

THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

---

APPEAL FROM YORK COUNTY  
Equity Court

The Honorable S. Jackson Kimball, Master-in-Equity

---

Case No.: 2012-CP-46-02286

---

Charles Sonnenberg, Festival Corp., Phillip Pulley  
and Robert Foster. ....  
Plaintiffs,

Of whom Phillip Pulley and Robert Forster are the Appellants,

v.

D&T Imports South Carolina, Inc., a Nevada Corporation,  
d/b/a Area 51 Fireworks, and York County, a political  
subdivision of the State of South Carolina, .....  
Defendants,

Of whom D&T Imports South Carolina, Inc., a Nevada Corporation,  
d/b/a Area 51 Fireworks is the Respondent.

Appellate Case No.: 2013-000604

---

RECORD ON APPEAL

---

W. Keith Martens  
Daniel J. Ballou  
HAMILTON MARTENS BALLOU  
& CARROLL, LLC  
P.O. Box 10940  
Rock Hill, South Carolina 29731  
(803) 329-7672  
ATTORNEYS FOR APPELLANTS

James Sheedy  
Susan E. Driscoll  
DRISCOLL SHEEDY, PA  
11520 N. Community House Road  
Suite 200  
Charlotte, NC 28277  
(704) 341-2101  
ATTORNEYS FOR RESPONDENT

**RECEIVED**

OCT 18 2013

**SC Court of Appeals**

## INDEX

|                                                                                                 |     |
|-------------------------------------------------------------------------------------------------|-----|
| Order Granting Injunctive Relief filed June 21, 2012 .....                                      | 3   |
| Order Modifying Temporary Restraining Order filed June 29, 2012.....                            | 7   |
| Order Granting Preliminary Injunction, filed July 3, 2012.....                                  | 10  |
| Order Granting Motion to Dismiss, filed September 28, 2012.....                                 | 14  |
| Order (Wrongful T.R.O.), filed November 13, 2012.....                                           | 18  |
| Order (Damages and Attorneys' Fees), filed February 14, 2013.....                               | 22  |
| Verified Complaint filed June 19, 2012.....                                                     | 27  |
| Answer of York County filed July 18, 2012.....                                                  | 63  |
| Transcript of Hearing on June 28, 2012.....                                                     | 68  |
| Transcript of Proceedings dated November 1, 2012 .....                                          | 142 |
| Deposition Transcript of Ruonala dated January 9, 2013.....                                     | 181 |
| Transcript of Proceedings on January 16, 2013.....                                              | 295 |
| Plaintiff's Motion for Temporary Restraining Order<br>filed June 19, 2012.....                  | 358 |
| Respondent's Motion to Dissolve Ex Parte TRO<br>filed June 26, 2012.....                        | 362 |
| Appellant's Response to Motion to Dissolve Exparte TRO filed<br>June 28, 2012 .....             | 368 |
| Respondent's Motion to Dismiss Complaint against D&T,<br>filed August 17, 2012.....             | 390 |
| Respondent's Memorandum in Support of Motion to Dismiss filed<br>September 21, 2012 .....       | 392 |
| Respondent's Motion to Recover Damages filed October 29, 2012 .....                             | 402 |
| Respondent's Memorandum in Support of Motion to Recover Damages<br>Filed November 1, 2012 ..... | 407 |

|                                                                                                             |     |
|-------------------------------------------------------------------------------------------------------------|-----|
| Affidavit of Doug Cianfrocca filed November 1, 2012.....                                                    | 411 |
| York County Records Custodian Affidavit and attached exhibits .....                                         | 377 |
| Affidavit of Ryland Kieffer .....                                                                           | 384 |
| Respondent's Affidavit of Attorney's Fees filed November 1, 2012 .....                                      | 415 |
| Respondent's Supplemental Affidavit of Attorneys', Fees filed<br>November 29, 2012.....                     | 417 |
| Respondent's Supplemental Memorandum in Support of Motion to<br>Recover Damages filed January 16, 2013..... | 425 |
| Undertaking on TRO Order filed July 2, 2012 .....                                                           | 429 |
| Increase in Amount of Undertaking filed July 27, 2012.....                                                  | 436 |
| Deed Recorded in York County Book 07175 Page 072 .....                                                      | 45  |
| Deed Recorded in York County Book 07175 Page 077 .....                                                      | 50  |
| Deed Recorded in York County Book 12005 Page 120 .....                                                      | 55  |
| Deed Recorded in York County Book 12551 Page 127 .....                                                      | 60  |
| Certificate of Counsel .....                                                                                | 437 |
| Certificate of Compliance .....                                                                             | 438 |

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTHTEENTH JUDICIAL CIRCUIT

Charles Sonnenberg, Festival Corp., )  
Phillip Pulley and Robert Foster, )

C/A No. 2012-CP-46-2286

Plaintiffs, )

**ORDER GRANTING INJUNCTIVE  
RELIEF**

v. )

D&T Imports South Carolina, Inc., )  
A Nevada Corporation, d/b/a )  
Area 51 Fireworks, and York )  
County, a political subdivision of )  
the State of South Carolina )

Defendants. )

FILED-RECEIVED  
2012 JUN 21 PM 2:56  
DAVID HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, SC

This matter came before the court upon Plaintiffs' motion for a Temporary Restraining Order and Temporary Injunction to prohibit York County from issuing any further permits, certificates or other approvals in furtherance of the application of D&T Imports South Carolina, Inc. d/b/a Area 51 Fireworks ("D&T Imports") to operate a retail fireworks store on the real property located at 3620 Festival Drive, Fort Mill, South Carolina (the "Subject Property").

Present at the hearing on Plaintiffs' Motion were Daniel J. Ballou, counsel for Plaintiffs Pulley and Foster, B. Bayles Mack, counsel for Plaintiffs Sonnenberg and Festival Corp. and Michael Kendree, County Attorney for York County. Based upon the Verified Complaint and other papers presented by Plaintiffs in support of this motion, the court makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Plaintiff Sonnenberg is the owner of certain real property located at 3630 and 3644 Festival Drive, Fort Mill, South Carolina, adjacent to the Subject Property. Sonnenberg is also, through his corporation Festival Corp., a landlord under a lease with the Plaintiffs Pulley and Foster, who are operate a retail fireworks store known as Fireworks World on Sonnenberg's property under a lease with Sonnenberg's corporation Festival Corp.

2. Defendant D&T Imports is a Nevada corporation that is not registered to do business in South Carolina, but which nonetheless is transacting business in South Carolina as Area 51 Fireworks and is the owner of the Subject Property.

*[Handwritten signature]*  
1

ROA 000003



3. The Defendant York County is a governmental entity and political subdivision of the State of South Carolina, subject to the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code Section 6-29-310, et seq. (the "Act").

4. The Subject Property is burdened by the following deed restriction placed by Crescent Resources, LLC in its conveyance to D&T Imports' predecessor in title, Randazzo Properties, LLC ("Randazzo") on or about June 14, 2005 (the "Deed Restriction"):

The within property is conveyed subject to restrictions, covenants and reservations of record and further to the covenant and restriction that the following activities are prohibited on the subject property: the sale of fireworks or the operation of a bingo parlor or similar recreation facility. (emphasis added).

5. TD Bank, N.A. acquired title to the Subject Property pursuant to that certain Master in Equity Deed ("Master's Deed") dated May 23, 2011, issued as a result of a mortgage foreclosure action filed against Randazzo Properties, Barbara Jean R. Oriani, Joseph E. Randazzo, et al., Judgment Roll No. 2010-CP-46-2431. The Master's Deed states that the Subject Property was sold subject to "any past due or accruing property taxes, assessments, existing easements and restrictions of record and any senior encumbrances."

6. On or about April 6, 2012, D&T Imports purchased the Subject Property pursuant to a certain Limited Warranty Deed from TD Bank, N.A. The deed from TD Bank states that the Subject Property was sold "subject to all obligations, restrictions, limitations, covenants, easements and other matters of record and governmental ordinances and regulations affecting the Property."

7. The Deed Restriction is in D&T Imports' chain of title, runs with the land and prohibits the D&T Imports' intended activity of operating a retail fireworks store on the Subject Property.

8. D&T Imports has sought and obtained building and other permits from York County seeking to open and operate a retail fireworks store on the Subject Property, an activity which is in direct violation of the Deed Restrictions.

9. On July 19, 2012, Plaintiffs commenced an action in the York County Court of Common Pleas seeking a declaratory judgment as to the rights of the parties under the Deed Restriction, and seeking injunctive relief prohibiting the sale of fireworks on the Subject Property, prohibiting the issuance of any further permits to D&T Imports, stopping any further work on the project and revoking any permits issued by York County in furtherance of D&T Imports' efforts to open a retail fireworks store on the Subject Property.

*mm*  
#2

10. Section 6-29-1145 of the Act provides in relevant part as follows:

(A) In an application for a permit, the local planning agency must inquire in the application or by written instructions to an applicant whether the tract or parcel of land is restricted by any recorded covenant that is contrary to, conflicts with, or prohibits the permitted activity.

(B) If a local planning agency has actual notice of a restrictive covenant on a tract or parcel of land that is contrary to, conflicts with, or prohibits the permitted activity:

(1) in the application for the permit;

(2) from materials or information submitted by the person or persons requesting the permit; or

(3) from any other source including, but not limited to, other property holders, the local planning agency must not issue the permit unless the local planning agency receives confirmation from the applicant that the restrictive covenant has been released for the tract or parcel of land by action of the appropriate authority or property holders or by court order.

11. In its permit applications, D&T Imports did not disclose that the Deed Restriction prohibits sale of fireworks on the property. Notwithstanding D&T Imports' failure to disclose this fact, York County has actual notice of the Deed Restriction as provided in Section 6-29-1145 of the Act.

12. Based on the foregoing, I find and conclude that Plaintiffs could suffer irreparable harm as a result of the issuance of permits and other administrative authorizations by York County as to the development of the Subject Property by D&T Imports for purposes prohibited by the Deed Restriction. I further find that Plaintiffs, as "other property holders" under the Act, have no adequate remedy at law other than injunctive relief to prevent this harm, and that that Plaintiffs have a likelihood of success on the merits of the claims presented.

13. York County will suffer no harm if a temporary restraining order and preliminary injunction are entered prohibiting it from issuing any further permits in violation of the Act. Because D&T Imports purchased the Subject Property with actual or constructive notice of the Deed Restriction prohibiting the sale of fireworks, because it has failed to disclose the existence of the Deed Restriction to York County, and because it has failed to register to do business in South Carolina, it will suffer no harm if temporary injunctive relief is granted to the Plaintiffs.

#### ORDER

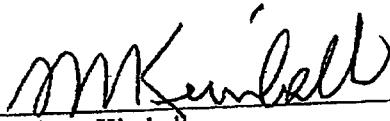
Based on the record presented, it is ordered that, subject to the limitations under Rule 65,

*MMK*  
*AB*

S.C.R.C.P., Defendant York County is temporarily enjoined from issuing any further permits or taking any other administrative action of any kind in furtherance of the applications of D&T Imports to develop the Subject Property, including but not limited to the issuance of any certificate of occupancy. It is further ordered that Defendant D&T Imports be temporarily restrained and enjoined from taking any further action of any kind towards renovating, building up-fitting, or constructing the Subject Property for the purposes of selling fireworks, including but not limited to the installation of fixtures, equipment, or other improvements to the Subject Property of any kind until further order of this Court.

Plaintiffs' motion for preliminary injunction shall be heard by the court on July 2, 2012 (date) at 2:30 p.m. (time) at 1 North Congress St. York, S.C., 29745. Unless extended by subsequent order of this court or consent of the parties, this temporary restraining order shall expire on July 1, 2012 (date) at 1:42 p.m. (time).

AND IT IS SO ORDERED, this 21<sup>st</sup> day of June, 2012, at 1:43 o'clock p.m.

  
S. Jackson Kimball  
Special Circuit Court Judge  
York County

#4

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTHTEENTH JUDICIAL CIRCUIT

Charles Sonnenberg, Festival Corp., )  
Phillip Pulley and Robert Foster, )  
Plaintiffs, )

Case No. 2012-CP-46-2286

v. )

**ORDER MODIFYING TEMPORARY  
RESTRAINING ORDER**

D&T Imports South Carolina, Inc., )  
A Nevada Corporation, d/b/a )  
Area 51 Fireworks, and York )  
County, a political subdivision of )  
the State of South Carolina )  
Defendants. )

FILED-RECEIVED  
2012 JUN 29 AM 8:44  
DAVID HAMILTON  
C.C.P. & S.S.  
YORK COUNTY, S.C.

This matter came before me on June 21, 2012, upon the Motion of Defendant D&T Imports South Carolina, Inc. ("D&T") pursuant to Rule 65(b), S.C.R.C.P., to dissolve the temporary restraining order issued by this Court on June 21, 2012 ("TRO"). Present at the hearing were James W. Sheedy, counsel for D&T, Daniel J. Ballou, counsel for Plaintiffs Pulley and Foster, B. Bayles Mack, counsel for Plaintiffs Sonnenberg and Festival Corp., and Michael Kendree, County Attorney for York County.

The TRO originally restrained the Defendant York County from issuing any further permits or taking any other administrative action on the applications of D&T to develop the property located at 3620 Festival Drive ("Property") as a retail fireworks store, and enjoined D&T from renovating, building, upfitting or constructing the Property for the purpose of selling fireworks.

D&T moved to dissolve the TRO on the grounds that:

1. The TRO was entered without bond;
2. The TRO suspended D&T's general and ordinary business *ex parte*;
3. The Plaintiffs will not suffer irreparable harm;
4. D&T is registered to do business in South Carolina;
5. The deed restriction contained in D&T's chain of title ("Deed Restriction") is not enforceable by the Plaintiffs.

At the hearing, D&T acknowledged that York County may properly withhold issuance of



ROA 000007

a certificate of occupancy for the Property unless and until D&T provides written confirmation that the Deed Restriction has been properly released by Crescent Resources, LLC, or otherwise declared invalid by a court of law.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the record presented at the hearing on D&T's motion and the arguments of counsel, I find and conclude the following:

1. The continuation of construction activity on the Property, without the issuance of a certificate of occupancy by York County, does not pose a threat of irreparable harm to Plaintiff. Thus, the TRO should be vacated insofar as it enjoins construction activities by D&T on the Property, and D&T may proceed with such work at its own risk as to the ultimate outcome of this litigation.

2. Continuation of the TRO as to York County, enjoining the County from issuing a certificate of occupancy for operation of a fireworks store in the Property, does not suspend the general and ordinary business of D&T. D&T cannot, by its own admission, open for business as a fireworks store without removal of the Deed Restriction prohibiting such use.

3. Plaintiffs are a class of persons entitled to relief under S.C. Code Ann. § 6-29-1145 (1976, as amended), and may seek enforcement of the statute. § 6-29-1145, on its face, prohibits the issuance of a certificate of occupancy to D&T under these facts. Plaintiffs have demonstrated a likelihood of success on the merits of their claim as to the statutory relief.

4. Plaintiffs have no adequate remedy at law to redress possible damages to their business interests resulting from the issuance of permits over the Deed Restriction. If, as D&T asserts, Plaintiffs have no right to enforce the Deed Restriction, Plaintiffs would not be able to recover damages against D&T in an action at law under any theory of liability of which I am aware, and none has been brought to my attention. Thus, Plaintiffs' only remedy would be equitable relief.

5. As they would have no remedy at law affording recovery of economic losses they might suffer from operation of the competing fireworks store, such losses would amount to irreparable harm.

6. Plaintiffs should be required to provide adequate security for damages D&T might suffer if this TRO ultimately be determined to be wrongful. Because I find that D&T's damages at this point would be limited to additional construction costs related to delay caused by the TRO, I find and conclude that \$100,000, either in the form of a surety bond, or cash

*MK*  
#2-

deposited with the Clerk of Court, is adequate to be provided by Plaintiffs at this time.

7. I find and conclude that whether Plaintiffs are "other property holders" as provided in § 6-29-1145, and whether Plaintiffs are entitled to enforce the Deed Restriction in question, cannot be sufficiently determined at this juncture so as to conclude that Plaintiffs have a likelihood of success on the merits of their claim on those issues.

#### ORDER

Based on the findings and conclusions herein, the TRO is modified in the following particulars, and it is ordered as follows:

1. The TRO against D&T is vacated as to construction activities on the Property, and may proceed with such work at its own risk.

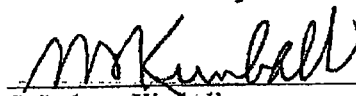
2. York County remains enjoined from issuing a certificate of occupancy or other permit to D&T for the duration of this TRO, unless the Deed Restriction encumbering the Property is sooner released.

3. Plaintiffs shall post security in the amount of \$100,000.00, either in the form of a surety bond, or cash deposited with the Clerk of Court, and such bond shall be retroactive to the date of entry of the TRO.

4. In all other respects, the TRO remains in full force and effect to govern the conduct of the parties in this case.

AND IT IS SO ORDERED, this 28th day of June, 2012, at 4:55 o'clock p.m.

June 28, 2012



S. Jackson Kimball  
Special Circuit Court Judge  
York County

#3

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTHTEENTH JUDICIAL CIRCUIT

Charles Sonnenberg, Festival Corp., )  
Phillip Pulley and Robert Foster, )

Case No. 2012-CP-46-2286

Plaintiffs, )

v. )

**ORDER GRANTING  
PRELIMINARY INJUNCTION**

D&T Imports South Carolina, Inc., )  
A Nevada Corporation, d/b/a )  
Area 51 Fireworks, and York )  
County, a political subdivision of )  
the State of South Carolina )

Defendants. )

FILED-RECEIVED  
2012 JUL -3 PM 2:09  
DAVID NATHAN  
C.C.P. & G.S.  
YORK COUNTY, SC

This matter came before me July 2, 2012, upon Plaintiffs' Motion for a Preliminary Injunction to prohibit York County from issuing any further permits, certificates or other approvals in furtherance of the applications of D&T Imports South Carolina, Inc. d/b/a Area 51 Fireworks ("D&T Imports") to operate a retail fireworks store on the real property located at 3620 Festival Drive, Fort Mill, South Carolina (the "Property"). Present at the hearing were Daniel J. Ballou, counsel for Plaintiffs Pulley and Foster, B. Bayles Mack, counsel for Plaintiffs Sonnenberg and Festival Corp., James W. Sheedy, counsel for D&T, and Michael Kendree, County Attorney for York County.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the record presented at the hearing on Plaintiffs' motion and the arguments of counsel, I find and conclude the following:

The Property is burdened by the following deed restriction placed by Crescent Resources, LLC, in its conveyance to D&T Imports' predecessor in title, Randazzo Properties, LLC ("Randazzo"), on or about June 14, 2005 (the "Deed Restriction"):

The within property is conveyed subject to restrictions, covenants and reservations of record and further to the covenant and restriction that the following activities are prohibited on the subject property: the sale of fireworks or the operation of a bingo parlor or similar recreation facility. (emphasis added).

D&T purchased the Property on or about April 6, 2012, from TD Bank, N.A., which acquired title through mortgage foreclosure against Randazzo. The Deed Restriction is in D&T's chain of

ROA 000010

title, runs with the land, and prohibits D&T's intended activity of operating a retail fireworks store on the Property. D&T Imports has sought and obtained building and other permits from York County, and intends to open and operate a retail fireworks store on the Property. This is in conflict with the Deed Restriction as recorded.

This action was filed June 19, 2012. On June 21, 2012, this Court issued a Temporary Restraining Order ("TRO") halting all further activity on the Property by D&T, and temporarily enjoining York County from issuing any further permits or approvals. On June 28, 2012, this Court modified the TRO to lift it as to construction activities by D&T on the Property, but otherwise continuing the TRO in effect to enjoin York County from issuing a certificate of occupancy or other permit to D&T for so long as the Deed Restriction encumbers the Property ("Modified TRO").

S.C. Code Ann. § 6-29-1145 (1976, as amended), provides in relevant part as follows:

(A) In an application for a permit, the local planning agency must inquire in the application or by written instructions to an applicant whether the tract or parcel of land is restricted by any recorded covenant that is contrary to, conflicts with, or prohibits the permitted activity.

(B) If a local planning agency has actual notice of a restrictive covenant on a tract or parcel of land that is contrary to, conflicts with, or prohibits the permitted activity:

(1) in the application for the permit;

(2) from materials or information submitted by the person or persons requesting the permit; or

(3) from any other source including, but not limited to, other property holders, the local planning agency must not issue the permit unless the local planning agency receives confirmation from the applicant that the restrictive covenant has been released for the tract or parcel of land by action of the appropriate authority or property holders or by court order. (Emphasis added.)

In order to obtain a temporary restraining order or preliminary injunction, a party must demonstrate (1) irreparable harm, (2) a likelihood of success on the merits and (3) an inadequate remedy at law. *Mailsources LLC v. M.A. Bailey & Assocs., Inc.*, 356 S.C. 363, 367-368, 588 S.E.2d 635, 638 (Ct. App. 2003). The sole purpose of an injunction is to preserve the *status quo*, and the decision to issue or deny such extraordinary relief is entrusted to the sound discretion of the trial judge. *Id.*; *Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995); *Poynter Inv., Inc. v. Century Builders of the Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010).

*[Handwritten signature]*  
#2

ROA 000011



Plaintiffs seek relief under § 6-29-1145. The plain language of the section indicates that Plaintiffs belong to a class of persons entitled to seek enforcement of the statute. D&T concedes that the Deed Restriction has not been released by "... action of the appropriate authority or property holders or by court order." Thus, § 6-29-1145 on its face requires that York County not issue a certificate of occupancy, or other requisite permit, to D&T that would permit commencement of the operation of a fireworks store. Accordingly, Plaintiffs have demonstrated a likelihood of success on the merits of their claim as to statutory relief.

Plaintiffs have no adequate remedy at law to redress possible damages to their business interests resulting from the issuance of permits over the Deed Restriction. If, as D&T asserts, Plaintiffs have no right to enforce the Deed Restriction, Plaintiffs would not be able to recover damages against D&T in an action at law under any theory of liability of which I am aware, and no such theory has been brought to my attention. Thus, Plaintiffs' only remedy would be in equity.

Further, as they would have no adequate remedy at law affording recovery of damages they might suffer, such losses would amount to irreparable harm.

Therefore, I find and conclude the following:

1. Plaintiffs meet the standard for the granting of a preliminary injunction under Rule 65, S.C.R.C.P., to preserve the *status quo ante*, until such time as the County determines that it has received the requisite and satisfactory evidence of release of the Deed Restriction.

2. The injunctive relief granted under the Modified TRO should be continued as a preliminary injunction.

3. Upon receipt by the County of documentation judged by the County satisfactory to satisfy the requirements of § 6-29-1145, confirming the release of the Deed Restriction, this preliminary injunction should have no further effect, and the County may proceed with the issuance of the appropriate permits authorizing the commencement of operation of the fireworks store.

4. Plaintiffs must provide adequate security to meet the requirements of Rule 65, and security in the total amount of \$150,000, either in the form of a surety bond, or cash deposited with the Clerk of Court, is adequate security to be provided by Plaintiffs at this time for damages occasioned by the TRO and this preliminary injunction.

#### ORDER

Based on the findings and conclusions herein, it is ordered as follows:

1. York County is enjoined, *pendent lite*, from issuing a certificate of occupancy or other permit to D&T for the operation of a business for the sale of fireworks until such time as the Deed Restriction encumbering the Property is released, as provided by § 6-29-1145, based on



ROA 000012

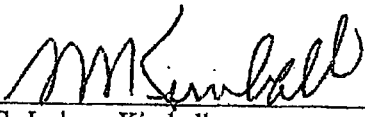
the administrative determination of the County.

2. Upon the determination by the County that the Deed Restriction has been released, the County may issue any necessary permits authorizing operation of the fireworks business, and this preliminary injunction shall expire, and be of no further force or effect.

3. Plaintiffs shall post security in the amount of \$150,000.00, either in the form of a surety bond, or cash deposited with the Clerk of Court, as security for both the Modified TRO and Preliminary Injunction, and such bond shall be retroactive to the date of entry of the original Temporary Restraining Order on June 21, 2012.

AND IT IS SO ORDERED

July 3, 2012

  
\_\_\_\_\_  
S. Jackson Kimball,  
Special Circuit Judge for York County

#4

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Charles Sonnenberg, Festival Corp., Phillip  
Pulley and Robert Foster,

Plaintiffs,

vs.

D&T Imports South Carolina, Inc., a Nevada  
Corporation, d/b/a Area 51 Fireworks and  
York County, a political subdivision of the  
State of South Carolina,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO. 2012-CP-46-02286

**ORDER GRANTING  
MOTION TO DISMISS**

FILED-RECEIVED  
2012 SEP 28 PM 2:21  
DAVID HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, SC

This matter came before me on September 20, 2012, upon the motion to dismiss of Defendant D&T Imports South Carolina, Inc. ("D&T"). Present at the hearing were: G. Hamlin O'Kelley, attorney for D&T; Daniel J. Ballou, attorney for Plaintiffs; and, Michael K. Kendree, attorney for York County ("County"). Based on the record presented, the arguments of counsel and the applicable law, I find and conclude as follows.

**FINDINGS OF FACT**

The following recited facts are undisputed.

D&T is the owner of real property located at 3620 Festival Drive in Fort Mill, South Carolina ("the Property"). D&T acquired the property from TD Bank, N.A., ("TD Bank") by way of a Special Warranty Deed dated April 6, 2012. TD Bank had acquired the property as a result of this Court's Master Deed dated May 23, 2011, through a foreclosure action by Carolina First Bank against Randazzo Properties, LLC ("Randazzo"). Randazzo had acquired the Property from Crescent Resources, LLC, ("Crescent") by a quitclaim deed dated June 14, 2005. Plaintiff Charles Sonnenberg ("Sonnenberg") owns property at 3644 Festival Drive, which he acquired from Crescent in 1990.

The deed from Crescent to Randazzo contained the following restrictive covenant:

The within described property is further conveyed subject to restrictions, covenants and reservations of record and further to the covenant and restriction that the following activities are prohibited on the subject property: the sale of fireworks or the operation of a bingo parlor or similar recreation facility.

The deed to D&T does not contain the quoted deed restriction. Nor does the deed

ROA 000014

specifically reference the restriction. However, the deed from TD Bank to D&T does state that the conveyance is subject to all restrictions, covenants, and other matters of record.

D&T's property and Sonnenberg's property were both originally owned by Crescent, but are not part of the same parent tract of land or any unified subdivision of Crescent land. Nor are the parcels part of any common scheme or plan of development. Further, Sonnenberg purchased his parcel some fifteen years before Crescent restricted the use of the D&T parcel in Crescent's deed to Randazzo.

Sonnenberg conducts business as Festival Corp., and has leased his property to Plaintiffs Phillip Pulley and Robert Foster. They do business as FWK, Inc., and are fireworks retailers.

### CONCLUSIONS OF LAW

#### I. Private cause of action under S.C. Code Ann. § 6-29-1120 et seq.

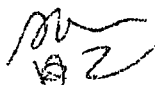
Plaintiffs' Complaint asserts claims premised on S.C. Code Ann. § 6-29-1120, *et seq.*, a portion of the South Carolina Local Government Comprehensive Planning Act of 1994 ("Planning Act"). § 6-29-1120 states the purpose of the Planning Act:

- (1) to encourage the development of economically sound and stable municipalities and counties;
- (2) to assure the timely provision of required streets, utilities and other facilities and services to new land developments;
- (3) to assure the adequate provision of safe and convenient traffic access and circulation, both vehicular and pedestrian, in and through new land developments;
- (4) to assure the provision of needed public open spaces and building sites in new land developments through the declaration of land for recreational, education, transportation and other public purposes; and
- (5) to assure, in general, the wise and timely development of new areas, and redevelopment of previously development areas in harmony with the comprehensive plans of municipalities and counties.

Plaintiffs have sought injunctive relief against D&T and the County under the provisions of § 6-29-1145(B)(3), a portion of the Planning Act, which provides, in part:

(B) If a local planning agency has actual notice of a restrictive covenant on a tract or parcel of land that is contrary to, conflicts with, or prohibits the permitted activity:

- (1) in the application for the permit
- (2) from materials or information submitted by the person or persons requesting the permit; or
- (3) from any other source, including, but not limited to, other property holders, the local planning agency must not issue the permit unless the local planning agency receives confirmation from the applicant that the restrictive covenant has been released for the tract or parcel of land by action of the



ROA 000015

appropriate authority or property holders or by court order.

It is clear from a reading of § 6-29-1145(B)(3) that it does not provide for any private cause of action on the part of a member of the public, including any adjacent property owner, against an offending property owner either for damages, or for injunctive relief. At most, it gives an interested party the ability to compel the local agency to withhold permitting because of "... a restrictive covenant on a tract or parcel of land that is contrary to, conflicts with, or prohibits the permitted activity . . . ."

Where there is no private right of action under the Planning Act, there is no right for a private individual to sue another private individual under its provisions. Absent a private right of action, this court lacks subject matter jurisdiction over the matters asserted in Plaintiffs' Complaint, at least as it relates to D&T. *Hambrick v. GMAC Mortgage Corp.* 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006). All of Plaintiffs' claims and causes of action alleged are based on an assumption of the existence of a private cause of action under § 6-29-1145(B)(3).

The main factor in determining whether a statute creates a private cause of action is legislative intent. *Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 245, 711 S.E.2d 908, 911 (2011). Without legislative intent for a private cause of action, there can be no jurisdiction. "The legislative intent to grant or withhold a private cause of action for violation or performance of a statutory duty is determined primarily from the language of the statute." *Id.*; *Doe v. Marion*, 373 S.C. 390, 396, 645 S.E.2d 245, 248 (2007). "[T]he general rule is that a statute which does not purport to establish civil liability, but merely makes provision to secure the safety or welfare of the public as an entity, is not subject to construction establishing civil liability." *Doe v. Marion, supra*, 373 S.C. at 396, 645 S.E.2d at 248.

The legislative intent in the promulgation of the Planning Act is clear in § 6-29-1120 quoted above, namely, to insure sound principles of local development and land use planning. Nowhere in the Planning Act may it be inferred that the General Assembly intended to create any private right to sue for a violation of the Planning Act. The use of the term "other property holders" in § 6-29-1145(B)(3), quoted above, relates only to the various sources of notice to the local agency of an existing covenant or restriction that would prohibit issuance of necessary permits for the proposed use of the property. Thus, the section affects only local planning agencies, and does not open to a complaining property owner the right to bring an action to adjudicate either the existence, or application, of a restrictive covenant.

Without the right to bring a private cause of action, Plaintiffs have no claim against D&T



ROA 000016

under § 6-29-1145(B)(3). The Planning Act emphasizes public health, safety, economy, good order, appearance, convenience, morals, and general welfare, requiring the harmonious, orderly, and progressive development of land within municipalities and counties of the State. *See* § 6-29-1120. The statute is plainly for promotion of the safety or welfare of the public as an entity, and not for establishment of civil liability. There being no private cause of action granted, this Court lacks subject matter jurisdiction over Plaintiffs' declaratory judgment action based on the statute, and accordingly, the claim should be dismissed.

**II. Plaintiffs' standing to sue.**

Plaintiffs seek to enforce a deed restriction against D&T in which they have no cognizable interest. As recited in the findings of fact, the Sonnenberg parcel and the D&T parcel do not come from any common tract, and neither is part of any common scheme or plan of development. Thus, Plaintiffs have no common law right to enforce the restriction in question against D&T. *See Bomar v. Echols*, 270 S.C. 676, 244 S.E.2d 308, (1978); and, *Gambrell v. Schriver*, 312 S.C. 354, 440 S.E.2d 393 (Ct.App. 1994). In other words, they have no standing to bring this action against D&T.

"To have standing, one must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest." *Sea Pines Ass'n for Protection of Wildlife, Inc. v. South Carolina Dept. of Natural Resources*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). "A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Charleston County School Dist. v. Charleston County Election Com'n*, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999).

Since Plaintiffs cannot claim the protection of the restrictive covenant in question, they are not a real party in interest and have no standing to pursue enforcement of the restrictive covenant. It follows that Plaintiffs' claim based on enforcement of the restrictive covenant against D&T should be dismissed.

Therefore, based on the findings and conclusions herein, it is ordered that Plaintiffs' claims against Defendant D&T Imports South Carolina, Inc., be dismissed with prejudice.

AND IT IS SO ORDERED.

September 26, 2012

  
S. Jackson Kimball, Special Circuit Court Judge  
York County

ROA 000017

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Charles Sonnenberg, Festival Corp., Phillip  
Pulley and Robert Foster,

Plaintiffs,

vs.

York County, South Carolina,

Defendant.

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

ORDER

(WRONGFUL T.R.O.)

Case No. 2012-CP-46-2286

FILED-RECEIVED  
20 NOV 13 AM 8:52  
CLERK OF COURT  
YORK COUNTY, SC

This matter came before me on November 1, 2012, upon motion of D&T Imports South Carolina, Inc. d/b/a Area 51 Fireworks ("D&T"), a former Defendant in this action, seeking recovery of damages against the bond provided by Plaintiffs as security for the Temporary Restraining Order ("TRO") issued by me on June 21, 2012 ("Motion"). Representing the parties at the hearing were: James W. Sheedy and Susan E. Driscoll, counsel for D&T; Daniel J. Ballou and B. Bayles Mack, counsel for Plaintiffs; and, Michael K. Kendree, counsel for York County. Based on the record presented and the arguments of counsel, I make the following findings and conclusions.

**PROCEDURAL BACKGROUND**

Plaintiffs brought this action as a declaratory judgment action, asking the court to rule that applicable deed restrictions in D&T's chain of title prohibited the operation of a fireworks store on D&T's property. Plaintiffs also sought injunctive relief "[f]or entry of a Preliminary and Permanent Injunction prohibiting and enjoining D&T Imports from selling fireworks" at 3620 Festival Drive, South Carolina ("Subject Property").

Plaintiffs sought, and were granted, an *ex parte* TRO on June 21, 2012. The TRO caused D&T to stop all construction work then taking place on the Subject Property. On June 26, 2012, D&T moved to dissolve the TRO. It asserted that Plaintiffs did not have a private cause of action under S.C. Code Ann. § 6-29-1145(C)(2) (1976, as amended) to enjoin construction work on the Subject Property. It also asserted that Plaintiff lacked standing to enforce the applicable deed restriction.

On June 28, 2012, Plaintiffs obtained, and Travelers Casualty and Surety Company of

*mm*  
#1

ROA 000018

America (Travelers) issued, a bond in the amount of \$100,000, subsequently increased to \$150,000 on July 3, 2102 (Bond), as required by the court. Pursuant to Rule 65(c), SCRCF, the Bond was issued for the benefit of D&T in the event it was ultimately determined that D&T was "wrongfully enjoined." The bond secured D&T from "such damages and costs not exceeding the sum of One Hundred Fifty Thousand DOLLARS as [D&T] may sustain by reason of the temporary restraining order, if the Court shall finally decide that the Plaintiffs were not entitled thereto." (Bond, p.1.)

On June 28, 2102, D&T's motion to dissolve the TRO was granted, and an Order Modifying Temporary Restraining Order that vacated the TRO against D&T was entered. On August 17, 2012, D&T filed a motion to dismiss the claims against it pursuant to Rule 12(b)(1) and (6), SCRCF. Subsequently, on September 28, 2012, an Order Granting Motion to Dismiss was entered, dismissing the causes of action against D&T with prejudice. The dismissal was based on a finding that S.C. Code Ann. § 6-29-1145 does not create a private right of action on the part of Plaintiffs, and that Plaintiffs did not have a common law right to seek enforcement of the deed restriction against D&T.

#### CONCLUSIONS OF LAW

Applying the foregoing Findings of Fact, I make the following conclusions of law.

Rule 65(c), SCRCF, requires that upon the issuance of a temporary restraining order, the applicant must provide adequate security "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." See also, *Chambron v. Lost Colony Homeowners Association*, 317 S.C. 43, 451 S.E.2d 410 (1994); and, *Hylar v. Wheeler*, 240 S.C. 386, 126 S.E.2d 173, 175 (1962) ("[D]amages recoverable in an action on an injunction bond include all actual damages sustained by reason of the wrongful issuance of the injunction, that is, such damages as are the direct, natural, and proximate result of the injunction."). Such recovery "... is limited to the period of a temporary restraining order or temporary injunction." *Chambron*, 317 S.C. at 45, 451 S.E.2d at 411.

Attorneys' fees may also be included as a part of the damages recoverable under the bond, "... provided the injunctive relief is not merely ancillary to the main issue." *Walker v. Oswald*, 181 S.C. 278, 186 S.E. 916, 918 (1936); see also *Fici v. Koon*, 372 S.C. 341, 642 S.E.2d 602 (2007).

The Order Modifying Temporary Restraining Order dissolved the TRO against D&T. The Order Granting Motion to Dismiss dismissed Plaintiffs' claims against D&T with prejudice.

mk  
JE



These rulings establish that Plaintiffs were not entitled to issuance of the TRO, and that D&T was "wrongfully enjoined". As a result, D&T may recover damages against Plaintiffs and the Bond for those losses proximately caused by the TRO during the time it was in force. An evidentiary hearing is required to determine such damages, as there are issues of fact in dispute concerning whether the TRO caused any damages.

Plaintiffs' Complaint sought temporary and permanent injunctive relief against D&T prohibiting D&T from building a fireworks store on, and selling fireworks at, the Subject Property. Although the action is characterized as one for a declaratory judgment, the sole relief sought against D&T was a permanent prohibition from operating a fireworks store on the Subject Property. I conclude that the determination of whether injunctive relief is primary or ancillary to the case presented focuses on the essence of the relief sought by Plaintiffs.

In *Walker, supra*, in dealing with this issue, the court stated: "... it appears from the record that the sole purpose of the original action instituted by the plaintiff-appellant was to procure an injunction restraining the cutting of the timber on the tract of land involved in this litigation." *Walker, supra*, 186 S.E. at 918. Based on these facts, the court reached the following conclusion.

It appears that the counsel fees paid in this case were for services rendered in dissolving the injunctions in an action seeking only injunctive relief, and it matters not whether the dissolution was accomplished by motion or the trial of the case on its merits, provided the injunctive relief was not merely auxiliary to the main issue, and it does not appear that such was a fact. *Id.*

Conversely, in *Fitch, supra*, the plaintiff's purpose was to obtain a decree of specific performance of a contract for the sale of land. A temporary injunction was issued by the trial court prohibiting the seller from conveying the property, pending a decision on the merits of the case. The defendant prevailed; the injunction was dissolved; and, the defendant sought to recover attorney fees under the bond given in connection with the temporary injunctive relief. The court recognized the rule laid down in *Walker*, and stated:

In an action to determine the rights of parties in reference to land, as here, an injunction is considered ancillary. (Citation omitted.) Attorney's fees for successfully ending the temporary injunction as part of this suit are therefore not recoverable under the injunction security bond. *Fitch, supra*, 372 S.C. at 350, 642 S.E.2d at 606.

In the present case, the relief sought is not a determination of the parties' respective interests in the Subject Property. Rather, it is solely to prohibit D&T's intended use of the

mmk  
43

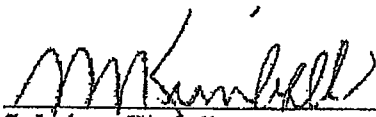
property. Plaintiffs have no equitable or legal interest in the Subject Property, and they do not seek to establish any. They only seek to enjoin D&T from operating a fireworks store on the property.

Thus, the injunctive relief sought in this action is primary, not ancillary, and D&T is entitled to recover attorneys' fees and costs from the injunction bond.

Therefore, based on the findings and conclusions herein, it is ordered that D&T be granted judgment against Plaintiffs and the surety on the Bond as to liability for damages proximately resulting from the wrongful issuance of the TRO against D&T, and also for reasonable attorneys' fees and costs. It is further ordered that an evidentiary hearing be held to determine any damages, and attorneys' fees and costs, to be awarded to D&T against the Bond and Plaintiffs, such hearing to be held on December 10, 2012, at 1:30 p.m. at 1 North Congress Street, York, S.C. 29745.

**AND IT IS SO ORDERED.**

November 9, 2012

  
S. Jackson Kimball  
Special Circuit Court Judge  
York County

49

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTHTEENTH JUDICIAL CIRCUIT

Charles Sonnenberg, Festival Corp., )  
Phillip Pulley and Robert Foster, )

Case No. 2012-CP-46-2286

Plaintiffs, )

**ORDER**

D&T Imports South Carolina, Inc., )  
A Nevada Corporation, d/b/a )  
Area 51 Fireworks, and York )  
County, a political subdivision of )  
the State of South Carolina )

(DAMAGES & ATTORNEYS' FEES)

Defendants. )

FILED-RECEIVED  
2013 FEB 14 PM 2:13  
CLERK OF COURT  
YORK COUNTY, SC

This matter came before me January 16, 2013, for a hearing pursuant to Rule 65, SCRCP, on Defendant D&T Imports South Carolina, Inc.'s ("D&T") claim for damages and attorneys' fees for a wrongful injunction. Present at the hearing were Daniel J. Ballou, as counsel for Plaintiffs, and James W. Sheedy and Susan E. Driscoll, as counsel for D&T, and Michael Kendree, as County Attorney for York County.

**BACKGROUND**

The essential facts and conclusions of law pertinent to the ruling contained in this order are set forth in this court's prior orders in this case filed June 21, 2012, June 29, 2012, and November 13, 2012. Reference is made to those orders as background for this order, and the facts and conclusions of those orders are incorporated herein where applicable.

**FINDINGS OF FACT**

The following are the findings of fact, which I have determined to be based on all the evidence, and after consideration of any applicable burden of proof. They are made based upon the written record presented, including the deposition of Rick Ruonala and related exhibits, and the affidavit of D&T's counsel.

**A. Damages due to wrongful injunction.**

D&T seeks reimbursement for several different items of additional cost related to the granting of the temporary restraining order ("TRO") in this case. All are related to a period of delay in construction on the project during the time of a work stoppage while D&T was bound by the TRO. The relevant period of time of delay is from June 21, 2012 to June 28, 2012, or eight days. For that delay, D&T seeks additional expenses and charges billed to D&T by TLR Construction Co., Inc.

*mm*  
#1

ROA 000022

("TLR"), which was the contractor hired to do the necessary upfitting work on D&T's building on the subject property. The items of additional cost claimed include additional lodging and per diem expense, additional administrative expense, additional project overhead and expense, and overtime expense. These claimed costs include both those of TLR and its subcontractors on the job.

I find that D&T is entitled to compensation for the additional lodging and other expenses owed to TLR for the period that the TRO, and resulting work stoppage, was imposed upon D&T, namely, June 21 through June 28. However, I except from that grouping of expense the charges attributed to Sunshine Construction Co. of \$1,150, as the invoice supporting the charge indicates that it was paid by D&T on June 21, 2012, which was necessarily for services prior to imposition of the TRO. As to the remainder of the charges, I find that both the explanation for the charges and the amount thereof are within the realm of reasonableness under the circumstances.

Since the charges as presented cover more than the duration of the TRO against D&T, they must be adjusted to cover only the applicable period. The charges of TLR, Melton Electric, and Melton Heating and Cooling are based on a per diem expense of \$200. Thus, the recoverable charges for those three companies total \$4,800 for the applicable period. All of the extra charges of Coastal Carolina Carpet and Tile, totaling \$2,100, predate the termination of the TRO, so that D&T is entitled to the entire amount of those charges. Likewise, D&T is entitled to the extra charges of Integrity Installation in the amount of \$925. Thus, I find that D&T is entitled to recover a total of \$7,825 for expenses incurred while bound by the TRO.

As to the remainder of the additional expenses claimed by TLR due to the delay, I find that the record is insufficient to establish that these expenses are damages that should be attributed to the period of the TRO and stop work order. First, it appears that much of the delay had to do with D&T's predicament caused by its failure to disclose that its property was deed-restricted against use as a fireworks store. Had this been dealt with at the outset of the proposed project, these claimed additional expenses would not have been incurred. Second, there is no consideration given to a *pro rata* allocation of the additional overhead-related expenses to other jobs of TLR. Third, there is apparently a remaining dispute between D&T and TLR concerning the total amount due by D&T. Finally, it appears that the parties' contract called for the job to be complete by June 15, 2012, which was prior to the TRO and stop work order.

Therefore, I find that D&T is entitled to recover damages proximately the result of the TRO and stop work order in the amount of \$7,825.

**B. Attorneys' fees and costs.**

The dispute in this case required D&T to address simultaneously two fundamental legal issues presented, namely, the TRO imposed at Plaintiffs' instance, and the interpretation of S.C.

*mm*  
*2*

ROA 000023

Code Ann. § 6-29-1145 (1976, as amended), as applied to the facts of this case. The latter does not afford recovery of attorney fees and costs incurred in resolving the issue, while litigating a wrongful TRO does. A precise allocation of fees and costs between the two is not possible as a practical matter, and they are somewhat intertwined in any event. As a result, I have considered, and find as a fact, that the two issues proceeded on a parallel course, and cannot reasonably be separated, from the time of the imposition of the TRO on June 21, until its vacation on June 28.

The factors considered by me in making the award of attorney's fees above are: "... 1) nature, extent and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained. *Seabrook Island Property Owners' Association v. Berger*, 365 S.C. 234, 240, 616 S.E.2d 431, 434-435 (Ct.App. 2005), citing *Blumberg v. Nealco*, 310 S.C. 492, 427 S.E.2d 659 (1993); *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997); *Collins v. Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961); *Burton v. York County Sheriff's Department*, 358 S.C. 339, 358, 594 S.E.2d 888, 898 (Ct.App. 2004); *Weatherford v. Price*, 340 S.C. 572, 580, 532 S.E.2d 310, 314 (Ct.App. 2000). Those factors are analyzed as follows:

1. Nature, extent, and difficulty of the case.

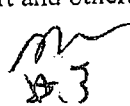
In this connection, as the trial court in this matter, I have thoroughly reviewed and considered the record in the case and the law applicable to the dispute of the parties. I find that the factual and legal issues presented were complex. They required full analysis of the cases and court rules pertaining to temporary injunctive relief, and application and interpretation of § 6-29-1145, a relatively new and untested statute.

2. Time necessarily devoted to the case.

The recitation above as to the nature, extent and difficulty of the case also supports a finding that the time expended by D&T's counsel's firm was reasonable. The multiplicity of issues presented in the case required individual analysis and response, and the time records submitted by D&T support a finding of reasonableness. In addition, the ultimate disposition of the matter required preparation for and conduct of multiple hearings. Thus, I find that the time spent by D&T's counsel within the applicable time limitation was reasonable and necessary under the circumstances.

3. Professional standing of counsel.

D&T's counsel has substantial experience in litigating similar cases and issues. Counsel enjoys a reputation in the legal community, as well as with the general public, of being a very competent litigation attorney with substantial experience and expertise. I also recognize, based on my own experience, that counsel is competent and prepared, and adheres to a high standard of professionalism in cases litigated in this court and others.

  
10.3

ROA 000024

4. Contingency of compensation.

As counsel was retained on an hourly fee arrangement, this factor is not material to an analysis of the fee charged in this case.

5. Beneficial results obtained.

Through counsel's efforts, D&T has been able to obtain dismissal of the TRO as it pertains to Plaintiffs' claim, which is the result it sought in the case.

6. Customary legal fees for similar services.

The affidavits submitted to the court establish that the hourly rates charged by counsel's firm in this case are within the range of hourly rates customarily charged for similar services by attorneys in this State.

In this analysis, I have balanced all of the factors, and considered those appropriate to a determination of a reasonable fee in this case. Based on this analysis of the record, I find that \$8,369.00 is a reasonable fee for dealing with the TRO in this case. I further find that costs of \$64.68 are also reasonable. I have also necessarily limited the award against Plaintiffs to the time period that the TRO was in force.

Thus, I find that D&T is entitled to recover all attorneys' fees and costs incurred with the Driscoll-Sheedy law firm from June 21, 2012, through June 28, 2012. Based on the summary of charges submitted, that amount is \$8,369.00 in fees, and \$64.68 in costs, for a total of \$8,433.68.

**CONCLUSIONS OF LAW**

"The damages recoverable in an action on an injunction bond include all actual damages sustained by reason of the wrongful issuance of the injunction, that is, such damages as are the direct, natural, and proximate result of the injunction. In such actions the general rules governing the measurement of damages ordinarily apply." *Hylar v. Wheeler*, 240 S.C. 386, 392, 126 S.E.2d 173, 175 (1962). Such recovery "... is limited to the period of a temporary restraining order or temporary injunction." *Chambron v. Lost Colony Homeowners Association*, 317 S.C. 43, 45, 451 S.E.2d 410, 411 (1994).

Pursuant to Rule 65(c), SCRPC, upon the issuance of a temporary restraining order, the applicant must provide adequate security "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." See also, *Chambron, supra*; and, *Hylar, supra*.

Attorneys' fees may also be included as a part of the damages recoverable for a wrongful injunction. *Walker v. Oswald*, 181 S.C. 278, 186 S.E. 916, 918 (1936); see also *Fici v. Koon*, 372 S.C. 341, 642 S.E.2d 602 (2007).



ROA 000025

Based on the findings of fact, and consistent with those findings and the cases cited above, I conclude that D&T is entitled to recover damages and attorneys' fees and costs as a matter of law as a result of the wrongful injunction sought and obtained by Plaintiffs. Likewise, I further conclude that such damages and fees are recoverable against the injunction bond provided in this case.

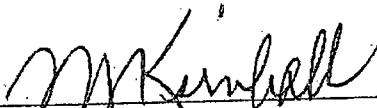
**ORDER**

Based on the findings and conclusions herein, it is ordered as follows:

1. D&T is granted judgment for damages for the wrongful injunction in the amount of \$7,825.
2. D&T is granted judgment for an award of attorneys' fees and costs in the amount of \$8,433.68.
3. The amount of the judgment granted is also recoverable against the injunction bond submitted in this action.

AND IT IS SO ORDERED

February 8, 2013

  
\_\_\_\_\_  
S. Jackson Kimball,  
Special Circuit Court Judge  
York County

#5

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTHTEENTH JUDICIAL CIRCUIT

Charles Sonnenberg, Festival Corp., )  
Phillip Pulley and Robert Foster )

C/A No. 2012-CP-46-02286

Plaintiffs, )

VERIFIED COMPLAINT

v. )

D&T Imports South Carolina, Inc., )  
A Nevada Corporation, d/b/a )  
Area 51 Fireworks, and York )  
County, a political subdivision of )  
the State of South Carolina )

Defendants. )

FILED-RECEIVED  
2012 JUN 19 PM 2:39  
DAVID HAMILTON  
C.C.P. & S.  
YORK COUNTY, SC

The Plaintiffs Charles Sonnenberg ("Sonnenberg"), Festival Corp. ("Festival"),  
Phillip Pulley ("Pulley") and Robert Foster ("Foster") (collectively, "Plaintiffs")  
complaining of the above-named Defendants, D&T Imports South Carolina, Inc., a  
Nevada Corporation, d/b/a Area 51 Fireworks, ("D&T Imports") and York County,  
allege as follows:

**PARTIES, JURISDICTION AND VENUE**

1. Sonnenberg is a citizen and resident of the State of Tennessee, and is the  
owner of real property located at 3644 Festival Drive in Fort Mill, York County, South  
Carolina ("Plaintiffs' Property"). Sonnenberg does business in South Carolina through  
Festival Corp., of which he is majority owner.

2. Festival Corp. is a South Carolina corporation with its principal place of  
business located in Fort Mill, York County, South Carolina.

3. Pulley and Foster are citizens and residents of Arkansas, and are tenants of  
record under a lease pertaining to Plaintiffs' Property. Pulley and Foster do business in

ROA 000027



South Carolina as FWK, Inc. an Arkansas corporation registered to do business in the State of South Carolina, with its principal place of business located at 3644 Festival Drive, Fort Mill, York County, South Carolina.

4. Defendant D&T Imports is, upon information and belief, a Nevada corporation that is not registered to do business in South Carolina, but which nonetheless is transacting business in South Carolina and is the owner of real property located at 3620 Festival Drive, Fort Mill, York County, South Carolina (the "Subject Property"). Service of process upon Defendant can be made by serving the South Carolina Secretary of State.

5. The Defendant York County is a governmental entity and political subdivision of the State of South Carolina, subject to the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code Section 6-29-310, et seq. (the "Act").

6. This action concerns a recorded deed restriction affecting the use of real property located in York County, South Carolina. This Court has jurisdiction over the parties and the subject matter of this dispute. Venue is proper in York County.

#### STATEMENT OF FACTS

---

7. D&T Imports' Subject Property is adjacent to Plaintiffs' Property, both of which were originally owned by Crescent Resources, Inc. ("Crescent"), a common grantor for both properties.

8. On or about August 30, 1990, Crescent sold Plaintiffs' Property to Sonnenberg. A true and correct copy of the deed from Crescent is attached hereto as Exhibit "A" and is incorporated herein by reference.

9. Sonnenberg, through Festival Corp., leased the Plaintiffs' Property to Pulley and Foster by lease dated December 31, 2003. Prior to entering into the lease for

Plaintiffs' Property, Pulley and Foster sought to purchase the Subject Property from Crescent for the purpose of operating a retail fireworks store at that location. Crescent's representative informed Pulley and Foster that fireworks sales were prohibited on the Subject Property, and that deed restrictions prohibited the sale of fireworks on the property.

