiver of any right of Landlord.

7.3 **Late Payment Charge.** Tenant hereby acknowledges that late payment by Tenant to Landlord of Rent will cause Landlord to incur costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. Such costs include, but are not limited to, processing and accounting charges, personnel costs, and late charges which may be imposed on Landlord by the terms of any mortgage or trust deed covering the Center. A payment by Tenant of a five (5%) percent late charge shall be due as Additional Rent for any Rent not paid within five (5) days after the same is due. Landlord and Tenant hereby agree that such late charge represents a fair and reasonable estimate of the cost Landlord shall incur by reason of late payment by Tenant. Acceptance of such late charge by Landlord shall in no event constitute a waiver of Tenant's default with respect to such overdue amount, nor prevent Landlord from exercising any other rights and remedies. Notwithstanding the foregoing, should any payment of Rent by check be rejected for insufficient funds, Landlord shall have the right, upon notice to Tenant, to require that all future payments by Tenant under this Lease be made by cashier's check acceptable to Landlord.

8. ~~PERCENTAGE RENT:~~

~~8.1 **Tenant's Obligation.** In addition to Minimum Rent, Tenant shall pay as "Percentage Rent" an amount equal to Tenant's "Gross Sales" (as defined in Section 8.5) for each Lease Year (as defined in Section 2.1) in excess of the Annual Breakpoint set forth in Section 1.15, multiplied by the percentage set forth in Section 1.15. On or before the fifteenth (15th) day of the second month following the end of each Lease Year, Tenant shall pay to Landlord the Percentage Rent payable for such Lease along with its annual Gross Sales statement. Landlord's acceptance of Percentage Rent from Tenant shall not constitute a waiver of Landlord's right to additional Percentage Rent justified by an inspection and/or audit.~~

~~8.2 **Gross Sales Statements.** On or before the fifteenth (15th) day of the second month after the end of each Lease Year or portion thereof during the Term, Tenant shall furnish Landlord at the Rent Payment Address a sworn statement duly certified by Tenant, showing the Gross Sales during the preceding Lease Year or portion thereof. The statement shall be in detail, and in form and content, acceptable to Landlord. Following Landlord's request, Tenant shall also provide Landlord a monthly statement of Gross Sales on or before the fifteenth (15th) day following the end of each calendar month. If a partial Lease Year should occur at either the beginning or end of the Term, Percentage Rent for that partial Lease Year shall be annualized based upon an adjusted Annual Breakpoint, which shall be arrived at by multiplying the applicable Annual Breakpoint set forth in Section 1.15 by a fraction, the numerator which is the number of days during such partial Lease Year and the denominator which is three hundred sixty-five (365).~~

~~8.3 **Tenant's Books and Records.** For the purpose of ascertaining the amount of Percentage Rent payable, Tenant agrees to prepare and keep on the Premises or at Tenant's principal offices for a period of not less than three (3) years following the end of each Lease Year or portion thereof adequate books and records, which shall show inventories and receipts of merchandise at the Premises and receipts from all sales and other transactions on the Premises by Tenant and any other persons conducting any business upon the Premises. Tenant shall record at the time of sale, in the presence of the customer, all receipts from sales or other transactions, whether for cash or credit, in a cash register or registers having a sealed cumulative total and having such other features as Landlord may require or with other equipment acceptable to Landlord. The books and records Tenant is to keep under this Section 8.3 shall include gross income, sales and occupation tax returns and all pertinent original sales records. Pertinent original sales records shall include: (i) cash register tapes, including tapes from temporary registers; (ii) serially numbered sales slips; (iii) the originals of all mail orders at and to the Premises; (iv) the original records of all telephone orders at and to the Premises; (v) settlement report sheets of transactions with subtenants, concessionaires, licensees and others; (vi) the original records showing that merchandise returned by customers was in fact purchased at the Premises by such customers; (vii) memorandum receipts or other records of merchandise taken out on approval; (viii) such other sales records, if any, which would normally be examined by an independent accountant pursuant to generally accepted auditing standards in performing an audit of Tenant's sales; and (ix) the records specified in (i) through (viii) above of subtenants, concessionaires, licensees and/or others doing business on or from the Premises.~~

~~8.4 **Landlord's Right to Audit.** Landlord or its Agents may, on regular business days and during~~

reasonable office hours, inspect or audit Tenant's books, records of sales made in the Premises, either at the Premises or at Tenant's principal offices, provided that such inspection or audit is made within three (3) years after Tenant furnishes, or is to furnish, Landlord a statement of Gross Sales for the period being audited. If Landlord's inspection or audit discloses a deficiency in Percentage Rent paid for any Lease Year, Tenant shall promptly pay to Landlord the amount of such deficiency. In addition, if Landlord's inspection or audit discloses a deficiency in Gross Sales reported for any Lease Year or portion thereof of two percent (2%) or more, Tenant shall promptly pay to Landlord the cost of such audit. Landlord will hold in confidence all sales figures and other information obtained from Tenant's records except in any litigation or arbitration proceedings between the parties, and except further that Landlord may divulge such information to a prospective buyer or lender for the Center or a portion of the Center, and to Landlord's attorneys, accountants, consultants and other Agents:

~~8.5 Definition of Gross Sales. The term "Gross Sales" shall mean the total gross dollar amount of the actual sales price, whether for cash or on credit or partly for cash and partly on credit, of all sales of merchandise and services and of any and all other receipts of business conducted in or from the Premises, including but not limited to, all gift and merchandise certificates, mail or telephone orders received or filled at or from the Premises, deposits not refunded to purchasers including all sums paid on lay-away sales which are or shall become forfeited to Tenant, orders taken in and from the Premises whether or not filled elsewhere, commissions received on vending machines or other coin-operated devices, also by any subtenant, concessionaire or licensee of Tenant or otherwise in the Premises, and the retail value of any goods, services, food or merchandise received by employees in lieu of earnings:~~

~~Gross Sales, however, shall not include any sums collected from customers and paid out by Tenant for any sales, use, occupation or retail excise tax imposed by any duly constituted governmental authority upon retail purchases, nor the amount of returns to shippers or manufacturers, exchanges, refunds and discounts, and transfers of merchandise from the Premises to other stores of Tenant. Each sale upon installment or credit shall be regarded as a sale for the full price in the month during which the sale shall be made, irrespective of the time when or whether Tenant shall receive payment from its customer, but lay-away sales shall not be taken into account until they shall become actual sales, except for forfeited lay-away payments as provided above. No deduction shall be allowed for uncollected or uncollectible credit accounts:~~

9. ADDITIONAL RENT.

9.1 Tenant's Obligation. In addition to the Minimum Rent and Percentage Rent, Tenant shall pay as Additional Rent "Tenant's Share" (as set forth in Section 1.10 and defined in Section 9.3) of: (i) all Real Estate Taxes (as defined in Section 9.4) imposed or levied against the Center during the Term; (ii) premiums for all insurance including liability, fire, rent loss and casualty on the improvements and Common Areas of the Center ("Insurance Premiums"); (iii) all Common Area Costs (as defined in Section 9.5).

9.2 Payment and Adjustment. Tenant shall pay to Landlord Tenant's Share of items of Additional Rent under this Section 9 in estimated monthly installments, in advance, on the first day of each month together with Minimum Rent. The initial estimated monthly installments of Real Estate Taxes, Insurance Premiums, and Common Area Costs are set forth in Section 1.16, Section 1.17 and Section 1.18. Landlord may adjust these estimated installments from time to time based on actual or reasonably projected costs. After notice from Landlord, Tenant shall pay the adjusted installment amount. Within a reasonable period of time after the end of each calendar year, Lease Year or fiscal year (in no event less than one hundred twenty (120) days after the end of each calendar or fiscal year unless sooner completed by Landlord) Landlord shall furnish Tenant a statement showing in reasonable detail Tenant's Share of the actual Real Estate Taxes, Insurance Premiums, and Common Area Costs incurred for the period in question. If Tenant's payments for that year are less than Tenant's Share of the actual amount Tenant shall pay the difference to Landlord within ten (10) days thereafter. If Tenant shall have overpaid Landlord, Landlord shall credit such overpayment toward Tenant's next installment payments under this Section 9.2. When the final determination is made at the end of the Term, Landlord shall rebate any overpayment to Tenant. Any delay or failure by Landlord in delivering any estimate or statement pursuant to this Section 9.2 shall not constitute a waiver of its right to require Tenant to pay Tenant's Share of Real Estate Taxes, Insurance Premiums or Common Area Costs. At the time of billing, upon request, Landlord shall provide Tenant with copies of invoices or statements for specifically requested items included in calculating Tenant's Share of Additional Rent under this Section 9.2.

9.3 Definition of Tenant's Share. The term "Tenant's Share" means that portion of Real Estate Taxes, Insurance Premiums, and Common Area Costs determined by multiplying the cost of such item by a fraction, the numerator of which is the Premises Square Footage and the denominator of which is the total square footage of the floor area in the Center built and leasable (which total square footage may change from time to time). For the years in which the Term commences and terminates, the provisions of this Section shall apply but Tenant's liability for Tenant's Share of any such costs for such year shall be subject to a pro rata adjustment based upon the number of full or partial calendar months of such year included in the Term.

9.4 Definition of Real Estate Taxes. The term "Real Estate Taxes" means any form of tax, general or special assessment, charge, license, fee, rent tax, levy, penalty (if a result of Tenant's delinquency), real property, transfer or other tax (other than Landlord's net income, estate, succession, inheritance, or franchise taxes), now or hereafter imposed with respect to the Center or any part thereof (including any improvements), this Lease, or any Rent payable under this Lease by an authority having the direct or indirect power to tax, or by any City, County, State or Federal government or any improvement district or other district or division thereof, whether such tax or any portion thereof: (i) is determined by the area of the Center or any part thereof or the Rent payable under this Lease by Tenant including, but not limited to, any gross income or excise tax levied by any of the foregoing authorities with respect to receipt of the Rent due under this Lease; (ii) is levied or assessed in lieu of, in substitution for, or in addition to, existing or additional taxes with respect to the Center or any part thereof whether or not now customary or within the contemplation of Landlord or Tenant; or (iii) is based upon any legal or equitable interest of Landlord in the Center or any part thereof. If the Center is assessed as part of a larger parcel, then Landlord shall equitably apportion the Real Estate Taxes and reasonably determine the amount of Real Estate Taxes attributable to the Center. Landlord's reasonable determination of such apportionment shall be conclusive. For the purposes of determining Real Estate Taxes, figures supplied by the local assessing authority as to any amount so assessed shall be conclusive as between Landlord and Tenant.

9.5 Definition of Common Area Costs. The term "Common Area Costs" means all costs and expenses incurred by Landlord or Landlord's Agents in connection with the operation of the Center including, but not limited to, the following: repair, replacement and maintenance of the roofs, foundations and exterior walls of the buildings in the Center; periodic painting of the buildings in the Center; periodic cleaning of the exterior windows of the buildings in the Center; landscaping services; pest control; maintenance, repair and replacement of the HVAC through maintenance contracts or otherwise; sweeping, maintenance services, repairs to and replacement of asphalt paving, bumpers, striping, light bulbs, light standards, monument and directional signs and lighting systems, perimeter walls, retaining walls, sidewalks, planters, landscaping and sprinkler system in planting area, any and all assessments levied against the Center pursuant to the Restrictions, water, electrical and other utility services supplied to tenants, removal of trash, rubbish and other refuse from the Center, cleaning of and replacement of signs of the Center, including relamping, replacements and repairs made as required; repair, operation and maintenance of the Common Area, including, but not limited to, removal of any obstructions not reasonably required for the Common Area uses, prohibition and removal of the sale or display of merchandise or the storing of materials and/or equipment in the Common Area, and payment of all electrical, water and other utility charges or fees for services furnished to the Common Area; costs of security equipment personnel, if any, Landlord elects to provide; fees for required licenses and permits; costs incurred in connection with compliance of any laws or changes in laws applicable to the Center, including, without limitation, any laws or changes in laws regarding Hazardous Materials; establishment of reasonable reserves for replacement and/or repair of Common Area improvements, equipment and supplies; employment of such personnel as Landlord may deem reasonably necessary, if any, to direct parking and police the Common Area and facilities; depreciation or rental costs of machinery and equipment used in connection with the maintenance and operation of the Common Area; service agreements on equipment used in connection with maintenance and operation of the Common Area; employment of personnel used in connection with any of the foregoing, including, but not limited to, payment or provision for unemployment insurance, workers' compensation insurance and other employee costs; the cost of bookkeeping, accounting and auditing and legal services provided in connection with any of the foregoing; management fees; the cost of any environmental consultant or other services used in connection with Landlord's monitoring of the Center with respect to Hazardous Materials; the cost of any tax, insurance or other consultant utilized in connection with the Center; any other items reasonably necessary from time to time to properly repair, replace, maintain and operate the Center, the center's pro rata share of property owner association dues and costs (if applicable) and any interest in connection therewith. If Landlord elects to perform any maintenance, replacement or repair herein described in conjunction with properties other than the Center, and if a common maintenance contractor is contracted with for such purpose, the contract amount allocable to the Center, as reasonably determined by Landlord, shall be added to and deemed a part of the Common Area hereunder. Increases in Common Area Costs by reason of a disproportionate impact by Tenant thereon (for example, and not by way of limitation, increases in costs of trash collection because of Tenant's excessive generation of trash, or increases in costs of Common Area maintenance because of Tenant's unpermitted storage of inventory or materials in the Common Area), in Landlord's reasonable judgment, may be billed by Landlord, as an item of Additional Rent, directly to Tenant. Notwithstanding, the renovation costs incurred by Landlord in 2005 shall not be Common Area Costs.

9.6 Personal Property Taxes. Tenant shall pay before delinquency to the appropriate governmental authority any and all taxes, assessments, license fees and public charges levied, assessed or imposed at any time and which become payable during the Term of this Lease upon Tenant's Personal Property whether or not such assessment is made against Tenant or against Landlord, either separately or as a part of the assessment of the Center, and whether any such item was installed by Landlord or Tenant. Tenant shall indemnify, protect, defend and hold harmless Landlord and Landlord's Agents from and against any liability, claim, demand, cost or expense (including, but not limited to, reasonable attorneys' fees and cost of suit) in

connection with Tenant's responsibilities under this Section 9.6.

10. **UTILITIES.** Tenant shall contract for and pay, before delinquency, directly to the provider thereof, all charges for natural gas, electricity, water, sewage disposal, telephone and other utility charges used or consumed at the Premises, including without limitation, impact fees, connection fees, hook-up fees, standby fees, meter set charges and deposits. Landlord shall not be obligated in any way to contract for or provide any utility services other than making available a reasonable hook-up point for the Premises. If any such utilities or services are not separately metered, Tenant shall pay the charges Landlord reasonably allocates to the Premises. Landlord shall not be liable for, and Tenant shall not be entitled to any abatement or reduction of Rent by reason of any interruption or cessation of any utility service.

11. TENANT'S MAINTENANCE AND REPAIR OF PREMISES.

11.1 **Landlord's Maintenance and Repair Obligations.** Landlord shall, subject to receiving Tenant's Share of Common Area Costs, and subject to Section 20 and Section 21, maintain the exterior of the building, including the roof, walls, foundations, walks, driveways, parking areas, and the structural portion of the Premises, in good condition and repair, except when damaged by Tenant or Tenant's Agents. Landlord shall not be required to make any repairs unless and until Tenant has notified Landlord in writing of the need of such repair and Landlord shall have a reasonable period of time thereafter to commence and complete such repair, if warranted. Landlord's obligation to so repair and maintain the Premises shall be limited to the cost of effecting such repair and maintenance and in no event shall Landlord be liable for any other amounts, including, but not limited to, any consequential damages, opportunity costs or lost profits Tenant suffers.

11.2 **Tenant's Maintenance and Repair Obligations.** Tenant shall, subject to Landlord's obligations set forth in Section 11.1, at all times during the Term of this Lease, and at Tenant's sole cost and expense, clean, keep, maintain, repair and make necessary improvements and replacements to, the Premises and every portion thereof and all improvements therein or thereto, in good and sanitary order and condition to the reasonable satisfaction of Landlord and in compliance with all Applicable Laws. Without limiting the generality of the foregoing, Tenant shall be responsible for the maintenance, replacement and repair of all HVAC, plumbing, and electrical installations servicing the Premises as well as all floor surfaces within the Premises. Tenant shall provide Landlord with a copy of Tenant's contract for preventive maintenance for the HVAC system within thirty (30) days of the Commencement Date of this Lease. This contract shall provide for at least two (2) preventive checks on the system per year. Tenant shall at all times keep the Premises (including maintenance and cleaning of exterior entrances, all glass and show window moldings, signs and bulkheads) and all partitions, doors, floor surfaces, fixtures, equipment and appurtenances thereof in good order, condition and repair, and in a reasonably satisfactory condition of cleanliness, including reasonably periodic painting of the interior of the Premises and Tenant shall make such other necessary repairs in and to the Premises.

11.3 **Waiver.** Tenant hereby waives all rights provided for by any present or future laws regarding Tenant's right to make repairs or replacements at the expense of Landlord or to terminate this Lease because of the condition of the Premises. Any repairs or replacement necessitated by Casualty damage or condemnation shall be governed by Section 20 and Section 21.

12. COMMON AREA AND PARKING

12.1 **Grant of Nonexclusive License and Right.** Landlord hereby grants to Tenant and its successors and assigns, a nonexclusive license and right for Tenant and its permitted subtenants, in common with Landlord and all persons, firms and corporations conducting business in the Center and their respective customers, guests, licensees, invitees, subtenants, employees and agents, to use the Common Area for vehicular parking, for pedestrian and vehicular ingress, egress and travel.

12.2 **Control of Common Area.** The Common Area shall at all times be subject to the exclusive control and management of Landlord. Landlord shall have the right to: (i) construct, maintain, replace and operate lighting facilities within the Common Area; (ii) police the Common Area from time to time; (iii) change the area, level, location and arrangement of the parking areas and other improvements within the Common Area and otherwise repair, alter, delete, relocate, expand and replace any Common Area; (iv) restrict parking by tenants, their officers, agents, and employees to employee parking areas; (v) enforce parking charges (by operation of meters or otherwise); (vi) close all or any portion of the Common Area or improvements therein to such extent as may, in the opinion of counsel for Landlord, be legally sufficient to prevent a dedication thereof or the accrual of any rights to any person or to the public therein; (vii) close temporarily all or any portion of the Common Area and/or the improvements thereon; (viii) discourage noncustomer parking; (ix) designate other areas not currently part of the Common Area as Common Area (including expansion of the Common Area to property which is adjacent to the Center); (x) select a person(s), firm(s) or corporation(s) (which may be an entity related to Landlord) to maintain and operate all or any part of the

Common Area; (xi) designate from time to time certain portions of the Common Area as exclusively for the benefit of certain tenants in the Center; and (xii) do and perform such other acts in and to the Common Area and improvements thereon as Landlord shall determine to be advisable. Landlord reserves the right to install, use, maintain, repair, relocate and replace pipes, ducts, conduits, wires and appurtenant meters and equipment included in the Premises or outside the Premises, Tenant acknowledges that Landlord makes no representation or warranty whatsoever concerning the safety of the Common Area or the adequacy of any security system that is or may be instituted for the Common Area.

12.3 Parking. Landlord shall at all times provide the parking facilities required by Applicable Laws for the Premises. All parking spaces shall be used only for parking by vehicles no larger than full size passenger automobiles or pickup trucks. Tenant shall not permit or allow any vehicles that belong to or are controlled by Tenant or Tenant's Agents, suppliers, or shippers, to be loaded, unloaded, or parked in areas other than those designated by Landlord for such activities. Parking within the Common Area shall be limited to striped parking stalls. No parking shall be permitted in any driveways, accessways or in any which would prohibit or impede the free flow of traffic within the Common Area. There shall be no overnight parking of any vehicles of any kind. If Tenant or its employees fail to park their vehicles in designated parking areas, then Landlord, in addition to any other rights or remedies Landlord might have, may charge Tenant Twenty Dollars (\$20) per day for each day or partial day per vehicle parked in such nondesignated areas, which amount Tenant shall pay to Landlord as Additional Rent. In addition, if Tenant permits or allows any of the prohibited activities described above, then Landlord shall have the right, without notice, in addition to such other rights and remedies, to remove or tow away the vehicle involved and charge the cost to Tenant as Additional Rent.

13. SUBORDINATION AND ESTOPPEL CERTIFICATES.

13.1 Subordination. The rights of Tenant shall be and remain, at the election of Landlord or any ground Landlord or Mortgagee, subordinate to the lien of and rights under any current or future mortgage, deed of trust, ground lease or other security instrument affecting the Premises and/or the Center during the Term. This subordination shall be effective without the necessity of any additional document being executed by Tenant; however, if requested by Landlord or any Mortgagee, Tenant shall execute and deliver within fifteen (15) days after such request in the form requested by Landlord, or any Mortgagee or ground Landlord, any additional documents evidencing the priority or subordination of this Lease with respect to any such ground leases of underlying leases or the lien of any such mortgage or deed of trust. Tenant's failure to timely execute and deliver such additional documents shall, at Landlord's option, constitute an Event of Default hereunder. Furthermore, if Tenant fails to execute and deliver any such additional documents within fifteen (15) days of Landlord's request, Tenant's failure to execute and deliver such additional document shall be conclusively deemed to constitute irrevocable appointment of Landlord as Tenant's special attorney-in-fact to execute and deliver those additional documents. If Landlord's interest in the Premises is acquired by any ground Landlord or Mortgagee, or in the event any foreclosure or in the event a conveyance in lieu of foreclosure is made for any reason, Tenant shall, notwithstanding any subordination and upon the request of the resulting successor-in-interest to Landlord, attorn to and become the tenant of such successor-in-interest and recognize such successor-in-interest as the Landlord under this Lease. In such event and provided that Tenant is not in default, this Lease shall not terminate so far as the Tenant continues to pay the Rents required by this Lease and otherwise performs and observes all of the terms, covenants, conditions and provisions of this Lease to be performed and observed by or on behalf of Tenant.

13.2 Estoppel Certificates. Within fifteen (15) days of request by Landlord or any Mortgagee, Tenant shall, from time to time, execute and deliver estoppel certificates in the form and certifying such matters with respect to this Lease, as Landlord or any such Mortgagee may reasonably request. Tenant's failure to timely execute and deliver any such estoppel certificates shall be deemed Tenant's certification of the statements in such certificate and, at Landlord's option, shall constitute an Event of Default hereunder. Furthermore, if Tenant's failure to timely execute and deliver any such estoppel certificate shall be conclusively deemed to constitute irrevocable appointment of Landlord as Tenant's special attorney-in-fact to execute and deliver such estoppel certificate.

14. SECURITY DEPOSIT. Tenant has deposited with Landlord the amount set forth in Section 1.20 (the "Security Deposit") as security for the full and faithful performance of each term, provision, covenant, and condition of this Lease. At Landlord's request, Tenant shall from time to time increase the Security Deposit commensurate with any increase in Minimum Rent. If Tenant defaults in respect of any of its obligations under this Lease, including, but not limited to, payment of Rent, Landlord may use, apply or retain all or part of the Security Deposit for the payment of any Rent in default or for any other sum that Landlord may spend or be required to spend by reason of Tenant's default. Within ten (10) days of demand Tenant shall repay to Landlord the amount of the Security Deposit so used. Tenant's failure to do so shall, at Landlord's election, constitute an Event of Default by Tenant. Tenant shall not assign, transfer or encumber the Security Deposit, and any attempt to do so shall not be binding upon Landlord. Landlord shall not be required to keep the Security Deposit separate from its general funds, and no trust relationship is created with respect to the Security Deposit. If Landlord sells, ground leases or assigns the Center or a

portion of the Center containing the Premises, or otherwise terminates its interest in this Lease, then Landlord may assign the Security Deposit to its purchaser, ground Landlord, successor or assignee without further liability to Tenant. Should Tenant faithfully and fully comply with all of the terms, provisions, covenants, and conditions of this Lease, the Security Deposit or any balance thereof shall be returned to Tenant, or at the option of Landlord, to the last assignee of Tenant's interest in this Lease at the expiration of the Term. Tenant shall not be entitled to any interest on the Security Deposit.

15. ALTERATIONS, CHANGES, AND ADDITIONS.

15.1 Consent Required. Tenant shall not make any Alterations to the Premises without the prior, written consent of Landlord. Any Alterations to or on the Premises shall, at the option of Landlord, remain for the benefit of and become the property of Landlord upon the termination of this Lease or be removed (with any damage resulting from such removal repaired) at Tenant's cost and expense. Tenant shall not remove any Alterations without Landlord's written permission.

15.2 Permitted Alterations. Subject to the following provisions of this Section 15, Tenant may install, at its expense and without Landlord's written consent, trade fixtures, movable partitions, furniture, equipment, and other personal property with accumulative cost of no more than Ten Thousand Dollars (\$10,000), and may remove the same at any time prior to the termination of this Lease provided Tenant always maintains the Premises fully stocked, equipped and fixtured and professional in appearance. If any damage is caused to the Premises by Tenant's removal of any property, Tenant shall bear the cost of repair of such damage.

15.3 Requirements. All work performed by or on behalf of Tenant in or about the Premises shall be done in a good and workmanlike manner and, once started, diligently prosecuted to completion. Tenant covenants to only use contractors that are either: (i) included in a listing of Landlord's "approved" contractors; or (ii) if not in such listing, a contractor approved in writing by Landlord prior to the commencement of Tenant's work. Tenant and any contractors or subcontractors of Tenant shall carry insurance meeting the requirements of Section 19 and any other insurance Landlord may require covering any Alterations and related work. Tenant shall have all work on or about the Premises performed in such a manner so as not to interfere with or obstruct the access of any other tenant of the Center or any other work thereon. Tenant shall not install or maintain any equipment, partitions, furniture, or apparatus, the weight or operation of which would tend to injure or be detrimental to the Premises or (in Landlord's reasonable judgment) be loud or offensive to other tenants. All work done by or on behalf of Tenant shall be performed in full compliance with all Applicable Laws. Any such work, whether such work was approved by Landlord or not, which violates any such Applicable Laws shall be corrected at Tenant's sole cost and expense, including any required structural alterations. Tenant shall require its contractors (including all employees, agents, subcontractors and material suppliers of such contractors) to conduct their work and employ labor in such manner as to maintain harmonious labor relations at the Center.

15.4 Mechanics' Liens. Tenant shall not permit any mechanics', materialmen's or other liens to be filed against the Premises, any portion of the Center, nor against Tenant's leasehold interest. If by reason of any Alteration, repair, labor performed or material furnished to the Premises for or on behalf of Tenant any mechanics' or other lien shall be filed, claimed, perfected or otherwise established as provided by law against the Premises, Tenant shall discharge or remove the lien by bonding or otherwise at Tenant's cost and expense, within ten (10) days after notice from Landlord to Tenant of the filing of same. Landlord shall have the right at all reasonable times to post and keep posted on the Premises any notices which it deems necessary for protection from such liens. If any such liens are filed, Landlord may, without waiving its rights and remedies based on such breach by Tenant and without releasing Tenant from any of its obligations, cause such liens to be released by any means it shall deem proper, including payment in satisfaction of the claim giving rise to such liens. Tenant shall pay to Landlord at once, upon notice by Landlord, any sum paid by Landlord to remove such liens, together with interest at the Applicable Rate from the date of such payment by Landlord.

15.5 Compliance with Laws. Tenant, at Tenant's expense, shall comply with all Applicable Laws, now in force or which may hereafter be in force, which shall impose any duty (including without limitation, structural work) with respect to the use, occupation, condition or alteration of the Premises.

16. ENTRY BY LANDLORD. Landlord, and Landlord's Agents, shall have the right, but not the duty, to enter the Premises at reasonable times to inspect the Premises; to take samples and conduct environmental investigations, to post notices of nonresponsibility and similar notices and signs indicating the availability of Premises for sale, to show the Premises to interested parties such as prospective lenders and purchasers, to make necessary Alterations or perform maintenance, replacement and repairs, to perform Tenant's obligations as permitted herein when Tenant has failed to do so, all without liability to Tenant. Landlord shall give Tenant twenty-four (24) hours notice of any entry, except no notice shall be required in the event of an emergency. Within one hundred eighty (180) days before the expiration of the Term, Landlord may place upon the Premises

reasonable signs indicating the availability of Premises for lease and to show the Premises to prospective tenants by appointment only. Landlord shall at all times have the right to retain a key which unlocks all of the doors in the Premises, excluding Tenant's vaults and safes. Landlord and Landlord's Agents shall have the right to use any and all means which Landlord may deem proper in an emergency to obtain entry to the Premises. No entry to the Premises by Landlord or Landlord's Agents shall under any circumstances be deemed to be a forcible or unlawful entry into, or a detainer of the Premises, or an eviction of Tenant, or to give rise to an abatement of Rent.

17. ASSIGNMENT AND SUBLETTING.

17.1 Prohibition. Neither this Lease nor any interest in it or the Premises may be assigned, sublet or mortgaged by Tenant in whole or part, voluntarily or otherwise. Any assignment, mortgage, pledge, hypothecation, subletting, or license of this Lease or the Premises or any portion thereof, either voluntary or involuntarily, whether by operation of law or otherwise without the prior, written consent of Landlord shall be null and void and shall, at Landlord's election, constitute an Event of Default under this Lease. To the extent not prohibited by provisions of the Bankruptcy Code of 1978, 11 U.S.C. Section 101 et seq. (the "Bankruptcy Code"), Tenant on behalf of itself, creditors, administrators and assigns waives the applicability of Sections 541(c) and 365(e) of the Bankruptcy Code unless the proposed assignee of the trustee for the estate of the bankrupt meets Landlord's standards for consent as set forth below. Landlord has entered into this Lease with Tenant in order to obtain for the benefit of the Center the unique attraction of Tenant's name and business; the foregoing prohibition on assignment or subletting is expressly agreed to by Tenant in consideration of such fact. If this Lease is assigned to any person or entity pursuant to the provisions of the Bankruptcy Code, any and all monies or other considerations payable or otherwise to be delivered in connection with such assignment shall be paid or delivered to Landlord, shall be and remain the exclusive property of Landlord and shall not constitute property of Tenant or the estate of Tenant within the meaning of the Bankruptcy Code. Any and all monies or other considerations constituting Landlord's property under the preceding sentence not paid or delivered to Landlord shall be held in trust for the benefit of Landlord and be promptly paid or delivered to Landlord. Any person or entity to which this Lease is assigned pursuant to the provisions of the Bankruptcy Code shall be deemed without further act or deed to have assumed all of the obligations arising under this Lease on and after the date of such assignment. Any such assignee shall upon demand execute and deliver to Landlord an instrument confirming such assumption.

17.2 Landlord's Consent. In the event Landlord consents to any assignment or subletting, such consent shall not constitute a waiver of any of the restrictions of this Section 17, which shall apply to each successive assignment of this Lease or subletting of the Premises (or portion of the Premises), if any. In no event shall Landlord's consent to an assignment or subletting affect the continuing primary liability of Tenant (which, following assignment, shall be joint and several with the assignee(s)), or relieve Tenant of any of its obligations hereunder. In the event that Landlord shall consent to an assignment or subletting under this Section 17, such assignment or subletting shall not be effective until the assignee or subTenant shall execute, acknowledge and deliver to Landlord an agreement, in form and substance satisfactory to Landlord, whereby assignee or subTenant shall assume all of the Tenant's obligations of this Lease and whereby the assignee or subTenant shall agree that the provisions contained in this Lease shall, notwithstanding such assignment or subletting, continue to be binding upon it with respect to all future assignments and sublettings. Such assignment or sublease agreement shall be duly executed and a fully executed original thereof shall be delivered to Landlord, and Landlord may collect Minimum Rent, ~~Percentage Rent~~ and Additional Rent due hereunder directly from the assignee or subTenant. Collection of Minimum Rent, ~~Percentage Rent~~ and Additional Rent directly from an assignee or subTenant shall not constitute a consent or a waiver of the necessity of consent to such assignment or subletting, nor shall such collection constitute a recognition of such assignee or subTenant as the Tenant hereunder or a release of Tenant from the performance of all of its obligations hereunder.

17.3 Landlord's Actions. Tenant shall notify Landlord in writing of Tenant's intent to assign the Lease or any right or interest hereunder, or to sublease the Premises or any part of the Premises, and of the name of the proposed assignee or subTenant, the nature of the proposed assignee's or subTenant's business to be conducted on the Premises, the terms and provisions of the proposed assignment or sublease, a copy of the proposed assignment or sublease form and such other information as Landlord may reasonably request concerning the proposed assignee or subTenant, including, but not limited to, net worth, income statements and other financial statements for a two-year period preceding Tenant's request for consent, evidence of insurance complying with the requirements of Section 19, any other information Landlord may reasonably request, and the fee described in Section 17.6. Landlord shall, within thirty (30) days of receipt of such written notice and all additional information requested by Landlord concerning the proposed assignee or subTenant, elect to take one of the following actions:

- (a) Consent to such proposed assignment or sublease;
- (b) Refuse to consent to such proposed assignment or sublease;

(c) Landlord may, at its option exercised by thirty (30) days written notice to Tenant, elect to recapture the Premises and as of the thirtieth (30th) day after Landlord so notifies Tenant of its election to recapture, this Lease shall terminate. If Landlord fails to elect any of the alternatives (a), (b) or (c) above within the thirty (30)-day period, Landlord shall be deemed to have refused its consent to such assignment or subletting by Tenant.

17.4 Bonus Value. In the event greater than 50% of the Premises is subleased or assigned, Tenant agrees that seventy-five percent (75%) of any amounts paid by the assignee or subTenant, however described (including, but not limited to, the value of any nonmonetary consideration), in excess of: (i) the Minimum Rent payable by Tenant (or, in the case of a sublease of a portion of the Premises, in excess of the Minimum Rent reasonably allocable to such portion); plus (ii) Tenant's direct out-of-pocket costs which Tenant certifies to Landlord have been paid to provide occupancy related services to such assignee or subTenant of a nature commonly provided by landlords of similar space, shall be the property of Landlord and such amounts shall be payable directly to Landlord by the assignee or subTenant. At Landlord's request, a written agreement shall be entered into by and among Tenant, Landlord and the proposed assignee or subTenant confirming the requirements of this Section 17.

17.5 Certain Transfers. The sale of all or substantially all of Tenant's assets (other than bulk sales in the ordinary course of business), or, if Tenant is a corporation, a limited liability company, an unincorporated association, or a partnership, the transfer, assignment or hypothecation of any stock or interest in such corporation, company, association or partnership in the aggregate (cumulative during the Term) in excess of twenty-five percent (25%) of the total ownership interest in such entity shall be deemed an assignment within the meaning and provisions of this Section 17.

17.6 Landlord's Fee and Expenses. If Tenant requests Landlord's consent to an assignment or subletting by Tenant under this Lease, Tenant shall pay to Landlord a fee of One Thousand Dollars (\$1,000.00) and all of Landlord's out-of-pocket expenses, including, but not limited to, actual attorneys' fees reasonably incurred related to such assignment or subletting by Tenant, whether or not the assignment or subletting is approved.

17.7 Transfer of the Premises by Landlord. Upon any conveyance of the Premises and assignment by Landlord of this Lease, Landlord shall be and is hereby entirely released from all liability under any and all of its covenants and obligations contained in or derived from this Lease accruing after the date of such conveyance and assignment, and Tenant agrees to attorn to any entity purchasing or otherwise acquiring Landlord's interest in the Premises.

17.8 Tenant has the right to sublease to businesses complimentary to Lifequest Fitness operations up to 30% of the Premises without adhering to the provisions of this Section 17. However, Tenant will notify and provide Landlord pertinent sublease terms as subleases are executed.