10. Based on Crescent's representations as to the prohibition on fireworks sales, and in reliance on said representations, Pulley and Foster declined to purchase the Subject Property and instead entered into a long term lease with Sonnenberg and have operated their fireworks retail store at that location ever since. Pulley and Foster acted in reliance on the existence of such deed restriction and would not have entered the long term lease to conduct a retail fireworks business from the adjacent property but for the prohibition.

11. On or about June 14, 2005, Crescent sold the Subject Property to Randazzo Properties, LLC, pursuant to a certain Special Warranty Deed and a certain Quit-Claim Deed of the same date ("Randazzo Deeds"). True and correct copies of the Randazzo Deeds are attached hereto as Exhibits "B" and "C," respectively, and are

---

incorporated herein by reference.

12. When the Randazzos purchased the Subject Property in 2005, the Randazzo Deeds specifically included the following language (the "Deed Restriction"):

The within property is conveyed subject to restrictions, covenants and reservations of record and further to the covenant and restriction that the following activities are prohibited on the subject property: the sale of fireworks or the operation of a bingo parlor or similar recreation facility. (emphasis added). Exhibits C and D at p. 2.

13. TD Bank acquired title to the Subject Property pursuant to that certain Master in Equity Deed ("Master's Deed") dated May 23, 2011, issued as a result of a

mortgage foreclosure action filed against Randazzo Properties, Barbara Jean R. Oriani, Joseph E. Randazzo, et al., Judgment Roll No. 2010-CP-46-2431. A true and correct copy of the Master's Deed is attached hereto as Exhibit "D" and is incorporated herein by reference. The Master's Deed states that the Subject Property was sold subject to "any past due or accruing property taxes, assessments, existing easements and restrictions of record and any senior encumbrances." Exhibit D at p. 2.

14. On or about April 6, 2012, D&T Imports purchased the Subject Property pursuant to a certain Limited Warranty Deed from TD Bank, N.A. ("TD Bank Deed"). A true and correct copy of the deed from TD Bank is attached hereto as Exhibit "E" and is incorporated herein by reference. The TD Bank Deed states that the Subject Property was sold "subject to all obligations, restrictions, limitations, covenants, easements and other matters of record and governmental ordinances and regulations affecting the Property." Exhibit E, at p. 1.

15. The Deed Restriction is in D&T Imports' chain of title, runs with the land and prohibits the D&T Imports' intended activity of operating a retail fireworks store on the Property.

---

16. D&T Imports is aware of and bound by the Deed Restrictions.

17. Section 6-29-1145 of the Act provides in relevant part as follows:

(A) In an application for a permit, the local planning agency must inquire in the application or by written instructions to an applicant whether the tract or parcel of land is restricted by any recorded covenant that is contrary to, conflicts with, or prohibits the permitted activity.

(B) If a local planning agency has actual notice of a restrictive covenant on a tract or parcel of land that is contrary to, conflicts with, or prohibits the permitted activity:

(1) in the application for the permit;

(2) from materials or information submitted by the person or persons requesting the permit; or

(3) from any other source including, but not limited to, other property holders, the local planning agency must not issue the permit unless the local planning agency receives confirmation from the applicant that the restrictive covenant has been released for the tract or parcel of land by action of the appropriate authority or property holders or by court order. (emphasis added).

18. York County has actual notice of the Deed Restriction as provided in Section 6-29-1145 of the Act. Plaintiffs provided a copy of the Randazzo Deeds, which contain the Deed Restriction, to York County on or before May 31, 2012.

19. Upon information and belief, D&T Imports has sought or obtained building and other permits from York County and intends to open and operate a retail fireworks store on the Subject Property in direct violation of the Deed Restrictions.

20. Plaintiffs are further informed and believe that York County has instructed D&T Imports that no certificate of occupancy can be issued unless and until a release of the Deed Restriction is obtained.

21. Upon further information and belief, D&T Imports has requested that Crescent release the Deed Restriction. No such request has been made upon the Plaintiffs and Plaintiffs have not released the Deed Restriction.

---

**FOR A FIRST CAUSE OF ACTION**  
**(Declaratory Judgment)**

22. Plaintiffs reiterate the allegations contained in the above paragraphs and incorporate them by reference herein to the extent not inconsistent with the following.

23. Plaintiffs, owner and tenants of the Plaintiffs' Property, are interested parties in and intended beneficiaries of the Deed Restrictions. The Deed Restriction runs

with and binds the land, and inures to the benefit of and are enforceable by adjacent property owners.

24. The Act specifically prohibits the issuance of permits by York County that would allow D&T Imports to sell fireworks on the Subject Property because such activity is prohibited by the Deed Restriction.

25. An actual controversy and dispute has arisen between the Plaintiffs and the Defendants regarding the Deed Restriction, the ability of York County to issue permits over the Deed Restriction, and D&T Imports' ability to operate a retail fireworks store on the Subject Property.

26. Based on the foregoing, the Plaintiffs seek and are entitled to a judicial declaration, pursuant to the provisions of S.C. Code Ann. § 15-53-30 (Law. Co-op. 2005), that:

a) the sale of fireworks on the Subject Property is prohibited by the Deed Restriction.;

b) as adjoining property owners who have acted in reliance on the continued existence of the Deed Restriction, the Plaintiffs are "other property holders" under the Act required to consent to the release of the Deed Restriction; and

c) York County is prohibited from issuing any permits relating to the use of the Subject Property contrary to the Deed Restriction without obtaining a release from the Plaintiffs; and

d) Any and all permits issued by York County over the Deed Restriction are invalid and must be revoked as being in violation of S.C. Code Section 6-29-1145(A)(3).

27. Plaintiffs are entitled to recover its costs in this matter from Defendants, including reasonable attorney's fees, pursuant to the provisions of S.C. Code Ann. §§ 15-53-100 and 15-53-120 (Law. Co-op. 2005).

**FOR A SECOND CAUSE OF ACTION**  
**(Preliminary Injunction and Permanent Injunction)**

28. Plaintiffs reiterate the allegations set forth above and incorporate them by reference to the extent not inconsistent herewith.

29. D&T Imports' intended use of the Subject Property in direct violation of the Deed Restrictions substantially interferes with Plaintiffs' use and enjoyment of its property and threatens irreparable harm to the Plaintiffs' Property. Specifically, Plaintiffs Pulley and Foster have operated a retail fireworks store on the adjacent lot since 2004. Prior to entering into that lease, they had to forego the opportunity to purchase the Subject Property from Crescent due to the prohibition on selling fireworks at that location. Their revenues from fireworks sales will dramatically and precipitously fall as a result of D&T Imports' improper and illegal activity on the adjoining parcel.

30. D&T Imports has failed to register to do business as a foreign corporation ~~in the state of South Carolina, in defiance of this State's corporation and taxation laws.~~

31. Defendants' conduct has caused, and will continue to cause irreparable harm to Plaintiffs. Plaintiffs have made investment decisions and entered into long term contractual relationships based in reliance upon the existence and effect of the Deed Restriction.

32. Plaintiffs are "other property holders" as described in Section 6-29-1145 of the Act, and have not released the Deed Restriction.

33. Upon information and belief, York County has already issued a building permit and other permits to D&T Imports to allow improvements to be made to the Subject Property, contrary to the clear mandate of Section 6-29-1145 of the Act.

34. There is no adequate remedy at law available to Plaintiffs if York County issues a certificate of occupancy or other permit to D&T Imports.

35. By reason of the foregoing, Plaintiffs are entitled to a Preliminary and Permanent Injunction prohibiting D&T Imports from operating a retail fireworks store on the Subject Property, prohibiting York County from issuing any further permits, certificates or other approvals in furtherance of D&T Imports' efforts to open a retail fireworks store on the Subject Property, and revoking any and all permits issued by York County in violation of S.C. Code Section 6-29-1145.

WHEREFORE, Plaintiffs pray for the following relief against D&T Imports:

- a) For declaratory relief as set forth above;
  - b) For entry of a Preliminary and Permanent Injunction prohibiting and enjoining D&T Imports from selling fireworks at the Subject Property contrary to the Deed Restriction;
- 
- c) For entry of a Preliminary and Permanent Injunction prohibiting and enjoining York County from issuing any further permits, certificates or other approvals in furtherance of D&T Imports' efforts to open a retail fireworks store on the Subject Property, and revoking any and all permits previously issued in violation of S.C. Code Section 6-29-1145
  - d) For the costs of this action;
  - e) For such other relief as the Court deems just and proper.

June 19, 2012

  
Daniel J. Ballou  
HAMILTON MARTENS & BALLOU, LLC  
Post Office Box 10940  
Rock Hill, South Carolina 29731  
803/329-7672

ATTORNEYS FOR PLAINTIFFS  
PHILLIP PULLEY AND ROBERT FOSTER

B. Bayles Mack  
MACK & MACK  
101 Allison Street  
Fort Mill, South Carolina 29715

ATTORNEYS FOR PLAINTIFFS CHARLES  
SONNENBERG & FESTIVAL CORP.



STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTHTEENTH JUDICIAL CIRCUIT

Charles Sonnenberg, Festival Corp., )  
Phillip Pulley and Robert Foster )

C/A No. 2012-CP-46-\_\_\_\_\_

Plaintiffs, )  
)  
)

VERIFICATION

v. )  
)  
)

D&T Imports South Carolina, Inc., )  
A Nevada Corporation, d/b/a )  
Area 51 Fireworks, )  
)

Defendant. )  
)  
)

v.

Personally appeared before me, Phillip Pulley, who first being duly sworn deposes and says:

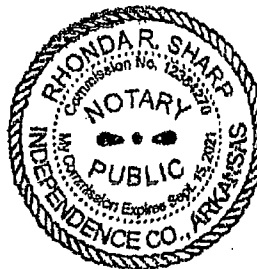
1. I am a tenant under lease with Festival Corp. as to the Plaintiffs' Property located adjacent to the Defendant's Property described in the lawsuit in this matter, and along with Robert Foster am one of the owners of FWK, Inc. d/b/a Fireworks World. This verification is based upon my personal knowledge and belief, or based upon documents that generated and maintained in the ordinary course of business.

2. I have reviewed the allegations and statements of the Verified Complaint, and verify that they are true and accurate of my own knowledge, except those matters and things stated upon information and belief, and as to those matters and things, I believe them to be true.

Phillip Pulley  
Phillip Pulley

Sworn to before me this  
13<sup>th</sup> day of June, 2012

Rhonda R. Sharp  
Notary Public for Independence  
My commission expires Sept. 15, 2021.



4825-7897-7551, v. 1

ROA 000036

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

BOOK 111 PAGE 324

File No. \_\_\_\_\_

Aug 30 2 54 PM '90

KNOW ALL MEN BY THESE PRESENTS that CRESCENT RESOURCES, INC. (formerly Crescent Land Co. Timber Corp.), a South Carolina corporation, hereinafter called "Grantor", in consideration of the sum of Three Hundred Twenty-Five Thousand and No/100 Dollars (\$325,000.00), to it in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto CHARLES SONNENBERG, hereinafter called "Grantee", all that certain tract of land more particularly described as follows (the "Premises"):

Lying and being in Fort Mill Township, York County, South Carolina and being more particularly described as follows:

BEGINNING at a concrete monument located on the easterly boundary of the property conveyed to Festival Associates by deed recorded in Deed Book 825 at Page 327 in the Office of the Clerk of Court for York County, South Carolina which beginning point is located S. 04-10-48 E. 3863.43 feet from a marker for NCGS Carolands having North Carolina Grid System coordinates (North American Datum 1927) of N. 499,560.16 and E. 1,421,333.10, which beginning point also marks the westerly boundary of the right-of-way of Outlet Drive (Y-H2-37), the same as shown in the document recorded in Deed Book 921 at Page 269 in the Office of the Clerk of Court for York County, South Carolina; and running thence from said BEGINNING point with an arc of the circular curve to the right having a radius of 118.22 feet (a chord bearing of S. 74-37-30 W. with a chord distance of 178.84 feet and having a delta of 98-04-30) a length of 202.36 feet to a 5/8 inch new iron rod; thence N. 56-18-07 W. 6.69 feet to a concrete monument located in the right-of-way of Festival Drive (Y-H2-38), the same as shown in the document recorded in Deed Book 921 at Page 283 in the Office of the Clerk of Court for York County, South Carolina; and running thence with the easterly margin of the right-of-way of Festival Drive S. 33-41-53 W. 293.05 feet to a 5/8 inch existing iron rod; thence continuing with the easterly boundary of the right-of-way of Festival Drive S. 33-41-53 W. 49.94 feet to a new point marking the intersection of the easterly boundary of the right-of-way of Festival Drive (Y-H2-38) and the northeasterly boundary of the right-of-way of Outlet Drive (Y-H2-37); thence S. 56-18-09 E. 252.54 feet to a point lying in the westerly margin of the right-of-way of Interstate Highway No. 77; thence with the westerly right-of-way margin of I-77 the following two courses and distances: (1) N. 33-27-17 E. 371.62 feet to

COUNTY  
TREASURER  
TAX  
367.50  
PAID

RECORDED  
YORK COUNTY CLERK'S OFFICE  
TAX ASS. 35 JRS OFFICE

DATE 8-31-90  
TAX MAP NO. 123-55  
INITIALS [Signature]

RECORDED  
RECORD  
117 PG 324  
YORK COUNTY, S.C.

324

EXHIBIT  
A

STATE OF SOUTH CAROLINA

BOOK 825

File No. \_\_\_\_\_

COUNTY OF YORK

Aug 30 2 54 PM '90

KNOW ALL MEN BY THESE PRESENTS that CRESCENT RESOURCES, INC. (formerly Crescent Land Co. Timber Corp.), a South Carolina corporation, hereinafter called "Grantor", in consideration of the sum of Three Hundred Twenty-Five Thousand and No/100 Dollars (\$325,000.00), to it in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto CHARLES BONNENBERG, hereinafter called "Grantee", all that certain tract of land more particularly described as follows (the "Premises"):

Lying and being in Fort Mill Township, York County, South Carolina and being more particularly described as follows:

BEGINNING at a concrete monument located on the easterly boundary of the property conveyed to Festival Associates by deed recorded in Deed Book 825 at Page 327 in the Office of the Clerk of Court for York County, South Carolina which beginning point is located S. 04-10-48 E. 3863.43 feet from a marker for NCGS Carowinds having North Carolina Grid System coordinates (North American Datum 1927) of N.=499,560.16 and E.=1,421,333.10, which beginning point also marks the westerly boundary of the right-of-way of Outlet Drive (Y-H2-37), the same as shown in the document recorded in Deed Book 921 at Page 269 in the Office of the Clerk of Court for York County, South Carolina; and running thence from said BEGINNING point with an arc of the circular curve to the right having a radius of 118.22 feet (a chord bearing of S. 74-37-30 W. with a chord distance of 178.54 feet and having a delta of 98-04-30) a length of 202.36 feet to a 5/8 inch new iron rod; thence N. 56-18-07 W. 6.69 feet to a concrete monument located in the right-of-way of Festival Drive (Y-H2-38), the same as shown in the document recorded in Deed Book 921 at Page 253 in the Office of the Clerk of Court for York County, South Carolina; and running thence with the easterly margin of the right-of-way of Festival Drive S. 33-41-53 W. 293.05 feet to a 5/8 inch existing iron rod; thence continuing with the easterly boundary of the right-of-way of Festival Drive S. 33-41-53 W. 49.94 feet to a new point marking the intersection of the easterly boundary of the right-of-way of Festival Drive (Y-H2-38) and the northeasterly boundary of the right-of-way of Outlet Drive (Y-H2-37); thence S. 56-18-09 E. 252.54 feet to a point lying in the westerly margin of the right-of-way of Interstate Highway No. 77; thence with the westerly boundary of the right-of-way margin of I-77 the following two courses and distances: (1) N. 33-27-17 E. 371.62 feet to

COUNTY  
CLERK  
TAX  
367.50  
PAID

RECORDED

TAX ASSESSOR'S OFFICE

DATE 8-31-90

TAX MAP NO. 733-55

INITIALS

324

RECORDED  
RECORD  
YOK 117 PG 324  
YORK COUNTY, S.C.

ROA 000038

a new point; and (2) with the arc of a circular curve to the left having a radius of 1324.69 feet (a chord bearing of N. 31-09-15 E. a chord distance of 106.34 feet and a delta of 04-36-03) an arc distance of 106.37 feet to a point; thence N. 56-17-06 W. 122.59 feet to the point and place of BEGINNING and containing a total of 2.439 acres identified as Tract 2 (1.414 acres including R/W) and Tract 2A (1.025 acres including abandoned portion of Outlet Drive) all as shown on Plat of Survey for Crescent Resources dated August 29, 1990 prepared by Cardan Systems Corp. and recorded in Plat Book 106 at Page 4 in the Office of the Clerk of Court for York County, South Carolina, reference to which plat of survey is hereby made for a more particular description of the above-described property.

BEING in all respects a portion of the property conveyed to The Carowinds Corporation by deed of E.L. Caldwell recorded in Book 416 at Page 222 in the Office of the Clerk of Court of York County. The Carowinds Corporation was merged into Crescent Land & Timber Corp. by Articles of Merger dated December 26, 1978 and recorded in Book 524 at Page 440 in the Office of the Clerk of Court for York County. Crescent Land & Timber Corp. changed its name to Crescent Resources, Inc. by Articles of Amendment dated July 12, 1989 and filed with the Secretary of State of the State of South Carolina on July 14, 1989.

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the Premises belonging, or in any wise incident or appertaining.

THIS CONVEYANCE is made subject to the following easements, reservations, conditions and restrictions which shall run with the land and be binding upon Grantee and Grantee's heirs, successors and assigns:

1. All valid and enforceable easements, restrictions and conditions which may appear of record, including but not limited to the following:
  - a. Declaration of Restrictions recorded in Volume 510 at Page 54 in the Office of the Clerk of Court for York County, as amended.
  - b. Public utility service easements and rights-of-way.
2. Rights-of-way of existing roads, including the right-of-way of Outlet Drive, if any.
3. Zoning and subdivision ordinances.

4. Ad valorem taxes for the year 1990, which the Grantor hereby agrees to pay.
5. Matters, easements, and rights-of-way shown on that certain plat of the Premises prepared by Cardan Systems Corp. dated August 29, 1990 and recorded in Plat Book 106 at Page 4 in the Office of the Clerk of County for York County, including but not limited to the following:
  - a. Forty (40) foot wide monorail right-of-way;
  - b. underground private electrical line;
  - c. two (2) inch plastic natural gas line (York County Natural Gas Authority);
  - d. telephone line (Fort Mill Telephone Company).
6. Any right or a claim, including but not limited to any right of possession or claim for damage relating to the Premises, which has or may be asserted of record or not, by or on behalf of any Indian or Indian tribe arising out of any treaty or other transfer of land, based on the Indian Non-Intercourse Act of 1790 (25 USC Section 177), or any similar State or Federal Law.

FURTHER, this conveyance is made subject to the following reservations, conditions and restrictions:

1. All buildings and improvements constructed upon the Premises shall be of a design, architecture and quality substantially similar or equivalent to the Site Plan dated August 16, 1990 and last revised on August 27, 1990 and Elevations dated August 20, 1990, all as prepared by S.G. Hondros & Associates, Inc., identified as "Rugal MacDoogal's Store. No building or other structure or improvement shall be erected on the Premises nor shall the exterior of any such building or other structure or improvement, any site plan or any sign be substantially altered from the plans hereinabove referred to until plans therefore shall have been approved in writing by Grantor, which such approval shall not be unreasonably withheld or delayed. For the purposes of this reservation, condition and restriction, the term "substantial modification" or "substantially altered" shall mean a modification to the exterior of any approved building or site plans which substantially changes the site configuration and the location of any building, structure or improvement, the color, building materials, structure or other material exterior feature of any building or other structure or any new signage or the relocation of any signage approved by Grantor as provided herein.

Prior to seeking approval of any substantial modification to any of the foregoing, Grantee shall submit to Grantor plans for the proposed modifications which comply with the following:

- (a) For any substantial change or alteration to the location of any buildings or any other structure or improvement on the Premises, a site plan showing the location of the proposed change;
- (b) for any substantial change or alteration to the design, exterior configuration, color, building materials of any building or other structure on the Premises, architectural plans in reasonable detail of all building and other structures proposed to be substantially changed or altered including, without limitation, elevations of all such buildings and other structures and descriptions of the proposed building materials and the color of such buildings and other structures;
- (c) for any new signage or the relocation of any existing signage on the Premises, plans or written descriptions of all signs to be constructed or relocated; provided, however the Grantee shall not be required to submit plans for, or receive Grantor's approval of any redesign or change in the copy, text, color, shape and message of any previously approved sign on the property herein conveyed so long as such modification of existing signage conforms, without waiver or special permit, to all applicable ordinances of York County or other authority having jurisdiction over such signs.

Such right of approval shall be enforceable by Grantor, its successors and assigns, and shall run with the land and be enforceable as against Grantee's heirs, successors and assigns for a period which is the lesser of: (a) fifteen (15) years or (b) until Grantor shall have conveyed all property of Grantor as shown upon plat of survey entitled "Composite Map Showing Property of Crescent Land & Timber Corp.," prepared by Spratt-Seaver, Inc., dated August 9, 1973, Revised March 27, 1975, recorded in Plat Book 44 at page 140 in the office of the Clerk of Court for York County, South Carolina. Nothing herein shall be construed to impose any condition or restriction upon the property of Grantor not herein conveyed. Grantor hereby indicates its approval of the plans hereinabove referred to.

The Grantor shall have forty-five (45) days after any of the foregoing plans are submitted to it in which to notify Grantee in writing that it either has approved or disapproved the plans. If Grantor does not object to any of the foregoing plans within forty-five (45) days after receipt of them, then Grantor shall conclusively be deemed to have approved the plans. Any notice disapproving any plans or specifications submitted pursuant to this provision shall not be effective unless such notice:

- (i) is in writing;
  - (ii) is delivered to Grantor within forty-five (45) days of submission of any of the plans and specifications to Grantor; and
  - (iii) is approved by resolution of the Board of Directors of Grantor, or any successor corporation which resolution shall be attached to such notice.
2. Grantor hereby reserves, grants and conveys unto itself, its successors and assigns an exclusive easement over the Property for the installation, reconstruction, maintenance and repair of the presently existing sign and all electrical lines and conduits associated therewith in the location indicated on the plat of the Property recorded in the office of the Clerk of Court of York County as "Comfort Inn Sign Lease to Ft. Mill Hotel Assoc." (the "Easement Tract"). Grantor further reserves a nonexclusive right of ingress, egress and regress over and upon that portion of the Property adjacent to or in the vicinity of the Easement Tract as may be essential to the use thereof or for the aforesaid purposes if adequate access thereto is not provided by established means of approach. Grantee shall be compensated for any damage resulting at any time from the exercise of the right of ingress, egress and regress hereby granted; provided, in the event of disagreement any time as to the amount of such damage, one arbitrator shall be selected by Grantor, one by Grantee, and a third, if necessary, by the two so selected and the decision in writing of the three shall be final and binding upon the parties thereto.

The easement herein reserved and granted shall exist only so long as such sign constructed on the Easement Tract advertises The Comfort Inn or any other hotel or motel on the Property upon which The Comfort Inn is located (York County Tax Parcel #723-23) and so long as Grantor complies with the terms and conditions of

this paragraph 2. Grantor shall be permitted to replace, rebuild and reconstruct the sign and change the copy, text, color, shape and message of the sign (but not change the size of the sign or the size or height of the base and support of the sign) so long as the sign is for the purpose herein stated and does not contain any text which is adverse to or competitive with the business which is then being operated on the Premises by the Grantee, his successors and assigns.

Grantor shall be permitted to lease or assign its interest in the Easement Tract reserved herein subject to the strict compliance by Grantor's tenant or assignee with the terms and provisions of this deed. Further, Grantor agrees to indemnify and hold Grantee harmless against all loss, claims, costs, actions and expenses (including reasonable attorney's fees) arising out of the use, repair, maintenance and operation of the sign upon the Easement Tract by Grantor and its tenants, assignees, or invitees.

TO HAVE AND TO HOLD all and singular the Premises before mentioned, unto the said Grantee and Grantee's successors and assigns forever.

And Grantor covenants with Grantee that Grantor has done nothing to impair such title as Grantor received, and Grantor will warrant and defend such title against the lawful claims of all persons claiming by, under or through Grantor, except for the exceptions stated herein.



ms fcb  
mfb

IN WITNESS WHEREOF, Grantor has caused this instrument to be executed by its duly authorized officials, this the 28th day of August, in the year of our Lord 1990, and in the 214th year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered  
in the Presence of:

Sharon C. Arrowood  
Cathy Walters Barkley

CRESCENT RESOURCES, INC.

By: Richard C. Ransom  
President

[CORPORATE SEAL]

ATTEST:

By: Ethelene G. Williams  
Assistant Secretary

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

PERSONALLY appeared before me Sharon C. Arrowood and made oath that (s)he saw the within named CRESCENT RESOURCES, INC., by Richard C. Ransom, President, and Ethelene G. Williams, Assistant Secretary, sign, seal and as its act and deed deliver the within written instrument, and that (s)he with Cathy Walters Barkley witnessed the execution thereof.

Sharon C. Arrowood  
First Witness

SWORN to before me this 28th  
day of August, 1990.

Cathy Walters Barkley  
Notary Public

My Commission Expires: October 27, 1993

WEP/mkb/1724

-7-

330

ROA 000044

Attn: Carroll M. Pitts, Jr.

INITIALS

AC / CH

ROBINSON, BRADSHAW & HINSON  
Attorneys at Law

140 East Main Street, Suite 420  
Rock Hill, South Carolina

Fee: \$10.00  
County: York  
David Hamilton, Clerk of Court  
York County, SC

THE STATE OF SOUTH CAROLINA

County of York

RECORDED 06/17/2005 02:48:23PM  
BK: 07175 Pg: 100072 Pages: 15  
Fee: \$10.00 State: \$2210.00  
County: York  
York County, SC  
TITLE TO LAND BY SPECIAL WARRANTY DEED

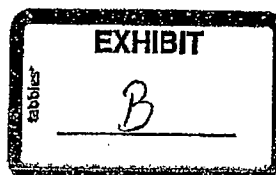
KNOW ALL MEN BY THESE PRESENTS, That Crescent Resources, LLC, a Georgia limited liability company, in consideration of the sum of One and No/100 Dollar and other valuable consideration, to it in hand paid at and before the sealing of these presents by Randazzo Properties, LLC, a South Carolina limited liability company having an address of 118 1/2 Academy Street, Fort Mill, SC 29715, (the receipt and sufficiency of which is hereby acknowledged) has granted, bargained, sold and released and by these Presents does grant, bargain, sell, and release unto the said Randazzo Properties, LLC, its successors and assigns, the following described property, subject to the restrictions, covenants, reservations, easements and right of ways set forth or referred to below, to wit:

All that certain piece parcel or lot of land lying, being and situate on the southeastern side of Festival Drive in Fort Mill Township, York County, South Carolina and being more particularly shown and described on plat entitled "Crescent Land & Timber Corp. AVENUE OF THE CAROLINAS SUBDIVISION TRACT 1" dated January 15, 1986 (the "Plat"), as follows: BEGINNING at a point on the northwestern edge of the right of way of Interstate Highway No. 77 at coordinates N= 494,936.57 feet and E= 1,421,257.42 feet and running thence N. 37° 59' 19" W. (passing an iron pipe found at 3.91 feet) for a distance of 275.16 feet to an iron pin found; thence running in a circular curve to the left having a radius of 1712.40 feet for an arc distance of 44.57 feet to a iron pin set on the southeastern edge of the right of way of Festival Drive; thence with the edge of said right of way N. 50° 31' 03" E. 49.68 feet and in a circular curve to the left having a radius of 833.00 feet for an arc distance of 100.05 feet to an iron pin set; thence turning and running with the right of way line of Festival Drive to the right of way line of Outlet Drive, N. 82° 42' 04" E. 76.19 feet to an iron pin set; running thence with Outlet Drive S. 56° 17' 06" E. 207.76 feet to an iron pin set on the northwestern edge of the right of way of Interstate Highway 77, at coordinates N= 495,182.27 and E= 1,421,420.15; running thence with said right of way S. 33° 31' 02" W. 294.70 feet to the point of beginning; containing 1.558 acres, according to said plat. (SEE ALSO P18-106-4)

DERIVATION: Carowinds, Inc., a/k/a The Carowinds Corporation, merged into Crescent Land & Timber Corp. by Articles of Merger dated December 26, 1975, recorded in Deed Book 524 at Page 440; Crescent Land & Timber Corp. changed its name to Crescent Resources, Inc., recorded in Deed Book 1100 at Page 347; Crescent Resources, Inc., a South Carolina corporation, merged into Crescent Resources of Georgia, Inc., a Georgia Corporation. Crescent

R-88627v2 04491.01270

07175 100072



ROA 000045

The within described property is conveyed subject to restrictions, covenants and reservations of record and further to the covenant and restriction that the following activities are prohibited on the subject property: the sale of fireworks or the operation of a bingo parlor or similar recreation facility.

The within described property is further conveyed subject to ad valorem property taxes for the year 2005 and to existing easements and rights of way appearing in the chain of title or apparent upon a reasonable inspection of the premises.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said Randazzo Properties, LLC, its successors and assigns forever.

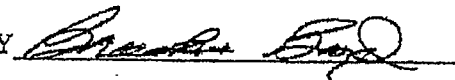
And Crescent Resources, LLC does hereby bind itself and its successors to warrant and forever defend all and singular the said Premises unto the said Randazzo Properties, LLC, its successors and assigns against it and its successors and all other persons whomsoever claiming or to claim the same, or any part thereof, by, through or under the Grantor, but not otherwise.

In Witness Whereof, Crescent Resources, LLC has caused these presents to be executed in its name by Brooks Boyd, its Vice President this 14 day of June and in the year of our Lord two thousand five (2005) and in the two hundred and twenty ninth year of the Sovereignty and Independence of the United States of America.

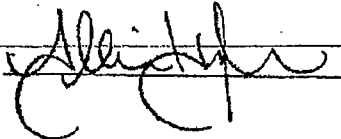
Signed, sealed and delivered  
In the presence of:



Crescent Resources, LLC

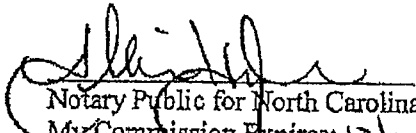
BY 

ITS: Vice President



THE STATE OF NORTH CAROLINA )  
COUNTY OF MECKLENBURG )

The foregoing instrument was acknowledged before me this 14 day of June 2005 by Brooks Boyd, as Vice President of Crescent Resources, LLC, a Georgia limited liability company, on behalf of the limited liability company.

  
Notary Public for North Carolina  
My Commission Expires: 12/15/09

[NOTARIAL SEAL]

R-88627v2 04491.01270

3

BK07175 PQ0074

ROA 000047

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.
2. The property being transferred is located at 3620 Festival Drive, Fort Mill, South Carolina bearing York County Tax Map Number 723-00-00-024 was transferred by Crescent Resources, LLC to Randazzo Properties, LLC on June \_\_, 2005.

3. Check one of the following: The deed is

- (a) X subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
- (b) \_\_\_\_\_ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
- (c) \_\_\_\_\_ exempt from the deed recording fee because (See Information section of affidavit):  
(If exempt, please skip items 4 - 7, and go to item 8 of this affidavit.)

4. Check one of the following if either item 3(a) or 3(b) above has been checked (See Information section of this affidavit):

- (a) X The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$850,000.00
- (b) \_\_\_\_\_ The fee is computed on the fair market value of the realty which is \_\_\_\_\_
- (c) \_\_\_\_\_ The fee is computed on the fair market value of the realty as established for property tax purposes which is \_\_\_\_\_

5. Check Yes \_\_\_\_\_ or No x to the following: A lien or encumbrances existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "Yes", the amount of the outstanding balance of this lien or encumbrance is: \_\_\_\_\_

6. The deed recording fee is computed as follows:

- (a) Place the amount listed in item 4 above here \$850,000.00
- (b) Place the amount listed in item 5 above here: 0

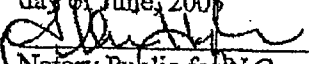
7. The deed recording fee due is based on the amount listed on Line 6(c) above and deed recording fee due is: \$3,145.00

8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Vice President of Crescent Resources, LLC.

9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned for not more than one year, or both.

  
Responsible Person Connected with the Transaction

Sworn to before me this 14  
day of June, 2006

  
Notary Public for N.C.

My Commission Expires: 12/15/09

## RECORDED

YORK COUNTY

TAX RECORDER'S OFFICE

APPROPRIATE RECORDING MAIL TO:  
Robinson, Bradshaw & Hinson, P.A.  
Post Office Drawer 11070  
Rock Hill, SC 29731  
Attn: Carroll M. Hinson, Jr.

DATE 6-30-05TAX MAP NO. 423-24INITIALS AC / CH

000241785  
RECORDED 06/17/2005 02:19:15PM  
Bk107175 Pg100077 Page915  
Fee:10.00 Bk107175 Pg100077 Page915  
County: York, SC  
David Hamilton, Clerk of Court  
York County, SC

ROBINSON, BRADSHAW &amp; HINSON, P.A.

Attorneys at Law

140 East Main Street, Suite 420

Rock Hill, South Carolina 29730

THE STATE OF SOUTH CAROLINA

County of York

TITLE TO REAL ESTATE  
QUIT-CLAIM DEED

KNOW ALL MEN BY THESE PRESENTS, That Crescent Resources, LLC, a Georgia limited liability company, in consideration of the sum of One and No/100 Dollar only, to it in hand paid at and before the sealing of these presents by Randazzo Properties, LLC, a South Carolina limited liability company having an address of 118 1/2 Academy Street, Fort Mill, SC 29713, (the receipt and sufficiency of which is hereby acknowledged) has granted, bargained, sold and released and by these Presents does grant, bargain, sell, quit-claim and release unto the said Randazzo Properties, LLC, its successors and assigns, the following described property, subject to the restrictions, covenants, reservations, easements and right of ways set forth or referred to below, to wit:

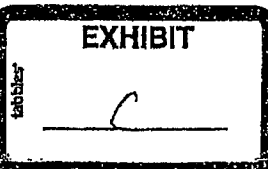
All that certain piece parcel or lot of land lying, being and situate on the southeastern side of Festival Drive in Fort Mill Township, York County, South Carolina and being more particularly shown and described on plat entitled "ALTS/ACSM SURVEY FOR RANDAZZO PROPERTIES, LLC" prepared by The Lease Group dated June 1, 2005 (the "Plat"), as follows: BEGINNING at a #4 rebar set on the southerly right of way of Outlet Drive (66' Public R/W); said point lying N. 02° 08' 46" E. from USGS Monument "Carowinds" having N. C. Grid Coordinates of N=499,624.273' and E=1,421,409.191'; thence from said point along the right of way of Outlet Drive, S. 36° 24' 25" E. 207.65 feet to a found #4 rebar on the westerly edge of the right of way of Interstate 77 south; thence along the right of way S. 33° 25' 31" W. 294.39 feet to a computed point on the right of way; thence turning and running with the common line of the Exxon Corporation (Deed Book 444, Page 444) N. 38° 01' 33" W. passing through a new #4 rebar set at 3.96 feet for a total of 276.15 feet to a new #4 rebar set; thence N. 38° 29' 14" W. 43.75 feet to a found #4 rebar on the southerly right of way of Festival Drive (Deed Book 921, Page 253) said point lying S. 37° 43' 21" E. 3.18 feet from a found #4 rebar; thence along the right of way of Festival Drive the following three (3) courses: (1) N. 50° 37' 17" E. 49.32 feet to a found #4 rebar; (2) N. 46° 55' 34" E. 100.43 feet to a found #4 rebar; and (3) N. 82° 55' 05" E. 75.94 feet to the point and place of beginning, containing 1.560 acres, according to said plat.

(PLAT 423-24 AT ---)  
DERIVATION: Carowinds, Inc., a/k/a The Carowinds Corporation, merged into Crescent Land & Timber Corp. by Articles of Merger dated December 26, 1975, recorded in Deed Book 524 at Page 440; Crescent Land & Timber Corp. changed its name to Crescent Resources, Inc., recorded in Deed Book 1100 at Page 347; Crescent Resources, Inc., a South Carolina corporation, merged into Crescent Resources of Georgia, Inc., a Georgia Corporation. Crescent

R-33027-3 04491.01270

06/17/05 PG00177

EXHIBIT



D + T deposit

803-548-

7200

BALAS  
MARKto  
back

March  
week  
@ computer  
net

ROA 000050

Resources of Georgia, Inc. converted into Crescent Resources, LLC, a Georgia limited liability company, see Record Book 3418, Page 225 *et seq.*

The within described property is conveyed subject to restrictions, covenants and reservations of record and further to the covenant and restriction that the following activities are prohibited on the subject property: the sale of fireworks or the operation of a bingo parlor or similar recreation facility.

The within described property is further conveyed subject to ad valorem property taxes for the year 2005 and to existing easements and rights of way appearing in the chain of title or apparent upon a reasonable inspection of the premises.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said Randazzo Properties, LLC, its successors and assigns forever.

In Witness Whereof, Crescent Resources, LLC has caused these presents to be executed in its name by Brooks Bond, its Vice President this    day of June and in the year of our Lord two thousand five (2005) and in the two hundred and twenty ninth year of the Sovereignty and Independence of the United States of America.

Signed, sealed and delivered  
in the presence of:

Thelma C. Smith

Crescent Resources, LLC

BY Brooks Bond

ITS: Vice President

Elaine Smith

R:862743 04491.01270

2

HX07175 780078

ROA 000051



THE STATE OF NORTH CAROLINA )  
COUNTY OF MECKLENBURG )

The foregoing instrument was acknowledged before me this 14 day of June 2005 by  
R. S. S. S. as Vice President of Crescent Resources, LLC, a Georgia limited  
liability company, on behalf of the limited liability company.

[Signature]  
Notary Public for North Carolina  
My Commission Expires: 12/15/09

[NOTARIAL SEAL]

R-88627-3 0439L01270

3

07175 PB0079

ROA 000052

STATE OF SOUTH CAROLINA)  
COUNTY OF YORK )

## AFFIDAVIT

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.
2. The property being transferred is located at 3620 Festival Drive, Fort Mill, South Carolina bearing York County Tax Map Number 723-00-00-024 was transferred by Crescent Resources, LLC to Randazzo Properties, LLC on June \_\_, 2003.
3. Check one of the following: The deed is
  - (a) \_\_\_\_\_ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
  - (b) \_\_\_\_\_ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
  - (c) X \_\_\_\_\_ exempt from the deed recording fee because (See Information section of affidavit): Quit-Claim Deed  
(If exempt, please stip items 4 - 7, and go to item 8 of this affidavit.)
4. Check one of the following if either item 3(a) or 3(b) above has been checked (See Information section of this affidavit):
  - (a) \_\_\_\_\_ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$1.00
  - (b) \_\_\_\_\_ The fee is computed on the fair market value of the realty which is \_\_\_\_\_
  - (c) \_\_\_\_\_ The fee is computed on the fair market value of the realty as established for property tax purposes which is \_\_\_\_\_
5. Check Yes \_\_\_\_\_ or No X to the following: A lien or encumbrances existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "Yes", the amount of the outstanding balance of this lien or encumbrance is: \_\_\_\_\_
6. The deed recording fee is computed as follows:

- (a) Place the amount listed in item 4 above here
- (b) Place the amount listed in item 5 above here: 0
- (If no amount is listed, place zero here)

A-18625-01 04451.01270

4

8807175 000000

ROA 000053

(c) Subtract Line 6(b) from Line 6(a) and place result here:

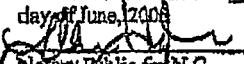
7. The deed recording fee due is based on the amount listed on Line 6(c) above and deed recording fee due is:

8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Vice President of Crescent Resources, LLC.

9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned for not more than one year, or both.

  
Responsible Person Connected with the Transaction

Sworn to before me this 14  
day of June, 2008

  
Notary Public for N.C.  
My Commission Expires 12/15/09

R-8802773 04491.01279

5

07175 00001

ROA 000054

Prepared by: Nelson, Mullins, LLP, PO Box 11070  
Columbia, SC 29211  
John T. Moore, Esquire

201100136028  
Filed for Record in  
YORK COUNTY, SC  
DAVID HAMILTON, CLERK OF COURTS  
06-02-2011 At 09:42 am.  
DEED 10.00  
State Tax .00  
County Tax .00  
OR Vol 12005 Page 120 - 124

# MASTER IN EQUITY DEED

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

TO ALL WHOM THESE PRESENT SHALL CONCERN:

I, S. Jackson Kimball, as Master In Equity for York County, the said State, send greetings:

WHEREAS, in an action in the Court of Common Pleas in York County between Carolina First Bank, now known as TD Bank, N.A. as plaintiff(s) and Randazzo Properties, Barbara Jean R. Oriani, Joseph E. Randazzo, et. al. as defendant(s), by an Order dated October 6, 2010, it was decreed that the property hereinafter described should be sold by the Master In Equity for York County on the terms and for the purposes mentioned in the Order(s) granted in the case (see Judgment Roll No. 2010-CP-46-2431) A MORTGAGE FORECLOSURE ACTION-TRANSFERRING REALTY

NOW THEREFORE KNOW ALL MEN, That I, the undersigned, as Master In Equity for York County, pursuant to the foregoing and in consideration of Eight Hundred Twenty Thousand Eighty Five and 56/100 (\$820,085.56) Dollars, as paid by the hereinafter named grantee, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant and release the following property unto, TD Bank, N.A. (Grantee):

All that certain piece, parcel or lot of land lying, being and situate on the southeastern side of Festival Drive in Fort Mill Township, York County, South Carolina and being more particularly shown and described on plat entitled "ALTS/ACSM SURVEY FOR RANDAZZO PROPERTIES, LLC" prepared by

The Isaacs Group dated June 1, 2005 (the "Plat"), as follows: BEGINNING at a #4 rebar set on the southerly right of way of Outlet Drive (66' Public R/W); said point lying N. 02° 08' 46" E. from USGS Monument "Carowinds" having N. C. Grid Coordinates of N=499,624.273' and E=1,421,409.191'; thence from said point along the right of way of Outlet Drive, S. 56° 24' 25" E. 207.65 feet to a found #4 rebar on the westerly edge of the right of way of Interstate 77 south; thence along the right of way S. 33° 25' 31" W. 294.89 feet to a computed point on the right of way; thence turning and running with the common line of the Exxon Corporation (Deed Book 444, Page 444) N. 38° 01' 53" W. passing through a new #4 rebar set at 3.96 feet for a total of 276.15 feet to a new #4 rebar set; thence N. 38° 29' 14" W. 43.75 feet to a found #4 rebar on the southerly right of way of Festival Drive (Deed Book 921, Page 253) said point lying S. 37°

RECORDED

YORK COUNTY

TAX ASSESSOR'S OFFICE

DATE 06-02-11

TAX MAP NO. 123-24

INITIALS CAP/JS

12005 00120

EXHIBIT

D

ROA 000055

43' 21" E. 3.18 feet from a found #4 rebar; thence along the right of way of Festival Drive the following three (3) courses: (1) N, 50° 37' 17" E. 49.32 feet to a found #4 rebar; (2) N. 46° 55' 34" E. 100.43 feet to a found #4 rebar; and (3) N. 82° 55' 05" E. 75.94 feet to the point and place of beginning; containing 1.560 acres, according to said plat. (PLAT C400 at 3).

This being the identical property conveyed to Randazzo Properties, LLC herein by deeds of Crescent Resources, LLC recorded June 17, 2005 in Record Book 7176 at Page 72 and Record Book 7176 at Page 77.

Tax Map No.: 723-00-00-024  
Property Address: 3620 Festival Drive

Grantee's Address: PO Box 1029, Greenville, SC 29602

This property was sold subject to any past due or accruing property taxes, assessments, existing easements and restrictions of record and any other senior encumbrances.

TOGETHER with all and singular the hereditaments, rights, members and appurtenances whatsoever to the said property belonging or in any wise incident or appertaining, and the reversions and remainders, rents, issues, and profits thereof, and also any estate, right, title, interest, dower, possession, benefit, claim or demand therein whatsoever of all parties to the said suit and of all other person who might rightfully claim the same or any part thereof, by, from, or under them, or either of them;

TO HAVE AND TO HOLD the said property, with its hereditaments, privileges and appurtenances, unto the said Grantee, its successors and assigns for their own use, benefit, and behoof, forever.

IN WITNESS WHEREOF, I, the undersigned, as Master In Equity for York County, under and by virtue of the said Order(s), have hereunto set my Hand and Seal the 28<sup>th</sup> day of May, 2011.

SIGNED, SEALED AND DELIVERED )  
IN THE Presence of:

Mary Ann Matz

Dorothy J. Shehan

By:

S. Jackson Kimball  
S. Jackson Kimball, Master  
In Equity for York County

#12005 MO-121

ROA 000056

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

I, Deborah J. Shehan, do hereby certify that S. Jackson Kimball, as Master in Equity for York County, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and seal this 23<sup>rd</sup> day of may, 2011.

Sworn To and Subscribed Before Me

This 23<sup>rd</sup> day of may, 2011.

Deborah J. Shehan (L.S.) My Commission Expires: 8/15/2011  
Notary Public of South Carolina

*Handwritten initials*

EX-12005 PD-122

ROA 000057

STATE OF SOUTH CAROLINA

COUNTY OF YORK

)  
) AFFIDAVIT FOR TAXABLE OR EXEMPT TRANSFERS  
)

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.
2. Property located in York County, South Carolina, TMS: 723-00-00-024, 3620 Festival Drive  
conveyed by S. Jackson Kimball, Master In Equity ("Grantor") to TD Bank, NA (see deed) (Grantee).
3. Check one of the following: The deed is
  - (a) \_\_\_\_\_ subject to the deed recording fee as transfer for consideration paid or to be paid in money or money's worth
  - (b) \_\_\_\_\_ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
  - (c) X Exempt from filing fee according to: Refer to Definition No. 13- Foreclosure Deed

(If exempt, skip items 4-7 and go to item 8.)

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information):
  - (a) \_\_\_\_\_ The fee is computed on the consideration paid or to be paid in money or money's worth.
  - (b) \_\_\_\_\_ The fee is computed on the fair market value of the realty which is \_\_\_\_\_.
  - (c) \_\_\_\_\_ The fee is computed on the fair market value of the realty as established for property tax purposes which is \_\_\_\_\_.
5. Check Yes \_\_\_\_\_ or No \_\_\_\_\_ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "Yes," the amount of the outstanding balance of this lien or encumbrance is: \_\_\_\_\_.

6. The deed recording fee is computed as follows:

- (a) Place the amount listed in item 4 above here \$
- (b) Place the amount listed in item 5 above here; (If no amount is listed, place zero here.) \$
- (c) Subtract Line 6(b) from Line 6(a): \$

7. The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is: \$ \_\_\_\_\_. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: closing attorney.

8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: closing attorney.

SK-12-05 100-1-23

ROA 000058

9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

NELSON MULLINS EILEY & SCARBOROUGH, LLP

By: \_\_\_\_\_

John T. Moore

Attorneys for TD Bank, NA

SWORN to before me this 31st  
day of May, 2011

William J. Chase

Notary Public for South Carolina

My commission expires: 10/24/2012

### INFORMATION

Except as provided in this paragraph, the term "value" means "the consideration paid or to be paid in money or money's worth for the realty." Consideration paid or to be paid in money's worth includes, but is not limited to, other realty, personal property, stocks, bonds, partnership interest and other intangible property, the forgiveness or cancellation of a debt, the assumption of a debt, and the surrendering of any right. The fair market value of the consideration must be used in calculating the consideration paid in money's worth. Taxpayers may elect to use the fair market value of the realty being transferred in determining fair market value of the consideration. In the case of realty transferred between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, and in the case of realty transferred to a trust or as a distribution to a trust beneficiary, "value" means the realty's fair market value. A deduction from value is allowed for the amount of any lien or encumbrance existing on the land, tenement, or realty before the transfer and remaining on the land, tenement, or realty after the transfer. Taxpayers may elect to use the fair market value for property tax purposes in determining fair market value under the provisions of the law.

Exempted from the fee are deeds:

- (1) transferring realty in which the value of the realty, as defined in Code Section 12-24-30, is equal to or less than one hundred dollars;
- (2) transferring realty to the federal government or to a state, its agencies and departments, and its political subdivisions, including school districts;
- (3) that are otherwise exempted under the laws and Constitution of this State or of the United States;
- (4) transferring realty in which no gain or loss is recognized by reason of Section 1041 of the Internal Revenue Code as defined in Section 12-6-40(A);
- (5) transferring realty in order to partition realty as long as no consideration is paid for the transfer other than the interest in the realty that are being exchanged in order to partition the realty;
- (6) transferring an individual grave space at a cemetery owned by a cemetery company licensed under Chapter 55 of Title 39;
- (7) that constitute a contract for the sale of timber to be cut;
- (8) transferring realty to a corporation, partnership, or a trust in order to become, or as, a stockholder, partner or trust beneficiary of the entity provided no consideration is paid for the transfer other than stock in the corporation, interest in the partnership, beneficiary interest in the trust, or the increase in value in such stock or interest held by the grantor. However, the transfer of realty from a corporation, a partnership, or a trust to a stockholder, partner, or trust beneficiary of the entity is subject to the fee even if the realty is transferred to another corporation, a partnership, or trust;
- (9) transferring realty from a family partnership to a partner or from a family trust to a beneficiary, provided no consideration is paid for the transfer other than a reduction in the grantor's interest in the partnership or trust. A "family trust" is a trust, in which the beneficiaries are all members of the same family. The beneficiaries of a family trust may also include charitable entities. "Family" means the grantor and the grantor's spouse, parents, grandparents, sisters, brothers, children, stepchildren, and the spouses and lineal descendants of any the above. A "charitable entity" means an entity which may receive deductible contributions under Section 170 of the Internal Revenue Code as defined in Section 12-6-40(A).
- (10) transferring realty in a statutory merger or consolidation from a constituent corporation to the continuing or new corporation;
- (11) transferring realty in a merger or consolidation from a constituent partnership to the continuing or new partnership; and,
- (12) that constitute a corrective deed or a quitclaim deed used to confirm title already vested in the grantee, provided that no consideration of any kind is paid or is to be paid under the corrective or quitclaim deed.
- (13) transferring realty subject to a mortgage to the mortgagee whether by a deed in lieu of foreclosure executed by the mortgagor or deed executed pursuant to foreclosure proceedings.

7-12-005 100-1-24

ROA 000059



Moore & Van Allen, PLLC  
40 Calhoun Street Ste. 300  
Charleston, SC 29401

2015.00  
85250

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

## LIMITED WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS, That TD BANK N.A. ["Grantor"], in the State aforesaid, for and in consideration of the sum of SEVEN HUNDRED SEVENTY FIVE THOUSAND AND 00/100, (\$775,000.00) DOLLARS to the Grantor, in hand paid at and before the sealing of these presents, by D&T IMPORTS SOUTH CAROLINA, INC., A NEVADA CORPORATION, D/B/A AREA 51 FIREWORKS ["Grantee"], in the State aforesaid, (the receipt of which, is hereby acknowledged) has granted, bargained, sold, and released, and by these Presents does grant, bargain, sell, and release unto the said GRANTEE, the following-described property (the "Property"):

ALL that certain piece, parcel or lot of land, lying, being and situate on the southeastern side of Festival Drive in Fort Mill Township, York County, South Carolina and being more particularly shown and described on plat entitled "ALTS/ACSM SURVEY FOR RANDAZZO PROPERTIES, LLC" prepared by the Isaacs Group, dated June 1, 2005 (the "Plat"), as follows: BEGINNING at a #4 rebar set on the southerly right of way of Outlet Drive (66' Public R/W); said point lying M. 02° 08' 46" E. from USGS Monument "Carowinds" having N. C. Grid Coordinates of N=499,624.273' and E=1,421,409.191'; thence from said point along the right of way of Outlet Drive, S. 56° 24' 25" E. 207.66 feet to a found #4 rebar on the westerly edge of the right of way of Interstate 77 south; thence along the right of way S. 33° 25' 31" W. 294.89 feet to a computed point on the right of way; thence turning and running with the common line of the Exxon Corporation (Deed Book 444, Page 444) N. 38° 01' 59" W. passing through a new #4 rebar set; thence N. 38° 29' 14" W. 43.75 feet to a found #4 rebar on the southerly right of way of Festival Drive (Deed Book 921, Page 233) said point lying S. 37° 43' 21" E. 3.18 feet from a found #4 rebar; thence along the right of way of Festival Drive the following three (3) courses: (1) N. 50° 37' 17" E. 49.32 feet to a found #4 rebar; (2) N. 46° 55' 34" E. 100.43 feet to a found #4 rebar; and (3) N. 82° 53' 05" E. 75.94 feet to the point and place of beginning; containing 1.560 acres, according to the said plat. (PLAT C400 at 3).

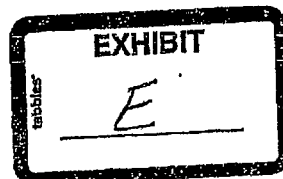
BEING the same property conveyed to TD Bank, N.A. by deed of S. Jackson Kimball, as Master in Equity for York County, dated May 23, 2011 and recorded in the RMC Office for York County in Book 12003 at Page 120.

TMS No.: 723-00-00-024

GRANTEE'S ADDRESS: PO Box 15595, Newport Beach, CA 92659

201200167268  
Filed For Record in  
YORK COUNTY, SC  
DAVID HAMILTON, CLERK OF COURTS  
04-10-2012 At 11:13 am.  
DEED 10.00  
County Tax 2015.00  
OR Vol 12551 Page 127 - 127

This conveyance is made subject to all obligations, restrictions, limitations, covenants, easements and other matters of record and governmental ordinances and regulations affecting the Property.



RECORDED  
YORK COUNTY

TAX ASSESSOR'S OFFICE

DATE 4-10-12  
TAX MAP NO. 123-24  
INITIALS CAR/JS

PK 12551 PG 127

ROA 000060

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said GRANTEE and GRANTEE'S Successors and Assigns forever.

And the GRANTOR does hereby bind GRANTOR and GRANTOR'S Successors and Assigns to warrant and forever defend all and singular the said premises unto the said GRANTEE and the GRANTEE'S Successors and Assigns against the GRANTOR and the GRANTOR'S Successors and those claiming through GRANTOR, but no others.

WITNESS our hands and seals this 6<sup>th</sup> day of April, in the year of our Lord Two Thousand Twelve (2012) and in the Two Hundred Thirty-Sixth (236<sup>th</sup>) year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED  
IN THE PRESENCE OF:

TD BANK N.A.

Margaret Brughman  
WITNESS NO. 1

Randy S. Garfinkle  
Randy S. Garfinkle, Vice President

[Signature]  
WITNESS NO. 2/NOTARY

STATE OF SOUTH CAROLINA

ACKNOWLEDGMENT

COUNTY OF GREENVILLE

THE FOREGOING instrument was acknowledged before me by Randy S. Garfinkle, Vice President of TD Bank N.A. on this 6 day of April, 2012.

[Signature]  
Notary Public for South Carolina  
My Commission Expires: Oct 18, 2014

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

AFFIDAVIT  
Date of Title Transfer: April 10, 2012

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.
2. The property is being transferred by TD Bank, N.A. to D&T Imports South Carolina, Inc., a Nevada corporation, d/b/a Area 51 Fireworks ON April 10, 2012.
3. Check one of the following: The DEED is
  - (a)   X   subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
  - (b)        subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as distribution to a trust beneficiary.
  - (c)        EXEMPT from the deed recording fee because (EXEMPTION # )  
(Explanation if required):  
(If exempt, please skip items 4-6, and go to item 7 of this affidavit.)
4. Check one of the following if either item 3(a) or item 3(b) above has been checked.
  - (a)   X   The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$775,000.00.
  - (b)        The fee is computed on the fair market value of the realty which is \$       .
  - (c)        The fee is computed on the fair market value of the realty as established for property tax purposes which is \$       .
5. Check YES        or NO   X   to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES," the amount of the outstanding balance of this lien or encumbrance is \$n/a.
6. The DEED Recording Fee is computed as follows:
 

|     |    |                   |                                                           |
|-----|----|-------------------|-----------------------------------------------------------|
| (a) | \$ | <u>775,000.00</u> | the amount listed in item 4 above.                        |
| (b) | \$ | <u>0.00</u>       | the amount listed in item 3 above (no amount place zero). |
| (c) | \$ | <u>775,000.00</u> | Subtract Line 6(b) from Line 6(a) and place the result.   |
7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Attorney
8. Check if Property other than Real Property is being transferred on this Deed.
  - (a)        Mobile Home
  - (b)        Other
9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Sworn to before me this  
9 day of April, 2012

Maria N. Dunbar  
NOTARY PUBLIC FOR SOUTH CAROLINA  
My Commission Expires: 06/24/2014

W. Gregory Pearce  
W. Gregory Pearce, Attorney

0612551 P80129

ROA 000062

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
C.A. NO.: 2012-CP-46-02286

Charles Sonnenberg, Festival Corp., )  
Phillip Pulley and Robert Foster, )

Plaintiffs, )

vs. )

D&T Imports South Carolina, Inc., )  
A Nevada Corporation, d/b/a Area )  
51 Fireworks, and York County, a )  
Political subdivision of the State )  
Of South Carolina, )

Defendants. )

**ANSWER OF YORK COUNTY**

FILED-RECEIVED  
2012 JUL 18 PM 2:11  
DAVID HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, SC

The York County Clerk of Court, (hereinafter, "York County"), by way of Answer to the Complaint of Charles Sonnenberg, et al, would respectfully show unto the Court:

**GENERAL DENIAL**

1. The Defendant York County denies each and every allegation of the Complaint not specifically admitted, qualified or denied.

**FOR A FIRST RESPONSE**

2. Responding to the allegations of Paragraph 1 of the Complaint, the Defendant York County does not have sufficient information to either admit or deny the allegations of the Paragraph and therefore denies the same and demands strict and absolute proof thereof.
3. The Defendant York County admits the allegations of Paragraph 2 of the Complaint.
4. Responding to the allegations of Paragraphs 3 and 4 of the Complaint, the Defendant York County does not have sufficient information to either admit or deny the allegations of the paragraphs and therefore denies the same and demands strict and absolute proof thereof.

5. The Defendant York County admits the allegations of Paragraphs 5 and 6 of the Complaint.

6. Responding to the allegations of Paragraph 7 of the Complaint, the Defendant York County does not have sufficient information to either admit or deny the allegations of the Paragraph and therefore denies the same and demands strict and absolute proof thereof.

7. The Defendant York County admits the allegations of Paragraph 8 of the Complaint, upon information and belief.

8. Responding to the allegations of Paragraphs 9 and 10 of the Complaint, the Defendant York County does not have sufficient information to either admit or deny the allegations of the Paragraphs and therefore denies the same and demands strict and absolute proof thereof.

9. The Defendant York County admits the allegations of Paragraph 11, 12, 13 and 14 of the Complaint, upon information and belief.

10. The Defendant York County admits the allegations of Paragraph 15 of the Complaint.

11. Responding to the allegations of Paragraph 16 of the Complaint, the Defendant York County does not have sufficient information to either admit or deny the allegations of the Paragraph and therefore denies the same and demands strict and absolute proof thereof.

12. The Defendant York County admits the allegations of Paragraphs 17 and 18 of the Complaint.

13. The Defendant York County admits the allegations of Paragraph 19 of the Complaint, upon information and belief.

14. The Defendant York County admits the allegations of Paragraph 20 of the Complaint.

15. Responding to the allegations of Paragraph 21 of the Complaint, the Defendant York County does not have sufficient information to either admit or deny the allegations of the paragraph and therefor denies the same and demands strict and absolute proof thereof.

16. Responding to the allegations of paragraph 22 of the Complaint, the pleading does not require a responsive pleading.
17. Responding to the allegations of Paragraph 23 of the Complaint, the Defendant York County does not have sufficient information to either admit or deny the allegations of the paragraph and therefore denies the same and demands strict and absolute proof thereof.
18. The Defendant York County admits the allegations of Paragraph 24 of the Complaint, upon information and belief. By way of clarification, York County asserts that any prohibition applies to the issuance of a Certificate of Occupancy and any related permits to permit sale of fireworks on the subject property.
19. The Defendant York County admits the allegations of Paragraph 25 of the Complaint, upon information and belief.
20. The Defendant York County admits the allegations of Paragraph 26 of the Complaint, subparagraphs (a)-(c) upon information and belief, as clarified and conditioned below; and, denies subparagraph (d). Responding to subparagraph (a), the Defendant York County admits, upon information and belief, that the sale of fireworks are prohibited upon the subject property; Responding to subparagraph (b), the Defendant York County admits, upon information and belief, that the Plaintiffs are "other property holders" as interpreted under the act; Responding to subparagraph (c) and by way of explanation, York County contends it may not issue a Certificate of Occupancy or any other permit directed toward the sale of fireworks upon the subject property until such time as the deed restriction is released; and responding to subparagraph (d), York County denies the allegations.
21. Responding to the allegations of Paragraph 27 of the Complaint, the Defendant York County does not have sufficient information to either admit or deny the allegations of the paragraph and therefore denies the same and demands strict and absolute proof thereof.

22. Responding to the allegations of paragraph 28 of the Complaint, the pleading does not require a responsive pleading

23. Responding to the allegations of Paragraphs 29, 30 and 31 of the Complaint, the Defendant York County does not have sufficient information to either admit or deny the allegations of the paragraphs and therefore denies the same and demands strict and absolute proof thereof.

24. The Defendant York County admits the allegations of Paragraph 32 of the Complaint, upon information and belief.

25. The Defendant York County admits the allegations of Paragraph 33 of the Complaint, upon information and belief. By way of clarification, York County contends that the issuance of initial building permit was prior to or contemporaneous in time with any notice of a deed restriction burdening the subject property.

26. The Defendant York County admits the allegations of Paragraph 34 of the Complaint, upon information and belief.

27. Responding to the allegations of Paragraph 35 of the Complaint, the Defendant York County does not have sufficient information to either admit or deny the allegations of the paragraph and therefore denies the same and demands strict and absolute proof thereof.

WHEREFORE, having fully answered, the Defendant York County prays that the Court dismiss the case as to the allegations against York County, with costs, and such other relief as it deems just and proper under the facts of this case.

Respectfully submitted,

**YORK COUNTY**

By: Michael K. Kendree  
Michael K. Kendree  
County Attorney  
26 West Liberty Street  
P.O. Drawer 299  
York, South Carolina 29745  
(803) 684-3559  
  
Attorney for the County

July 18, 2012

York, South Carolina





Appearances: For the Plaintiffs Phillip Pulley  
and Robert Foster -

Daniel J. Ballou, Esquire  
Hamilton, Martens & Ballou, LLC  
130 East Main Street  
Post Office Box 10940 (29731)  
Rock Hill, South Carolina 29730

For the Plaintiffs Charles  
Sonnenberg and Festival Corp. -  
B. Bayles Mack, Esquire  
Mack & Mack  
101 Allison Street  
Fort Mill, South Carolina 29715

For Defendant D & T Imports South  
Carolina, d/b/a Area 51 Fireworks -  
James W. Sheedy, Esquire  
Driscoll Sheedy, PA  
11520 North Community House Road  
Suite 200  
Charlotte, North Carolina 28277

For Defendant York County, SC -

Michael Kendree, Esquire  
Attorney at Law  
26 West Liberty Street  
Post Office Drawer 299  
York, South Carolina 29745

1 PROCEEDINGS  
2 BEFORE: THE HONORABLE S. JACKSON KIMBALL  
3 (9:33 a.m.)

4 \* \* \* \* \*

5 JUDGE KIMBALL - Good morning. Thank you.  
6 Please have a seat. Let me get organized.  
7 All right. This is - - - I am assuming that  
8 we are proceeding, at this point, under Rule  
9 65(b), the last - - - I guess the last full  
10 sentence of Subsection B. It says, on two  
11 days' notice - - - In other words, this is the  
12 defendant's motion to dissolve the TRO?

13 MR. SHEEDY - Yes, Your Honor.

14 JUDGE KIMBALL - And that's all we're doing  
15 today, right?

16 MR. SHEEDY - That is correct.

17 MR. BALLOU - That's correct, Your Honor.

18 JUDGE KIMBALL - Okay. Mr. Sheedy?

19 MR. SHEEDY - May it please the Court, Jim  
20 Sheedy appearing on behalf of the defendant,  
21 Your Honor. The defendant is styled D&T  
22 Imports South Carolina, Inc., d/b/a Area 51  
23 Fireworks. Seated to my right, of course, is  
24 Michael Kendree, who is here on behalf of York  
25 County.

1 JUDGE KIMBALL - Who needs no introduction.

2 MR. SHEEDY - Who needs no introduction. I

3 will refer to my client defendant as D&T,

4 rather than continuing to repeat the full

5 name.

6 JUDGE KIMBALL - I understand.

7 MR. SHEEDY - As Your Honor pointed out, the

8 matter before the Court is under Rule 65(b).

9 It is a motion to dissolve the TRO that was

10 issued on June 21. Before the Court should be

11 certain papers. Among them, D&T's Notice of a

12 Motion to Dissolve, along with D&T's

13 affidavit. I'll pause for a moment to make

14 sure that the Court has those.

15 JUDGE KIMBALL - Name the affiants. I've got

16 several affidavits.

17 MR. SHEEDY - To be perfectly honest with Your

18 Honor, I will try, and I will do this

19 phonetically. I think it's Cianfrocca,

20 something like that.

21 MS. SETTLE - Cianfrocca.

22 MR. SHEEDY - Thank you. From the back, Your

23 Honor, is Beth Settle with Moore and Van

24 Allen.

25 JUDGE KIMBALL - Mr. Sheedy, I don't think I

1 have his affidavit.

2 MR. KENDREE - May I approach, Your Honor?

3 JUDGE KIMBALL - Yes, sir. Certainly.

4 MR. KENDREE - Mr. Sheedy - - -

5 MR. SHEEDY - Yes.

6 JUDGE KIMBALL - Is it attached? No.

7 MR. SHEEDY - No.

8 JUDGE KIMBALL - It's not attached to anything  
9 else.

10 MR. SHEEDY - No. It was sent - - -

11 JUDGE KIMBALL - I don't believe I have it. I  
12 don't believe I have it.

13 MR. SHEEDY - It was sent by email, and it was  
14 also filed with the clerk's office.

15 JUDGE KIMBALL - Okay. Well, filing it with  
16 the clerk's office doesn't get it here.

17 MR. SHEEDY - And that's why I'm doing this, is  
18 to make sure that the Court has before it  
19 what's under consideration.

20 JUDGE KIMBALL - All right. Go ahead.

21 MR. SHEEDY - To the best of my knowledge,  
22 opposing counsel has submitted to the Court a  
23 response to Motion to Dissolve Ex Parte TRO.

24 JUDGE KIMBALL - (Indicating yes)

25 MR. SHEEDY - I received that yesterday

1 afternoon via email. I think it may have been  
2 emailed to the Court as well.

3 JUDGE KIMBALL - Let's proceed with the  
4 argument. IÆve - - -

5 MR. SHEEDY - And then there are two  
6 affidavits. Before the Court is a Motion to  
7 Dissolve TRO. The standard for issuance for  
8 injunctive relief, at one time, was very  
9 clear, and all of us knew at the time that it  
10 was Blackwelder. Of course, the United States  
11 Supreme Court has since weighed in on that in  
12 the landmark case of Winter, subsequently  
13 interpreted by the Fourth Circuit in the Real  
14 Truth about Obama, and acknowledged recently  
15 by Magistrate Paige Gossett. The standard has  
16 changed in the federal arena in two respects.  
17 First, there is now a clear showing of  
18 likelihood of success on the merits, and  
19 second, a clear showing of likelihood of  
20 irreparable harm. Rule 65 provides in the  
21 notes that it is substantially the federal  
22 rule, which in turn is very much the same as  
23 present-day practice. We have two recent  
24 South Carolina Supreme Court cases speaking to  
25 the standard for the entry of the temporary

1       restraining order, in the Pointer case and  
2       then in Hook Point. It was said, as it  
3       pertains to the motion to dissolve this  
4       morning, there must be a showing of  
5       irreparable harm. There must be a showing of  
6       likelihood of success on the merits, and there  
7       is no adequate remedy at law. The rule itself  
8       says that the movant on a TRO has to establish  
9       likelihood of success on the merits;  
10      irreparable harm; no adequate remedy at law as  
11      interpreted under these two cases, unless it  
12      specific - - - Unless it really appears from  
13      specific facts that immediate and irreparable  
14      injury, loss, or damage will result to the  
15      applicant before notice can be served and a  
16      hearing had thereon. Every temporary  
17      restraining order shall define the injury and  
18      state why it is irreparable and why the order  
19      was granted without notice. In the Motion to  
20      Dissolve, I submitted to the Court five  
21      reasons why this TRO should be dissolved.  
22      Some of the subsequent submittals by opposing  
23      counsel amplify why it is that this pending  
24      TRO should, in fact, be dissolved. First of  
25      all, if we look at Rule 65(e), and I will

1 quote from 65(e). No temporary restraining  
2 order shall be granted to suspend the general  
3 and ordinary business of a corporation. Same  
4 may be suspended only by injunction after  
5 notice. In the response submitted by Mr.  
6 Ballou, he essentially says this is not a  
7 general or ordinary business. This is  
8 development.

9 JUDGE KIMBALL - Let's deal with your - - - He  
10 can deal with his response. You deal with  
11 your argument.

12 MR. SHEEDY - I want to make the point that  
13 under 6-29-1145, a copy of which I hope the  
14 Court has before it, and if doesn't, I'll  
15 supply it.

16 JUDGE KIMBALL - I've got it.

17 MR. SHEEDY - From the definition of permit in  
18 that statute is basically excluded development  
19 activity. I'll quote from the rule.

20 JUDGE KIMBALL - Tell me how the TRO has  
21 suspended the ordinary business of D&T.

22 MR. SHEEDY - D&T is in the process of  
23 completing its fireworks building and  
24 operation, working through the restrictive  
25 covenant, and because of the injunction that



1 was entered - - -

2 JUDGE KIMBALL - Working through the  
3 restrictive covenant? How is it working  
4 through the restrictive - - -

5 MR. SHEEDY - It's dealing with Crescent in an  
6 effort to get a cancellation of the  
7 restrictive covenant. Because of the way 6-  
8 29-1145 is written, there is no reason that  
9 D&T shouldn't be allowed to continue its  
10 development activity. We understand that,  
11 administratively with York County, before York  
12 County is going to issue a certificate of  
13 occupancy, York County is going to have to  
14 make sure that the restrictive covenant has  
15 been canceled. But in the meantime - - -

16 JUDGE KIMBALL - But how can you do business in  
17 the meantime?

18 MR. SHEEDY - The business consists of building  
19 the property.

20 JUDGE KIMBALL - No, no, no, no. If the county  
21 cannot issue a CO until the covenant has been  
22 canceled, how can you continue to do business  
23 in violation of the statute?

24 MR. SHEEDY - I don't think it's a violation.

25 JUDGE KIMBALL - Well, then how can you do

1 business at all? If they don't issue a CO,  
2 you can't sell fireworks.

3 MR. SHEEDY - We can't sell fireworks, but  
4 there's no reason that between now and the  
5 time that we get our business constructed such  
6 that we're ready to open the doors to sell  
7 fireworks, we can't complete our development  
8 activities. The definition of permit in the  
9 statute - - -

10 JUDGE KIMBALL - Well, doesn't it logically  
11 follow, though - - -

12 MR. SHEEDY - Clearly says - - -

13 JUDGE KIMBALL - Mr. Sheedy that - - -

14 MR. SHEEDY - Excuse me?

15 JUDGE KIMBALL - Isn't it logical that if the  
16 county can't issue a CO, then D&T can't do  
17 business. Therefore, it is not doing  
18 business.

19 MR. SHEEDY - Incident to its opening its  
20 doors, it must have a certificate of  
21 occupancy. But before it can get to the point  
22 where it can open its doors and apply for a  
23 certificate of occupancy, D&T has to at least  
24 complete, in accordance with the permits that  
25 have been issued, a structure on a parcel of

1 land.

2 JUDGE KIMBALL - Ergo, it is not - - -

3 MR. SHEEDY - And the definition - - -

4 JUDGE KIMBALL - Doing business yet.

5 MR. SHEEDY - Well, we respectfully submit

6 that, in order to be able to open the doors,

7 we have to first have the doors there. We

8 think that - - -

9 JUDGE KIMBALL - I don't disagree with that.

10 MR. SHEEDY - Under the statute, it's plainly

11 written that permit does not mean an

12 authorization to build or place a structure on

13 a tract or parcel of land, and to the extent

14 that this TRO specifically is directed against

15 D&T and says that D&T may not - - -

16 JUDGE KIMBALL - It's also directed to the

17 county.

18 MR. SHEEDY - Engage in certain activities, we

19 don't think - - -

20 JUDGE KIMBALL - Mr. Sheedy - - - Mr. Sheedy -

21 - -

22 MR. SHEEDY - It's supported by the statute.

23 JUDGE KIMBALL - Mr. Sheedy - - -

24 MR. SHEEDY - Yes, Your Honor.

25 JUDGE KIMBALL - Can you hear me?

1 MR. SHEEDY - Yes, I can.

2 JUDGE KIMBALL - The TRO is also directed at  
3 the county.

4 MR. SHEEDY - I'm going to get to that. As I  
5 read the TRO, Your Honor - - - And I'm looking  
6 at Page 4. And let me say, I'm not trying to  
7 be argumentative. I hope the Court  
8 appreciates that - - -

9 JUDGE KIMBALL - You're making an argument. I  
10 expect you to be argumentative.

11 MR. SHEEDY - I'm not trying to be difficult  
12 with the Court. It says, it is further  
13 ordered that Defendant D&T Imports be  
14 temporarily restrained and enjoined from  
15 taking any further action of any kind towards  
16 renovating - - -

17 JUDGE KIMBALL - I agree with that.

18 MR. SHEEDY - And I'm just saying that, under  
19 the statute, the authorization to renovate,  
20 build, upfit, and construct is a type of  
21 permit that is accepted from the statute.

22 That portion of the injunction, Your Honor, as  
23 it is based on the merits, we believe should  
24 be dissolved.

25 JUDGE KIMBALL - All right. Bear with me a

1 minute.

2 MR. SHEEDY - Okay.

3 JUDGE KIMBALL - What then does the prohibition  
4 of (B)(2) - - - I'm sorry, (B)(3), in 6-29-  
5 1145(B)(3), apply to?

6 MR. SHEEDY - All permits other than  
7 authorizations to build or place a structure  
8 on a tract or parcel of land including, but  
9 not limited to, a certificate of occupancy.

10 JUDGE KIMBALL - Okay. So they can't issue you  
11 a certificate of occupancy?

12 MR. SHEEDY - Yes.

13 JUDGE KIMBALL - All right.

14 MR. SHEEDY - But right now, there's no reason  
15 we can't continue our efforts - - -

16 JUDGE KIMBALL - But what you're trying to tell  
17 me is, they could issue a permit in spite of  
18 it all?

19 MR. SHEEDY - They have already issued permits  
20 - - -

21 JUDGE KIMBALL - I know they have.

22 MR. SHEEDY - In connection with building.

23 JUDGE KIMBALL - I know that.

24 MR. SHEEDY - And we want to continue our  
25 building activities, but we don't dispute

1 administratively, between D&T and York County  
2 pursuant to the statute, until we have a  
3 release from the restrictive covenant, we  
4 don't get a certificate of occupancy.

5 Consequently, we can't open the doors and sell  
6 fireworks. We just want not to lose - - -

7 JUDGE KIMBALL - Are you saying, though, that  
8 under the statute, the county made no mistake  
9 in issuing the permits at issue?

10 MR. SHEEDY - We have no gripe against what the  
11 county has done and - - -

12 JUDGE KIMBALL - No. I'm asking you a  
13 question.

14 MR. SHEEDY - We do not think that the county  
15 has issued any mistakes with respect to the  
16 building permit.

17 JUDGE KIMBALL - I'm asking you a direct  
18 question. Is it your position that the county  
19 was authorized to, and despite the failure to  
20 - - - If it had known of the restrictive  
21 covenant, that it was nevertheless authorized  
22 to issue a building permit?

23 MR. SHEEDY - I don't see anything in 6-29-1145  
24 that would prohibit the county from issuing  
25 the building permit, because that's a type of

1 permit that's not under the statute. It's  
2 expressly accepted.

3 JUDGE KIMBALL - All right.

4 MR. SHEEDY - So I don't know why my client has  
5 to be handcuffed right now in his efforts to  
6 continue with his subcontractors and his  
7 suppliers and his general contractor to make  
8 the necessary above-ground improvements to get  
9 himself ready to open. We don't disagree that  
10 once he's ready to open, he cannot open until  
11 the restrictive covenant has been lifted. I  
12 think that's what this statute says, and we  
13 don't quibble with York County as to - - -

14 JUDGE KIMBALL - So it is willing to continue -  
15 - -

16 MR. SHEEDY - The CO.

17 JUDGE KIMBALL - To spend the money it's  
18 spending to proceed with the completion of  
19 construction, despite the fact that it could  
20 be found at a later time that the statute (a)  
21 gives the plaintiff standing, and (b) requires  
22 the county not to issue a certificate of  
23 occupancy?

24 MR. SHEEDY - Well, I'm going to speak to the  
25 plaintiff's rights under the statute in just a

1 second, but I - - - I think for purposes of  
2 what Your Honor just said, it is correct that  
3 York County cannot issue a permit until we  
4 show that the covenant has been lifted.

5 JUDGE KIMBALL - But my question was, is your  
6 client willing, at its own risk, to continue  
7 to spend money on upfit and other things that  
8 go with the completion of construction in  
9 anticipation of obtaining a certificate of  
10 occupancy despite the inability to get one?

11 MR. SHEEDY - It is my understanding that he  
12 is, and I think it is, in large measure,  
13 because he believes that he will be able to  
14 get a CO. We would say that that's an  
15 administrative matter, legislative in nature,  
16 between York County and D&T. So let me turn  
17 for just a moment and make sure that I answer  
18 the other part of what Your Honor has asked.  
19 Your Honor has asked about the plaintiffs  
20 under this statute. My read of this statute  
21 is, that this statute gives other property  
22 holders a very limited expressed right. That  
23 very limited expressed right is to notify York  
24 County of the existence of the restrictive  
25 covenant. That's all this statute does. It



1 doesn't give the plaintiffs a private right of  
2 action. It doesn't give them any claim for  
3 damages against - - -

4 JUDGE KIMBALL - Let me - - - I'm going to cut  
5 you off on that. I have reviewed - - - And we  
6 discussed this when I issued the TRO. I have  
7 concerns about the ability of this plaintiff  
8 to enforce a restrictive covenant so as to - -  
9 - So that it is my belief that that question  
10 would fail to meet the standard of likelihood  
11 of success on the merits under the applicable  
12 law.

13 MR. SHEEDY - Then I will - - -

14 JUDGE KIMBALL - We discussed - - - I raised  
15 that question when the TRO was issued, so you  
16 don't need to talk about that.

17 MR. SHEEDY - Then I will move to the other  
18 aspect of this. Rather than arguing about  
19 whether there is a private right of action  
20 under the statute, let me talk about what I do  
21 think is available under the statute because  
22 it's evident that there is some disagreement  
23 over that. I - - -

24 JUDGE KIMBALL - Now, what do you mean by  
25 private right of action under the statute?

1 MR. SHEEDY - Ability to sue for injunctive  
2 relief against D&T - - -

3 JUDGE KIMBALL - I disagree with that.

4 MR. SHEEDY - Based upon this statute.

5 JUDGE KIMBALL - Oh, I disagree - - -

6 MR. SHEEDY - This statute - - -

7 JUDGE KIMBALL - Well, that's not what I'm  
8 saying.

9 MR. SHEEDY - This statute, in D&T's respectful  
10 opinion of the Court, only gives other  
11 property holders, at best, the right to notify  
12 York County of the restrictive covenant. It  
13 doesn't give those other property holders the  
14 right to enjoin York County or to enjoin D&T.  
15 It's purely an opportunity to notify of the  
16 existence of a restrictive covenant.

17 JUDGE KIMBALL - Well, suppose the county  
18 issues a CO despite knowledge. What relief  
19 would the other property holder have?

20 MR. SHEEDY - Are they subject to the  
21 restrictive covenant?

22 JUDGE KIMBALL - That doesn't matter.

23 MR. SHEEDY - If it's subject to the  
24 restrictive covenant, they would have a remedy  
25 under the - - -

1 JUDGE KIMBALL - No. Under the statute - - -

2 MR. SHEEDY - Law to - - -

3 JUDGE KIMBALL - It doesn't matter.

4 MR. SHEEDY - I don't think - - -

5 JUDGE KIMBALL - Mr. Sheedy, one person is  
6 going to talk at a time. Among other things,  
7 the court reporter can't take down two people  
8 talking at once. Listen to me. The statute  
9 does not require anything to do with  
10 restrictive covenants by its terms. What I  
11 need to know from you is why the statute  
12 includes other property holders.

13 MR. SHEEDY - Other property holders, under the  
14 statute, can be interpreted two ways. It can  
15 be interpreted as those who are subject to the  
16 restrictive covenant, and we believe that's  
17 the correct reading of other property holders  
18 as that term is used in the statute. We think  
19 that is the correct reading for at least two  
20 reasons.

21 JUDGE KIMBALL - It says including, but not  
22 limited to, other property holders.

23 MR. SHEEDY - Yes. But the term other property  
24 holders - - -

25 JUDGE KIMBALL - All right.

1 MR. SHEEDY - If we look at the very last  
2 phrase, where it speaks of the release by  
3 action of property holders, the only party  
4 that could possibly give a release of a  
5 restrictive covenant is somebody who is  
6 subject to the restrictive covenant.

7 JUDGE KIMBALL - Let's assume for the moment  
8 that the plaintiff is not an other property  
9 owner, but that they - - - What is the scope  
10 of the category that is not limited to other  
11 property owners?

12 MR. SHEEDY - There is nothing expressed in the  
13 statute that would allow somebody similar to  
14 the facts here, who is just a competitor, from  
15 taking the position that they don't want a CO  
16 issued so that somebody else can go into  
17 business.

18 JUDGE KIMBALL - Well, Mister - - -

19 MR. SHEEDY - I understand the CourtÆs - - -

20 JUDGE KIMBALL - Mr. MackÆs client is not a  
21 competitor.

22 MR. SHEEDY - Mr. MackÆs client is a lessor of  
23 lessees who are competitors.

24 JUDGE KIMBALL - That's right.

25 MR. SHEEDY - Mr. MackÆs client, Frugal

1 MacDoogal, as I understand it, has leased this  
2 property to fireworks operators who obviously  
3 are not subject to the restrictive covenant,  
4 or they wouldn't be selling fireworks, and  
5 essentially, through their affidavits, have  
6 indicated that they don't want what they  
7 perceive as a diminution in firework sales  
8 caused by a competitor opening.

9 JUDGE KIMBALL - That's correct.

10 MR. SHEEDY - And I'm saying to the Court that  
11 it is my belief under the statute, that if  
12 they were subject to the restrictive covenant,  
13 they'd have the right to point out the  
14 restrictive covenant in accordance with these  
15 notice provisions. But I don't think this  
16 provision necessarily means, for example,  
17 somebody in Rock Hill like me could call up  
18 York County and say, I'm aware of that  
19 restrictive covenant, and I think you have to  
20 stop processing this. I don't think it's that  
21 broad. I think that if they had - - - If the  
22 General Assembly had intended for it to be  
23 that broad, the General Assembly would have  
24 put words in the statute to that effect.

25 JUDGE KIMBALL - It seems to me that the

1 General Assembly would have left out, but not  
2 limited to.

3 MR. SHEEDY - I'm - - - I see the words, and I  
4 also see the words, other source. I am aware  
5 that the South Carolina Association of  
6 Counties - - - And I think I cited this  
7 technical bulletin to the Court.

8 JUDGE KIMBALL - You did.

9 MR. SHEEDY - Has interpreted this to mean that  
10 other property holders means those subject to  
11 the restriction.

12 JUDGE KIMBALL - I don't disagree with that.

13 MR. SHEEDY - We think that's right.

14 JUDGE KIMBALL - I don't disagree with that.  
15 Let's just assume that I don't disagree with  
16 that, that clearly the - - - For the purposes  
17 of what we're talking about today, that there  
18 is an issue to be decided, and therefore, not  
19 a likelihood of success on the merits based  
20 upon a claim by the plaintiff that they are  
21 other property holders, if I said that  
22 correctly.

23 MR. SHEEDY - I think you did.

24 JUDGE KIMBALL - All right. My concern is any  
25 other source, including but not limited to.

1 MR. SHEEDY - I understand that, and all I can  
2 provide to the Court is the observation that  
3 the last sentence ties the release to the  
4 property holders using the same words. That  
5 would at least connote - - - It might not  
6 denote to the Court, but it will at least  
7 connote to me that property holders is a  
8 reference to those who are capable of  
9 releasing the covenant, those who are subject  
10 to the restrictive covenant, and that's not  
11 what we have here. So - - - I'm sorry. The  
12 Court was going to say something?

13 JUDGE KIMBALL - What I'm saying, what I'm  
14 trying to say is, if the plaintiff's motion -  
15 - - if the plaintiff's contention was based  
16 upon them being an other property holder, I  
17 would not grant the injunction because I think  
18 there's a genuine issue. They don't  
19 demonstrate the requisite likelihood of  
20 success on the merits with respect to that, as  
21 I have read the cases, but they are an other  
22 source, including but not limited to, I  
23 believe.

24 MR. SHEEDY - Your Honor, maybe I misread the  
25 papers that were before the Court.

1 JUDGE KIMBALL - Well, what we're talking about  
2 today is whether I'm wrong in issuing the TRO.  
3 So if the language of the TRO is wrong, it's  
4 wrong. The question, though, is whether they  
5 qualify - - - whether I should dissolve the  
6 TRO based on the statute. I've already said I  
7 wouldn't continue it based on their standing  
8 as landowners because they're not subject to  
9 those restrictive covenants. There's an  
10 issue, in my mind, to be determined about  
11 that.

12 MR. SHEEDY - And I know that Your Honor knows  
13 this, just for clarity of the record. This  
14 discussion is in the context of whether any  
15 other source would be a basis for the portion  
16 of the injunction against York County with  
17 respect to York County's issuance of the CO.  
18 I've already told the Court - - -

19 JUDGE KIMBALL - Well, would you then have to  
20 wait until they issued it to apply for the  
21 injunction and get the business suspended  
22 after it's issued?

23 MR. SHEEDY - For right now, we believe we can  
24 continue with our construction activity.

25 JUDGE KIMBALL - Well, I - - -



1 MR. SHEEDY - And that portion of the  
2 injunction, we think, should be dissolved. We  
3 think to the extent that the injunction  
4 against York County is so broad that it could  
5 possibly implicate the current activities that  
6 D&T is engaging on the property, we think that  
7 that's overbroad, too. We think we are  
8 entitled to continue with our construction  
9 pursuant to the permits that have been issued.

10 JUDGE KIMBALL - Okay.

11 MR. SHEEDY - And march right up to the point  
12 of trying to get a CO, assuming we have the  
13 cancellation of the restrictive covenant.

14 JUDGE KIMBALL - All right. I mean, obviously  
15 if there were no restrictive covenant and if  
16 you comply with the zoning, and I assume that  
17 you do, you could operate the business.

18 MR. SHEEDY - Yes. So on the first point, the  
19 point about 65(e) suspending the business  
20 activity, we think that under the  
21 circumstances where that occurred without  
22 notice, that that portion of the TRO order  
23 should be dissolved for the reasons that I  
24 stated.

25 JUDGE KIMBALL - Okay. I do not agree that it

1 suspends business activity, because it  
2 doesn't.

3 MR. SHEEDY - We think we have a legal right to  
4 continue with our construction.

5 JUDGE KIMBALL - That's different from  
6 suspending business activity. You have no  
7 business until you get a CO.

8 MR. SHEEDY - At this point, I would just be  
9 arguing back and forth, and I - - -

10 JUDGE KIMBALL - That's right.

11 MR. SHEEDY - I'd rather be a good steward of  
12 the Court's time in that respect. Second, and  
13 I think we've already begun to touch on this,  
14 there has to be a clear showing of likelihood  
15 of irreparable harm absent the injunctive  
16 relief. The two recent Supreme Court cases,  
17 first Pointer and then Hook, stand for the  
18 proposition it must be an irreparable harm  
19 which necessarily presumes that there is no  
20 adequate remedy at law. If there's an  
21 adequate remedy at law, then there's no  
22 irreparable harm, and consequently, no basis  
23 for the entry of an injunction. When I look  
24 at these affidavits that have been submitted  
25 after I filed my Motion to Dissolve, it looks

1 to me like the position that the plaintiffs  
2 have - - - And rather than characterize it,  
3 let me quote it. The losses we expect to  
4 suffer if Area 51 is allowed to sell fireworks  
5 on the property will threaten the financial  
6 viability and existence of our business. It  
7 goes on to describe that this competitor, my  
8 client, will be drawing customers away. It's  
9 basically a cannibalization argument. They're  
10 going to cannibalize revenues.

11 JUDGE KIMBALL - Well, they said they have - -  
12 - What they admit is, that your client's  
13 location is a more favorable location, and  
14 they fully expect people to stop there first  
15 before going to their store.

16 MR. SHEEDY - Which bolsters the point that I'm  
17 building to say. In the other affidavit,  
18 which is Brad Witherell's affidavit, I quote,  
19 calculating the losses my company will suffer  
20 if Area 51 is allowed to open on the property,  
21 highly competitive fireworks market existing  
22 in the area. Again, as Your Honor  
23 characterized it, they're saying that we've  
24 got a superior location, and we're going to be  
25 taking revenues away from them.

1 JUDGE KIMBALL - That's right.

2 MR. SHEEDY - Now, whether or not that's - - -

3 JUDGE KIMBALL - And I'm not saying that's  
4 irreparable harm.

5 MR. SHEEDY - Right, and I'm willing to say  
6 that it isn't. I think it's reparable, I  
7 think - - -

8 JUDGE KIMBALL - Now, that's the question.

9 MR. SHEEDY - Damages.

10 JUDGE KIMBALL - Well, this - - -

11 MR. SHEEDY - This is just what - - -

12 JUDGE KIMBALL - Based on your own argument - -  
13 - Here's the problem I have with that. Based  
14 on your argument, these - - - the plaintiff  
15 has no legal right of action to proceed  
16 against this D&T - - -

17 MR. SHEEDY - True.

18 JUDGE KIMBALL - Because it has no - - - It  
19 lacks standing to enforce the restrictive  
20 covenant, which is the impediment right now.  
21 Competition is not a basis for a right - - - a  
22 legal remedy, a remedy at law, unless it's  
23 unfair. There's nothing in the record to  
24 indicate that the competition would be unfair.  
25 It's all premised on this restrictive

1 covenant. If the plaintiff can't enforce the  
2 restrictive covenant, ergo it has no adequate  
3 remedy at law. Its only relief is equitable.

4 MR. SHEEDY - And I'm going to the next step  
5 and saying that, if Your Honor assumes  
6 arguendo that there's some likelihood of  
7 success under some theory, that these  
8 plaintiffs would nevertheless have to show an  
9 irreparable harm or injury to get injunctive  
10 relief. The type of injury that they are  
11 asserting is really monetary in nature. It is  
12 that we would have received X revenues based  
13 on our historic performance at this site,  
14 compared to what we just received this year  
15 because D&T opened for business. That  
16 difference is liquidated.

17 JUDGE KIMBALL - I agree.

18 MR. SHEEDY - It's a sum certain. You can get  
19 a judgment. You can execute and levy. You  
20 can collect it.

21 JUDGE KIMBALL - But whom would you sue, if you  
22 have no legal right of action?

23 MR. SHEEDY - If you have no legal right of  
24 action, then you've got no likelihood of  
25 success on the merits either. For purposes of

1       this - - -

2       JUDGE KIMBALL - You might have inequity.

3       MR. SHEEDY - And if you do inequity, then I'm  
4       arguing the next rung on that decision ladder,  
5       under the standard for the granting of  
6       injunctive relief, that there's no irreparable  
7       harm here. This is reparable harm. There is  
8       absolutely - - -

9       JUDGE KIMBALL - It is not irreparable - - - I  
10      mean, it is not reparable if there is no way  
11      to collect it.

12      MR. SHEEDY - I don't know that.

13      JUDGE KIMBALL - You don't?

14      MR. SHEEDY - I don't know that my client is  
15      judgment proof.

16      JUDGE KIMBALL - No, no, no. The next - - -  
17      Let me just posit it this way. Let's just  
18      assume that the plaintiff sues the defendant  
19      after the defendant opens up and attempts to  
20      sue the defendant for damages, claiming a  
21      violation of the restrictive covenants. No  
22      unfair competition, unfair trade practices,  
23      none of that. Sues for violation of the  
24      restrictive covenants. The next thing I would  
25      get from defendant's counsel would be a

1 12(b)(6) motion. They don't stay the cause of  
2 action.

3 MR. SHEEDY - Sure.

4 JUDGE KIMBALL - And that motion, according to  
5 your theory, would be granted - - - should be  
6 granted. Therefore, there is no adequate  
7 remedy at law. But yet, they have lost,  
8 according to their affidavit, five hundred  
9 thousand dollars. So how do you solve that  
10 problem? Equitable relief.

11 MR. SHEEDY - The availability of such  
12 equitable relief goes to the merits. It would  
13 support the idea that they have some  
14 meritorious position under the law, but for  
15 them to get injunctive relief, they still are  
16 not entitled to it unless they can establish  
17 that their injury is irreparable. They may be  
18 able to go through the whole case and get  
19 permanent injunctive relief. But at the end  
20 of the day, if they want something during the  
21 pendency of the case, one of the requirements  
22 that has to be met is irreparable, assuming  
23 they have a - - -

24 JUDGE KIMBALL - You just said a little bit ago  
25 - - -

1 MR. SHEEDY - Meritorious position.

2 JUDGE KIMBALL - You started your argument by  
3 saying, irreparable depends on adequate remedy  
4 at law, and they have an adequate remedy at  
5 law.

6 MR. SHEEDY - They have an adequate remedy at  
7 law if you assume that there is some merit to  
8 their position. If there is no merit to their  
9 position, they don't get injunctive relief  
10 anyway, so unlikelihood - - -

11 JUDGE KIMBALL - Well, I've already told you I  
12 wouldn't - - -

13 MR. SHEEDY - Of success.

14 JUDGE KIMBALL - I wouldn't continue the TRO  
15 based on the question I have concerning the  
16 restrictive covenants. This is all - - - In  
17 my mind, this position, this discussion today  
18 over a TRO, which is a serious matter, has to  
19 do with this strange statute.

20 MR. SHEEDY - I understand, and would agree  
21 that it is strange.

22 JUDGE KIMBALL - But it is a statute.

23 MR. SHEEDY - And consequently, we are here in  
24 the judicial branch of government arguing over  
25 this legislative action.



1 JUDGE KIMBALL - All right.

2 MR. SHEEDY - So I think Your Honor understands  
3 my point without spinning my wheels further,  
4 that I think there's an adequate remedy at law  
5 available. Consequently, the requirement for  
6 injunctive relief as to injury has not and  
7 cannot be met. Next, I want to talk a little  
8 bit about something that I think we've already  
9 been broaching, and that has to do with the  
10 enforceability of the covenant by these  
11 plaintiffs. I don't think these plaintiffs  
12 have any basis for enforcing the restrictive  
13 covenant. They're not subject to it. I think  
14 Your Honor has already made some comments  
15 about that, so perhaps I don't need to repeat  
16 it.

17 JUDGE KIMBALL - You don't. You don't. I've  
18 looked at that based on what I received, and I  
19 think that I would not be correct in  
20 continuing the TRO based upon the claim of the  
21 right to enforce restrictive covenants. I  
22 have a question about that, so I wouldn't  
23 continue the TRO for that.

24 MR. SHEEDY - And I think I understand Your  
25 Honor's position that, under the statute, Your

1 Honor is concerned that these folks may  
2 constitute any other source and, therefore,  
3 would be entitled under the statute to some  
4 kind of relief.

5 JUDGE KIMBALL - It appears to me that they - -  
6 - that the plaintiff falls - - - appears to  
7 fall in the category of people who are any  
8 other source including, but not limited to.

9 MR. SHEEDY - I heard Your Honor on that, and I  
10 think my comments are in the record.

11 JUDGE KIMBALL - All right.

12 MR. SHEEDY - So let me move to reason number  
13 four.

14 JUDGE KIMBALL - All right.

15 MR. SHEEDY - And I don't believe that reason  
16 number four is disputed, and I don't believe  
17 that it can be disputed, that D&T is  
18 authorized to do business in South Carolina.

19 JUDGE KIMBALL - I think that's been solved.

20 MR. SHEEDY - I think it's - - - it was - - -

21 JUDGE KIMBALL - On June the 4th, wasn't it?

22 MR. SHEEDY - I think it was solved before the  
23 TRO was entered.

24 JUDGE KIMBALL - Okay.

25 MR. SHEEDY - So I think to the extent that the

1 TRO order is based on this idea that D&T  
2 doesn't have any rights - - -

3 JUDGE KIMBALL - It's not.

4 MR. SHEEDY - Okay. No restraining order shall  
5 issue except upon the giving of security by  
6 the applicant in such sum as the Court deems  
7 proper for the payment of such costs and  
8 damages as may be incurred or suffered by any  
9 party who is found to have been wrongfully  
10 enjoined or restrained. I'm reading from Rule  
11 65(c).

12 JUDGE KIMBALL - All right. Your point is  
13 correct about that. That's my error. I  
14 didn't - - - As is usually the case with TROs,  
15 they come in the middle of all the other  
16 business you have, and it does not contain the  
17 adequate provision for security. That's got  
18 to be fixed.

19 MR. SHEEDY - And we think, based upon the  
20 affidavit that we've submitted, that we have  
21 damages in the 1.1 to 1.2 million dollar range  
22 - - -

23 JUDGE KIMBALL - Let me ask you this, though.  
24 Here's - - - IÆve thought through this, too.  
25 I think I have, anyway. Let's suppose - - -

1 If we assume that I lift the TRO in respect to  
2 the plaintiff's - - - I'm sorry, the Defendant  
3 D&T's construction activity, upfitting  
4 activity, and simply enjoin the county in  
5 issuing the CO because of the restrictive  
6 covenant under the statute, what damage would  
7 that cause D&T?

8 MR. SHEEDY - Oh, I believe that the case law  
9 is clear that, for purposes of setting the  
10 amount of the bond - - - And I'm quoting from  
11 a case that Mr. Ballou cited in his response  
12 papers. For the record, it is the AJG  
13 Holdings case at 674 S.E.2d 505. In that, our  
14 Supreme Court held that even a nominal bond  
15 does not satisfy Rule 65(c). The Court found  
16 the nominal amount was improper because of  
17 erroneously assuming the injunction was  
18 proper, instead of providing an amount  
19 sufficient to protect appellants in the event  
20 the injunction was ultimately deemed improper.  
21 The Court remanded the case to the trial court  
22 to award the appropriate amount of costs and  
23 damages incurred as a result of the temporary  
24 injunction.  
25 JUDGE KIMBALL - I have no problem with that.

1 MR. SHEEDY - My point is, that a nominal  
2 amount that's premised upon the idea that the  
3 injunction against York County - - - Well, for  
4 purposes of setting the bond, it has to be  
5 assumed that even the injunction against York  
6 County is not proper, and the amount of the  
7 bond has to be enough to protect D&T in the  
8 event that D&T may be successful - - -

9 JUDGE KIMBALL - Well - - -

10 MR. SHEEDY - In establishing that.

11 JUDGE KIMBALL - Well, arguably - - -

12 MR. SHEEDY - The Court may disagree.

13 JUDGE KIMBALL - Well, no. Arguably, D&T may  
14 be affected by an injunction issued to the  
15 county and may suffer - - - could suffer  
16 damages. But you've told me already that D&T  
17 recognizes that it can't get a CO until it  
18 gets the restrictive covenant removed as an  
19 obstacle and, therefore, can't legally operate  
20 until that happens. So my question is, if the  
21 injunction is strictly limited to enjoining  
22 the county from issuing a CO until the  
23 restrictive covenant is lifted, pursuant to  
24 the statute, how would - - - Based on your  
25 argument, how would D&T suffer any damage at

1 all?

2 MR. SHEEDY - It would be that seven-day window  
3 from June - - - Under Your Honor's construct,  
4 it would be that seven-day window from June  
5 21st, when the TRO was entered and  
6 construction activity had to stop - - -

7 JUDGE KIMBALL - (Indicating yes)

8 MR. SHEEDY - Up to today, when the TRO is  
9 lifted and would allow D&T to continue the  
10 construction activity. D&T was obviously  
11 harmed by that suspension.

12 JUDGE KIMBALL - Well, that would have to be  
13 proved.

14 MR. SHEEDY - Well, there's an affidavit before  
15 the Court indicating what the owner of D&T  
16 believes that its losses are, and I understand  
17 - - -

18 JUDGE KIMBALL - As a result of the six days?  
19 It doesn't say that.

20 MR. SHEEDY - Well, I think it's a per diem,  
21 but let me turn to it, rather than - - -

22 JUDGE KIMBALL - Well, do that. I didn't have  
23 that affidavit right here to see that. This  
24 is Mr. Cianfrocca, or whatever it is?

25 MR. SHEEDY - I have the same problem. At 5(a)

1        - - -

2        JUDGE KIMBALL - All right.

3        MR. SHEEDY - Fifty-four thousand dollars per  
4        day.

5        JUDGE KIMBALL - Well, that's speculative until  
6        a CO is obtained.

7        MR. SHEEDY - There is no question that we have  
8        had a seven-day demobilization with respect to  
9        construction activities under a contract  
10       that's three hundred and seventy-three  
11       thousand five hundred and seventy dollars. If  
12       Your Honor is limiting the amount of the bond  
13       and saying that the adequacy of the security  
14       is necessarily whatever the extra construction  
15       costs may be and then is turning to me and  
16       saying, what is that exact number, I don't  
17       have that exact number.

18       JUDGE KIMBALL - All right.

19       MR. SHEEDY - But I don't think there is any  
20       question that a bond has to be posted. It  
21       must be adequate. It must cover this period  
22       of time when the TRO was in effect and  
23       suspended the construction activity. The only  
24       evidence in the record with respect to the  
25       amount of the security is this affidavit. The

1 other affidavits that are in the record just  
2 relate to the losses to the plaintiff and area  
3 fireworks distributors in the event that Area  
4 51, D&T, is allowed to open.

5 JUDGE KIMBALL - Is this, in any way, affected  
6 by the fact that apparently, at least based on  
7 the affidavits and what's been submitted, D&T  
8 didn't disclose the covenant situation when it  
9 started pursuing this?

10 MR. SHEEDY - As Your Honor knows, I will be a  
11 vigorous advocate, but I'm always going to  
12 temper it with my duties as an officer of the  
13 Court. I was not in that loop. I understand  
14 what the plaintiffs have said about that. I  
15 don't have the application. I haven't  
16 reviewed it. I cannot speak to that. I don't  
17 know whether it was known as a result of D&T  
18 that the restrictive covenant existed. I  
19 can't speak to that. I don't have personal  
20 knowledge.

21 JUDGE KIMBALL - All right.

22 MR. SHEEDY - So I think Your Honor understands  
23 our position, which is that we believe the  
24 entire TRO should be dissolved. We think, at  
25 minimum, the portion of the TRO that prevents



1 ongoing construction activity should be  
2 dissolved, and in any event, a bond is  
3 required to be posted for at least the period  
4 of time that the construction activity has  
5 been suspended. Thank you.

6 JUDGE KIMBALL - All right. Mr. Kendree, since  
7 you represent another victim, do you want to  
8 go next?

9 MR. KENDREE - If I have a choice, Your Honor,  
10 I'd rather go third.

11 JUDGE KIMBALL - All right. I'll let you do  
12 that.

13 MR. KENDREE - I think those arguments are  
14 principally directed at Mr. Ballou's client.

15 JUDGE KIMBALL - That's fine. All right. Mr.  
16 Ballou?

17 MR. BALLOU - May it please the Court, Your  
18 Honor - - -

19 JUDGE KIMBALL - Why shouldn't I let them go  
20 ahead with their construction work, if they're  
21 willing to do so at their own risk?

22 MR. BALLOU - Well, Your Honor, you may recall  
23 that when we first came to you last week, my  
24 primary concern was the fact that there had  
25 been permits issued by York County. So my

1 number one goal was to make sure that the  
2 county had sufficient direction to not issue  
3 any permits over the deed restriction. I  
4 understand counsel's argument about whether or  
5 not a building permit is accepted under the  
6 statute. It does say permit - - -

7 JUDGE KIMBALL - Well, what's your opinion  
8 about that? I - - - That's confusing to me.

9 MR. BALLOU - It is confusing to me, too, Your  
10 Honor. It says, permit does not mean an  
11 authorization to build or place a structure.  
12 There's obviously a building there. The  
13 permits - - - And I did submit, Your Honor, a  
14 response with an affidavit from the records  
15 custodian of York County that if - - -

16 JUDGE KIMBALL - All right.

17 MR. BALLOU - Do you have that, Your Honor?

18 JUDGE KIMBALL - I do.

19 MR. BALLOU - Okay. That does establish that  
20 there was a demolition permit that was  
21 obtained. I don't know that that is accepted  
22 under the statute, where there was no  
23 disclosure. There was also the building, the  
24 renovation permit. I can imagine - - - I can  
25 see an argument where that might fit within a

1 building permit, but it does not technically  
2 mean an authorization to build. It's an  
3 authorization to do this renovation work. So  
4 it's upfit and demolition and those kinds of  
5 things. There's also a sign permit which we  
6 understand was issued, which we believe  
7 clearly would fall under the statute, and  
8 there's the CO, and there may be others.