18. DEFAULT AND REMEDIES.

18.1 Tenant's Default. At the option of Landlord, a default under this Lease by Tenant shall exist if any of the following events occur (each is called an "Event of Default"): (a) If Tenant fails to pay Minimum Rent, Additional Rent, or any other payment required by this Lease, and such failure continues for ten (10) days after same is due; (b) Tenant vacates or abandons the Premises; (c) Tenant is dismissed or expelled from the Premises by or under any authority other than Landlord; (d) Tenant files a voluntary petition or institutes any proceedings in bankruptcy or under any insolvency laws seeking to effect a reorganization or a composition with its creditors; (e) any bankruptcy or insolvency proceedings are commenced, a receiver or trustee is appointed for the agents of Tenant; or Tenant's leasehold estate is taken on execution or by any process of law; (f) Tenant admits in writing its inability to pay its obligations as they become due; (g) Tenant fails to observe or perform any other provision under this Lease and such failure is not cured before thirty (30) days elapse after notice to Tenant; (h) Tenant attempts to make or suffers to be made any transfer, assignment or subletting, except as provided in Section 17; or (i) Tenant fails to timely comply with the provisions of Section 13 ("Subordination and Estoppel Certificates). The notices required by this Section 18.1 shall be in lieu of, and not in addition to, any notice required under law. The provisions of this Section 18.1 to the contrary notwithstanding, if Tenant commits a default of its obligations under this Lease, and if the same default has previously occurred two (2) or more times during the Term (regardless of whether cured), such default shall be conclusively deemed to constitute a noncurable default and give Landlord the immediate right to exercise any or all of its available rights and remedies. In the event of a Tenant default Landlord will provide notice of such default to GTH Enterprises, Inc. at 35 Folly Road., Charleston, SC 29407.

18.2 Landlord's Remedies. Upon the occurrence of an Event of Default and Tenant fails to cure default within thirty (30) days, then, in addition to and without waiving any other rights and remedies available to Landlord in law or in equity or otherwise provided in this Lease, Landlord may, at its option, cumulatively or in the alternative, exercise the following remedies:

(a) Landlord may terminate Tenant's right to possession of the Premises, in which case this Lease shall terminate and Tenant shall immediately surrender possession of the Premises to Landlord. No act by Landlord other than giving written notice to Tenant of Landlord's election to terminate Tenant's right to possession shall terminate this Lease. Acts of maintenance, efforts to relet the Premises, or the appointment of a receiver on Landlord's initiative to protect Landlord's interest under this Lease shall not constitute a termination of Tenant's right to possession. Termination shall terminate Tenant's right to possession of the Premises but shall not relieve Tenant of any obligation under this Lease that has accrued prior to the date of such termination nor of the obligation for Rent that would have accrued but for such termination. Upon such termination, Landlord shall have the right to re-enter the Premises, and remove all persons and property, and Landlord shall also be entitled to recover from Tenant:

(i) The worth at the time of the award of any unpaid Rental which had been earned at the time of termination;

(ii) The worth at the time of the award of the amount by which the unpaid Rental which would have been earned after termination until the time of the award exceeds the amount of the loss of such Rental that Tenant proves could have been reasonably avoided;

(iii) The worth at the time of the award of the amount by which the unpaid Rental for the balance of the Term after the time of the award exceeds the amount of the loss of such Rental that Tenant proves could have been reasonably avoided;

(iv) Any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform its obligations under this Lease or which in the ordinary course of things would be likely to result from Tenant's default, including, but not limited to, the cost of recovering possession of the Premises, commissions and other expenses of reletting, including necessary repair, renovation, improvement and alteration of the Premises for a new tenant, the unamortized portion of any Tenant Improvements and brokerage commissions funded by Landlord in connection with this Lease, the cost of rectifying any damage to the Premises occasioned by the act or omission of Tenant, reasonable attorneys' fees, and any other reasonable costs; and

(v) At Landlord's election, all other amounts in addition to or in lieu of the foregoing as may be permitted by law.

As used in subparagraphs (i) and (ii) above, the "worth at the time of the award" is computed by allowing interest at the Applicable Rate. As used in subparagraph (iii) above, the "worth at the time of the award" is computed by discounting such amount at the discount rate of the Federal Reserve Bank for the District in which the Shopping Center is located at the time of the award plus one percent (1%).

(b) Landlord may elect not to terminate Tenant's right to possession of the Premises, in which event this Lease will continue in full force and effect as long as Landlord does not terminate Tenant's right to possession, and Landlord may continue to enforce all of its rights and remedies under this Lease, including the right to collect all Rent as it becomes due. In addition, if Tenant has entered into a sublease which is valid under the terms of this Lease, Landlord may also, at its option, cause Tenant to assign to Landlord the interest of Tenant under the sublease, including, but not limited to, Tenant's right to the payment of Rent as it becomes due. Landlord may elect to enter the Premises and relet them, or any part of them, to third parties for Tenant's account. Tenant shall be liable immediately to Landlord for all costs Landlord incurs in reletting the Premises, including, but not limited to, brokers' commissions, expenses of cleaning and remodeling the Premises required by the reletting, attorneys' fees and like costs. Reletting can be for a period shorter or longer than the remaining Term of this Lease and for the entire Premises or any portion thereof. Landlord shall have no obligation to prefer the letting of the Premises over any vacant space in the Shopping Center nor to accept any replacement tenant that would result in the violation of any use restrictions in the Shopping Center, not be desirable for the Shopping Center's tenant mix, or otherwise not meet Landlord's leasing criteria. Tenant shall pay to Landlord the Minimum Rent, and Additional Rent due under this Lease on the dates the Minimum Rent, and such Additional Rent are due, less the rent Landlord actually collects from any reletting. Except as provided in the preceding sentence, if Landlord relets the Premises or any portion thereof, such reletting shall not relieve Tenant of any obligation hereunder. Notwithstanding the above, no act by Landlord allowed by this Section 18.2(b) shall terminate this Lease unless Landlord notifies Tenant in writing that Landlord elects to terminate this Lease.

18.3 No Surrender. Tenant waives any right of redemption or relief from forfeiture under any present or

future law, in the event Tenant is evicted or Landlord takes possession of the Premises by reason of an Event of Default. No act or thing done by Landlord or Landlord's Agents during the Term shall be deemed an acceptance of a surrender of the Premises and no agreement to accept a surrender shall be valid unless in writing and signed by Landlord. No employee of Landlord or of Landlord's Agents shall have any power to accept the keys to the Premises prior to the termination of this Lease, and the delivery of the keys to any such employee shall not operate as a termination of this Lease or a surrender of the Premises.

18.4 Landlord's Default. Landlord shall not be deemed to be in default in the performance of any obligation required to be performed by it under this Lease unless and until it has failed to perform such obligation within thirty (30) days after receipt of written notice by Tenant to Landlord (and the Mortgagees who have provided Tenant with notice) specifying the nature of such default; provided, however, that if the nature of Landlord's obligation is such that more than thirty (30) days are required for its performance, then Landlord shall not be deemed to be in default if it shall commence such performance within such thirty (30) day period and thereafter diligently prosecute the same to completion.

18.5 Mortgagee Protection. Upon any default on the part of Landlord, Tenant will give notice by registered or certified mail to any Mortgagee who has provided Tenant with notice of its interest together with an address for receiving notice, and shall offer such Mortgagee a reasonable opportunity to cure the default (which, in no event shall be less than sixty (60) days), including time to obtain possession of the Premises by power of sale or a judicial foreclosure, if such should prove necessary, to effect a cure. Tenant agrees that each of the Mortgagees to whom this Lease has been assigned by Landlord is an express third party beneficiary of this Lease. Tenant shall not make any prepayment of Minimum Rent, Percentage Rent or Additional Rent more than one (1) month in advance without the prior written consent of such Mortgagee. Tenant waives any right under any present or future law to the collection of any deposit from such Mortgagee or any purchaser at a foreclosure sale of such Mortgagee's interest unless such Mortgagee or such purchaser shall have actually received and not refunded the deposit. Tenant agrees to make all payments under this Lease to the Mortgagee with the most senior encumbrance upon receiving a direction, in writing, to pay said amounts to such Mortgagee. Tenant shall comply with such written direction to pay without determining whether an event of default exists under such Mortgagee's loan to Landlord.

18.6 Landlord's Right to Perform. If Tenant shall at any time fail to make any payment or perform any other act on its part to be made or performed under this Lease, Landlord may (but shall not be obligated to), at Tenant's expense, and without waiving or releasing Tenant from any obligation of Tenant under this Lease, make such payment or perform such other act to the extent Landlord may deem desirable, and in connection therewith, pay expenses and employ counsel. All sums paid by Landlord and all penalties, interest and costs, including, but not limited to, collection costs and attorneys' fees reasonably incurred in connection therewith, plus twenty percent (20%) of any such sums for Landlord's administrative costs shall be due and payable by Tenant to Landlord, as an item of Additional Rent, on demand by Landlord, together with interest thereon at the Applicable Rate from the date of such demand until paid by Tenant.

18.7 Interest on Late Payments. Should Tenant fail to pay when due any installment of Minimum Rent, Additional Rent, Percentage Rent or any other sum payable to Landlord under the terms of this Lease within ten (10) days following the due date, then interest at the Applicable Rate, shall accrue from and after the due date until paid, and such interest shall be paid by Tenant to Landlord at the time of payment of the overdue sum.

19. INDEMNITY AND INSURANCE.

19.1 Indemnification. ~~Tenant agrees to defend (with attorneys acceptable to Landlord), protect, indemnify, and hold harmless Landlord and Landlord's Agents from any and all claims, liabilities, demands, causes of action, attorney's fees, damages, judgments, and expenses of any nature arising from or related to (a) the conduct or management of the Premises or of any business therein, or any work or thing whatsoever done, or any condition created in or about the Premises during the Term; (b) any act, omission or negligence of Tenant or any of Tenant's Agents; (c) any accident, injury or damage whatsoever occurring in or at the Premises; (d) any breach or default by Tenant under this Lease; (e) all damages sustained by Landlord as a result of any holdover by Tenant in the Premises including, but not limited to, any claims by another tenant resulting from a delay by Landlord in delivering possession of the Premises to such tenant; and, (f) any liens or encumbrances arising out of any work performed or materials furnished by or for Tenant, including any work Landlord may have performed or caused to be performed for Tenant for which Tenant has not paid Landlord. In the event Landlord, without fault on Landlord's part, is made a party to any litigation commenced by or against Tenant, then Tenant shall protect, defend, indemnify, and hold Landlord harmless and shall pay all costs, expenses and attorneys' fees incurred or paid by Landlord in connection with such litigation. Tenant hereby waives all claims against Landlord for damage to goods, wares or supplies or for injury or death to persons in and upon the Premises from any cause whatsoever, except such as result solely from the grossly negligent act or willful misconduct of Landlord.~~

19.1 Mutual Indemnification. Tenant agrees to defend (with attorneys reasonably acceptable to Landlord), protect, indemnify, and hold harmless Landlord and Landlord's Agents from any and all claims, liabilities, demands, causes of action, attorney's fees, damages, judgments, and expenses of any nature arising from or related to (a) the conduct or management of the Premises or of any business therein, or any work or thing whatsoever done, or any condition created in or about the Premises during the Term by or at the direction of Tenant; (b) any act, omission or negligence of Tenant or any of Tenant's Agents; (c) any accident, injury or damage whatsoever occurring in or at the Premises unless the same is a result of the act or omission of Landlord or a breach of Landlord's obligations hereunder; (d) any breach or default by Tenant under this Lease; (e) all damages sustained by Landlord as a result of any holdover by Tenant in the Premises including, but not limited to, any claims by another tenant resulting from a delay by Landlord in delivering possession of the Premises to such tenant; and, (f) any liens or encumbrances arising out of any work performed or materials furnished by or for Tenant, including any work Landlord may have performed or caused to be performed for Tenant for which Tenant has not paid Landlord. In the event Landlord, without fault on Landlord's part, is made a party to any litigation commenced by or against Tenant, then Tenant shall protect, defend, indemnify, and hold Landlord harmless and shall pay all costs, expenses and attorneys' fees incurred or paid by Landlord in connection with such litigation. Tenant hereby waives all claims against Landlord for damage to goods, wares or supplies or for injury or death to persons in and upon the Premises from any cause whatsoever, except such as result solely from the grossly negligent act or willful misconduct of Landlord. Likewise, Landlord agrees to defend, protect, indemnify and hold harmless Tenant and Tenant's Agents from any and all claims, liabilities, demands, causes of action, attorney's fees, damages, judgments and expenses of any nature arising from or related to (a) any act, omission or negligence of Landlord or any of Landlord's Agents; (b) any breach or default by Landlord under this Lease. In the event Landlord, without fault on Tenant's part, is made a party to any litigation commenced by or against Landlord, then Landlord shall protect, defend, indemnify and hold Tenant harmless and shall pay all costs, expenses and attorney's fees incurred or paid by Tenant in connection with such litigation.

19.2 Tenant's Insurance. Tenant shall at all times during the Term, and at its sole expense, obtain and keep in effect the following insurance: (a) commercial general liability insurance in the names of and for the benefit of Tenant and Landlord and other parties Landlord designates (as additional insureds), with a minimum combined single limit of Two Million Dollars (\$2,000,000); (b) fire insurance with special form endorsement covering all furniture, fixtures, inventory and equipment, whether supplied or owned by Tenant or by Landlord, Tenant's improvements to the Premises, Tenant's Personal Property and all glass forming a part of the Premises, including but not limited to plate glass to the extent of its full insurable value; (c) business interruption coverage in amounts sufficient to pay the Minimum Rent and Additional Rent hereunder for a period of at least twelve (12) months; (d) workers' compensation insurance as required under Applicable Laws; and (e) such other insurance in such form and amounts as Landlord or Landlord's Mortgagees may require from time to time.

19.3 Deductibles. Any policy of insurance specified to be carried by Tenant pursuant to this Lease which contains a deductible in excess of Five Thousand Dollars (\$5,000.00) per occurrence must be approved in writing by Landlord prior to the issuance of such policy. Tenant shall be solely responsible for the payment of any and all such deductibles.

19.4 Increased Coverage. Upon demand, Tenant shall provide Landlord, at Tenant's expense, with such increased amount of existing insurance, and such other insurance as Landlord or any Mortgagees may reasonably require.

19.5 Sufficiency of Coverage. Neither Landlord nor any of Landlord's Agents makes any representation that the types of insurance and limits specified to be carried by Tenant under this Lease are adequate to protect Tenant. If Tenant believes that any such insurance coverage is insufficient, Tenant shall provide, at its own expense, such additional insurance as Tenant deems adequate. Nothing contained herein shall limit Tenant's liability under this Lease, and Tenant's liability under any provision of this Lease, including without limitation under any indemnity provision, shall not be limited to the amount of any insurance obtained.

19.6 Insurance Requirements. Any policy of Tenant's insurance: (i) shall be in a form satisfactory to Landlord and the Mortgagees; (ii) shall be issued by insurance companies licensed and authorized to do business in the State, which are rated "A" or better in Best's Key Rating Guide and which are determined by Landlord, as financially sound on a current basis; (iii) shall provide that such policies, shall not be subject to material alteration or cancellation except after at least thirty (30) days prior written notice to Landlord and others Landlord may designate; and (iv) shall be primary, and any insurance carried by Landlord or Landlord's Agents shall be noncontributing. Tenant's liability insurance shall contain a cross liability endorsement, shall include fire legal liability coverage in the amount of at least One Hundred Thousand Dollars (\$100,000.00), and shall include contractual liability coverage specifically insuring performance of Tenant's obligations under Section 19.1 and Tenant's other indemnification obligations under this Lease. Tenant's fire insurance shall contain an agreed amount endorsement and

include boiler and machinery coverage, if applicable, in amounts acceptable to Landlord and any Mortgagees. Tenant's policy or policies, or duly certified copies of such policies, together with satisfactory evidence of payment of premiums, shall be deposited with Landlord prior to the Commencement Date, and at least thirty (30) days prior to each renewal of such policies. If Tenant fails to procure and maintain the insurance required to be procured by Tenant under this Lease, Landlord may, but shall not be required to, order such insurance at Tenant's expense. All sums reasonably disbursed, deposited or incurred by Landlord in connection therewith, including, but not limited to, all costs, expenses and actual attorneys' fees, shall be due and payable by Tenant to Landlord, as an item of Additional Rent, on demand by Landlord, together with interest thereon at the Applicable Rate from the date of such demand until paid by Tenant.

19.7 Waiver of Subrogation. Tenant agrees that any insurance required under this Lease and all other insurance carried by Tenant shall contain a waiver of subrogation by the insurer against Landlord, any Mortgagees, and Landlord's Agents. Tenant does hereby waive all rights of recovery or causes of action against Landlord, any Mortgagee, and Landlord's Agents for any damage or loss covered by Tenant's insurance, or by the type of insurance required by this Lease, or for which Tenant may otherwise be reimbursed.

19.8 Loss or Damage to Tenant's Property. Landlord shall not be liable for any damage to property of Tenant or of others located on the Premises, nor for the loss of or damage to any property of Tenant or of others by theft or otherwise. Landlord shall not be liable for any injury or damage to persons or property resulting from fire, explosion, falling plaster, steam, gas, electricity, water, rain, snow or leaks from any part of the Premises or from the pipes, appliances or plumbing works or from any other place or by dampness or by any other cause of whatsoever nature. Landlord shall not be liable for any such damage caused by other tenants or persons, occupants of property adjacent to the Center or the public, or from damage caused by operations in construction of any private, public or quasi-public work. Landlord shall not be liable for any latent defect in the Premises or in the building of which they form a part. All property of Tenant kept or stored on the Premises shall be so kept or stored at the risk of Tenant only, and Tenant shall hold Landlord harmless from any claim arising out of damage to the same, including subrogation claims by Tenant's insurance carriers, unless such damage shall be caused solely by the willful act or gross negligence of Landlord.

20. DAMAGE AND DESTRUCTION BY FIRE OR OTHER CASUALTY.

20.1 Landlord's Obligation to Rebuild. Subject to Landlord's right to terminate this Lease as provided below, if the Premises are damaged or destroyed by fire, wind storm, or other casualty (a "Casualty"), Landlord shall repair all such damage and restore the Premises within a reasonable time to the extent of the insurance proceeds received (net of collection expenses) subject to delays due to adjustment of insurance claims, strikes and other causes beyond Landlord's control. Landlord's obligation, should it elect or be obligated to repair the Premises following a Casualty, shall be limited to the basic building shell. Tenant shall, at its expense, replace or fully repair all Tenant's Personal Property and any Alterations or other leasehold improvements installed by Tenant existing at the time of such Casualty. In the event of damage or destruction to the Premises, the Rent shall not be abated wholly or proportionately.

20.2 Landlord's Right to Terminate. Landlord shall have the right to terminate this Lease following a Casualty if any of the following occurs: (i) insurance proceeds (together with any additional amounts Tenant elects, at its option, to contribute) are not available to Landlord to pay one hundred percent (100%) of the cost to fully repair the Premises, excluding the deductible (for which Tenant shall be fully responsible); (ii) Landlord determines that the Premises and/or any other damaged portions of the Center cannot, with reasonable diligence, be fully repaired by Landlord (or cannot be safely repaired because of the presence of hazardous factors, including, but not limited to, hazardous materials, radiation, chemical waste and other dangers) within one hundred eighty (180) days after the date of such Casualty or at a cost of less than thirty-five percent (35%) of the then replacement cost thereof; (iii) the Premises are destroyed or damaged during the last twenty-four (24) months of the Term; (iv) thirty-five percent (35%) or more of the area of the building in which the Premises are located is damaged or destroyed, regardless of whether the Premises are damaged; or (v) an Event of Default has occurred and is continuing at the time of such Casualty. If Landlord elects to terminate this Lease following a Casualty pursuant to this Section 20.2, Landlord shall give Tenant written notice of its election to terminate within thirty (30) days after Landlord has knowledge of such Casualty, and this Lease shall terminate fifteen (15) days after the date of such notice.

20.3 Waiver of Statutes. It is the parties intent that the provisions of this Section 20 govern their rights and obligations with respect to any Casualty. Tenant hereby waives any right to terminate this Lease following a Casualty pursuant to any present or future statute or other law.

21. CONDEMNATION.

21.1 Effect of Taking. In the event that a substantial part of the Premises shall be taken or condemned through the exercise of the power of eminent domain, with or without litigation (or a sale in lieu thereof), and Tenant shall determine that the remaining portion of the Premises is not reasonably suitable for Tenant's use and occupation, Tenant may, upon given written notice to Landlord within ten (10) days after the date of such taking, terminate this Lease, and Landlord shall refund any unearned Rent paid in advance by Tenant. If Tenant does not terminate this Lease, it shall continue in force as to the remaining portion of the Premises, and all Rent shall continue unabated. In the event of a total taking of the Premises by eminent domain or a sale in lieu thereof, this Lease shall terminate, and Landlord shall be due all of any condemnation award. In the event that part of the common areas or parking areas of the Center shall be taken, there shall be no abatement or reduction of Tenant's Rent; however, should the partial taking of the common areas or parking areas render the Premises untenable, then either the Landlord or the Tenant may elect to terminate the Lease upon delivery of thirty (30) days prior written notice to the other party.

21.2 No Apportionment of Award. No award for any partial or total taking shall be apportioned, it being agreed and understood that Landlord shall be entitled to the entire award for any partial or entire taking, whether for the value of the leasehold, the real estate, or otherwise. Tenant assigns to Landlord its interest in any award which may be made in such taking or condemnation, together with any and all rights of Tenant arising in or to the same or any part thereof. Nothing contained in this Section 21.2 shall be deemed to give Landlord any interest in or require Tenant to assign to Landlord any separate award made to Tenant for the taking of Tenant's Personal Property or its moving costs; provided, that any such separate award to Tenant does not diminish any award to which Landlord is entitled.

21.3 Waiver of Statutes. Tenant hereby waives the provisions of any present or future statute or law allowing either party to terminate this Lease in the event of a partial taking of the Premises.

22. QUIET ENJOYMENT. Landlord agrees that Tenant, upon keeping and performing the covenants of this Lease, shall at all times during the term of this Lease peaceably and quietly have, hold, and enjoy the Premises subject to the provisions hereof.

23. NOTICES. Any notice, demand, or communication called for hereunder shall be in writing and be given, served, or delivered either in person, by first-class, certified mail, return receipt requested; by Federal Express (or other nationally recognized overnight courier) with postage or delivery charge prepaid, or by facsimile transmission, and if to Tenant, addressed to Tenant at the Tenant's mailing address set forth in Section 1.6 and if to Landlord, addressed to the Landlord's mailing address set forth in Section 1.2, or to such other address as either may designate by notice to the other. Any such notice, demand, or communication so sent shall be deemed given at the time that it was placed in the U.S. mails or with the overnight courier, and any other notice shall be deemed given when delivered.

24. SURRENDER OF PREMISES; HOLDING OVER.

24.1 Surrender of Premises. Tenant agrees to turn over all keys and to surrender the Premises at the expiration or termination of this Lease, leave the Premises in the same condition (or as altered pursuant to the provisions of the Lease) as when delivered to Tenant (ordinary wear and tear excepted) and subject to the provisions of Section 11.1, Section 20 and Section 21 with all debris and Tenant's Personal Property removed and with all interior walls in good repair, all carpets shampooed and cleaned, the HVAC equipment, plumbing, electrical and other mechanical installations in good operating order and all noncarpeted floors cleaned and waxed, all to the reasonable satisfaction of Landlord. Any damage or deterioration of the Premises shall not be deemed ordinary wear and tear if the same could have been prevented by good maintenance practices by Tenant. Tenant shall pay a reasonable repair and/or cleaning charge should it be necessary for the Landlord to repair and/or clean the Premises. Landlord may apply the Security Deposit to such purposes. If, after default in payment of rent or violation of any other provision of this Lease, or upon the expiration of this Lease, Tenant moves out or is dispossessed and fails to remove any trade fixtures or other property prior to such removal, or prior to the execution of the warrant of eviction, then and in that event, the fixtures and property shall be deemed abandoned by the Tenant and shall become the sole property of the Landlord. If Tenant fails to remove Tenant's Personal Property after the expiration or termination of this Lease, Landlord may retain such property and all rights of Tenant with respect to such property shall cease, or Landlord may place all or any portion of such property in public storage for Tenant's account. Tenant shall pay to Landlord, upon demand, the costs of removal of any such Alterations and Tenant's Personal Property and storage and transportation costs of same, and the cost of repairing and restoring the Premises, and all attorneys' fees and interest on said amounts at the Applicable Rate from the date of expenditure by Landlord.

24.2 Holding Over. If Tenant shall retain possession of the Premises or any portion of the Premises without Landlord's consent following the expiration or termination of this Lease, then Tenant shall pay to Landlord for each day

of such retention one and one-half times the amount of daily Rent for the last month prior to the date of expiration or termination.

Tenant shall also indemnify and hold Landlord harmless from any loss or liability resulting from delay by Tenant in surrendering the Premises, including, without limitation, any claims made by any succeeding tenant founded on such delay. Alternatively, if Landlord gives written notice of Landlord's consent to Tenant's holding over, such holding over shall constitute renewal of the Lease on a month to month basis, and otherwise on the terms of this Lease. Acceptance of Rent by Landlord following expiration or termination of this Lease shall not constitute a renewal of this Lease, and nothing contained in this Section 24.2 shall waive Landlord's right of reentry or any other right. Unless Landlord gives its written consent as provided above, Tenant shall be only a Tenant at sufferance, whether or not Landlord accepts any Rent from Tenant while Tenant is holding over without Landlord's written consent.

25. —RELOCATION: Landlord shall have the right at any time, and from time to time, before or during the Term of this Lease or renewal or extension hereof to require Tenant to relocate to other space in the Center (the "Substitution Space"). The Substitution Space shall have approximately the same square footage as the Premises. If Landlord desires to exercise such right, it shall give Tenant at least sixty (60) days prior written notification that Tenant is to relocate to the Substitution Space. If Landlord elects to relocate Tenant to the Substitution Space, such move shall be at the sole expense of Landlord including all reasonable costs and expenses related to improving the Substitution Space with leasehold improvements substantially equivalent to those then in Tenant's Premises. Landlord shall have the right to reuse leasehold improvements and other alterations from the original Premises. After such relocation, all terms, covenants, conditions, provisions, and agreements contained in this Lease shall continue in full force and effect and shall apply to the Substitution Space except that (a) if the then unexpired balance of the Term of this Lease shall be less than one (1) year, the Term of this Lease shall be extended so that the unexpired balance of the Term shall be one (1) year from the date of the relocation; and (b) if the Substitution Space contains more square footage than the presently leased Premises, the Rent shall be increased proportionately (provided that such Rent increase shall not be in excess of ten percent (10%) of the Rent in effect immediately preceding such increase).

— If Tenant retains possession of the Premises, or any part thereof, following the date set for relocation or termination, Tenant shall be liable to Landlord, for each day of such retention, at double the amount of the daily Rent in effect immediately prior to the date set for relocation or termination, plus the actual damages incurred by Landlord resulting from Tenant's delay in surrendering the Premises, including without limitation, any claims made against Landlord by any succeeding tenant to the Premises and Landlord's costs in taking any action to evict Tenant from the Premises.

26. REAL ESTATE INVESTMENT TRUSTS. During the Term or any extension thereof, should a real estate investment trust ("REIT") become Landlord under this Lease the provisions of this Section 26 shall pertain, and all provisions of this Lease shall remain in full force and effect except as specifically modified by this Section 26. The provisions of this Section 26 shall have no force or effect except during such period as a REIT is Landlord under this Lease.

26.1 Management of Center. The parties to this Lease agree that Landlord need not itself directly manage or otherwise service all or any part of the Premises, Common Area or the Center but may cause such management, maintenance, operation and other services to Tenant to be performed by Landlord's agent (hereafter "Project Manager"). Landlord shall notify Tenant in writing of the name and address of the Project Manager, but Landlord shall have the absolute right to designate from time to time another person, association, corporation or partnership (general or limited) as Project Manager upon ten (10) days' written notice to Tenant.

26.2 Amendment to Section 7.1. Notwithstanding any provision to the contrary in Section 9, the following provisions shall apply:

(a) Tenant shall continue to pay all Additional Rent under this Lease to Landlord, subject to the provisions of Section 9, as modified below by Section 26.3. If the portion of Additional Rent due under Section 9 which constitute Common Area Costs are not paid at the time and in the manner provided in this Lease, the portion shall nevertheless be collectible with the next installment of Minimum Rent and Additional Rent becoming due, but nothing contained in this Section 26 shall be deemed to suspend or delay the payment of any amount of money or charge at the time the same becomes due and payable under this Lease, or limit any other remedy of Landlord; and

(b) Tenant shall pay all Rent and other charges to Landlord at such place as Landlord may from time to time designate in writing at least ten (10) days prior to the next ensuing payment date; provided, however, the payments made by Tenant pursuant to Section 9 for Common Area Costs shall be made to Landlord for the administrative convenience of the parties to this Lease and to further the efficient operation of the Center and shall remain the sole and separate property of the Project Manager for its services described in this Lease.

26.3 Amendment to Other Sections. This Lease is hereby amended, modified and supplemented as follows:

(a) Landlord shall cause the Project Manager to render to Tenant, other tenants and occupants of the Center the services required or permitted to be performed by Landlord under this Lease in connection with the maintenance, repair, management and operation of the Common Area or the Center and the Project Manager shall be reimbursed by Tenant for its expenses in connection with said Common Area or the Center in the manner provided below;

(b) Tenant shall continue to pay to the order of Landlord Tenant's Share of Common Area Costs due under Section 9 concurrently with its payment of Monthly Rent under this Lease, but Landlord shall disburse such portion of Tenant's Additional Rent to and for the benefit of the Project Manager; and

(c) Notwithstanding that such payments shall be made by Tenant to the order of Landlord, the parties agree that all such payments for Tenant's Share of Common Area Costs under Section 9 shall be retained by the Project Manager as its sole and separate property.

26.4 REIT Tax Provisions. If Landlord in good faith determines that its status as a REIT under the provisions of the Internal Revenue Code will be jeopardized because of any provision of this Lease, Landlord may request reasonable amendment to this Lease and Tenant will not unreasonably withhold, delay, defer or condition its consent to such amendments, provided that such amendments do not: (i) increase the monetary obligation of Tenant pursuant to the terms of this Lease; or (ii) in any other manner have a material adverse affect on Tenant's interest in the Premises.

27. MISCELLANEOUS PROVISIONS.

27.1 Rights of Successors and Assigns. The covenants and agreements contained in this Lease shall apply to, inure to the benefit, and be binding upon the parties, their heirs, permitted assigns, legal representatives, and other successors in interest, except as otherwise provided in this Lease.

27.2 Waiver. The failure of either party to require strict compliance with the provisions of this Lease shall not constitute a waiver of any rights or otherwise prevent either party from subsequently requiring strict compliance with any provisions hereof. No waiver of any provision of this Lease shall be effective unless it is in writing and signed by the waiving party.

27.3 Whole Agreement. This Lease constitutes the whole agreement between the parties, and may not be amended unless by a written agreement signed by both parties. No representation, condition, term or provision not contained in this Lease shall be binding upon either party. When appropriate, words of any gender shall mean and include the other genders, and singular shall mean and include the other plural, and vice versa.

27.4 Counterparts. This Lease may be executed in two or more counterparts, each of which shall be deemed to be an original, and all of which together shall constitute one and the same instrument.

27.5 No Recording. Tenant shall not record this Lease or any memorandum of this Lease without Landlord's prior written consent, but if Landlord so requests, Tenant agrees to execute, have acknowledged and deliver a memorandum of this Lease in recordable form which Landlord thereafter may file for record.

27.6 Attorneys' Fees. If any action at law or in equity shall be brought to recover any Rent under this Lease, on account of any breach, of, or to enforce or interpret any of the covenants, terms, or conditions of this Lease, or for the recovery of the possession of the Premises, or otherwise in connection with this Lease the prevailing party shall be entitled to recover from the other party as part of the prevailing party's cost, reasonable attorneys' fees, the amount of which shall be fixed by the court and shall be made a part of any judgement rendered.

27.7 Landlord's Security Interest. Landlord reserves, and is hereby granted, a first and superior lien and security interest (which shall be in addition to and not in lieu of any statutory lien or security interest) on all of Tenant's Alterations, equipment, and Tenant's Personal Property (tangible and intangible) now or hereafter located in or on the Premises, to secure all sums due from and all obligations to be performed by Tenant under this Lease, which lien and security interest may be enforced by Landlord in any manner provided by law, including, without limitation, under and in accordance with the Uniform Commercial Code applicable in the State. At Landlord's request, Tenant shall execute and file, where appropriate, all documents required under such Uniform Commercial Code to perfect the security interest granted in this Section.

27.8 **Captions.** The captions and headings used in this Lease are for the purpose of convenience only and shall not be construed to limit or extend the meaning of any part of this Lease.

27.9 **Time.** Time is of the essence for the performance of each term, condition and covenant of this Lease.

27.10 **Survival.** All covenants and indemnities set forth herein which contemplate the payment of sums, or the performance by Tenant after the expiration or termination of the Term or following an Event of Default, including all obligations to indemnify Landlord.

27.11 **Unavoidable Delay.** Landlord nor Tenant shall not be chargeable with, liable for, or responsible to the other for anything or in any amount for any Unavoidable Delay, and any Unavoidable Delay shall not be deemed a breach of or default in the performance of this Lease, it being specifically agreed that any time limit provision contained in this Lease, at Landlord's option, shall be extended for the same period of time lost by Unavoidable Delay; provided, however, in no event shall any Unavoidable Delay excuse or delay Tenant's obligation to timely pay Rent under this Lease.

27.12 **Authority.** If Tenant is a corporation, a limited liability company or a partnership (general or limited), each individual executing this Lease on behalf of the corporation, limited liability company or partnership, as the case may be, represents and warrants that: (i) he or she is duly authorized to execute and deliver this Lease on behalf of such entity in accordance with its corporate bylaws, appropriate limited liability company documentation, statement of partnership or certificate of limited partnership, as the case may be; (ii) this Lease is binding upon said entity in accordance with its terms; (iii) Tenant is a duly organized and legally existing corporation, limited liability company or partnership in good standing in the State; and (iv) the execution and delivery of the Lease shall not result in any breach of or constitute a default under any mortgage, deed of trust, lease, loan, credit agreement, partnership agreement or other contract or instrument to which Tenant is a party or by which Tenant may be bound. If Tenant is a corporation, Tenant shall, if requested by Landlord, within thirty (30) days after execution of this Lease and prior to entering into possession of the Premises, deliver to Landlord a certified copy of a resolution of the board of directors of the corporation authorizing or ratifying the execution of this Lease. If Tenant is a limited liability company or partnership, Tenant shall, if requested by Landlord, within thirty (30) days after execution of this Lease and prior to entering into possession of the Premises, deliver to Landlord a certified copy of its limited liability company, partnership agreement authorizing such execution.

27.13 **Guaranty.** As a condition to the execution of this Lease by Landlord, the obligations, covenants and performance of the Tenant as provided in this Lease shall, if required by Landlord, be guaranteed in writing by the Guarantor set forth in Section 1.24 on the form of guaranty set forth in Exhibit E.

27.14 **Security Measures.** Tenant hereby acknowledges that Landlord shall have no obligation whatsoever to provide guard service or other security measures for the benefit of the Premises, Common Area or the Center. Tenant assumes all responsibility for the protection of Tenant, its Agents and the property of Tenant and of Tenant's agents and invitees from acts of third parties. Nothing contained in this Section 27.14 shall prevent Landlord, at Landlord's sole option, from providing security protection for the Center or any part thereof, in which event the cost thereof shall be included within the definition of Common Area Costs and paid by Tenant in the manner set forth in Section 9.

27.15 **Covenants and Conditions.** All provisions of this Lease, whether covenants or conditions, on the part of Tenant shall be deemed to be both covenants and conditions.

27.16 **Waiver of Trial by Jury.** To the fullest extent permitted by law, Landlord and Tenant hereby waive the right to trial by jury in connection with any action suit or other proceeding arising out of or relating to this lease.