9 JUDGE KIMBALL - I didn't - - - When I read  
10 through it, I - - - There's a lot of it, and  
11 it's done in typical governmental form and  
12 fashion. I could not find the place in those  
13 forms, easily at least, where they failed to  
14 disclose the existence of the covenant.

15 MR. BALLOU - Well, it's - - -

16 JUDGE KIMBALL - Is that in there?

17 MR. BALLOU - It is, Your Honor. In the  
18 response to - - -

19 JUDGE KIMBALL - All right. Show me where.

20 MR. BALLOU - Motion - - - May I approach?

21 JUDGE KIMBALL - Yes. The records custodian's  
22 affidavit?

23 MR. BALLOU - That's correct.

24 JUDGE KIMBALL - All right.

25 MR. BALLOU - Or actually, it's - - - I've

1 pulled out the relevant documents out of that  
2 and attached them with the affidavit to our  
3 response.

4 JUDGE KIMBALL - All right.

5 MR. BALLOU - So we've got a number of - - -  
6 You may not have that. These are included in  
7 the records custodian's affidavit.

8 JUDGE KIMBALL - Well, then show me the right  
9 page. What are we looking for?

10 MR. BALLOU - This is the commercial building  
11 permit application.

12 JUDGE KIMBALL - Yes.

13 MR. BALLOU - And it's right down, right above  
14 the signature line.

15 JUDGE KIMBALL - I see.

16 MR. BALLOU - And it has asterisks and bolding,  
17 boldface type. That says, is this property  
18 burdened by a restrictive covenant?

19 JUDGE KIMBALL - Well, it's just blank.

20 MR. BALLOU - And it's blank on every one of  
21 them, ex - - - There is one where the only  
22 response is that they signed it. So theyÆve  
23 never answered yes or no to the county - - -

24 JUDGE KIMBALL - Yes, sir.

25 MR. BALLOU - Whether or not this property is

1       burdened, and we believe that is part of the  
2       reason we're in this position right now.

3       JUDGE KIMBALL - All right. This was - - -  
4       Well, I don't disagree with that.

5       MR. BALLOU - And as we laid out in our  
6       response, Your Honor, had they been - - -

7       JUDGE KIMBALL - That's in April, the end of  
8       April. Okay.

9       MR. BALLOU - That's right.

10      JUDGE KIMBALL - Okay.

11      MR. BALLOU - So had they been forthright with  
12      the county, in terms of disclosing this, this  
13      whole discussion would have occurred several  
14      months ago, and they would either have  
15      obtained or have not obtained at that point in  
16      time a release from Crescent or whoever else  
17      they believe they need to get one from to  
18      allow the county to move forward.

19      JUDGE KIMBALL - Unless Mr. Sheedy is right  
20      about the permit question.

21      MR. BALLOU - In what sense, Your Honor?

22      JUDGE KIMBALL - That is, that they could have  
23      gone ahead and gotten the building permit  
24      anyway.

25      MR. BALLOU - Well, perhaps they may have

1       gotten a building permit, but I - - - We would  
2       argue you cannot get a demolition permit.  
3       We'd argue you can't get a sign permit.  
4       Certainly, we'd argue you can't get a CO at  
5       that point in time. But I guess my point,  
6       Your Honor, is that this whole discussion  
7       would have occurred before any of the expenses  
8       would have been incurred.

9       JUDGE KIMBALL - Okay. Can I get you to hold -  
10      - - Hold on a minute.

11      MR. BALLOU - Yes, sir.

12      JUDGE KIMBALL - Let me look at something.  
13      That's just - - - That is curiously written.

14      MR. BALLOU - Are you referring to the statute?

15      JUDGE KIMBALL - Yes. If the local agency has  
16      actual notice, dot dot dot, in the application  
17      or from any other source, it must not issue  
18      the permit. All right. I'm inclined to  
19      believe that that - - - reading that with C(2)  
20      has to do with planning approval. Permit is a  
21      wrongly used or confusing term to use there.  
22      I think it must have to do with planning  
23      approval.

24      MR. BALLOU - Well - - -

25      JUDGE KIMBALL - It says, the planning agency,

1 the local planning agency. Let's see. The  
2 local planning agency must not issue the  
3 permit - - - (b) if a local planning agency  
4 has actual notice, dot dot dot, the local  
5 planning - - - down to (3), must not issue the  
6 permit unless it receives - - - the local  
7 planning agency receives confirmation that the  
8 covenant has been released. I am constrained  
9 to believe that that has to do with - - - must  
10 have to do with planning approval.

11 MR. BALLOU - Well, the planning department in  
12 York County is the agency that has been  
13 issuing these permits.

14 JUDGE KIMBALL - Well, I understand, but I - -  
15 - I mean, it's a two-edge sword. The permit -  
16 - - The building permit may not be covered in  
17 itself, but the fact that planning approval  
18 was issued at all was improper if there was no  
19 disclosure - - -

20 MR. BALLOU - We would agree.

21 JUDGE KIMBALL - Or after disclosure.

22 MR. BALLOU - We would agree.

23 JUDGE KIMBALL - It should not have been  
24 issued. Okay. Go ahead. I think I'm - - -

25 MR. BALLOU - So if - - -

1 JUDGE KIMBALL - I hope I'm seeing the light.

2 MR. BALLOU - In parsing through this unique  
3 statute, Your Honor, this is something that I  
4 think we're all coming to perhaps for the  
5 first time. It seems to me - - - And if you  
6 look at the guidance provided by the  
7 Association of Counties, it does set up an  
8 administrative process - - -

9 JUDGE KIMBALL - Well, I got us off the track  
10 here. What I asked was - - - long ago, was  
11 why shouldn't - - - Given Mr. Sheedy's  
12 argument, why shouldn't D&T be permitted to  
13 continue with its construction activities, if  
14 it wants to, at its own risk?

15 MR. BALLOU - Well, I'm not sure that's not a  
16 bad result, Your Honor. Given where we were  
17 last week - - - And I'll represent to the  
18 Court that I personally contacted the  
19 Secretary of State on the phone, not just on  
20 the website, and tried to find some kind of  
21 contact. It was very concerning that we had a  
22 new, out-of-state company that was doing  
23 business without - - - apparently at that  
24 point, so that - - -

25 JUDGE KIMBALL - Well, then are you agreeing



1 that it would be all right for Mr. Sheedy's  
2 client to continue at its own risk?

3 MR. BALLOU - I don't know that we have - - -  
4 We obviously would prefer that not to happen,  
5 but under this statute, I don't know that the  
6 statute gives us the right to insist that they  
7 not do things at their own risk.

8 JUDGE KIMBALL - No, but you've asked me to do  
9 that.

10 MR. BALLOU - Well, because of the concerns of  
11 the nondisclosure, because of the concerns of  
12 the non-filing, which I understand has been  
13 corrected and had been corrected at the time  
14 we obtained the TRO. All the concerns that  
15 they were moving so fast and the county had  
16 issued permits apparently over the  
17 requirements of the statute, we felt that the  
18 best case was to put a stop to this, so we  
19 could get everybody in front of you, which we  
20 are here today for.

21 JUDGE KIMBALL - Here we are.

22 MR. BALLOU - So I think counsel has  
23 essentially conceded that it cannot do  
24 business until it gets a release from  
25 Crescent. It hasn't done that. It hasn't

1 produced anything from Crescent indicating any  
2 willingness to release this. I think, at this  
3 stage of the game, I'm not sure I can object  
4 to the Court releasing the restraining order  
5 as to their ability to upfit. But we  
6 certainly didn't want to be placed in the  
7 position, Your Honor, is looking down the road  
8 at some kind of consequence or damage claim  
9 saying, well, because we relied on the  
10 issuance of permits, we expended all of this  
11 money. Sure enough, that's what Mr.  
12 Cianfrocca talks about, that we have spent all  
13 of this money trying to get open in time for  
14 June 28th.

15 JUDGE KIMBALL - I agree. I agree with that.

16 MR. BALLOU - So if, in fact, they are willing  
17 at their risk and certainly don't intend to  
18 hold us responsible for any delays - - -

19 JUDGE KIMBALL - All right. Well, let's just  
20 move on to the next thing. I think we  
21 understand one another about that.

22 MR. BALLOU - Okay. The next point, Your  
23 Honor, in terms of interpreting the statute.  
24 I understand your reading of the statute  
25 perhaps may track the interpretative guidance

1 from the Association of Counties, talking  
2 about the property holders similarly  
3 restricted. That's not the language that the  
4 General Assembly used, and I understand that,  
5 through the reading, that there are different  
6 ways of interpreting this.

7 JUDGE KIMBALL - Well, I think - - -

8 MR. BALLOU - But clearly, I think - - -

9 JUDGE KIMBALL - And what I mean to be doing is  
10 looking at it in the broader sense of finding  
11 any kind of standing of somebody other than a  
12 - - - someone else bound by the covenant to  
13 enforce the statute.

14 MR. BALLOU - Well, as established in the  
15 affidavits, this property is a unique  
16 property.

17 JUDGE KIMBALL - Excuse me?

18 MR. BALLOU - This property that we're talking  
19 about that the defendants own is a unique  
20 property. It has been a very desired  
21 property. My clients have tried to purchase  
22 it. Other clients - - - Other parties have  
23 tried to purchase it for the express purpose  
24 of operating a fireworks stand. Then we're  
25 told, no, you can't do that because of the

1 deed restriction. Now, they all of a sudden  
2 step in and say, oh, there's no deed  
3 restriction. We're going to open a fireworks  
4 stand. So in terms of the standing argument,  
5 I would suggest we are more than any other  
6 source. We may not be similarly burdened by  
7 the same deed restriction, and we ~~are~~ certainly  
8 not. But I think in terms of who has the  
9 ability to bring an action under this statute  
10 to require the county to enforce the law as  
11 it's written, I don't think there's any  
12 question that this statute contemplates a  
13 party such as my client or Mr. Mack's client  
14 to be able to say, look, this is unfair. This  
15 is inequitable harm that we don't have any  
16 adequate remedy other than to pursue this kind  
17 of claim.

18 JUDGE KIMBALL - Well, that's what I was trying  
19 to ask Mr. Sheedy, about the - - - I mean, if  
20 he claims that - - - if they - - - And I have  
21 a serious question about the ability of the  
22 plaintiff to enforce anything based on sort of  
23 the idea of a negative reciprocal covenant  
24 idea, because it - - - it's just not  
25 connected.

1 MR. BALLOU - Well, we do have a common  
2 grantor, but I would concede that we don't  
3 have, at this point in time, any evidence that  
4 there was a general scheme or plan of  
5 development that would apply to these  
6 properties. But we have not really had any  
7 information - - - gotten information from  
8 Crescent. It's entirely possible Crescent did  
9 have a plan or scheme of development that  
10 included this restriction. They certainly put  
11 this restriction in the deed for a reason.

12 JUDGE KIMBALL - Yeah, but to whom does it  
13 apply? It doesn't matter. They put it in  
14 there for a reason, but it doesn't mean - - -  
15 There's no - - - There has to be some  
16 coextensive relationship among - - - between  
17 your client and - - - or the owner of your  
18 property, which would be Mr. Mack's client - -  
19 -

20 MR. BALLOU - That's correct.

21 JUDGE KIMBALL - And Mr. Sheedy's - - - the  
22 owner of Mr. Sheedy's client's property to  
23 have a basis for a claim, and I - - - As I've  
24 already said, that doesn't meet the likelihood  
25 of success on the merits.

1 MR. BALLOU - Well - - -

2 JUDGE KIMBALL - That part of the argument  
3 doesn't. I'm just focusing on the statute.

4 MR. BALLOU - And I'd like to focus on the  
5 statute, too. Because I think that's really  
6 the heart of this issue, is that you've got a  
7 statute that applies. It hasn't been complied  
8 with, and we just want to make sure it's  
9 complied with, Your Honor. I think under this  
10 statute, whether we are simply any other  
11 source or a property holder, we have the  
12 ability to bring an action to ask for this  
13 statute to be enforced by the county. The  
14 implication of that enforcement is that D&T  
15 can't do business until it gets the  
16 permissions and the permits that it needs to  
17 do it, irrespective of this case. That  
18 certainly goes to this question of a bond,  
19 Your Honor. You are absolutely right. There  
20 is no damage until they can establish they  
21 have the right to those expenditures, making  
22 those expenditures in reliance on - - -

23 JUDGE KIMBALL - Well, that's a - - -

24 MR. BALLOU - The permit.

25 JUDGE KIMBALL - Just a question for a later

1 day.

2 MR. BALLOU - That's right. That's right.

3 JUDGE KIMBALL - Okay.

4 MR. BALLOU - So it does not suspend an  
5 existing business, general and ordinary  
6 business. They are not in the general and  
7 ordinary business of constructing or  
8 renovating.

9 JUDGE KIMBALL - I agree with that. Logically,  
10 it's inconsistent to argue that we're  
11 suspending business when they can't operate  
12 one yet.

13 MR. BALLOU - That's right. That's right. As  
14 far as Mr. Sonnenberg's concern and my  
15 client's, and I would - - - I just want to  
16 make sure that the record is clear, that we  
17 have expended dollars and resources in  
18 building the building where my client  
19 currently exists in reliance on the fact that  
20 the adjoining property, which we attempted to  
21 purchase, was deed restricted. So to the  
22 extent that plays into this whole relationship  
23 between my clients and the county and D&T's  
24 efforts, there is inequitable basis for us to  
25 say this isn't fair, this is inequitable.

1 JUDGE KIMBALL - Well, let's just - - - I don't  
2 know how big the parcel - - - How big is the  
3 parcel that's restricted, Mr. Sheedy?

4 MR. SHEEDY - Your Honor, I'd have to look at  
5 the deed. I thought the deed was attached to  
6 the plaintiff's - - -

7 JUDGE KIMBALL - Well, I just haven't looked at  
8 that.

9 MR. SHEEDY - Pleadings, and I'm not - - -

10 JUDGE KIMBALL - I'm just thinking.

11 MR. MACK - It's where the restaurant is  
12 situated.

13 JUDGE KIMBALL - The Randazzo restaurant.

14 MR. MACK - Right, the Randazzo, but there was  
15 a restaurant there before.

16 JUDGE KIMBALL - Right.

17 MR. MACK - And it's always been a restaurant.

18 MR. BALLOU - How big is that part?

19 JUDGE KIMBALL - But how big is it?

20 MR. MACK - It couldn't be much more than an  
21 acre, I don't think.

22 JUDGE KIMBALL - But it's just a single parcel,  
23 Mr. Mack?

24 MR. MACK - I think it's a single parcel. Then  
25 Frugal MacDoogal, which is the SonnenbergÆs,



1       adjoins that on the other - - - on one side.

2       Then on the other side would be the service  
3       station. When you make - - - you're turning  
4       into the little alleyway - - -

5       JUDGE KIMBALL - The service station that has  
6       the McDonald's and all of that?

7       MR. MACK - And there's a service station.

8       Then Mom's old restaurant, or the Randazzo  
9       restaurant, and then Frugal MacDoogal.

10      JUDGE KIMBALL - So this single parcel has been  
11      - - - is the only thing that's concerning was  
12      there any restrictions? In other words, Duke  
13      has sold each parcel separately?

14      MR. MACK - It's not Duke. It's Crescent.

15      JUDGE KIMBALL - Crescent. Well, I know. I  
16      still call them Duke.

17      MR. MACK - Okay. I don't mean to correct you,  
18      Your Honor.

19      JUDGE KIMBALL - I know. It's Crescent.

20      MR. MACK - But they have - - - they - - - Duke  
21      had all of those locations all around that  
22      whole interchange.

23      JUDGE KIMBALL - I understand. Right.

24      MR. MACK - And they have developed it over  
25      twenty-five years.

1 JUDGE KIMBALL - All right.

2 MR. MACK - And so this restrictive covenant is  
3 really a part of that overall development.

4 JUDGE KIMBALL - All right. Well - - -

5 MR. MACK - But I'm not going to get into what  
6 it means.

7 JUDGE KIMBALL - Well, that wouldn't sustain  
8 the TRO right now.

9 MR. MACK - I understand that. I understand  
10 that, Your Honor. But we have the same - - -  
11 Sonnenberg and Festival have the same concerns  
12 about - - -

13 JUDGE KIMBALL - I understand.

14 MR. MACK - There being - - - If Mr. Sheedy's  
15 client wants to continue on about - - - on  
16 building, that would not - - - We would have  
17 never been here to talk about that, if that  
18 was all they were doing. They're just not  
19 doing - - - They don't have the right to do  
20 business of fireworks and/or bingo and/or  
21 amusement.

22 JUDGE KIMBALL - I understand.

23 MR. MACK - That's all included.

24 JUDGE KIMBALL - I understand.

25 MR. MACK - And this was a grand plan by

1 Crescent, but maybe that's not applied in the  
2 right way.

3 JUDGE KIMBALL - I understand. Okay.

4 MR. MACK - And we - - - Mr. Ballou's clients  
5 would not have been on - - - in Mr.

6 Sonnenberg's building had it not been that - -

7 - And it was in the affidavit, that they were

8 told by Crescent that they could not do

9 business in that building, and they had to

10 have - - - And so they went to Mr. Sonnenberg.

11 JUDGE KIMBALL - All of that is for a later  
12 day.

13 MR. MACK - All right. And the - - -

14 JUDGE KIMBALL - This is all about the statute.

15 MR. MACK - So we have a building there that

16 was built by Mr. Sonnenberg and his clients

17 that would have never been built if that

18 restrictive covenant was not - - - had not

19 been on there.

20 JUDGE KIMBALL - Okay. All right.

21 MR. MACK - And, you know, I - - - I think that

22 that - - - That's really all. We agree with

23 what Mr. Ballou is saying in regard to the

24 statute and so on, but - - -

25 JUDGE KIMBALL - What about what he hasn't said

1 yet?

2 MR. MACK - And what he hasn't said, yes. But  
3 one of the things - - - One of the things that  
4 - - - the reason we are a plaintiff is, we  
5 actually - - - I actually don't think that the  
6 county had the right to issue any of the  
7 permits.

8 JUDGE KIMBALL - Okay.

9 MR. MACK - And that's based on what we do in  
10 other instances in other entities in other  
11 counties and other cities.

12 JUDGE KIMBALL - Anything else, Mr. Ballou?

13 MR. BALLOU - Your Honor, and I - - - Just to  
14 wrap up interpreting this statute. The only  
15 interpretation I think we have - - - any of us  
16 has found is this Association of Counties  
17 bulletin, which of course is nonbinding. It  
18 may be instructive, but I think it - - -

19 JUDGE KIMBALL - Well, as I understood what I  
20 read that Mr. Sheedy gave me, that that just  
21 applies to who is a property holder, right?

22 MR. BALLOU - Well, the guide is actually  
23 fairly - - -

24 JUDGE KIMBALL - Other property holders.

25 MR. BALLOU - Fairly detailed. It goes through

1 it clause-by-clause on this, and the - - -

2 JUDGE KIMBALL - Well, I didn't read it.

3 MR. BALLOU - And a copy was attached to our  
4 memorandum. What the Association of Counties

5 says, is that the administrative regime that

6 is set up by the statute creates a situation

7 where, and I'll quote, the burden - - - And

8 this is on Page 3 of 4 of the technical

9 bulletin. The burden is upon the permit

10 applicant to provide the written proof that

11 the covenant had been waived or is no longer

12 valid. That's why it's so important that they

13 didn't disclose this early on. Because it

14 puts the responsibility on that applicant.

15 JUDGE KIMBALL - Let me ask you this, and I

16 should have asked it to both - - - I'll ask

17 anybody this. Does anybody have a copy of

18 this statute as it was put in the Acts and

19 Joint Resolutions? It will have that little

20 preamble. I couldn't find it this morning. I

21 looked for it.

22 MR. BALLOU - I don't. I don't. I just got it  
23 off of Westlaw.

24 JUDGE KIMBALL - Well, I - - - Okay. Would you  
25 have that, Mr. Kendree?

1 MR. KENDREE - I don't have it with me, but we  
2 do have it in our office, Your Honor.

3 JUDGE KIMBALL - All right.

4 MR. KENDREE - I can - - -

5 JUDGE KIMBALL - I've tried to look that up to  
6 see what the preamble was, when it was offered  
7 as a bill and approved, and I couldn't find  
8 it. Okay. Go ahead.

9 MR. BALLOU - Your Honor, as to the issue of  
10 the bond, we concede. The bond should have  
11 been - - - and I accept responsibility for not  
12 including that in the order that was  
13 presented.

14 JUDGE KIMBALL - It was my order.

15 MR. BALLOU - But we certainly tendered the - -  
16 - a nominal bond. We understand the case law  
17 as to nominal bonds. We don't think the  
18 affidavit of Mr. Cianfrocca has any bearing on  
19 what an appropriate bond ought to be in this  
20 situation, given the fact that D&T cannot do  
21 any business at all unless the county gives  
22 them the CO. The county, under our  
23 interpretation of this statute, is prohibited  
24 from doing that until D&T resolves this issue  
25 to the county's satisfaction.

1 JUDGE KIMBALL - Okay.

2 MR. BALLOU - So to the extent that - - - I  
3 understand that a bond is required, and we ask  
4 for a nominal or something - - - a minimal  
5 bond. Not a nominal bond, but a minimal bond.  
6 We don't think the delay, if there was any,  
7 between the time that this TRO was entered and  
8 today, again really has any bearing except for  
9 their specific timetable to try to open up for  
10 this weekend. That's what they're trying to  
11 bootstrap in, Your Honor, is that there is a  
12 very narrow window that - - -

13 JUDGE KIMBALL - Well, if they got - - -

14 MR. BALLOU - They can open up.

15 JUDGE KIMBALL - If they got the covenant  
16 waived tomorrow, they could open for this 4th  
17 of July.

18 MR. BALLOU - I think they probably could, Your  
19 Honor.

20 JUDGE KIMBALL - You know, that's - - - That  
21 would be the end of that.

22 MR. BALLOU - Well, I'm not quite willing to  
23 concede that, but I believe that that was - -  
24 -

25 JUDGE KIMBALL - Well, no, you still have your

1 lawsuit.

2 MR. BALLOU - That's right. But in terms of  
3 enjoining the county from taking further  
4 action, I'm not sure where we would be with  
5 that.

6 JUDGE KIMBALL - That's right.

7 MR. BALLOU - That would be a different  
8 situation.

9 JUDGE KIMBALL - And that's all I'm dealing  
10 with today.

11 MR. BALLOU - You know, the irreparable injury  
12 and inadequate remedy, I think we had talked  
13 through it. Frankly, Your Honor, in sitting  
14 here, the conversation between Your Honor and  
15 counsel anticipated many of the arguments that  
16 I had made in my brief and that I intended to  
17 make. So I'm not going to go over those  
18 again, other than to say, we believe we have  
19 shown we have - - - there is irreparable harm.  
20 The Pointer case, in particular, is  
21 interesting. Because I've heard many  
22 attorneys say, well, you don't consider the  
23 balance of the equities in an injunction case  
24 any more. What Pointer says is, you don't do  
25 a separate inquiry. The balance of the



1 equities is subsumed within irreparable harm  
2 and inadequate remedy at law. In this case,  
3 Your Honor, you have nondisclosure. You have  
4 a situation where this developer, this  
5 company, is coming in and trying as fast as  
6 they can to get these permits, getting permits  
7 issued over the statute, and now saying, oh,  
8 but we've been harmed. Well, the balance of  
9 the equities doesn't favor that, Your Honor.

10 It favors my client, who has complied with the  
11 statute and has complied with the deed  
12 restriction and relied on the deed  
13 restriction. Your Honor, unless there are  
14 particular issues that you have concern with  
15 that you would like a response from my client,  
16 I am done.

17 JUDGE KIMBALL - No. Let me just hear from Mr.  
18 Kendree.

19 MR. BALLOU - Thank you, Your Honor.

20 MR. KENDREE - Briefly, Your Honor, I think the  
21 underlying issues have been addressed by  
22 defendant's counsel, and acquiesce to a  
23 certain degree with plaintiff's counsel  
24 regarding proceeding at their own risk. The  
25 questions that come - - - I do believe the

1 analysis involves the balance of the equities,  
2 and the Court is asking that question to York  
3 County. I think it's an errand in the whole  
4 process that's envisioned in this particular  
5 statute. Abstractly, the only issue that  
6 comes to mind, but for this lawsuit - - - And  
7 certainly, we will be bound by the directives  
8 of the Court in issuing the COs or not issuing  
9 the COs. But presuming we - - - this lawsuit  
10 didn't exist and we had notice of a  
11 restrictive covenant, but nonetheless issued a  
12 CO, then the question that was coming to mind  
13 was, who would then have standing in this  
14 unique property when only one parcel is  
15 burdened by the restrictive covenant? At  
16 least from the vantage point of the county  
17 sitting here today, it would seem logical that  
18 a neighboring property owner would have that  
19 right to pursue under the statute, to force  
20 York County to comply with the law.

21 JUDGE KIMBALL - Yes.

22 MR. KENDREE - And Mr. Sheedy's client, at that  
23 point, would be an indispensable party, I  
24 would envision. But that's not before the  
25 Court today. But those are the questions that

1 would come to mind about enforcement issues  
2 when you were inquiring of counsel on that  
3 matter.

4 JUDGE KIMBALL - So the county's position is  
5 that - - - Well, I don't want to ask a leading  
6 question. What is the county's position with  
7 respect to whether the plaintiff is an any  
8 other source including, but not limited to?

9 MR. KENDREE - Well, I think the statute is  
10 broadly written, and I would - - - The  
11 analysis we've looked at is, there's certainly  
12 another source, if not another property owner.

13 JUDGE KIMBALL - All right.

14 MR. KENDREE - Because it doesn't limit it to  
15 burdened - - - similarly burdened property  
16 owners. However, certainly, I believe they're  
17 another source. From just the fairness  
18 standpoint, I think that's what this statute  
19 is trying to approach, and I see your point of  
20 looking into the preamble to the Acts and  
21 Joint Resolutions to see what was envisioned,  
22 if anything, at that time. But that's how  
23 we're looking at it - - -

24 JUDGE KIMBALL - All right.

25 MR. KENDREE - From a fairness standpoint.

1 JUDGE KIMBALL - All right. Mr. Sheedy, I  
2 don't think I need anything else. Here's what  
3 I'm going to do - - - Unless you want to be -  
4 - -

5 MR. SHEEDY - Yes, Your Honor.

6 JUDGE KIMBALL - I'm going to clock you two  
7 minutes.

8 MR. SHEEDY - Okay, fine. Number one, the  
9 property is 1.560 acres, for the record.  
10 Number two, I agree with Mr. Ballou that the  
11 technical bulletin from the South Carolina  
12 Association of Counties is persuasive and  
13 should be considered. That - - -

14 JUDGE KIMBALL - I just think it's not on  
15 point. That's my view of it, but go ahead.

16 MR. SHEEDY - All right. And third, to be  
17 clear about what Pointer says, the three  
18 inquiries have to take place first. Only then  
19 may the Court balance the equities. That's  
20 what Pointer says.

21 JUDGE KIMBALL - Well, it's pretty - - - I'm  
22 not sure we're not picking at a nit with that.  
23 It doesn't matter as far as my decision is  
24 concerned. Here's what I'm going to do. I'm  
25 going to lift the TRO with respect to

1 construction activity. The Defendant D&T can  
2 proceed at its own risk. I'm going to require  
3 a one hundred thousand dollar bond be posted  
4 immediately. It will be retroactive to the  
5 entry of the TRO. That was my error in not  
6 requiring that. Thirdly, I'm going to  
7 continue the TRO under the rule, according to  
8 the rule, with respect to the issuance of a  
9 certificate of occupancy. The county is - - -  
10 continues to be restrained, and necessarily  
11 D&T is affected by that, from issuing a CO so  
12 long as the restrictive covenant encumbers  
13 that property. I find that the plaintiff is  
14 in the category of any other source, including  
15 but not limited to, even if it is not a  
16 property holder, which I do not decide. I  
17 think I've made that clear. I think that  
18 there is no adequate remedy at law because if  
19 one adopts the - - - D&T's position, which I  
20 have left to another day for determination as  
21 well, there would be no legal basis upon which  
22 the plaintiff could obtain relief from D&T,  
23 even if it was wrong, even if D&T was wrong.  
24 If there's no - - - In other words, I'm  
25 harking back to my - - - what I said about a

1 12(b)(6) motion. Thus, it would suffer  
2 damages that it couldn't collect from anybody.  
3 So I find that there's a likelihood - - - that  
4 there's a likelihood of irreparable harm, a  
5 likelihood of success on the merits as to the  
6 narrow issue under the statute, and there is  
7 no adequate remedy at law. So the TRO will  
8 continue, in effect, to that extent. Now,  
9 having said that, how do you gentlemen want to  
10 deal with what obviously comes next, and  
11 that's an extension of the TRO? Mr. Sheedy,  
12 what's your position about that? I mean, I  
13 know I'm jumping ahead. That's not what we're  
14 here today to deal with.

15 MR. SHEEDY - Your Honor, I think the PI  
16 hearing is set for Monday, I think.

17 JUDGE KIMBALL - Is it?

18 MR. BALLOU - It is.

19 MR. SHEEDY - I think the TRO - - -

20 JUDGE KIMBALL - Oh, okay. All right.

21 MR. SHEEDY - I think the TRO expires on  
22 Sunday.

23 JUDGE KIMBALL - All right.

24 MR. SHEEDY - And consequently, there's no need  
25 for an extension of the TRO. We'll be back

1 here on Monday.

2 JUDGE KIMBALL - All right. That will be fine.

3 That will work. Okay. Anything I didn't  
4 cover? Anybody?

5 MR. KENDREE - No, Your Honor.

6 JUDGE KIMBALL - Mr. Ballou? Mr. Mack?  
7 Anything I didn't cover yet? That needed to  
8 be covered today, I should say.

9 MR. BALLOU - I don't believe so. That hearing  
10 is at three o'clock?

11 JUDGE KIMBALL - I don't know. I hope it's  
12 earlier than that.

13 MR. BALLOU - We'll be here. It's in the  
14 afternoon, I believe.

15 JUDGE KIMBALL - Okay. Well, that's good  
16 because I - - - The reason - - - What was  
17 concerning me as I thought about it, if we  
18 extended the TRO, I'm going on vacation  
19 starting on the 4th and won't be back here  
20 until the 16th of July, and everything would  
21 fall to pieces in between. So that's good.  
22 We're doing the temporary injunction hearing  
23 on Monday. That would be good. Anything  
24 else?

25 MR. SHEEDY - At two thirty p.m.

1 JUDGE KIMBALL - Two thirty, okay.

2 MR. SHEEDY - Nothing further from D&T.

3 JUDGE KIMBALL - All right.

4 MR. BALLOU - Nothing further, Your Honor.

5 JUDGE KIMBALL - Mr. Ballou, email me an order

6 that I can edit to be sure I don't

7 inadvertently leave anything out again.

8 MR. BALLOU - Very good.

9 JUDGE KIMBALL - All right. Thank you.

10 MR. SHEEDY - Thank you, Your Honor.

11 MR. BALLOU - Thank you.

12 JUDGE KIMBALL - Oh, let me - - - There is one

13 thing. I wanted to raise this to both

14 parties, because I think it's - - - I think it

15 at least may be instructive about this issue

16 of standing. Ironically, I happened to read a

17 Supreme Court case that was filed yesterday.

18 It's called Richard Freemantle against John -

19 - - and others, against John Prest - - I'm

20 sorry, Joe Preston and others. It is not - -

21 - It doesn't address the Local Planning Act.

22 It deals with the standing - - - It does deal

23 with standing, based on some connection to the

24 cause of action or the wrong, and it also

25 deals with standing in the broader sense about



1 under - - - under a statutory scheme that  
2 provides relief in general to the public, any  
3 member of the public. What it talks about is  
4 the FOIA statute, FOIA. A part of my  
5 consideration about this statute is, that I  
6 believe that that kind of standing is broad.  
7 Statutory standing, it's called. All right.

8 That will do it.

9 MR. BALLOU - Thank you, Your Honor.

10 MR. SHEEDY - Thank you.

11 JUDGE KIMBALL - Thank you.

12 WHEREUPON - The hearing was concluded at

13 10:48 a.m.

Kelly Reiter

Court Reporter/Notary Public

(Recorded tapes retained for fifteen days from date of  
certification or until transcript has been signed in  
cases when signature is not waived)

Master-in-Equity Hearing

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF YORK ) 2012-CP-46-2286

CHARLES SONNENBERG, )  
FESTIVAL CORPORATION, )  
PHILLIP PULLEY, AND )  
ROBERT FOSTER, )  
PLAINTIFFS, )

-VS- )

D&T IMPORTS SOUTH CAROLINA, INC., )  
A NEVADA CORPORATION, D/B/A )  
AREA 51 FIREWORKS, AND )  
YORK COUNTY, A POLITICAL SUBDIVISION )  
OF THE STATE OF SOUTH CAROLINA, )  
DEFENDANTS. )

TRANSCRIPT OF PROCEEDINGS  
YORK, SOUTH CAROLINA  
NOVEMBER 1, 2012

REPORTER - WILLIAM H. WHITE

DALLAS REPORTING  
SERVING THE CAROLINAS FOR OVER TWENTY-FIVE YEARS  
ROCK HILL, SOUTH CAROLINA  
803-328-9640/TOLL FREE 1-877-871-6363

Sonnenberg -vs- D&T Imports - Hearing 11-1-12

ROA 000142

Appearances: For the Plaintiffs -

Daniel J. Ballou, Esquire  
Hamilton Martens Ballou & Carroll  
130 East Main Street  
Rock Hill, South Carolina 29731

For the Defendants -

James Sheedy, Esquire  
Susan Driscoll, Esquire  
Driscoll Sheedy, PA  
11520 N. Community House Rd.  
Suite 200  
Charlotte, North Carolina 28277

For the Defendant, York County

Michael Kendree, Esquire  
York County Attorney  
P. O. Box 229  
York, South Carolina 29745

1 PROCEEDINGS  
2 BEFORE - THE HONORABLE S. JACKSON KIMBALL  
3 3:23 P.M.

4 \* \* \* \* \*

5 THE COURT: As best I can tell, this is the  
6 Defendant's, D&T's, Motion to Recover Damages  
7 against the bond, but more importantly to have me  
8 not enter something discharging the surety or maybe  
9 all of the above.

10 MR. SHEEDY: Correct, Your Honor.

11 THE COURT: Okay.

12 MR. SHEEDY: For the record, Jim Sheedy  
13 appearing on behalf of D&T Imports of South  
14 Carolina, Inc., D/B/A Area 51 Fireworks.

15 Your Honor, on October 17 in a conference call  
16 with Mr. Kendree, seated behind me, the attorneys  
17 for D&T learned that the Plaintiffs and York County  
18 were in the process of desisting this action. York  
19 County had signed an order and sent it to Mr.  
20 Ballou. It was unclear to D&T's Counsel whether  
21 that order had already gone to the Court for  
22 signature. D&T asked for a copy of the order, and  
23 Mr. Kendree was kind enough to furnish it to us on  
24 October 18.

25 When Counsel for D&T reviewed that order,

1 there were a few things that were of concern.

2 First, the parties were bearing their own  
3 costs and expenses including attorneys fees, which  
4 appears on Page 2 of that proposed order; second,  
5 York County could not issue a Certificate of  
6 Occupancy if D&T received a release of the  
7 restrictions as opposed to the language of the  
8 statute, which said a final court order or release,  
9 and last, that the bond was to be immediately  
10 discharged. And the discharge of the bond, as I  
11 think Your Honor was suggesting a moment ago,  
12 ordering us that once the bond was gone we wouldn't  
13 be able to recover anything against the bond, which  
14 is the principal reason that we are here today. As  
15 a result, we have made this motion asking for  
16 damages to be awarded against the bond.

17 D&T has no objection to this case being  
18 dismissed. It just wants to reserve and preserve  
19 its rights against the bond to recover those  
20 damages or refund the entry of the temporary  
21 restraining order that was ultimately dissolved.

22 We believed that we had to race to the  
23 courthouse with this motion against the bond before  
24 the order was entered, and that's why we did so on  
25 October 19. And, we appreciate the Court hearing

1 this today. We were doing the best that we could,  
2 given that we had Counsel in California, and a  
3 client in California, and I was traveling at the  
4 time.

5 The motion before Your Honor seeks \$34,025.00  
6 for additional construction costs and \$39,701.97 in  
7 legal fees to get the TRO dissolved and the claims  
8 against D&T dismissed.

9 THE COURT: Didn't I read something that says  
10 the whole thing was -- once you asked to hold the  
11 bond against something like \$55,000 --

12 MR. SHEEDY: That is correct. D&T has since  
13 reduced its legal fees claim to \$17,770.41. Based  
14 on my review of Your Honor's case, Chambrin versus  
15 Lost Colony, I quickly became convinced that D&T is  
16 not entitled to its legal fees for the preliminary  
17 injunction, which was not against D&T; it was just  
18 against York County. And unfortunately, I don't  
19 see any basis for claiming legal fees for the  
20 dismissal of D&T from this action. I think under -  
21 - and I may be mispronouncing it, Chambrin, we are  
22 only entitled to legal fees up through the  
23 dissolution of the TRO that was issued against D&T.

24 THE COURT: I believe that to be the case.

25 MR. SHEEDY: So we have changed our request.

1 Originally we set in motion not the entire \$150,000  
2 bond as suggested in your motion. As Your Honor  
3 noted, we are here today looking for \$51,795.41,  
4 which consists of \$17,770.41 in legal fees and  
5 \$34,025 in additional construction costs.

6 The liability now seems pretty clear. The TRO  
7 enjoined D&T from renovating, building, up-fitting  
8 or constructing the property for the purpose of  
9 selling fireworks. The bond insured against such  
10 damages and costs D&T may sustain by reason of the  
11 temporary restraining order if the Court should  
12 finally decide that the Plaintiffs were not  
13 entitled to resume.

14 The order modifying the temporary restraining  
15 order vacated the TRO as to construction activities  
16 on the property and allowed D&T to proceed with  
17 such work at its own risk.

18 So the Court found the Plaintiffs were not  
19 entitled to a TRO against D&T. In addition, the  
20 Court found in that order modifying the temporary  
21 restraining order that D&T's damages at this point  
22 were limited to additional construction costs  
23 related to the delay caused by the TRO, and  
24 according to the order modifying the temporary  
25 restraining order.



1       So D&T is here today asking that its 34,025 in  
2       additional construction costs related to the delay,  
3       caused by the entry of the TRO, be awarded to it.  
4       In addition, it appears under the case law that D&T  
5       --

6       THE COURT: Let me go back a second. You made  
7       a reference a minute ago, and I am trying to find  
8       it as you talked, over modifying the TRO. You said  
9       something about -- let me find it. You sounded  
10      awful conclusionary about the right of D&T to  
11      collect damages.

12      MR. SHEEDY: Yes, Your Honor. I have  
13      highlighted that -- If Your Honor turns to Page 2,  
14      finding Number 6, the second sentence --

15      THE COURT: Okay.

16      MR. SHEEDY: (As read) Because I find that  
17      D&T's damages at this point would be limited to ---

18      THE COURT: Would be limited to. Okay. Go  
19      ahead.

20      MR. SHEEDY: Okay. In addition is the law that  
21      allows the recovery of attorneys fees in this  
22      instance, inasmuch as this action was really for  
23      injunctive relief and not for monetary damages. So  
24      the injunctive relief here is central rather than  
25      ancillary to the action. D&T is only asking for

1 its legal fees up to and through the entry of the  
2 TRO because, as I said, while we would love to get  
3 more, I think Chambrin stands for the proposition  
4 that no, we cannot do that.

5 THE COURT: Let me ask you this. You are  
6 making a distinction that the cases apparently have  
7 made about whether the relief, injunctive relief,  
8 is ancillary to the whole case. I'm not -- Maybe I  
9 am getting ahead of myself here but the action --  
10 In connection with that, I had to go back and look  
11 at it.

12 The action is styled as a declaratory  
13 judgement action seeking a declaration that the  
14 restrictive covenants really don't permit - if I  
15 remember right - don't permit the -- permit D&T to  
16 have a fireworks store.

17 MR. SHEEDY: As well as seeking injunctive  
18 relief --

19 THE COURT: It does do that.

20 MR. SHEEDY: -- as a part of the Court hearing  
21 the complaint, and both of the orders, and I think  
22 the final order that's been presented to Your Honor  
23 actually requests a permanent injunction against  
24 York County. So I would submit that the injunctive  
25 relief in this case is actually central to the

1 action. It is the form of equitable relief that  
2 the Plaintiffs are seeking under the declaratory  
3 judgement action.

4 THE COURT: All right. Go ahead.

5 MR. SHEEDY: Although D&T was forced to act  
6 rather quickly in filing this motion in order to  
7 avoid a case dismissal that would discharge the  
8 bond, D&T has done so timely, in a procedurally  
9 correct manner. We have looked at the rule, Your  
10 Honor. I was a little confused about this at  
11 first. The rule could be a whole lot clearer with  
12 respect to the procedure that's pertinent here.

13 Prior to the adoption of Rule 65 this was all  
14 governed by statute, and it looked to me, under the  
15 statutes, that this had to be done by motion. The  
16 rule now says it may be done by motion. So we  
17 think that we are here in a procedurally correct  
18 posture, doing this by motion before the bond is  
19 discharged.

20 We are asking that the Court enter an order  
21 obligating Travelers Surety, that's the entity that  
22 issued this bond, pay D&T \$51,795.41, and we really  
23 take no position, once we have recovered that sum  
24 of money against the bond, with respect to the  
25 discharge of the remainder of the bond, or with

1 respect to the dismissal of the case. I don't know  
2 that we have a dog in either one of those fights.  
3 So, that basically is our position, Your Honor.

4 THE COURT: Why wouldn't a determination of  
5 reasonable attorneys fees and a determination of  
6 damages proximately caused by the TRO require some  
7 other kind of hearing?

8 MR. SHEEDY: I can't find any support for that  
9 one way or the other, Your Honor. The older cases  
10 under the statute, where there were Special  
11 Referees appointed, and I am referring to the  
12 Walker case that I think we cited in our papers --

13 THE COURT: Right.

14 MR. SHEEDY: There may be one other case along  
15 that line, the Hyler case. There were actual  
16 evidentiary hearings with testimony that was  
17 presented --

18 THE COURT: Right.

19 MR. SHEEDY: -- but, I am now looking at 1936  
20 and 1962 cases, so they precede the adoption of the  
21 South Carolina Rules of Civil Procedure. Under  
22 Rule 65 there is a mention -- In fact, let me quote  
23 it to Your Honor rather than do this from memory.

24 Your Honor, look at Rule 65C, about three-  
25 quarters of the way down in that subsection. (As

1 read) Liability may be enforced on motion without  
2 necessity of an independent action. So that seems  
3 to envision --

4 THE COURT: Hold on a second. This is in C,  
5 under Surety?

6 MR. SHEEDY: Yes, Your Honor.

7 THE COURT: All right. Hang on just a minute.  
8 That's sort of what I am saying, really. I think  
9 liability -- Let's think in terms of partial  
10 summary judgement, just by analogy. Liability  
11 could be established. It's the damages part that  
12 I'm concerned about. I am not saying it is. I  
13 haven't read the whole thing, but you see what I  
14 mean? What it says, his liability may be enforced  
15 on motion, and I understand the ultimate  
16 liability's for money. Go ahead.

17 MR. SHEEDY: Well, I can't find any authority,  
18 Your Honor, on that point, whether there's an  
19 evidentiary hearing requirement. There certainly  
20 was prior to the adoption of Rule 65, or whether  
21 this is something that's just done on motion.

22 Quite honestly, when I went through the rules  
23 it seems like in the South Carolina Rules of Civil  
24 Procedure wherever there is a requirement that  
25 there be an affidavit they know how to say that.

1 Earlier in Rule 65 when they talk about  
2 temporary restraining orders, they call for an  
3 affidavit or a verified complaint. When they talk  
4 about, Rule 56, Summary Judgement, they talk about  
5 the pleadings, the affidavits -- here, on  
6 surety, it's silent. I don't find any South  
7 Carolina law on that point.

8 So, we are here today, we think in a  
9 procedurally correct way, to address the  
10 jurisprudence against our clients. Susan is  
11 pointing out to me that -- and I may mispronounce  
12 this one, too. Ficci?

13 THE COURT: Right.

14 MR. SHEEDY: And in Ficci, the attorneys fees  
15 were handled in the same way that you are handling  
16 them here today, which is in a motion and by the  
17 affidavit. And I am looking -- I am happy to hand  
18 this up, but I am looking, Your Honor, on Page 349  
19 of the Southeastern Reporter for that motion.

20 THE COURT: Right. I've got it here. Go  
21 ahead. I am listening.

22 MR. SHEEDY: Well, I really don't have anything  
23 further to offer. I think I have made my point. I  
24 understand Your Honor's questions of me, that  
25 liability may be determined but damages are

1 unliquidated, and we think we have made the  
2 required showing under the rule of my motion. I  
3 mean, that's what we -- it's the only thing we know  
4 to do, because it's the only guidance we have.

5 THE COURT: Do I have -- In going through all  
6 this paper I may have missed it. Do I have an  
7 affidavit of the current claim for attorney fees?

8 MR. SHEEDY: I think you do. I will be happy  
9 to hand you this other one.

10 THE COURT: What's it attached to?

11 MR. SHEEDY: It's attached to the pleading that  
12 I filed yesterday, the very short Memorandum of  
13 Support.

14 THE COURT: Okay. All right. Hang on.

15 MR. SHEEDY: Would Your Honor like me to hand  
16 that up?

17 THE COURT: I might have it. I got it right  
18 here. Let me see what's attached to it. Okay.  
19 Here it is. Okay. Let me look at that a minute.  
20 Okay. I see it. Anything else? All right. Mr.  
21 Ballou?

22 MR. BALLOU: May it please the Court, Your  
23 Honor, Dan Ballou on behalf of the Plaintiffs, and  
24 specifically Robert Foster.

25 Your Honor, speaking of affidavits, at 4:52

1 yesterday afternoon is when we got the first  
2 affidavit in this case. We would object to the  
3 affidavits as being untimely under Rule 6. They  
4 were not filed with the motion --

5 THE COURT: I can sort all of that out. Let's  
6 deal with the core issues.

7 MR. BALLOU: Well, I want to make sure I am on  
8 the record as objecting to those affidavits because  
9 we have not had an opportunity to, under the rules,  
10 to respond to them. We got them at the end of the  
11 day yesterday. I have had a chance to look at them  
12 today. I've got some concerns that do relate to  
13 the issue as to, procedurally, how to proceed with  
14 this matter --

15 THE COURT: Let's talk about the core issue  
16 first, and that is liability.

17 MR. BALLOU: Well, Your Honor, the rule says  
18 that a party who is wrongfully enjoined can seek  
19 costs and damages. And what we would contend D&T  
20 has done is completely skipped over that analysis  
21 and just assumed, for purposes of its motion, that  
22 the fact that the portion of the TRO that affected  
23 construction activities was lifted equates to a  
24 finding of wrongful injunction. And there is not  
25 evidence that that, in fact --



1 THE COURT: Say that again?

2 MR. BALLOU: The rule says that you are  
3 entitled to claim your costs and damages as a  
4 result of being wrongfully enjoined. And so, that  
5 term has actually not been defined in South  
6 Carolina. Defense Counsel has not defined it but  
7 has simply leapt forward to the fact that since the  
8 original TRO was lifted as to those construction  
9 activities, that that equates to wrongful  
10 injunction.

11 So we think that their procedure -- In the  
12 first place, there's got to be a finding that  
13 there's a wrongful injunction. There hasn't been,  
14 in this case. We talked about a motion under the  
15 rule. I think that's what we would probably  
16 suggest should happen, that there should be a  
17 motion as to substantively it was a wrongful  
18 injunction of the Defendant's rights. So that is  
19 the first issue, that there wasn't any wrongful  
20 injunction. And as Your Honor may recall, the  
21 reason that we even included any --

22 THE COURT: Here's what the TRO said: (As read)  
23 It is further ordered that the Defendant D&T  
24 Imports be temporarily restrained and enjoined from  
25 taking any further action of any kind towards

1 renovating, building, up-fitting or constructing  
2 the subject property for the purposes of selling  
3 fireworks, and so on. A later order modified that  
4 to exclude D&T, and the arguments at that hearing -  
5 - I am stacking up papers now. The arguments at  
6 that hearing related to standing. An order  
7 granting a Motion to Dismiss --

8 MR. BALLOU: That was an order that was signed  
9 most recently, as was D&T, when D&T --

10 THE COURT: Well, I can't find -- Yeah, Roman  
11 Numeral II finds that the Plaintiffs had no common  
12 law right to enforce the restriction in question,  
13 if they sought to, in the complaint, the verified  
14 complaint, which resulted in the TRO.

15 MR. BALLOU: That's correct, Your Honor. And  
16 our position, again, on this, the context of all of  
17 that -- really, look at that one segment of the  
18 original TRO that affects D&T, because for all  
19 intents and purposes the remainder of that  
20 injunction, that TRO, has remained in place through  
21 the preliminary injunction and is the basis of the  
22 County's agreement on the consent order for a  
23 permanent injunction. And that until such time as  
24 D&T satisfies the statutory requirements of, under  
25 Title 6, that the County cannot issue a Certificate

1 of Occupancy. That's what we sought from the very  
2 beginning. That is what the core of this case is  
3 all about.

4 Now, Your Honor may recall that the reason  
5 that there was any even discussion --

6 THE COURT: But you sought to enforce the  
7 restriction.

8 MR. BALLOU: Well, --

9 THE COURT: In the complaint, in the verified  
10 complaint that resulted in the issuance of the TRO.

11 MR. BALLOU: That's correct. Through --

12 THE COURT: That was the basis of the TRO, part  
13 of the basis for the TRO.

14 MR. BALLOU: Well, that's right. That was --  
15 And it was through the lens of Title 6, though,  
16 Your Honor, Title 6, Section 629-1145, we said that  
17 the county cannot issue these permits.

18 THE COURT: Then why did you have to name D&T  
19 as a Defendant?

20 MR. BALLOU: Well, first of all, under the  
21 Declaratory Judgements Act, it requires you, I  
22 believe, to name parties whose interest may be  
23 affected by the declaration. We had to --

24 THE COURT: So why did you have to seek a TRO  
25 as to D&T?

1 MR. BALLOU: Well, and that's what I am getting  
2 to, Your Honor, is that the reason that we moved  
3 for ex parte relief, amongst others including the  
4 difficulty of trying to identify any kind of local  
5 representative, you may recall, that was an issue.  
6 We ended up resolving that issue.

7 But the history of the case, Your Honor, was  
8 that D&T had failed to disclose the existence of  
9 the deed restriction to the County and had obtained  
10 permits over the course of time. And so the fear  
11 was, if this isn't frozen in place, the status quo,  
12 until such time that D&T can appear, that there  
13 will be prejudice in that.

14 At that point, we hadn't determined whether or  
15 not -- We didn't know whether or not there was a  
16 common -- We knew there was a common grantor as to  
17 the restrictions on the Plaintiff's property and on  
18 D&T's property. We hadn't determined whether or  
19 not there was any basis to seek some kind of  
20 negative easement rights. We could, in fact, bring  
21 those claims to enforce the deed restriction, as to  
22 D&T. It was very early in the case, Your Honor.

23 And so, again, the primary goal of that whole  
24 TRO and the modified TRO was to make sure that the  
25 County was clear that it could not issue any

1 permits as long as this deed restriction was  
2 outstanding.

3 THE COURT: But you asserted, attempted to  
4 assert, a private right of action against D&T under  
5 the statute. That was part of the plea, and part  
6 of the basis for the TRO. And the subsequent order  
7 specifically found that there is no private right  
8 of action against the -- in this case, D&T.

9 MR. BALLOU - And I understand what you are  
10 saying, Your Honor, but I would submit that if you  
11 look at the complaint, the verified complaint, the  
12 only cause of action was a declaratory judgement as  
13 to the validity -- how this statute was going to  
14 affect the County and how D&T's ability to develop  
15 its property. It did not --

16 THE COURT: Well, it didn't answer the question  
17 as to whether the attorney fees are ancillary or  
18 primary, in my mind.

19 MR. BALLOU: Well, we'll get to that, you know,  
20 Your Honor, because clearly, in our -- If you look  
21 at this case from virtually any perspective, the  
22 goal in this case was to make sure the County was  
23 not going to issue permits over that statute.

24 THE COURT: Well, that begs the question, then,  
25 why did you name D&T and get a TRO against D&T?

1 MR. BALLOU: Again, Your Honor, once we  
2 determined that we didn't have any affirmative  
3 rights under the emergency situation we thought  
4 existed, when they were proceeding as fast as they  
5 could to try to get these permits and, in fact,  
6 they got the permits, that we believe would have  
7 been prohibited by the statute. And we were  
8 obligated to join D&T as a party under the  
9 declaratory judgement statute.

10 Clearly, their property rights were going to  
11 be affected by a declaration as to whether or not  
12 the County could issue a Certificate of Occupancy  
13 or permits. So I don't think there is any question  
14 that that was properly permitted under the rules.  
15 And so the only question is, whether or not it was  
16 wrongful for -- to obtain a TRO as to this eight or  
17 nine day period when the construction activities  
18 that were covered in the first temporary  
19 restraining order were permitted.

20 So I think that we are jumping ahead of this  
21 whole determination, whether or not under the  
22 circumstances of the case at that time there is any  
23 basis to determine that this was a wrongful  
24 injunction. Just because the injunction --

25 THE COURT: And the determination of wrongful

1 injunction can -- which was initially begun with a  
2 TRO, can wait until the end, until a trial on the  
3 merits.

4 MR. BALLOU: And they have been dismissed.  
5 They are no longer an active party in the case --

6 THE COURT: Which means it's decided, as to  
7 them. Doesn't it?

8 MR. BALLOU: Well, I don't believe that  
9 particular fact has been decided, Your Honor. I  
10 think that the issue is whether or not there is  
11 standing --

12 THE COURT: Did you read the two Chambrin  
13 cases?

14 MR. BALLOU: Yes, sir.

15 THE COURT: Both of them? The first one had to  
16 do with the Circuit Court granting a TRO and a  
17 temporary injunction, and ultimately a permanent  
18 injunction, against a guy who wanted to put a  
19 modular home in a subdivision. He won, but he  
20 didn't win until the Supreme Court said he won.  
21 Whereupon, he came back, and that's when I found  
22 myself in the mix, when he came back and sought  
23 damages for all the injunctive relief that he had  
24 suffered. And the Supreme Court ultimately said,  
25 oh, no; yeah, you won, but you are only entitled to

1 relief for the TRO damages, not the -- not  
2 prevailing in the permanent injunction part of the  
3 case. So effectively the result wasn't determined  
4 until ultimately the Supreme Court said, Mr.  
5 Chambrin, you are right, in a final order. Well,  
6 you got final orders already, in this case, about  
7 whether D&T is -- has been rightly enjoined.

8 MR. BALLOU: Well, I would suggest that there  
9 is a difference between an injunction that is not  
10 ultimately upheld and a wrongful injunction.

11 THE COURT: No, but the order -- Their order --  
12 They made a motion to dismiss, and that order  
13 found, A, that the Plaintiffs had no cause of  
14 action under the statute and, B, that they had no  
15 standing to sue at common law, or they weren't  
16 entitled to an injunction.

17 MR. BALLOU: And, again, I think there is a  
18 difference between that and a wrongful injunction.  
19 That's a term of art that --

20 THE COURT: What does wrongful mean?

21 MR. BALLOU: I could suggest coercive, or  
22 something along those lines --

23 THE COURT: I think it means not having a  
24 foundation in the law. In other words, you might  
25 think you do, but you might lose at the end. Like,



1 Mr. Chambrin won, and Lost Colony lost.

2 MR. BALLOU: Well, Your Honor, we certainly  
3 came to this Court in an equitable fashion, and  
4 certainly at equity one of the concerns was, where  
5 --

6 THE COURT: I am not trying to attribute to you  
7 any bad faith, anything immoral or illegal. It's  
8 just -- I am saying that the -- and I don't think  
9 the law contemplates that. I think the law in  
10 essence, or sort of the message of the two Chambrin  
11 cases is, you pay your money and you take your  
12 choice. And you may or may not win; we all know  
13 that.

14 MR. BALLOU: Well, and since the injunction's  
15 already an inherent and equitable creature,  
16 certainly there is a clean hands argument about how  
17 D&T got to the point where we had filed for the TRO  
18 in the first place, and the fact that they did not  
19 disclose repeated instances to the County the  
20 existence of this created a situation where --  
21 which resulted in the injunction against them, at  
22 least for those eight or nine days. So, we would  
23 certainly contend that from an equitable  
24 standpoint, under 65C they should not be entitled  
25 to costs or damages, particularly when the

1 substance of the injunction is upheld.

2 THE COURT: Okay.

3 MR. BALLOU: Which also, Your Honor, if you go  
4 back to the order where the Court instructed D&T  
5 that it may, in fact, proceed with construction  
6 activities at its own risk, again, Your Honor, I  
7 suggest that there is a situation under these facts  
8 where ultimately D&T may never get to open up this  
9 store until such time as it can comply with the  
10 requirements of the statute and satisfy the County  
11 under the current proposed consent order or  
12 otherwise, it can't do anything.

13 So it may certainly be able to spend the money  
14 in theory to prepare this building in a way that  
15 could, I guess, ultimately be used, if they ever  
16 get the opportunity to sell fireworks at this  
17 place.

18 But that's not the point here, Your Honor.  
19 That's, that is -- that issue, until such time as  
20 somebody can provide proof to the County that this  
21 deed restriction has been lifted by court order or  
22 otherwise, we aren't even going to get to that  
23 point. So you've got a request from D&T for  
24 compensation for alleged, I think they  
25 characterized it as re-mobilization damages, and

1 we'll look at that in a second, Your Honor. But  
2 that isn't -- the way I read this case in this rule  
3 is, really, what the law intends to reward a party  
4 for basically violating the law, for not complying  
5 with statutes and not informing the County of the  
6 existence of the deed restriction.

7 So that is a fundamentally inequitable result,  
8 if that's the direction that liability is heading  
9 in this case. Now, we had talked a little bit  
10 about whether or not the attorneys fees -- and I  
11 will get to these re-mobilization damages in a  
12 moment.

13 The attorneys fees, first of all, are not  
14 provided for in the rules. Now, I understand in  
15 the cases we are talking about reasonable attorneys  
16 fees being able to be recovered in appropriate  
17 circumstances. But I just want to make the point  
18 first of all, it is not illegal.

19 THE COURT: No.

20 MR. BALLOU: The case law suggests that if they  
21 are recoverable, they are only recoverable if they  
22 are the direct focus of the lawsuit and not  
23 ancillary to the lawsuit.

24 THE COURT: No. That's on the -- What the  
25 cases say about that is that it's only recoverable

1 from the surety if it's a direct -- if it's part of  
2 the direct focus of the lawsuit, as opposed to  
3 being ancillary. It doesn't say it's not  
4 recoverable from the parties if it's ancillary.  
5 It's just the bond.

6 MR. BALLOU: Well, the fundamental fact is,  
7 though, Your Honor, that it's not directly the  
8 focus of this case --

9 THE COURT: Well, that may -- I am not making a  
10 pronouncement about that yet, but I think that only  
11 -- As I read the cases, the direction of that,  
12 that's directed only to whether the bondholder, the  
13 surety bond, the surety company, has to pay the --  
14 is liable for the attorney fees or not.

15 MR. BALLOU: Well, I would certainly like an  
16 opportunity to brief that particular issue, but the  
17 way I read it, it was a broader reading than that.  
18 But bottom line from our position is that this is,  
19 at least the main focus, the main intent of this  
20 lawsuit, was in fact accomplished by the order and  
21 the agreement, essentially of York County not to  
22 issue permits as defined in the statute, over the  
23 deed restriction.

24 So, you know, the attorneys fees related to  
25 this issue under this brief window of the TRO in

1 June of this year really was -- that wasn't the  
2 focus of this case. You know, my client wasn't  
3 interested in making sure that D&T didn't actually  
4 construct this fireworks store as much as whatever  
5 it did at its own risk complied with the law. And  
6 the end result was that they weren't going to be  
7 able to open that up, but --

8 THE COURT: You mean, open, now, for fireworks?

9 MR. BALLOU: No doubt, Your Honor. Absolutely.  
10 But again, the interesting thing about this case  
11 is, we've got an interesting situation with this  
12 statute. It creates rights of the parties that are  
13 not -- You know, this is the first case I have ever  
14 seen in person involving this particular statute --

15 THE COURT: Me, too.

16 MR. BALLOU: -- and it talks about other  
17 parties who might notify the County of the  
18 existence of the deed restrictions, those kind of  
19 things. It certainly, I think the Court agrees,  
20 created some right to seek the injunctive relief,  
21 at least as against the County.

22 Ultimately, we don't dispute the Court found,  
23 and frankly we could not find a basis to hold  
24 otherwise, that there was an independent cause of  
25 action under the statute. But fundamentally, the

1 whole point of this case was to make sure that  
2 whatever happened complied with that statute, and  
3 that's what happened, and that's what was  
4 accomplished.

5 So the substance of the affidavits -- Again,  
6 Your Honor, these are affidavits that were not  
7 submitted pursuant to Rule 6. They were not  
8 submitted --

9 THE COURT: What would you do if the County had  
10 said no, we are not going to enforce that statute?  
11 That isn't what it means.

12 MR. BALLOU: Then we would have been in the  
13 position of having to potentially bring some kind  
14 of mandamus action or something against the County,  
15 and we'd be, you know, probably on appeal by now.  
16 But the reality is, the County agrees with our  
17 position

18 THE COURT: Well, I know that.

19 MR. BALLOU: So, Your Honor, looking at the --

20 THE COURT: That doesn't mean D&T did.

21 MR. BALLOU: Absolutely. We agree with that.  
22 We agree. They don't agree with that, in some  
23 cases. But they have sought to, and have obtained  
24 an order that suits them in the case, so they don't  
25 really have a voice in that argument.

1 THE COURT: Okay.

2 MR. BALLOU: Now, Your Honor, the two  
3 affidavits that were submitted yesterday, one from  
4 Doug -- I may butcher this name. Cianfroca. That  
5 purports to say that there were \$34,045 in  
6 additional charges --

7 THE COURT: Let me say this about it, Dan, just  
8 in reviewing all this. I'm inclined to believe  
9 that -- Well, first of all, I think they would have  
10 a right to submit something to contest your  
11 affidavit, number one. But number two, I think  
12 that it strikes me that what we are really talking  
13 about is what damages were proximately caused by  
14 the TRO. That's my terms, not the case's terms.  
15 And that there ought to be in the end a hearing, an  
16 evidentiary hearing on damages, if liability be  
17 determined.

18 And as for the attorney fees, the way I  
19 usually do that, I think, I think that that's an  
20 evidentiary matter, as well. Usually it's resolved  
21 by people swapping records and working out what  
22 they think is reasonable and unreasonable, but I  
23 think in the end that it requires -- could require  
24 an evidentiary hearing on the reasonableness of  
25 attorney fees.

1 All of which is to say, I don't -- I am not  
2 going to award anybody, or punish, or award against  
3 anybody damages today. I don't -- Think of it this  
4 way. Here's the way I've thought it through. If  
5 it were a summary judgement by the affidavits back  
6 and forth, we'd wind up -- we could wind up with a  
7 genuine issue of material fact on the question of  
8 proximate cause or reasonableness of attorney fees,  
9 which would put us right in the position of having  
10 to have a hearing on both those issues. And I  
11 think that's where we are going to wind up, unless  
12 you-all have agreed otherwise. And I don't see  
13 that as being likely. Mr. Sheedy?

14 MR. SHEEDY: Well, I certainly don't want to  
15 break up Mr. Ballou's argument, but -- and I can  
16 comment on that now, or I can wait until he's  
17 finished, however Your Honor pleases. But, yes, I  
18 do have a few sentences that I --

19 THE COURT: All right. Well, let's let him  
20 finish, then.

21 MR. BALLOU: And, Your Honor, maybe this would  
22 be better suited for an evidentiary hearing as to  
23 damages and attorneys fees if, in fact, they are  
24 recoverable. But it's clear --

25 THE COURT: If, in fact, there is liability.



1 MR. BALLOU: That's right. And it is clear  
2 from the affidavit of Mr. Cianfroca, when he  
3 attaches a letter from, presumably, his contractor,  
4 that the damages they are seeking are not in fact  
5 re-mobilization damages in any real sense, Your  
6 Honor. These are costs of lodging, and per diem,  
7 and quote, administrative expenses, under the  
8 assumption, being told by D&T that this was going  
9 to be relieved, that this issue was going to be  
10 resolved. And so, they just kept them on site,  
11 just said, just sit tight. This is not a situation  
12 where there is any evidence whatsoever that there  
13 was an additional cost involved of bringing, of re-  
14 mobilizing construction on the site. This is a  
15 different animal altogether.

16 THE COURT: Well, I don't -- Honestly, I don't  
17 know, but it doesn't seem like they'd re-mobilize  
18 until they had permission.

19 MR. BALLOU: But, Your Honor, again, the issue  
20 wasn't so much, at this point, the issue was, let's  
21 sit tight because we think we're going to get this,  
22 the deed restriction lifted, and we'll be able to  
23 open for the July 4 holiday. That's what all the  
24 rush was. If you read this letter from TLR  
25 Construction --

1 THE COURT: Well, Dan, that's what I am saying.  
2 This strikes me as, it struck -- the damages issue,  
3 if we get to that, strikes me as one that requires  
4 an evidentiary hearing, period, and these arguments  
5 are pertinent to that hearing, but not now.

6 MR. BALLOU: I understand. That certainly  
7 would entitle us to discovery on these, and they  
8 are going to have these witnesses saying what these  
9 damages were --

10 THE COURT: Well, que sera, sera. Isn't that  
11 what the song says? What will be, will be. But I  
12 am not going to determine damages today based on  
13 the record, because, A, it hasn't afforded the  
14 Plaintiffs an opportunity to respond and, B, I  
15 think if there was a genuine issue of fact we would  
16 have to have a hearing anyway.

17 MR. BALLOU: Well, it sounds like where we are  
18 is back to the original question of whether or not  
19 there was a wrongful injunction that would entitle  
20 D&T to an award of costs and/or attorneys fees of  
21 any kind. That's what it sounds like where the  
22 Court is headed on this --

23 THE COURT: I think so.

24 MR. BALLOU: I just find it difficult to  
25 understand how, under the law, a party can behave

1 as D&T did in order to get as far as it did that  
2 required emergency relief, ex parte relief, and  
3 then when the dust settled after eight or nine  
4 days, to charge the party that, in fact, is  
5 prevailing in the case to pay some award of damages  
6 or fees incurred. You know, that --

7 THE COURT: Well, I'll tell you how. You  
8 involved them in the TRO process, and you didn't  
9 need to. They may be entitled to attorney fees,  
10 whether they are entitled to any damages or not,  
11 because you involved them in the TRO process and  
12 they were ultimately dismissed because there was no  
13 basis for a TRO against them. That's how I ruled,  
14 and that's a final order of the Court, and as a  
15 result they could be entitled to attorney fees if  
16 they weren't entitled to anything else.

17 MR. BALLOU: Your Honor, I still think there's  
18 a basis to have them involved in the TRO process as  
19 a party whose interests were affected by the --

20 THE COURT: Well, you said you didn't  
21 understand it, and I am telling you how I  
22 understand it.

23 MR. BALLOU: Understood.

24 THE COURT: Anything else?

25 MR. BALLOU: Nothing further, Your Honor.

1 THE COURT: Mr. Kendree. Hold on. Mr. Kendree  
2 is back there.

3 MR. KENDREE: Nothing now, at this point, Your  
4 Honor.

5 THE COURT: All right. Mr. Sheedy?

6 MR. SHEEDY: Very, very briefly on damages, and  
7 then a little bit more on liability --

8 THE COURT: I am not going to rule on damages today.

9 MR. SHEEDY: I just wanted to underscore that  
10 Rule 65 doesn't speak of an evidentiary hearing --

11 THE COURT: It doesn't say -- It doesn't speak  
12 against it, either.

13 MR. SHEEDY: Doesn't prohibit it. The pre-Rule  
14 65 cases do speak of an evidentiary hearing. Rule  
15 65, as it pertains to this type of matter, does not  
16 impose the requirement of affidavits. Because I am  
17 a belt and suspenders type of guy, I submitted  
18 affidavits --

19 THE COURT: I really do think, Jim, that it  
20 smacks of a motion for summary judgement. Walks  
21 like a summary judgement, quacks like a summary  
22 judgement, must be one.

23 MR. SHEEDY: Not trying to be argumentative. I  
24 am just trying to plumb the depths with respect to  
25 the statute and cases under it to make clear that I

1 understand Your Honor's predilection for an  
2 evidentiary hearing, and I am not objecting to  
3 that, nor would I object if Mr. Ballou were to say,  
4 I'd like a period of time to submit reply  
5 affidavits and brief. Then, I'd say, okay, so long  
6 as I could submit a brief when I see his brief. I  
7 get that point.

8 Let me turn to liability. I think that Mr.  
9 Ballou has two concepts confused in his  
10 presentation. I am not here today on a Rule 11  
11 motion. I am not here today to say that the  
12 Plaintiff or its Counsel didn't meet their  
13 requirements under Rule 11 to assert suffering that  
14 was either based on existing law or a good faith  
15 modification, and facts that they believe to be in  
16 existence.

17 THE COURT: I understand.

18 MR. SHEEDY: I'm not here to impute any  
19 malevolence to the Plaintiffs or their Counsel --

20 THE COURT: Well, let me say this. I don't  
21 think the term wrongful, in this context, imputes  
22 any moral failure, or ethical failure.

23 MR. SHEEDY: I don't think it imputes any Rule  
24 of Evidence failure.

25 THE COURT: That's right.

1 MR. SHEEDY: I think instead it is about this  
2 simple, and the cases so provide. The injunction  
3 was granted, prohibiting construction activities.  
4 The Court said that injunction should not have been  
5 entered. That's tantamount, when it was vacated,  
6 to the injunction being wrongful. We were  
7 prevented from engaging in construction activities.  
8 We looked at 629-1145 in front of Your Honor, and  
9 we identified the very exception that said that we  
10 could continue with our construction activities,  
11 and the Court vacated the TRO. That's what makes  
12 it wrongful, and a liability.

13 THE COURT: Well, wrongful means, in this  
14 context, ultimately had no basis founded on common  
15 law or statute.

16 MR. SHEEDY: And that's consistent with my  
17 reading of the Hyler case. The Hyler case says,  
18 Page 392, that's South Carolina 240-392, that  
19 damages accrue once it's decided that the party was  
20 not entitled to the injunction. So there's no  
21 determination of what was behind the determination  
22 that they are not entitled to the injunction; it's  
23 just that they aren't entitled to it and that's  
24 what makes it wrongful.

25 So on liability, I think the liability is

1 clear, again, and I understand the Court's position  
2 on damages.

3 THE COURT: All right. Anything else, Mr.  
4 Kendree?

5 MR. KENDREE: No, Your Honor. Thank you.

6 THE COURT: Let me read one thing, here. All  
7 right. I find that the defendant D&T is entitled  
8 to a determination of damages for the wrongful  
9 issuance of the TRO, for wrongfully -- that's not  
10 the right way to say it. The TRO was wrong; let's  
11 just say it that way. I don't mean to imply any  
12 tortious or ethical meaning by saying that. I  
13 think it's a wrongful injunction.

14 The reason I think that is, that upon being  
15 involved with all this, D&T made a motion. They  
16 made a motion to dismiss D&T. There was already a  
17 hearing and arguments made. The Plaintiffs opposed  
18 that, is my recollection, and the result of it was  
19 the issuance of an order that found, A, there was  
20 no private cause of action under the statute, 629-  
21 1120 and following, and that there's no common law  
22 right vested in the Plaintiffs to seek enforcement  
23 of the restrictive covenant against the -- against  
24 D&T, both of which the verified complaint sought.

25 So I find that that D&T is entitled to a

1 hearing on the question of damages and attorney  
2 fees proximately caused by the issuance of the TRO.

3 And just to sort of orient everybody to my  
4 thinking, I think it does, somewhere in all that,  
5 there's a question about whether -- of course, what  
6 the damages are, whether they are proximately  
7 caused by the TRO, whether they are reasonable, and  
8 I don't remember a case that would simply apply.

9 If they are not otherwise entitled to do what  
10 they were doing anyway, are they entitled to  
11 damages? And that hasn't -- Well, maybe it has  
12 been determined. I am not sure. But I think all  
13 of those are issues to be determined, or to be  
14 raised and hashed out in a hearing, an evidentiary  
15 hearing.

16 But in any event, I find that the Plaintiff is  
17 -- I don't mean the Plaintiff. D&T is entitled to  
18 an award of reasonable attorneys fees directly  
19 related to the TRO. That, to be determined by an  
20 evidentiary proceeding if necessary. If parties  
21 can determine that by looking at records -- and  
22 that's one thing that's not attached to your  
23 affidavit, is any time records from which they  
24 could make a reasoned determination about what is  
25 related to this or what's related to something



1 else.

2 So I think we'll have a hearing on all of  
3 that. And you've been taking notes, Ms. Driscoll.

4 Are you the one that's going to submit me an order?

5 MS. DRISCOLL: I would be happy to, Your Honor,  
6 if you would like me to do that.

7 THE COURT: If you will, please. And, you  
8 know, the usual form, Word or Word Perfect, and we  
9 will go from there. Any questions?

10 MR. SHEEDY: Your Honor, if I could suggest  
11 that we go off the record for just a moment, and  
12 maybe Mr. Ballou and --

13 THE COURT: Everybody consents, we will go off  
14 the record.

15 MR. BALLOU: Yes.

16 THE COURT: Okay. He says yes, so we are.

17 (Off the record.)

18 Whereupon, the hearing was concluded at 4:15

19 P.M.

**In The Matter Of:**  
*Charles Sonnenberg, et al. v.*  
*D&T Imports South Carolina, Inc., et al.*

---

Rick Ruonala  
January 9, 2013



---

**ALDERMAN COURT REPORTING**  
*"Proudly serving the Palmetto State"*  
500 Oak Pond Court  
Conway, SC 29526  
P: 843-254-2675 F: 843-234-2309 E: RPA1277@AOL.COM

Original File Ruonala-01-09-13.txt  
**Min-U-Script® with Word Index**

ROA 000181

1 STATE OF SOUTH CAROLINA  
2 COUNTY OF YORK

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
CASE NO. 2012-CP-46-2286

3 CHARLES SONNENBERG, FESTIVAL  
4 CORP., PHILLIP PULLEY and  
ROBERT FORSTER,

5 Plaintiffs,

6 VS.

7 D&T IMPORTS SOUTH CAROLINA, INC.,  
8 A Nevada Corporation, d/b/a AREA  
51 FIREWORKS, and YORK COUNTY, a  
9 Political Subdivision of the  
State of South Carolina,

10 Defendants.

11  
12 DEPOSITION OF RICK RUONALA  
13

14 DATE TAKEN: January 9, 2013

15 TIME BEGAN: 1:30 p.m.

16 TIME ENDED: 4:10 p.m.

17 LOCATION: Melton Electric, Inc.  
18 111 Jacob Lane  
Myrtle Beach, South Carolina 29579

19 REPORTED BY: Rita Rodriguez  
20 Court Reporter  
Notary Public for South Carolina  
21

22  
23 ALDERMAN COURT REPORTING  
24 "Proudly serving the Palmetto State"  
500 Oak Pond Court  
Conway, South Carolina 29526

25 P: 843-254-2675 F: 843-234-2309 E: RPA1277@AOL.COM

1 Any court, party, or person who has purchased a  
2 transcript may, without paying a further fee to the  
3 reporter, reproduce a copy or portion thereof as an  
4 exhibit pursuant to court order or rule or for internal  
5 use, but shall NOT otherwise provide or sell a copy or  
6 copies to any other party or person.

7 APPEARANCES:

8 Daniel J. Ballou, Esq.  
9 Hamilton, Martens, Ballou & Carroll, LLC.  
10 P.O. Box 10940  
11 Rock Hill, South Carolina 29731

12 ..... On behalf of Plaintiffs

13 James W. Sheedy, Esq.  
14 Driscoll, Sheedy, P.A.  
15 11520 N. Community House Road, Suite 200  
16 Charlotte, North Carolina 28277

17 ..... On behalf of Defendant D&I Imports

18 ALSO ATTENDING: (None)

19 STIPULATIONS: The within deposition was taken pursuant  
20 to the South Carolina Rules of Civil Procedure.

21 WAIVER: Examination and reading of the deposition are  
22 waived by the witness and by the parties.  
23  
24  
25

## INDEX

|                                                                                                              | PAGE |
|--------------------------------------------------------------------------------------------------------------|------|
| Examination by Mr. Sheedy .....                                                                              | 04   |
| Examination by Mr. Ballou .....                                                                              | 44   |
| Reexamination by Mr. Sheedy .....                                                                            | 110  |
| Certificate .....                                                                                            | 114  |
| Exhibits:                                                                                                    |      |
| D&T IMPORTS EXHIBITS MARKED FOR IDENTIFICATION:                                                              |      |
| 1. Letter to Doug Cianfrocca from Rick Ruonala,<br>dated October 16, 2012 .....                              | 18   |
| 2. Letter dated January 9, 2013 on Melton<br>Electric, Inc letterhead .....                                  | 20   |
| 3. Invoice from Coastal Carolina Carpet & Tile,<br>Dated 6-25-12 .....                                       | 21   |
| 4. Letter from Integrity Installation Service<br>to Rick Ruonala, dated 7/11/12 .....                        | 24   |
| 5. Invoice from Integrity Installation Service,<br>Dated 7/9/12 .....                                        | 24   |
| 6. Invoice from Sunshine Construction .....                                                                  | 27   |
| PLAINTIFFS' EXHIBIT MARKED FOR IDENTIFICATION:                                                               |      |
| 1. Standard Form of Agreement between D&T<br>Imports of SC and TLR Construction, dated May<br>14, 2012 ..... | 85   |

1 RICK RUONALA, being duly sworn, testified as follows:

2 EXAMINATION BY MR. SHEEDY:

3 Q. Good morning or, actually, afternoon at this  
4 point. I'm Jim Sheedy. I'm here on behalf of  
5 D&T Imports.

6 State your name.

7 A. Rick Ruonala.

8 Q. Where do you work?

9 A. TLR Construction, North Myrtle Beach, South  
10 Carolina.

11 Q. What do you do for TLR?

12 A. I run TLR. I'm the estimator, project manager,  
13 purchasing agent. I personally supervise every  
14 facet of it.

15 Q. Chief, cook and bottle washer?

16 A. That's me.

17 Q. Are you familiar with a company known as D&T  
18 Imports of South Carolina doing business as Area  
19 51 Fireworks?

20 A. Yes, I am.

21 Q. How are you familiar with it?

22 A. We were engaged in two separate contracts to  
23 renovate two separate buildings, one in Little  
24 River, South Carolina, and one in Fort Mill,  
25 South Carolina, to convert those buildings into a

1 fireworks store that was designed by a local  
2 architect.

3 Q. For purposes of today, Rick, I'm only going to  
4 ask you questions about the Fort Mill store.

5 A. Understood.

6 Q. I show you a letter dated October 16, 2012, two  
7 pages in length. Do you have a copy of that in  
8 front of you?

9 A. I do, sir.

10 Q. Turn to Page 2 of that letter, please.

11 A. All right, sir.

12 Q. Is that your name which appears at the bottom of  
13 Page 2?

14 A. It is indeed.

15 Q. Does this letter with your name on it correctly  
16 state additional costs incurred by TLR due to a  
17 Stop Work Order from June 21, 2012 until July 5,  
18 2012?

19 A. Yes, sir, it does.

20 Q. Were there additional costs on this Area 51  
21 Fireworks project of \$340,025 from June 21st to  
22 July 5th as stated in this letter?

23 A. Yes, sir.

24 Q. I'm looking at the first two paragraphs of this  
25 letter. If you would take a second and review

1 the paragraph that begins "This letter shall  
2 serve," and the paragraph that begins "We were  
3 forced to pay."

4 A. Yes, sir.

5 Q. You read pretty quickly. The first sentence of  
6 Paragraph 2 says, "We were forced to pay  
7 additional monies to each subcontractor that was  
8 on site at the time of the Stop Work Order."

9 Do you see that sentence?

10 A. I do, sir.

11 Q. Were you forced to pay additional monies to each  
12 subcontractor?

13 A. We were, sir. And may I state that the word  
14 "forced" could have easily been substituted with  
15 "obligated." No one held a gun to my head.

16 Q. I understand.

17 A. Okay.

18 Q. By "forced," do you mean that your subcontractors  
19 made requests of TLR --

20 MR. BALLOU: I'm going to object to the  
21 leading --

22 Q. -- that subcontractors be paid additional sums?

23 MR. BALLOU: I'm going to object to the  
24 leading nature of the question.

25 Q. You may answer.



1 A. What do you want me to say?

2 Q. I want an answer to the question. Would you like  
3 me to rephrase the question?

4 A. The answer is yes.

5 Q. I'll rephrase for you. Could you describe for  
6 me, Rick, what you mean by "forced to pay  
7 additional monies to each subcontractor"?

8 A. Each one of the subcontractors that was working  
9 on the site at that time incurred additional  
10 costs in the form of trip charges, mileage, hotel  
11 costs, per diem costs, out of town expenses,  
12 related to keeping them on site until we received  
13 notice that the Stop Work Order had been removed.

14 Q. The end of the second sentence says, "We elected  
15 to keep all personnel on site." Did TLR elect to  
16 keep all personnel on site?

17 A. We did, sir.

18 Q. Why?

19 A. We were told -- the day it was issued, I notified  
20 my owner and told him what had happened. He was  
21 quite upset about it and surprised. And speaking  
22 with his attorneys, he called me back that same  
23 afternoon, and he felt confident that he would  
24 have the Stop Work Order lifted the following  
25 day.

1                   We were then told for the next few days  
2                   daily that those same hopes applied to the next  
3                   day.

4       Q.       Rick, who are the personnel that were elected to  
5               be kept on site?

6       A.       We had a large roster of people. TLR's personnel  
7               included Phil Aslum, which was my superintendent.  
8               He had four individuals working for him that I do  
9               not know by name. He had hired them. Their  
10              payrolls will reflect it.

11             We had the electricians, our framers,  
12             drywall. We had the complete construction staff  
13             at that time. Heating and air, electrical, the  
14             flooring guys. We were installing doors, trims,  
15             hardware, toilet accessories, ceiling. All the  
16             individuals that were engaged in their trades at  
17             the time. We were in the latter stages but we  
18             basically had almost every trade working at the  
19             time in each of those individuals.

20      Q.       Are some of the personnel that you just described  
21               subcontractors?

22      A.       That's correct.

23      Q.       The last sentence in that paragraph reads, "This  
24               was to mitigate the delay in completion, as the  
25               "season" was upon us, and every day you were not

1           opened was critical."

2                       Would you please explain that sentence?

3   A.   When I was hired to do the job, my contract, it  
4       was made clear from the beginning that he had to  
5       be open before July 4th. It made perfect sense  
6       to me. I understood that.

7                       We are placed under a heavy time  
8       constraint to begin with for matters not  
9       necessarily relating to the Stop Work Order.  
10      But, at that time, we were working seven days a  
11      week, 16 to 20 hours a day to get him open prior  
12      to July 4th. The two weeks before July 4th was  
13      critical.

14   Q.   How did the Stop Work Order affect your ability  
15       to complete on time and in accordance with the  
16       contract?

17   A.   We weren't released to go back to work until  
18       July 5th so, in essence, we totally missed it.

19   Q.   Why did you stay mobilized as opposed to  
20       demobilizing and remobilizing once the Order had  
21       been lifted?

22                       Do you understand my question?

23   A.   I do now. For the same manner that I just  
24       described earlier. We were told and led to  
25       believe that this Stop Work Order had the

1 opportunity or there was a possibility, and that  
2 the owner was doing everything in his power, to  
3 have it lifted immediately. There was never a  
4 date set in which we were told this is the date  
5 you will go back to work.

6 Q. Would it have been more expensive to demobilize  
7 on June 21st and then remobilize on July 5th?

8 MR. BALLOU: Objection to the leading,  
9 but you may answer the question.

10 A. Yes, sir, it would have been an entirely  
11 different set of circumstances and costs. But it  
12 wasn't done from a cost standpoint. It wasn't to  
13 mitigate the cost. It was to mitigate the delay.

14 Q. I understand. Do you know if TLR would have been  
15 able to remobilize all subcontractors on July 5th  
16 if the subcontractors had been demobilized on  
17 June 21st?

18 A. No, we wouldn't. As a matter of fact, we lost a  
19 few guys because it did take as long, and we had  
20 to hire some other people to finish their work  
21 because they had obligations in other places.

22 Q. Rick, I'm going to turn to the language that  
23 appears in bold on this two-page letter. It  
24 starts with "Recap of Cost," and on Page 2 it  
25 ends with "total of additional cost related to

1 Stop Work Order."

2 Do you see all that language in bold?

3 A. I do, sir.

4 Q. The recap is broken into four categories. Who  
5 determined that it should be organized in four  
6 categories?

7 A. That was purely my doing.

8 Q. The first category is "Additional lodging and per  
9 diem expense." Before we get into subparts A and  
10 B, would you please explain why there was  
11 additional lodging and additional per diem  
12 expense?

13 A. Well, there were 14 days that our people, our  
14 subcontractors, employees, spent incurring those  
15 expenses that there was no productivity towards  
16 the job at all. So that's 14 days with the same  
17 amount of work that was done. Had we not had the  
18 Stop Work Order, that's 14 days we would have  
19 used. All those costs were directly related to  
20 the time we were stopped.

21 Q. Let me ask you about the 14 days. And I  
22 apologize for jumping around. If you would  
23 return to the first paragraph of your letter  
24 which begins "This letter shall serve."

25 Do you see the last sentence, "We were not

1 released"?

2 A. I do, sir.

3 Q. Would you please explain that sentence?

4 A. Well, we actually had to have the Stop Work Order  
5 lifted by the York County building officials. We  
6 were subject to not only a monetary fine but we  
7 faced charges. They said that we would be served  
8 or ticketed or whatever. But we were notified by  
9 the authorities as well as that there would be  
10 negative ramifications on our contractor's  
11 license also for working contrary to a Stop Work  
12 Order that had been lifted. And it explains it  
13 on the Stop Work Order itself.

14 MR. BALLOU: Objection. There is  
15 hearsay I think in there. You were told by  
16 somebody.

17 A. Okay. Let me rephrase it.

18 MR. SHEEDY: Wait. Just state the  
19 objection.

20 MR. BALLOU: The objection is hearsay.

21 A. Okay. Let me rephrase it.

22 Q. Let me ask you --

23 A. I could rephrase it so it's not hearsay.

24 Q. Did you communicate with anybody from the York  
25 County Building & Zoning Authority?

1 A. Yes, sir, I did.

2 Q. With whom did you communicate?

3 A. The Director of Zoning. I don't have his name  
4 right here in front of me nor do I recall off the  
5 top of my head, but he's the Director of Planning  
6 and Zoning as well as the chief building  
7 official.

8 Q. Did you receive any paperwork, and by "you" I  
9 mean you, Rick Ruonala?

10 A. No, sir, I did not.

11 Q. Did you receive paperwork from the Building and  
12 Zoning Authority?

13 A. I had it delivered to me. It was hand delivered  
14 to me from my superintendent who was served on  
15 the site with it.

16 Q. What was "it"?

17 A. It was a Stop Work Order. It was two things. We  
18 received a Court Order telling us that we had to  
19 stop. I don't remember the legal mumbo jumbo  
20 behind it. I just knew the contents of it. It  
21 told us to cease all activities.

22 We were also served a placard by the York  
23 County building official which says no work is to  
24 be done in any manner on that project subject to  
25 criminal prosecution and reprimand from the LLR,

1 License, Labor and Regulation.

2 Q. I apologize if my question wasn't clear. When  
3 you were released to resume work, did you receive  
4 any paperwork from York County?

5 A. We did, sir.

6 Q. Can you describe what you received?

7 A. They came and picked up the Stop Work Order. And  
8 I believe by that, I don't know that they  
9 actually had a form that released us or we needed  
10 a building inspection. And we did get paperwork  
11 the day we went back. I know we received an  
12 inspection which they started because we were  
13 stopped short of our inspection on June 21st.  
14 Whether in that there is actually a piece of  
15 paper that releases you, I do not know.

16 Q. Let's return to Recap of Cost, category number 1.  
17 I think you responded to my question about the  
18 additional lodging and per diem. Let's turn to  
19 1A.

20 There is 14 days at \$2800 which is cost  
21 and per diem to TLR's personnel. Can you explain  
22 that, please?

23 A. Yes, sir. What I did was I assigned 14 days. I  
24 used \$200 a day. That included lodging for my  
25 superintendent, that included lodging for the two



1 individuals that he had working from this area  
2 that were up there that we were housing in motels  
3 as well. We paid them a daily per diem rate. I  
4 believe, I'll confirm what that is in a moment  
5 when she comes in and gives that.

6 MR. SHEEDY: Let the record reflect  
7 that "she" is an employee of TLR.

8 A. That's correct. She's pulling that out. I did  
9 not actually take these direct charges and put  
10 them together and add them up. What I did was I  
11 took my superintendent and my personnel and I  
12 charged \$200 a day. Rather than, at that time,  
13 going back and pulling out hotel bills and  
14 everything else, I just assigned it a rate. The  
15 same rate that I used when I originally estimated  
16 the job.

17 Q. I understand that 14 times 200 is 2800. How did  
18 you pick 200?

19 A. Well, the room costs alone, when I'm up there,  
20 the rates are between 90 and \$120 a day just for  
21 the room cost. Based on the rooms when I stayed.  
22 And that includes a few days where I was up there  
23 as well. And then the per diem for their meals  
24 and so forth. Again, we are talking about three  
25 TLR employees.

1 Q. Where did these TLR personnel stay?

2 A. They stayed at the Best Western as well as, we  
3 moved around a couple of times. The Quality Inn.  
4 At that time, they were staying at the Quality  
5 Inn at Carowinds.

6 Q. Was the Best Western at Carowinds or elsewhere?

7 A. That was right there at Carowinds as well. The  
8 Best Western charges -- that's where I stayed.  
9 We had a contract with them for a weekly rate.

10 Which was another reason why we didn't  
11 demobilize. Because if we left, we are talking  
12 about July 4th, those rooms weren't available.  
13 We had an agreement with them that during the  
14 duration of that job, and, again, we told them we  
15 would be done by July 4th, which was part of  
16 their season, and they gave us a weekly rate for  
17 our people. So that's where we housed them.  
18 When I came in, those rooms weren't available. I  
19 stayed in the Best Western right next door.

20 Q. Rick, let's move to 1B.

21 A. All right, sir.

22 Q. Am I correct that for Melton Electric, Melton  
23 Heating & Cooling, did you make an assumption of  
24 \$200 a day for each of those subcontractors?

25 A. Well, again, with Melton Electric and Melton

1 Heating & Cooling, they are sister companies to  
2 TLR Construction. They are owned by the same  
3 individual that is the primary principal in TLR.  
4 So I have a very good working knowledge of what  
5 they're doing. When I sat down there and I put  
6 together the cost, I consulted with the owner of  
7 that company as well and I took and I used the  
8 same rate for his personnel, for both of those  
9 two, for Melton Electric and Melton Heating &  
10 Cooling, both at \$2800.

11 Coastal Carolina Carpet & Tile is an  
12 actual charge they invoiced me for. They  
13 actually came back. They had another job to do.  
14 I had to hire somebody else up there. But they  
15 had paid the hotel room. They lost it because  
16 they couldn't cancel the reservation on such  
17 short notice so I had to reimburse them for that  
18 as well as an additional trip.

19 Integrity Installations and Sunshine  
20 Construction, both their charges relate to  
21 additional trip charges. One night stay.  
22 Integrity Installations \$925 is one night's stay  
23 for two people. I did not request a hotel  
24 receipt from them. We had a discussion because  
25 he had to come back and then go back once we were

1 released. He didn't stay the full two weeks nor  
2 did Sunshine. But they both came from the beach,  
3 approximately 125 miles away, and they had to  
4 interrupt their schedules from other work they  
5 were performing. So I paid a premium to them  
6 both because of the interruption.

7 Q. Rick, let me back up for just a minute.

8 MR. SHEEDY: Let's mark this October  
9 16, 2012 two-page letter as D&T either 1 or A, it  
10 doesn't matter to me.

11 (LETTER TO DOUG CIANFROCCA FROM RICK RUONALA,  
12 DATED OCTOBER 16, 2012 MARKED FOR IDENTIFICATION  
13 AS D&T EXHIBIT NO. 1)

14 Q. Rick, you got going so fast there that I need to  
15 sort of regroup myself, to be honest with you.

16 For clarity of the record, is it correct  
17 that Melton Heating & Cooling is a company in  
18 Myrtle Beach and not a company in Rock Hill?

19 A. Yes, sir.

20 Q. Are you aware there is a Melton Heating & Cooling  
21 in Rock Hill?

22 A. No, I'm not.

23 Q. You mentioned Melton Electric has 2800. I'm  
24 going to show you a letter dated January 9, 2013  
25 to TLR, attention you, from Larry Melton

1 (handing) .

2 Have you seen this before?

3 A. Yes, I received it actually this morning.

4 Q. Can you tell me what it is?

5 A. It is an itemized breakdown on the expenses for  
6 that time period that we are discussing.

7 MR. SHEEDY: Let's go off the record  
8 for just a moment.

9 - - - - -

10 (Thereupon, discussion was had  
11 off the record)

12 - - - - -

13 MR. SHEEDY: Back on the record.

14 Q. I believe as we took a break I was asking you  
15 about a letter from Melton Electric dated  
16 January 9, 2013.

17 A. Yes, sir.

18 Q. And I think you said that that is a letter that  
19 you just received recently?

20 A. Yes, sir. What I did in response to this  
21 proceeding and the subpoena, I had them go back  
22 and pull out a document, their cost relating to  
23 that particular time period.

24 And, again, I say this was not a document  
25 that I used in preparation. It's simply coming

1 back and saying, you know, okay, this is a number  
2 you gave me, now justify it.

3 Q. Based upon that request of yours, did you receive  
4 Melton's sum of \$2808.76?

5 A. I did, sir.

6 Q. Is it true that the amount that you have  
7 requested from the owner, D&T, is 2800 not  
8 2808.76?

9 A. That is correct.

10 MR. SHEEDY: Let's mark the Melton  
11 Electric letter, please.

12 (LETTER DATED JANUARY 9, 2013 ON MELTON ELECTRIC,  
13 INC. LETTERHEAD MARKED FOR IDENTIFICATION AS  
14 D&T EXHIBIT NO. 2)

15 Q. A moment of ago, Rick, you also had a few words  
16 to share about Coastal Carolina Carpet & Tile  
17 \$2100?

18 A. Uh-huh.

19 Q. I'm going to show you an invoice. Actually, you  
20 have it in front of you, don't you?

21 A. I do, sir, invoice number 907.

22 Q. Have you seen this before?

23 A. Uh-huh.

24 MR. BALLOU: Which document are you  
25 looking at, please?

1                   THE WITNESS: This one right here,  
2                   Coastal Carolina Carpet & Tile.

3       Q.       When did you first see this document?

4       A.       It's dated 6/25. So I probably saw it, the first  
5               time I saw it was probably right around the first  
6               of July when we cut the check. Well, the check  
7               was cut on 6/26.

8       Q.       You are referring to someone's handwriting to the  
9               left of the word "invoice" on this page?

10      A.       That's correct. Paid with check number 1699 on  
11               June 26, 2012.

12      Q.       Is that your handwriting?

13      A.       No, that's our comptroller, Trixie Melton.  
14               Actually, her title is president of TLR  
15               Construction.

16      Q.       Is the \$2100 which is shown on this invoice the  
17               same \$2100 that appears on your October 16, 2012  
18               letter under 1B, Coastal Carolina Carpet & Tile?

19      A.       It is indeed.

20               MR. SHEEDY: I would ask that this be  
21               marked, please.

22               MR. BALLOU: No objection.

23               (INVOICE FROM COASTAL CAROLINA CARPET & TILE,  
24               DATED 6-25-12, MARKED FOR IDENTIFICATION AS D&T  
25               EXHIBIT NO. 3)

1 Q. You also offered us a few words earlier about  
2 Integrity Installations. What is the amount for  
3 Integrity Installations under 1B?

4 A. 1B. \$925.

5 Q. I'm going to show you a letter dated July 11, '12  
6 (handing). Have you seen this before? Maybe you  
7 have a copy of your own handy.

8 A. Yes, sir.

9 Q. When did you first see this?

10 A. I received it today. And, I apologize, the date  
11 of July 11, '12 was not to be construed as the  
12 date of this letter. It was referring back to  
13 the date of the conversation that we had. I'm  
14 not referring back to -- corresponding with his  
15 there (indicating).

16 This was a document in which I asked him  
17 to produce, to put in writing the discussion that  
18 he had with me and as to what that -- when he  
19 billed me, the charge for labor was more than  
20 what we had initially agreed upon. He discussed  
21 with me he had one day, an extra day in the motel  
22 with four men and he went back two different  
23 times to complete.

24 Also, he had to pull off of another job  
25 that he was doing in Sumter somewhere. It put



1 him behind on that. Based on that, I paid him a  
2 premium.

3 He told me upfront that he was going to  
4 charge me, initially he said it was going to be  
5 somewhere around \$1,000. When I got the invoice,  
6 we talked about it. I considered it fair and  
7 appropriate. I approved it for payment.

8 Q. I noticed that in answering my question you  
9 referred to invoice number 4009 dated July 9th,  
10 2012 from Integrity Installation Service; is that  
11 correct?

12 A. That is correct.

13 Q. Is this the original invoice from Integrity?

14 A. It is a copy of that original invoice, yes, sir.

15 Q. At the top of the July 11, '12 letter signed by  
16 Neil Cox, there appears to be some typewritten  
17 numbers and dates. Does this reflect the date  
18 when you first received this document?

19 A. That is correct. Which is today's date.

20 Q. The \$925 referenced on the July 11, '12 letter  
21 signed by Neil Cox, is that included in the  
22 \$3,223.64 on invoice number 4009, dated July 9,  
23 2012?

24 A. It is, sir. More specifically, under the last  
25 item on that which is for the labor portion, the

1           \$2000.

2   Q.     Is a part of the \$2000 the \$925?

3   A.     It is indeed, sir, yes.

4                   MR. SHEEDY: For clarity of the record,  
5     let's mark the Integrity Installation, July 11,  
6     '12 letter, first as an exhibit. And then  
7     sequentially let's mark the Integrity  
8     Installation invoice.

9           (LETTER FROM INTEGRITY INSTALLATION SERVICE TO  
10    RICK RUONALA, DATED 7/11/12 MARKED FOR  
11    IDENTIFICATION AS D&T EXHIBIT NO. 4)

12    (INVOICE FROM INTEGRITY INSTALLATION SERVICE,  
13    DATED 7/9/12 MARKED FOR IDENTIFICATION AS  
14    D&T EXHIBIT NO. 5)

15   Q.     The last category under Roman numeral I on Page 1  
16     of your October 16th letter is Sunshine  
17     Construction. Can you explain that item?

18   A.     Yes, sir. That is the contractor that was  
19     putting in the acoustical ceiling system as well  
20     as doing the framing and the drywall.

21   Q.     What does the figure \$1150 represent?

22   A.     Are we referring back to my letter?

23   Q.     I'm referring to Roman numeral I-B.

24   A.     Again, that was an agreed upon sum when I sat  
25     down. I have a very close working relationship

1 with these subcontractors. I basically use the  
2 same subs on every job. He too is from Myrtle  
3 Beach, South Carolina. He went up there, he and  
4 his two helpers, actually, had rented rooms to  
5 which they actually stayed for the first four  
6 days thinking that we would have it resolved.  
7 But they left, and went back up there on an  
8 additional trip charge.

9 But when all the dust had settled, he sat  
10 down and when he wrote out his last bill he said  
11 I have to --

12 MR. BALLOU: Objection. Hearsay.

13 A. What's hearsay?

14 Q. You may continue.

15 MR. BALLOU: You can continue.

16 A. I did?

17 MR. BALLOU: You can continue.

18 Q. Please continue with your answer.

19 A. My subcontractor informed me that he had incurred  
20 additional costs and that he was charging me for  
21 that. We discussed what figure would be fair.  
22 He asked me around 1100, 1200 dollars. I said --

23 MR. BALLOU: Same objection. You can  
24 answer.

25 Q. You can continue.

1 A. He asked me if 1100, 1200 dollars was fair and I  
2 said that was fair. He billed me \$1150.

3 Q. In response to the subpoena that the plaintiffs,  
4 Sonnenberg et al, served upon you, you produced  
5 two documents. I'm guessing the one dated 6/7/12  
6 is not relevant to the \$1150?

7 A. It is not. I just pulled both of them that were  
8 related to him on that project.

9 Q. Is the other invoice which has --

10 A. We paid it on June 21st.

11 Q. Paid by check number 1692 on June 21, '12?

12 A. Uh-huh.

13 Q. Explain to me how that relates to the \$1150 on  
14 your October 16th letter?

15 A. The cost that he charged me. He charged me \$1600  
16 for working on the walls. He charged me \$8,985  
17 to do the ceiling system. That cost that he did,  
18 it was cost plus.

19 In other words, I sent him up there, it  
20 was time and material. He took it. I pay him a  
21 standard set rate that is based on his man hours  
22 and the square footage that he produces.

23 In addition to that, he added \$1150 which  
24 is in the 8985 that he charged for his additional  
25 expenses related to the stop and go.

1 Q. Let me make sure that I understand. Was the  
2 total subcontract price as adjusted by delay  
3 \$10,585?

4 A. It was, sir.

5 Q. Was there a deposit of 3600 given to Sunshine?

6 A. Yes, on the invoice that you just referred to  
7 that you said was irrelevant.

8 Q. Did the net of 6985 include or exclude the \$1150?

9 A. It included it.

10 MR. SHEEDY: I would ask that this be  
11 marked, please.

12 MR. BALLOU: No objection.

13 (INVOICE FROM SUNSHINE CONSTRUCTION MARKED FOR  
14 IDENTIFICATION AS DEFENDANT'S EXHIBIT NO. 6)

15 Q. Do you see the figure on your October 16, 2012  
16 letter, total cost \$12,575?

17 A. Yes, sir.

18 Q. What does that represent, Rick?

19 A. It's a summary of the items that we just  
20 discussed.

21 Q. Let's move to Roman numeral II. Can you please  
22 explain "Additional Administrative Expense"?

23 A. Yes, sir. That included, that is primarily the  
24 cost related to me and the value that I placed on  
25 it for, I think we had no fewer than three,

1 possibly as many as five, meetings with those  
2 individuals to represent our stand for it, the  
3 fact that our construction was related to a  
4 building, it was not related to any particular  
5 trade, and sitting meeting with the different  
6 officials through the York County Government  
7 Complex, whether it be planning or zoning,  
8 utilities or building officials. We had separate  
9 meetings with each one of those.

10 Q. Could you please explain whether the words,  
11 "project reinstated" that appear under Roman  
12 numeral II are different in any way from "release  
13 to resume work," which is the language at the end  
14 of the first paragraph of this letter?

15 A. Rephrase that again.

16 Q. Is that another way of saying the same thing?

17 A. Yes, it was. That charge right there represents  
18 the cost that I assign and the value that I  
19 assign for acting as the owner's representative  
20 as these issues that we were up there working out  
21 were not construction related. But he did not  
22 have a representative on site.

23 Q. When did you and I first meet face-to-face?

24 A. Today.

25 Q. So the reference to a meeting with an attorney

1 does not include me?

2 A. No. No.

3 Q. Do you recall which attorneys?

4 A. Oh, my goodness. Several. I do not know the  
5 names. I know I met with Shep Guyton, Robert S.  
6 Guyton, here several times to get his counsel on  
7 what we could possibly do, if anything.

8 Q. By "here" do you mean in Myrtle Beach?

9 A. Yes, sir.

10 Q. Who was Shep Guyton assisting or representing for  
11 purposes of your meeting?

12 A. He was on retainer by Doug Cianfrocca. D&T  
13 Imports.

14 Q. Are there any other attorneys with whom you had  
15 met?

16 A. There was a young lady. I don't know the name of  
17 the firm but I understand it was the lady that  
18 was involved in the initial, the attorney that  
19 represented the closing. She was very much  
20 involved.

21 Q. Does the name Beth Settle sound familiar?

22 A. Yes. As well as there was an attorney that  
23 contacted us and we had to debrief several times  
24 a day. Well, "we," I did. Take instructions, go  
25 back and carry documents or whatever, provide

1           them with a summary and description for what I  
2           was told was used in the preparing of their  
3           documents to have this Stop Work Order lifted.

4           That law firm was out of Charleston. I  
5           can probably look through some documents and get  
6           you that name. But for some reason I think they  
7           are related to that same firm. I think it's just  
8           a firm, an office that they have in North  
9           Charleston that Beth works for.

10       Q.     Do you think that name is Moore & Van Allen?

11       A.     I don't know, sir.

12       Q.     There is also a reference here under Roman  
13           numeral II, subcontractors. Which subcontractors  
14           were in attendance?

15       A.     Basically everyone that was involved. I had  
16           subcontracts that I had employed in Rock Hill.  
17           We had to go, I had to go explain to them, try to  
18           keep them on pace and try to develop some type of  
19           schedule as time was of the essence. We were  
20           trying to produce this thing on July 4th and we  
21           were working literally two shifts to make it  
22           happen.

23           So it was a daily, and I was receiving  
24           almost daily, at first it was daily for probably  
25           about the first week, we were told tomorrow,



1 tomorrow, tomorrow, you will be released. There  
2 were meetings throughout the day with my  
3 subcontractors there as well as here.