27.17 **Landlord's Property.** Tenant shall look only to Landlord's estate and interest in the land and buildings comprising the Center for the satisfaction of Tenant's remedies for any alleged failure to perform any of Landlord's obligations under this Lease, whether express or implied herein or under the law. Neither Landlord nor Landlord's Agents shall have any personal liability under this Lease and no other property or assets of the Landlord or Landlord's Agents shall be subject to levy, execution, or the enforcement procedure for the satisfaction of any of Tenant's remedies or any judgement obtained by Tenant.

27.18 **Landlord's Consent.** Whenever in this Lease Landlord's consent is required, Landlord may not unreasonably withhold its consent.

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27.19 No Partnership. Landlord does not in any way or for any purpose become a partner of Tenant in the conduct of its business or otherwise or a joint venturer with Tenant.

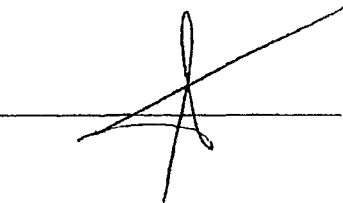
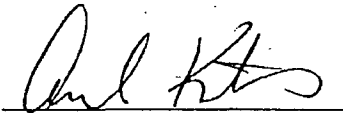
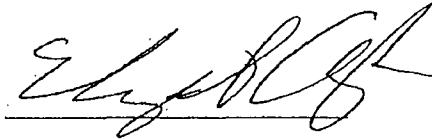
27.20 Governing Law. This Lease shall be governed exclusively under the provisions hereof and by the laws of South Carolina.

27.21 Exhibits. The Exhibits referenced at the end of Section 1 or elsewhere in this Lease and attached hereto are incorporated in and made a part of this Lease.

27.22 Absence of Option. The submission of this Lease for examination does not constitute a reservation of or option for the Premises, and this Lease becomes effective only upon execution and delivery thereof by Landlord.

IN WITNESS WHEREOF, the parties have caused these presents to be executed the day and year first above written.

WITNESS:

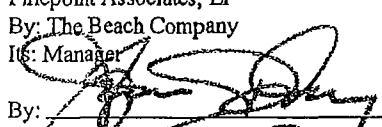


LANDLORD:

Pinepoint Associates, LP

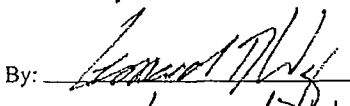
By: The Beach Company

Its: Manager

By: 

Print Name: John Dorthy

Title: President

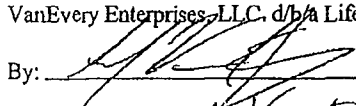
By: 

Print Name: Leonard Dorthy

Title: Asst Corp Sec

TENANT:

VanEvery Enterprises, LLC, d/b/a Lifequest Fitness

By: 

Print Name: Sandy Van Every

Title: Owner

EXHIBIT A-1
CENTER SITE PLAN

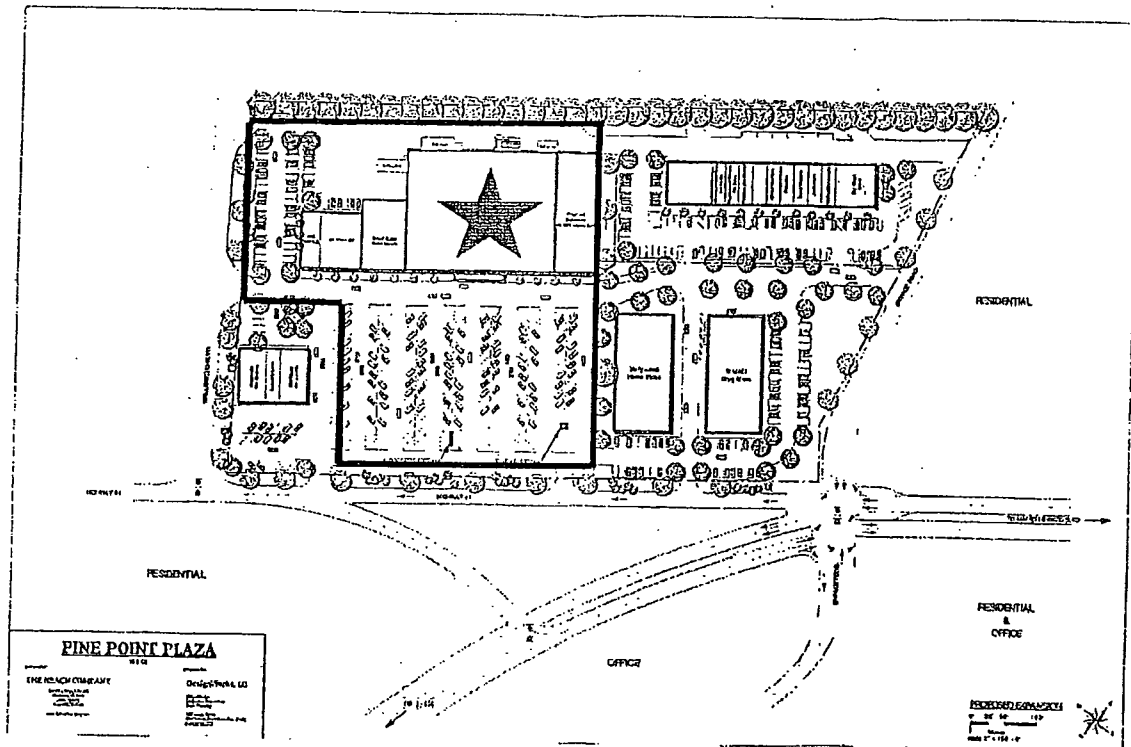
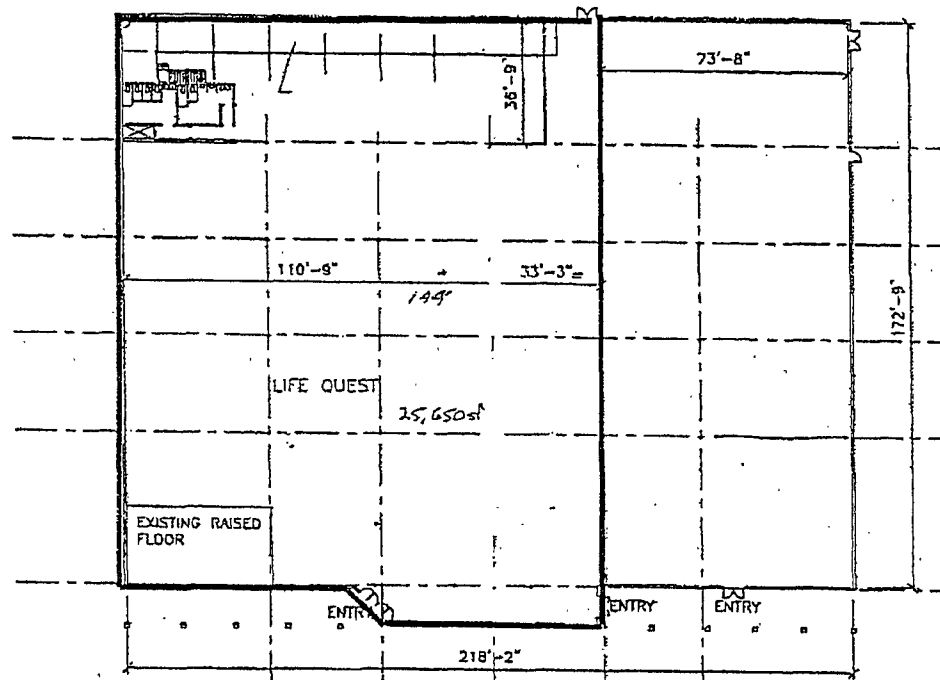


EXHIBIT A-2
PREMISES



APPROXIMATE TOTAL SQUARE FOOTAGE - 38,560

147

EXHIBIT B

LEGAL DESCRIPTION OF CENTER

1964 Ashley River Road, Charleston, South Carolina 29407. TMS# 351-03-00-002.

EXHIBIT C

CONSTRUCTION RIDER

LANDLORD'S WORK

Landlord shall be responsible for supplying Tenant with a demised vanilla shell. Landlord shall be responsible for all exterior "systems" including new HVAC units. Tenant shall be responsible for the management of all construction considered as part of Tenant's improvements to the Premises.

TENANT'S WORK

Plans and specifications for Tenant's Work and a construction budget and a draw schedule must be submitted by Tenant to Landlord for approval and shall be accordance with Section 15. All such Tenant's Work shall be subject to Landlord's approval and acceptance, which shall be a condition to any reimbursement herein provided. Tenant's portion of the construction budget must be expensed before the Landlord's allowance is expended. Tenant may hire a construction manager to perform a bid process and assist Tenant in the construction process. Such fees will be included in the budget and may be included in the Tenant Improvement Allowance.

The cost of any and all work in addition to that specifically delineated as Landlord's Work, or any increase in cost resulting from subsequent changes, shall be the responsibility of and paid by the Tenant.

EXHIBIT D

SIGNAGE CRITERIA

- 1) Tenant shall comply with uniform signage criteria designated by Landlord from time to time. Detailed criteria for the uniform signage will be provided to Tenant prior to construction completion of the Premises or occupancy of Tenant.
- 2) It is the sole responsibility of Tenant, at its expense, to provide its premises with identification and under canopy signage prior to opening for business.
- 3) The construction and installation of all signage must conform to all applicable codes and ordinances having jurisdiction over the Center. There shall be no exposed wiring on the facia of the building.
- 4) Tenant shall, prior to fabrication and installation of proposed sign, submit shop drawings and color samples to the Landlord for approval.
- 5) The following criteria shall be followed in the fabrication and installation of all Tenant identification signs:
 - A) Tenant shall maintain all sign(s) neon tubes, sign accessories supports or associated material in good condition and repair. If Landlord determines that any sign presents a threat of injury to person or property, or causes obstruction to the use of the sidewalk, parking, roadway, or interferes with the operation of any municipal departments (fire, police, etc.), other Tenant's, or Landlord's activities, it shall be the responsibility (at Tenant's sole cost and expense) of Tenant or Tenant's agents to remove, install, or repair the same property, immediately upon notice from any such municipal departments, or from Landlord (or Landlord's representative).
 - B) If Landlord deems it necessary to remove any of Tenant's signs in order to paint, redecorate, or make repairs, alterations or improvements in or to the leased premises or any part of the building to which Tenant's sign(s) may be affixed, Landlord shall have the right to do so, provided the same be removed and replaced at Landlord's initial cost and expense, unless the necessity therefore shall have been occasioned through the acts of Tenant. Landlord shall have the right, without notice to Tenant, to remove any sign installed by Tenant in violation of this Exhibit or Lease Agreement and to charge Tenant the cost of such removal, storage and/or destruction, and/or repairs necessitated thereby, without liability to the Tenant for any damage caused by such removal. Tenant shall pay Landlord the cost immediately thereof upon presentation to Tenant by Landlord of a statement showing the costs so incurred by the Landlord. Tenant shall indemnify and hold Landlord harmless from any claims arising from such removal.
- 6) The following shall not be permitted:
 - A) Exposed neon, exposed lamps, moving character (animated), flashing actions, intermittent (blinking) illumination, scintillating, audible signs, panel, flat cut-out letters, or cabinet signs.
 - B) Identification tags, marking signs, designations, or other descriptive placements which identify the manufacturer or fabricate of the sign, whether such tags are on Tenant's sign(s) (unless located on the top of the sign letter "non-readable" from Center's common areas), on the building structure, or elsewhere on the Center.

This criteria may be modified, changed, or added to, from time to time by notice from Landlord or Landlord's authorized representative.
 - C) Free standing signs and portable signs.
 - D) Electric signs in storefront windows.
 - E) Sign boxes.
 - F) Paper signs and stickers.
 - G) Banners

NOTE: The above is the minimum specification for sign criteria. Specifications in excess of the criteria will be accepted upon written approval of the Landlord.

Tenant shall provide two completed sets of sign drawings to the Landlord for review by the Landlord before fabrication. Tenant's sign drawings must include the following:

1. Elevation view of storefront showing sign (drawn to accurate scale) with dimensions of height of letters and length of sign.
2. All color samples of the metal sign return.
3. A cross-section view of the sign letter and sign panel showing the dimensioned projection of the face of the letter from face of the sign panel.

THE LANDLORD SHALL NOT BE RESPONSIBLE FOR THE COST OF REFABRICATION OF SIGNS FABRICATED, ORDERED, OR CONSTRUCTED THAT DO NOT CONFORM TO THE SIGN CRITERIA.

EXHIBIT E

RULES AND REGULATIONS

1. The sidewalks, halls, passages, and/or stairways shall not be obstructed by any Tenant or used by any Tenant for any purposes other than for ingress and egress from and to their respective leased spaces. The halls, passages, entrances, elevators, stairways, and roof are not for the use of the general public, and Landlord shall in all cases retain the right to control and prevent access thereto to all persons whose presence, in the sole judgment of Landlord or its employees, shall be prejudicial to the safety, character, reputation and interests of the Building and interests of the Center, its Tenants and occupants.
2. The toilet rooms, water closets and other water apparatus shall not be used for any purpose other than those for which they were constructed, and no sweepings, rubbish, rags, ashes, chemicals or refuse or other injurious substances shall be thrown therein. Any damage resulting from such misuse or abuse shall be borne and immediately paid by the party by whom or by whose employees it shall have been caused.
3. No sign, placard, picture, advertisement or notice shall be inscribed, painted or affixed on any part of the outside or inside of the Building unless first consented to in writing by Landlord. No neon signs are allowed unless specific written approval by Landlord is granted.
4. No additional locks shall be placed upon any doors of the Premises. Each Tenant must, upon the termination of its Lease, leave the windows and doors in the Premises in like condition as of the Commencement Date of the Lease, and must then surrender to Landlord all keys to the Premises.
5. Tenant shall not cause unnecessary labor by reason of carelessness and indifference to the preservation of good order and cleanliness in its Premises, surrounding area and the Center. In order that the Common Areas may be kept in a good state of preservation and cleanliness, Tenant may, during the continuance of its Lease, permit the janitor of Landlord to take charge of and clean the Common Areas. Any associated expense shall be borne and immediately paid by the party by whom or by whose employees it shall have been caused.
6. No Tenant shall employ any person or persons, other than the janitor of Landlord for the purpose of cleaning, or taking charge of the Common Areas, and it is understood and agreed that Landlord shall not be responsible to any Tenant for any damage not arising out of the gross negligence of Landlord done to the furniture or other effects of Tenant by the janitor or any of his employees, or any other person, or for any loss of property of any kind whatever from the Common Areas, however occurring. Tenant will see each day that the doors to the Premises are securely locked before leaving the Center or space.
7. Tenant, its employees, clerks, or servants, shall not make or commit any improper noises or disturbances of any kind in the Building, Premises, surrounding area, or in the elevators, or make or defile the water closets, or toilet rooms, or the walls, windows or doors of the Building, or interfere in any way with other Tenants or those having business with them.
8. No Tenant shall do or permit anything to be done in the Premises, or bring or keep anything therein, which will in any way increase the rate of fire insurance on the Center or on property kept therein, or obstruct or interfere with the rights of other Tenants, or in any other way injure or annoy them, or conflict with the laws relating to fires, or with the regulations of the Fire Department, or any insurance policy upon the Center or any part thereof, or conflict with any of the rules and ordinances of the Board of Health.
9. Each Tenant shall promptly, at its expense, execute and comply with all laws, rules, orders, ordinances and regulations of the City, County, State, or Federal Government, and of any department or bureau of any of them, and of any other governmental authority having jurisdiction over the Premises, affecting the Tenants' occupancy of the Premises or Tenants' business conducted thereon.
10. Nothing shall be thrown or allowed to be dropped by Tenant, its employees, clerks or servants out of the windows or doors, through the passages of the Building, or from any balcony in the Building. No Tenant shall sweep or throw, or permit to be swept or thrown from the Premises, any dirt or other substances into any of the corridors, passages, sidewalks, stairwells, halls, elevators or stairways of the Building.
11. No animals, birds, grills, bicycles or other vehicles shall be kept in or about the Premises or permitted therein.
12. If any Tenant desires to introduce signaling, telegraphic, satellite dishes, telephonic or other wires and instruments into the Premises, Landlord shall direct the electricians as to where and how the same are to be placed, and without such

directions no placing, boring, cutting for wires will be permitted. Landlord shall in all cases retain the right to require the placing and using of electrical protecting devices to prevent transmission of excessive currents of electricity into or through the Building and to require the changing of wires and of their placing arrangement as Landlord may deem necessary, and further to require compliance on the part of all using or seeking access to such wires and such rules as Landlord may establish relating thereto; and in event of noncompliance with such requirements and rules; Landlord shall have the right to immediately cut and prevent the use of such wires.

13. If applicable, a directory in a conspicuous place on the first floor of the Building may be provided by Landlord, on which the names of the Tenants in the Building will be placed by Landlord at its discretion.
14. Tenants shall not use or keep in Building any explosives, kerosene, gasoline, benzene, camphene, burning fluid or other flammable material, or any hazardous or toxic substance or material, other than minor quantities thereof for cleaning purposes only, as permitted by or exempt from applicable governmental regulations.
15. No Tenants or employees of any Tenant shall go upon the roof of the Building without the written consent of Landlord.
16. No mechanics shall be allowed in or about the Building other than those employed by the Landlord or Its Agents without the written consent of Landlord first having been obtained, which consent shall not be unreasonably withheld or delayed; provided, however, Tenant may permit technicians, servicemen and repairmen to enter the Premises for the purpose of maintaining, servicing or repairing office machines, equipment and computer systems used by Tenant.
17. Subject to the terms of the Lease and other reasonable limitations, Tenants may have access to the halls, corridors, elevators and stairways in the building and to the Premises at any time or times. Access to the Building may be refused unless the person seeking admission is known to the watchman in charge, or has a pass or is properly identified. Landlord shall in no case be liable for damages for the reasonable admission or exclusion of any person from the Building. In the case of invasion, mob riot, public excitement, or other commotion, Landlord reserves the right to prevent entrance to the Building during continuance of the same by closing the doors or otherwise for the safety of the tenants and protection of property in the Building.
18. Landlord in all cases shall prescribe the method and manner in which any merchandise, heavy furniture, large packages or safes shall be brought in or taken out of the Building and also the hours at which such moving shall be done. Landlord shall in all cases have the right to prescribe the weight and proper position of such heavy furniture and safes; and all damage done to the Building by taking out of such merchandise, heavy furniture, large packages or safes or any damage done to the Building while said property shall be positioned shall be made good and paid for by Tenant by, through or under whom the said damage may have done. All furniture, equipment or fixtures shall be provided with supports, glides or castors approved by the Management of the Building.
19. Tenant and its employees or agents shall refrain from parking in parking spaces directly in front of the Premises and other retail shops unless Landlord authorizes in writing for Tenant to do so.
20. If Tenant's business use creates "wet trash" (trash from food, beverages, and other materials utilized in a restaurant or food services operation). Tenant shall bag such trash in bags designated by Landlord and/or any appropriate authority. In the event of noncompliance with such requirement, Landlord may pursue all avenues available through the Lease, including but not limited to monetary reimbursement for cleaning up such trash in the proper manner.

EXHIBIT F

GUARANTY

Sandy VanEvery ("Guarantor") whose address is 1303 Eaglet Lane, Charleston, SC 29406, as a material inducement to and in consideration of PINEPOINT ASSOCIATES, LP. ("Landlord") entering into a written lease (the "Lease") with VanEvery Enterprises, LLC d/b/a LIFEQUEST FITNESS ("Tenant"), dated the same date as this guaranty, pursuant to which Landlord leased to Tenant, and Tenant leased from Landlord, premises located at 1964 Ashley River Road, Charleston, South Carolina 29407, unconditionally guarantees and promises to and for the benefit of Landlord that Tenant shall pay all obligations and perform the provisions of the Lease that Tenant is to perform, including but not limited to payment of rent and other sums payable thereunder.

If Guarantor is more than one person, Guarantor's obligations are joint and several. Guarantor's obligations are independent of Tenant's obligations. A separate action may be brought or prosecuted against any Guarantor whether the action is brought or prosecuted against any other Guarantor or Tenant, or all, or whether any other Guarantor or Tenant, or all, are joined in the action. This guaranty is a guaranty of payment and not of collection.

Guarantor waives the benefit of any statute of limitations affecting Guarantor's liability under this guaranty.

The provisions of the Lease may be changed by written agreement between Landlord and Tenant at any time without the consent or written notice to Guarantor. This guaranty shall guarantee the performance of the Lease as changed from time to time. Assignment of the Lease (as permitted by the Lease) shall not affect this guaranty.

This guaranty shall not be affected by Landlord's failure or delay to enforce any of its rights.

If Tenant defaults under the Lease, and Tenant fails to cure within the time period allowed within the Lease, Landlord may proceed immediately, thereafter, against Guarantor or Tenant, or both, or Landlord can enforce against Guarantor or Tenant, or both, by rights that it has under the Lease, or pursuant to applicable laws. If the Lease terminates and Landlord has any rights it can enforce against Tenant after termination, Landlord can enforce those rights against Guarantor without giving previous notice to Tenant or Guarantor, or without making any demand on either of them.

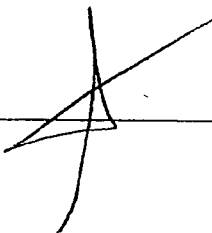
Guarantor waives the right to require Landlord to (1) proceed against Tenant; (2) proceed against or exhaust any security that Landlord holds from Tenant; or (3) pursue any other remedy in Landlord's power. Guarantor waives any defense by reason of any disability of Tenant, and waives any other defense based on the termination of Tenant's liability from any cause. Until all Tenant's obligations to Landlord have been discharged in full, Guarantor has no right of subrogation against Tenant. Guarantor waives its right to enforce any remedies that Landlord now has, or later may have, against Tenant. Guarantor waives any right to participate in any security now or later held by Landlord. Guarantor waives all presentments, demands for performance, notices of nonperformance, protests, notices of protest, notices of dishonor, and notices of acceptance of this guaranty, and waives all notices of the existence, creation, or incurring of new or additional obligations.

If Landlord disposes of its interest in the Lease, "Landlord", as used in this guaranty, shall mean Landlord's successors.

If Landlord is required to enforce Guarantor's obligations by legal proceedings, Guarantor shall pay to Landlord all costs incurred, including, without limitation, reasonable attorney's fees.

Guarantor's obligations under this guaranty shall be binding on Guarantor's successors.

WITNESS:



GUARANTOR:

Sandy VanEvery

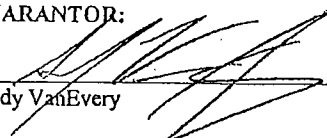


EXHIBIT F

GUARANTY

GTH Enterprises, Inc. ("Guarantor") whose address is 35 Folly Road, Charleston, SC 29407 as a material inducement to and in consideration of PINEPOINT ASSOCIATES, LP ("Landlord") entering into a written lease (the "Lease") with VanEvery Enterprises, LLC, d/b/a LIFEQUEST FITNESS ("Tenant"), dated the same date as this guaranty, pursuant to which Landlord leased to Tenant, and Tenant leased from Landlord, premises located at 1964 Ashley River Road, Charleston, South Carolina 29407, unconditionally guarantees and promises to and for the benefit of Landlord that Tenant shall pay all obligations and perform the provisions of the Lease that Tenant is to perform, including but not limited to payment of rent and other sums payable thereunder.

If Guarantor is more than one person, Guarantor's obligations are joint and several. Guarantor's obligations are independent of Tenant's obligations. A separate action may be brought or prosecuted against any Guarantor whether the action is brought or prosecuted against any other Guarantor or Tenant, or all, or whether any other Guarantor or Tenant, or all, are joined in the action. This guaranty is a guaranty of payment and not of collection.

Guarantor waives the benefit of any statute of limitations affecting Guarantor's liability under this guaranty.

The provisions of the Lease may be changed by written agreement between Landlord and Tenant at any time without the consent or written notice to Guarantor. This guaranty shall guarantee the performance of the Lease as changed from time to time. Assignment of the Lease (as permitted by the Lease) shall not affect this guaranty.

This guaranty shall not be affected by Landlord's failure or delay to enforce any of its rights.

If Tenant defaults under the Lease, and Tenant fails to cure within the time period allowed within the Lease, Landlord may proceed immediately, thereafter, against Guarantor or Tenant, or both, or Landlord can enforce against Guarantor or Tenant, or both, by rights that it has under the Lease, or pursuant to applicable laws. If the Lease terminates and Landlord has any rights it can enforce against Tenant after termination, Landlord can enforce those rights against Guarantor without giving previous notice to Tenant or Guarantor, or without making any demand on either of them.

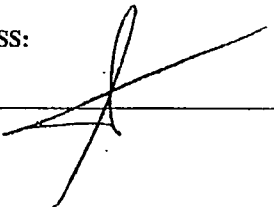
Guarantor waives the right to require Landlord to (1) proceed against Tenant; (2) proceed against or exhaust any security that Landlord holds from Tenant; or (3) pursue any other remedy in Landlord's power. Guarantor waives any defense by reason of any disability of Tenant, and waives any other defense based on the termination of Tenant's liability from any cause. Until all Tenant's obligations to Landlord have been discharged in full, Guarantor has no right of subrogation against Tenant. Guarantor waives its right to enforce any remedies that Landlord now has, or later may have, against Tenant. Guarantor waives any right to participate in any security now or later held by Landlord. Guarantor waives all presentments, demands for performance, notices of nonperformance, protests, notices of protest, notices of dishonor, and notices of acceptance of this guaranty, and waives all notices of the existence, creation, or incurring of new or additional obligations.

If Landlord disposes of its interest in the Lease, "Landlord", as used in this guaranty, shall mean Landlord's successors.

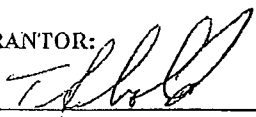
If Landlord is required to enforce Guarantor's obligations by legal proceedings, Guarantor shall pay to Landlord all costs incurred, including, without limitation, reasonable attorney's fees.

Guarantor's obligations under this guaranty shall be binding on Guarantor's successors.

WITNESS:



GUARANTOR:



GTH Enterprises, Inc.

EXHIBIT F
GUARANTY

Timothy R. Sebold ("Guarantor") whose address is 35 Folly Road, Charleston, SC 29407 as a material inducement to and in consideration of PINEPOINT ASSOCIATES, LP. ("Landlord") entering into a written lease (the "Lease") with VanEvery Enterprises, LLC. d/b/a LIFEQUEST FITNESS ("Tenant"), dated the same date as this guaranty, pursuant to which Landlord leased to Tenant, and Tenant leased from Landlord, premises located at 1964 Ashley River Road, Charleston, South Carolina 29407, unconditionally guarantees and promises to and for the benefit of Landlord that Tenant shall pay all obligations and perform the provisions of the Lease that Tenant is to perform, including but not limited to payment of rent and other sums payable thereunder. Notwithstanding, this Guaranty shall be in full force for the first twelve months of the initial term. Thereafter, it will be in force covering a rolling twelve-month period. The guaranty will be cancelled after the initial twelve months upon guarantor providing Landlord satisfactory documentation that Tenant's membership is at a level that provides an operating breakdown point. This level is not to be less than 1500 members.

If Guarantor is more than one person, Guarantor's obligations are joint and several. Guarantor's obligations are independent of Tenant's obligations. A separate action may be brought or prosecuted against any Guarantor whether the action is brought or prosecuted against any other Guarantor or Tenant, or all, or whether any other Guarantor or Tenant, or all, are joined in the action. This guaranty is a guaranty of payment and not of collection.

Guarantor waives the benefit of any statute of limitations affecting Guarantor's liability under this guaranty.

The provisions of the Lease may be changed by written agreement between Landlord and Tenant at any time without the consent or written notice to Guarantor. This guaranty shall guarantee the performance of the Lease as changed from time to time. Assignment of the Lease (as permitted by the Lease) shall not affect this guaranty.

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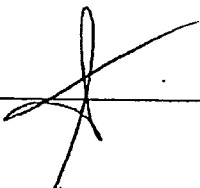
Guarantor waives the right to require Landlord to (1) proceed against Tenant; (2) proceed against or exhaust any security that Landlord holds from Tenant; or (3) pursue any other remedy in Landlord's power. Guarantor waives any defense by reason of any disability of Tenant, and waives any other defense based on the termination of Tenant's liability from any cause. Until all Tenant's obligations to Landlord have been discharged in full, Guarantor has no right of subrogation against Tenant. Guarantor waives its right to enforce any remedies that Landlord now has, or later may have, against Tenant. Guarantor waives any right to participate in any security now or later held by Landlord. Guarantor waives all presentments, demands for performance, notices of nonperformance, protests, notices of protest, notices of dishonor, and notices of acceptance of this guaranty, and waives all notices of the existence, creation, or incurring of new or additional obligations.

If Landlord disposes of its interest in the Lease, "Landlord", as used in this guaranty, shall mean Landlord's successors.

If Landlord is required to enforce Guarantor's obligations by legal proceedings, Guarantor shall pay to Landlord all costs incurred, including, without limitation, reasonable attorney's fees.

Guarantor's obligations under this guaranty shall be binding on Guarantor's successors.

WITNESS:



GUARANTOR:



Timothy R. Sebold

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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON) AMENDMENT TO LEASE AGREEMENT

WHEREAS, HERETOFORE, on, June 21, 2005, Pinepoint Associates, LP, ("Landlord") and VanEvery Enterprises, LLC, d/b/a Lifequest Fitness Center, ("Tenant") entered into a written Lease Agreement ("Lease Agreement") for property located at 1964 Ashley River Road, Charleston, SC (the "Premises") and being the property commonly known as Pinepoint Plaza.

WHEREAS, the Landlord and the Tenant deem it appropriate and necessary to amend the aforesaid Lease Agreement by this written Amendment to the Lease Agreement ("Amendment").

NOW, THEREFORE, in consideration of the rents hereinafter specified to be paid by Tenant to Landlord and in further consideration of the covenants of the respective parties hereto, each to the other, to be performed by them at the time and in the manner hereinafter provided, Landlord does hereby rent and lease to Tenant, and Tenant does hereby rent and lease from Landlord, upon the following terms and conditions:

1. Premises Address. As defined in Section 1.9 of the Lease Agreement, shall be amended to include a designated suite number which shall be referred to as Suite D1.

2. Premises Square Footage. As defined in Section 1.10 of the Lease Agreement, shall be amended to 26,285 square feet of a 52,519 square foot center.

3. Tenant's Share. As defined in Section 1.10 of the Lease Agreement, shall be amended to be 50.05%.

4. Minimum Rent. As defined in Section 1.14 of the Lease Agreement, shall be amended to be as follows:

<u>Term</u>	<u>Annually</u>	<u>Monthly</u>	<u>PSF</u>
Years 1-7	\$226,839.55	\$18,803.30	\$8.63

5. Initial Monthly Installment of Real Estate Taxes. As defined in Section 1.16 of the Lease Agreement, shall be amended to be \$1,842.10.
6. Initial Monthly Installment of Insurance Premiums. As defined in Section 1.17 of the Lease Agreement, shall be amended to be \$832.36.
7. Initial Monthly Installment of Common Area Cost. As defined in Section 1.18 of the Lease Agreement, shall be amended to be \$2,475.18.
8. Total Initial Monthly Payment. As defined in Section 1.19 of the Lease Agreement, shall be amended to be \$23,952.94.
9. Security Deposit. As defined in Section 1.20 of the Lease Agreement, shall be amended to be \$18,803.30.
10. Tenant Improvement Allowance. As defined in Section 1.26 of the Lease Agreement, shall be confirmed to be Two Hundred Sixty-Two Thousand and Eight Hundred Fifty Dollars (\$262,850.00) which represents Ten Dollars (\$10.00) per square foot.
11. Except as amended in this Amendment, all other terms and conditions of the Lease Agreement shall remain in full force and effect throughout the Extension Term.

IN WITNESS WHEREOF, the said Landlord and Tenant have caused this Amendment to Lease Agreement to be executed this 19th day of July, 2025, by and through their duly authorized officers and the corporate seals to be affixed hereto.

WITNESS:

[Signature]
[Signature]

[Signature]

LANDLORD:

Pinepoint Associates, LP

BY: [Signature] *By: The Beach Company
its partner*

ITS: President

BY: [Signature]
Leonard D. Way

ITS: Assistant Corporate Secretary

TENANT:

VanEvery Enterprises LLC.

d/b/a Lifequest Fitness Center

BY: [Signature]
Signature

Sandy Van Every
Name (Print)

owner
Title

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON) SECOND AMENDMENT TO LEASE AGREEMENT

WHEREAS, HERETOFORE, on, June 21, 2005, Pinepoint Associates, LP, ("Landlord") and VanEvery Enterprises, LLC, d/b/a Lifequest Fitness Center, ("Tenant") entered into a written Lease Agreement ("Lease Agreement") for property located at 1964 Ashley River Road, Charleston, SC (the "Premises") and being the property commonly known as Pinepoint Plaza.

WHEREAS, the Landlord and the Tenant deemed it appropriate and necessary to amend the aforesaid Lease Agreement by the written Amendment to the Lease Agreement ("Amendment") dated July 19, 2005.

WHEREAS, the Landlord and the Tenant deem it appropriate and necessary to further amend the aforesaid Lease Agreement by this written Second Amendment to the Lease Agreement ("Amendment").

NOW, THEREFORE, in consideration of the rents hereinafter specified to be paid by Tenant to Landlord and in further consideration of the covenants of the respective parties hereto, each to the other, to be performed by them at the time and in the manner hereinafter provided, Landlord does hereby rent and lease to Tenant, and Tenant does hereby rent and lease from Landlord, upon the following terms and conditions.

1. Commencement Date. As defined in Section 1.12 of the Lease Agreement, shall be amended to October 17, 2005.

2. Anticipated Delivery Date. As defined in Section 1.13 of the Lease Agreement, shall be amended to be October 17, 2005.

3. Rent Start Date. As defined in Section 1.131 of the Lease Agreement, shall be amended to March 15, 2006.

4. Except as amended in this Amendment, all other terms and conditions of the Lease Agreement shall remain in full force and effect throughout the Extension Term.

IN WITNESS WHEREOF, the said Landlord and Tenant have caused this Amendment to Lease Agreement to be executed this 5th day of December, 2005, by and through their duly authorized officers and the corporate seals to be affixed hereto.

WITNESS:

[Signature]

[Signature]

[Signature]

LANDLORD:

Pinepoint Associates, LP
By: The Beach Company,
Its: Partner

BY: [Signature]

ITS: CHAIRMAN

BY: [Signature]

ITS: Asst Corp Sec

TENANT:

VanEvery Enterprises LLC.
d/b/a Lifequest Fitness Center

BY: [Signature]
Signature

Sandy Van Every
Name (Print)

Owner
Title

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
2008-CP-10-6947

Pinepoint Associates, LP,)
)
PLAINTIFF,)
)
VS.)
)
Sandy Vanevery and)
Vanevery Enterprises,)
Inc.,)
)
DEFENDANTS.)
_____)

TRANSCRIPT OF RECORD

March 2, 2010

Charleston, South Carolina

B E F O R E:

THE HONORABLE J.C. NICHOLSON, JR., Judge

A P P E A R A N C E S:

DAVID PARRISH, Esquire
Attorney for the Plaintiff

MATTHEW PECOY, Esquire
Attorney for the Defendant

MISSY BROWN
Court Reporter

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1 PROCEEDINGS

2 March 2, 2010

3 (Whereupon, Court convened when the following matters
4 were had:)

5 THE COURT: Motion to dismiss complaint for lack
6 of personal service; is that correct?

7 MR. PECOY: Yes, sir. Good afternoon, Your
8 Honor.

9 THE COURT: Who's here for who?

10 MR. PARRISH: I'm David Parrish here for the
11 Plaintiff, Pinepoint.

12 THE COURT: Okay.

13 MR. PECOY: I'm Matt Pecoy. I'm here on behalf
14 of Sandy Vanevery and Vanevery Enterprises.

15 THE COURT: Matt what?

16 MR. PECOY: Pecoy.

17 THE COURT: How do you spell it?

18 MR. PECOY: P-E-C-O-Y.

19 THE COURT: Okay. Who's motion?

20 MR. PECOY: It's our motion, Your Honor.

21 THE COURT: Okay. I'll be glad to hear you, Mr.
22 Pecoy.

23 MR. PECOY: Your Honor, I'm here to respectfully
24 request a motion to dismiss the Plaintiff's complaint based
25 on lack of personal jurisdiction and failure to comply with

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1 the statute of limitations.

2 Your Honor, this dispute arises out of allegations of
3 breach of a commercial lease agreement between the
4 plaintiffs and my clients, Sandy Vanevery and Vanevery
5 Enterprises, amongst others.

6 Your Honor, if you look at the Plaintiff's complaint
7 at paragraph 13 it states that they learned of the alleged
8 breach in April of 2006. As I'm sure this Court is well
9 aware, under South Carolina statute, Plaintiff has three
10 years within which to commence a civil cause of action
11 based on breach of contract.

12 Plaintiff filed their complaint on December 8th, 2008.
13 As I'm sure the Court is also well aware, a civil cause of
14 action is not properly commenced until it is filed and
15 served within the statute of limitations, which is that
16 three years.

17 Now if they learned of the breach in April 2006, they
18 had three years from that point. So April of 2009 was when
19 their statute of limitations ended. If you look at the
20 Plaintiff's attorney's affidavit, it states they did not
21 properly serve my client until July 14th, I believe, 2009.
22 They did not serve within the statute of limitations.
23 Their complaint is void on its face therefore and should be
24 dismissed.

25 The South Carolina Rule of Civil Procedure 382, as I'm

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1 sure this Court is well aware, kind of grants the Plaintiff
2 a safety valve, the 120-day rule. And it basically says
3 that if the Plaintiff is filing a complaint close to the
4 end of the statute of limitations they have 120 days after
5 filing that complaint within which to properly serve.

6 I turn the Court's attention back to the time line on
7 that outline. They filed on December 8th 2008. They did
8 not properly serve my client until July 14th, 2009, two-
9 hundred-plus days past their original filing and eighty-
10 plus days past the already 120-day safety valve granted to
11 them by South Carolina statute in civil proceedings.

12 Therefore, Your Honor, I respectfully request that our
13 motion be granted. Thank you.

14 THE COURT: Yes, sir?

15 MR. PARRISH: Your Honor, David Parrish here for
16 the Plaintiff. The short answer is the Defendant moved out
17 of state and the statute's tolled under 15-3-330. I have a
18 copy here which I want to hand up to the Court with your
19 permission.

20 THE COURT: What do you have showing he moved out
21 of state?

22 MR. PARRISH: Sir?

23 THE COURT: What do you have showing he moved out
24 of state?

25 MR. PARRISH: Your Honor, I also filed a copy of

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1 that affidavit that was served on opposing counsel and I
2 have a copy here.

3 THE COURT: Okay.

4 MR. PARRISH: Mr. Vanevery, individually, and
5 Vanevery Enterprises, his last listed mailing address was
6 in the Mountclair Condominium Apartments in Mt. Pleasant,
7 South Carolina. After his mail was returned by the Post
8 Office as unclaimed, as indicated in this affidavit, I used
9 three process servers and basically six months chasing him
10 through South Carolina and discovered he lived up in North
11 Carolina. Mr. Avery [phonetic] apparently takes that
12 condominium and rents it to tenants who never answer the
13 door. Thirteen attempts by the process server never
14 elicited an answer at the door.

15 Mr. Vanevery also as this company, Vanevery
16 Enterprises, listed -- lists a Hanahan address as his
17 registered agent address. When the process server went to
18 that address, as indicated in the affidavit, that's where
19 his mother lives, who told the process server he had moved
20 to North Carolina, but would not give him the address.

21 We then found two possible addresses ---

22 THE COURT: Who was the agent of service?

23 MR. PARRISH: Mr. Vanevery.

24 THE COURT: All right.

25 MR. PARRISH: He listed his address incorrect. A

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1 South Carolina Supreme Court case frowns on that. Says
2 it's tolled automatically if you don't have a current
3 registered agent address. But after his mother told us --
4 told the process server he lived in North Carolina, we
5 searched in North Carolina, found two possible addresses.

6 THE COURT: How long is it tolled if he's out of
7 state?

8 MR. PARRISH: Indefinitely.

9 THE COURT: Indefinitely until he comes back into
10 the state ---

11 MR. PARRISH: Yes, sir.

12 THE COURT: --- or you find him, right?

13 MR. PARRISH: Yes, sir.

14 THE COURT: Okay.

15 MR. PARRISH: And like I say, clearly, we clearly
16 served him within the statute of limitations. That's not
17 the issue. We took about seven months to track him down
18 instead of six.

19 I do want to point out ---

20 THE COURT: The statute -- I thought he said the
21 breach occurred in April of 2006.

22 MR. PARRISH: That's what he's saying. We served
23 him two and a half years later. So we served him in 2008.
24 They're not saying we didn't serve him ---

25 THE COURT: Oh, you served him? I thought he

1 said you served him on July the 14th, '09.

2 MR. PARRISH: Yes, sir, I'm sorry. I misspoke.

3 We clearly filed within the statute of limitations.

4 THE COURT: You filed within the statute of
5 limitations, ---

6 MR. PARRISH: But he moved out ---

7 THE COURT: --- you didn't serve him within the
8 statute of limitations.

9 MR. PARRISH: Yes, sir. Because he had moved out
10 of state.

11 THE COURT: All right.

12 MR. PARRISH: In fact, if I may point out also a
13 copy of Rule 3(a). I slightly disagree with counsel's
14 description of this rule. It's changed some in the last
15 year. 3(a) has two parts, parts one and two.

16 THE COURT: Yeah.

17 MR. PARRISH: Part one says -- part one says if
18 you served them within the statute of limitations. The
19 120-day rule only applies if it's filed outside of the
20 statute of limitations. There's an or there. We filed it
21 in the statute. He moved out of state. He lives now
22 permanently in North Carolina. That's where we ultimately
23 located him, in Charlotte. He moved out of state. He
24 resides out of state. And under 15-3-30 the statute is
25 tolled with him taking up residence in North Carolina. And

1 I think the affidavit clearly shows we made due diligence
2 in efforts to locate him.

3 So the 3(a)(2), the 120 days doesn't apply. It's the
4 in 3(a)(1); it's just the statute is tolled. We have
5 served him within the statute of limitations and therefore
6 the argument, I believe, fails.

7 THE COURT: But you didn't serve him within the
8 statute of limitations.

9 MR. PARRISH: Yes, sir.

10 THE COURT: As I understand the statute of
11 limitations. I know the -- being out of state would toll
12 it, but you still served him outside of three years.

13 MR. PARRISH: Well the statute's tolled.

14 THE COURT: It's tolled maybe, but you said it's
15 not served within the statute, actual service to be
16 accomplished not later than 120 days.

17 MR. PARRISH: Yeah, but if the statute of
18 limitations is tolled, the statute of limitations has not
19 yet expired at that point.

20 THE COURT: I understand your argument.

21 MR. PARRISH: And I'd also note in the South
22 Carolina Supreme Court case of *Hooper vs. Ebenezer Senior*
23 *Center*, and the cite for the record is 687 S.E.2d 29, it
24 appears to be clearly on point here. And once again I'm
25 going to submit a copy of the case. The Court found the

1 statute was tolled when the registered agent did not
2 include the proper address. And in that particular case
3 that's where the registered agent still resided in South
4 Carolina. Here we have the registered agent listing a
5 former address and moved out of state. And to this day he
6 doesn't have his current address here.

7 THE COURT: Okay.

8 MR. PARRISH: So I believe the tolling provisions
9 of 15-3 -- 15-3-30 would clearly apply here and toll the
10 statute. The statute had not run as of the time he was
11 served because it had been tolled for the period he was out
12 of state.

13 That's kind of my argument in a nutshell. I'll be
14 happy to answer any questions you might have of me.

15 THE COURT: Okay. Be glad to hear you.

16 MR. PECOY: Yes, Your Honor.

17 First and foremost, there's two separate entities
18 here, Vanevery Enterprises and the registered agent of
19 service is, as counsel pointed out correctly, Mr. Vanevery
20 as a person. And Sandy Vanevery did move out of state.
21 And when a Defendant moves out of state, the Plaintiff had
22 South Carolina statute which allows service by publication.
23 I -- I do not know why they did not serve him by
24 publication. And they could have very easily served him
25 within the statute of limitations after their thirteen or

1 fourteen attempts to track him out of state. They did not
2 avail themselves of all legal remedies in order to
3 effectuate proper service.

4 THE COURT: 15-3-30 doesn't apply to serve by
5 publication. I mean it just says it's tolled when they
6 move out of state. There's no requirement under 15-3-30 to
7 serve by publication.

8 MR. PECOY: Yes, Your Honor. I -- I understand
9 that. I was just trying ---

10 THE COURT: There's no requirement for them to
11 serve by publication.

12 MR. PECOY: Yes, sir. I was just saying that
13 they did not avail themselves of all means to properly
14 serve our client.

15 THE COURT: Then what does that have to do with
16 15-3-30 that tolls the statute when they move out of state?

17 MR. PECOY: I guess not much, Your Honor.

18 THE COURT: Okay. Thank you very much. Motion
19 denied.

20 MR. PARRISH: Would you like me to submit an
21 order or would you prefer ---

22 THE COURT: Type me up an order and attach this
23 affidavit to it.

24 MR. PARRISH: Yes, sir.

25 ***END OF REQUESTED TRANSCRIPT OF RECORD***

State of South Carolina) Court of Common Pleas
)
County of Charleston) Ninth Judicial Circuit

Pinepoint Associates,)
LLC,)
)
Plaintiff,)
)
vs.) Case No. 2008-CP-10-6947
)
Vanevery Enterprises,)
Inc., et al.,)
)
Defendants.)
)

Transcript of Record

January 28, 2011

Charleston, South Carolina

BEFORE: The Hon. J.C. Nicholson, Jr., Judge

APPEARANCES:

David J. Parrish, Esq.
Attorney for the Plaintiff

David K. Haller, Esq.
Attorney for the Defendants
Vanevery Enterprises, Inc.,
and Sandy Vanevery

Brenda Cooley
Circuit Court Reporter

1 (On Friday, January 28, 2011, the hearing
2 convened and the following proceedings were had:)

3 THE COURT: Pinpoint Associates vs.
4 Vanevery; is that correct?

5 MR. HALLER: Yes, sir.

6 MR. PARRISH: Yes, sir.

7 THE COURT: All right. Let me look at the
8 order real quick, okay?

9 (The Court reviews document.)

10 THE COURT: I'll be glad to hear you.

11 MR. HALLER: Thank you, Your Honor. May it
12 please the Court. I'm David Haller for the defendants.

13 Your Honor, just to give you a little bit
14 of procedural background because it has been almost ten
15 months since we've ---

16 THE COURT: Yeah, it's been awhile.

17 MR. HALLER: --- been before you.

18 THE COURT: I was reading the order, and
19 apparently there's a statute of limitation question and
20 the location of the ---

21 MR. HALLER: Yes, sir.

22 THE COURT: --- I assume the defendant in
23 North Carolina.

24 MR. HALLER: That's correct.

25 THE COURT: Didn't leave a return address

1 -- I'm sorry, not return address but a registered
2 agent.

3 MR. HALLER: The corporate defendant, that
4 is correct.

5 THE COURT: Right.

6 MR. HALLER: The individual defendant is a
7 27-year-old college student, currently is a college
8 student in North Carolina.

9 THE COURT: All right.

10 MR. HALLER: This is an action that was
11 brought in December of 2008. Service was attempted over
12 a period of time and finally accomplished on my clients,
13 Mr. Vanevery and Vanevery Enterprises, in July of 2009.
14 And then we were before you in March of 2010 on our
15 motion to dismiss, and here we are this morning on our
16 motion for reconsideration of that order. With due
17 respect to ---

18 THE COURT: Let me ask you one question,
19 Mr. Haller, before we get started.

20 MR. HALLER: Yes, sir.

21 THE COURT: Do you think there's a
22 different argument for the individual versus the
23 corporation?

24 MR. HALLER: I do, Your Honor.

25 THE COURT: Okay.

1 MR. HALLER: I do.

2 THE COURT: Because the order just sort of
3 lumped them together.

4 MR. HALLER: I noticed that, and I'll deal
5 with the individual first just as ---

6 THE COURT: That's Timothy R. Sebold?

7 MR. HALLER: No, Your Honor. I'm here for
8 Sandy Vanevery.

9 THE COURT: Sandy Vanevery, okay.

10 MR. HALLER: As I understand it, Mr. Sebold
11 answered in a timely fashion.

12 THE COURT: All right. So he was served.

13 MR. HALLER: He was served.

14 THE COURT: Okay. Now, you're talking
15 about Sandy Vanevery.

16 MR. HALLER: Yes, sir.

17 GTH, it's my understanding from Mr. Parrish
18 that GTH Enterprises and Mr. Sebold were served. They
19 appear *pro se*, and I do not represent their interest.

20 THE COURT: Okay.

21 MR. HALLER: Mr. Vanevery and Vanevery
22 Enterprises, it's our argument, were served out of time
23 and that the statute of limitations is gone on his
24 claims.

25 Under Rule 3(a) we believe that the

1 defendants were always amenable to suit to be served in
2 South Carolina under publication.

3 Let me just give Your Honor a little bit of
4 kind of a timeline that has been outlined by the
5 plaintiff.

6 The complaint alleges that no later than
7 April of 2006 there was a breach of a lease agreement,
8 and so by that time -- actually, April of 2006 is when
9 the defendants -- or the plaintiffs, rather, had been
10 able to mitigate their damages. They found a subtenant
11 for a lease that they claim has been breached. So they
12 know in April of 2006, whatever date that is, and
13 probably sometime prior to that because it was sometime
14 prior to April of 2006. The complaint is very vague as
15 to the issue of the date of when it is that the breach
16 occurred, but we know it's April 2006 is the only date
17 that we've got to go by.

18 The action is then filed on December the
19 8th of 2008.

20 THE COURT: December the 8th, 2008?

21 MR. HALLER: Yes, sir.

22 THE COURT: Was filed?

23 MR. HALLER: Yes, sir.

24 THE COURT: Okay.

25 MR. HALLER: According to the affidavit of

1 plaintiff's counsel, it first attempted service on
2 Mr. Vanevery and Vanevery Enterprises on December the
3 19th of 2008. Now, it's unclear from the affidavit when
4 that -- they attempt service first by certified mail.
5 The certified mail is returned as unclaimed. There's no
6 indication as to the date that this return is unclaimed.

7 They then attempt personal service through
8 a very well respected process server here in town, John
9 Gamble. Mr. Gamble then goes and attempts to serve two
10 locations. One is a condominium here in Mount Pleasant
11 and the second is a home in Hanahan in Berkeley County
12 which is the address of the resident agent for Vanevery
13 Enterprises.

14 It's unclear exactly when the process
15 server begins his work, except we know this based on the
16 affidavit of plaintiff's counsel: We know that
17 Mr. Gamble, the process server, meets up with
18 Mr. Vanevery's mother and Mr. Vanevery's mother tells
19 him that Mr. Vanevery has now moved to North Carolina;
20 and we know that as early as February the 3rd of 2009,
21 based on the affidavit of a process server in North
22 Carolina, in Mecklenburg County, North Carolina, that
23 they have then begun to serve -- attempt personal
24 service by process server in Mecklenburg County, North
25 Carolina and in fact the process server in Mecklenburg

1 County then attempts to serve Mr. Vanevery at four
2 different addresses in Mecklenburg County, North
3 Carolina.

4 At that point there appears to be a break
5 in time. There is no action that occurs between -- at
6 least from the record that has been put before Your
7 Honor, there is no record as between February the 14th
8 of 2009 and sometime in May. Sometime in May it looks
9 like the personal service of Mr. Gamble here in South
10 Carolina ensues.

11 And then in July they apparently get a
12 phone call from my client, or they find a phone call
13 from Mr. Vanevery, and they call him and they get his
14 address and that is how service is attempted.

15 At no time in that point do they attempt to
16 accomplish service by publication which under 15-9-710
17 we believe would have been proper service at that point
18 in time, because Mr. Vanevery is a student, we believe
19 he maintained his --- they allege in his complaint that
20 he maintained his residency in South Carolina, and he
21 owns property in Charleston County, South Carolina. So
22 he probably would have been amenable to service of
23 process by publication in Charleston County, probably
24 would have been amenable to service by process in
25 Mecklenburg County, North Carolina, all within the

1 time ---

2 THE COURT: All right. I thought you said
3 they tried at three locations in Mecklenburg County.

4 MR. HALLER: They tried at four.

5 THE COURT: Four locations, okay.

6 MR. HALLER: They could not find him.

7 THE COURT: All right.

8 MR. HALLER: That's correct.

9 THE COURT: Okay.

10 MR. HALLER: At that point -- and it's
11 clear that at least sometime between December the 19th
12 and February 3rd they claim to learn that Mr. Vanevery
13 was living in Mecklenburg County, North Carolina. They
14 made an attempt to find him by process server and they
15 are unable to find him by process server in North
16 Carolina. So by that, had a suitable affidavit been
17 presented, they could have then attempted service of
18 process by publication in, for example, the Charlotte
19 Observer, a newspaper of common use in Mecklenburg
20 County, North Carolina. They did not do that. And so
21 we believe, under the strict interpretations of Rule 3
22 and the code sections which go along with that, that the
23 time limitation expired.

24 Now, Your Honor, with due respect to -- and
25 just for some additional time information, 120 days

1 under Rule 3(a)(2) the complaint would have had to have
2 been filed and served within 120 days after filing which
3 would have been April the 9th, and service was not
4 accomplished until at least July the 2nd. And again,
5 it's unclear as to exactly when service was
6 accomplished, but sometime in July of 2009.

7 Your Honor's order, with due respect, seems
8 to take the position that the former law of South
9 Carolina as to open-ended tolling if a person leaves the
10 state remains to be the law in South Carolina. And with
11 due respect to Your Honor, that is no longer the law.
12 The law by a case called *Meyer vs. Paschal* actually
13 changed the interpretation of the tolling statute. And
14 in *Meyer* what the court held is ---

15 THE COURT: Have you got a copy of the
16 case?

17 MR. HALLER: I do, Your Honor. I do.

18 THE COURT: So you're of the opinion that
19 changes the *Tiralango vs. Balfry* and the *Hooper vs.*
20 *Ebenezer*?

21 MR. HALLER: Your Honor, actually, the
22 *Tiralango* matter that Your Honor cites in your opinion
23 is actually the next step in the *Meyer* cases. *Meyer*
24 first holds that if you can be served by process via our
25 long arm statute then tolling does not apply. And

1 clearly, the plaintiffs attempted via South Carolina's
2 long arm statute to serve Mr. Vanevery in North
3 Carolina. So that's the first thing.

4 THE COURT: What was the cause of action?
5 I don't remember.

6 MR. HALLER: It's a breach of -- purported
7 breach of a lease, lease agreement.

8 THE COURT: Okay.

9 MR. HALLER: So that's my ---

10 THE COURT: Breach of a lease?

11 MR. HALLER: Yes, sir.

12 THE COURT: All right.

13 MR. HALLER: And I think that's an
14 important -- because there is a factual aspect to ---

15 THE COURT: If it's a breach of a lease,
16 how would you handle the long arm statute?

17 MR. HALLER: Because the lease agreement
18 occurred here in South Carolina, so he's done business
19 in South Carolina.

20 THE COURT: Right.

21 MR. HALLER: But my understanding of the
22 long arm statute is if you've done business in South
23 Carolina we can go out and get you.

24 THE COURT: So basically your position is
25 they should have served by publication in North Carolina

1 under the long arm statute before the time the statute
2 ran?

3 MR. HALLER: That's correct, Your Honor.
4 That's correct.

5 THE COURT: Therefore, that wasn't done
6 and, therefore, you should be granted your summary
7 judgment?

8 MR. HALLER: That's correct.

9 THE COURT: Or your 12(b).

10 MR. HALLER: Yes, sir. But, you know,
11 Mr. Parrish has submitted an affidavit ---

12 THE COURT: Tell me how it is in your
13 opinion the *Meyer* case has changed the cases that were
14 cited in the order.

15 MR. HALLER: Actually, *Meyer* -- the
16 *Tiralango* case interprets *Meyer*.

17 THE COURT: Okay.

18 MR. HALLER: And what *Meyer* holds is that
19 -- and I'll just read the holding for Your Honor. "To
20 construe the tolling statute in the manner urged by the
21 plaintiff" -- which is open-ended tolling which,
22 granted, Your Honor, was the law of South Carolina for a
23 number of decades. "To construe the tolling statute in
24 the manner urged by the plaintiff would allow suits to
25 be postponed indefinitely, for no good purpose, and to

1 be brought in some cases at the virtually unlimited
2 pleasure of the plaintiff. This is highly prejudicial
3 to the out-of-state defendant. It would allow a
4 plaintiff to defer initiation of a suit until the
5 witnesses have disappeared or documentary evidence has
6 been lost, prejudices which could not logically have
7 been intended by our legislature."

8 *Tiralango* then says here's the test to
9 apply, and what *Tiralango* says is if the defendant -- or
10 if the plaintiff, rather, knew or could by reasonable
11 diligence have learned of the location of the defendant
12 during the applicable statute of limitations then the
13 tolling never applies.

14 And in *Tiralango*, the facts of the
15 situation was this: A New York resident gets into an
16 automobile accident with a Quebec resident in Myrtle
17 Beach -- only in Myrtle Beach would that happen -- and
18 the police report adequately puts the address of the
19 individual in the police report, of the defendant in the
20 police report. They wait until the last minute to try
21 and serve him, and they claimed because he lived out of
22 state, because he lived outside of South Carolina, that
23 there was -- the tolling was open-ended, that there was
24 no statute of limitations. And the court said no, at
25 all times you could have gotten the police report which

1 had the address on there.

2 Now, taking that same law and that same
3 analogy to this case, I'd say several things.

4 Number one, this is a lease case. And
5 under their theory of the case, at the moment in which
6 the lease was breached, the moment all of their --
7 everything that they came to know about this case then
8 became locked in. This isn't a case where you had to go
9 get an expert, had to wait for maximum medical
10 improvement, such as you might have in a personal injury
11 or malpractice action, Your Honor. This is a lease
12 case. So had they brought the suit not two and a half
13 years or almost three years up to the moment of the
14 statute of limitations, they would have been able to
15 find both Mr. Sebold and Mr. Vanevery immediately.
16 Instead, now life has gone on. And this is one of the
17 things that the supreme court has become concerned
18 about, is life goes on. Mr. Vanevery who's now --
19 again, is in his late twenties and has gone on to
20 medical school. He's going to become a physical
21 therapist. So he's gone on to North Carolina. That's
22 the first thing.

23 The second thing is that at all times
24 between sometime in late December of 2008 and February
25 of 2009 they came -- February 3rd, 2009, that's what the

1 record shows when the first attempt by a process server
2 in North Carolina to serve Mr. Vanevery in North
3 Carolina -- they came to learn that he was in North
4 Carolina. So they always knew his name, because it was
5 a lease agreement so his name is on the lease, and they
6 always knew his -- then they came to learn his location,
7 Mecklenburg County, North Carolina, if you take every
8 inference of that when that occurred.

9 THE COURT: Yeah, but they tried in
10 Mecklenburg and couldn't find him at four different
11 locations.

12 MR. HALLER: They tried by personal
13 service.

14 THE COURT: Right.

15 MR. HALLER: There are methods of service.

16 THE COURT: Well, did any of the cases
17 address your argument that if they don't do service by
18 publication, if they do go on the last known address,
19 that doesn't toll the statute unless they do the
20 publication? Any cases that address that issue?
21 Because that's sort of -- that's a different issue than
22 what's in these other cases.

23 MR. HALLER: Well, in the other cases --
24 no, sir. I have not found a case ---

25 THE COURT: Have you found any cases that

1 address the publication issue that you're bringing forth
2 to the Court today?

3 MR. HALLER: Well, as to the adequacy of
4 publication...

5 THE COURT: Right.

6 MR. HALLER: --- no.

7 THE COURT: Okay.

8 MR. HALLER: But I will take that a step
9 further ---

10 THE COURT: Okay.

11 MR. HALLER: --- to say that even having
12 not served him within the 120 days, that April 9th day,
13 from December the 8th when the action was filed to the
14 120 days which is April the 9th ---

15 THE COURT: When did the statute run, by
16 the way?

17 MR. HALLER: That, I can't make -- there's
18 nothing from the complaint that we get a definitive date
19 as to that. What the complaint says is ---

20 THE COURT: I believe you said the breach
21 occurred on April -- sometime in April of '06. So that
22 would run it to what?

23 MR. HALLER: April of '09.

24 THE COURT: April '09.

25 MR. HALLER: What the complaint alleges is

1 that the damages of rent damages that the plaintiff
2 claims are capped as of April '06.

3 THE COURT: Doesn't the 120 days run, in
4 the rule, where the statute is about to run and you
5 file, and you can file to prevent it and then you've got
6 120 days to file -- not -- in other words, let's say
7 they file a year -- the statute had two years to run,
8 then they file. Are you trying to tell the Court
9 they've got to serve him within 120 days? Because I
10 think the rule was covered on the situation where you
11 can file a complaint and you had the 120 days to serve
12 after the statute had run, is what my impression -- I
13 may be wrong. I haven't looked at it in awhile.

14 MR. HALLER: But what the plain language of
15 the rule is, for Your Honor's edification, is ---

16 THE COURT: Because, you know, it used to
17 be you didn't have that 120 days, you had to serve
18 before the statute ran, and the legislature came back
19 and said -- or the court came back and said we'll give
20 you 120 days actually after the statute has run.

21 MR. HALLER: What it says is: If not
22 served within the statute of limitations, actual service
23 must be accomplished not later than 120 days after
24 filing.

25 My initial impression of what the change --

1 the intent of the change was that. However, that's not
2 what it says. It says after filing. So when you count
3 the 120 days ---

4 THE COURT: But if you read back up in that
5 rule, isn't it related to filing a complaint?

6 MR. HALLER: A civil action is commenced
7 when the summons and complaint are filed with the clerk
8 of court if, subsection one, the summons and complaint
9 are served within the statute of limitations in any
10 manner prescribed by law -- now, that is the point of my
11 publication argument, they could have served him by
12 publication and fallen within 3(a) -- or if not served
13 within the statute of limitations, actual service must
14 be accomplished not later than 120 days after filing.
15 So I think ---

16 THE COURT: If not accomplished within the
17 statute of limitation time period.

18 MR. HALLER: That's right.

19 THE COURT: All right.

20 MR. HALLER: So if they can't get him -- I
21 suppose there's some benefit, Your Honor, to waiting to
22 the last minute under the rule.

23 THE COURT: Well, you get, what, four more
24 months.

25 MR. HALLER: That's right. If you're

1 getting real close, you wait till the next day.

2 THE COURT: Right, you get four more months
3 to look.

4 MR. HALLER: I think there is some benefit
5 to that.

6 But going back to the tolling, if you've
7 looked at the tolling law as it stands today and you
8 give them every benefit that they're entitled to, let's
9 say that they cannot after due diligence -- because the
10 record's clear, they didn't start to look for him until
11 December the 19th of 2008. So they didn't even try and
12 exercise due diligence until that time.

13 So if that's the day it starts, December
14 the 19th, that's giving them the benefit that on that
15 date they could not have found him, to February the 3rd
16 which is the first time that they attempt service of him
17 in Mecklenburg County, let's assume that between those
18 two poles, those two calendar dates, there is a toll.
19 That's 43 days. April 3rd -- April 9th plus 43 days
20 kind of takes us to I think May 25th, and they still
21 haven't gotten him served on May 25th.

22 At some point in time the defendants are
23 entitled to have the benefit of the statute of
24 limitations, and it's not -- and that's what the *Meyer*
25 case and the *Tiralango* case said, is that at some point

1 in time you cannot sit back and say, okay,
2 Mr. Out-of-State Resident, you're out of state so we get
3 to keep this going on and on and on forever, that you've
4 got an obligation to go and try and track this defendant
5 down. And they waited until the last minute on a claim
6 that didn't need to be developed ---

7 THE COURT: It wasn't to the last minute.
8 I mean, they filed it in February -- I'm sorry. You
9 said they filed it in December. So it was, what, three
10 or four months, four months or so, three and a half,
11 four months prior to the statute running? And that's
12 not -- the last minute's a week.

13 MR. HALLER: Well, Your Honor, my answer to
14 that, respectfully, is this. Again, this isn't a claim
15 that over a period of time -- it's not like an
16 automobile accident where over a period of time the
17 claim continues to develop in some way because you have
18 to -- there's maximum medical improvement, there is
19 what's the degree of your damage going to be, those
20 kinds of questions.

21 The complaint alleges, in and of itself, on
22 paragraph 13, that in April of 2006 -- assuming that
23 that's the statute of limitations they have, and it's
24 probably earlier than that, Your Honor, but in April of
25 2006 that's the last -- that's when they were able to

1 mitigate their damages on rent, and so they knew right
2 then everything that they claim was owed.

3 So that's what I think the courts are
4 trying to tell us, the supreme court's trying to tell us
5 right now, is that when you start to know you've got an
6 action you have three years to bring it, and when you
7 wait until the very end and you can't find the person,
8 that's -- at some point it becomes your own fault.

9 THE COURT: Okay.

10 MR. HALLER: Now, as to the corporate
11 defendant, Your Honor, I will say this. There is a case
12 that came out I think -- I don't remember the exact
13 date. The supreme court reversed the *Ebenezer* case.
14 And the *Ebenezer* case has held that there is equitable
15 tolling of a corporate defendant who fails to change
16 their registered agent. And I would bring one
17 particular line -- famous last words from a lawyer --
18 one line under that order to your attention, and it says
19 "under the unique circumstances of this case."

20 And I think the critical difference about
21 whether Your Honor should apply the court's equitable
22 rule authority to tolling the statute of limitations in
23 this manner versus what was done in *Ebenezer* is this --
24 and *Ebenezer* was a nursing home case, and the nursing
25 home continued to operate. It never ceased operation

1 during the entire time in which they were trying to
2 track down a -- track down the agent of service.
3 Vanevery Enterprises was created to operate a fitness
4 center.

5 THE COURT: But, I mean, did he dissolve
6 the corporation? I mean, the corporation still existed
7 unless he had dissolved it.

8 MR. HALLER: It didn't dissolve, Your
9 Honor. No, sir, it didn't dissolve, but it went belly
10 up.

11 THE COURT: Okay. Well, that happens a
12 lot.

13 MR. HALLER: It does. And the plaintiffs
14 knew that. That's why they're suing him for -- suing
15 him for a lease agreement, a breach of a lease.

16 THE COURT: Okay. Thank you so very much.

17 MR. HALLER: Thank you, Your Honor.

18 THE COURT: Mr. Parrish, let me hear you on
19 the issue about the publication issue, about should you
20 have used publication since you did have a last address
21 in Mecklenburg County prior to the statute running. And
22 I don't think any of these cases address that, and I
23 think there may be some merit in his argument on that
24 issue.

25 MR. PARRISH: Your Honor, I have ---

1 THE COURT: And I don't know the answer to
2 that, but...

3 MR. PARRISH: I have submitted -- the last
4 time we came over to argue this, these same issues were
5 presented. Mr. Haller's associate was here at the time
6 back in March. We went over all these, again, and it's
7 just been ---

8 THE COURT: Well, maybe he's more
9 persuasive this morning than the associate was, okay?

10 MR. PARRISH: Well, at the time I submitted
11 -- and I have some copies of my affidavit if you'd like
12 another copy ---

13 THE COURT: I've got a copy of it. Here is
14 the file and the affidavit. I've got your affidavit.

15 MR. PARRISH: And just kind of want to --
16 just remind or reiterate the fact that Mr. Vanevery,
17 he's 27 years old plus or minus, but he had a fairly
18 significant trust fund that allowed him to enter into a
19 commercial lease agreement and have the landlord pay
20 \$50-60,000 in commission costs and pay significant
21 up-fit costs to their contractors. The lender would --
22 actually would have a pocket on this lease. So he may
23 be 27 years old, but his financial statement that he
24 gave to the landlord is not reflective of a 27-year-old
25 college student.

1 Mr. Vanevery had a condominium in Mount
2 Pleasant which when we filed this complaint on December
3 8th we immediately served him by certified mail. About
4 two weeks later it came back unclaimed. At that point
5 in time we embarked on an odyssey to find Mr. Vanevery
6 by the process -- there were people living in the
7 condominium, but they'd never come to the door or they
8 were never home. The process server went over there
9 multiple times, never found anybody there.

10 We then went to the address he listed as a
11 registered agent which turns out it was his mother's
12 house and, as in the affidavit, his mother said he's in
13 North Carolina, but she refused to give us the telephone
14 number or a location.

15 I then spent a fair amount of time trying
16 to find Vaneverys in North Carolina. We found a couple.
17 It turns out those were not him.

18 We sent the process server back to the
19 condominium, and finally after multiple attempts a
20 tenant answered the door and said he's in North
21 Carolina, here is his cell phone, and then the process
22 server was able to track him down and get him to meet.
23 I still to this day don't know where he lives in North
24 Carolina. We had to -- he showed up and met the guy
25 once we eventually tracked him down on the cell phone.

1 A little interesting tidbit is while we
2 were doing all this Mr. Vanevery changed the address
3 from his condominium to -- his South Carolina address,
4 he flipped it over to a North Carolina P.O. Box. Maybe
5 it was just totally circumstantial, but it's kind of
6 interesting that he did that right during the middle of
7 knocking on his door trying to find him.

8 That said, to answer your question, we made
9 attempts to locate him and finally did. We served him
10 personally.

11 Rule 3 which ---

12 THE COURT: All you had to do was file an
13 affidavit with the court and say you made a diligent
14 effort to locate him, we want to publish by publication.
15 And that's done every day. You know that.

16 MR. PARRISH: I know that, but also I know
17 when I sign those I have to affirm under 15-9-710. It
18 says "after due diligence." I have to say I don't know
19 where this guy lives, we can't find him. Well, we found
20 out he lived in North Carolina and were in the process
21 of tracking him down, so I could not, you know, in good
22 faith and conscience say I don't have any idea where he
23 is.

24 We made a due diligent effort and we
25 finally found him. The statute says due diligence. We

1 did that. There's no indication that we delayed when we
2 were trying to do all this stuff. It took some time to
3 do it, but I made a due diligent effort and actually
4 found him which avoided the need to have to do an
5 affidavit by publication, which we know if that had been
6 published in the paper in South Carolina he never would
7 have seen it, then he'd be down here in court right now
8 saying y'all could have found me up in North Carolina.
9 So I'm kind of between a rock and a hard place if I do
10 it that way.

11 Under 15-3-30 he clearly left the state,
12 which tolled the statute. Mr. Haller handed up the
13 *Meyer-Paschal* case, and the very last part of that
14 opinion, if you look at the very -- the second paragraph
15 from the very end, about halfway, and it starts off, it
16 says "Therefore, we find the tolling statute
17 inapplicable..."

18 THE COURT: Let me see where you're
19 reading.

20 MR. PARRISH: The second paragraph from the
21 end.

22 THE COURT: "Therefore, we find....," okay.

23 MR. PARRISH: Yeah. Go down and the second
24 sentence says: "Our holding is limited to situations
25 similar to the instant case in which the name and

1 location of the defendant is known to the plaintiff."