4 Q. Do you remember the names of the York County  
5 officials with whom you met?

6 A. I do not remember their names. I know their  
7 titles and I could pull out my records and get  
8 their names.

9 It was the director of Planning and  
10 Zoning. Several meetings with him. And several  
11 meetings with the chief building official.

12 Q. Do you recall any others?

13 A. There was other individuals outside of the CBO  
14 that I had discussions with but the ultimate  
15 authority was with the chief building official.  
16 So they would defer.

17 We would have discussions. I would  
18 present my case, they would tell me what I could  
19 and could not do.

20 And ultimately after talking with the  
21 chief building official, he strictly deferred  
22 back to the Planning and Zoning, the head of  
23 Planning and Zoning, who actually is the one that  
24 placed the Stop Work Order.

25 Q. Your last sentence under Roman numeral II reads,

1 "Please note this involved several trips to the  
2 site as well as York County's Government  
3 Complex."

4 Do you know, as you sit here today, how  
5 many trips to York County's Government Complex  
6 that you may have made?

7 A. A minimum of four.

8 Q. What is the total under Roman numeral II?

9 A. \$5000.

10 Q. Can you explain the math that you used in order  
11 to arrive at that number?

12 A. What I did with that was I took a value that I  
13 related to my services performed for those two  
14 weeks. And those services I could, I mean, I  
15 could even go back with my cell phone records.  
16 But we were working trying to get this thing  
17 ironed out, especially the first week of this,  
18 trying to get it to where we could offset the  
19 time lost and still get him opened by July 4th.  
20 We were working until 11:00, 12:00, 1:00 in the  
21 morning. And I just took it that was cost for  
22 me.

23 I did have some secretarial expense that I  
24 had hired. Again, I'm the only employee that  
25 works directly out of my office. I actually had

1 a young girl come in and type up those things and  
2 organize some things during that time that I had  
3 factored in that as well.

4 And it also notes, I think it's roughly  
5 130, 140 miles from my office to that site. It's  
6 probably an additional 20, 25 miles to the York  
7 County complex. And that trip was made at least  
8 four or five times.

9 Q. Do you have any job costing notes that would show  
10 the computation of that 5000?

11 A. No, sir, I don't. That was a value that I purely  
12 assessed to it.

13 Q. Do you have any written notation of the number of  
14 hours that you spent on this category?

15 A. No, sir, I'm salary. I work whatever hours it  
16 takes to get it done.

17 What I do have, I have credit card  
18 receipts during that time from, you know, gas  
19 stations, places where I had my meals and so  
20 forth during that duration. That's not here in  
21 North Myrtle Beach, it's in Rock Hill.

22 Q. Of the 5000, how much represents out-of-pocket  
23 expenses such as for which there may be receipts  
24 that you just described.

25 A. Well, let's just say it takes a tank of gas every

1           time you drive up there. That's \$100. Five  
2           trips, that's \$500 just in fuel. Meals at each  
3           one probably, between the two, somewhere around  
4           75 to \$100 a day, depending on if anybody was  
5           with me.

6   Q.     I sense that you are guesstimating?

7   A.     That's the way I put this whole thing together.

8   Q.     The \$5000, do you know, as you sit here today,  
9           how much would have represented out of pocket and  
10          how much would have represented a value for your  
11          time?

12  A.     I do not. I could not tell you an absolute  
13          number. But as I looked at that, I would say  
14          probably actual cost on there is probably  
15          somewhere between 2000 and \$2500.

16  Q.     Let's move to the next category, Roman numeral  
17          III.

18  A.     Yes, sir.

19  Q.     Would you please describe "Additional Project  
20          Overhead and Expense"?

21  A.     That is the cost related to keeping our company.  
22          That is my insurance. That is my workmen's comp.  
23          That is my office. That is my equipment. That  
24          is the overhead of the company that we incurred  
25          just by this project running an additional two

1 weeks over.

2 Q. I'm going to use a job costing term, O and A.  
3 Are you familiar with that, overhead?

4 A. Overhead, okay.

5 Q. When you compute a bid, in addition to the cost  
6 of materials and whatever labor and  
7 subcontractors and suppliers, do you include any  
8 other expenses that you would attribute to the  
9 project?

10 A. Yes, sir. We refer to that as our soft cost.  
11 And our soft cost represents your labor burden,  
12 which is your workmen's comp, taxes and  
13 insurance, as well as your FICA, Social Security.

14 We also figure in a percentage typically  
15 somewhere between, depending on the size of the  
16 job relates to that percentage. On a larger job  
17 it may be 10 percent, on a smaller job it may be  
18 as much as 25 percent that is factored in to  
19 cover the cost of our, cost related personnel and  
20 support equipment that is not directly on site.

21 Q. Does it include rent?

22 A. Yes.

23 Q. Does it include utilities?

24 A. It does.

25 Q. Can you think of any other categories of expense

1           that would be included in your soft cost?

2       A.     Truck payment. Your insurances. Of course the  
3           cost for the officers that are involved in the  
4           company. I'm the only working partner in here  
5           but we have a president and a vice president that  
6           do not receive a salary. As a matter of fact,  
7           they didn't receive a salary all year but their  
8           cost has to be figured when it's in there. I  
9           mean, it's on paper. We just didn't write the  
10          check.

11      Q.     I made an assumption. Let me go back and make  
12           sure it wasn't incorrect. Does the figure 8,000  
13           represent soft costs?

14      A.     It does.

15      Q.     Are these soft costs correlated or related to the  
16           additional time due to the work stoppage?

17      A.     Yes.

18      Q.     Can you explain how it is that that relates to  
19           the work stoppage?

20      A.     When I figured the job, I typically figured this  
21           job as \$15,000 a month overhead costs. That's in  
22           addition to the direct cost on the job such as  
23           out of town expenses and so forth. That is just  
24           my overhead. And then I figured a profit line on  
25           top of that. This was a little over two weeks.

1           And I just took the same labor rate.

2   Q.       So 8,000 is a subset of the 15 that represents  
3           your monthly carry?

4   A.       That's correct.

5   Q.       Did you engage in any computation of this figure  
6           on any notes or computer screen in order to  
7           arrive at this number of 8,000?

8   A.       No, sir. As an estimator, and I have been doing  
9           this for 35 years, I'll sit down and I'll take a  
10          set of drawings and I'll take a project, three to  
11          \$4 million project. I have done schools. It's  
12          to the point now where I have done it so long  
13          that I don't have to go back and do individual  
14          takeoffs and unit costs. I have shortcut  
15          formulas. I know what it costs me. I know what  
16          my costs are for a week or for a square foot.

17               Once I break it down and define it in  
18          that, once I take the project and the expenses  
19          that are related to that, I break it into a unit.  
20          That's why I broke it into these categories. And  
21          then I assign a cost that is competitive and  
22          fair. Most of my work is bid so I'm competing  
23          against other contractors to be successful. And  
24          these are the same numbers I use.

25   Q.       Let's move to category IV. Would you please

1 explain "Overtime Expense"?

2 Well, before you do, let me ask you one  
3 other question. The soft costs of 8,000.

4 A. Yes, sir.

5 Q. Why is that not included in the total cost of  
6 5000 for Administrative Expense?

7 A. I just broke it out as a separate line item.

8 Q. Do you consider those to be separate expenses?

9 A. Yes, sir.

10 Q. Could you explain that, please?

11 A. Well, again, what I charge for administrative  
12 expenses was outside the realm of TLR  
13 Construction's duties that I had. What I was  
14 asked to do was get this fixed from every aspect,  
15 whether it would be from the owner, even from the  
16 attorneys that were involved at that time, they  
17 were having me go talk to certain people, collect  
18 documentation and report back. None of that fell  
19 under my scope. So to perform that service I  
20 assigned a value to it.

21 This additional overhead soft cost, that's  
22 my duties. That's my rent. I didn't charge Doug  
23 or anyone else. These charges went to Doug. I  
24 did not charge D&T any additional cost that  
25 related to the administrative cost for my office,



1           for my copier, for my computer, the things that  
2           we have already discussed and broke out.

3       Q.     Would it be fair to say that the \$5000 in Roman  
4           numeral II represents your labor, whereas Roman  
5           numeral III represents your internal soft cost  
6           expense?

7                       MR. BALLOU: Object. Leading.

8       A.     Item number II is not just my labor. It is a  
9           value that was placed on the services that were  
10          performed.

11      Q.     I see. Are II and III computed on a different  
12          basis for different expenses and losses?

13      A.     Yes, sir. I have no formula for item number II.  
14          That was not construction related. I was, again,  
15          asked to perform services by the owner and by his  
16          representatives to try to get the project going  
17          again.

18      Q.     Thank you, sir. Let's move to Roman numeral IV.  
19          Would you please explain "Overtime Expense"?

20      A.     Sure. That's a cost that we had in putting  
21          together, after the project was restarted, to try  
22          to make up the time. We were trying to get it  
23          back open just as soon as we could. But for the  
24          time lost, you never recoup time. But we put  
25          everybody on overtime.

1 Q. How did you compute \$8,450?

2 A. I took the estimated two weeks and I took our  
3 salary and I basically just figured everything is  
4 at time and a half. And what I did, I just took  
5 the salaries of our guys and just doubled it.

6 And, again, I did not have a copy of any  
7 invoices. I didn't even consult my construction,  
8 at the time that I did that, I didn't even go  
9 back and look at my payroll records. I just  
10 looked at the people we had on the site. Our  
11 payroll was running us about, looking back now, I  
12 did not know that at the time, but I was pretty  
13 close, my payroll was running me about 7,000  
14 bucks a week.

15 Q. Rick, in categories I and II and III, do those  
16 figures include anything for TLR's payroll  
17 relating to overtime and completing the project?

18 A. Items I, II and III?

19 Q. Yes, sir.

20 A. No, sir.

21 Q. Now, on the subcontractors in category number IV,  
22 why is that not included under lodging and per  
23 diem expense in category I?

24 A. Because the people that, when they went back to  
25 work, instead of giving the schedule that --

1           okay. Their schedule may have related to the  
2           plumber. He may have had three days to set his  
3           fixtures and get out of there. When he came  
4           back, you had one day. Everybody went on a  
5           nonstop basis. I think we worked until about 11  
6           o'clock every night.

7                       So they're costs related to performing the  
8           items even though it was the same thing. They  
9           had to perform it out of sync and they worked  
10          overtime hours. There was cost involved.

11   Q.       I understand that in the 8450 there is included  
12           overtime of subcontractors.

13   A.       That's correct.

14   Q.       We looked at some invoices earlier for Melton,  
15           Coastal Carolina, Integrity and Sunshine.

16   A.       That's correct.

17   Q.       Do you have separate invoices for --

18   A.       I can generate that, yes, sir.

19   Q.       Does it exist?

20   A.       Yes, sir. But like these other items, what they  
21           will be is there is a cost and we agreed on the  
22           cost. They called me, the owners, whether it was  
23           the plumber, the tile guy or whoever was working  
24           at that time, when they called back we said,  
25           Okay, we're back to work. Here is our schedule.

1 We need you there tomorrow and you have to be  
2 done by such and such time. So we accelerated  
3 their time schedule.

4 What they did, they invoiced me according  
5 to the time schedule that was given me. That  
6 cost was different than the day-to-day normal  
7 construction time period and the cost that would  
8 have been related to it.

9 Q. Under Roman numeral IV, Rick, is there paperwork  
10 somewhere that shows what portion of the 8450  
11 represents TLR's payroll?

12 A. Yes, sir. Very similar to -- I'll produce you a  
13 transaction detail by account which is a labor  
14 summary based on those dates.

15 Q. Would that be a labor summary from June 21st to  
16 July 5th?

17 A. Not only.

18 Q. When you say based on --

19 A. Not only, no, sir. It will be until the  
20 completion of that job.

21 Q. Was additional work required to be done in order  
22 to complete on time?

23 A. We accelerated our working hours.

24 Q. I see. Now, as to the portion of the 8450 that  
25 represents subcontractor overtime, do you have

1 any paperwork where subcontractors have invoiced  
2 TLR?

3 A. The amount of their invoice was actually higher  
4 than what it would have been. It is not broke  
5 down as a separate number, no, sir.

6 Q. Would that be reflected on the invoices that we  
7 looked at earlier for Integrity, Sunshine,  
8 Coastal Carolina and Melton?

9 A. It is the same type and the same description but  
10 the same explanation will apply. Like with  
11 Integrity where I had him write me a letter to  
12 document the fact that a discussion was had, an  
13 agreement was made that there would be additional  
14 monies paid to them for either the delay or the  
15 accelerated work schedule that was now given to  
16 them. That can being produced.

17 But there were conversations that was had.  
18 Basically they'd say, Rick, you know this is not  
19 how we originally traded to do this job and you  
20 know it's going to cost me.

21 And I said, Be fair with me. Turn me in a  
22 bill and I'll pay you.

23 Q. Did they turn in a bill?

24 A. Yes, sir.

25 Q. And did you pay them?

1 A. Yes, sir. Everybody on that job has been paid  
2 but me.

3 Q. Now, "Total of additional cost related to Stop  
4 Work Order." Can you explain that?

5 A. That is a summary of items I, II, III and IV that  
6 we just discussed, \$34,025.

7 Q. Does this represent a sum that D&T owes TLR?

8 A. That's correct.

9 Q. Have you requested that this sum be paid?

10 A. I did. I have, sir.

11 Q. And do you expect that this sum is going to be  
12 paid?

13 A. I hope so.

14 Q. I have no further questions at this time. I pass  
15 the witness. And, by the way, this is not an  
16 endurance contest.

17 A. I want to just get some lozenges.

18 Q. Absolutely.

19 - - - - -

20 (Thereupon, at 2:25 p.m., a  
21 thirteen-minute recess was had)

22 - - - - -

23 EXAMINATION BY MR. BALLOU:

24 Q. Mr. Ruonala, my name is Dan Ballou. We met today  
25 for the first time.

1 A. We did, sir.

2 Q. I think we may have spoken on the phone once  
3 before. I want to go over some of the things you  
4 just testified to regarding this case.

5 You mentioned earlier that there was a  
6 contract with D&T. Do you have that contract  
7 with you, sir?

8 A. I do, sir.

9 Q. Could we get a copy of that and mark that as an  
10 exhibit?

11 A. Certainly.

12 Q. And that's the entire contract?

13 A. It is, sir.

14 Q. Let's get a couple copies of that.

15 A. I'm going to give it to somebody to copy for us.

16 Q. Let's go ahead and move forward. We'll get that  
17 contract in a little bit.

18 A. All right.

19 Q. Tell me again the relationship between TLR  
20 Construction and Melton Heating & Cooling and  
21 Melton Electric?

22 A. No problem. Trixie Melton is the president.  
23 Larry Melton is the vice president.

24 Q. Of?

25 A. TLR Construction. Larry Melton is the owner of

1 Melton Electric and Melton Heating & Cooling. I  
2 have the contractor's license.

3 I had worked in this area for 30 some odd  
4 years. I had gone out on my own in 2003 and,  
5 unfortunately, I ran into two contracts that I  
6 got stuck for almost \$2 million in 90 days and it  
7 put me out of business.

8 As a result, after two years of that,  
9 Larry and I became in contact and we discussed  
10 the possibility of opening up a general  
11 contracting company to which I provide the  
12 license and the credentials and I run it. He  
13 financed it.

14 My office is in North Myrtle Beach. Other  
15 than the fact that I share, I have a comptroller  
16 that's assigned to me that does my book work, we  
17 have no interaction.

18 Q. Other than the commonality of Larry Melton being  
19 an officer of multiple companies, is there any  
20 corporate relationship?

21 A. No.

22 Q. Is there a parent/subsidiary relationship,  
23 affiliate relationship of any kind?

24 A. No, we stand alone. He competitively bids on  
25 everything I do. As a matter of fact, I would



1 say he only does about 25 to 33 percent of my  
2 work.

3 Q. Let's talk about Exhibit 1. If you could pull  
4 that out. That's the letter of October 16, 2012.

5 A. All right, sir.

6 Q. Why was that letter prepared? Tell me about why  
7 this letter came about?

8 A. When the Stop Work Order was done, discussing the  
9 ramifications of it, I said, Doug, this is  
10 costing me money.

11 And he was like, I need you to stay right  
12 there.

13 Well, somebody has got to pay me. I'm  
14 going to pay these guys down here.

15 He said, Rick, just keep going. We'll  
16 take care of it. The attorney have got it.

17 Q. So Doug said to stay there?

18 A. Yes. I was working under the instructions of my  
19 owner.

20 Q. Doug Cianfrocca?

21 A. Doug Cianfrocca.

22 Q. So then what happened?

23 A. Well, we stayed and we committed to it and we  
24 worked through it. When we got released, we went  
25 back and we finished the project.

1           After it was done and the dust settled, I  
2           said, Doug, you owe me some money.

3           He said, Yes, sir. Put it in writing.

4           And he also told me, he said, We have gone  
5           to court. At the time it was like, there was  
6           going to be additional costs. He said, Put it in  
7           writing to me.

8           And then our concern and our efforts were  
9           on the building. We finished the building.

10          He got a lot more change orders than this.  
11          He had got \$200,000 worth of changes that we  
12          didn't originally contract for. This came as a  
13          result -- he said, My attorneys have met with  
14          their attorneys. And the Judge has decided  
15          that -- this is what he told me. The Judge has  
16          decided that we are due monies from them for the  
17          damages that you incurred and we incurred related  
18          to the Stop Work Order. I need you to prepare me  
19          a document listing the cost, your cost that  
20          solely related to the Stop Work Order not  
21          anything else that we did on the building. And  
22          that's why I prepared that document.

23          MR. SHEEDY: Let the record reflect  
24          that the witness's reference to "this" is the  
25          October 16, 2012 letter.

1 MR. BALLOU: That's the document we're  
2 talking about.

3 Q. So tell me that again. The instruction from Mr.  
4 Cianfrocca was for you to write a letter  
5 accounting for --

6 A. Any cost that you had, that you incurred as a  
7 result of the Stop Work Order.

8 Q. As a result of the Stop Work Order?

9 A. That's correct.

10 Q. Not as a result necessarily of an injunction?

11 MR. SHEEDY: Object to the form.

12 A. They're one in the same to me. It was one  
13 document. The Stop Work Order and injunction  
14 came at the same time. A man came out there in a  
15 police car and gave me a document and told me to  
16 stop.

17 And that same man in a police car came out  
18 there on July 5th and told me I could start.

19 Q. Let me show you a document and ask you if you  
20 have ever seen this before?

21 A. I believe I have.

22 Q. What is that document?

23 A. An Order granting injunctive relief.

24 Q. What's the date of that Order?

25 A. Is that the date right there? The date it was

1 filed?

2 Q. Does it have a date on it?

3 A. There is a date that's been stamped. It says,  
4 "File received June 21, 2012."

5 Q. That coincides with the date on which work  
6 stopped as we have been talking about today?

7 A. That's correct.

8 Q. And you were served a copy of that Order?

9 A. My superintendent was delivered a copy of this,  
10 yes, sir.

11 MR. BALLOU: Let's mark this as  
12 Plaintiff's Exhibit 2.

13 MR. SHEEDY: I don't see any need to  
14 clutter the record with that. It's already part  
15 of the court file.

16 MR. BALLOU: That's fine.

17 Q. Let me show you another document. Have you ever  
18 seen this document (handing)?

19 A. No.

20 Q. I'll represent to you that's another document  
21 that was an Order that was issued.

22 What's the date shown on that document?

23 A. It says, "File received June 29, 2012."

24 Q. June 29th not July 5th. And that's not a Stop  
25 Work Order?

1 A. Either one of those. I just read it to you. It  
2 says Order Modifying Temporary Restraining Order.  
3 It says modifying.

4 Q. But you would agree with me this is not the Stop  
5 Work Order that you received from York County?

6 MR. SHEEDY: Objection. Calls for a  
7 legal conclusion.

8 A. I don't know.

9 Q. Is this the Stop Work Order that you received  
10 from York County?

11 A. I don't know.

12 Q. Did you ever see a Stop Work Order from York  
13 County?

14 A. Oh, yes, York County.

15 Q. From York County Building Planning Services?

16 A. Yes. I'm sorry. I thought you were referring to  
17 that as a Stop Work Order.

18 Q. No, sir, I'm referring to this as the Order  
19 Modifying Temporary Restraining Order.

20 You would agree with me that that date of  
21 June 29th does not coincide with the date on  
22 which you received permission to go back to work?

23 A. No, sir, it does not.

24 Q. But, in any event, your instructions were to  
25 prepare an accounting of your additional cost

1 related to the Stop Work Order?

2 A. For the time we were stopped, yes, sir.

3 Q. Pursuant to the county Stop Work Order?

4 A. Pursuant to the Stop Work Order that we served,  
5 yes, sir.

6 Q. Not pursuant to the Order which I just showed  
7 you?

8 A. I think they're one in the same.

9 Q. You believe they're the same? You believe this  
10 is the same Stop Work Order that --

11 A. Whoa, whoa, whoa, don't handle me.

12 Q. I'm just asking you. You're saying they're the  
13 same thing and I'm asking you --

14 A. I'm saying they came together. The building  
15 official and the policeman that served the paper.  
16 I got the paper, the paper that said stop. I  
17 never got a piece of paper that said go back  
18 until the county delivered it.

19 We were told that there was a favorable  
20 decision rendered. I called the Building  
21 Department that same day and they said, No, it is  
22 not. We don't know about it.

23 Q. How many times had you talked to the building  
24 officials from the time that you received the  
25 initial Stop Work Order until the time you heard

1           that it had been lifted?

2       A.     Daily. Daily. Several times a day.

3       Q.     In person?

4       A.     Sometimes.

5       Q.     On the phone?

6       A.     Sometimes.

7       Q.     What was the subject of those conversations?

8       A.     Well, it was different conversations, but the  
9           first one was, Hey, what's going on?

10           Well, we received, we were notified -- and  
11           this is hearsay. What he told me was he was told  
12           that he was named in this suit as well and that  
13           they had to make us stop. So that's what they  
14           were doing until it was cleared up, okay.

15           Then we started going through it. And  
16           after some meetings with some counsel saying, you  
17           know, what's going on here? They said, Look,  
18           what I was told was that the Stop Work Order was  
19           related to building a structure that did not  
20           comply with the zoning regulations at that time.  
21           Being that we were building a fireworks store and  
22           there was a restriction in place, said to be in  
23           place, that we were not aware of, that prohibits  
24           a fireworks store.

25           Counsel was telling me that you're

1 building a building. You can be building a  
2 Frisbee stand. Yes, it's going to be a fireworks  
3 store but nothing you're doing right now is a  
4 fireworks store. You're building a building.

5 Q. But you understood, sir, that you could not take  
6 any action on constructing this during at least  
7 the period of injunction?

8 A. I understood quite clearly until July 5th if I  
9 was caught on that property I would be taken to  
10 jail. That's what I was told.

11 Q. You were told by York County building officials?

12 A. Yes, sir. The same person that told me to stop.

13 Q. Not by your attorneys?

14 A. No.

15 Q. And not by D&T's attorneys?

16 A. No, no, no. It was actually by the attorneys as  
17 well. Because they said if you go to work,  
18 because I was like, look, you know, I've got to  
19 get this building done. I'm caught in the middle  
20 here. I just want to build the building. How  
21 about if I go in there at night. I want to get  
22 done, come home, and get out of there, honestly.

23 They said that is not going to look good  
24 when a judge has sent an Order out there telling  
25 you to stop. You're in contempt of that Order.



1           Because you're telling that judge, I don't care  
2           what you say, I'm going to do what I want.

3                     They said do not do that. And the  
4           attorneys also told me don't do work until it was  
5           resolved.

6   Q.       So you knew until you got an Order from a judge  
7           or from York County, you weren't going to do  
8           anything?

9   A.       Absolutely, sir.

10   Q.       And, in fact, to open up this fireworks store,  
11           you were also going to need to get a Certificate  
12           of Occupancy from York County; right?

13   A.       That's correct.

14   Q.       And that's what you were working towards for the  
15           July 4th holiday; right?

16   A.       Overall completion, yes, sir.

17   Q.       So until you were going to get a Certificate of  
18           Occupancy from York County, this store was not  
19           going to be able to open?

20   A.       No building could be occupied until you have a  
21           C/O.

22   Q.       To your knowledge, has this building received a  
23           C/O?

24   A.       No, sir, we have not.

25   Q.       Not to this day?

1 A. Not to this day.

2 Q. So July 5th, even though you were allowed to  
3 return to work, it's the day after the 4th of  
4 July; right?

5 A. Uh-huh.

6 Q. You still hadn't received a C/O?

7 A. Uh-uh.

8 Q. You apparently put in some overtime after that  
9 and tried to get this thing done?

10 A. Uh-huh.

11 Q. Still never got a C/O?

12 A. Correct.

13 Q. And, again, to this date, you've never seen the  
14 C/O?

15 A. That is correct, sir.

16 MR. SHEEDY: I ask that the witness  
17 answer audibly. The court reporter can't  
18 transcribe an uh-huh or a uh-uh. So make sure  
19 you say yes or no.

20 A. Yes. Again, if it's pertinent or whatever, the  
21 reason why we did that was we were informed that  
22 my owner was working on having the issue that is  
23 standing between his C/O. Everything related to  
24 construction is done. It's a zoning issue. And  
25 he was hopeful that it would be done by July 4th.

1                   We were informed of this obviously, as  
2                   everyone knows, after construction had began. So  
3                   he said just go on. I'll get that cleared up.  
4                   And, you know, it was a zoning issue.

5       Q.       So the owner assured you, and I think you  
6               testified he kept saying, tomorrow, tomorrow,  
7               tomorrow, tomorrow?

8       A.       Uh-huh.

9       Q.       It was always tomorrow?

10      A.       Any day. Any day.

11      Q.       And based on him telling you it's going to be  
12               here any day, it's tomorrow, it's any day, you  
13               determined to stay on site?

14      A.       Well, actually, I was instructed to. Mr.  
15               Cianfrocca is actually, uses quite colorful  
16               language to which would not be appropriate for me  
17               list here. He's a very excitable fella. And  
18               every time I spoke with him he was quite audible  
19               and used many adjectives that he has got to get  
20               this building open. Do not stop. Give it  
21               everything you have.

22               He said, Rick, work day and night. I'm  
23               going to get this resolved tomorrow. I need your  
24               people right there ready to go back et cetera.

25      Q.       And it was critical to him to be open July 4th?

1 A. That was the initial stage, yes, sir. That's  
2 their biggest day of the year for sales.

3 Q. Biggest day of the year?

4 A. Uh-huh.

5 Q. July 5th doesn't do him much good, does it?

6 A. I wouldn't think that would do as good as  
7 July 4th. I'm sure they make sales on July 5th.  
8 But that week prior to July 4th is a tremendous  
9 opening.

10 Q. So if you don't get open by July 4th, there is no  
11 sense of urgency after that point because you  
12 don't have a holiday upcoming that's really going  
13 to be pushing this timetable?

14 MR. SHEEDY: Objection. Calls for  
15 speculation of this witness.

16 A. I would state this. I'll offer you this. In 30  
17 some odd years that I have been doing this, a lot  
18 of factors play into the urgency of opening a  
19 building. You have a construction loan that you  
20 are paying interest on. You have a lot of costs  
21 that will be minimized and structured once the  
22 building becomes operational. It relieves a lot  
23 of burden.

24 Q. Which still hasn't happened?

25 A. I'm just telling you why as a contractor it is

1 not out of character or out of line for an owner  
2 to desire to push a building through.

3 Q. I understand that. But this isn't just any  
4 building, this is a fireworks retail store. A  
5 fireworks retail store that's being modified and  
6 renovated in preparation for the July 4, 2012  
7 holiday.

8 A. It was being modified in preparation for opening  
9 it up for a full-time business. We were doing --  
10 the optimum time period was to get it opened for  
11 July 4th to take advantage of the sales that are  
12 pending right then and there.

13 Q. Which is why you were working 12, 16 hours a day?

14 A. Exactly.

15 Q. You were working as hard as you could to get this  
16 thing open as fast as you could for them to open  
17 for business for the July 4th holiday?

18 A. That was the initial plan. And I think it's even  
19 in my contract.

20 Q. So in your letter, let's go back to your letter.  
21 You say, "Not knowing how long this interruption  
22 would last, as well as your optimism that it  
23 would be removed immediately, we elected to keep  
24 all personnel on site."

25 So what you're really saying is he

1           elected?

2    A.     Yes, sir.

3    Q.     You were instructed?

4    A.     That's correct.

5    Q.     He said don't leave?

6    A.     That's right.

7    Q.     Stay here because I'm going to get this fixed or  
8           something to that affect?

9    A.     Yes.

10                 MR. SHEEDY: Object to the form.

11   A.     Mr. Cianfrocca did ask me to stay on standby,  
12           that he was optimistic that this would be  
13           relieved any day and he wanted to be sure that we  
14           would minimize any disruption by having everyone  
15           right there to where we could immediately go  
16           back.

17   Q.     And in your letter you say "This was to mitigate  
18           the delay in completion."

19   A.     Correct.

20   Q.     "As the," quote, "'season' was upon us."

21   A.     Right, sir.

22   Q.     The season was the July 4th season?

23   A.     That's what I was referring to in this letter.

24   Q.     So mitigate the delay in completion. All of this  
25           is driving towards being open in time for that

1 holiday; right?

2 A. That holiday and the summer.

3 Q. Sure.

4 A. You're looking at a fireworks store that is in  
5 the Carowinds parking lot. During the summer  
6 there is a lot of people that go through there.

7 Q. But the real urgency, the season was --

8 A. The target was July 4th. But even though  
9 July 4th, summer is the months where they sell.  
10 We weren't far from being open at that point so  
11 we just pushed it on through as we were told.  
12 Which I'm sure his sales in August will be  
13 considerably better than they are in November.  
14 Q. But considerably less than they are in the first  
15 two weeks of July?

16 MR. SHEEDY: Objection. Calls for  
17 speculation.

18 A. A whole lot better than October or November. So,  
19 earlier we get it done, the better his revenue  
20 is.

21 Q. As we look at this Order Modifying Temporary  
22 Restraining Order, I'll represent to you the  
23 purpose of a modification of the Restraining  
24 Order was to allow construction activities.

25 So on July 29th, this Order is filed. It

1           actually was dated I believe July 28th at 4:55  
2           p.m., 28th of June. Excuse me, 20th of  
3           June 2012, 4:55 p.m.

4   A.    That's five minutes before quitting time; right?

5   Q.    Right. So at least as far as that time is  
6           concerned, that's the end of the injunction. But  
7           what your testimony is is that you weren't going  
8           to go back to work until you got the Stop Work  
9           Order lifted by your county?

10  A.    I was notified that that had happened on that  
11           date at 5 o'clock or 6 o'clock.

12  Q.    How were you notified?

13  A.    One of the attorneys, Doug or somebody said we  
14           went to court yesterday and the Judge lifted it  
15           or ordered it be lifted.

16  Q.    Ordered what be lifted?

17  A.    The injunction, Stop Work Order, whatever. I  
18           call it all the same. The legal case that had  
19           been brought forth that demanded that work be  
20           stopped until a hearing could be held. I was  
21           informed that the hearing had been held. And the  
22           exact words were used that the Judge ruled in  
23           favor of D&T and we can go back to work.

24  Q.    What remains to be done as the building exists  
25           today until the time that a C/O would be issued,



1 is there any additional work that has to be done?

2 A. No.

3 MR. SHEEDY: Object to form, relevance.

4 A. There is nothing. I have no other construction  
5 activities to performed. I'm done.

6 Q. You're just waiting on the C/O?

7 A. Waiting on a zoning approval.

8 But to finish about this statement here, I  
9 called the building official the very next  
10 morning and said, I was told we can go back to  
11 work. Are we good?

12 He said, I don't know nothing about it.

13 I said, Well, I have been told.

14 He said, I have been served to stop. We  
15 do not have any paperwork that tells us you could  
16 go back to work. When I do, then I'll let you  
17 go.

18 So it wasn't until July, because I called  
19 him every day, Dude, they're telling me it's  
20 done.

21 Not as far as we're concerned. We don't  
22 have it. I don't know if he was not served or  
23 what. I don't know why. But he just said, We  
24 don't have it yet.

25 Q. You made a point earlier to distinguish between

1 mitigating delay and mitigating cost. Explain  
2 that to me?

3 A. Explain to me how I used it in reference.

4 Q. You described what you were doing was mitigating  
5 delay by your activities involved --

6 A. No, what I was asked was if I had remobilized, if  
7 I had demobilized and remobilized, would that  
8 have cost more or less? That's two different  
9 animals.

10 Q. You're not here to testify and have not offered  
11 any evidence of what your remobilization costs  
12 are?

13 A. I did not remobilized.

14 Q. That was not what you were asked to do?

15 A. No. I did not demobilize and have to remobilize.  
16 I stayed on site.

17 Q. Just so we're clear, the nature of what you were  
18 asked to do was to prepare a statement of your  
19 additional costs to mitigate delay?

20 A. I was asked to put together a summary of my costs  
21 that was directly related to my inability to  
22 perform my contract during that allotted time.

23 Q. Which was to mitigate delay not necessarily to  
24 mitigate the cost?

25 A. Absolutely. Mitigate cost would be to intercede,

1 my definition of that would be to interact and  
2 intercede in some manner to lessen the costs.

3 Q. So what you didn't do was to demobilize and then  
4 come back and then provide a statement of here is  
5 how much more it cost us to perform the contract  
6 because of the stop work?

7 A. That's correct. That's correct.

8 Q. You didn't do that?

9 A. No. No. And I think, in all fairness, why that  
10 couldn't even have been weighed out as to which  
11 is the more favorable option, whether from his  
12 standpoint or even from a cost standpoint, was no  
13 one knew how long it was going to be. To  
14 demobilize and come back and remobilize for two  
15 days wouldn't have been prudent. Two weeks  
16 you're looking at a whole different animal.

17 But I was told there were several  
18 different dates. And, if I'm not mistaken, it  
19 seems like my recollection is there was a date  
20 and then it was postponed. Is that correct?

21 Q. I don't know what you're talking about?

22 MR. SHEEDY: You can't ask the  
23 interrogator questions.

24 THE WITNESS: Okay.

25 Q. How many more days after July 5th were you on the

1 job?

2 A. Let's see. You mind if I make a phone call?

3 Q. I don't care, if you answer the question.

4 A. I need to ask my superintendent what date we  
5 completed and whatnot. He will know. It's  
6 probably in here.

7 Q. You're the one that is under oath. If you can  
8 determine how many days from what you have got.

9 A. I just don't know where it's at in this book.  
10 It's not my book.

11 Q. Take a minute and look and see if you can find  
12 it.

13 A. I'll do that. Off the record. I think it was,  
14 I'm thinking it was end of July, first of August.

15 If you want me to go consult the computer,  
16 I'll tell you the exact date we finished.  
17 Without consulting the computer, I believe it to  
18 be around the first week of August.

19 Q. So based on your recollection, you worked from  
20 the 5th of July until around the first week of  
21 August?

22 A. Uh-huh.

23 MR. SHEEDY: You have to answer  
24 audibly.

25 A. Yes.

1 Q. That's obviously a longer period of time than it  
2 is from June 21st to July 4th?

3 A. Yes.

4 Q. Are you saying that you could not have finished  
5 it by the July 4th weekend because there was that  
6 much work to be done?

7 A. No.

8 Q. How did you account for the difference in time?

9 A. There was two weeks of delays that impacted.  
10 There was three weeks that I took to finish the  
11 store. Some of the delays actually impacted our  
12 schedule. Some of our subcontractors that were  
13 working had went to other sites and had other  
14 commitments than coming back and we had to  
15 reschedule, actually bring in other contractors  
16 than the initial ones.

17 And for me to tell you whether I could  
18 have cut a week off of it or not, that last week  
19 that I was there with my superintendent, the last  
20 day that I worked on the site with my  
21 superintendent, he was there doing punch list  
22 work. Just little odds and ends. About two  
23 weeks we could have instead of three weeks. We  
24 were there for three weeks but the last week he  
25 was doing little odds and ends to finish. That

1           could have and would have been done after the  
2           building was C/O'd.

3       Q.     But it's fair to say after July 4th there wasn't  
4           a sense of urgency as there was before July 4th?

5       A.     That's not a true statement at all. Not at all.  
6           The pressure was never taken off. Actually, it  
7           might have even been more intense. It was used  
8           with many colorful adjectives saying how much he  
9           had lost. And it was imperative for him to get  
10          this blankety blank store open.

11      Q.     Were you aware after July 5th that there was  
12          still an injunction on the issuance of the C/O?

13      A.     I don't know.

14                   MR. SHEEDY: Objection. Calls for  
15          legal conclusion.

16      Q.     As we sit here today, are you aware that there is  
17          an injunction in place effecting the issuance of  
18          the Certificate of Occupancy on this building?

19                   MR. SHEEDY: Same objection.

20      A.     I can answer your question to say I know that  
21          there is a legal block somewhere involved here  
22          that is preventing Mr. Cianfrocca from meeting  
23          the zoning requirement.

24      Q.     Were you aware of that legal block in July of  
25          2012?

1 A. Yes. That's what I thought you were going to  
2 court over. That's what I thought this whole  
3 thing was about.

4 Q. You do understand there is a difference between  
5 the injunction as to construction activities  
6 which effected your operations?

7 A. I'm a contractor, I'm not an attorney.

8 Q. Okay. Fair enough.

9 Did you understand the reason for the Stop  
10 Work Order?

11 A. Neighbors had complained.

12 Q. This was not the first Stop Work Order on this  
13 project, was it?

14 A. No, it was not.

15 Q. How many other Stop Work Orders were there?

16 A. There was one that I'm aware of off the top of my  
17 head. And that was where we had, it was one  
18 official Stop Work Order and we were paid a visit  
19 by the Building Department once prior to that  
20 telling us to stop.

21 Because at the time I had submitted the  
22 drawings for permitting after we had done our  
23 mobilization and got there, when the initial time  
24 schedule I was given to receive that permit had  
25 come to the point, we went inside and started

1           doing selective demolition. By that I mean  
2           tearing out the booths, the tables, the paneling  
3           off the walls to where it was a restaurant.

4                 Soon after I started, like the very same  
5           day, I got a visitor from the fire marshal, which  
6           is odd, because the fire marshal never comes on  
7           the site until the end of the job. But somebody  
8           had called the fire marshal. And he comes in,

9           What are you doing?

10                 Well, we are building a building here.

11                 Do you have a permit?

12                 They're working on it. Should have it any  
13           day.

14                 I get a phone call from the building  
15           inspector, from my superintendent, the building  
16           inspector was out on the site. He said, You're  
17           not allowed to do anything on this project until  
18           you have a permit. Close the doors and go home.  
19           So we went inside.

20                 I went to the Building Department the next  
21           day and said, Where do we stand?

22                 And they said, Well, has it gone through  
23           the review process?

24                 It's still going through. And I said,  
25           Could I get a demo permit and start the



1 demolition?

2 Yes, you can do that.

3 So I got the demo permit that day. We  
4 came in and started the demolition. While we  
5 were doing the demolition, I got a visit from a  
6 fire marshal. That's really strange, a fire  
7 marshal. Hmm. He comes to see us again.

8 Now, it's not customary. He's not due on  
9 site. I mean, he could come any time he wants.  
10 He's a local official. But he shows up, What are  
11 you boys doing?

12 Well, we are doing the demolition. Well,  
13 part of the demolition was we had to remove a  
14 wall that actually held up the roof. To remove  
15 that wall, which is demolition, we had to  
16 construct a, put in some steel columns and a beam  
17 to hold that roof so we can tear that wall down.  
18 I started doing that.

19 They came back and somebody determined  
20 that by me installing those columns that wasn't  
21 demolition, that was construction. So I get a  
22 Stop Work Order.

23 So I get in my car and I drive to Rock  
24 Hill and I meet with them. And I said, How can I  
25 tear that wall down unless I put something up

1 under it to hold it up?

2 And, to be honest, they were like, they  
3 agreed but at the same time, well, it's part of  
4 the new building. Once you put up those columns  
5 they will remain and they're part of the new.

6 And they told me they had received  
7 complaints and they had no choice. They, you  
8 know, were not trying to be ugly. I think he  
9 used some verbiage. But when we get a call and a  
10 complaint we have to go out there. You could do  
11 your demo but you can't do anything that's new.  
12 So we had to stop that section.

13 But there was a Stop Work Order served and  
14 then I got my permit a couple days later. We  
15 were still able to work on the demo. There was a  
16 Stop Worked Order to do any new work.

17 Q. Let's go through, and I'm going to try not to  
18 plow through old ground on this.

19 A. That would be nice.

20 Q. Your recap of cost, additional lodging and per  
21 diem expense, is that something that's provided  
22 for in your contract?

23 A. That was something that was included in my  
24 original estimate. When I gave the man a price  
25 to go up there and do the job, I factored in a

1 cost knowing that I would have to provide out of  
2 town expense.

3 Q. So this is, there are some of these under B, for  
4 instance, that I believe you testified are  
5 reflected or supported by specific documents,  
6 bills you got from subcontractors. \$2800 under  
7 Melton Electric, and Melton Heating & Cooling  
8 2800?

9 A. Right, sir.

10 Q. Is it your testimony that those are not actual  
11 invoices you received from those subcontractors  
12 but that is an allocation that you assigned to it  
13 based upon the amount of the contract?

14 A. What that is is I gave Mr. Cianfrocca a lump sum  
15 total. As a matter of fact, I gave him, as a  
16 part of your contract, I gave him a copy of my  
17 estimate verbatim, every dollar. And the reason  
18 why I did that was because everything was so  
19 rushed and it was so incomplete, the drawings and  
20 all. We were actually out there mobilizing while  
21 the drawings were being done. I gave him a copy,  
22 an open book estimate so that he could clearly  
23 see I've either got it or I don't.

24 And if you say, Oh, wait a minute, we have  
25 to put toilet partitions in. He goes, You don't

1           have that? I go, Look at my estimate. Is it in  
2           there? If it's in, we do. If it's not, we  
3           don't.

4                       So that was included in general  
5           conditions. My general conditions includes my  
6           out of town expense as well as my superintendent  
7           expense and his vehicle.

8    Q.    No matter whether you stop work or you're  
9           working, that's a constant?

10   A.   No, sir, that is a unit cost. So whether it's a  
11       week or a month, I assign it. In this case I do  
12       it by the week or the month, depending on whether  
13       I'm talking about a two-year job or I'm talking  
14       about a six-week job. But I'll assign a unit  
15       cost. And, again, that's what I do. That's my  
16       expertise. I know what it costs me.

17                So I don't go back and say send me Phil's  
18       check, who is my superintendent, send me this. I  
19       know what it cost me. I have seen too many job  
20       costs at the end of the month. So I look at it  
21       and I say, Okay, I'm going to be there for X  
22       amount of weeks. I just put a unit cost on there  
23       for so many weeks and I add that in.

24                Now, the additional cost that's reflected  
25       there is as a result of those two weeks not

1           working. I never included in my estimate two  
2           weeks to sit there. And that's what I did.

3       Q.     So you have three people from TLR on site?

4       A.     Yes, sir.

5       Q.     And what were they doing these two weeks?

6       A.     Going through the -- two of them were watching  
7           television. The other one is making phone calls,  
8           talking to the subs, he's the superintendent,  
9           going through drawings, making color selections,  
10          trying to do something. But it's not productive.

11      Q.     How many people from Melton Electric were on  
12          site?

13      A.     They had anywhere from two to six.

14      Q.     How about Melton Heating & Cooling?

15      A.     About the same number, two to six.

16      Q.     So there were anywhere from five or six to 15 of  
17          y'all sitting in a hotel room in York County for  
18          two weeks over July 4th Holiday?

19      A.     Not over the whole holiday, no, sir. They  
20          actually did come home over a weekend.

21      Q.     But, again, my point is that this isn't a  
22          reflection of invoices that you received from a  
23          hotel saying --

24      A.     But it is.

25      Q.     Hold on. Let me finish my question. But, in

1 fact, what it relates to is your allocation, your  
2 assignment of the cost based upon what you knew  
3 as an experienced contractor was going to be your  
4 lodging per diem cost allocated over the 14 days  
5 that you were stopped under the Stop Work Order?

6 A. If I understand your question correctly, then my  
7 answer is yes.

8 But the way I interpret that question is,  
9 what I knew was I still had the hotels, whether  
10 the guys slept in them at night or not, for me to  
11 hold the hotels, because it is right at the peak  
12 season, I had to either take them or not. And  
13 once I left, if they rented them, I've lost them.

14 Q. But if the stop work hadn't been issued, you were  
15 going to be in those hotels?

16 A. Yes, but I would be getting production as a  
17 result.

18 Q. I understand that. But you had three more weeks  
19 at least of hotel stays after the fact. So you  
20 were at least going to be there anyway, through  
21 that period of time?

22 A. I would have been there those two weeks. I'm not  
23 quite understanding. Yes, I would have been  
24 there but I would have been getting bang for my  
25 buck.

1 Q. You would have been getting bang for your buck  
2 but you weren't necessarily incurring any  
3 additional costs?

4 A. I did incur additional costs. Now, if you are  
5 going to say you would have been there paying  
6 from June 21st to July 4th anyway, yes, I would  
7 have. But I would not have been there from  
8 July 7th to August 1st.

9 Q. But that is not what you're allocating here  
10 though?

11 A. That is what I'm saying. I'm saying --

12 Q. You said 14 days from June 21st to July 4th?

13 A. No, I did not. No, I did not. I said as a  
14 result of these days we were down, I lost  
15 14 days. I didn't say those days. I said  
16 14 days. Nowhere in there did I say it was for  
17 those days.

18 Q. Then I misunderstood. So you're not claiming --  
19 wait. Wait. Let me ask my question.

20 You were not claiming lodging and per diem  
21 and expense from June 21st to July 5th, you're  
22 claiming per diem and expense after July 5th?

23 A. I'm saying that I had 14 days of per diem and  
24 expense as a result, 14 additional days incurred  
25 of cost to my contract as a result of being

1           stopped for 14 days. You can't take it away from  
2           me and then I have to make it up at the end.

3       Q.     And there was no provision to account for delays  
4           in the contract?

5       A.     There is plenty of provisions. AIA general  
6           conditions says that under those very same  
7           conditions, if you will look at them, I think  
8           Article 6 or whatever. I'll identify them in the  
9           contract. But it refers you back to the AIA  
10          general conditions.

11                It says if a Stop Work Order or anything  
12           is incurred as a result of the owner, then the  
13           owner is responsible for damages and costs  
14           associated to the contractor.

15      Q.     Now, in fact, the owner is the one who told you  
16           to stay here?

17      A.     Yes.

18      Q.     York County didn't tell you to stay here?

19      A.     No, York County just told me I couldn't work.

20      Q.     No one else told you you could stay here?

21      A.     That's right.

22      Q.     And this was all based on the hope --

23      A.     That it was going to be resolved quickly.

24      Q.     That it was going to be resolved quickly and they  
25           were going to be able to get a C/O and open up



1 for business on July 4th?

2 A. That's what the letter says. Or as close to  
3 July 4th as possible.

4 Q. Has D&T paid this invoice?

5 A. That is part of an outstanding debt. No.

6 Q. There is more owed by D&T?

7 A. They owe me about \$200,000.

8 Q. What's the rest of that consist of?

9 MR. SHEEDY: Objection. Relevance.

10 A. So do I answer?

11 Q. Yes.

12 A. They still owe me monies on the building.

13 Q. For all the other than work that you did?

14 A. That's correct.

15 Q. Let's talk a little about your additional  
16 administrative expense. You're on salary you  
17 testified?

18 A. That's correct.

19 Q. I think you testified that what you did, you  
20 basically allocated what you thought the value of  
21 everything that you were doing as the owner's  
22 representative to try to resolve this?

23 A. Yes, sir.

24 Q. When in fact there was a Court Order that the  
25 parties had counsel dealing with that issue,

1           there was nothing that you could have done,  
2           unless you're an attorney representing a party in  
3           the case, to get that Court Order lifted?

4                   MR. SHEEDY:  Objection.

5   A.    I don't know.  I was just doing what I was  
6           instructed to do.

7   Q.    Under whose instruction?

8   A.    Instruction from my owner that I'm working for  
9           and the people that he put me in touch with that  
10          said call this person.  "This person" being one  
11          of the attorneys.  They need to know so-and-so.  
12          Okay, I go and find it out.  They need me to go  
13          talk to them.  Or, Who did you talk to?  Who is  
14          the one that's saying no.

15  Q.    So is it your testimony that that was not within  
16          what you determined to be your salary  
17          compensation?

18  A.    Absolutely.  Yes, sir, that's my testimony.

19  Q.    It is beyond that?

20  A.    Yes, sir.

21  Q.    When you had the first Stop Work Order, did you  
22          go talk to anybody?  Did you go talk to the fire  
23          marshal?

24  A.    No.

25  Q.    Did you go talk to York County?

1 A. Yes.

2 Q. Did you talk to an attorney?

3 A. No.

4 Q. Who else did you talk to?

5 A. The Building Department.

6 Q. Did you charge the owner for additional  
7 administrative expenses under those  
8 circumstances?

9 A. No.

10 Q. Not at all?

11 A. No.

12 Q. Not a penny?

13 A. Not at all.

14 Q. That was within the scope of your work on this  
15 project?

16 A. That was the result of something that we had  
17 done.

18 Q. How is it that you determine that additional  
19 administrative expenses are chargeable for the  
20 second Stop Work Order but not for the first one?

21 A. Well, the first Stop Work Order, what I told you,  
22 it was, call it a misunderstanding or whatever.  
23 It was simply waiting on the permit to be  
24 processed. I simply made a phone call and said,  
25 Where do we stand on the permit?

1                   We are not ready yet but you can come pick  
2                   up a demo permit. And that's what I did.

3                   The second one I was told go talk to  
4                   so-and-so. Find out if you could go to work  
5                   because it's not a fireworks store. Go find out  
6                   if you could be doing this. Go find out there.

7    Q.           So do you differentiate between those two, if  
8                   it's something that you should have been doing,  
9                   you don't charge, if it's something that you  
10                  didn't have any involvement with, you do charge?

11   A.           Absolutely, yes, sir.

12   Q.           Regardless of whose fault it is that you're in  
13                  that situation?

14   A.           No, sir. If it's my fault, then it's on my dime.  
15                  If it's not my fault and I'm asked to engage in  
16                  it, then I'm due compensation for it.

17                  If I construct your office and I put the  
18                  door in and the door doesn't work, I have to go  
19                  fix that door and repair that door. If I put  
20                  that door in and you and your associate get into  
21                  a brawl and you break the door, you pay me to go  
22                  fix that door.

23   Q.           You don't know my associate well. She's a  
24                  partner now.

25                  MR. SHEEDY: I will not consider that

1 as being opening the door.

2 Q. You signed some of the applications for permits?

3 A. Yes, sir.

4 Q. In this case?

5 A. I did.

6 Q. In this project?

7 A. Yes, sir.

8 Q. And there is a question on those applications  
9 that asks whether or not there is a deed  
10 restriction prohibiting the use --

11 A. Correct. If there is anything in zoning -- no, I  
12 don't know that the deed restrictions -- I think  
13 the verbiage is, and it's standard on almost any  
14 building, as a matter of fact, I don't know of  
15 any entity that doesn't have it, that says, Do  
16 you have any knowledge or does this building meet  
17 with zoning compliance?

18 Q. It's not really zoning compliance. What I'm  
19 asking about is a question on the application  
20 that says, Is there a deed restriction that  
21 conflicts with the use, intended use of the  
22 building?

23 A. Okay. If that statement is on there, it could  
24 be.

25 Q. Are you aware of that requirement to disclose any

1           conflicting deed restrictions?

2       A.     It's never come up before.

3       Q.     You're aware that in this case there is an issue  
4           about a --

5       A.     I was informed of that well after the building  
6           was permitted. As far as I know, I mean, you  
7           stop me when you want. What I was told, when the  
8           owner closed on the building, he didn't even know  
9           it. It wasn't even part of his closing  
10          documents. So there was never any intent to  
11          defraud or knowingly misrepresent.

12      Q.     I'm not suggesting that. I don't want you to  
13           think I'm suggesting that.

14      A.     That's what it sounds like. I was told that we  
15           were clear. And York County had given me  
16           approval. It meets our zoning compliance.

17      Q.     Do you recall leaving those questions blank or  
18           actually answering yes or no?

19      A.     I don't know. Typically you don't leave anything  
20           blank. It has to have a yes or no, a question  
21           like that. The only reason I can't say whether I  
22           did it was because it may have been part of a  
23           document that the owner had to sign. Some of  
24           those documents were sent to California and he  
25           had to sign them because I couldn't. I'm not the

1 person financially responsible.

2 MR. BALLOU: Mark this, please.

3 (STANDARD FORM OF AGREEMENT BETWEEN D&T IMPORTS  
4 OF SC AND TLR CONSTRUCTION, DATED MAY 14, 2012  
5 MARKED FOR IDENTIFICATION AS PLAINTIFF'S EXHIBIT  
6 NO. 1)

7 Q. Sir, I'm just going to ask you if you can  
8 identify Plaintiff's 1?

9 A. Yes, sir. This is a copy of our contract with  
10 D&T Imports for the renovations and alterations  
11 to Area 51 Fireworks, Fort Mill.