2 In that case, they knew where the plaintiff
3 lived. You know, we did not know where the plaintiff
4 lived, and to this day I frankly don't know what his
5 actual address is. He was served I think at a
6 McDonald's or something like that.

7 THE COURT: Where?

8 MR. PARRISH: Wherever they served him, I
9 don't -- he wasn't served at a physical address.

10 THE COURT: Oh, all right.

11 MR. PARRISH: So I still don't know where
12 he lives to this day.

13 THE COURT: Okay.

14 MR. PARRISH: Your order that you issued
15 and the *Balfry* case, because I can never pronounce
16 *Tiralango*, the *Balfry* case ---

17 THE COURT: Yeah, it is a mouthful, isn't
18 it.

19 MR. PARRISH: Yes, sir. Well, that case,
20 *Balfry* cites *Meyer*. *Balfry* is the more recent case, and
21 the court in *Balfry* specifically said: "*Meyers* was
22 expressly limited, as follows: Our holding is limited
23 to situations similar to the instant case in which the
24 name and location of the defendant is known to the
25 plaintiff."

1 Mr. Vanevery or his side have not submitted
2 any affidavits. The only affidavit we submitted said it
3 wasn't known and we had difficulty finding him after due
4 diligent attempts to do so... So I can't come into court
5 and say I couldn't find him, because I found him and had
6 him served.

7 THE COURT: Well, let me ask you this.
8 Have either one of you looked out of state on the issue
9 of the publication? Are there any other states that
10 ruled on that point on tolling the statute, where you
11 have to make the effort to go through publication before
12 the statute's tolled?

13 MR. PARRISH: I haven't.

14 MR. HALLER: I have not, Your Honor.

15 THE COURT: Do you think you all could do
16 that?

17 MR. HALLER: I'll be glad to.

18 MR. PARRISH: Your Honor, I've pulled our
19 due diligence affidavit statute here, and it says "due
20 diligence" which is undefined. There's no specific time
21 limit on it.

22 THE COURT: I understand your argument that
23 you don't -- you personally, I mean, I think you did due
24 diligence, but the question in my mind is at that point
25 in time before the statute ran should you have gone to

1 publication, and I would like for you to look at some
2 other states to see if that issue has been addressed
3 with similar statutes such as ours.

4 MR. PARRISH: Your Honor, if I could also
5 add one more thing. The arguments seem to be -- kind of
6 go back and forth between the Rule 3 argument. Rule 3
7 has parts one -- Rule 3(a) subparagraph one and
8 subparagraph two, big importance, there's an "or"
9 between those two paragraphs.

10 THE COURT: Right.

11 MR. PARRISH: And it says: The summons and
12 complaint are served within the statute of
13 limitations -- which if he's out of state it's tolled.
14 It was served. Then it says "or" if not served within
15 the statute of limitations then you have 120 days.

16 THE COURT: But I think you've got 120 days
17 from the time the statute ran.

18 MR. PARRISH: Well, yes, sir. And that's
19 the old -- you used to be able to serve with the
20 sheriff ---

21 THE COURT: And I think that's the reason
22 they changed the rule.

23 MR. PARRISH: Because the sheriff didn't
24 like getting served with all those things. That used to
25 be the only way you do it. You deliver it to the

1 sheriff in the county where they reside, it's deemed
2 service as far as the tolling matter.

3 So we complied with the terms of the
4 statute. We made a due diligence effort and then
5 actually located him to give him actual notice versus
6 the fallacy of a notice by publication which is not the
7 preferred method to do so.

8 THE COURT: I understand, but still,
9 address that issue, okay?

10 MR. PARRISH: Yes, sir.

11 THE COURT: Do y'all want to just address
12 it by letter to me?

13 MR. PARRISH: That's fine.

14 THE COURT: Call it to my attention, care
15 of the Clerk of Court. And by the way, if you find any
16 case, attach it to your letter if you would, please.

17 MR. PARRISH: Yes, sir.

18 THE COURT: How much time do you need to do
19 that? Ten days?

20 MR. PARRISH: I can do it while it's fresh
21 on my mind. Would you prefer a written letter or an
22 email letter?

23 THE COURT: Either way, it doesn't matter.

24 MR. PARRISH: Whatever is easier for you.

25 THE COURT: Whatever is -- email is fine.

1 I mean, email's fine. If you find some law, attach the
2 case to the email and I'll -- or you can do it written,
3 however you want to do it.

4 MR. PARRISH: If you grant ten days, that
5 would be great because we're trying to figure out how to
6 make this go away.

7 THE COURT: Mr. Haller, does ten days suit
8 you?

9 MR. HALLER: Certainly. I'm going to do it
10 this afternoon probably.

11 THE COURT: Okay. All right, that's fine.
12 You can either email it or written -- it doesn't matter
13 to me, okay? And you may not find anything, and that's
14 fine, but at least I would like for you to look.

15 MR. HALLER: I do know that in both *Meyer*
16 and the *Tiralango* case the courts dug deep into what
17 other jurisdictions were doing. So I think we should
18 start...

19 THE COURT: Okay. All right. Thank y'all
20 very much.

21 (Whereupon, the hearing is concluded.)
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PROCEEDINGS

THE COURT: Pinepoint Associates and Van Every Enterprises. Let's see it's 6947. I want you to tell me about it rather than me sit here and thumb through the file. Whose motion?

MR. PARRISH: Your Honor, David Parrish here for the plaintiff. We're doing cross-motions and I'll give you the 30 second background.

This is a commercial landlord tenant action. This is actually the third hearing we've had in this case over the years. We were over here twice in front of you on the Van Every's motion. But we served him. We filed this on December 8, 2008 is when it was clocked in.

He moved to North Carolina and we spent some time chasing him around North Carolina. And Mr. Van Every's counsel raised the issue that we were past the 120 day requirement under Rule 3 for service and we came over here. And I put a copy of the order on your desk right there. This is your order and you've heard it. You ruled that Mr. Van Every was out of state and that was told that the 120 day requirement did not apply to him. We served him in July -- we clocked it in on 12/8/2008 and served him in July 2009. And you ruled that the 120 day ---

THE COURT: --- okay, I remember now.

1 MR. PARRISH: And we came back over to argue that
2 issue again and you did a motion -- or an order on the
3 motion to reconsider, which is also up there and again
4 ruled on that same issue.

5 Mr. Van Every I think he is 27 -- 25 or 27 years
6 old; fairly young guy. He with his company Van Every
7 Enterprises contracted with the landlord, Pinepoint
8 Associates, to rent a fairly large space in a commercial
9 shopping center.

10 Mr. Van Every was going to open a fitness center
11 there. It's an entity called Lifequest, which had at the
12 time a bunch of locations in the Charleston area and I
13 think he was going to do a franchise with Lifequest. So
14 he signed the lease agreement, this commercial lease
15 agreement where Van Every Enterprises, Mr. Van Every's
16 company, is the tenant. And Mr. Van Every personally
17 guaranteed the lease.

18 It was also personally guaranteed by G-T-H
19 Enterprises, which is one of the defendants. G-T-H is
20 actually the entity that owns the Lifequest name, and it
21 was signed by Mr. Tim Sebold who was the owner of the
22 Lifequest chain. They all three of those entities, Mr.
23 Van Every, G-T-H, and Mr. Sebold personally guaranteed
24 the lease. Construction commenced over there. They took
25 a bare box building that had been a grocery store, the

1 bare walls -- a metal box and started devising walls up
2 and so forth. And I have on the top of your desk -- or
3 the ledge it has the sheet on the front of it that has
4 this itemization and damages that shows the landlord's
5 total -- damages in the case on top.

6 And what happened is this lease was actually
7 executed in June of 2005. And then on 12-16-05 Bill
8 Swope there was a fax from him; and this is probably one
9 of the most important documents, shoots the landlord a
10 fax and says Mr. Van Every has changed his mind. He no
11 longer wants to be in the building. Please release the
12 premises. And right behind that the landlord's letter
13 says you know you can't do that. It's like when you sign
14 a mortgage with your mortgage company you can't call them
15 up and say I changed my mind.

16 Also in the stack is a copy of the landlord's
17 representative, Mr. Leonard Way who indicated that for a
18 period of time he met and dealt with Sandy Van Every and
19 with Tim Sebold in an effort to sign the lease. He said
20 Mr. Van Every if you don't want to be in there we will
21 assign it to Mr. Sebold but y'all all have to agree. And
22 Mr. Way said in his deposition that we never got the
23 signed returned lease. We sent it; they never sent it
24 back to us. And if you go down and look farther in the
25 stack I got involved and on March 17th I wrote them a

1 letter saying your first rent payment was due on March
2 15, 2006. That's the first time the rent became due.
3 They took possession in June of '05 but they had a build-
4 out period and their first rent payment wasn't due until
5 March of 2006.

6 And my letter tells them that you know you missed a
7 rent payment but we need to have a meeting to talk about
8 this with you and your counsel. In fact my letter even
9 mentions that you never sent back the assignment. We
10 sent it to Mr. Sebold and Mr. Van Every and said you
11 missed the rent payment, you're still in the premises,
12 you haven't sent the assignment back, and we want to meet
13 and we ---

14 THE COURT: --- they were actually in the premises
15 at that time?

16 MR. PARRISH: Yes sir, they were still in there,
17 hadn't surrendered the premises. I found out later on
18 that Mr. Sebold and Mr. Van Every ---

19 THE COURT: --- when did they finally surrender the
20 premises?

21 MR. PARRISH: I did have to issue notice of default
22 to them and that's in the letter in there further and
23 that default notice says we're going to meet in my
24 office. It was supposed to be set in April but because
25 of Mr. Van Every's attorney, not the same attorney here

1 today by the way, kept having scheduling conflicts and we
2 finally met in my office in late April or the early part
3 of May of 2006. And after that meeting I sent them a
4 surrender agreement. I personally prepared it and said
5 here is a surrender agreement, sign it, and give us the
6 premises back so we can start trying to lease it.

7 And the very last fax I got or the last stack in
8 there is a fax sheet from Mr. Swope who said he's refers
9 it to the lease agreement, but was actually talking about
10 the surrender agreement, he says I am going to look at it
11 with my client over the weekend and get back to you. He
12 never sent it back and I filed the eviction action to get
13 them out of the premises on May or June; ever how long it
14 took that 30 day cycle to run.

15 So where we were is on 12/16/2005 Van Every's
16 attorney says I don't want to do the lease. The landlord
17 deals with them while they are still in the premises and
18 never does get an assignment sent back by Mr. Van Every
19 or by Mr. Sebold. They don't pay the rent, we default
20 them.

21 We meet with them; they met in my office with me and
22 Mr. Way, the landlord representative. Mr. Sebold and Mr.
23 Van Every show up with their two counsels; different
24 counsel, again from what is here today. I send them
25 surrender agreements and said if you want us to release

1 the premises you've got to let us have the premises back.
2 If you don't sign this we're going to evict you. I sent
3 it to them; neither one of them returned it and we
4 finally evicted them out and we got them out around June
5 of 2006.

6 THE COURT: You got them out in June of 2006?

7 MR. PARRISH: Yes, sir. And we had to evict them
8 out after they never would sign it and they never would
9 surrender the premises. Mr. Haller, who then -- now
10 represents Mr. Van Every who was not involved at the
11 time, I think have an agreement that the facts in this
12 case kind of are what they are. They are not in dispute.
13 What I just told you is what happened as is reflected in
14 the correspondence.

15 I think the only issue we have there is some legal
16 arguments that Mr. Haller wants to make. But the damages
17 that are shown, Mr. Way's exhibit at the top, they total
18 550,675 dollars. Of that includes past due rents and
19 charges. It also includes some commissions we paid to
20 their leasing agents.

21 We also had to pay for the tenant, Mr. Van Every
22 Enterprises' upfits. He didn't pay his architect,
23 Palmetto Construction wasn't billed. I personally hand
24 delivered an 80,000 dollar check to Palmetto Construction
25 on Friday afternoon because they put a mechanic's lien on

1 the property. The landlord was able to release the
2 premises. We got a new tenant in there which capped
3 these damages off. They stopped at 550,675. And I
4 don't think there is a dispute over those numbers. They
5 may argue they are not liable for the numbers for a legal
6 reason but I don't think there is a dispute on that.

7 THE COURT: There is no dispute on the figure
8 550,675?

9 MR. HALLER: Mr. Parrish's statement that there is
10 no dispute?

11 THE COURT: As to the amount?

12 MR. HALLER: I don't think anybody can -- who can
13 testify to those -- that the addition and subtraction of
14 those numbers is incorrect.

15 THE COURT: That's okay. That's fine.

16 MR. PARRISH: And so where we are is I understand
17 that Mr. Van Every has two arguments against this.
18 Number one is trying to say he wasn't served within the
19 three years statute of limitations.

20 Well if you give them the best case scenario that
21 Bill Swope, and his fax sheet is on top, 12/16/05 started
22 the statute of limitations and we clocked in on 12/08;
23 more than -- less than three years before that date. And
24 then we made some efforts to serve him that you issued
25 two orders on that issue. So even if that is still their

1 best case scenario we're still within the three years
2 statute of limitations. More importantly at that point
3 in time they weren't in breach of the lease. On 12/15 --
4 16/05, in fact the landlord's letter behind it says you
5 can't go away; they are still in the premises. Their
6 rent is not due until March of 2006.

7 They didn't breach their lease until March of 2006
8 when they did not make their first rent payment. Then
9 after that we had the meetings in default. So I would
10 respectfully argue that any statute of limitations didn't
11 run at least until they missed the first rent payment.
12 We didn't have a right to kick them out of there.

13 And they didn't ever return back and say here is the
14 lease back, here are the keys back. Mr. Van Every didn't
15 turn over possession of the premises. Neither he nor his
16 attorney ever gave back the surrender. So they are still
17 in the premises and they don't -- they are not late on
18 the lease until they missed their first rent payment.

19 So I think respectfully they were clearly served
20 within this three year statute of limitations whether you
21 go by the 12/16/05 or the March date or the date they
22 kick him out of the premises. I understand that the
23 other argument that Mr. Van Every contends is that okay
24 even if you served me in the three year statute of
25 limitations I shouldn't be liable for any of the accrued

1 damages. And I understand his argument is based on the
2 theory that when Mr. Swope sent this letter over on
3 12/16/05 it absolved me of all liability. Unfortunately,
4 it doesn't work that way. Mr. Van Every's company was
5 the tenant. Mr. Van Every was the sole owner of the
6 tenant Van Every Enterprises and he was a personal
7 guarantor on the lease.

8 I frankly wish his argument would work that way
9 because I made the mistake -- my wife and I bought a
10 piece of property a couple of years ago when it was a
11 good idea, and we can't sell it; we're stuck with it.
12 I'd love to call my bank up and say bank, you know what
13 I've changed my mind, you need to take it back. They'll
14 do that but they will come after me for the balance on
15 it.

16 So I don't think under the -- the facts, the
17 undisputed facts, that legally he can't just say I'm
18 going to walk away and wash his hands of the lease that
19 his company is the tenant and he personally guaranteed.
20 And number two he especially can't do that when after his
21 attorney sent that letter they never did assign the lease
22 over, they didn't return the assignment, they didn't
23 surrender the property. We had to actually evict the
24 tenant out of the premises through the Magistrate's
25 Court, which I personally signed the paperwork. So even

1 if the law was, and I would respectfully suggest it is
2 not, that you can just say hey, I'll hold my hands up and
3 undo the lease unilaterally. Even if that was the law,
4 but it's not, he never surrendered the premises back. He
5 had counsel and didn't return the documents and we had to
6 evict him out.

7 So under those circumstances I think both of the
8 arguments should fail as a matter of law. And like I
9 said we're not arguing facts, what we just said happened,
10 happened; there are legal ramifications to it. And Mr.
11 Haller and I talked about this before we came over here
12 because if we try this case what do we put on the witness
13 stand.

14 I put in the letters and they will all say the exact
15 same thing I just said. Mr. Van Every put in an
16 affidavit and the only thing he says is I live in North
17 Carolina and I told them I didn't want to be responsible
18 for my lease anymore.

19 So that's kind of the facts where we are today and I
20 believe under those circumstances Van Every Enterprises
21 and the three guarantors all breached the lease and they
22 breached their personal guarantees. And we are asking
23 for the sums owed up and until the time we were able to
24 mitigate our damages by releasing the premises to a
25 different entity. And as to Mr. Sebold and G-T-H

1 Enterprises they put in an answer, in fact they put a pro
2 se answer in for his corporation. Mr. Haller was kind
3 enough to serve him with notice of this hearing. They
4 haven't appeared. Mr. Sebold has not shown up at
5 anything. And frankly he left town with a massive amount
6 in judgments chasing him. He has shown no interest
7 whatsoever to be here and he got noticed today; he failed
8 to appear. So unless you have any questions that is what
9 the case is about and what my position is as a matter of
10 law.

11 THE COURT: Okay. Let me read Mr. Van Every's
12 affidavit real quick.

13 MR. HALLER: Thank you, Your Honor.

14 [Whereupon, the court reviews documents]

15 THE COURT: I'll be glad to hear from you.

16 MR. HALLER: Thank you, Your Honor. May it please
17 the court? Your Honor, I'd like to build on some of what
18 Mr. Parrish said but there are a couple of inferences
19 that I don't agree with.

20 But let's go back to this what Mr. Parrish
21 characterizes as the most important document, which is
22 this fax that Mr. Swope sent on behalf of Mr. Van Every.
23 And he says on December 16, 2005 Mr. Van Every has
24 invested me with the unfortunate task of advising you
25 that the build-out of the above referenced premises will

1 not go forward. In addition please accept this as formal
2 notice of his intent to rescind the lease agreement,
3 which is guaranteed for this site. That's December 16th,
4 2005. If you read the lease and you read the complaint
5 compared to the plaintiff says there is one tenant,
6 that's Van Every Enterprises, and there are three
7 guarantors; that's Mr. Van Every individually, Mr. Sebold
8 individually, and G-T-H Corporation, Inc. Those are the
9 three guarantors.

10 After receiving this as Mr. Parrish and Mr. Way, his
11 client, Mr. Parrish's client, writes and says you can't
12 do that but if you want to assign we'll agree to an
13 assignment and you have that right under your lease
14 agreement. Within a few weeks -- build-out of the site
15 begins. Not by the tenant under the lease agreement, but
16 by a different company altogether.

17 G-T-H Corporation signs a contract, which we
18 obtained from the business records of Pinepoint that is
19 for the build-out. And the amount of the build-out is
20 going to be in round numbers 223,000 dollars. So who does
21 the build-out? Not the tenant, but a third party comes
22 in and begins the build-out of the building. So here's
23 what you have Your Honor. You've got the tenant saying
24 I'm not coming in. I'm not going to do the build-out and
25 I'm not going to abide by the terms of the least. And

1 you've got the landlord at that point saying if you want
2 to assign the lease you can assign it. And then you've
3 got the third party who comes in and that third party
4 begins doing the work for the build-out, which is what is
5 anticipated.

6 Your Honor, we believe that is an assignment. But
7 what has happened is G-T-H Corporation has now undertaken
8 all responsibility under the terms of the lease with the
9 knowledge and approval of the landlord. And an
10 assignment, an oral assignment, what Mr. Parrish and the
11 plaintiff are banking on is that there is no written and
12 executed assignment. And that's correct; I haven't seen
13 one. And I don't know that one exists.

14 However, the parties to this new assignment, that
15 being G-T-H and Pinepoint clearly are operating because
16 Mr. Van Every has nothing to do with the build-out and
17 the contract which Your Honor is -- on the package that I
18 have prepared for Your Honor is exhibit number 5. The
19 contract for the build-out is to G-T-H.

20 And in fact when G-T-H doesn't perform under the
21 contract with the contractor it's to G-T-H that they ask
22 for payment of the money. And who do they work with
23 directly according to Mr. Way's testimony? If you look
24 on page 17 lines 12 through 16.

25 So Mr. Sebold is the one who had all the plans, to

1 the best of your knowledge made all the plans to do the
2 upfit, what it would look like, obtaining contractors?

3 Answer, yes.

4 So as of whatever date they began doing the
5 construction, which is clearly after the time in which
6 Mr. Van Every and Van Every Enterprises indicated they
7 were no longer going to abide by the terms of the lease
8 Pinepoint goes and finds somebody else. And they need to
9 do it by acquiescence, which is that they have agreed to
10 a verbal assignment of the contract with G-T-H as of that
11 time.

12 Or G-T-H has come in and trespassed, which under
13 statute, and its 27-35-40, they are allowed to come in
14 and say -- if an individual comes in and trespasses on
15 property and begins to use it the landlord can either go
16 through trespass, which they've not done, or go through
17 and obtain a lease owner.

18 And I'd also call Your Honor's attention to the case
19 of -- and I have a copy of this case for you and I'll
20 hand it up in just a second. It's Diminich v 2001
21 Enterprises, Inc., which is 292 S.C 141, 355 S.E.2d 275,
22 which holds that when there is an acceptance -- when
23 there is an exchange of consideration between two parties
24 you don't have to have a written assignment for a lease.
25 And we would contend that the upfit, which under -- which

1 Mr. Way testifies that the landlord is responsible for
2 262,000 dollars worth of upfit that when the upfit --
3 when G-T-H goes out and puts 80 some odd thousand dollars
4 of upfit into that building there is now an exchange and
5 consideration that the lease is assigned from Van Every
6 Enterprises, Inc. to G-T-H Corporation, and that the
7 lease is now between G-T-H and Pinepoint. And Van Every
8 is out of the picture. And if Your Honor please, I will
9 approach with a copy of this case.

10 THE COURT: What's the date you allege the oral
11 assignment? What's the date that this occurred?

12 MR. HALLER: Your Honor, if I could look?

13 THE COURT: According to the affidavit, your
14 client's affidavit, he says he told Pinepoint sometime in
15 December '05 that he wasn't going to comply with the
16 lease.

17 MR. HALLER: That's correct, Your Honor.

18 THE COURT: And the complaint was filed on December
19 the 8th, 2008.

20 MR. PARRISH: That's correct.

21 THE COURT: There's no date. It just says sometime
22 in December.

23 MR. HALLER: I would refer Your Honor to Mr.
24 Swope's letter of December 16th, 2005.

25 THE COURT: December the 16th?

1 MR. HALLER: Yes, sir.

2 THE COURT: Okay.

3 MR. HALLER: That's the date in which Mr. Van Every
4 informs the plaintiff we're not going to abide by the
5 lease. We're not going to the upfit.

6 THE COURT: All right. When do you allege that
7 the oral lease took place?

8 MR. HALLER: Whatever the -- this is a ---

9 THE COURT: --- or oral assignment I should say;
10 excuse me.

11 MR. HALLER: Sometime in 2000 -- early 2006.

12 THE COURT: Well, that's not clear enough; early
13 2006. That could be January, February, March.

14 MR. HALLER: Well, this is -- the contracts that we
15 put in is ---

16 THE COURT: --- my question is even if your theory
17 is correct and I accept your theory at some point in time
18 until that assignment was made your clients would still
19 owe some rent.

20 MR. HALLER: Except the lease is -- has a rent free
21 period. I think that's a fact that both of us had left
22 out.

23 THE COURT: Okay.

24 MR. HALLER: There's a rent free period. Rent does
25 not begin to run ---

1 THE COURT: --- until March of '06?
2 MR. HALLER: March 15th under the lease is the first
3 day rent is due.
4 THE COURT: Oh, I see. Rent free because of
5 construction and the upgrade?
6 MR. HALLER: Yes, sir.
7 THE COURT: Okay.
8 MR. HALLER: So whatever the parties ---
9 THE COURT: --- irrespective it occurred before
10 March, huh?
11 MR. HALLER: That's correct.
12 THE COURT: The assignment from your position?
13 MR. HALLER: If somebody else is in it it's
14 somebody else's responsibility.
15 THE COURT: Okay. Anything else you want to ---
16 MR. HALLER: Your Honor, we'd also -- I know Your
17 Honor has already ruled on our statute of limitation
18 request.
19 THE COURT: Right. I think I've ruled on that
20 twice.
21 MR. HALLER: You have, Your Honor. I would only
22 bring this one new fact to your attention.
23 THE COURT: Yes, sir.
24 MR. HALLER: That is that clearly on December 16th,
25 2005 the plaintiff knew or could have reasonably and

1 diligently determined that Van Every and Van Every
2 Enterprises were no longer going to abide by the terms of
3 the lease. And we believe clearly that's the date on
4 which the statute of limitations begins to run.

5 Our interpretation of Rule 3 is that you get 120
6 days after filing to serve your complaint, which I put a
7 calendar into the record to show Your Honor the date that
8 it is; that is sometime in April. Service wasn't done
9 until sometime in July. If -- and the way Your Honor
10 interpreted the statute within the rule was it was 120
11 days after the termination of the statute of limitations,
12 which in that case would be December 16th. So the first
13 day that they had to file was either the 16th or 17th. And
14 they still then have 120 days from that point.

15 So the statute of limitations lapsed sometime in
16 April of 2009. During which time they never performed --
17 they never accomplished service. And going back to the
18 argument I made before at least in February of 2009 they
19 knew my client was in Mecklenburg County. They attempted
20 four times to serve him personally in Mecklenburg County
21 and they were unable to do so. At that point in time
22 under the case of Meyer v Paschal, which I have
23 referenced in previous arguments, the law is if they can
24 be served personally in another jurisdiction through a
25 long-arm statute then they can be served by publication

1 through the long-arm statute and that would -- service.
2 Our argument is that he had -- the plaintiff knew by
3 reasonable diligence at that point in time at least by
4 February where he was and who he was and could have
5 served him by publication and failed to do so. And when
6 April came and went after the 120 days the statute of
7 limitations was gone. Thank you, Your Honor.

8 THE COURT: Okay thank you. Anything else? Yes,
9 sir.

10 MR. PARRISH: Your Honor, I'll be brief. You
11 already ruled on the issue of your order and your order
12 denying the order of motion to reconsider both addressed
13 Meyer v Paschal -- on that contested issue again -- we
14 beat that pretty hard. What I would is this oral
15 assignment defense. Mr. Swope's fax is dated 12/16/05
16 and said he is not going forward.

17 If you look at the second document, kind of
18 important now, December 19th 2005 response was from the
19 landlord, which was the Beach Company, the very last
20 paragraph in that ---

21 THE COURT: --- tell me where you are looking?

22 MR. PARRISH: December 19, 2006 letter. It's a
23 Beach Company letter on top and it's the second or third
24 document.

25 THE COURT: Is it after the depositions?

1 MR. PARRISH: No, sir. It will be up here at the
2 top. It's the third document and it looks like this
3 [indicates].

4 THE COURT: The third document?

5 MR. PARRISH: Yes, sir.

6 THE COURT: I'll find it. -- the Beach Company?

7 MR. PARRISH: Yes, sir. The Beach Company December
8 19th, 2005.

9 THE COURT: Okay.

10 MR. PARRISH: This is the landlord responding to
11 Mr. Swope's we don't want the lease anymore letter. The
12 very last paragraph says -- let me back up. The letter
13 says you can't do what you're trying to do; you're still
14 responsible.

15 But the last paragraph says your client may assign
16 the lease and divide the lease -- and this is the
17 important part -- with the landlord's consent. And
18 please understand that all the guarantors must be in
19 agreement with such an assignment..

20 Well, all the defendants on the case caption; Mr.
21 Sebold, Mr. Van Every, and Mr. Sebold's company, G-T-H
22 Enterprises were all the guarantors. And it's undisputed
23 that the landlord sent an assignment to Mr. Sebold and
24 Mr. Van Every and never got it back. In fact Mr. Van
25 Every's affidavit that you read a moment ago paragraph 4,

1 bottom of the first page, he says the landlord, he said
2 Pinepoint, the landlord, sent me an assignment. He
3 doesn't say he ever signed the documents; he did not. In
4 fact you can tell from my -- that last letter I mentioned
5 earlier from Mr. Swope in May of 2006 Mr. Swope said I
6 will look at your surrender agreement and get back to you
7 and he never did.

8 So in order to have an oral assignment you have to
9 have an offer of acceptance and consideration; it's a
10 form of a contract. We have no consideration. The
11 landlord offered to do it; they never responded to it.
12 And the only consideration that has been made is by the
13 landlord who paid 262,000 in tenant upfits. They have
14 never collected a dime of rent from anybody; the original
15 tenant or the alleged oral assignee.

16 But what happened is this letter came in in March.
17 There was no construction going on -- I'm sorry the
18 letter came in December. We want out of the lease. You
19 can't get out of the lease. We'll assign it and all
20 agree. And there was some back and forth between the
21 landlord and the individual defendants and he never got
22 an assignment. And then in May -- excuse me, March 15th
23 the rent came due. Nobody had paid any rent. The
24 guarantors hadn't paid the rent and the tenant hadn't
25 paid the rent. The building was not finished. I may

1 have forgotten to mention that part. This building was
2 left -- when we finally evicted them out they had left a
3 half or a third finished building, had some dry wall up
4 and some steel studs; the place was in a mess. A new
5 tenant we found had to come and finish it ---

6 THE COURT: --- what was G-T-H's involvement in
7 this? They were just supposed to do the work? Why were
8 they a guarantor?

9 MR. PARRISH: G-T-H was actually Mr. Sebold was the
10 Lifequest. They have big gyms all over town. He
11 probably had 8 locations plus or minus. G-T-H was the
12 Lifequest entity and Mr. Van Every this was going to be
13 his first franchise. He and Mr. Sebold were business
14 partners. Van Every apparently gave Mr. Sebold a bunch
15 of money and invested in his business and they were
16 business partners.

17 And what we didn't know was going on until after the
18 fact is around the time these letters were back and forth
19 Mr. Van Every and Mr. Sebold were suing each other and
20 claiming fraud and breach of fiduciary duties. But the
21 two of them were business partners. They were looking to
22 -- they were going to open this next Lifequest building
23 and operate it together. Sebold was going to be the day
24 manager; his entity. I'm sorry, Van Every was going to
25 be the day to day manager. Van Every was actually the

1 tenant and Sebold was the business partner and ---

2 THE COURT: --- G-T-H hasn't paid any rent either?

3 MR. PARRISH: Nobody paid any rent. We never
4 collected -- all we did was pay a bunch of money to get
5 half finished upfits. We've got a mechanic's lien on the
6 building. We've got the architect that didn't get paid
7 and we never collected one penny of rent and got stuck
8 with a half empty building that has a mechanic's lien.

9 THE COURT: Okay. Anything very briefly on
10 rebuttal -- or comments?

11 MR. HALLER: If they had -- if they knew that Van
12 Every wasn't going to pay the rent in December. They
13 knew Van Every wasn't -- Van Every is the tenant. They
14 knew that the tenant wasn't going to do any upfit. And
15 what did they do? They let some third party to the lease
16 in to put in all this stuff; to do the upfit.

17 And then they've asked Your Honor to access 200,000
18 dollars against Van Every who says I'm not going to be a
19 party to any upfit. They put them in. At that point
20 that is a new agreement. Whether you call it an
21 assignment, whether you call it a new lease on a month to
22 month tenancy; whatever it is, somebody who is not the
23 tenant to the agreement that they are suing under is in
24 there making -- is responsible for a mechanic's lien
25 being put on the property. And what they are trying to

1 do is saddle my client for somebody else's actions. And
2 what my client told them months before they did all this
3 don't hold me accountable. That's our argument, Your
4 Honor.

5 THE COURT: Okay. Thank y'all very much. Give me
6 a chance to look at this and read the cases and I'll give
7 you an opinion hopefully shortly.

8 MR. PARRISH: Thank you, Your Honor.

9 MR. HALLER: Thank you, Your Honor.

10 THE COURT: Thank you.

11 *****END OF TRANSCRIPT OF RECORD*****
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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
-----)

IN THE COURT OF
COMMON PLEAS

ORIGINAL

PINEPONT ASSOCIATES LP,)
 .PLAINTIFF)
 vs.)
)
VANEVERY ENTERPRISES, ET AL)
 DEFENDANT)
-----)

TRANSCRIPT OF RECORD

NOVEMBER 26, 2012
CHARLESTON, SC

B E F O R E:

THE HONORABLE J.C. NICHOLSON, JR.

A P P E A R A N C E S:

DAVID J. PARRISH, ESQUIRE
ATTORNEY FOR PLAINTIFF

DAVID K. HALLER, ESQUIRE
ATTORNEY FOR DEFENDANT

SHARON D. JONES,
OFFICIAL COURT REPORTER

P R O C E E D I N G S

1 THE COURT: All right. Mr. Haller.

2 MR. HALLER: Thank you, Your Honor.

3 THE COURT: You're saying that -- you're raising
4 the issue on the statute of limitations again, is that
5 correct?
6

7 MR. HALLER: Yes, sir.

8 THE COURT: And that was -- we heard it before, we
9 heard it at trial and we're going to hear it again?

10 MR. HALLER: Well, Your Honor, since that time --

11 THE COURT: Anything different? I mean, if I
12 remember correctly, he was out of state and they
13 couldn't locate him?

14 MR. HALLER: That -- that's was -- well, that was
15 the position that they took. And at the sake of
16 beating a dead horse and testing Your Honor's patience,
17 since that, if you remember our position at the time
18 was that Rule 3 (a) (b), which is the so-called 120 day
19 --

20 THE COURT: 120 days, right.

21 MR. HALLER: Foreclosed the statute of limitations
22 permanently as to the claims of the Plaintiff, because
23 a suit was brought on December 8, 2009 -- excuse me --
24 2008, December 8th --

25 THE COURT: They had filed it and there is no

1 question that they didn't serve it in the 120 days?

2 MR. HALLER: That's correct, Your Honor. And
3 since that time, since we were before Your Honor, the
4 Supreme Court has clarified the 120 days in a case
5 called Mims v. Babcock.

6 And the Mims case, which I have copy for Your
7 Honor if you would like, says it's 120 days from the
8 filing to the -- as long -- any time you go beyond the
9 statute of limitations, that's when the 120 day rule
10 applies. So if you file on the 119th day before the
11 statute of limitations, and you get to day 121, and you
12 still haven't served the Defendant, you're out of luck.
13 The statute has passed.

14 If you file on day 364, at the end of the
15 statute of limitations, you bought yourself another 119
16 days to extend the statute of limitations, which is the
17 application of the Rule. And based on that, because
18 the claim here was filed in December of 2008 --

19 THE COURT: It was filed when now?

20 MR. HALLER: December 8, 2008 is the date the
21 Complaint was filed.

22 THE COURT: December 8, 2008 is when the Complaint
23 was filed, right?

24 MR. HALLER: That's correct, Your Honor. Your
25 Honor's order --

1 THE COURT: When was he finally served, because I
2 haven't read those orders. Those are the previous
3 orders?

4 MR. HALLER: Yes, sir. He was -- he was served,
5 according to the affidavit of service that's in -- in
6 the file, July 14, 2009.

7 THE COURT: Okay.

8 MR. HALLER: And the statute of limitations -- in
9 Your Honor's order, the judgment in this case,
10 specifically references four different dates of when
11 the Defendant -- or the Plaintiff was taking actions
12 based on nonperformance by -- by the Defendants. The
13 last of those is May 12, 2006 when they filed.

14 THE COURT: May 12, 2006 was the last action,
15 right?

16 MR. HALLER: That's -- that's -- that's the day
17 they filed an action to evict in the Magistrate's
18 Court.

19 THE COURT: For eviction. Okay.

20 MR. HALLER: Giving them every benefit of the
21 doubt as to when the statute of limitations would
22 begin, it would be just -- May the 12th, 2006. The
23 120th day after filing is April 8, 2009.

24 THE COURT: April 8, 2009?

25 MR. HALLER: Yes, sir. And they -- they served

1 July 14, 2009.

2 THE COURT: So you're saying giving them the
3 benefit of doubt, the statute ran on April 8, 2009,
4 they served it on 12/8/08, is that correct?