12 Q. And this is the only contract document that  
13 exists between D&T and your company for the  
14 construction renovation work in this case?

15 There aren't any other documents that  
16 constitute the contract?

17 A. Well, this actually refers to other documents.  
18 There is a proposal that goes with it. There are  
19 drawings that are enumerated on here that go with  
20 it. The change orders that I presented Mr.  
21 Cianfrocca when I told you this was not the only  
22 change order. Anything that was outside of my  
23 contract I submitted for payment.

24 Q. Was there a separate change order done for the  
25 work that you have described in your October 16,

1           2012 letter?

2    A.     That is it.

3    Q.     There is no other change order document?

4    A.     There are other change orders.

5    Q.     But that relates to this issue?

6    A.     No, that's it.

7    Q.     The meetings that you describe in item two, Roman  
8           numeral number II, Additional Administrative  
9           Expense, were these meetings that you were  
10          instructed to attend or coordinate or participant  
11          in by the owner?

12   A.     In a nut, yes. I was asked by Mr. Cianfrocca to  
13          go do everything I could. I was asked to confer  
14          with his counsel, to go talk to the Building  
15          Department, to take every liberty I could to try  
16          to help him get this resolved as quickly as  
17          possible.

18                 And, again, a large part of that cost is  
19                 the fact that it's 130 miles away from my office  
20                 and every day I was up there I lost the entire  
21                 day.

22   Q.     But when you assign \$5000 to Roman numeral II,  
23           Additional Administrative Expense, that is an  
24           effort by you to assign a cost item to all the  
25           things, these other things that weren't from



1           these other three categories that you did?

2    A.     That's correct.

3    Q.     It isn't necessarily reflected or supported by  
4           specific invoices that say here is my mileage,  
5           here is my gas, here is my meals. This is your  
6           eyeball estimate of what that administrative  
7           expense number was?

8    A.     That is not to say that there was not milage and  
9           there was not fuel and there was not direct  
10          expense.

11   Q.     But you have not submitted that?

12   A.     It is to say that, yes, I assigned the cost to  
13          it. As we discussed earlier in the same manner,  
14          when I sit down and I take off on a \$4 million  
15          school, I don't go look and see on a lot of cases  
16          how many two-by-fours, how many this and that. I  
17          know what it costs me to do.

18                 And doing this, yes, this is something, we  
19                 are not talking about adding six doors or  
20                 something else, we are talking about my time.  
21                 And the amount of time is two weeks. But as I  
22                 explained to you before, there were several of  
23                 these trips that were 20-hour days. And I just  
24                 looked and I said, What is that worth? What did  
25                 that cost me to do that?

1 Q. How did you come up with that number?

2 A. Just what I charge. I know what a  
3 superintendent, a project manager, what it is  
4 worth.

5 Q. To do two weeks of what? How did you quantify  
6 this?

7 A. I quantified it by I was captive for almost two  
8 weeks. Well, actually, it was during a two-week  
9 duration but it actually equates to about maybe  
10 six days. That \$5000 is probably six actual  
11 days.

12 Q. But you haven't gone to the trouble of actually  
13 quantifying that on a day-by-day and saying this  
14 equals six days of my involvement on this  
15 project?

16 A. I haven't quantified it to you nor, in that  
17 regards, to Doug. Do I know what it was, yes?  
18 And everyone else did at the time. I'm on the  
19 phone. Mr. Cianfrocca is three or four hours  
20 behind us so when he's calling me at 9 o'clock at  
21 night, it's 1:00 or 2:00 in the morning here.  
22 I'm up here working on it.

23 I jumped in my vehicle on two occasions  
24 after 8 o'clock at night, drive up there and  
25 don't even get there until 1:00, 2:00 in the

1 morning so I could be at the Building Department  
2 the very next morning in an effort to get this  
3 thing restarted.

4 Again, I have done this long enough  
5 that -- can I produce a document now? Yes, I can  
6 create a document to quantify and justify. You  
7 asked me how I came upon it. It's fresh in my  
8 mind. I could tell you today what I did during  
9 those times. I took the hours -- I do quite a  
10 bit of math and estimating in my head. It's a  
11 gift. It's something I'm very good at, is the  
12 math. And that's how I assigned it.

13 When I was sitting there at the computer  
14 20 years ago, 25 years ago, yes, I would have had  
15 a spread sheet and it would have said this and  
16 this and this. But as I also explained to you,  
17 I'm the secretary. I'm the estimator. I'm the  
18 owner. So as I'm doing it, I'm producing three  
19 things at once. But as I'm typing it, I'm  
20 quantifying it in my mind. I'm recapping it.  
21 And I break it down into these categories.  
22 That's why I didn't just give you a letter that  
23 says, Hey, you owe me \$34,000.

24 Q. And you did this in October of 2012?

25 A. That's correct.

1 Q. You didn't do this in June of 2012?

2 A. I couldn't have done it in June. We didn't know  
3 what it was until July 5th.

4 Q. So --

5 A. I had this.

6 Q. I understand.

7 A. I probably put this together the first part of  
8 September.

9 Q. Are you saying you did it six weeks prior to  
10 sending this letter?

11 A. I'm saying that's when I recapped my cost.  
12 That's when I knew. For instance, I knew what I  
13 had paid Coastal Carolina Carpet. I knew what I  
14 had paid Integrity Installation. I knew those  
15 numbers. But they came in July, August,  
16 September. By September I knew what my cost was.

17 Q. So how did you go about calculating this in the  
18 beginning of September?

19 A. I'm sorry.

20 Q. How did you go about calculating this number in  
21 the beginning of September?

22 A. What I'm saying is, that's when I had the numbers  
23 incurred. When I recapped it, the only thing I  
24 had to do was think about costs that I couldn't  
25 go out there and say here is the check that was

1 written for that. There is a value for it. And  
2 that is the extra administrative expense that  
3 we're talking about now.

4 That's why when I sat down and said, you  
5 know what? There is not a bill for it but I did  
6 those things.

7 Q. So even though you were on salary and you were  
8 being paid by that salary in order to manage and  
9 be the general contractor and the owner's  
10 representative, you determined on October 16,  
11 2012 that this was additional administrative  
12 expense that you were going to charge D&T for  
13 whatever reason?

14 A. No, not for whatever reason. What I determined  
15 on October 16th when I sat down was that I  
16 performed a service for him. I was asked to  
17 perform it. That was outside of my contract.

18 Look, my salary, irregardless of what my  
19 salary makes, that service that I performed, if  
20 it's an expense, a recoupable expense, it gets  
21 charged whether I'm making a salary or not. In a  
22 good case, I'm recouping my salary several times  
23 over if the work goes there. There are other  
24 times when my salary goes there is nobody to bill  
25 it to. It's overhead. That's the way we do

1 business.

2 Q. So salary is either overhead or administrative  
3 expense?

4 A. My salary is part of my overhead.

5 Q. Isn't that what's in item III though?

6 A. Yes, sir. My salary is a part of my overhead.  
7 I'm not in here, TLR Construction is not here to  
8 break even. We are here to produce a profit. My  
9 efforts that went forth for those days that I  
10 invested doing outside of my work for D&T  
11 Imports, I wasn't doing anything else to make  
12 money for TLR.

13 Q. So the \$8000 of sections II and III of this --

14 A. \$8000 is not the same. That's why it's in a  
15 separate line. The \$8000 is overtime expense  
16 occurred by my personnel and the subcontractor's  
17 personnel.

18 Q. So let me make sure I understand. Your  
19 testimony, correct me if I'm wrong, is that the  
20 \$5000 really is profit?

21 A. No, it is a service that I performed. What I  
22 would say is, I would compare that to an  
23 attorney. If I sat down with an attorney and I  
24 had a conversation with him and you have somebody  
25 on staff that you're paying, I get a bill for

1           that attorney for his time that he did that  
2           service for me. He provided a service and it's a  
3           billable service. Whether he bills it so that  
4           it's four times his salary at the end of the week  
5           or not, it's irrelevant. It's a set rate for a  
6           service performed.

7           I performed a service. And during the  
8           course of that service I wasn't doing anything  
9           else for TLR. What I do has to make the company  
10          money. If it doesn't, we don't have a company.

11          I apologize for using an attorney. You  
12          just happened to be sitting in front of me. I  
13          was going to use a dentist. But a dentist, he's  
14          actually got Novocaine and stuff like that. But  
15          when it's a person, the knowledge and the benefit  
16          of their skill that you're using, that service,  
17          that's what I was trying --

18   Q.     Above and beyond what you're being paid on your  
19           salary?

20   A.     That's correct.

21   Q.     Has that number been questioned at all by D&T?

22   A.     No.

23   Q.     Mr. Cianfrocca hasn't questioned any of the  
24           charges that you've listed in this document?

25   A.     No.

1 Q. Forgive me again but I still didn't exactly  
2 understand what the difference between, I think I  
3 understand what your additional administrative  
4 expense is, but additional project overhead and  
5 expense, explain that to me one more time?

6 A. The job went on over two weeks longer than it  
7 should have at no fault of mine. During that  
8 time, there is job trailers, there is equipment  
9 on site, dumpster rentals, toilets, all of those  
10 things that are on site that I paid for by the  
11 week, by the month, by the day, that sat down  
12 there.

13 Now, could I have returned the dumpster  
14 and told them hold it for two weeks? Yes, I  
15 guess I could have. Could I have done that with  
16 the toilet? Yes, I guess I could have. Could I  
17 have done that with the electric bill and the  
18 phone? Yeah. But, again, that wasn't the  
19 scenario that was painted.

20 Q. So this represents additional project overhead  
21 and expense which you called soft costs, for a  
22 two-week period?

23 A. A little more than two weeks, yes.

24 Q. Well, your letter says for the period from --

25 A. 21st through the 5th.



- 1 Q. 21st through the 5th. '
- 2 A. That's 14 days, 14 or 15.
- 3 Q. But that's not the same 14 days that you have got
- 4 in section I?
- 5 A. No, it's not. We have already gone over that. I
- 6 explained what that is. That is costs related to
- 7 lodging and per diem. Lodging and per diem
- 8 overhead.
- 9 Q. So lodging and per diem not during June 21st to
- 10 July 5th?
- 11 A. 14 additional days. Whether you want to say I'm
- 12 charging them from the 27th through the 5th, I
- 13 don't care. Or if you want to say I'm charging
- 14 from July 15th to August 1st, I don't care. What
- 15 I'm saying is I was there for two weeks longer
- 16 than I would have been had we not been
- 17 interrupted. Plain and simple. That can't even
- 18 be disputed.
- 19 Q. And your backup for the \$8000 is that you
- 20 estimated \$15,000 per month in overhead costs and
- 21 profit. How did you get from \$15,000 to \$8000?
- 22 A. Roughly half of it.
- 23 Q. Well, it's actually more than half of it?
- 24 A. Yes, it would be. Like I said, I'm pretty good
- 25 at math. The math would be \$7500. But that's

1 company expense.

2 In addition to that, I've got  
3 Porta-Potties, I've got dumpsters, I've got  
4 forklift, I've got other equipment there that I'm  
5 paying by the day.

6 Q. Isn't that what you just said was overhead?

7 A. No, sir, that's not what I said. What overhead  
8 is, there is job overhead and then there is  
9 company overhead. I'm overhead. You're sitting  
10 in overhead. This (indicating) is overhead.  
11 Those lights that are burning, that's overhead.

12 Q. What I'm trying to differentiate is what is  
13 overhead --

14 A. It's both. I took it --

15 Q. Let me ask the question first. You have -- I'm  
16 going to withdraw the question.

17 A. Okay.

18 Q. I think I understand what you mean.

19 A. What I'm explaining is why it's not \$7500.

20 Q. Because you didn't have an exact formula. You  
21 didn't have an invoice that said here is what my  
22 cost was for this period of time?

23 A. Never have. Not in 32 years. \$55 million a year  
24 for several years in volume, never had a formula.  
25 The formula is derived out of your history.

1 Q. Right.

2 A. There is no magic formula as to what it costs a  
3 company.

4 Q. You just picked this number out of your  
5 experience?

6 A. No, it's what it cost me with the tools and the  
7 -- if I give you the same and you go and do it,  
8 depending on how you run it, how you staff your  
9 office, what you decide, whether you want a \$100  
10 chair or \$500 chair, that's going to determine  
11 your overhead.

12 Q. And it's the same for every project you have got?

13 A. I take my overhead for the year and I divide that  
14 out by the volume that I'm doing. That's how I  
15 ascertain what my overhead is.

16 Q. So that overhead number per day can change  
17 depending on how busy you are?

18 A. That overhead --

19 Q. If you've got more work, then you're spreading it  
20 out over more projects; right?

21 A. That would be correct.

22 Q. So it really isn't tied to this particular  
23 project other than the number of days you were  
24 asked to --

25 A. Sure. Sure. That's absolutely correct. My

1           overhead is my company's overhead. He had my  
2           company there for two additional weeks.

3   Q.       Because he believed it was going to be fixed  
4           tomorrow and tomorrow and tomorrow?

5   A.       We have established that.

6                   MR. SHEEDY: Asked and answered.

7   A.       Several times.

8   Q.       Let's talk a little bit about overtime expense.  
9           When was the overtime expense incurred?

10   A.       From July 5th until we finished.

11   Q.       Why was overtime -- first of all, who authorized  
12           the overtime?

13   A.       I did.

14   Q.       Did the owner authorize overtime?

15   A.       Yes, the owner wanted it done as quickly as  
16           possible, yes.

17   Q.       From July 5th forward?

18   A.       Uh-huh.

19   Q.       So that is an expense that was incurred after the  
20           Stop Work Order was lifted?

21   A.       Trying to make the season.

22   Q.       The answer is yes to that?

23   A.       Yes.

24   Q.       That in no way accounts for any expense or cost  
25           or fee or overhead or soft cost or anything like

1           that, that would have been incurred between June  
2           21st and July 5th?

3       A.     That is correct.

4       Q.     Or between June 21st and June 28th.

5       A.     Right. That was cost that was incurred after we  
6           went back to work to try to make up for the time  
7           lost.

8       Q.     Let's look real quickly at Exhibit 2, Melton  
9           Electric, Inc., January 9, 2013. Do you have  
10          that in front of you, sir?

11      A.     Somewhere. I have got it right here.

12      Q.     You just got that?

13      A.     That's correct.

14      Q.     And that correlates, I think you testified to, on  
15          Page 1 of Exhibit 1, the first item under Roman  
16          numeral number I little B?

17      A.     Yes, sir.

18      Q.     You don't have one for Melton Heating & Cooling?

19      A.     No. And, actually, what this was, I mean, it's  
20          quite a coincidence that even an act of god or so  
21          to speak, none of those four numbers as they  
22          relate had anything to do with how I derived at  
23          that \$2800 for Melton.

24                   What that does do, and Miss Joan, a good  
25          church going woman in there, et cetera, I didn't

1 give her any indication. She does not know what  
2 I billed you for that time. I simply said, Miss  
3 Joan, during those times would you go pull out  
4 your hotel cost, these items, please pull them  
5 out for me. The only thing she did, she said,  
6 Rick, during that time Jamie, who was the foreman  
7 up there, she said, I do not have the mileage or  
8 the gas in there. Do I need to add that? I  
9 said, Yes. I hadn't even seen the numbers. That  
10 was last night. She handed me this.

11 All that does to me is validate that when  
12 I put in \$2800 for them, it's pretty doggone  
13 accurate. I know what I'm doing. That's what it  
14 cost us.

15 Q. So these people did not actually stay in these  
16 rooms?

17 A. Yes, sir, they did.

18 Q. Not the whole 14 days?

19 A. No.

20 Q. How many days did they stay in them?

21 A. Maybe four. But the rooms had to be paid for. I  
22 couldn't let the rooms go. We're talking about  
23 July 4th in Carowinds parking lot. We were  
24 supposed to be out of there by July 4th. The  
25 lady was kind enough to extend the rates and our

1 contract to keep those rooms. But we had to pay  
2 for them.

3 Q. And those are rooms that were essentially vacant  
4 for ten days out of those 14 days?

5 A. Yes.

6 Q. You had a contract with the hotel for those?

7 A. I had a verbal. I went to the lady and said,  
8 Ma'am, I'm going to be working from this date to  
9 this date. I'm going to need some rooms for my  
10 employees and for subcontractors. Can we work  
11 something out?

12 Q. The reason you kept those rooms is because you  
13 kept being assured that this was going to be  
14 resolved any day?

15 A. That's correct. Well, no. That is why we  
16 proceeded in that manner. I kept those rooms  
17 because once I left those rooms, our deal was  
18 off. She told me she needed those rooms. She  
19 had those at a higher occupancy rate. They were  
20 full. We're talking July 4th, summer. She  
21 wanted the rooms.

22 I said, No, I need them. I had to pay  
23 her. I couldn't let her have them for Friday and  
24 Saturday. Once my guys moved his stuff, he's  
25 living in that unit. He lived there for

1 two months. Once he pulls all his stuff out, it  
2 goes on the market. That created a problem for  
3 me. So basically I had two additional weeks  
4 sitting in there in lodging.

5 Q. But under the assumption based on representations  
6 from the owner that you were going to be able to  
7 get back on the job prior to July 4th?

8 MR. SHEEDY: Objection. Asked and  
9 answered.

10 MR. BALLOU: I'm not sure it's been  
11 answered, actually.

12 MR. SHEEDY: I think it was answered  
13 multiple times.

14 A. Well, let me answer. Whether he said we were  
15 coming back tomorrow or if he said, Rick, this  
16 might be a month, unless we were looking at  
17 extended like, Rick, this could be months, then I  
18 would have pulled out with the rooms.

19 If he had told me then, Hey, it's going to  
20 be two or three weeks, I would have kept the  
21 rooms and paid for the rooms. Because there were  
22 no rooms available in that area during that time.  
23 Those rooms that I was getting for 60 whatever,  
24 80, 100 bucks a night, were now \$225 a night, if  
25 you could get them. And you're not going to get



1           them on a Friday, Saturday and Sunday.

2                       So I would have made that administrative  
3           decision and said, look, we are going to pay for  
4           them. We had to. I have got to have a place for  
5           my people to go.

6   Q.       Let's look at Exhibit 3, Coastal Carolina Carpet  
7           & Tile, \$2100, which is under I-B?

8   A.       Yes.

9   Q.       Dated 6/25/2012. Paid 6/26/2012.

10   A.       You want an explanation?

11   Q.       Paid five days into this period of time?

12   A.       That's correct. Because they came home. They  
13           came home. They had to go to another job.

14   Q.       So how many days does this represent?

15   A.       They had booked the rooms for a week. They had  
16           paid for the rooms with a credit card. They were  
17           up there one day and we got stopped. And that's  
18           when I said, you know what? I'm going to let  
19           them, because they're tile layers. They were  
20           putting down floor tile. You guys go in there at  
21           9 o'clock, put one light on, don't be playing any  
22           music, close the door, lock it up, put the blinds  
23           in and put the floor tile down. You got rooms  
24           for five days.

25                       And they said, Rick, they will not give me

1 my money back. Why? Because it's July. It's  
2 almost July. Those rooms were sold. They said  
3 we can't sell them. You're paying for the room.

4 So I'm thinking, well, look, this is what  
5 we will do. That's when everybody said, Don't do  
6 that. You want to piss somebody off, you do  
7 that. You don't.

8 So they stayed there one, maybe two more  
9 days and said, I don't know what to tell you. We  
10 got another job we got to do. They went home.  
11 But when they billed me, that's what they billed  
12 me.

13 Q. They billed you the day they left?

14 A. Yes, sir. Actually, they billed me while they  
15 were still up there because the guy said he  
16 needed the money to pay for the hotel. A lot of  
17 these people I work with are hand to mouth.

18 I'll tell you this, Mr. Ballou, I may get  
19 inventive or have my own reason why it's there  
20 but I won't lie to you. I won't. Those people,  
21 they sent me that bill. I wrote the check long  
22 before I ever knew you and I would be sitting  
23 here. I wrote it because it was the right thing  
24 to do.

25 Q. Your testimony, as we sit here today looking at

1 Exhibits 4 and 5, I think you testified that  
2 Exhibit 4, the 9/25, you believe is included  
3 in --

4 A. I know it is.

5 Q. Let me finish the question, sir.

6 A. Time out. I'm going to get an aspirin. I really  
7 have a headache. Let me go get an aspirin and a  
8 glass of water.

9 - - - - -  
10 (Thereupon, at 3:57 p.m., a  
11 three-minute recess was had)

12 - - - - -

13 BY MR. BALLOU:

14 Q. Sir, my question simply was that your  
15 understanding is that the \$925 on Exhibit 4 is  
16 included within the \$2000 line item, the last  
17 line item on Exhibit 5?

18 A. And my answer was, you said you think, and my  
19 answer was, No, I know.

20 Q. And you know that because?

21 A. Exactly what I said. If you play that tape back  
22 when you asked me.

23 Q. Well, tell me again.

24 A. I will. And I will tell you again and again for  
25 every time you ask me. What I said was that man

1       called me and said, Rick, you know I had to go up  
2       there two more times. You know we got up there,  
3       we got shut down, I waited overnight, I had to  
4       come back. You know I had to pull off another  
5       job.

6               I said, Yes, I do.

7               And he said, You know I have got to charge  
8       you for that.

9               And I said, Yes, I do.

10              He said, I didn't want you to see my labor  
11       bill and say What in the world are you doing?  
12       Because I know what it cost to put in the doors.  
13       And when I saw that I would go boop.

14              So Neil called me, great guy, Christian  
15       man, called me and said, I'm going to bill you  
16       more.

17              I said, What are you going to bill me?

18              He said, I'm thinking around 1000 bucks.

19              And I said, Okay. And I said, Go ahead.

20       At this time, I didn't know I was going to be  
21       sitting here with you. I did that because I'm  
22       dealing with a contractor that I hired and I sent  
23       him up there and he couldn't work, he had to go  
24       back home. He had to stay in my hotel and go  
25       back home and do it again. It ain't his fault.

1 But it was my responsibility.

2 So when he called me I said, Yes, I will  
3 pay you. How much? So when I called him back I  
4 said, How much of that was there?

5 And he said, Hold on a minute, I'll figure  
6 it out. And he said, \$925.

7 Q. And this is what he gave you?

8 A. When I called him I said, I have attorneys coming  
9 in tomorrow. I have your bill where I paid you.  
10 You and I know that part of that bill was because  
11 you had to make a couple of trips. We weren't  
12 documenting all that. I didn't know this was  
13 coming up.

14 I said, Dude, I need something from you  
15 stating that. And what I told him to do is  
16 please reference that invoice. And that date,  
17 I'm sure that he's referring to the date -- but  
18 even the date there, I don't know that.

19 Q. But he didn't provide you with any --

20 A. This was on my fax machine this morning.

21 Q. Just so we're clear, he didn't provide you with  
22 any accounting of mileage or gas receipts or  
23 anything like that, he just sent you this and  
24 said 925, this includes travel time and gas?

25 A. Before he ever submitted it, we discussed what

1           was fair. When he does that, he does all my  
2           doors, hardware, toilets, partitions and so  
3           forth. He's done it enough that we'll go boom,  
4           boom, boom. No, he did not quantify. We said  
5           what is fair. He gave me a number and I said,  
6           Okay, that is fair. I will pay that.

7                     And, Mr. Ballou, I did pay it because it  
8           was fair.

9   Q.       I don't doubt it.

10 A.       Oh, I know you don't doubt it. You see the dam  
11       check receipt right there.

12 Q.       Give me just a minute. I'm going to try to wrap  
13       it up.

14 A.       You know, I just want it to be clear that I don't  
15       know your clients. I never spoke with them. I  
16       have no hardship or anything. That's why when  
17       you said do you know about the deconstruction --  
18       I'm a contractor. I looked at a building in the  
19       dark, walked around with a flashlight. We drew  
20       it up, tried to come in here, gave the man a  
21       price on cost, went up there and tried to build a  
22       building and come home. That's all I did. This  
23       wasn't my beef.

24 Q.       I understand that.

25 A.       All I did was build a building and now, you know,

1 I didn't do nothing. I built the man a building.  
2 And I charged him a ridiculously low price to do  
3 it.

4 Q. And the only reason we're here is because, not  
5 you, but your owner is trying to recoup some of  
6 the money he says that he incurred because he was  
7 subject to a Restraining Order for a weeks period  
8 of time. And the only basis for determining --

9 A. Two weeks.

10 Q. No, sir.

11 A. 21st to the 28th is seven days.

12 MR. SHEEDY: I strike this line of  
13 dialog. It's not a question.

14 Q. I'm getting to my question which is, well --

15 A. You know, that man actually had product delivered  
16 at our store that I signed for and carried over  
17 and delivered to him on several occasions. I did  
18 it myself. I mean, you know, I'll help anybody.

19 Q. Let me just close with this, sir. You would  
20 agree were me, though, that these additional  
21 costs were incurred because the owner instructed  
22 you to stay on the job?

23 A. No, not all of them, no.

24 Q. But primarily because the owner believed or at  
25 least represented to you, you believed, as

1 indicated in your letter, that you were going to  
2 be able to continue your work any time tomorrow,  
3 tomorrow, tomorrow, you testified earlier?

4 A. Those charges are a direct result of being  
5 stopped for two weeks. The charges also are  
6 compounded. There are charges in there that  
7 relate to the way we approached that stoppage  
8 based on information and direction I was given  
9 from the owner to stay there, be on ready, hope  
10 to get started tomorrow. But those charges are  
11 related to two weeks of delay.

12 Q. Because every day you were not open was critical?

13 A. Uh-huh.

14 Q. And they are not open today?

15 MR. SHEEDY: Objection. That's two  
16 questions.

17 Q. Are they?

18 A. No, they're still not. No products are in there.

19 As a matter of fact, somebody has gone up  
20 there and stole \$15,000 work of shelving out of  
21 the warehouse. Disappeared.

22 Q. That's all I've got.

23 REEXAMINATION BY MR. SHEEDY:

24 Q. A couple of quick topics. Rick, in response to  
25 Mr. Ballou's questions, you described some



1 conversations that you may have had with  
2 attorneys from D&T.

3 Am I correct you did not have any  
4 conversations with me, as an attorney for D&T,  
5 until just prior to this deposition today?

6 A. That is correct, sir.

7 Q. Second of all, you described a Stop Work Order  
8 generated by the York County fire marshal. Do  
9 you recall that testimony?

10 A. That's misconstrued. The Stop Work Order came  
11 from York County Building Department. What I  
12 said was the fire marshal showed up several  
13 different times and seemed to play a part in  
14 this, which was very unusual.

15 Q. Do you know who, if anyone, may have complained  
16 to York County about the construction of the  
17 pillar to support the roof?

18 MR. BALLOU: Objection. Calls for  
19 speculation.

20 MR. SHEEDY: I asked him if he knew.  
21 He can testify if he knows.

22 A. We assumed. That's all I know. I was not there.  
23 No one told me who called.

24 Q. Thank you, sir. I have nothing further.

25 MR. BALLOU: Nothing further.

1 MR. SHEEDY: This deposition is  
2 concluded. You chose to conclude it not to  
3 adjourn it?

4 MR. BALLOU: That's true. I assume  
5 you're not submitting any more documents?

6 THE WITNESS: Unless you want me to.

7 MR. BALLOU: To the extent any  
8 additional documents are submitted by this  
9 witness, I certainly reserve the right to open  
10 this back up. But barring such, I don't intend  
11 to do that.

12 THE WITNESS: And I will say that if  
13 needed, if someone wants to see a paper trail as  
14 to how I quantified the numbers, I can generate  
15 that. And I feel they will be very much in line  
16 with --

17 MR. BALLOU: That's fine. Just as long  
18 as you know if you do provide that to counsel --

19 THE WITNESS: Which I don't plan on  
20 doing. But if somebody goes, man, that's too  
21 much, I can go, well, let me show you.

22 BY MR. SHEEDY:

23 Q. I want to keep this clean. As we sit here today,  
24 Rick, those documents that you just described, do  
25 they exist?

1 A. They do not exist. It's done in my head.

2 Q. Is it correct that you would have to generate  
3 those documents in order to produce them in the  
4 future?

5 A. That is correct. But I want to say that if you  
6 ask me what two plus two is, I will tell you  
7 four. And if you ask me to show you work, which  
8 my teachers used to always say, show your work,  
9 I'd have an answer, it would be right, but the  
10 work wasn't on the page because I could do it.

11 Q. I'm just asking you about what is in your  
12 possession today?

13 A. I do not have it.

14 Q. Thank you, sir.

15 A. But they weren't a whimsical document. It  
16 wasn't, that sounds good. It was forethought.

17 Q. Thank you, sir.

18

- - - - -

19

(Time noted: 4:10 p.m.)

20

- - - - -

21

22

23

24

25

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF YORK ) 2012-CP-46-2286

CHARLES SONNENBERG, )  
FESTIVAL CORPORATION, )  
PHILLIP PULLEY, AND )  
ROBERT FOSTER, )

PLAINTIFFS, )

-VS- )

D&T IMPORTS OF SOUTH CAROLINA, INC., )  
A NEVADA CORPORATION D/B/A )  
AREA 51 FIREWORKS, AND )  
YORK COUNTY, A POLITICAL SUBDIVISION )  
OF THE STATE OF SOUTH CAROLINA, )

DEFENDANTS. )

TRANSCRIPT OF PROCEEDINGS  
YORK, SOUTH CAROLINA  
JANUARY 16, 2013

REPORTER - WILLIAM H. WHITE

DALLAS REPORTING  
SERVING THE CAROLINAS FOR OVER TWENTY-FIVE YEARS  
ROCK HILL, SOUTH CAROLINA  
803-328-9640/TOLL FREE 1-877-871-6363

Appearances: For the Plaintiffs -

Daniel J. Ballou, Esquire  
Hamilton, Martens, Ballou & Carroll  
130 East Main Street  
Rock Hill, South Carolina 29730

For the Defendant D&T-

James Sheedy, Esquire  
Susan Driscoll, Esquire  
Driscoll & Sheedy  
11520 N. Community House Rd.  
Suite 200  
Charlotte, North Carolina 28277

For the Defendant York County -

Michael Kendree, Esquire  
York County Attorney  
P. O. Box 229  
York, South Carolina 29745

1 PROCEEDINGS

2 BEFORE - THE HONORABLE S. JACKSON KIMBALL

3 9:30 A.M.

4 JANUARY 16, 2013

5 \* \* \* \* \*

6 THE COURT: This is Case Number 2012-CP-46-  
7 2286, Charles Sonnenberg and others against D&T  
8 Imports South Carolina, Inc., and others. Mr.  
9 Sheedy, I got your e-mail. I skimmed but did not  
10 read in its entirety the deposition. Presumably,  
11 it relates to this letter you attached, doesn't it?

12 MR. SHEEDY: It does. It regards testimony  
13 supporting each of the categories set forth in the  
14 letter.

15 THE COURT: Okay. How do we want to deal with  
16 all this? Obviously, you don't have any live  
17 witnesses. Or do you have live witnesses who  
18 couldn't get across the river, too?

19 MR. SHEEDY: Well, I think I am alive, but we  
20 are still fairly early in the hearing. We'll see.  
21 I am happy to get on the stand about attorney's  
22 fees. I hope I don't have to do that. Ms.  
23 Driscoll is here if the Court or Mr. Ballou insist  
24 that I get on the stand.

25 THE COURT: Well, I am not concerned about that

1 right now. I just wanted to know. Did you intend  
2 for me to read the deposition as evidence in  
3 support of the claim for the damages?

4 MR. SHEEDY: Yes. We consider the deposition  
5 to be evidence to provide detail for the 34,024  
6 that is construction delay damages.

7 THE COURT: All right. I did not print out the  
8 100 and whatever number, 45 pages. Do you have an  
9 extra copy of the condensed version?

10 MR. SHEEDY: I do. I don't know that I printed  
11 the condensed version, and in fairness to Mr.  
12 Ballou I have highlighted various positions in the  
13 copies that I have, and I am happy to give my copy  
14 to the Court if that would assist the Court. I was  
15 going to summarize, anyway, as opposed to reading  
16 portions of the deposition transcript, unless  
17 called to do that.

18 THE COURT: Well, this is in the nature of an  
19 evidentiary hearing, and I think I am going to --  
20 As I say, I skimmed it because I didn't know how  
21 you wanted to use it today. I didn't know whether  
22 someone was going to be here to testify or not.  
23 But, I will be happy to read it.

24 MR. BALLOU: I have a printed copy of the  
25 condensed version. If I could ask one of your

1 staff to make a copy, because it's my only copy, if  
2 you don't mind.

3 THE COURT: Sure. Yes. That would be better  
4 than printing that PDF. That's good. Just ask  
5 Mary Ann to do that. Did you want to direct me to  
6 certain pages and whatnot?

7 MR. SHEEDY: I would be happy to do that, if  
8 the Court wishes for that.

9 THE COURT: How do you want to deal with the  
10 issue of attorney fees?

11 MR. BALLOU: Well, Your Honor, I really do not  
12 intend to cross examine Mr. Sheedy on the  
13 individual -- entries as to whether or not they are  
14 related. I am going to take --

15 THE COURT: Paint with broader brush?

16 MR. BALLOU: That's right, Your Honor. I mean,  
17 there are certainly time frames I think we can all  
18 agree are valid; but within the time frame of the  
19 TRO, which was from June 21 until June 29, I  
20 believe, 28 --

21 THE COURT: Seven. 28. Yes. 28, 29.

22 MR. BALLOU: I don't intend to cross examine  
23 Mr. Sheedy on whether or not those particular  
24 entries related to efforts to release the TRO  
25 against his client. I'm going to take on its face



1 that those, in fact, are rationally related to  
2 doing what he could to try and get the TRO lifted  
3 from his client.

4 But what I am going to argue about is whether  
5 or not, as a matter of law, he is entitled to any  
6 attorney's fees beyond that date, or before that  
7 date. There is an entry prior to that date.

8 THE COURT: Okay. Well, why don't we go ahead  
9 and deal with that while we wait on the deposition?  
10 So, Mr. Sheedy, you go first about attorney fees.

11 MR. SHEEDY: Well, I stand and am pleased to  
12 say that I think we can further narrow that  
13 difference of opinion as follows --

14 THE COURT: I got your -- I read your  
15 supplemental memo.

16 MR. SHEEDY: Well, and I think I can narrow it  
17 beyond that. After re-reading Your Honor's order -  
18 -

19 THE COURT: All right.

20 MR. SHEEDY: -- it looks to me from the order  
21 that there is already a finding of liability under  
22 Chambrin and a few of the other cases --

23 THE COURT: Right.

24 MR. SHEEDY: That the damages are cabined, or  
25 limited, to the time of the TRO while it was in

1 force. In fact, I think that's the language in  
2 Chambrin. So, -- and that's the language that  
3 appears in Your Honor's order.

4 THE COURT: You cited me that Heiler case.

5 MR. SHEEDY: Yes. I did. And I have got a  
6 copy with me.

7 THE COURT: I've got a copy, too.

8 MR. SHEEDY: My point is, we agree that any  
9 time after 7/5 is not recoverable, in light of the  
10 Court's order, and after looking more closely at  
11 these cases.

12 I think the area of dispute between Mr. Ballou  
13 and me, and the Court may very quickly indicate its  
14 view on this, is over the period from the time of  
15 the entry of the order dissolving the TRO to the  
16 time that York County actually issued a retraction  
17 of the stop-work order. There was a period of time  
18 after the order dissolving the TRO where the stop-  
19 work order was still in force --

20 THE COURT: Right.

21 MR. SHEEDY: -- and Mr. Kendree and I had some  
22 communications. Your Honor will see from my  
23 Supplemental Affidavit of Attorney's Fees, that Mr.  
24 Kendree and I spoke on July 3, and he called me  
25 back on July 5, I don't know why I missed that time

1 in my billing, and told me that the stop-work order  
2 was no longer in force, and I informed my client.

3 So I think the real disputed entries are just  
4 those from 6/28 to 7/5. Numerically, I would  
5 represent to the Court, because nothing after 7/5  
6 is being asserted this morning, our request should  
7 be reduced from 15,748.41 to 14,878.41; and the  
8 entries that would be in question amount to just  
9 the 6/30/2012 entry on the first bill and the  
10 entries on the second bill up to 7/5/2012, where I  
11 spoke to General Counsel for --

12 THE COURT: Say that again?

13 MR. SHEEDY: 6/30 to 7/5 are in dispute.

14 THE COURT: Are in dispute?

15 MR. SHEEDY: Yes. Are in dispute, I believe.

16 THE COURT: Okay.

17 MR. KENDREE: You Honor, if I may approach?

18 THE COURT: Thank you, Mike. All right. I am  
19 afraid I have gotten us out of order, so let's just  
20 proceed, Mr. Sheedy, with your Motion for Damages  
21 in general, the whole thing.

22 MR. SHEEDY: Okay. If I didn't say it before,  
23 Your Honor, for the record, Jim Sheedy, appearing  
24 on behalf of D&T Imports. This is a damages  
25 hearing pursuant to the bond that was posted as

1 security for the Temporary Restraining Order. Your  
2 Honor issued an order dated November 9, 2012, which  
3 I am going to track here for just a second.

4 The order recites that the TRO was entered on  
5 June 21, 2012. I don't think that can fairly be  
6 disputed. The order cites that the TRO is  
7 dissolved as to D&T on June 28, 2012; nor do I  
8 think that can be fairly disputed. The recovery,  
9 as I said a moment ago, under Chambrin and other  
10 cases, is limited to the period of the TRO, or the  
11 temporary injunction.

12 We are not claiming any damages in connection  
13 with the preliminary injunction, although at the  
14 preliminary injunction hearing Mr. Ballou argued  
15 for a preliminary injunction against D&T. No  
16 preliminary injunction was entered against D&T, and  
17 about halfway through that hearing, according to  
18 the hearing transcript, Your Honor indicated that  
19 the scope of that hearing was much narrower than it  
20 had been at the TRO hearing.

21 The order says D&T is entitled to damages  
22 during the time the TRO was in force. I am looking  
23 at the top of Page 3. (As read) "As a result,"  
24 according to the order, (As read) "As a result, D&T  
25 may recover damages against Plaintiffs and the bond

1 for those losses proximately caused by the TRO  
2 during the time it was in force." On Page 4 the  
3 order says in the first paragraph, (As read) "D&T  
4 is entitled to recover attorney's fees and costs  
5 from the injunction bond." So, before the Court is  
6 a damages hearing under the liability hearing. The  
7 damages that are being sought by D&T consist of two  
8 components.

9 As we were just discussing, one component is  
10 attorney's fees. The amount sought is 14,878.41.  
11 That figure presupposes, or assumes, and that would  
12 be the better word, that the cut-off for the  
13 damages on attorney's fees would be the date that  
14 the stop-work order issued by York County was  
15 lifted, in light of the order dissolving the TRO.

16 THE COURT: Give me the gross number again,  
17 please?

18 MR. SHEEDY: The gross is 14,878.41 --

19 THE COURT: That's attorney fees?

20 MR. SHEEDY: That's attorney's fees.

21 THE COURT: Yes. Doesn't go to the damages.

22 MR. SHEEDY: Oh. The total that is being  
23 sought this morning is 48,903.41.

24 THE COURT: All right.

25 MR. SHEEDY: I've given you one component; the

1 other component is \$34,025 in actual damages owed  
2 to the general contractor for delay damages between  
3 June 21, the date of the entry of the TRO, and the  
4 July 5 date to which I made reference, when the  
5 stop-work order pursuant to the order dissolving  
6 the TRO was retracted.

7 THE COURT: All right.

8 MR. SHEEDY: It seems that the legal standard  
9 is well-settled, and that all damages which are the  
10 proximate result, or are by reason of the  
11 injunction are recoverable. I provided some  
12 examples of such recoveries in the brief that we  
13 submitted. In the Heiler case, the lost rental  
14 value and the waste while the real property was  
15 occupied by a tenant that had sought an injunction  
16 in an eviction proceeding was recoverable. In the  
17 Chambrin case, with which Your Honor is much more  
18 aware than, certainly, I am, housing, meals and  
19 attorney's fees were awarded as damages for a  
20 wrongful injunction that prevented the set-up of a  
21 modular home due to a restrictive covenant in a  
22 subdivision, as I understand the facts in that  
23 case.

24 We have cited to Your Honor two cases outside  
25 the jurisdiction: the Rochester Blue Park and South

1 Central Tennessee Railroad cases. We cited those  
2 cases because they really were the only good cases  
3 that we found, good in the sense that they  
4 discussed a little closer to the issues before Your  
5 Honor today, which is to say construction delay  
6 expenses. And I brought copies of those, and I am  
7 happy to hand them up. I don't know whether Your  
8 Honor has access to cases outside the jurisdiction  
9 or not.

10 The Rochester Blue Park case allowed a hog  
11 farmer to prove the damages that he incurred as a  
12 result of the imposition of a preliminary  
13 injunction that stopped the construction of his  
14 planned expansion of his hog farm. In South  
15 Central Tennessee Railroad, damages were awarded  
16 due to construction delays caused by the issuance  
17 of a TRO and a temporary injunction. And again, I  
18 am happy to hand those up if Your Honor is  
19 interested in --

20 THE COURT: What I am trying to find is the  
21 memo in which they are cited. Which one is it?

22 MR. SHEEDY: It is the memo that we submitted  
23 yesterday. Let's see if I can find an extra copy.

24 THE COURT: I thought Mary Ann had printed that  
25 out for me, but I don't see it. In what she

1 printed out, I do not see those two cases. Maybe  
2 that's my fault, and not hers.

3 MR. SHEEDY: I don't know that I have an extra  
4 copy of that myself. But I am pretty sure it was  
5 submitted.

6 THE COURT: All right.

7 MR. SHEEDY: Your Honor had just heard, and I  
8 don't know that there is a need for any further  
9 discussion about legal fees. If your Honor would  
10 like for me to explain the entries 6/30/2012  
11 through 7/5/2012, I would be happy to do so.

12 THE COURT: Well, let's just, let's deal with  
13 the other damages first, and then we will deal with  
14 the attorney's fees.

15 Let me tell you one distinction that I saw  
16 between the Heiler case and these facts. It  
17 appears to me that -- and I don't know about the  
18 out-of-state cases because I don't have that. It  
19 appears to me that the reason your statement of law  
20 has set out is absolutely correct. But the facts  
21 of Heiler were that defendant didn't get out when  
22 the -- or it appears to me, didn't get out of the  
23 property until some time after the tenant's  
24 injunction was lifted. And so, that the damage  
25 continued beyond the time that the injunction --



1 the damages started by the injunction continued  
2 beyond the period that the injunction was enforced.  
3 Is that --

4 MR. SHEEDY: Well, that's not clear to me. I  
5 am looking at language of the case, and maybe I  
6 don't understand the procedural background of this  
7 case. It appears that the tenant obtained an  
8 injunction, a TRO, in order to be allowed to stay  
9 on the property during the pendency of the  
10 ejectment proceedings, and it looks to me --

11 THE COURT: And that was set aside, was  
12 vacated.

13 MR. SHEEDY: Yes. And I am looking at, I guess  
14 it would be Page 391 for the South Carolina reports  
15 --

16 THE COURT: Hang on a minute. Which heading  
17 number?

18 MR. SHEEDY: It begins, really, as a part of  
19 the facts --

20 THE COURT: All right.

21 MR. SHEEDY: The damages that were determined  
22 to be sustained by the Special Referee were  
23 sustainable by reason of the injunction. So it  
24 looks to me like it was loss of the use of the  
25 premises, coupled with waste that was committed

1 during her period of occupancy, and attorney's  
2 fees.

3 THE COURT: Right.

4 MR. SHEEDY: So I am not sure that I see where  
5 she stayed on the property after the TRO was  
6 lifted.

7 THE COURT: One of those elements of damage was  
8 the fair rental value, and the fair rental value  
9 was extended beyond the period of the -- beyond the  
10 period of the injunction. That is, after it was  
11 lifted. And they gave -- In fact, if I read it  
12 right, they gave the landlord damages for fair  
13 rental value for a period of time beyond the period  
14 of the injunction.

15 MR. SHEEDY: Oh, I see. I do think that is  
16 correct. Because as I understand the analysis,  
17 it's really a tort proximate-cause analysis  
18 characterized as directly flowing from the wrongful  
19 injunction. That's a little more expansive than,  
20 say, contract analysis under Hadley v. Baxendale,  
21 where it would be just limited to once the  
22 injunction was lifted. I did read Heiler that way.  
23 Yes.

24 THE COURT: Okay. Go ahead.

25 MR. SHEEDY: Turning to the contractual -- I am

1       sorry. Turning to the contractor's damages, I  
2       gathered from our discussion earlier this morning  
3       that Your Honor has a copy of the October 16, 2012  
4       letter.

5       THE COURT: I do, if I can find it in here.  
6       Yes. October 16?

7       MR. SHEEDY: October 16, 2012.

8       THE COURT: Right.

9       MR. SHEEDY: This letter explains that there  
10      are four categories that together total \$34,025.  
11      And I would like to take just a second to run  
12      through those categories, explain them, and if  
13      necessary resort to the deposition transcript. But  
14      I will represent to the Court that the deposition  
15      was taken de bene esse by agreement with Mr.  
16      Ballou, and in the event that there is some dispute  
17      over that we are seeking to use this deposition  
18      today under Rule 32A-3B on the grounds that this  
19      witness is more than 100 miles from here. So I  
20      think from an admissibility standpoint the  
21      deposition transcript is before Your Honor.

22      THE COURT: Any objection to any of that, Mr.  
23      Ballou?

24      MR. BALLOU: No, Your Honor.

25      THE COURT: All right. Let's go ahead.

1 MR. SHEEDY: The first category consists of  
2 additional lodging and per diem expense. Under 1A,  
3 that's \$2800; under 1B, Melton Electric and Melton  
4 Heating and Cooling, 2800 for each of those. As an  
5 aside to the Court, this is not the Melton Heating  
6 and Cooling that we know here locally; this is an  
7 HVAC contractor from Myrtle Beach.

8 The testimony is that the general contractor  
9 used the figure of \$200 per day, which represented  
10 booked hotel rooms that, if he had let the rooms  
11 go, they would not have been available, given the  
12 season there at Carowinds; and the per diem for the  
13 contractor's personnel and expenses of the  
14 contractors Melton Heating and Melton Electric.

15 So, \$2800 represents 14 days times \$200 a day,  
16 which -- and this is true as to all of these  
17 expenses that I am about to discuss. They  
18 represent obligations that D&T has to the  
19 contractor.

20 Coastal Carolina Carpet and Tile actually sent  
21 an invoice, and my understanding is that amount,  
22 2100, represents an invoice, and the invoice is  
23 appended to the deposition as an exhibit.

24 THE COURT: That reminds me of something else.  
25 Because I don't have the original, in looking at --

1 in skimming this thing, the deposition, I do have  
2 the exhibits, obviously, because they are attached  
3 to the original deposition, I assume.

4 MR. KENDREE: There are exhibits attached to  
5 the deposition.

6 THE COURT: The one you gave to me?

7 MR. KENDREE: Yes, sir.

8 THE COURT: Oh, I am sorry. Well, they weren't  
9 on what was scanned to me. Okay. That's good.  
10 Good enough. Go ahead.

11 MR. SHEEDY: So, Coastal Carolina Carpet,  
12 Integrity Installations and Sunshine Construction,  
13 there are invoices for those subs to the general  
14 contractor, which invoices have been paid.

15 THE COURT: Yes, sir.

16 MR. SHEEDY: Now, Integrity Installations's  
17 \$925 is actually a subset of a larger figure  
18 roughly in the \$2,000 range, which the Court will  
19 see in the testimony. And I think either Coastal  
20 Carolina or Sunshine, the invoice came after this  
21 October 16 letter, with the contractor leaving it  
22 out for these conversations.

23 So the first category, \$12,575, is just the  
24 lodging and per diem expense during the 14-day  
25 period that the subs and the GC remained mobilized,

1 hoping they could resume their construction  
2 activity as soon as possible.

3 I am going to move to the second category,  
4 which is additional administrative expense. This  
5 \$5000 represents the value of the owner or chief  
6 executive of this construction company, his time  
7 spent once the injunction went in to force,  
8 speaking with attorney's for D&T, various  
9 subcontractors and York County officials --

10 THE COURT: This is the owner only?

11 MR. SHEEDY: This is the owner of the  
12 construction company. This is the deponent, Rick  
13 Ruonala, however it's pronounced. He testified  
14 that he would call daily to find out if the  
15 injunction had been lifted --

16 THE COURT: Let me stop you about that. When I  
17 skimmed that, the thought that occurred to me is  
18 why should -- why should anybody be able to recover  
19 for talking with the County about something that  
20 was essentially the County ordinance. It's  
21 illegal.

22 What he was talking about was not the  
23 injunction, but the stop-work order, which was  
24 issued based on -- the County's stop-work order was  
25 different from the injunction, the temporary

1 injunction, and the County stop-work order was  
2 based on the statute.

3 MR. SHEEDY: My understanding of the stop-work  
4 order, and based on the testimony of the principal  
5 of this construction company, was that it was  
6 issued and posted once the TRO was entered, and it  
7 was retracted and disappeared once the TRO -- once  
8 the County understood that the TRO had been  
9 dissolved.

10 THE COURT: The stop-work order?

11 MR. SHEEDY: The stop-work order.

12 THE COURT: But they completed construction?

13 MR. SHEEDY: After -- by the first week in  
14 August, it is my understanding the construction was  
15 complete except for certain final inspections. And  
16 I have an e-mail from Mr. Kendree describing what  
17 was left to be done, which included the Certificate  
18 of Occupancy.

19 THE COURT: A CO has been issued?

20 MR. SHEEDY: No, sir.

21 THE COURT: No?

22 MR. SHEEDY: No.

23 THE COURT: Okay.

24 MR. SHEEDY: But that final inspection has not  
25 been done because of the status of this case.

1 THE COURT: So the work -- would it be correct  
2 to say that the work has been completed, based on  
3 the assumption that it can't presently be used as a  
4 fireworks store?

5 MR. SHEEDY: Yes.

6 THE COURT: Okay. That issue is still not  
7 resolved?

8 MR. SHEEDY: It is not resolved, and as Your  
9 Honor may know from the interaction with the  
10 Clerk's Office, a lawsuit has now been filed, which  
11 I am sure will be --

12 THE COURT: I don't know anything about it.

13 MR. SHEEDY: -- visited upon Your Honor  
14 shortly. There is a DJ and a QT action which has  
15 now been filed naming everyone who may claim an  
16 interest or right to enforce the contract.

17 THE COURT: What I mean is, the construction  
18 was completed with the understanding that, had the  
19 County permitted the construction to go forward,  
20 with the understanding that the restraint on the  
21 use as a fireworks store still existed, and had to  
22 be dealt with.

23 MR. SHEEDY: Yes. The Certificate of Occupancy  
24 and the final inspections and the Certificate of  
25 Occupancy could not be issued until that



1 restrictive covenant had been resolved.

2 THE COURT: Well, couldn't -- I mean, couldn't  
3 they issue a CO -- do you have to -- couldn't they  
4 issue a CO for another purpose? I mean, if all of  
5 a sudden D&T said, we want to use it for office  
6 space or -- pick a number. Whatever would be  
7 permitted by the zoning statute, zoning ordinance.  
8 In other words, is a CO limited to getting rid of  
9 the fireworks restriction?

10 MR. SHEEDY: I think Your Honor has exceeded my  
11 knowledge in this sense. I don't know if there is  
12 anything special or unique about the nature of the  
13 improvements that would make a CO inappropriate  
14 because it could only be utilized for fireworks  
15 sales. I don't know the answer.

16 THE COURT: I guess they would have to specify  
17 a use in order to determine whether they met  
18 parking requirements and other --

19 MR. KENDREE: That would be part of the review  
20 process.

21 THE COURT: Okay.

22 MR. SHEEDY: And I will share with the Court an  
23 e-mail that Mr. Kendree was kind enough to send you  
24 on July 18 at 11:09 A.M. And I am not going to  
25 read the whole thing. I'll just provide you with

1 the portions that are relevant to what we are  
2 discussing right now.

3 THE COURT: All right.

4 MR. SHEEDY: (As read) "Consequently, there  
5 should be no issue with HVAC or plumbing. Also,  
6 the fire marshall inspected the premises yesterday  
7 and the location passed. From the County's  
8 records, all that remains for the location is a  
9 final inspection. To date there is no record that  
10 a final inspection has been requested, and there is  
11 no record of denial of request inspections.  
12 Outstanding items for the location are the final  
13 inspection, required for a CO, and a sign permit  
14 for the firework signage." And Mike had copied  
15 someone in the Building and Zoning Department to  
16 correct Michael if that was not true. So, that's  
17 my understanding of the status of the building at  
18 this time.

19 THE COURT: But you are cutting off on July 5,  
20 anyway, so it doesn't matter.

21 MR. SHEEDY: I'm cutting off on July 5, anyway,  
22 because I don't think it's disputed that at that  
23 point whatever the County did administratively  
24 pursuant to the issuance of the TRO had been  
25 retracted or released, and construction activity

1 resumed.