5 MR. HALLER: 7/14/08 --

6 THE COURT: I'm sorry. They filed it on 12/8 and
7 served it in July '09?

8 MR. HALLER: That's right.

9 THE COURT: Okay.

10 MR. HALLER: And the statute -- and under the
11 application of the Mims case, we believe the statute of
12 limitations is gone, we would ask you to reconsider
13 your --

14 THE COURT: Okay. Do you have a copy of that
15 case?

16 MR. HALLER: Your Honor, I've got two different
17 things for you, if you would like a copy of your
18 judgment -- I didn't know if you had that in front of
19 you.

20 THE COURT: Well, I have got a copy of the final
21 order that I read. I did not read the previous orders
22 on the -- on the issue of -- of what we're talking
23 about.

24 MR. PARRISH: Your Honor, I have a copy of those
25 two orders if you would like me to submit those.

1 THE COURT: I'll listen to you in just a second;
2 okay?

3 MR. PARRISH: Okay.

4 THE COURT: Okay.

5 MR. HALLER: That's our argument -- we have a
6 couple of other matters that we made in our motion.

7 THE COURT: I guess I need to read those other
8 orders earlier to refresh my memory, because I don't
9 remember off the top -- it was an order denying -- the
10 Motion to Dismiss, and the order -- the order is dated,
11 it looks like March 30th and this one is March 22nd.

12 That was section 15-3-30 where he said he lived
13 out-of-state, and they couldn't reasonably locate his
14 whereabouts, is that correct, is the reason that I
15 ruled the first time we heard it?

16 MR. HALLER: That's correct. That was Your
17 Honor's order.

18 THE COURT: And the registered agent for Vanevery
19 Enterprises did not have the proper address filed, is
20 that correct?

21 MR. HALLER: That is --

22 THE COURT: If I remember, they tried to locate
23 him. I can't remember how they finally found him.

24 MR. HALLER: They found him in Charlotte.

25 THE COURT: In Charlotte?

1 MR. HALLER: He was living in the Charlotte area.
2 He was a student in school. They found -- they found
3 that he was living in Mecklenburg County, North
4 Carolina. They weren't able to find his -- find him
5 actually until Mr. Vanevery called -- my recollection
6 is he called Mr. Parrish's office and told him, I hear
7 that somebody is looking for me.

8 THE COURT: Okay. Let me ask you this: In light
9 of this order -- I haven't read the second one denying
10 the Motion to Reconsider, I haven't read that one yet.
11 But considering the order I just read about living
12 out-of-state and holding the statute, how does this
13 case change that -- that position?

14 MR. HALLER: Well, the out-of-state stay statute
15 was in existence at the time that the 120 day rule went
16 into effect in 2002. And we take the position that
17 although -- I think that you can read --

18 THE COURT: If I remember, didn't you make the
19 argument he should have served him by publication?

20 MR. HALLER: That's correct.

21 THE COURT: The argument you made before the
22 statute ran, if I remember --

23 MR. HALLER: That's right. They had the ability
24 because they knew he was in Mecklenburg County under --
25 under -- under the stay statute, they had the ability

1 to reach him and could have brought a -- could have
2 brought and served him that way. And so that -- they
3 didn't have -- they didn't do that, so the statute
4 passed.

5 But that since the General Assembly is presumed
6 to have remembered the out-of-state statute was in
7 place at the time that it enacted the 120 day rule, and
8 since it also knew about the case law and interpreting
9 it, which thereby narrowed the out-of-state stay
10 statute to situations in which -- I'm sorry -- let me
11 read -- the cases is Tiralango, in which Your Honor
12 relied on it, and it says "the statute is tolled when
13 the Plaintiff did not and could not reasonably have
14 known the whereabouts of the Defendant."

15 This is a situation in which they -- we assert
16 they knew where he was and that's why we said they
17 could have served him by publication because they knew
18 where he was. They knew he was in Mecklenburg County.
19 And for whatever reason, they chose not to.

20 But that reading those two statutes together to
21 harmonize them, which is what the courts are required
22 to do, that the -- the imposition of the 120 day rule,
23 which is the intention of the General Assembly, was to
24 bring to a conclusion -- to bring the necessary date to
25 a time in which you had to bring your claim.

1 That when you harmonize those two things
2 together, you have to read them as if -- even even if
3 you're out of state, you get the benefit of the 120 day
4 rule because that's when -- at some point, cases have
5 to come to a conclusion.

6 Because otherwise, the case could forever -- if
7 he had moved to Montana and one day steps back into
8 South Carolina ten years later, theoretically under the
9 Plaintiff's theory, the -- the case would still be --
10 continue to be alive. And the purpose of the amendment
11 in 2002 was to -- there being a point in which --

12 THE COURT: So you think the purpose was to
13 require them to go ahead and do it by publication?

14 MR. HALLER: That's correct, Your Honor.

15 THE COURT: At the last known address?

16 MR. HALLER: That at some point, they had to take
17 the reasonable steps -- when they got to the point
18 where they knew he was in Mecklenburg County, that they
19 -- they then knew where he was, they had to take
20 whatever steps they needed to take to find him and
21 secure the statute of limitations, if that -- and to
22 beat the statute. If that meant serving him by
23 publication, then serving him by publication.

24 But the overall intent of the 120 day rule was
25 to bring a date of finality to all actions, regardless

1 of where the Defendant was. And this isn't a case
2 where -- Your Honor specifically held in one of your
3 orders, that he was in fact -- an order denying the
4 motion -- the previous Motion to Reconsider, that
5 Mr. Vanevery was not out of state to defraud creditors,
6 that there was no evidence to that effect. And that
7 being the case, what it appears is he was just
8 out-of-state. He moved. He has a right to those -- to
9 the remedy of the 120 day rule and the security of the
10 120 day rule. That's our position.

11 THE COURT: Okay. Well, this -- I'm sure this
12 case doesn't address the publication issue, does it?

13 MR. HALLER: It does not, Your Honor.

14 THE COURT: Because that -- if I remember, that
15 was -- I felt the strongest argument you made when I
16 heard all of this a while back, okay, whether there was
17 a burden on him to do it by publication once the
18 statute is about to run, within the 120 day period.

19 MR. HALLER: And I think that's the whole -- the
20 purpose of the 120 day, again, is there being a line --

21 THE COURT: Do the comments -- do the comments in
22 the statute address that issue? I mean, the problem is
23 this and I understand what you're saying, you've got to
24 put an end to it. But if you've got somebody in North
25 Carolina or Georgia, or wherever evading service, if I

1 remember -- I think the process server even tried to
2 track him down -- I can't remember the exact -- they
3 tracked him down and he wouldn't come to the door -- I
4 don't remember the exact --

5 MR. HALLER: Yes, sir. They tried to find him
6 multiple times in a condominium --

7 THE COURT: And if that goes on and on and on and
8 he's evading service, then why should the Plaintiff be
9 thrown out of court because the Defendant evaded
10 service?

11 MR. HALLER: Well, Your Honor, first of all, the
12 fact that --

13 THE COURT: That was my problem with your
14 argument.

15 MR. HALLER: I appreciate that, Your Honor. I
16 would say in this situation, that that may be a
17 situation where you've got a person who, regardless of
18 where they live, whether it be North Carolina or
19 Greenville --

20 THE COURT: Right.

21 MR. HALLER: You have got to -- you start to
22 measure it, in these day and age and state lines really
23 are just highway signs on the side of the road, because
24 people move across the state lines so quickly -- I
25 start to wonder -- and I think that that's what the

1 Tiralango case was really starting to get at, at what
2 time point does the state line not really be a state
3 line anymore from a constitutional aspect, when our
4 long arm statute allows you to reach out --

5 THE COURT: But you didn't have a long arm in this
6 case, did you? All you could have done was publish it
7 here in Charleston at his last known address -- you
8 didn't have a long arm statute like you have in
9 automobile wrecks --

10 MR. HALLER: And to the full extent --

11 THE COURT: When you served -- what -- the Highway
12 Department?

13 MR. HALLER: Yes, sir. And my understanding of
14 the publication statute is, the publication is due and
15 proper service under -- under the due process --

16 THE COURT: Right.

17 MR. HALLER: Which would have gotten him through
18 the arm -- would have gotten him through the longest
19 arm of the long arm statute --

20 THE COURT: If you want to call publication long
21 arm -- okay.

22 MR. HALLER: I mean, it is what it is.

23 THE COURT: Right.

24 MR. HALLER: The -- but this is a situation, if
25 you remember, they finally reached him and were finally

1 able to serve him only because Mr. Vanevery picked up
2 the phone and called Plaintiff's counsel and said, I'm
3 told somebody is looking for me, and gave them his
4 address.

5 THE COURT: And that was several months after they
6 had been looking for him, wasn't it?

7 MR. HALLER: That's correct.

8 THE COURT: Okay. It is what it is.

9 MR. HALLER: It is what it is, Your Honor. And I
10 think that this is a situation when -- when you
11 harmonize the two statutes together, because you can't
12 just now start ignoring -- you can't start ignoring
13 that those statutes were there and those
14 interpretations were there.

15 THE COURT: Except when they are trying to evade
16 service. That's my point.

17 MR. HALLER: I --

18 THE COURT: If there was no evasion there and if
19 they didn't go to his condominium complex trying to
20 find him, I think you may be right, and you're going to
21 have -- have to look at these statutes. But that to
22 me, that puts a different element on it.

23 MR. HALLER: Well, it's always the burden of a
24 Plaintiff to properly secure service on a Defendant.

25 THE COURT: Right.

1 MR. HALLER: And when you go back to the service
2 of process -- excuse me -- the service by publication,
3 which is a --

4 THE COURT: It is sort of like -- I know up in
5 Greenville, they had an outfit called Paper Dolls. And
6 they were pretty girls. And, you know -- you know,
7 some guy walks up and knocks on the door, they don't
8 answer the door. But when they go up in mini skirts
9 and knock on the door, the door would fly open and they
10 would hand them the papers, you know. But when they're
11 evading service, I think that's a different element on
12 it.

13 MR. HALLER: And I think that's what the service
14 by publication statute provides, if they are evading --
15 in fact, it specifically says and Your Honor
16 specifically references in your order, that if they are
17 out of state or if they are evading service to defraud
18 creditors, and you specifically held that Mr. Vanevery
19 was not doing that, if that -- so if he's not doing
20 that --

21 THE COURT: I don't think there was any proof he
22 was evading creditors, I think he was avoiding service,
23 which is a little different.

24 MR. HALLER: I don't know if where they were
25 serving him was -- I can't represent to the court that

1 where they were trying to serve him at that time is
2 where he was living, so I honestly do not know. And
3 and it may have been one of those -- Mr. Vanevery is a
4 college student and you know how college students are,
5 they move -- you know -- every 11 months or so they
6 seem to be moving somewhere new. But nevertheless,
7 their remedy was to serve by publication within a 120
8 days after filing, whether --

9 THE COURT: If the legislature's intent was to
10 reconcile the two statutes and put an end to it, why
11 didn't they put in the 120 day statute, that at that
12 point in time your remedy is publication? Because
13 that's basically your argument.

14 MR. HALLER: I think what it actually says is,
15 it's -- it's proper if you serve by any way allowed by
16 law --

17 THE COURT: Right.

18 MR. HALLER: Or within 120 days after the filing
19 within the statute of limitations.

20 THE COURT: Okay. All right. I understand. It's
21 basically the same argument you made before except for
22 this case. I'll have to look at it and see if I think
23 it changes my mind.

24 MR. HALLER: Thank you, Your Honor.

25 THE COURT: I'm not sure it changes the reason I

1 ruled. I don't -- from what I read about it so far, I
2 don't really disagree with it. What does it say in the
3 holding? What were the facts in this case?

4 MR. HALLER: Your Honor, this is not a case that
5 --

6 THE COURT: This is a worker's compensation
7 appeal?

8 MR. HALLER: No, sir. This was a wrongful -- a
9 personal injury case, in which the Plaintiff filed a
10 Complaint in 2007 within the statute of limitations,
11 then did not perfect service within 120 days. There's
12 another set of facts and circumstances that don't
13 really deal with the holding, involving an amendment to
14 the Complaint.

15 But the question was, could they still serve the
16 Complaint within the statute of limitations even if
17 they hadn't gotten to the 120 day rule -- to the 120
18 days. And the court said, as long as you're within the
19 120 rule -- within the statute of limitations, the 120
20 day rule has no impact on your case. It's only in
21 those situations when you serve outside the statute of
22 limitations, does the 120 day rule go into effect. And
23 at that point, you look at the date that you filed, we
24 add 120 days, and that's what you get to. So, again,
25 if it's -- if you -- if you file on the last day of the

1 statute of limitations, you then get 119 days to
2 perfect your service. If you file 119 days before the
3 statute runs, you get an extra day to perfect your
4 service.

5 THE COURT: Justice Pleicones dissented on it. I
6 have to read his dissent. Anything else?

7 MR. HALLER: No, sir.

8 THE COURT: All right. Thank you so very much.

9 MR. HALLER: Thank you very much.

10 MR. PARRISH: Yes, sir. Thank you, Your Honor.
11 David Parrish. This is actually the fourth time we
12 have argued this. There was a Motion to Dismiss. We
13 did an order. They did a Motion to Reconsider on that
14 order. We had a hearing. You issued a second order on
15 that. This issue came up in the hearing on the final
16 judgment and now we're here again today.

17 I have copies of your order denying that Motion
18 to Reconsider and the previous orders --

19 THE COURT: I would like that --

20 MR. PARRISH: If I may approach?

21 THE COURT: I've got them.

22 MR. PARRISH: Okay. And actually the Mims case
23 that came up fairly recent, actually affirms everything
24 you've done in this case to date.

25 I respectfully disagree with Mr. Haller's

1 interpretation of the case. What this case dealt with
2 was a Complaint that was never served and refiled and
3 the trial judge kicked it based on the argument they're
4 making today. And the court reversed it, sent it back
5 to trial court, being that it was dismissed.

6 The case did not deal with an out-of-state
7 Defendant. It did not deal with service by publication
8 or any of the issues that are before the court today.

9 THE COURT: He's got a point, when do you finally
10 put an end to it?

11 MR. PARRISH: Well, I was going to --

12 THE COURT: I thought at the time, I still think,
13 he's probably got a valid point about the publication
14 issue.

15 MR. PARRISH: Well, the publication statute,
16 15-9-710 says you have to make a diligent effort to
17 find him and you have to submit an affidavit to the
18 court. And what we did, we made a diligent effort. We
19 got a rumor that he might be in North Carolina and we
20 went up there looking for him. If we hadn't found him
21 when we did -- he was served within a day after he was
22 located. If we hadn't have found him, we would have to
23 come in and give that affidavit to the court and file
24 by publication --

25 THE COURT: Well, does that go on for five years,

1 six years, 120 days, how do you end it other than with
2 the 120 days?

3 MR. PARRISH: Well, I guess if we hadn't heard --
4 gotten a tip that he was in North Carolina, then we
5 could have come in and said, we have no clue where he
6 is. But since we knew he might be there, we felt the
7 effort to go look -- need to make the effort before we
8 come to court and say, hey, we don't have a clue where
9 he is. We will just file an affidavit in Charleston --
10 or a publication that he'll never see, then we would be
11 in here, going, hey, you could have located him in
12 North Carolina. You should have served him. But we
13 were trying to comply with the statute requirements to
14 make a diligent effort, if we had an idea or rumor he
15 might be up there.

16 THE COURT: Isn't the statute of limitations
17 hanging over your head, the 120 day statute?

18 MR. PARRISH: Well, the other thing -- what Mims
19 says and this is important when you read it, and I
20 invite you to do so when you have a chance -- Mims says
21 that Rule 3 (a) incorporates 15-3-20, which the wording
22 is the same, it's that 120 day rule and all the service
23 by publication, so all 3 (a) does is incorporate the
24 statute. That's what Mims says here, which is kind of
25 important.

1 And as we discussed before, and the reason this
2 is important is 15-3-020 says "except in special
3 occasions and special cases, a different limitation is
4 prescribed by statute" -- it says "except when there is
5 a different limitation by statute" -- then it goes on
6 to pronounce the 120 day.

7 Well, there are two -- there is an exception by
8 statute because the statute right behind this, 15-3-30
9 says that the statute of limitations is tolled when the
10 Defendant is out of state. 15-3 (a) doesn't address
11 the 30, the out-of-state Defendant. It doesn't address
12 service by publication, all it does is incorporate
13 15-3-20. And 15-3-20, by its expressed words, says
14 that 120 rule applies except when the statute provides
15 otherwise.

16 So we had at the time this occurred, the statute
17 that tolled it when the Defendant was out-of-state and
18 we're looking for him. So the statute of limitations
19 didn't run. It was filed and didn't run because it was
20 tolled. That's kind of the thing that I think
21 sometimes gets lost here, is because he was
22 out-of-state, it was tolled. The statute didn't run,
23 so the 120 rule wouldn't apply in the first place.

24 And number two, the 120 day rule doesn't apply
25 because there is another statute that specifically

1 changes that, so we had a toll. The statute had not
2 run. And on top of that, we've got a publication
3 statute which specifically requires you to go through
4 the hoops and make an affirmative representation to the
5 court that you can't find the person before you file a
6 publication affidavit. And I could not in good faith
7 and conscience come in and say, we don't know where he
8 is.

9 So on the law, on the specific point, Mims, it's
10 easy to get kind of lost in those because it doesn't
11 really address this. But if you look at Mims, it says
12 incorporates 15-3-20. Then you read the first sentence
13 15-3-20, it says except when there is not another
14 statute. In 15-3-30, as you have addressed in your
15 orders, it's specifically on point, the statute was
16 tolled. The statute didn't run, and therefore, this
17 120 day rule does not apply. So that's the narrow
18 legal issue.

19 THE COURT: What did Pleicones say in his dissent?

20 MR. PARRISH: If I recall correctly that dissent,
21 he went on to address the 15 (a) amendment, and it says
22 it shouldn't have got to that, the issue that was
23 relevant before the court. This was not a Judge
24 Pleicones v. Judge Toal type case. And I think it's
25 Judge Beatty --

1 THE COURT: Judge Beatty wrote the majority
2 opinion.

3 MR. PARRISH: Yeah. He got into the 15 (a)
4 analysis. And if I recall correctly, he said --

5 THE COURT: Do you have copies of those previous
6 two orders?

7 MR. PARRISH: Yes, sir, I do.

8 THE COURT: Would you mind handing them up. I've
9 got them in the file, but I hate to take them out of
10 the file --

11 MR. PARRISH: If I may approach?

12 THE COURT: Yes, sir. Because I want to read the
13 Mims case and revisit all of this in my mind. It's
14 been a while, back in March. I can't remember what I
15 did last week, much less March. Anything else?

16 MR. PARRISH: No, sir. None from me.

17 THE COURT: Talking about the statute being tolled
18 when they're out of state, when -- when they move back
19 in the State, does statute start running again from
20 your argument?

21 MR. PARRISH: 15-3-30 does not address that. It
22 say when out-of-state. And luckily here, we do not
23 have a situation where the Defendant moved out-of-state
24 -- I think he still lives out-of-state, according to
25 Mr. Haller and the facts before the court, so I haven't

1 thought about that issue, but I would note it doesn't
2 apply here. That's the best I can do on short notice
3 on that issue.

4 THE COURT: Okay. I appreciate it. You did well,
5 thank y'all so very much on. Okay. I'll read these
6 orders and read the Mims case and see if the Mims case
7 changes my mind.

8 MR. HALLER: Your Honor, if I may -- just one
9 point and I'm sorry to read from my phone, but I was
10 pulling up the court record -- the affidavit of due
11 diligence that was filed shows that service of process
12 was attempted in North Carolina in February of 2009,
13 which was two months before the statute ran. And six
14 months -- four months -- five months -- excuse me --
15 before when service was actually accomplished. So they
16 knew for some period of time that he was in North
17 Carolina. It's not as if it wasn't --

18 THE COURT: Well, I'm not impressed with his due
19 diligence argument. I mean, he sent it to the Sheriff
20 and it comes back, they can't locate him. That's --
21 file your affidavit and get your publication.

22 What my concern is as a matter of law, tie the
23 publication -- service by publication to the 120 days
24 issue pass the statute of limitations -- or as a matter
25 of law, are you going to tell the attorneys and parties

1 they've got to serve by publication once the statute of
2 limitation runs, doing that in 120 days. You've got to
3 publish what, three times for once a month. So that's
4 going to take it -- once a month for three times?

5 MR. HALLER: Yes.

6 THE COURT: I think the statute --

7 MR. HALLER: Under the interpretation of the first
8 time it's published, you've met the published --

9 THE COURT: Don't have you publish it three times?

10 MR. HALLER: It is three times I think.

11 MR. PARRISH: You have to have a court order
12 allowing you to do that.

13 THE COURT: I understand that, but don't you have
14 to publish it three times?

15 MR. PARRISH: Yes, sir. In fact -- I understand
16 your argument, and I appreciate it, you know, given the
17 time when you file -- you ask for a motion hearing and
18 can get a hearing, it takes 120 days nowadays to get
19 that hearing --

20 THE COURT: I know.

21 MR. HALLER: I think the clerk can sign off on it.

22 THE COURT: My point is -- what I was getting
23 ready to say, if I'm going to find as a matter of law
24 once your statute runs, and you've got 120 days to
25 publish it, I'm not sure you can get it done in 120

1 days.

2 MR. HALLER: Well, except you can walk in -- my
3 recollection of the statute, and I did one of these a
4 year ago -- first of all, the -- I think the Clerk of
5 Court can sign an order of publication. And the
6 affidavit is pretty well gospel. In other words, you
7 don't have to come in with the documentation of all the
8 things you have done to have to prove --

9 THE COURT: You just have to show due diligence.

10 MR. HALLER: I have -- we have executed reasonable
11 diligence. And by Your Honor's example is a good one,
12 we gave it to the Sheriff, who returned it as
13 undeliverable for whatever -- we were not able to
14 locate him. And I think when you look at what -- the
15 Tiralango's language about you could not find -- I mean
16 could not, through the exercise of reasonable diligence
17 find, when the stay into -- into play for an
18 out-of-state person, and when you look at the service
19 of process, you can -- and if you read the 120 day
20 rules, you can merge those all together.

21 THE COURT: But doesn't that sort of gut the
22 statute, it says if you're out of state, it's tolled?

23 MR. HALLER: Well, under Tiralango, it's -- what
24 it says is, the toll applies if there is almost no way
25 you can find them.

1 THE COURT: Right.

2 MR. HALLER: Okay. So if the -- so if you can't
3 find them -- and there is no way you can find them and
4 no way you can serve them, is really what it comes down
5 to --

6 THE COURT: So under your argument, you have got
7 to find them within that 120 days or get him served by
8 publication?

9 MR. HALLER: That's right.

10 THE COURT: And that's what the law would be --
11 that's what I would be doing in holding that if I
12 followed your argument?

13 MR. HALLER: Yes, sir. And I think the intent of
14 the Mims and Tiralango cases, which interpret the toll
15 was to narrow it to the most narrow of circumstances,
16 because as -- otherwise when you reach that deadline --

17 THE COURT: I agree with you, other than the
18 situation where we're talking about, about the
19 out-of-state person. I agree with what you're saying.
20 I agree with the Mims case, except for the next statute
21 that tolls when you're out-of-state.

22 MR. HALLER: Because the way that statute has been
23 interpreted is, it -- to narrow it to the most narrow
24 of circumstances, which is the situation we don't have
25 here, which is when you have no way of finding who the

1 defendant is. It is almost the John Doe situation.

2 THE COURT: Right.

3 MR. HALLER: In this case, however, they have
4 provided to you the affidavit of the process server
5 from North Carolina who says in February of 2009, I
6 went looking for him in Matthews, North Carolina and I
7 couldn't find him. And they don't --- in fact, they
8 attached the certified mail from December of 2008,
9 which under the publication rules is sufficient.
10 Because that's a viable manner of service. So this
11 isn't a situation where they could not have found him.
12 It's just that they weren't able to get him, so even if
13 he were evading service, and I don't think he was --
14 but if he were evading service, they could come in and
15 say we attempted due diligence to the last information
16 we had as to him, and we couldn't find him. We
17 couldn't get him.

18 THE COURT: It's interesting, the argument from
19 both sides. I appreciate it. Thank y'all so much.

20 MR. HALLER: Thank you, Your Honor.

21 MR. PARRISH: I know the answer to your question,
22 about if the defendant is out-of-state, comes back in.
23 15-3-30 says it is tolled while the defendant is
24 out-of-state. I believe under the statute when he
25 comes back in --

1 THE COURT: So that added more time to it than the
2 120 days, go on the tail end of that?

3 MR. PARRISH: Yeah, the statute wouldn't have run,
4 therefore the 120 days wouldn't apply until that time
5 ran. And I just would also note that the argument of
6 Mires and Taralango arguments, you have addressed that
7 in the order I handed up to you, under service by
8 publication. And I call those to the attention --
9 you've analyzed those, both of those issues and
10 directed them in detail in your orders in this case.
11 So thank you so much.

12 THE COURT: Thank you so very much.

13 MR. HALLER: Thank you, Your Honor.

14

15 (Whereupon, the hearing adjourned)

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Deposition of Leonard Way

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

DEPOSITION OF LEONARD D. WAY

PINEPOINT ASSOCIATES, LP,

Plaintiff,

Case No. 2008-CP-10-6947

vs.

VANEVERY ENTERPRISES, INC., SANDY VANEVERY, GTH
ENTERPRISES, INC., and TIMOTHY R. SEBOLD,

Defendants.

DEPONENT: LEONARD D. WAY

DATE: May 31, 2011

TIME: 10:00 A.M.

LOCATION: NEXSEN PRUET
205 King Street, Suite 400
Charleston, South Carolina 29401

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APPEARANCES

ON BEHALF OF THE PLAINTIFF:

NEXSEN PRUET
BY: DAVID J. PARRISH
205 King Street, Suite 400
Charleston, SC 29401

ON BEHALF OF VANEVERY ENTERPRISES AND SANDY VANEVERY:

HALLER LAW FIRM
BY: DAVID K. HALLER
505 Belle Hall Parkway, Suite 101
Mount Pleasant, SC 29464

LEONARD D. WAY,

having been first duly sworn, was examined and
testified as follows:

EXAMINATION

BY MR. HALLER:

Q. Mr. Way, my name is David Haller. I
represent Vanevery Enterprises and Sandy Vanevery.

Have you ever given a deposition before?

A. I have.

Q. Well then you know how this works. I'm
required to go through this litany every time we
start a deposition. I ask you questions. You give
me answers. Since you're under oath, I will assume
that every answer that you give is truthful, and I
wouldn't have any reason to believe otherwise.

If I ask you a question and you don't
understand it, you need to address any questions
that you have to me. And now that the deposition
has begun, any questions that you have or any
comments that you make except as to matters of
privilege to Mr. Parrish, I will be able to ask you
about.

I need you to please give articulated
answers, yes, no, maybe, not huh-uhs, uh-uhs, ups
and downs, as our court reporter will be writing

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1 everything down. This is a marathon, not a race,
2 so we can take as long as you want to go through
3 this, although I hope we can get in and out of here
4 relatively quickly. Do you have any questions
5 before we start?

6 A. No, I don't.

7 Q. Any reason today you can't give full and
8 complete answers?

9 A. No.

10 Q. You have been designated as the 30(b)(6)
11 designee for Pinepoint Associates, LP, correct?

12 A. Yes.

13 Q. All right. And have you reviewed the
14 designations that were sent to Mr. Parrish?

15 A. It's been a long time since I looked at
16 anything.

17 Q. Did you look at documents before you came in
18 here today?

19 A. I looked at the lease file we had for
20 Vanevery Enterprises.

21 Q. All right. Are you familiar with the lease
22 between Pinepoint and Vanevery Enterprises?

23 A. I am.

24 Q. All right. I'm going to show you what I'm
25 going to ask the court reporter to mark as Exhibit

1 Q. They're just individuals?

2 A. Yes.

3 Q. And what are their names?

4 A. Charles S. Way, Jr., Mary Ellen Way, Charles
5 B. Darby, Jr., and Joyce Carolyn Long Darby.

6 Q. Okay. This is the Complaint and lease
7 agreement, I think you said, between the two --
8 sometimes I may use the word you. I'm not talking
9 about you individually. I'm talking about
10 Pinepoint. You understand that?

11 A. I understand.

12 Q. Okay. And let's talk about the -- about the
13 lease. If I could get you to turn back to Exhibit

14 A. Is this your standard lease that Pinepoint
15 uses?

16 A. It is a standard template, and it's adjusted
17 for each tenant.

18 Q. Who drafted the lease?

19 A. The Nexsen Pruet firm originally drafted it.
20 We make the changes specific to each tenant
21 in-house.

22 Q. Does the tenant -- did Vanevery Enterprises
23 or any of your other tenants have an opportunity to
24 change the say in terms of the lease?

25 A. They did.

1 Number 1.

2 (Exhibit No. 1 was marked for
3 identification.)

4 Q. See if you've seen this before.

5 A. Yes. Yes, I have.

6 Q. And what is that?

7 A. It is the lease between Pinepoint Associates
8 and Vanevery Enterprises.

9 Q. All right. What is your role with Pinepoint
10 Associates?

11 A. I am the vice president for asset management
12 for the Beach Company. The Beach Company is the
13 majority owner of Pinepoint Associates, and thus, I
14 oversee any and all of our income-producing
15 properties, this being one of them.

16 Q. How much of a stake in Pinepoint does the
17 Beach Company own?

18 A. 70 percent.

19 Q. Who are the other owners within Pinepoint?

20 A. Individuals. Four individuals that were
21 also owners of the Beach Company.

22 Q. Which would be whom?

23 A. Founders' daughters and their spouses.

24 Q. Is it in a trust or something like that?

25 A. No.

1 Q. What are the terms of -- as I understand it,
2 there's the original lease that's dated June 21st,
3 2005, right?

4 A. Correct.

5 Q. And then there are two amendments to the
6 lease. Are you familiar with that?

7 A. Two or three, yes, sir.

8 Q. All right. And if you look, I think they're
9 attached at the back there.

10 A. Yes, they are.

11 Q. What were the terms -- what was the key
12 element of the terms of the initial lease?

13 A. We determined what size the space was going
14 to be, which was a former Winn-Dixie, so I was
15 cutting it into thirds. Did they want one, two, or
16 three bays, so they settled on two. The length of
17 time that the lease was going to be.

18 Q. How long was that?

19 A. It was set at seven years and five months.
20 So that would be -- the way we operate, that's
21 seven years' worth of rental payments and five
22 months of free rent, generally up front, as this
23 one was.

24 And then it sets out the rental rate,
25 options to renew, guarantors, what you can do in

1 the space, tenant improvement allowances, and then
2 the condition upon delivery since we were in the
3 middle of renovating the space.

4 Q. Okay. What was the -- under the lease, what
5 was the amount of rent that was to be paid?

6 A. \$221,359.56 per year.

7 Q. And that's in paragraph 1.14?

8 A. Yes. But that was amended in the first
9 amendment.

10 Q. All right. Tell me about that.

11 A. The space, once it was fully demised and the
12 wall was -- the demising wall was put in place, the
13 space was remeasured. It was slightly larger than
14 the 25,000 that was stated in the original lease.
15 It was 26,285. So everything that had been quoted
16 on a per-foot basis was adjusted in the second --
17 or in this first amendment.

18 Q. Okay. I understand. And the -- and as I
19 understand from the amendment, every month
20 22,952.94 was to be paid?

21 A. Correct.

22 Q. And that's in paragraph 8. Then in
23 paragraphs 5, 6, and 7 of the first amendment, it
24 talks about various other charges that are supposed
25 to be made. Do you see those?

1 the former grocery store, so we didn't have
2 specific dates as to when we'd be able to hand over
3 the space. This amendment was to say, you're going
4 to get it October 17th, and then the rent will
5 start March 15th of 2006.

6 Q. Okay. And when you say you're going to get
7 it, that means that --

8 A. Vanevery Enterprises would be able to take
9 receipt of it, or they had. This was actually
10 dated after the fact.

11 Q. So had, in fact, Vanevery Enterprises taken
12 delivery on or about October the 17th, 2005?

13 A. That's my understanding from this.

14 Q. Well, I'm asking you -- is it your position
15 that it actually says that?

16 A. Yes.

17 Q. All right. And were keys provided to the
18 space on or about October the 17th, 2006?

19 A. Sometime in that time frame, yes.

20 Q. Did you do that?

21 A. Our property management group handles that.

22 Q. And who would have done that?

23 A. At the time, the property management was
24 Margot Pate. She's no longer with our company.

25 Q. Do you know where Ms. Pate is?

1 A. I do.

2 Q. Tell me about those, please.

3 A. We operate our retail centers on a
4 triple-net basis, wherein the tenant pays a base
5 rent, and then in addition to that, they pay their
6 pro rata share of property taxes, property
7 insurance, and the common area costs. So these
8 were the monthly estimates for those costs.

9 Q. All right. And in paragraph 9, there's a
10 requirement to pay a security deposit. Do you see
11 that?

12 A. I do.

13 Q. And the second deposit is 18,803.30?

14 A. Yes, that's what it says.

15 Q. Do you know if Vanevery Enterprises paid
16 18,803.30?

17 A. I do believe they did.

18 Q. And then there was a second amendment,
19 correct?

20 A. Yes, sir.

21 Q. What was the purpose of the second
22 amendment?

23 A. It was to set forth the specific dates for
24 the lease. At the time the original lease was
25 signed, we were still in the process of renovating

1 A. I do not.

2 Q. And Ms. Pate was employed by the Beach
3 Company?

4 A. She was.

5 Q. Do you know from your -- does the Beach
6 Company manage all of your income-producing
7 properties?

8 A. The vast majority, yes.

9 Q. Are there documentation -- giving a receipt?
10 Do they do a walk-through to say there's no holes
11 in the walls, anything of that nature?

12 A. Not to my knowledge.

13 Q. Sitting here today, other than having read
14 this that it says that the lease is amended for the
15 anticipated delivery date to be October 17th, 2005,
16 do you know for sure whether or not it was actually
17 turned over that day?

18 A. I'm going to say that it was because when
19 you look at the signature date on that amendment,
20 it was signed in December.

21 Q. Okay.

22 A. So why would we not use the specific date.

23 Q. Strange things happen in life, right? Okay.

24 You mentioned a tenant upfit improvement -- tenant
25 improvement allowance. That's 1.6 of the original

1 lease. You see that?
 2 A. I do.
 3 Q. All right. And how much -- generally, what
 4 is the tenant improvement allowance?
 5 A. That is an allowance from the landlord to
 6 offset the cost that a tenant incurs to renovate
 7 the space for their use.
 8 Q. And how much had the landlord promised to
 9 provide to the tenant for this property?
 10 A. It was \$10 per square foot, and in the first
 11 amendment, it sets out the specific -- \$262,000 --
 12 262,850. It's in item 10 of the first amendment.
 13 Q. Okay. Did Pinepoint actually pay out
 14 262,800 --
 15 A. Not entirely, no.
 16 Q. Is it your position that Pinepoint has
 17 abided by all terms of the lease and the two
 18 amendments?
 19 A. It is.
 20 Q. Tell me what you contend that Vanevery
 21 Enterprises and Sandy Vanevery did to breach this
 22 lease.
 23 MR. PARRISH: Object to the form. Go
 24 ahead and answer it.
 25 A. They never paid rent. They never occupied

1 ahead and answer it.
 2 A. I don't know why.
 3 Q. Well, this letter that you received, what
 4 did it say?
 5 A. Best of my recollection, that he did not
 6 wish to move forward with the tenant improvement
 7 allowance or with the tenant build-outs. He wished
 8 to rescind the lease. Didn't go into specifics as
 9 to why.
 10 Q. All right. And did you respond to that?
 11 A. I did.
 12 Q. Did you personally do it, or did somebody
 13 else?
 14 A. I personally.
 15 Q. And what did you say?
 16 A. That as much as we could understand he might
 17 not wish to move forward, he didn't have that right
 18 under the lease and that we were looking to hold
 19 him to that obligation. Tenants always have the
 20 right to assign or sublease a space, and I
 21 generally will put that in the letter, that you
 22 have that right. If you don't want to move
 23 forward, find someone else to move forward.
 24 Q. Okay. Have you seen those letters?
 25 A. Yes. They were in the lease file I reviewed

1 the space for operations. They started the
 2 build-out to suit their needs but never completed
 3 it.
 4 Q. Anything else?
 5 A. No.
 6 Q. All right. What is the first day on which
 7 you believe rent was paid but not -- was to be paid
 8 under the lease but was not paid?
 9 A. It would have been March 15th of 2006.
 10 Q. All right. And at what point do you
 11 believe -- did you come to know or understand that
 12 there would be a -- potentially be a problem with
 13 the payment of rent by Vanevery Enterprises?
 14 MR. PARRISH: Object to the form. Go
 15 ahead and answer it.
 16 A. I anticipated that rent was going to be
 17 paid. In December of 2005, Mr. Vanevery, through
 18 an attorney, sent us notice that he wished to not
 19 move forward with the lease, but we reminded him
 20 that he didn't have that right to terminate.
 21 Q. Do you know the date of that?
 22 A. It was mid-December of 2005.
 23 Q. And what was your understanding as to why he
 24 did not want to move forward?
 25 MR. PARRISH: Object to the form. Go

1 before coming here.
 2 Q. Okay. I don't -- did you provide a copy of
 3 that to your lawyer?
 4 A. It's been five years since I've handed over
 5 that file.
 6 Q. Okay. Do you give a copy of it, or did you
 7 give --
 8 A. It was -- it was in that lease file.
 9 Q. Can I get a copy of those letters?
 10 A. That's fine.
 11 Q. All right. Great.
 12 MR. PARRISH: You don't have the
 13 letter?
 14 MR. HALLER: Huh-uh.
 15 A. I believe I wrote it to his attorney at the
 16 time.
 17 Q. Who would have been -- I saw Bill Swope or
 18 William Swope.
 19 A. Yeah, Swope.
 20 Q. All right. Who is Tim Sebold?
 21 A. Tim Sebold was the primary owner, operator
 22 of Lifequest Fitness.
 23 Q. And when was the last time you talked to
 24 Mr. Sebold?
 25 A. Early 2006.

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1 Q. And what was his role with the lease?
2 A. He was going -- it's my understanding this
3 location was going to be the first franchise of
4 Lifequest or one of the first. So Mr. Vanevery
5 would run it. Mr. Sebold was going to be giving
6 him guidance as the head of Lifequest. But he --
7 Lifequest was handling or overseeing the build-out
8 and the layouts and the design.
9 Q. And that would -- when you talk about
10 Lifequest, you mean that would be Mr. Sebold?
11 A. Correct.
12 Q. Okay. So Mr. Sebold is the one who had --
13 who made all the plans -- to the best of your
14 knowledge, made all the plans as to what the upfit
15 would look like, retaining contractors?
16 A. Yes.
17 Q. I'm going to show you a document that was
18 produced to me. Tell me if you recognize this.
19 A. I've seen it.
20 Q. Did you prepare this document?
21 A. We would have provided those numbers to
22 Mr. Parrish.
23 MR. HALLER: Okay. I'm going to go
24 ahead and mark this as Exhibit Number --
25 Defendants' Exhibit Number 2.

1 there, and then I believe there's portions of the
2 default language, section 18.
3 Q. Tell me what provision you assert allows for
4 interest.
5 A. The landlord's remedies under section 18.2.
6 And section 18.7 specifically says interest on late
7 payments.
8 Q. And what is the interest that you are
9 contending is due?
10 A. I haven't calculated it.
11 Q. Do you know what the interest rate is?
12 A. It's at the applicable rate, which per this
13 lease was 15 percent or the highest permitted non
14 usurious rate in the state, which I don't know what
15 that is.
16 (Off-the-record discussion.)
17 Q. Okay. So other than interest which you
18 haven't calculated yet, any other charges that you
19 think -- and take your time. I'm not --
20 A. Legal bills.
21 Q. Legal bills. And what is your -- those
22 would be costs incurred by your representation
23 through Nexsen Pruet?
24 A. Correct.
25 Q. And what is your fee agreement with Nexsen

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1 (Exhibit No. 2 was marked for
2 identification.)
3 Q. And let's talk about this. Good thing to go
4 through. It's my only copy, so we're going to have
5 to work through this together.
6 A. No problem.
7 Q. As I understand it, is it fair to say -- and
8 you call it what you want to -- I'm not trying to
9 put words in your mouth -- but that this is a --
10 well, at the very bottom, it says summary of
11 amounts owed to landlord.
12 A. Yes, it does.
13 Q. So would you consider this to be your, as we
14 lawyers like to say, damages claim in this lawsuit?
15 A. At that time, yes.
16 Q. All right. Has this changed?
17 A. If you add interest for ensuing years, then
18 it would change.
19 Q. Do you intend or do you contend that there
20 is a provision -- some provision of law that allows
21 interest?
22 A. There are provisions in the lease.
23 Q. All right. Show me those provisions,
24 please.
25 A. Section 7 deals with rent payment, so in

1 Pruet?
2 A. Billed on an hourly basis.
3 Q. All right. Do you know how much has been
4 incurred to date?
5 A. I don't. It's several thousand, but I don't
6 know the specific number.
7 Q. Interest, attorneys' fees. Anything else?
8 A. No.
9 Q. All right. Let's walk through these
10 individually if we can. The first item you have
11 here is commissions paid, and that's \$92,971,
12 correct?
13 A. Correct.
14 Q. To whom did you pay commissions?
15 A. That amount of money was paid to our
16 brokerage division, Beach Commercial. Our agent
17 for this transaction would have received her split,
18 and then Beach Commercial sent half of that amount
19 to Anchor Commercial for the agent there, Michael
20 Elmore, who represented Vanevery Enterprises.
21 Q. And from what did you actually pay that
22 commission?
23 A. Funds on hand.
24 Q. So as I understand it, Vanevery never paid a
25 dollar worth of rent?

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1 A. Correct.
 2 Q. And it's your contention though that even
 3 though no dollars were ever paid, you were -- I'm
 4 going to put it a different way. Your agent was
 5 entitled to \$46,000, and Anchor Commercial was
 6 entitled to \$46,000, in round numbers, in
 7 commissions.
 8 A. Correct.
 9 Q. And under what provision of the contract is
 10 that?
 11 A. It's not in the lease. It's per a separate
 12 listing agreement for leasing the space.
 13 Q. Okay. And do you have a copy of that?
 14 A. I do not.
 15 Q. Who would have a copy of that?
 16 A. Our brokerage group at the Beach Company.
 17 Q. I've seen Hagood Marshall's -- not
 18 Marshall -- Hagood Morrison's name in a couple
 19 places. Would he have been your agent?
 20 A. No. He didn't handle our retail. He might
 21 have been involved from -- I don't know why he was
 22 involved.
 23 Q. And so it's your testimony that your
 24 agreement with your agents say that even if there's
 25 no money ever paid on the lease, they're entitled

1 to a commission?
 2 A. Correct. The typical listing agreement in
 3 this state that every co-broker, as Anchor was,
 4 wishes to go by is 50 percent of the commission is
 5 paid when the lease is signed and 50 percent is
 6 paid when the tenant takes over possession of the
 7 space.
 8 Q. And so the 92,971 does not -- is not the
 9 full commission. Is that your testimony?
 10 A. No. That's the full commission.
 11 Q. That would be 100 percent?
 12 A. Yes.
 13 Q. So when was the first portion of that 92,000
 14 paid?
 15 A. When the lease was signed.
 16 Q. So --
 17 A. In June of 2005.
 18 Q. All right. And when was the second portion
 19 paid?
 20 A. When they took occupancy of the space in
 21 October of 2005.
 22 Q. Okay. Do you have checks?
 23 A. Yes.
 24 Q. Where are they?
 25 A. With our accounting department.

1 MR. PARRISH: Do you want the check?
 2 MR. HALLER: Yes. And I also -- I can
 3 send a subpoena to Beach.
 4 MR. PARRISH: I'll make a note of it.
 5 MR. HALLER: Okay.
 6 MR. PARRISH: The listing agreement is
 7 not going to be kept in the tenant file.
 8 Q. Would you say that your agents --
 9 considering that no money was ever received on
 10 this, would you say that your agents actually made
 11 any -- did what they were paid to do?
 12 A. They did what they were supposed to do,
 13 which is find a tenant for the space.
 14 Q. Even though you never got any money out of
 15 it?
 16 A. Correct.
 17 Q. Have you asked them to pay the money back?
 18 A. No.
 19 Q. And as I understand it, Beach Commercial is
 20 owned also by the Beach Company?
 21 A. It is.
 22 Q. All right. What's the -- do you know the
 23 percentage ownership the Beach Company has of Beach
 24 Commercial?
 25 A. 100 percent.

1 Q. Are they separate entities?
 2 A. It's just a division.
 3 Q. Just a division. All right. So it paid
 4 itself \$46,000?
 5 A. Well, and then 50 percent of that went to
 6 our agent.
 7 Q. Okay. So 50 percent of that went to whoever
 8 handled this internally?
 9 A. Correct.
 10 Q. And another 50 percent -- so one quarter of
 11 this \$92,000 went to your agent?
 12 A. Correct.
 13 Q. Okay. And one-half of that went to Anchor?
 14 A. Correct.
 15 Q. All right. Did you ask Anchor for the money
 16 back?
 17 A. No.
 18 Q. I suspect I know what Bob Nuttall would say.
 19 All right. The next item that you have here is TI
 20 allowance paid to date. What is that?
 21 A. That's the amount of money that was paid
 22 out.
 23 Q. And what's the TI?
 24 A. The tenant improvement allowance.
 25 Q. Okay. And it says, Anchor Commercial,

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1 \$18,000.
2 A. Correct.
3 Q. And what was that for?
4 A. Michael Elmore, as an agent for Anchor
5 Commercial, was also acting as the construction
6 manager for Vanevery, so that was his construction
7 oversight fee.
8 Q. Was that paid directly to him?
9 A. It was paid to Anchor.
10 Q. All right. The next item is LS3P.
11 A. It's an architectural firm that was hired to
12 design the interior for Vanevery, so that was their
13 billing.
14 Q. Does the Beach Company have any connection
15 with LS3P?
16 A. We've used them, and they're a tenant in
17 this building.
18 Q. Other than those, do they have -- does
19 anybody at the Beach Company have any ownership
20 interest in --
21 A. No.
22 Q. -- LS3P? If you would, let me finish my
23 sentence.
24 A. Sorry.
25 Q. It's all right. It just makes it easier for

1 Q. And that's as per the contract?
2 A. Per the first amendment, yes, sir.
3 Q. Right, thank you. Then you have CAM
4 expenses, and that's under what provision?
5 A. Section 7 of the first amendment.
6 Q. And then taxes?
7 A. Yes. From section 5 of the first amendment.
8 Q. And insurance?
9 A. Correct. From section 6 of the first
10 amendment.
11 Q. And the CAM, taxes, and insurance, are
12 those -- how are those determined?
13 A. We calculate a budget for each property for
14 each year, divide -- do the prorations to each
15 tenant, and then divide by 12 to come up with a
16 monthly amount.
17 Q. Okay. And then this last thing here, a go
18 dark penalty, what is that?
19 A. That is the penalty that we're allowed to
20 charge if you're not operational from section 6.4
21 of the lease.
22 Q. And how is that calculated?
23 A. It's 50 percent of the daily minimum rent.
24 Q. Now, as I understand it, at the time that
25 this quote, unquote, went dark, it had been dark

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1 her to keep it all down.
2 And so the 26,174 is for architectural
3 fees?
4 A. It is.
5 Q. And all of these -- there are checks for all
6 of these?
7 A. There should be.
8 Q. Palmetto Construction, what is that?
9 A. That is the construction firm that was hired
10 to do the upfit.
11 Q. And it says here that \$125,340 was paid to
12 Palmetto Construction?
13 A. Yes, it does.
14 Q. And is that an accurate figure of what was
15 paid to Palmetto Construction?
16 A. I believe it is, yes.
17 Q. Okay. And then you've got -- so I guess
18 this 262,485 is just the tally of the five numbers
19 that are -- or four numbers, rather, that appear.
20 A. It is.
21 Q. Okay. And then we've got real estate --
22 rental expenses owed.
23 A. Correct.
24 Q. And the first item is base rent of 18,803.
25 A. It is.

1 for a while, the space, correct?
2 A. It had been.
3 Q. I mean, Winn-Dixie had been there for a long
4 period of time. This is just from my personal
5 knowledge of driving by.
6 A. Uh-huh.
7 Q. Correct?
8 A. Correct.
9 Q. And how long had the space been vacant
10 before Lifequest came in?
11 A. Approximately a year. Maybe a
12 year-and-a-half.
13 Q. All right. So for a year or
14 year-and-a-half, nobody had been in the space
15 anyway?
16 A. Correct.
17 Q. All right. And then we have the rents for
18 March, April, May, June, July, August, September,
19 October, and November.
20 A. Correct.
21 Q. And how is -- now, as I understand, at some
22 point in time, East Shore Athletic Club came in and
23 took the space, correct?
24 A. Yes, they rented the space.
25 Q. Do you know when the date of that lease is?

264

1 A. I believe they signed it in either June or
2 July of 2006.

3 MR. HALLER: Let's mark this.
4 (Exhibit No. 3 was marked for
5 identification.)

6 Q. See if you recognize that.

7 A. I do.

8 Q. And that's East Shore lease?

9 A. It is.

10 Q. And based on what I can see, it looks like
11 East Shore is paying maybe a little bit more than
12 what --

13 A. Yes. I believe it's a total of about \$267
14 more a month in base rent.

15 Q. And they signed the lease May 26th, 2006?

16 A. Yes.

17 Q. And now they got five months free rent,
18 correct?

19 A. Yes.

20 Q. All right. So they moved in -- when did you
21 provide them possession?

22 A. Their lease commenced when they got their
23 construction permit, so -- or July 1. I'm not sure
24 as to the specific date there.

25 Q. All right. So they started getting -- as of

1 did not pay rent and gave us notice that they were
2 going to continue forward until we signed this
3 lease was two-and-a-half, three months.

4 Q. First rent day is March 15th, 2006, right?

5 A. Correct.

6 Q. And the date of this lease is May 26th,
7 2006. They take possession July 1. So somewhere
8 in that time is the amount of time that you really
9 have nobody in the space?

10 A. Correct.

11 Q. I've seen some papers that intimate that in
12 January there was a person or a company that was
13 interested in taking the space from Lifequest. Are
14 you familiar with those?

15 A. I believe there were discussions between Tim
16 Sebold and Mr. Vanevery about assigning the lease
17 to Mr. Sebold's entity, which was also one of the
18 guarantors of the lease.

19 Q. Okay. And that would have been what entity?
20 Was that GTH Enterprises?

21 A. Yes.

22 Q. And did that assignment ever happen?

23 A. It did not.

24 Q. Did you have any issues with that? I mean,
25 were -- was Pinpoint okay with the assignment?

1 July 1, 2006, for the five months that followed
2 after that, they got free rent?

3 A. Correct.

4 Q. That's part of their upfit?

5 A. Correct.

6 Q. And they got a -- it looks to me like, in
7 1.26, a good bit of upfit, \$292,000.

8 A. Correct.

9 Q. And what was the purpose of them getting so
10 much upfit?

11 A. They had to build out the space.

12 Q. Were they able to use any of the upfit that
13 had already been done by Lifequest?

14 A. To my knowledge, very little.

15 Q. Okay. Any other -- this looks to me like --
16 and I haven't gone through it point by point, but
17 that the lease for East Shore looks to be almost
18 identical to the lease that -- except for some of
19 the dates and the amounts that we've discussed --
20 to be pretty identical to the --

21 A. Correct.

22 Q. All right. So how long is it -- was it that
23 you had a -- had a vacancy in the spot that

24 Lifequest was supposed to be moving in?

25 A. From when Lifequest first paid rent -- first

1 A. We were.

2 Q. All right. And would that have changed the
3 guarantors at all?

4 A. In all likelihood, would have released
5 Mr. Vanevery.

6 Q. And why didn't that get signed, if you know?

7 A. I'm not exactly sure why it didn't get
8 signed, but from when the conversations first
9 started until March, Lifequest as an overall
10 operating entity pretty much ceased to exist.

11 Mr. Sebold shut them all down.

12 Q. When do you think that started?

13 A. It was in the news as I was reading it
14 January, February of 2006.

15 Q. And so in January or February of 2006, you
16 kind of knew already -- you told me that
17 Mr. Vanevery's attorney wrote you and said, I'm
18 not -- I don't want to do the lease in December,
19 right?

20 A. Correct.

21 Q. And then in -- sometime January, February of
22 2006, you learned that there were financial
23 problems with Lifequest?

24 A. That's what the newspaper was reporting,
25 yeah.

1 Q. Did you do anything to determine if the
2 newspaper was lying? Maybe that's not the right
3 word, but --
4 A. Probably had a few conversations with
5 Mr. Sebold.
6 Q. And I think we all know now that those
7 newspaper reports were correct.
8 A. Yes.
9 Q. And Lifequest eventually went out of
10 business.
11 A. That's my understanding, yes.
12 Q. I think I've got some of those e-mails.
13 (Off-the-record discussion.)
14 Q. I'm going to show you an e-mail that was
15 produced in discovery dated March 1, 2006. Tell me
16 if that refreshes your recollection.
17 A. It does.
18 Q. And that just is -- tell me what you were
19 talking about.
20 A. It basically -- this was to Mr. Sebold
21 basically saying we're learning through the
22 newspaper that your company is -- has a very short
23 life to it.
24 Q. Okay. Did you ever hear back from
25 Mr. Sebold?

1 A. I don't remember which one it was. I know I
2 talked to four or five different companies about
3 taking the space.
4 Q. Did you ever hear back from Mr. Vanevery
5 about --
6 A. Not to my recollection.
7 Q. How about Mr. Swope?
8 A. No. Shortly after this is when Mr. Parrish
9 took over as handling all our communications on
10 this.
11 Q. All right. I'm going to -- this is going to
12 get a little jumbled here, so I apologize for that.
13 This is a series of e-mails that were produced, and
14 take a moment to look at that, and going to get you
15 to -- the topic is a little unclear.
16 A. Okay.
17 Q. And they may be --
18 A. Okay. What was the question?
19 Q. Are there -- are those -- there's three --
20 it looks to me like there are -- that you have in
21 your hand three sets of e-mails. Maybe they're not
22 connected to one another.
23 A. I'm not seeing that they would be connected.
24 Q. Okay. The first set of e-mails talks about
25 changing locks, and it's dated January 17th,

1 A. Not to my recollection.
2 Q. Had you heard anything else prior to that
3 from anyone regarding the stability of Lifequest?
4 A. No.
5 Q. All right. Did the letter from
6 Mr. Vanevery's lawyer indicate anything -- any
7 problem with Lifequest's --
8 A. Not to my recollection, no.
9 Q. All right. I'm going to show you another
10 e-mail that's dated March 7th, 2006. And tell me
11 if you've -- where you talked about an assignment.
12 A. All right.
13 Q. It mentions in that e-mail that there's a
14 third party who's interested. You see that?
15 A. Correct.
16 Q. And do you know who that third party was?
17 A. I do not remember.
18 Q. Could it have been East Shore?
19 A. I do not believe it was.
20 Q. At some point in time, had you started the
21 process of finding another tenant?
22 A. Around this -- definitely after March 15th,
23 I started interviewing other fitness companies.
24 Q. Was this the third party that was described
25 in the March 7th e-mail?

1 2000 --
2 A. '6.
3 Q. -- '6. Can you enlighten me a little bit
4 about which locks need to be changed, why, which --
5 et cetera?
6 A. I believe this had to do with another space
7 at the shopping center that had been occupied by 96
8 Wave. They wanted to have a location where they
9 could set up a desk and start selling memberships
10 before opening. So all of our vacant spaces put on
11 a master lock for our maintenance and our leasing
12 people. So once a tenant takes it, we switch the
13 locks over to a key that's only for that space.
14 Q. I see.
15 A. And generally, the tenant, you know, has
16 their locksmith come and put their key in place.
17 Q. Okay.
18 A. This was a temporary use for the 96 Wave
19 space. So this e-mail was primarily about them
20 occupying that space.
21 Q. Okay. So the -- what you're talking about
22 is not the four corners of the premises of the
23 lease that we're talking about.
24 A. Correct.
25 Q. Some different location?

1 A. Correct.

2 Q. And was there a formal lease agreement for
3 that?

4 A. No. There was a little one-page agreement
5 that Mr. Vanevery and I signed just stipulating out
6 the time periods and responsibilities of both
7 parties.

8 Q. Okay. Very good. All right. Thank you.
9 And the second one talks about -- I guess that's
10 the assignment that had been drafted up to assign
11 the lease to Mr. Sebold?

12 A. I would have to assume it was, yes. I don't
13 know who -- that makes sense, yes.

14 Q. All right. How did that come about, the
15 assignment issue? Did Mr. Vanevery say, I'm going
16 to assign it to Sebold? Did Sebold say, I'm going
17 to take responsibility?

18 A. In the letter I sent Mr. Vanevery or his
19 attorney in December, I stated, you know, you have
20 the right to assign the space, if that's your best
21 way out, and then I believe Mr. Sebold started the
22 conversation with us. Either he did or Michael
23 Elmore on his behalf.

24 Q. And was that document ever sent on to either
25 Mr. Swope or Mr. Vanevery?

1 A. Not that I know of.

2 Q. And then -- I'll take that one back from
3 you. Just so we're clear, that's the January 3rd,
4 2006, e-mail from Margot Pate to Michael at Anchor
5 Commercial.

6 Let me just ask you this question here.
7 This is an e-mail from Amy Williams to -- looks
8 like it's going to you --

9 A. Correct.

10 Q. -- dated November the 14th, 2005.

11 A. Correct.

12 Q. And it says that -- who is Amy Williams?

13 A. She works for the Beach Company, and at the
14 time, she was our lease administrator.

15 Q. And it says that, I finally got Sandy this
16 morning and explained what happened with the rent
17 start date. Can you fill me in as to what she
18 might have --

19 A. Going back to the second amendment that
20 spelled out the dates for rent to be paid. Before,
21 it was a moving target because we didn't know when
22 the space would be finished being handled.

23 Q. Okay. I'm going to show you these two
24 documents.

25 A. Okay.

1 Q. I'm not sure I understand what that's about.

2 I think I understand a little bit more now that
3 you've explained that there was a 96 Wave use.

4 A. Correct. This was a space that was vacant.
5 It was being marketed for lease. They came to us,
6 wanted the space for a temporary sales office, and
7 we went in, and shortly after they took occupancy,
8 they had painted on the walls, taken doors off, you
9 know, did things that were going to cost us money
10 to repair so that we -- it would be marketable.

11 Prospective tenants don't like to come
12 and see graffiti on the walls. It makes them think
13 bad thoughts.

14 Q. Okay. Was that repaired?

15 A. Yes.

16 Q. Were these repaired, the repairs on this --

17 A. Yes, they were repaired.

18 Q. And this, I guess, is a work order --

19 A. Correct.

20 Q. -- for the cost of the repairs?

21 A. Correct.

22 Q. Who paid for that?

23 A. Pinepoint Associates would.

24 Q. Is this a cost or damage that you're
25 asserting in this case?

1 A. I don't believe it was added in, no.

2 Q. Well, do you intend to ask a judge to assess
3 it?

4 A. No.

5 Q. All right. This is an e-mail dated March
6 13th from you to Tim Sebold. Actually, it's a
7 couple of e-mails. It's a forward. Take a moment
8 to look at that, please.

9 A. Okay.

10 Q. And tell me basically what that is, please.

11 A. Well, the bottom portion was sent from Amy
12 Williams as our lease administrator reminding him
13 that the first rent payment was due two days after
14 this e-mail on March 15th.

15 And then the top part is where I sent
16 it on to Tim Sebold saying, you know, here's --
17 we're starting. Are you going to do the
18 assignment? He had not signed the -- or even
19 commented on the documents that we had sent him.

20 Q. All right. Did you hear from either
21 Mr. Vanevery or Mr. Swope or Mr. Sebold as a result
22 of these e-mails?

23 A. I did not personally, no.

24 Q. Did anybody?

25 A. I don't --

1 Q. You don't know or --
 2 A. I don't know. Again, shortly after this,
 3 Mr. Parrish took over, and communication would have
 4 gone through --
 5 Q. What would have made you have sent or
 6 somebody have sent an e-mail dated March 13th, if
 7 rent's not due until March the 15th?
 8 A. It was a reminder. And generally, our lease
 9 administrators will send out a reminder to tenants
 10 when the rent is to start.
 11 Q. Rent wasn't late at this point?
 12 A. It was not late.
 13 Q. Did you anticipate that it would be late?
 14 A. At this point, yes. Given the December
 15 communications and then wanting to assign it and
 16 having someone wanting to take assignment of it,
 17 but nothing was transpiring.
 18 Q. Was work continuing on the upfit?
 19 A. I believe it was.
 20 Q. The whole time?
 21 A. Yes.
 22 Q. All right. On here, you have -- going back
 23 to Exhibit 2, you have utility reimbursements and
 24 total rent currently due -- oh, that's a different
 25 line. Utility reimbursements of \$5,234. Is that

1 East Shore.
 2 A. That is when it's due. The time period was
 3 from April 15th to May 17th.
 4 Q. Fair enough. But at that point in time,
 5 they're gone. Vanevery is not there. Nobody's
 6 there.
 7 A. He's still responsible for the space. They
 8 hadn't -- they haven't given it back to us.
 9 Q. Well, did you take any steps to take it
 10 back?
 11 A. I can't remember the specifics. Mr. Parrish
 12 can answer that.
 13 Q. What was on and running, if you know?
 14 A. Well, there's always a base charge, and then
 15 your -- I don't know what else.
 16 Q. Okay. And then this is a bill here at the
 17 back from February to March.
 18 A. Correct.
 19 MR. PARRISH: Just a -- I'm not jumping
 20 on your toes. We had to evict them out of the
 21 space, and you should have a copy of the eviction
 22 papers in there.
 23 Q. Get you to look through here. Are these
 24 the -- and I'm going to show you another stack, and
 25 I'm going to get her to mark those as Defendants'

1 correct?
 2 A. That's the number, yes.
 3 Q. And what do you base that on?
 4 A. Those would have been the portion of the
 5 bills for the space. I believe also they were to
 6 reimburse us the utilities for the former 96 Wave
 7 space that they used as a sales office.
 8 Q. Okay. Let me show you -- I'm going to go
 9 ahead and let her mark that because it's a damage
 10 thing. Go ahead and mark this as 4. That's a
 11 series of bills from SCE&G.
 12 (Exhibit No. 4 was marked for
 13 identification.)
 14 A. Okay.
 15 Q. And those are -- is that the basis for the
 16 power?
 17 A. It would be, yes.
 18 Q. Okay. So nobody's in there, but they're
 19 still expected to pay power?
 20 A. They were in there doing the upfit work so
 21 they could become operational.
 22 Q. Well, this is dated June 6th, 2005 -- or I'm
 23 sorry. June 6th, 2006, right?
 24 A. It is.
 25 Q. And by that time, you had already signed

1 5.
 2 (Exhibit No. 5 was marked for
 3 identification.)
 4 A. Okay.
 5 Q. And tell me what those are.
 6 A. These are the water bills for the space.
 7 Q. And I assume your testimony as to the water
 8 bills is going to be the same as it was as to the
 9 electric bills?
 10 A. Yes, sir.
 11 Q. All right.
 12 MR. HALLER: Mark this.
 13 (Exhibit No. 6 was marked for
 14 identification.)
 15 A. Okay.
 16 Q. What is that, sir?
 17 A. This appears to be the bill for the expense
 18 of taking the Lifequest's sign off the building and
 19 off of our pylon.
 20 Q. Is this a damage that you're claiming in
 21 this case?
 22 A. I don't know if it was included or not.
 23 MR. HALLER: Mark that, please, as
 24 Number 7.
 25 (Exhibit No. 7 was marked for

1 identification.)
 2 Q. Hand you Defendants' 7 and ask you if you
 3 can identify that for me.
 4 A. It's a letter from Mr. Parrish here to
 5 Mr. Vanevery and Mr. Sebold notifying of their
 6 default on their lease.
 7 Q. It looks to me that that is the second
 8 letter that was sent. At least in the second
 9 paragraph you see there, this is March 17th --
 10 A. Yes.
 11 Q. So pretty clear that you are aware that
 12 there are some serious problems early on.
 13 A. Correct.
 14 Q. I mean, the rent payday is March 15th, and
 15 the first letter from Mr. Parrish on you-all's
 16 behalf is March the 17th, which is two days later,
 17 correct?
 18 A. Correct.
 19 Q. And what was Pinepoint doing to mitigate any
 20 damages it had?
 21 A. Well, by this date, I was interviewing other
 22 fitness companies trying to find a replacement
 23 tenant, and I was handling that process personally
 24 instead of assigning it to one of our agents.
 25 Q. And how many replacement tenants did you

1 talk with?
 2 A. Four or five.
 3 Q. Do you remember the names?
 4 A. Well, of course there was East Shore. I
 5 believe we talked to Mount Pleasant Aerobic
 6 Fitness. I can't remember the name of it, but it
 7 was -- they ended up taking space at the shopping
 8 center on Sam Rittenberg and Northbridge, Pivotal
 9 or -- and then there was a guy out of the New
 10 Jersey, New York area that had a gym and wanted to
 11 come down here with it.
 12 Q. Okay. On the East Shore lease, who were the
 13 agents on this?
 14 A. None. I handled it personally.
 15 Q. Was there any commission that was paid?
 16 A. None.
 17 Q. Are you a licensed real estate agent?
 18 A. I am.
 19 Q. Do you have your broker's license?
 20 A. I do. Well, not broker. Salesman.
 21 Q. Salesman. They didn't pay you commission?
 22 A. I didn't ask for one. I was mitigating
 23 damages.
 24 MR. HALLER: Let's mark this as Number
 25 8.

1 (Exhibit No. 8 was marked for
 2 identification.)
 3 Q. See if you can tell me what that is.
 4 A. This is the settlement agreement between
 5 Pinepoint Associates and Palmetto Construction.
 6 There's separate documents.
 7 Q. Oh, yeah. Let me separate that out, please.
 8 Thank you. How much did -- under the agreement,
 9 does it say that was paid to --
 10 A. 82,500.
 11 Q. Is that all that was paid to them?
 12 A. Through this settlement. There was a prior
 13 payment made, noted on the list of charges you had.
 14 Q. Okay. So just so I understand, the list of
 15 charges that is on Exhibit 2, I believe you had
 16 \$125,000 down for Palmetto, includes the \$82,500
 17 that's listed on the settlement agreement and
 18 40-some-odd-thousand more dollars that was paid at
 19 a different time?
 20 A. That's my understanding, yes.
 21 Q. Okay. Thank you. Do you know if Palmetto
 22 did the work for East Shore?
 23 A. They did.
 24 Q. And you say you don't think any of that was
 25 able to be used?

1 A. They used what they could, but it's my
 2 recollection that folks from East Shore didn't like
 3 the layout that Lifequest had spec'd for the space,
 4 and so they were having to change where things were
 5 going to go.
 6 Q. Okay. When did Palmetto start work?
 7 A. I'm not sure.
 8 Q. All right. Not to trip you up, but I'm
 9 going to represent to you that in the documents
 10 that have been produced, there's an e-mail pretty
 11 early on -- here it is. Let's see. This is an
 12 e-mail that's dated January 25th, 2006, to a bunch
 13 of people, and from Amanda McCoy at Palmetto
 14 Construction Group that was produced to me.
 15 And it says, there will be a
 16 preconstruction meeting for the Lifequest addition
 17 on Monday, January 30th at 11 a.m. at the job site.
 18 Please arrange for someone in your company to
 19 attend this meeting. Have you seen that e-mail
 20 before?
 21 A. No. I don't believe I have.
 22 Q. Okay. I guess my question is, if in
 23 mid-December you knew that there were -- there was
 24 a concern or some sort of problem because the
 25 tenant had asked to be let out of the lease, and I

1 think your testimony was that there were other
2 issues that were going on, assignment questions,
3 those kinds of things all along, here we are almost
4 the first of February, and that's when they begin
5 construction.

6 At any time, did you or anybody else at
7 Pinepoint say, hang on. We need to have some --
8 our questions answered and our fears allayed before
9 you-all begin this because if you-all aren't going
10 to abide by the lease, then we're not going to pay
11 out under the tenant improvements?

12 A. I believe we were having those discussions
13 by trying to do the assignment over to Tim Sebold's
14 group. But they were contracting for the work.
15 You know --

16 Q. As I understand, under the tenant
17 improvement clause, up to \$262,000 and change you
18 were going to pay to --

19 A. Correct.

20 Q. -- Palmetto, right?

21 A. Or whoever else they invoiced us.

22 Q. Okay. So but you knew though or you at
23 least were concerned in January that there was a
24 chance that maybe they might not -- Lifequest might
25 not move in?

1 Q. I don't want you to tell me anything you
2 told your attorney. I'm talking internal in
3 Pinepoint, at what point was a decision made to
4 proceed with litigation?

5 A. Probably as soon as the rent wasn't paid in
6 March.

7 Q. In March of 2006?

8 A. '6.

9 Q. And this case was filed in December of 2009.
10 Are you aware of that?

11 A. I'm not aware of the dates.

12 Q. All right. Well --

13 MR. PARRISH: You said 2009. You meant
14 2008.

15 MR. HALLER: I'm sorry, yeah, 2008.
16 That's right. December of 2008. Thank you, David.

17 Q. Do you know why there was a delay of
18 two-and-a-half, almost three years?

19 MR. PARRISH: Once again, that is an
20 attorney-client issue, and if you want me to go
21 talk to him about this issue, but you're getting
22 into a serious attorney-client issue. And I'm --
23 I'm going to object and tell him not to answer
24 because I know where you're going with that, and
25 that's strictly attorney-client.

1 A. No. At the end of January, I wasn't
2 concerned. My only concern was who was going to be
3 operating Lifequest. To be quite honest, I would
4 rather have had Tim Sebold versus Mr. Vanevery who
5 had never run one before.

6 Q. Well, now, me too. Okay. I'm going to show
7 you just one last point and see if you recognize
8 that.

9 A. I don't recall seeing this before.

10 Q. All right. It's an action for an ejectment.

11 A. Uh-huh.

12 Q. I believe it's dated May 12th, 2006.

13 A. Yes.

14 Q. It looks like Mr. Parrish filed that on your
15 behalf?

16 A. Looks like his signature, yes, sir.

17 Q. Is there a reason that there was a delay
18 until late or mid-May to file that?

19 A. I can't recall.

20 Q. At what point were directions -- was a
21 decision made to proceed with litigation against
22 the defendants in this case?

23 MR. PARRISH: You're getting into
24 attorney-client stuff. You might want to rephrase
25 that a little bit.

1 Q. All right. Was there any decision making
2 within Pinepoint, absent any discussions with your
3 counsel, that were not strategic as to your
4 counsel, to withhold filing a Complaint?

5 A. No.

6 MR. HALLER: Thank you, sir. Give me
7 just a moment.

8 Q. I have two questions I know I want to ask
9 you. Number 1, have you received any money at all
10 from Vanevery Enterprises?

11 A. Not to my recollection, no.

12 Q. Okay. This 550 figure here, I think you've
13 testified that you did receive the security deposit
14 of \$18,000 and some change, correct?

15 A. Correct.

16 Q. And that has not been deducted from this
17 amount?

18 A. No.

19 Q. So you've received that. Would you agree
20 with me that that should be deducted?

21 A. I would agree with that.

22 Q. Okay. Have you received any money from
23 Sandy Vanevery, individually, paid as a result of
24 the lease?

25 A. Not to my recollection, no.

1 Q. All right. Do you know whether Palmetto was
2 paid some money directly from either Mr. Vanevery
3 or Vanevery Enterprises?

4 A. I do not know.

5 Q. Has Pinepoint received any money from GTH
6 Enterprises paid on behalf of the lease at all?

7 A. No.

8 Q. How about Mr. Sebold?

9 A. No, I do not believe so.

10 Q. Has anybody paid Pinepoint any money on
11 behalf of the lease?

12 A. Not that I'm aware of, no.

13 Q. At what point was Palmetto, if you know,
14 instructed to stop doing work on the premises?

15 A. I do not know.

16 Q. On March 17th, when Mr. Parrish wrote to
17 Mr. Sebold and Mr. Vanevery and said, you're in
18 breach of the lease, was Palmetto still working?

19 A. I don't know.

20 Q. Did anybody from Pinepoint pick up the phone
21 and call Palmetto and say, stop working?

22 A. No. They weren't our contractor.

23 Q. But you-all were paying them?

24 A. We weren't contracted to pay them. I was
25 contracted to -- per the lease, to reimburse

1 on the wall.

2 Q. I think that was March the 1st.

3 MR. HALLER: Let's go ahead and mark
4 that.

5 (Exhibit No. 9 was marked for
6 identification.)

7 Q. Is that the e-mail that you were --

8 A. Yes. This is what I was referring to.

9 Q. So on March the 1st, 2009, that's when
10 you -- as I understand it, you kind of kicked it
11 into gear to see if you couldn't find somebody --

12 A. At this point, we were trying to have more
13 serious conversations. Up to this point, we were
14 being told by Mr. Sebold and Mr. Elmore as his
15 representative, you know, don't worry about what
16 you're hearing. It's just a disgruntled employee,
17 this, that. You know, we're moving forward.

18 And it wasn't until he physically
19 started -- there was more eye-opening news articles
20 I guess you would say as to the extent of his
21 issues. Before it was a payroll -- you know,
22 missed a payroll or something along those lines.
23 Q. Okay. Let me show you this. This was in
24 your -- what I guess you're calling the lease file,
25 the stack of documents that was produced to me.

1 Vanevery Enterprises.

2 Q. Fair enough. But that was going to be
3 through whatever you paid?

4 A. Whatever invoices he received, they would
5 present them to us.

6 Q. Okay. At any point in time when there were
7 concerns, did you ever tell Palmetto -- let me
8 rephrase that question.

9 It's pretty clear to me that at least
10 by mid-December, there were some concerns about the
11 stability of the lease. Is that a fair statement?
12 By Pinepoint.

13 A. The only concern I had was who was going to
14 be a tenant. Was it going to be Mr. Vanevery, or
15 was it going to be someone that he assigned the
16 lease to?

17 Q. So -- and yet immediately -- I think your
18 testimony was sometime in March, you started
19 looking for a substitute tenant.

20 A. Once it was -- once it was clear that
21 Lifequest wasn't going forward any more, then I
22 started trying to find a substitute.

23 Q. Give me a date thereabouts.

24 A. You showed me an e-mail where I sent to
25 Mr. Sebold. Pretty much by then, the writing was

1 A. Okay.

2 Q. Have you seen that before? Take your time.
3 It's a several-page document, so take your time.

4 A. I believe I have.

5 Q. When did you first see that?

6 A. Probably sometime in 2006.

7 Q. That's the -- just so we're all -- the
8 record's clear, that's a lawsuit that was filed
9 between Mr. Vanevery and Mr. Sebold?

10 A. That's what it says, yes.

11 Q. And it's -- what's the date on it?

12 A. The date at the bottom is February 6th, '06.

13 MR. HALLER: Let's go ahead and mark
14 that.

15 (Exhibit No. 10 was marked for
16 identification.)

17 Q. When did you come to learn that
18 Mr. Sebold -- I'm sorry -- that Mr. Vanevery was
19 being represented by Will Swope?

20 A. In December of '05.

21 Q. And did this litigation -- was the
22 litigation that's referenced here on Exhibit Number
23 10 referenced in that letter from Mr. Swope?

24 A. No, it wasn't.

25 MR. PARRISH: David, that document is

1 something I pulled up in the course of research for
2 this, of this case. I pulled off of Charleston
3 County online.

4 MR. HALLER: Okay. So you put it in
5 the file? I hate to get Mr. Parrish to testify. I
6 just want to be clear.

7 MR. PARRISH: I found that at some
8 point in time, I threw it in the file, and I
9 thought it was responsive to your discovery
10 requests.

11 MR. HALLER: Sure. I appreciate that.
12 I'm not looking to trip anybody up.

13 All right. Give me just a second. I
14 think I may be done.

15 Q. Do you know where Mr. Sebold is today?

16 A. Have no idea. What we heard in 2006 was he
17 had fled to Maryland, but we don't know why.

18 MR. PARRISH: Sometime after 2006.

19 MR. HALLER: Okay. There were a couple
20 of documents -- I'll go back through my notes and
21 send you an e-mail.

22 MR. PARRISH: Yeah, please.

23 (Off-the-record discussion.)

24 Q. Tell me -- in Exhibit 7, there's an
25 invitation for a meeting. Do you see that?

1 was prepared for the meeting that was held in April
2 of 2006?

3 A. No. I don't believe it had been finalized
4 at that point because I hadn't finalized the lease
5 with East Shore. But the substance of what was
6 accruing was presented and what had been incurred.
7 I was able to -- we were able to finalize this
8 number once the East Shore lease was executed.

9 Q. So what were you looking for them to do?
10 You wanted them to stroke you a check for \$550,000
11 or --

12 A. Make some sort of substantial settlement
13 offer.

14 Q. And nothing happened?

15 A. Correct.

16 Q. And that was in April of 2006?

17 A. That's when this was being asked to meet,
18 but I don't know if it actually happened on that
19 date, but it was in that time frame.

20 MR. HALLER: All right. I don't have
21 any other questions for you. Thank you, Mr. Way.

22 MR. PARRISH: I don't have any
23 questions.

24 (The deposition was concluded at 11:31
25 a.m.)

1 MR. PARRISH: Probably the last
2 paragraph.

3 A. There is.

4 Q. Did that meeting occur?

5 A. I do remember having a meeting here.

6 Q. Were you present?

7 A. I was.

8 Q. Who else was present?

9 A. Mr. Parrish, of course. There were two
10 attorneys. I do not believe Mr. Sebold was here,
11 but I'm not sure. He was either represented, or he
12 was here, and I believe Mr. Vanevery was here.

13 Q. Okay. And what was said during the course
14 of that meeting?

15 A. I can't remember the specifics other than
16 the dollar amount put in front of them wasn't being
17 agreed to in terms of anybody getting ready to pay
18 it.

19 Q. As in what?

20 A. As in they were -- I wasn't going to be
21 receiving on behalf of Pinepoint Associates
22 \$550,000 as a result of that meeting.

23 Q. You're talking about Exhibit Number 2?

24 A. Right.

25 Q. At that point, was it your -- so Exhibit 2

1 STATE OF SOUTH CAROLINA
2 COUNTY OF CHARLESTON

3 I, Teri L. Horihan, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby certify
6 that the witness in the foregoing deposition was by
7 me duly sworn to testify to the truth, the whole
8 truth and nothing but the truth in the
9 within-entitled cause; that said deposition was
10 taken at the time and location therein stated; that
11 the testimony of the witness and all objections
12 made at the time of the examination were recorded
13 stenographically by me and were thereafter
14 transcribed by computer-aided transcription; that
15 the foregoing is a full, complete and true record
16 of the testimony of the witness and of all
17 objections made at the time of the examination; and
18 that the witness was given an opportunity to read
19 and correct said deposition and to subscribe the
20 same.

21 Should the signature of the witness not
22 be affixed to the deposition, the witness shall not
23 have availed himself of the opportunity to sign or
24 the signature has been waived.

25 I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.
Witness my hand, I have hereunto
affixed my official seal on June 7th, 2011, at
Charleston, Charleston County, South Carolina.

19 Teri L. Horihan
20 NCRA REGISTERED PROFESSIONAL REPORTER
21 My Commission expires
22 January 17, 2017
23
24
25

12/19/05

SWOPE LAW FIRM, P.A.

1535 Sam Rittenberg Blvd., Suite E
Charleston, SC 29407
(843) 852-4925
Fax: (843) 852-4929

FAX TRANSMISSION COVER SHEET

Date: 12/16/05
To: Mr. Leonard Way - The Beach Company
Fax: 722-6449
Re: Lifequest Fitness site @ 1964 Ashley River Road, Charleston, SC 29407
Sender: WILLIAM K. SWOPE, ESQUIRE

YOU SHOULD RECEIVE 1 PAGE(S), INCLUDING THIS COVER SHEET.
IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL (843)852-4925.

Dear Mr. Way:

Please be advised that I have been retained by Mr. Sandy Van Every to represent his interests herein. He has invested me with the unfortunate task of advising you that the build-out of the above referenced premises will not be going forward. In addition, please accept this as formal notice of his intent to rescind the lease agreement, which he has guaranteed, for this site. He regrets having to reach this business decision, but he believes it to be in his best financial interest. Any correspondence or contact concerning this situation should be addressed to me as his attorney. He will forward all notices and conduct any of the affairs attendant to this matter with or through me. Sincerely, William K. Swope.

William K. Swope

The information contained in this facsimile is subject to attorney-client privilege, and/or attorney work product privilege, and is confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone at (843) 852-4925 and return the original message to us at the above address via the U.S. Postal service. Thank you.

THE BEACH COMPANY

REAL ESTATE DEVELOPMENT • SALES • LEASING • MANAGEMENT
Building Traditions Since 1945

December 19, 2005

Mr. William K. Swope
Swope Law Firm, PA
1535 Sam Rittenberg Blvd, Suite E
Charleston, SC 29407

Re: Van Every Enterprises, LLC & LifeQuest Fitness Site

Dear Mr. Swope:

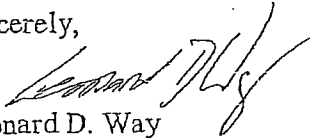
I have received your facsimile dated December 16 in reference to the above location and Sandy Van Every's desire to rescind his lease. While it is unfortunate that Mr. Van Every does not believe that this lease is in his best interest, he has no rights within the lease to rescind the agreement. The lease dated June 21, 2005 and amended on July 19, 2005 and December 5, 2005 does not provide the Tenant any rights to terminate the lease as a result of build-out issues.

Pinepoint Associates, LP, an affiliate of The Beach Company, has invested considerable time and money into the LifeQuest premises to make it ready for the Tenant. In addition, renovations for the overall center have commenced as a direct result of securing LifeQuest as the lead tenant. As far as Pinepoint Associates, LP is concerned the referenced lease is in full effect, the premises have been accepted, and the rent payments start March 15, 2006.

Your client may always assign the lease as provided in Lease Section 17 with the Landlord's consent. Please understand that all of the guarantors must be in agreement to such an assignment.

Please call me at your earliest opportunity to discuss.

Sincerely,


Leonard D. Way
Vice President, Asset Management

C: Sandy Van Every, Van Every Enterprises, LLC
Timothy R. Sebold, LifeQuest Fitness, Guarantor
GTH Enterprises, Inc., Guarantor ✓
Michael Elmore, Anchor Commercial Real Estate Services
Jeff Vinzani, Nexsen Pruet
Margo Pate, Beach Management

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March 17, 2006

VIA HAND DELIVERY,
AND VIA UNITED STATES MAIL,
FIRST CLASS, CERTIFIED MAIL,
POSTAGE PREPAID, ADDRESSED TO:

Mr. Sandy Van Every,
Individually and Registered Agent for
VanEvery Enterprises, LLC
1303 Eaglet Lane
Hanahan, SC 29406

Timothy R. Sebold,
Individually and as Registered Agent for
GTH Enterprises, Inc.
35 Folly Road
Charleston, SC 29407

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

IMPORTANT NOTICE – IMMEDIATE ATTENTION REQUIRED

Re: Lease Agreement between Pinepoint Associates, LP, as the Landlord,
and VanEvery Enterprises, Inc., as the Tenant, dated June 21, 2006,
for commercial retail space in the Pine Point Plaza shopping center
located at 1964 Ashley River Road in Charleston County, South
Carolina.

Dear Mr. Van Every and Mr. Sebold:

Our Firm represents Pinepoint Associates, LP, which is the Landlord under the
above-referenced Lease. VanEvery Enterprises, Inc. is the Tenant under the Lease,
and the two of you, together with Mr. Sebold's company, GTH Enterprises, Inc.,
signed personal guarantees jointly and severally guarantying the full performance of
all of the Tenant's obligations under the Lease, including the payment of rent.

205 King Street
Suite 400 (29401)
PO Box 486
Charleston, SC 29402
www.nexsenpruet.com

T 843.720.1771
F 843.720.1777
E DParrish@nexsenpruet.com
Nexsen Pruet Adams Kleemeier, LLC
Attorneys and Counselors at Law

Ms. Sandy VanEvery
Mr. Tim Sebold
March 17, 2006
Page 2

The Lease was executed in connection with the Landlord's renovations to the Pine Point Plaza shopping center. In reliance on the Lease, the Landlord proceeded to complete the Landlord's portion of the overall improvements for the demised premises as required under the Lease.

As reflected in the Second Amendment to the Lease, the Landlord delivered the property to the Tenant on October 17, 2005, the Lease Commencement Date began that same day, and the Rent Start Date began on March 15, 2006. The Tenant accepted possession of the premises as of October 17, 2005, for the purpose of proceeding with the Tenant's construction of the improvement to the premises as required for the Tenant to open and operate a fitness center in the space. Since that time, several events have occurred that have made the Landlord extremely concerned about the Tenant's willingness and ability to comply with its Lease obligations.

On December 12, 2005, Mr. William Swope, acting as attorney for Sandy Van Every and VanEvery Enterprises, Inc. faxed the Landlord's property manager, The Beach Company, a one page fax cover sheet indicating that Mr. Van Every was "rescinding" the Lease. As indicated in The Beach Company's reply letter, neither the Tenant nor the personal guarantors have any right or authority to "rescind" the Lease or the personal guarantees, and the letter from Mr. Swope was sent only a few days after Mr. Van Every signed an estoppel certificate affirming that the Lease was "in full force and effect."

Thereafter, some discussions took place about the possibility of Mr. Van Every assigning the Lease to Mr. Sebold or his company, but the Assignment Agreement that The Beach Company drafted and presented was never signed or returned to The Beach Company.

From October 17, 2006, to mid-January, very little, if any, work was performed by the Tenant. While improvements have since commenced, it appears that the Tenant's construction of its improvements has progressed only intermittently, and it does not presently appear that the Tenant will have the space ready and open for business anytime in the foreseeable future.

In addition to the Landlords' concerns regarding the rent, it is detrimental to a commercial shopping mall for retail space to remain unoccupied and "dark." That is why the Lease contains specific requirements that the Tenant must continuously operate a fitness facility on the premises and remain open for business during the designated hours and days of the week. At the present time it does not appear that the space will be complete or open for business anytime in the foreseeable future.

Ms. Sandy VanEvery
Mr. Tim Sebold
March 17, 2006
Page 3

On March 1, 2006, a prominent article appeared in the Charleston Post & Courier newspaper that suggests Mr. Sebold and LifeQuest Fitness may be having significant cash flow problems. This causes the Landlord concern considering that Mr. Sebold personally guaranteed this Lease and appears to be at least tangentially involved in the fitness center that the Tenant is supposed to construct and open in Pine Point Plaza.

As reflected in the First Amendment to the Lease, beginning March 15, 2006, the Tenant's Initially Monthly Rent is \$23,952.94 per month (including base rent, CAM, property taxes, and insurance). The first rent payment (prorated to \$13,924.28 for the half-month Rent Start Date in the month of March) was due on March 15, 2006, and is now past due. The next full monthly rent payment of \$23,952.94 is due on April 1, 2006—which is only two weeks away. The Beach Company sent an email to Mr. Van Every on March 13, 2006, reminding him that first rent payment was due on March 15th, but The Beach Company never received any reply.

The Beach Company has received information that suggests the Tenant's construction is not proceeding and causes the Landlord to question the willingness and ability of the Tenant to pay for and complete the construction and open a business on the Premises. It also causes the Landlord to question whether the Tenant's contractors, subcontractors, and material suppliers are being paid for the work performed on the project.

Finally, just this week the Landlord discovered that a lawsuit has been filed in the Charleston County Court of Common Pleas in the case of *Sandy Van Every, Every Life, LLC, and Van Every Enterprises, Inc. vs. Tim Sebold a/k/a Timothy Sebold, Michael Elmore, and Anchor Commercial, LLC d/b/a Anchor Commercial Real Estate Services*, Case No. 2006-CP-10-454. The allegations in the complaint in that case give the Landlord further concerns and questions as to the intentions, willingness, and financial ability of the Tenant and the personal guarantors to fulfill their obligations owed to the Landlord under the Lease for Pine Point Plaza.

**FOR ALL OF THE ABOVE REASONS, THE LANDLORD HEREBY PLACES
THE TENANT AND THE PERSONAL GUARANTORS ON THE
FOLLOWING NOTICES AND DEMANDS:**

1. Notice and demand is made for immediate delivery and payment of the first rent payment (prorated to \$13,924.28 for the half-month of March) that was due on March 15, 2006.

Ms. Sandy VanEvery
Mr. Tim Sebold
March 17, 2006
Page 4

2. The Tenant and personal guarantors are hereby requested to provide the Landlord with further and adequate assurances that: (i) they are willing and intend to timely complete the Tenant improvements to the space and open a fitness center in the space; and (ii) they are financially capable of doing so. These assurances would include without limitation, providing the Landlord with proof of the Tenant's financial ability to proceed, including funding sources; information regarding status of the construction work; and written documentation of the Tenant's timetable for completing construction, equipping the interior, and opening the business. Copies of the Tenant's permits and licenses, or application therefore, to perform the construction work and open the business should also be included.
3. The Lease (in paragraph 15.4) requires that the Tenant not permit any mechanic's liens to be filed on the premises. In light of the current situation, the Landlord is concerned that the Tenant's contractors and subcontractors are not being paid, which could result in mechanic's liens being filed on the Landlord's property. Accordingly, the Tenant is hereby noticed and requested to provide the Landlord with a list of all contractors, subcontractors, and materials suppliers on this project, and copies of all pay applications and payment records. Until the Landlord receives this information together with the rent that was due March 15th, the Landlord will not be releasing any funds for Tenant improvement reimbursements. In addition, the Landlord needs the list of contractors and suppliers because the Landlord is preparing to send written notice to all of the Tenant's contractors, subcontractors, and material suppliers informing them that pursuant to South Carolina Code Ann. § 29-5-80 the Landlord will not be responsible for payment of any labor or materials furnished on the Tenant's behalf.

An immediate response and compliance with these requests on your part is needed to protect the Landlord's rights and interests in its property and avoid placing the Landlord at further risk for damages. If a prompt response is not received from you, then the Landlord will assume that you do not intend to complete the construction or deliver the rent, and the Landlord is prepared to immediately exercise all of its rights under the Lease, which would include, without limitation, the right to declare the Lease in default. In the event of default, the Landlord would be entitled to terminate the Lease and re-take possession of the premises, and the Tenant and the personal guarantors would remain liable for all past due and future rent and recoverables that will continue to accrue under the Lease.

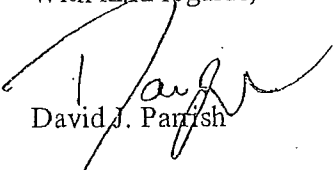
In an effort to provide a graceful and reasonable resolution of this situation, the Landlord is presently willing to consider allowing the Tenant to voluntarily terminate

Ms. Sandy VanEvery
Mr. Tim Sebold
March 17, 2006
Page 5

the Lease and discharge all personal guarantors from further liability under the Lease upon the Landlord's location of a suitable replacement tenant for the space. The Landlord would, of course, expect to receive payment of all past due rent and future rent that continues to accrue until the Landlord can re-lease the space, and the Tenant would responsible for paying all construction costs it has incurred on this project. The Landlord would expect the Tenant to provide it or any replacement tenant with copies of all designs, specifications, and construction plans for the project so that the Landlord or any replacement Tenant can complete the project if so desired. The issue of the unamortized brokerage commissions that the Landlord paid in full at the start of this Lease also needs to be addressed. The Landlord has been contacted by someone that may be interesting in lease the space, and the Landlord's interest in considering this possible solution may disappear if that option disappears. Therefore, time is of the essence.

This letter should not be deemed a waiver of any rights, and the Landlord continues to reserve all rights under the Lease.

With kind regards,



David J. Parrish

DJP/sdl

Cc: Stephen Futeral, Esquire (via fax and mail)
William Swope, Esquire (via fax and mail)
Michael Elmore at Anchor Commercial (via fax and mail):

April 5, 2006

HAND DELIVERED

Mr. Sandy Van Every,
Individually and Registered Agent for
VanEvery Enterprises, LLC
1303 Eaglet Lane
Hanahan, SC 29406

Timothy R. Sebold,
Individually and as Registered Agent for
GTH Enterprises, Inc.
35 Folly Road
Charleston, SC 29407

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

NOTICE OF DEFAULT

Re: Lease Agreement between Pinepoint Associates, LP, as the Landlord,
and VanEvery Enterprises, Inc., as the Tenant, dated June 21, 2006,
for commercial retail space in the Pine Point Plaza shopping center
located at 1964 Ashley River Road in Charleston County, South
Carolina.

Dear Mr. Van Every and Mr. Sebold:

Because of the nature of this notice and the requirements of the Lease, I am delivering
this letter directly to each of you, with a copy to your attorneys.

My March 17, 2006 letter to each of you demanded payment of the rent due on March
15th and requested adequate assurances and other information regarding the ability
and willingness of the Tenant, VanEvery Enterprises, Inc., to comply with its Lease
obligations by paying the rent, completing the space, and opening a business in the

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Suite 400 (29401)
PO Box 486
Charleston, SC 29402
www.nexsenpruet.com

T 843.720.1771
F 843.720.1777
E DParrish@nexsenpruet.com
Nexsen Pruet Adams Kleemeier, LLC
Attorneys and Counselors at Law

Ms. Sandy VanEvery
Mr. Tim Sebold
April 5, 2006
Page 2

space. I never received a response to that letter and the Tenant thereafter failed to deliver the next monthly rent payment due on April 1st. Accordingly, the Landlord, Pinepoint Associates, LP, hereby declares the Tenant in default for failing to deliver the rent payments that were due on March 15 and April 1, 2006. The Landlord is prepared to file an action to evict the Tenant from the premises in order to terminate the Tenant's right of possession and allow the Landlord to re-take possession of the property so it can attempt to mitigate its damages by re-leasing the property to another tenant. Pursuant to the terms of the Lease, the Landlord's eviction and termination of the Tenant's right of possession will not terminate the liability of the Tenant and personal guarantors for payment of past due and future rent and other expenses that will continue to accrue while the Landlord attempts to re-lease the space.

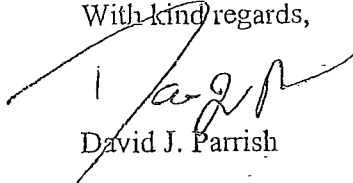
The Tenant currently owes approximately \$39,000 in past due rent and related charges and incurring additional rent and other charges at the rate of approximately \$24,000 per month. The personal guarantees that each of you signed make you personally liable for the Tenant's obligations under the Lease, and the Landlord is prepared to file a lawsuit against each of you individually to collect the past due and future accrued rents. You have significant personal exposure for the Tenant's financial obligations under the Lease.

The Beach Company is acting as the Landlord's property manager and authorized agent in connection with this matter. Prior to filing an eviction action and collection lawsuit, The Beach Company has requested that both of you appear and attend a meeting with representatives of The Beach Company at 10:00 a.m. on next Tuesday, April 11, 2006, to discuss a resolution of this matter. The meeting will be held in my firm's office located at 205 King Street, Fourth Floor, in downtown Charleston, South Carolina. Your attorneys are invited and encouraged to attend the meeting. If you fail to appear, then the Landlord will move forward with eviction and collection proceedings without further notice.

This letter should not be deemed a waiver of any of the Landlord's rights under the Lease, and the Landlord specifically reserves all rights.

Ms. Sandy VanEvery
Mr. Tim Sebold
April 5, 2006
Page 3

With kind regards,

A handwritten signature in black ink, appearing to read "DJP", with a long horizontal stroke extending to the left.

David J. Parrish

DJP/sdl

Cc: Stephen Futeral, Esquire (via fax and mail)
William Swope, Esquire (via fax and mail)
George J. Gatgounis, Esquire (via fax and mail)

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NEXSEN|PRUET

David J. Parrish
Member
Admitted in SC

May 9, 2006

Via Facsimile and Mail

William K. Swope, Esquire
The Swope Law Firm, PA
1535 Sam Rittenberg Blvd., Ste. E
Charleston, SC 29407

George G. Gatgounis, Esquire
1495 Remount Road
North Charleston, SC 29406

Re: Lease Agreement between Pinepoint Associates, LP, as the Landlord,
and VanEvery Enterprises, Inc., as the Tenant, dated June 21, 2006,
for commercial retail space in the Pine Point Plaza shopping center
located at 1964 Ashley River Road in Charleston County, South
Carolina.

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Dear Gentlemen:

As we discussed at the settlement meeting, attached is a Surrender of Tenant's Leasehold Interest Agreement, in which the Tenant voluntarily surrenders its right to possession of the leasehold so the Landlord can attempt to mitigate its damages by attempting to re-lease the premises. The Agreement needs to be signed by the Tenant, VanEvery Enterprises, Inc., and by the Personal Guarantors of the Lease, Sandy Van Every, Tim Sebold and GTH Enterprises, Inc. Unpaid rent continues to accrue at the rate of over \$23,000 per month, not including the additional rent, late fees, attorney's fees and other charges. Further, the Landlord has received notice that Palmetto Construction Group intends to file a mechanic's lien on the property because of unpaid invoices totaling approximately \$125,000 pursuant to its contract with GTH Corporation, which I understand is company controlled by Mr. Sebold. According, please have your clients sign the enclosed Agreement and return it to me by fax and mail by not later than 9:00 pm on this Friday, May 12th. If I have not received the signed document by then, I will assume that they do not plan to sign it and I will proceed to file eviction and collection actions on Friday.

205 King Street
Suite 400 (29401)
PO Box 486
Charleston, SC 29402
www.nexsenpruet.com

T 843.720.1771
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E DParrish@nexsenpruet.com
Nexsen Pruet Adams Kleemeier, LLC
Attorneys and Counselors at Law

NPCHAR1:301044.1-LJ-(DJP).016019-00085

283

William K. Swope, Esquire
George G. Gatgounis, Esquire
May 9, 2006
Page 2

Thank you for your prompt attention to this matter.

With kind regards,

A handwritten signature in cursive script that reads "David J. Parrish/pdl". The signature is written in dark ink and is positioned above the printed name.

David J. Parrish

DJP/sdl

cc via fax:

Leonard Way
Tim Walter
Margo Pate

SURRENDER OF TENANT'S LEASEHOLD INTEREST AGREEMENT

This Surrender of Tenant's Leasehold Interest Agreement ("Agreement") is entered into and effective as this ____ day of May, 2006, by and between VanEvery Enterprises, Inc. ("Tenant"), Pinepoint Associates, LP, ("Landlord"), and Sandy Van Every, Timothy R. Sebold, and GTH Enterprises, Inc. (collectively the "Personal Guarantors") with respect to the following:

Witnesseth

WHEREAS, Landlord and Tenant entered into a lease agreement dated June 21, 2005, (the "Lease") for commercial retail space (the "Demised Premises") in the Pine Point Plaza shopping center located at 1964 Ashley River Road in Charleston County, South Carolina, as more particularly described in the Lease.

WHEREAS, under the terms of the Lease, the Tenant is required to construct improvements, open, and operate a Lifequest health club/fitness facility in the Demised Premises.

WHEREAS, in connection with execution of the Lease, the Personal Guarantors signed personal guarantees in which they jointly and severally guaranteed the full performance of all of the Tenant's obligations under the Lease.

WHEREAS, the Landlord and Tenant subsequently entered into a First Amendment to the Lease executed on July 19, 2005, and a Second Amendment to the Lease executed on December 5, 2005. The original Lease, the First Amendment to the Lease, and the Second Amendment to the Lease are hereinafter collectively referred to as the "Lease."

WHEREAS, the Tenant has breached and defaulted on the Lease by, without limitation, failing to pay the rent and other payments required under the Lease and by failing to complete and open a business in the Demised Premise as required under the Lease. The Tenant's construction of the improvements to the Demised Premises is only partially complete. The Tenant will not to complete the improvements and has abandoned any intentions of occupying or using the Demised Premise.

WHEREAS, the Tenant and the Personal Guarantors desire that the Landlord attempt to mitigate its damages by attempting to re-lease the space, and the Tenant and the Personal Guarantors agree that it is more difficult for the Landlord to market and attempt to re-lease the Demised Premises while the Tenant is in possession. The Tenant's voluntary surrender of its right to possession of the Demised Premises to the Landlord will also avoid the need for the Landlord to file an eviction action.

NOW THEREFORE, in consideration of the foregoing recitals and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Landlord, Tenant and Personal Guarantors hereby agree as follows:

1. Effective Time and Date. This Agreement and the requirements herein shall become effective at 5 pm on the date of execution by the Landlord following the Landlord's receipt of this Agreement executed by the Tenant and the Personal Guarantors.

2. Termination of the Tenant's Right of Possession. All of the Tenant's legal, equitable, statutory and any other rights to possession, use, entry, ownership, title, custody, and/or control of the Demised Premises and any fixtures, furnishing, or other improvements contained on or in the Demised Premises are terminated and returned, transferred, conveyed, and/or assigned to the Landlord.

3. Keys. The Tenant and the Personal Guarantors shall deliver to the Landlord all keys and any security codes to the Demised Premises.

4. Use of Tenant's Construction Plans. The Tenant and the Personal Guarantors agree that the Landlord and its assigns shall have the right to use all architectural designs, plans and specifications, and any other design and construction drawings, specifications, concepts, and other plans that were developed by or on behalf of the Tenant and/or the Personal Guarantors for use at the Demised Premises; except, however, the Landlord shall not have any right to use the name "Lifequest."

5. No Liabilities Assumed. The Landlord is not assuming, and shall not be held liable or responsible for, any debts, accounts, obligations or liabilities of the Tenant or the Personal Guarantors, or for claims of any nature whatsoever heretofore or hereafter made against any one or more of them.

6. Risk of Loss. The risk of casualty and loss to the Demised Premise shall rest solely with the Landlord on and after the Effective Time and Date of this Agreement (as defined above), and the Tenant's obligation to maintain casualty, liability, and other insurance as required under the Lease shall cease as of the Effective Time and Date. This Agreement does not constitute an obligation of the Landlord to indemnify or defend any claims arising from the Tenant's use or possession of the Demised Premise.

7. Further assurances. Upon the request of the Landlord, the Tenant and the Personal Guarantors shall promptly perform any acts, sign and deliver any documents, and provide any information that may be reasonably required to give full force and effect to the terms and intent of this Agreement.

8. Representations and Warranties of Tenant and Personal Guarantors. In order to induce Landlord to enter into this Termination Agreement, the Tenant and the Personal Guarantors hereby make the following representations, warranties, and covenants to the Landlord:

(a) The Tenants and Personal Guarantors agree, represent, warrant that the Landlord has fully complied with all of its obligations owed under the Lease, and that the Tenant's default and breach of the Lease has not been caused, in whole or in part, by any act or omission of the Landlord:

(b) The Tenants and Personal Guarantors agree, represent, and warrant that the Tenant has not assigned, mortgaged, or otherwise transferred, amended or encumbered,

voluntarily or involuntarily, the Tenant's interest in the Lease and in the Demised Premises (and any furnishing, fixtures, and improvements contained therein), and that the Tenant is duly authorized to execute and consummate this Agreement with the full consent any person(s) so required.

9. No release from rent and other obligations under the Lease. This Agreement is intended solely for the purpose of facilitating the Landlord's attempt to mitigate its damages arising from the Tenant's default and breach of the Lease. This Agreement does not release or discharge the obligations of the Tenant and the Personal Guarantors for the payment of past due and future rent, additional rent, late fees, interest, CAM charges, attorney's fees and costs, and other charges owed by the Tenant under the Lease, which charges shall continue to accrue after execution of this Agreement. The Tenant and Personal Guarantors acknowledge the Landlord may, at any time and without prior notice, file an action against the Tenant and the Personal Guarantors to collect unpaid future rent and other charges and damages arising from the Tenant's default and breach of the Lease.

10. No Waiver of Landlord's Rights. This Agreement does not constitute a waiver of any of the Landlord's rights under the Lease, and the Landlord specifically reserves all rights.

11. Survival. All of the terms and conditions in of this Agreement, including the covenants, warranties and representations contained herein, shall survive the execution and consummation of this Agreement, and shall continue in full force and effect

12. Governing Law. This Agreement was negotiated, prepared, signed, and delivered exclusively in the State of South Carolina, and this Agreement shall be governed by, interpreted, performed, and enforced in accordance with the laws of the State of South Carolina. No provision in this Agreement shall be interpreted against the Landlord by virtue of the fact that the provision was drafted by the Landlord or the Landlord's attorney.

13. Entire Agreement. This Agreement contains and represents the entire agreement between the parties hereto with respect to the transactions contemplated hereby and may be modified only by a subsequent written document executed by the parties hereto.

Binding on Successors. The provisions of this Agreement shall bind and inure to the benefit of the heirs, representatives, successors, and assigns of the parties hereto.

14. Facsimile signatures and execution in counterparts: This Agreement can be executed in counterparts by all parties signing this Agreement and, when taken together, the signed counterparts shall constitute one complete and fully executed and binding document. Any party may rely on a facsimile copy of the signed original received from another party and may consider the facsimile copy as a legal, binding, and enforceable document.

IN WITNESS WHEREOF, the parties have entered into this Agreement as of the day and year first set forth above.

VANEVERY ENTERPRISES, INC.

By: _____
Sandy Van Every
Its: _____

(Witness)

SANDY VAN EVERY, Individually

(Witness)

TIMOTHY R. SEBOLD, Individually

(Witness)

GTH ENTERPRISES, INC.

By: _____
Timothy R. Sebold
Its: _____

(Witness)

PINEPOINT ASSOCIATES, LP

By: _____

Its: _____

(Witness)

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

RECEIVED
SEP 30 2013

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Circuit Court Judge

Case No. 2008-CP-10-6947

Pinepoint Associates, LP,

Respondents,

vs.

Vanevery Enterprises, Inc., Sandy Vanevery, GTH
Enterprises, Inc. and Timothy R. Seibold,

Defendants,

Of Whom

Vanevery Enterprises, Inc. and Sandy Vanevery are

Appellants.

CERTIFICATE OF COUNSEL

I certify that the Record on Appeal contains all material proposed to be included by all of
the parties and not any other material.



David K. Haller, Esq.
Haller Law Firm, P.C.
115 River Landing Drive, Suite 102
Charleston, SC 29492
843-849-1384
ATTORNEY FOR THE APPELLANTS

September 17th, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Circuit Court Judge

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Defendants,

Of Whom

Vanevery Enterprises, Inc. and Sandy Vanevery are

Appellants.

PROOF OF SERVICE

I certify that I served the RECORD ON APPEAL by hand delivering on counsel for the respondent on September 17, 2013 at the address below.



David K. Haller, Esq.
Haller Law Firm, P.C.
115 River Landing Drive, Suite 102
Charleston, SC 29492
843-849-1384
ATTORNEY FOR THE APPELLANTS

COUNSEL SERVED:
David J. Parrish, Esq.
Nexsen Pruet Adams Kleemeier, LLC
205 King Street, Suite 400
Charleston, SC 29402

RECEIVED

SEP 20 2013

SC Court of Appeals