2 THE COURT: All right.

3 MR. SHEEDY: I think we were through Category  
4 1. We were in Category 2 talking about additional  
5 administrative expense. The figure is \$5000. It  
6 represents the communications between the GC, the  
7 general contractor, and various officials trying to  
8 learn when he could resume, and whether he could  
9 resume, and the scope of what he could do and not  
10 do during this 14-day period.

11 In fairness and full disclosure, there are no  
12 documents to support that item. The general  
13 contractor testified abundantly that he has been  
14 doing bid estimating for over 30 years and he knows  
15 what his time value is on a project, and what these  
16 14 days would have been worth if, instead of making  
17 these phone calls to York County and others he had  
18 been doing something on another project.

19 Category 3 consists of additional project  
20 overhead and expense. Your Honor, from your own  
21 private practice you know certainly more about  
22 construction that I do, and my somewhat sophomoric  
23 understanding of the bid estimating process is that  
24 included in a bid is a certain allocation for  
25 overhead and administrative at the home office. It

1 consists of rent, utilities, truck payments,  
2 insurance.

3 This contractor testified that his monthly  
4 carry is about \$15,000 for overhead and  
5 administrative. So the 14 days in question,  
6 because he was not able to expend that time on  
7 something different, he allocated \$8000 for his  
8 internal overhead and administrative, which was  
9 beyond the scope of his work in his AIA contract  
10 and; therefore, he had to bill this as an extra or  
11 a change order to D&T as the owner of the project.

12 THE COURT: Isn't that where he said he didn't  
13 use any formula, or actual billings or that kind of  
14 thing, but rather just -- he didn't have to do that  
15 anymore because he had been in the business so  
16 long?

17 MR. SHEEDY: Yes, sir. The last category of  
18 expense consists of overtime. This is additional -  
19 - this represents additional sums which this  
20 general contractor had to cover his own payroll for  
21 that 14 days, and claims made by subcontractors for  
22 overtime during this period from those  
23 subcontractors who were not able to be doing any  
24 other work. The testimony does reveal that there  
25 were a couple of subcontractors that demobilized,

1 did some other jobs, and maybe in at least one  
2 instance a substitute contractor had to be  
3 retained.

4 THE COURT: So this -- I didn't get to look at  
5 this. This is overtime for subcontractors, as  
6 well?

7 MR. SHEEDY: Subcontractors and the general  
8 contractor's people.

9 THE COURT: I understand that. But why weren't  
10 these subcontractors over here be included in Item  
11 1?

12 MR. SHEEDY: Because Item 1 only covers lodging  
13 and per diem. It's just a flow-through of  
14 additional expenses as I understand it, and as the  
15 testimony supports.

16 Now, as I said earlier I can, should the Court  
17 wish, meticulously go through this transcript  
18 pointing out to the Court the passages that support  
19 what I just said about these four categories. But,  
20 Your Honor has this transcript before him, and it  
21 seems to me that that's probably not necessary, but  
22 I offer to do that if the Court thinks that would  
23 be helpful understanding my comments about this.

24 THE COURT: No. No, I'm going to -- I did not  
25 read it in detail. I need to go back and read it,

1 and I intend to do that. Treat it like testimony.

2 Does that cover that?

3 MR. SHEEDY: That covers the two Complainants.

4 A couple of comments. I am sure in just a moment  
5 that Mr. Ballou will say that D&T inflicted damages  
6 on itself --

7 THE COURT: Well, let me hear that from him,  
8 and then you can respond to that. I will give you  
9 a chance to do that.

10 MR. SHEEDY: Okay. Thus, D&T is here today  
11 asking for an award of damages against the bond in  
12 the total amount of 48,903.41. Thank you.

13 THE COURT: Yes, sir. Mr. Ballou?

14 MR. BALLOU: May it please the Court, Your  
15 Honor, Dan Ballou on behalf of the --

16 THE COURT: Let me ask Mr. Sheedy one -- Mr.  
17 Sheedy, the 34,025 is the figure we've had all  
18 along. In your initial comments, you were talking  
19 about -- you didn't reduce that any by the  
20 limitation you placed on the time scope of -- the  
21 time period that you claim was covered?

22 MR. SHEEDY: Correct. You still have the  
23 October 16 letter before you --

24 THE COURT: I do. But that's the same number  
25 you've always claimed?

1 MR. SHEEDY: Yes. Yes, and that's because the  
2 cut-off in the October 16 letter is also July 5.

3 THE COURT: Okay. Yes, sir, Mr. Ballou?

4 MR. BALLOU: Thank you, Your Honor. We would  
5 certainly take the position that pursuant to your  
6 award, pursuant to our understanding of the case  
7 law, that any award of damages or costs is  
8 constrained by the time limit of the restraining  
9 order as it applied to the Defendant. We would  
10 first take the position that under the limitations  
11 of our rules, that if there are any damages or  
12 costs incurred, alleged, outside the time frame of  
13 that -- there may be some claims out there  
14 somewhere, but it's not under this --

15 THE COURT: Well, I think that -- In my view,  
16 that becomes a fact question. For example, that  
17 Heiler case is the best example of that. And I am  
18 not saying, I am not declaring either way, in this  
19 case. I am just saying, I really do think that's a  
20 fact question, whether the damages were proximally  
21 caused, that damages outside the period of the  
22 injunction were proximally caused by the  
23 injunction.

24 MR. BALLOU: I believe you are right. But  
25 that's all entailed within this concept of

1 proximately-caused damages.

2 THE COURT: I understand.

3 MR. BALLOU: And as another initial point, Your  
4 Honor, Counsel, Mr. Sheedy was very clear in his  
5 presentation that these are costs, at least as  
6 reflected by Mr. Ruonala's deposition and his  
7 letter, that are claimed by Mr. Ruonala and his  
8 company, who is not a party to this case. That has  
9 been attached to an affidavit from Mr. Cionfrogga,  
10 who is the executive, I believe, of D&T. It is  
11 clear from the deposition testimony of Mr. Ruonala,  
12 that there is a dispute on payment, and that in  
13 excess of \$200,000 is owed to Mr. Ruonala's company  
14 by Mr. Cionfrogga's company. And so we think there  
15 is a fundamental threshold question in terms of any  
16 damages recoverable by D&T, who is the party before  
17 you today, that they haven't paid anything.

18 THE COURT: What is the issue in dispute  
19 between those two companies?

20 MR. BALLOU: It is unclear.

21 THE COURT: In the deposition?

22 MR. BALLOU: Well --

23 THE COURT: I don't see anything about  
24 \$200,000, or I don't remember reading it.

25 MR. BALLOU: It's part of a number of change



1 orders that apparently have not been paid. That's  
2 the nature of that dispute that I believe Mr.  
3 Ruonala has testified to.

4 THE COURT: All right.

5 MR. BALLOU: So that, I think, creates an issue  
6 of law over whether or not, as a matter of law, D&T  
7 is entitled to any award for these costs as  
8 proposed by Mr. Ruonala.

9 We do contend that at least a fair portion of  
10 these alleged costs were incurred by the direction  
11 of Mr. Cionfrogga to Mr. Ruonala to do things that,  
12 frankly, were not foreseeable, were not part of the  
13 normal course of this case, and that, frankly, we  
14 don't believe are in any way proximally caused.

15 For instance, this \$5,000 additional  
16 administrative expense. Mr. Ruonala testified that  
17 what happened was, when he got the stop-work order  
18 Mr. Cionfrogga says, stay there; do everything you  
19 can; go talk to people, do everything you can, even  
20 though they had retained counsel, there was a court  
21 order in place, and there was nothing that was  
22 going to happen, at least until this court issued  
23 the order modifying the TRO. So you have -- and I  
24 think we have, Your Honor, raised a very fair  
25 question. How is it that my client is being

1 charged in any way with the cost of coming up here  
2 and meeting with people that -- it's not going to  
3 make any difference whatsoever, at least until such  
4 time as the TRO is modified to allow construction  
5 activities to continue.

6 THE COURT: Doesn't some of that become a  
7 question of what is a reasonable mitigation of  
8 damages?

9 MR. BALLOU: Well, I think it is a question of  
10 reasonable mitigation of damages, but there is  
11 nothing that Mr. Ruonala can do at that point in  
12 time, during the pendency of the original TRO, to  
13 lift that TRO except for D&T to hire Counsel, which  
14 they did. So on the one hand we are being asked to  
15 pay for the attorney's fees for the attorney for  
16 D&T to take care of their legal issue, but at the  
17 same time Mr. Cionfrogga is saying, do whatever you  
18 can; get everything -- I mean, hypothetically, Your  
19 Honor, and this is pure argument, speculation --  
20 not speculation. But, if Mr. Cionfrogga had said,  
21 go down to the legislature and see what they can do  
22 about it, my client shouldn't be charged with that  
23 kind of activity.

24 THE COURT: Or, arguing with the County about  
25 whether the statute applies.

1 MR. BALLOU: That's right. These are legal  
2 issues. Counsel was retained. We don't think that  
3 in any way a proximate damage can be recovered  
4 under this, in this motion.

5 Dealing with the --

6 THE COURT: Back up a second. Are you  
7 addressing that -- just for my convenience, are you  
8 addressing that to Roman Numeral II in the letter?

9 MR. BALLOU: That would specifically relate to  
10 Roman Numeral II.

11 THE COURT: Okay. All right.

12 MR. BALLOU: And just to round out, addressing  
13 -- I'll take that out of order. It is absolutely  
14 clear in that, in the deposition testimony, that  
15 Mr. Ruonala had no backup; he had no documentation;  
16 he had no cost invoices or any kind of documents of  
17 any kind, and at the same time was being paid a  
18 salary as the owner's representative under this  
19 contract. Attached to the deposition is the AIA  
20 contract, fixed-cost, and he was being compensated  
21 under that contract.

22 Now, there was a prior stop-work order that is  
23 entirely unrelated to this dispute, where he was  
24 required to take certain -- come back to York  
25 County, and deal with the building officials, and -

1 -

2 THE COURT: Did the COs, change orders -- did  
3 the change orders over which there is a dispute  
4 have anything to do with a general increase in  
5 overhead and whatnot under the contract?

6 MR. BALLOU: No.

7 THE COURT: And it was a fixed price contract?

8 MR. BALLOU: A fixed price contract. And so,  
9 essentially what happened is, after the fact, after  
10 the injunction as to construction activities had  
11 concluded, and --

12 THE COURT: I am sorry. I am writing slowly,  
13 and I am not -- the TLR is not included in any  
14 proposed change order or claim as a claim of  
15 additional administrative expense or overhead?

16 MR. BALLOU: Not other than what is contained  
17 in this letter.

18 THE COURT: That's what I mean.

19 MR. BALLOU: Nothing else. There was nothing  
20 else --

21 THE COURT: In other words, they haven't  
22 increased the contract price to the owner by reason  
23 of the -- what he asserts is the necessary  
24 additional overhead and administrative costs.

25 MR. BALLOU: Well, let -- and I want to be fair

1 to Mr. Ruonala. The text of this letter is  
2 important because in October of this past year he  
3 was asked by Mr. Cionfrogga -- Mr. Ruonala said,  
4 you owe me some money. Now, there hadn't been any  
5 change orders submitted under the AIA contract --

6 THE COURT: At any time? Or --

7 MR. BALLOU: No. Not -- I mean, this is the  
8 change order. Essentially, this is it.

9 THE COURT: No, no. Are there other change  
10 orders that relate to add-ons, or --

11 MR. BALLOU: I think, in fact, there were other  
12 change orders --

13 THE COURT: But you are talking about a change  
14 order for this matter?

15 MR. BALLOU: This item here, this claim.

16 THE COURT: All right. Go ahead.

17 MR. BALLOU: And he complains to Mr.  
18 Cionfrogga, I am losing my shirt here, to  
19 paraphrase. Well, send me a letter.  
20 So, he prepares this letter, and his testimony is  
21 that he didn't have any backup, he didn't have any  
22 -- he didn't have the job costs; he didn't have any  
23 documentation; he just came up with these numbers.  
24 And so what he determined was for his time, for the  
25 value of his services, he believed that those were

1 outside of what he should be paid for under the  
2 contract, and that's worth about \$5,000. And he  
3 said, I picked that out of the air and put that  
4 down. And he hasn't -- he didn't have any backup;  
5 didn't have any other documentation to support  
6 that.

7 So we think that that item in particular is  
8 complete speculation, baseless. Has no basis in  
9 the contract; hasn't been asserted as a change  
10 order in the contract; isn't supported by  
11 documentation.

12 THE COURT: To what extent does that relate to  
13 Roman Numeral III?

14 MR. BALLOU: Well, it was a little confusing,  
15 and I think we are all going to have to read  
16 through the testimony. We were trying to  
17 differentiate between project overhead and  
18 administrative expense, and why they were two  
19 separate line items. I think what his testimony  
20 was is that Roman Numeral III was, as Mr. Sheedy  
21 described, his carry, his home-office expense,  
22 which I presume to be something above and beyond  
23 what he is saying the value of his time would be.

24 THE COURT: Right. Right.

25 MR. BALLOU: So, that's how I understood his

1 testimony.

2 THE COURT: All right.

3 MR. BALLOU: All right. And, let me back up.

4 Let's deal with Number 1, initially.

5 THE COURT: Okay.

6 MR. BALLOU: \$200 a day was picked, again kind  
7 of out of the air, for 14 days, which he assigned -  
8 - he explained the reason he picked 14 days, and it  
9 had to do with a perceived need to hold on to hotel  
10 rooms that were not being used. His testimony was  
11 that they really only used four of those nights in  
12 the hotel, and that in order to hold this hotel  
13 over the Fourth of July holiday weekend, that he  
14 felt that he just had to commit to the hotel, and  
15 that's what he did. So that doesn't seem to us to  
16 be anywhere near the kind of proximate cause damage  
17 if, in fact, the reason for him doing that is Mr.  
18 Cionfrogga saying, we're going to get this  
19 tomorrow; we're going to get this done tomorrow.

20 In the context of a court hearing, a court  
21 proceeding, where there is a hearing scheduled and  
22 there is a timetable that is being established by  
23 the court, and Mr. Cionfrogga is telling him, you  
24 need to stay there, and if that means whatever  
25 expenses you needed to incur to stay there, then

1 you do that, that's not the kind of foreseeable  
2 damage that these cases talk about.

3 This is not a fair rental value of space that  
4 they were deprived of. This is not -- Now, I will  
5 concede there are a number of invoices attached to  
6 the deposition, where some of his subs have said,  
7 here's where we had additional hard costs resulting  
8 from the stop-work order. And to be perfectly  
9 fair, Your Honor, I have to concede that to the  
10 extent his testimony is, we got -- my sub said,  
11 here's how much it cost me, those are probably --  
12 To the extent any of this is recoverable, those are  
13 probably within the umbrella of foreseeable costs.

14 THE COURT: Well, but again, we are talking  
15 about TLR, not D&T.

16 MR. BALLOU: Absolutely.

17 THE COURT: Has he submitted any change order,  
18 proposed change order, for those costs?

19 MR. BALLOU: Nothing beyond what is attached to  
20 this deposition.

21 THE COURT: All right.

22 MR. BALLOU: And so, you've got this letter --

23 THE COURT: Well, what does that mean? You  
24 construe those as change orders?

25 MR. BALLOU: He called this a change order --



1 THE COURT: All right.

2 MR. BALLOU: -- even though it was submitted  
3 outside the time frames of the AIA process. It was  
4 submitted in response to this conversation, after  
5 the conversation with Mr. Cionfrogga, and that  
6 hasn't been paid, hasn't been -- it's still kind of  
7 out there, and it is unclear -- I don't know  
8 whether -- Frankly, I don't know whether there is  
9 any litigation over whether or not this \$200,000  
10 owed on this contract is recoverable or not. But  
11 certainly I would have to assume Mr. Cionfrogga's  
12 going to do everything he can to minimize his  
13 expense, no matter what the outcome of this  
14 proceeding is, to minimize what he's going to have  
15 to pay his contractor.

16 So, you know, the whole documentation of this  
17 claim, I would suggest is suspect. Here, he used  
18 only four out of his 14 days. And he talks in his  
19 deposition about having to deal with holding rooms  
20 over the Fourth of July weekend, but then he  
21 started back up on the fifth, I guess, and he  
22 doesn't explain why they couldn't have let those  
23 rooms go and then come back, and it doesn't talk  
24 about why he couldn't have gone to Rock Hill or  
25 some other place. There are two hotels he

1 mentioned right there on Carowinds Boulevard. You  
2 know, he testified that he had pressure from the  
3 manager to release those rooms, but he didn't  
4 because of the situation.

5 But it certainly seems to me reasonable that  
6 if he wasn't able to put his people up on Carowinds  
7 Boulevard there are any number of hotels in the  
8 area that would be willing to take his business.

9 The subs -- now, interestingly, Melton  
10 Electric and Melton Heating and Cooling --

11 THE COURT: Let me go back a second. Maybe I  
12 need to ask this of Mr. Sheedy. There's an entry  
13 in -- the first entry on the time records of Mr.  
14 Sheedy's firm is June 8, 2012, telephone conference  
15 with Phillips about fireworks dispute. I am trying  
16 -- Do I remember correctly that the Plaintiffs gave  
17 notice to D&T that they were in violation of the  
18 covenant prior to this?

19 MR. BALLOU: No. If you recall correctly, we  
20 couldn't track down D&T, because we could not  
21 identify they had, in fact, registered the  
22 business, and I don't believe we made any direct  
23 communication with D&T prior to filing suit on the  
24 twenty-first, or the nineteenth.

25 THE COURT: Okay.

1 MR. BALLOU: And we can certainly deal with  
2 that, but that's outside the scope of this claim.  
3 Melton Electric and Melton Heating and Cooling are  
4 -- he testified they are not affiliated companies,  
5 but they are owned -- this company is owned by the  
6 Melton family. And just like there is scant backup  
7 for his claim, there is even less backup for the  
8 two claims from the two Melton entities, and no  
9 testimony as to whether or not there was any  
10 requirement for those folks to have to reserve  
11 numbers of rooms, and essentially what he did was,  
12 he took those three entities and he assigned \$200 a  
13 day times 14 days, \$2800, and that's what he put in  
14 this letter claiming he's been damaged, to Mr.  
15 Cionfrogga.

16 Coastal Carolina Carpet has an invoice for  
17 \$2,100, a \$2,100 invoice, for what it says is non-  
18 refundable rooms, food, fuel and lost labor. And I  
19 think, Your Honor, that's probably in the category,  
20 to the extent any of this is recoverable. A sub  
21 has now said, you have cost me this amount. If  
22 that is chargeable through, from that sub to the  
23 general contractor, from the general contractor to  
24 the owner and recoverable against my client, I am  
25 not sure I have got much basis to object to that.

1 Integrity has what they call additional trip  
2 charges of \$925.

3 We would contend, Your Honor, that there is  
4 testimony in the record that Integrity included  
5 that number within another invoice. That is not  
6 apparent from the documents. Mr. Ruonala --

7 THE COURT: Say that again, please?

8 MR. BALLOU: There is an invoice attached to  
9 the deposition from Integrity that doesn't -- it is  
10 not apparent from that at all that this \$925 is  
11 included within that time. We just don't know what  
12 to make of that, Your Honor, because it seems --  
13 his testimony was that there was a conversation  
14 between Mr. Ruonala and the owner of Integrity that  
15 somehow this amount was going to be charged in to  
16 their bill, and I think the documentation on that,  
17 again, is very problematic.

18 Sunshine Construction, Exhibit 6 to the  
19 deposition, on Page 26, is discussed. Exhibit 6 to  
20 the deposition predates this lawsuit, Your Honor;  
21 it is paid prior to the filing of the lawsuit. So  
22 we don't think there's any basis to include that.  
23 Well, let me say that 6 is dated June 21, 2012,  
24 marked paid June 21, 2012. That was the date of  
25 the issuance of the TRO, so we would contend that

1 anything having to do with Sunshine Construction in  
2 this case ought to be excluded. It simply is not a  
3 -- there is no evidence that it is a cost that was  
4 incurred within the time frame of the injunction or  
5 by reason of the injunction.

6 THE COURT: Okay.

7 MR. BALLOU: Item 3, Your Honor, additional  
8 project overhead expenses. We discussed that  
9 briefly. We interpret that, essentially, as soft  
10 costs, home-office costs. And what his testimony  
11 was, he basically took all of his overhead and  
12 allocated it to this project. And then said, well,  
13 for the monthly overhead of \$15,000, despite the  
14 fact there may be other projects going on -- this  
15 is insurance; this is rent; this is all kind of  
16 things. There is no evidence that this is a proper  
17 allocation for this particular project.

18 THE COURT: I don't remember that. He  
19 ballparked his entire company overhead as 15,000 a  
20 month? Is that right?

21 MR. BALLOU: That's what his testimony was. He  
22 said, my overhead is about 15,000 a month; this was  
23 about two weeks, so I put it about half of that.  
24 And I may have misunderstood his testimony, but  
25 that's how I read it.

1 THE COURT: Okay.

2 MR. BALLOU: Now again, since this is a fixed-  
3 price contract, Your Honor, the overhead is what it  
4 is. Now, the interesting thing is that this  
5 contract had a substantial completion date of June  
6 15, a week prior to the filing of this lawsuit. So  
7 at the time this lawsuit was filed, the time the  
8 TRO was originally issued, they are already a week  
9 late in performance of this contract. And the  
10 other interesting thing about this time line is  
11 that his testimony was that they reached the point  
12 of being able to, I guess, request a Certificate of  
13 Occupancy around the first week of August.

14 So after this period of time they had another  
15 month of activity on this site. So, you know, this  
16 whole concept of trying to take this two-week  
17 period and say, well, I'll cost that increase  
18 because of that -- they were underwater on this  
19 contract already. They are scrambling, trying to  
20 find some way to make up the profit that they  
21 apparently envisioned on this, and it's just clear  
22 that these are not proximally-caused damages to  
23 this particular portion of the restraining order.

24 The overtime expense -- and again, you've got  
25 a contract that is already late; that admittedly

1 they had been working, his testimony, 16 to 20  
2 hours a day up to the time of the stop-work order.  
3 After the stop-work order is released, he testifies  
4 that he is employing them again 16 to 20 hours a  
5 day for another four weeks. So how is it that  
6 overtime that is driven not by this injunction, but  
7 it is driven by the owner's desire to open as soon  
8 as possible, that overtime is now allocated back to  
9 my client?

10 And if you will recall, Your Honor, it has  
11 prevailed on the underlying injunction against the  
12 County issuing a Certificate of Occupancy to date.  
13 And so, from the owner's standpoint, they are  
14 trying to recover, or have filed this claim to  
15 recover this alleged overtime expense that was  
16 going to be incurred anyway, was part of the rush  
17 to try to get this thing opened, I suppose, and  
18 really has very little to do with the seven days in  
19 June that the TRO was in place, as far as the  
20 construction activity is concerned.

21 I don't know whether Mr. Sheedy -- I don't  
22 intend on calling Mr. Sheedy as to the substance of  
23 the time entries from June 21 until June 28. My  
24 objection to that, Your Honor, is that the June 8,  
25 2012 entry is prior to any of the injunctions. If

1 it is recoverable at all, it certainly is not  
2 recoverable as a proximally-related cost or damage  
3 of the restraining order, and that once the  
4 restraining order was lifted the activities  
5 indicated in the time entries are really going to  
6 the substance of the claim, not to the restraining  
7 order.

8 There certainly was no need to continue  
9 litigating a restraining order once this Court had  
10 made it abundantly clear that it didn't believe  
11 that restraining order applied to the construction  
12 activities. And frankly, at that hearing my  
13 recollection is -- I can go back and look at the  
14 transcript, because at that point in time we agreed  
15 that, really, the point of this restraining order  
16 was to make sure the County didn't issue any  
17 permits over the ordinance, over the conflicting  
18 deed restriction, and that, really, the focus of  
19 the case from that point forward is and had been --  
20 that issue had nothing to do with proceeding  
21 against restraining the construction activities  
22 after June 28, 2012.

23 So, Your Honor, the law --

24 THE COURT: In summary, the only issue you  
25 raise about attorney fees is the time period for



1 which they should be paid?

2 MR. BALLOU: That's right. That's right. I  
3 have no reason to challenge Mr. Sheedy's hourly  
4 rate; I have no reason to challenge the time  
5 entries he's put in to the file. Obviously, there  
6 was a hectic period of time in June, and I don't  
7 have any basis to challenge that.

8 THE COURT: All right.

9 MR. BALLOU: But, Your Honor, I think in  
10 summary this really comes down to what is  
11 foreseeable, what is a proximately-caused damage,  
12 what is a reasonable calculation of costs and/or  
13 damages that could be allocated as a result of this  
14 restraining order, and fundamentally whether D&T is  
15 entitled under any set of facts before you today,  
16 Your Honor, to recover this. And at that point, we  
17 certainly believe they are not.

18 THE COURT: All right. Mr. Sheedy?

19 MR. SHEEDY: I am going to try to limit myself  
20 in response to just the deposition transcript.

21 THE COURT: Then let me ask you a couple of  
22 questions. What is this June entry, June 8 entry  
23 in -- and I am not asking you to violate any  
24 attorney-client privilege, but explain that entry  
25 for me.

1 MR. SHEEDY: Your Honor, those were Phillip's,  
2 I believe. If Your Honor would like a refresher on  
3 that, I think Randy was a senior when you were a  
4 sophomore.

5 THE COURT: Doesn't matter if I know him or  
6 not.

7 MR. SHEEDY: Well, it probably does, in the  
8 sense that at the temporary injunction hearing on  
9 July 2, there was dialogue explaining to the court  
10 that Davis called Sam Applegate at Moore and Van  
11 Allen informing Sam that there was this  
12 restriction, and indicating that there was going to  
13 be some litigation as a result.

14 THE COURT: All right. I'm sorry. That's in  
15 the transcript?

16 MR. SHEEDY: That is in the temporary  
17 injunction hearing transcript dated July 2, 2012,  
18 Page 32.

19 THE COURT: Okay. Now and that -- sometime --  
20 and it pertains to this date?

21 MR. SHEEDY: Well, I got called on or about  
22 June 8 from Mr. Phillips --

23 THE COURT: So, Bayles had called --

24 MR. SHEEDY: Sam Applegate at Moore and Van  
25 Allen in Charleston.

1 THE COURT: -- pertaining to this issue, prior  
2 to anything happening?

3 MR. SHEEDY: Prior to anything even being  
4 filed, is my understanding.

5 THE COURT: And Moore and Van Allen represented  
6 the Defendant?

7 MR. SHEEDY: Well, actually, Moore and Van  
8 Allen was the closing attorneys on this, and Your  
9 Honor may recall that there are some issues of  
10 liability here. Mr. Phillips, who is the General  
11 Counsel at Moore and Van Allen, soon after Mr. Mack  
12 had had this conversation with Mr. Applegate,  
13 called me to run conflicts and to make sure that I  
14 was going to be available in the event that this  
15 mushroomed in to a contested injunction prior to  
16 July 4.

17 THE COURT: So the call from Mr. Mack resulted  
18 in the Defendant retaining you, and this telephone  
19 call on June 8 is the first inquiry about that?

20 MR. SHEEDY: Yes. I might modify that by  
21 saying it was Moore and Van Allen that recommended  
22 to D&T to retain me then.

23 THE COURT: But the point is that this phone  
24 call represents activity that had gone on before  
25 June 8, where the question of the restrictive

1 covenant was presented. And obviously, then D&T  
2 either had or was immediately going to have  
3 knowledge of that problem, at least by June 8?

4 MR. SHEEDY: Yes.

5 THE COURT: Okay.

6 MR. SHEEDY: I can't disagree with that, based  
7 on what I think is already in the record in this  
8 case.

9 THE COURT: Okay.

10 MR. SHEEDY: Rather than jump around and  
11 characterize things, I am just going to go to the  
12 transcript to make a few points in response to Mr.  
13 Ballou's factual characterizations.

14 THE COURT: All right.

15 MR. SHEEDY: Your Honor said the time is the  
16 fact question, and I think the testimony beginning  
17 on Page 14, Mr. Ruonala was asked questions about  
18 the stop-work order, and he says on Page 14 they  
19 came and picked up the stop-work order, and I  
20 b  
21 elieve by that, I don't know that they actually  
22 had a form that released them, but they needed a  
23 final inspection, and they did get paperwork the  
24 day we went back. (As read) "I know we received  
25 the inspection which they started because we were  
stopped short of our inspection on June 21."

1 Whether there's actually a piece of paper that  
2 releases, I don't know. So I think the facts  
3 establish the July 5 date. Your Honor, Mr. Ballou  
4 spoke briefly about the status of paint.

5 THE COURT: The status of what?

6 MR. SHEEDY: Of paint. It is my understanding,  
7 and I think the transcript supports, that there  
8 were a great many number of change orders to this  
9 AIA contract. On page 79 of the transcript, (As  
10 read) "Has D&T paid this invoice?" This is -- I am  
11 referring to --

12 THE COURT: I see it.

13 MR. SHEEDY: yeah. Answer, (As read) "That is  
14 part of an outstanding debt." That's a reference  
15 to the October 16 letter. (As read) "There is more  
16 owed by D&T?" Answer, (As read) "They owe me about  
17 200,000." Answer, (As read) "They still owe you  
18 monies on the building for all the other work that  
19 you did?" Answer, (As read) "That's correct."  
20 So I think the testimony is that of the \$200,000  
21 which is owed by D&T, 34,025 consists of these  
22 construction delays resulting from the imposition  
23 of the injunction.

24 THE COURT: But there are no change orders  
25 directly pertaining to these items?

1 MR. SHEEDY: I believe the -- I think Mr.  
2 Ballou stated it correctly, that the contractor  
3 considers the October 16 letter to be a change  
4 order that is owed. Over on Page -- I believe it's  
5 44. I asked this witness, (As read) "Now, total of  
6 additional costs related to the stop-work order,  
7 can you explain that?" That is the summary of  
8 Items 1,2,3 and 4 that we just discussed. 34,025.  
9 (As read) "Does this represent a sum that D&T owes  
10 to you?" (As read) "That's correct."  
11 (As read) "Have you requested that the sum be  
12 paid?" (As read) "I did. I have, sir."  
13 (As read) "And do you expect that this sum is going  
14 to be paid?" Answer, (As read) "I hope so."  
15 So I think that's the testimony with respect to the  
16 October 16 letter.

17 THE COURT: Okay.

18 MR. SHEEDY: I always thought a duty to  
19 mitigate was a construction -- was a contract  
20 concept rather than a tort concept; so I am not  
21 sure in this instance that the contractor owed any  
22 duty to the Plaintiffs with respect to mitigating  
23 damages on the bond, and I haven't seen any cases  
24 on that. So, I don't want to overstate --

25 THE COURT: Well, I have a related question

1 that has to do with the interaction of this sort of  
2 peculiar legal predicament. What about -- how, if  
3 at all, should the -- what caught my attention was  
4 the June 8 entry on your bill. How does the --  
5 does D&T's persistence in continuing the project  
6 after it had knowledge that there was a potential  
7 problem figure in to whether the damages were  
8 proximately caused by the TRO, if at all?

9 MR. SHEEDY: While it is true, as has now been  
10 litigated, the CO will not be issued until the  
11 restrictive covenant dispute is resolved, D&T found  
12 itself at the end of June, upon receipt of this  
13 order prohibiting construction activity, in a  
14 posture of having to stop construction on an  
15 ongoing project.

16 THE COURT: Well, couldn't they have stopped,  
17 though, at some time prior to June 8 when they knew  
18 there was a problem? Certainly, prior to June 21?

19 MR. SHEEDY: Here's the difficulty, and I think  
20 this was what was in --

21 THE COURT: I know they were trying to open by  
22 July 4; that was a big deal.

23 MR. SHEEDY: Absolutely. And, it was a big  
24 deal to the Plaintiff's not to allow that to occur.

25 THE COURT: That's just competing priorities,

1 isn't it?

2 MR. SHEEDY: Well, it is; that's what this is  
3 really all about, is competition.

4 THE COURT: That's right.

5 MR. SHEEDY: I lost my train of thought. We  
6 were talking about the restrictive covenant? Is  
7 that correct?

8 THE COURT: Well, you were saying that  
9 mitigation has no part in this framework, and my  
10 question was, I made a note about it, what about  
11 the Defendant, D&T's own negligence, or whatever  
12 you want to call it, in electing to go forward  
13 after it already had notice that there was a  
14 problem? Just in order to meet the July 4 payday?

15 MR. SHEEDY: Two answers. The first is, D&T  
16 apparently decided as a business matter to have a  
17 completed building while they had a mobilized  
18 contractor, even if it couldn't get a CO. It was  
19 better to finish the job than to leave the gutted  
20 interior in it's then-condition.

21 THE COURT: Okay.

22 MR. SHEEDY: In addition, and I don't think  
23 this is supported by the Ruonala testimony but we  
24 can supply this in prior transcripts, I think it's  
25 been represented to this Court that during this



1 period of time starting around June 8, after Bayles  
2 has called Sam Applegate, what D&T proceeded to do  
3 through Moore and Van Allen was, call Todd  
4 Mansfield, who is the CEO of Crescent, over and  
5 over and over again to try and get this restrictive  
6 covenant voluntarily lifted.

7 And the reality is, there was another issue  
8 going on with Paramount Carowinds and Crescent at  
9 the time. We ultimately, long after -- we got  
10 dismissed from this case, discovered that we were  
11 not going to be able to get that accomplished  
12 consensually, and now there is an acquired title  
13 and declaratory judgement action that has been  
14 filed across the street in the Clerk's Office.

15 So during this period of time it was believed,  
16 through communications with Todd Mansfield, that  
17 this restriction was going to go away and we were  
18 going to be able to open up, D&T was going to be  
19 able to open up for business.

20 THE COURT: All right. Which comes to the next  
21 question. Let's assume that it was reasonable to  
22 make a business decision to not have a partially-  
23 completed building sit there and deteriorate. Does  
24 it matter then that -- if you pull this period of  
25 time from the whole time period of construction,

1 they wouldn't have been through by July 4 anyway?  
2 MR. SHEEDY: Oh, I don't know the answer to that,  
3 and I don't think Rick Ruonala's deposition  
4 transcript clearly responds to that. There were  
5 changes in the scope of the work. I think Mr.  
6 Ballou has correctly pointed out that this project  
7 was running behind schedule because of some changes  
8 in the scope of the work. Whether or not it would  
9 have been completed by July 4 I don't know. I  
10 think that's beyond the transcript, beyond the  
11 evidence before Your Honor. I can't answer that.

12 THE COURT: Mr. Ballou, where did you get that  
13 information? I thought that was in some record we  
14 had.

15 MR. BALLOU: It is in his deposition --

16 THE COURT: Mr. Ruonala's deposition?

17 MR. BALLOU: In Ruonala's deposition, and I'll  
18 get you a page on it, Your Honor.

19 THE COURT: I've got the deposition. I'll read  
20 the whole thing.

21 MR. BALLOU: Well, he testified, I think his  
22 testimony was that he had overtime crews working  
23 for four more weeks, until the first week in  
24 August, after the stop-work order had been lifted.

25 THE COURT: Okay. That's all right. Go ahead,

1 Mr. Sheedy.

2 MR. SHEEDY: I made a comment about the  
3 applicability of the duty of mitigating in the  
4 context of claims against the bond because it looks  
5 to me like the case law, while we can analogize it  
6 to a tort-damages measure, there doesn't seem to be  
7 anything in the jurisprudence about an obligation  
8 on the part of third parties to be litigating the  
9 issuing injunctive relief of parties on any  
10 litigation --

11 THE COURT: You would say it's more like strict  
12 liability?

13 MR. SHEEDY: I think it is.

14 THE COURT: All right.

15 MR. SHEEDY: On foreseeability, I don't think  
16 the foreseeability that Mr. Ballou suggests is  
17 really appropriate either from the case law because  
18 the Plaintiff, the party that was seeking the  
19 injunction, isn't going to know exactly what the  
20 construction activity is of some third-party  
21 contractor. The cases instead are very careful to  
22 say the damages that result from the imposition of  
23 the prohibition.

24 A couple of more points. There is a \$925  
25 invoice.

1 THE COURT: All right.

2 MR. SHEEDY: Okay. I think Mr. Ballou  
3 indicated that Integrity Installations does not  
4 have a \$925 invoice; there is an exhibit for that  
5 amount --

6 THE COURT: To the deposition?

7 MR. SHEEDY: Yes. I think so.

8 THE COURT: All right.

9 MR. SHEEDY: In closing, I would say this.  
10 While I appreciate the argument, although I don't  
11 think it has merit, that D&T inflicted damages on  
12 itself, because of this injunction and for no other  
13 reason D&T found itself not able to continue with  
14 construction, and had to decide whether to  
15 demobilize or stay mobilized and made a decision,  
16 not knowing the amount of time that the prohibition  
17 would remain in effect, to remain mobile and to try  
18 and complete the construction because it was in  
19 midstream and it made sense to finish the job.

20 Plaintiffs have also said, as an overarching  
21 objection to this request, that it was folly for  
22 D&T to want to finish when it really couldn't get a  
23 CO. I think the dialogue between Your Honor and me  
24 already responds to that, that we had a project  
25 that was stopped not because we couldn't get a CO,

1 but because we had a TRO. That's the reason for  
2 the halting of the construction activity, and we  
3 felt that we needed to finish the construction in  
4 accordance with the contract, utilizing the GC and  
5 the subs that were already mobilized to do that  
6 work.

7 THE COURT: In other words, it had a right to  
8 finish the contract, in accordance with the  
9 contract; you just didn't have the right to occupy  
10 the property?

11 MR. SHEEDY: Yes. And based upon the --

12 THE COURT: Because they had a legit- -- Well,  
13 wasn't part of that statute, though, that they  
14 couldn't even have gotten a building permit, could  
15 they, though, without -- under the statute?

16 MR. SHEEDY: Well, I think they could, and they  
17 did and the statute has an exception in it for  
18 construction activity. And Your Honor may  
19 remember, that was really the basis why the TRO was  
20 dissolved, is that the prohibition of construction  
21 activities fell outside the limit of the statute,  
22 629-11-45.

23 THE COURT: All right.

24 MR. SHEEDY: So in short, while I understand  
25 the picking at my bill, and while I appreciate the

1 equal scrutiny given to the request for \$34,025,  
2 the fact remains inescapable that D&T mobilized  
3 legal counsel because it was sued and an injunction  
4 was imposed against it, and it had to have that  
5 injunction resolved, and that was the direct result  
6 of what the Plaintiffs sought in this case. And,  
7 that the contractor, who was in the middle of  
8 construction activity, was stopped for a period of  
9 time from doing that activity, and then was allowed  
10 to resume his work. And those are things that are  
11 a result because of this TRO, no matter how you  
12 spin it.

13 THE COURT: And that obviously presupposes that  
14 he had a right to continue his work whether or not  
15 he could occupy the property?

16 MR. SHEEDY: Which, according to Your Honor's  
17 prior relief, yes. Thank you.

18 THE COURT: Yes, sir.

19 MR. BALLOU: Your Honor, if I may, very  
20 briefly?

21 THE COURT: You may.

22 MR. BALLOU: This Court did instruct D&T that  
23 it could proceed at its own risk, recognizing this  
24 precise issue.

25 THE COURT: I understand.

1 MR. BALLOU: And this is not a typical delay  
2 damage as a result of the injunction, given the  
3 posture of D&T and its contractors and that kind of  
4 thing; but I think it is critical, and I made this  
5 point perhaps prematurely in response to the issue  
6 of whether or not there is any liability for a  
7 wrongful injunction, that the fact that no CO has  
8 or can be issued until this deed restriction  
9 question is resolved --

10 THE COURT: Yes, but if they were prohibited  
11 from doing something they had a right to do anyway  
12 --

13 MR. BALLOU: Well, that's right. And that's  
14 why I think the liability is a correct issue  
15 because that doesn't presuppose any kind of -- I  
16 mean, Mitchell says that they had a legal right to  
17 do it.

18 THE COURT: That's right.

19 MR. BALLOU: Now, but that does directly apply  
20 to whether or not there are proximally-caused  
21 damages that are attributable as a result of the  
22 TRO.

23 THE COURT: I disagree with that.

24 MR. BALLOU: So, I think that issue does  
25 absolutely apply to the question of their

1 entitlement to any recovery for the TRO.

2 THE COURT: Mr. Sheedy, you mentioned, starting  
3 out, a deposition page -- no. A transcript-page  
4 sequence, when you responded to Mr. Ballou. Can  
5 you just send me copies, scan and e-mail me copies  
6 of those pages? I don't have the transcript.

7 MR. SHEEDY: Yes. It was Page 32 of the  
8 transcript from the temporary injunction hearing,  
9 July 2, 2012, --

10 THE COURT: Okay.

11 MR. SHEEDY: -- and I would be happy to.

12 THE COURT: Okay. And Mr. Ballou, do you have  
13 something you think needs to be added on either end  
14 of that, you can e-mail me that, too. Just scan  
15 and e-mail me the pages; I don't need the whole  
16 thing.

17 MR. SHEEDY: Does Your Honor want a copy of the  
18 Rochester Blue Park case or the South Central  
19 Tennessee Railroad case? Those are cases outside  
20 the jurisdiction.

21 THE COURT: I don't think I -- think I'll stick  
22 with the State of South Carolina.

23 MR. SHEEDY: Thank you, Your Honor.

24 MR. BALLOU: Thank you.

25 THE COURT: Now, wait a minute. Mr. Kendree, I



1 didn't ask you if you had anything to add.

2 MR. KENDREE: Thank you, Your Honor. I do not.

3 THE COURT: All right. Thank you.

4 Whereupon - Hearing was concluded at 10:50

5 A.M.

Sonnenberg -vs- D&T Imports Hearing 1-16-13

William H. White  
Notary Public/Court Reporter

(Recorded audio retained fifteen days from date of  
certification unless otherwise requested.

Sonnenberg -vs- D&T Imports - Hearing 1-16-13

Dallas Reporting, Inc.

803-328-9640

ROA 000357

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTHTEENTH JUDICIAL CIRCUIT

Charles Sonnenberg, Festival Corp., )  
Phillip Pulley and Robert Foster )

C/A No. 2012-CP-46-02286

Plaintiffs,

v.

MOTION FOR TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY INJUNCTION

D&T Imports South Carolina, Inc., )  
A Nevada Corporation, d/b/a )  
Area 51 Fireworks, and York )  
County, a political subdivision of )  
the State of South Carolina )

Defendants.

FILED-RECEIVED  
2012 JUN 19 PM 2:51  
DAVID HAMILTON  
C.C. CP & G.S. SC  
YORK COUNTY, SC

Plaintiffs move for a Temporary Restraining Order and Preliminary Injunction pursuant to Rule 65 S.C. R. Civ. P. In support of this motion, Plaintiffs allege:

1. Defendant D&T Imports South Carolina, Inc. ("D&T Imports") is a Nevada corporation that is not registered to do business in South Carolina, but which nonetheless is transacting business in South Carolina and is the owner of real property located at 3620 Festival Drive, Fort Mill, York County, South Carolina (the "Subject Property").

2. Defendant York County is a governmental entity and political subdivision of the State of South Carolina, subject to the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code Section 6-29-310, et seq. (the "Act").

3. As set forth more fully in the Verified Complaint, which is attached hereto and incorporated herein by reference, D&T Imports is in the process of seeking approvals

from York County to open and operate a retail fireworks store on the Subject Property contrary to a deed restriction specifically prohibiting that activity (the "Deed Restriction"). D&T Imports has already obtained a building permit and/or other permits issued by York County over the existing Deed Restriction, in violation of S.C. Code Section 6-29-1145, of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (the "Act").

4. The Plaintiffs herein are the owner and tenants of an adjacent parcel and are "other property holders" under the Act that have provided actual notice of the Deed Restriction to York County. Moreover, York County has actual notice of the Deed Restriction through other means. As "other property holders," Plaintiffs are entitled to withhold consent to release the Deed Restriction, and York County must not issue any further permits over the Deed Restriction without obtaining a release from the Plaintiffs. S.C. Code 6-29-1145(A)(3).

5. The requested relief is reasonably necessary to protect the Plaintiffs' legal rights pending a trial on the merits of this action. D&T Imports has sought and obtained building plan approval from York County officials and intends to open its retail fireworks store on or before July 4, 2012, the busiest season of the year for fireworks sales, which will cause immediate and irreparable harm to the Plaintiffs' businesses.

6. Plaintiffs are likely to succeed on the merits of their claims, as shown more fully hereinabove. The Act clearly prohibits the issuance of permits while the Deed Restriction remains in effect.

7. No adequate remedy at law exists to redress D&T Imports' breach of the Deed Restriction or to redress York County's issuance of permits over the Deed Restrictions in violation of Section 6-29-1145 of the Act.

8. Plaintiffs are entitled to immediate injunctive relief, and are reasonably likely to prevail on the merits.

9. Defendants will suffer no harm if an injunction is granted, while Plaintiffs will suffer immediate and potentially irreparable harm if an injunction is not granted.

10. Upon information and belief, D&T Imports has requested a release of the Deed Restriction from Crescent Resources, LLC ("Crescent"), the entity that originally created the Deed Restriction in conveying the Subject Property to a prior owner. Irrespective of whether Crescent releases the Deed Restriction, the Plaintiffs are entitled to enforce it under the Act and otherwise, as set forth more fully in the Verified Complaint.

11. Because of the nature and immediacy of D&T Imports' plans to open and operate a retail fireworks store on the subject property contrary to the Deed Restriction, and its attempt to obtain a release of the Deed Restriction from Crescent Resources, LLC, Plaintiffs believe that a temporary restraining order is appropriate. Plaintiffs will suffer immediate and irreparable injury, loss or damage before notice can be served on Defendants and a hearing held.

This motion is supported by the Verified Complaint filed herewith in support of this motion. Plaintiffs tender security in the sum of \$250.00, or such amount as the Court deems appropriate for the payment of such costs and damages Defendants may incur as the result of a temporary restraining order.

June 19, 2012

  
Daniel J. Ballou  
HAMILTON MARTENS & BALLOU, LLC  
Post Office Box 10940  
Rock Hill, South Carolina 29731  
803/329-7672

ATTORNEYS FOR PLAINTIFFS  
PHILLIP PULLEY AND ROBERT FOSTER

B. Bayles Mack  
MACK & MACK  
101 Allison Street  
Fort Mill, South Carolina 29715

ATTORNEYS FOR PLAINTIFFS CHARLES  
SONNENBERG & FESTIVAL CORP.

4836-8850-8687, v. 1

STATE OF SOUTH CAROLINA )

COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

Charles Sonnenberg, Festival Corp., Phillip )  
Pulley and Robert Foster, )

Plaintiffs, )

vs. )

D&T Imports South Carolina, Inc., d/b/a )  
Area 51 Fireworks, and York County, )  
South Carolina, )

Defendants. )

Case No. 2012-CP-46-2286

(Scheduling Priority)

**NOTICE OF AND MOTION TO  
DISSOLVE *EX PARTE* TRO AGAINST D&T**

**To: Plaintiffs and their counsel, B. Bayles Mack, Esq. and Daniel J. Ballou, Esq.**

**PLEASE TAKE NOTICE** that defendant D&T Imports South Carolina, Inc., d/b/a Area 51 Fireworks, (D&T), through its undersigned counsel, hereby moves, as soon as it may be heard, for entry of an order dissolving pursuant to Rule 65, SCRPC, the *ex parte* temporary restraining order entered against it. In support of this Motion, D&T respectfully submits as follows.

1. On June 21, 2012, the Court entered an *ex parte* Order Granting Injunctive Relief (the "TRO") enjoining York County from issuing any further permits or taking any other administrative action on the applications of D&T to develop the Subject Property (as defined therein), and enjoining D&T from renovating, building, upfitting or constructing the Subject Property for the purpose of selling fireworks. (Order, p.4).

Plaintiffs are a property owner and the lessor and lessees of property that is adjacent to D&T's property. They do not own D&T's property, nor are they in the chain of title to such property. As the Verified Complaint alleges, to the extent there is a deed restriction that encumbers D&T's property, that restriction does not extend to Plaintiffs' property, as they operate a fireworks business there. (Verified Complaint, p.3, ¶ 10). As such, Plaintiffs do not have standing to enforce the deed restriction, nor do they have a right to enforce a negative reciprocal easement, as their own property is not so encumbered.

For example, in *Bomar v. Echols*, 270 S.C. 676, 679-80, 244 S.E.2d 308, 310 (1978), the South Carolina Supreme Court held that a property owner who wished to develop his tract into a mobile home subdivision was not prohibited from doing so because adjacent property owners purchased their lots subject to restrictions prohibiting any use other than residential use, because the adjacent property owners could not demonstrate all of the following elements required to assert a reciprocal negative easement: (1) a common grantor; (2) a designation of the land or tract subject to restrictions; (3) a general plan or scheme of restriction in existence for the designated land or tract; and (4) the restrictive covenants were intended to run with the land. Most importantly, the adjacent property owners failed to show a "general plan or scheme of restriction." *Id.* at 681, 244 S.E.2d at 311. See also *Marathon Finance Co. v. HHC Liquidation Corp.*, 325 S.C. 589, 483 S.E.2d 757 (Cl. App. 1997) (General plan or scheme is a necessary element to establish a negative reciprocal easement.).

Similarly, in *McLeod v. Baptiste*, 315 S.C. 246, 433 S.E.2d 834 (1993), the South Carolina Supreme Court was asked to determine whether or not the original grantor of a restrictive covenant



had standing to enforce that covenant against a remote grantee when the grantor no longer owned any real property that would be benefitted by its enforcement. The Court held that the grantor lacked standing to enforce the covenant against the remote grantee since the grantor no longer owned real property that would benefit from the enforcement of that restrictive covenant. *Id.* at 247, 433 S.E.2d at 835. *See also, Charming v. J.P. Scurry & Co., Inc.*, 296 S.C. 312, 372 S.E.2d 120 (S.C. App. 1988) (grantor did nothing to affirm or reaffirm at any point that the covenant was to run with the plaintiff's land or for his benefit).

S.C. Code Ann. § 6-29-1145(B) (2007) (Emphasis added.) provides as follows:

If a local planning agency has actual notice of a restrictive covenant on a tract or parcel of land that is contrary to, conflicts with, or prohibits the permitted activity; ....(3) from any other source including, but not limited to, **other property holders**, the local planning agency must not issue the permit unless the local planning agency receives confirmation from the applicant **that the restrictive covenant has been released for the tract or parcel of land by action of the appropriate authority or property holders or by court order.**

South Carolina counties interpret the term "other property holders" to mean those who are similarly bound by the restrictive covenants and not (as in this case) an adjacent property owner who is not so bound. In a Technical Bulletin, the South Carolina Association of Counties interpreted the Statute in this manner, noting that "Section 6-29-1145(B)(3) states that the waiver can be by action of the other property holders subject to the covenant or by court order."<sup>2</sup> (Emphasis added.). Here, Plaintiffs acknowledge that the deed restriction on D&T's property does not extend to their own property. As such, they cannot establish the likelihood of success necessary for this Court to take

<sup>2</sup> South Carolina Association of Counties Technical Bulletin, "2007 Legislative Changes Related to Land Use and Planning" FN (Aug. 8, 2007) (<http://www.sccounties.org/legislation/bulletins/2007.aspx#Aug8>)

the "drastic" step of stopping D&T from conducting its business. This is yet another reason why the TRO should be dissolved.

**WHEREFORE**, for the foregoing five reasons, any one of which is sufficient and compelling, D&T requests that the TRO be dissolved.

Date: 6/25/12

DRISCOLL SHEEDY, P.A.

By: J. W. Sheedy

James W. Sheedy  
Susan E. Driscoll  
11520 N. Community House Road  
Suite 200  
Charlotte, N.C. 28277  
Telephone - (704) 341-2101  
Facsimile - (704) 341-2105  
jimsheedy@driscollsheedy.com  
sdriscoll@driscollsheedy.com

MOORE & VAN ALLEN, PLLC

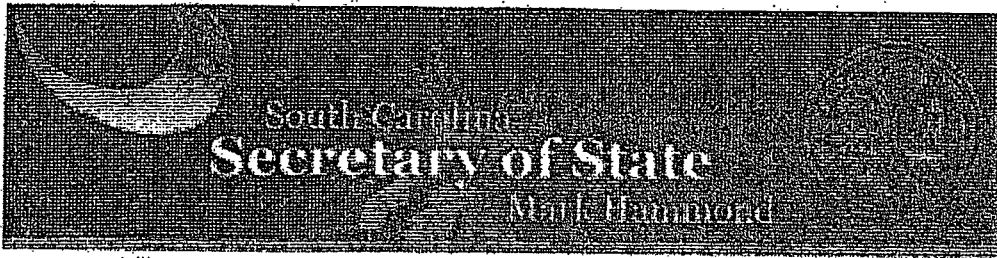
By: R. B. Sumner, IV

Robert B. Sumner, IV (#71728)  
Douglas M. Muller (#10277)  
40 Calhoun Street, Suite 300  
Post Office Box 22828  
Charleston, SC 29401  
Telephone: (843) 579-7018  
Facsimile: (843) 579-8743  
robertsumner@mvalaw.com  
dougmmuller@mvalaw.com

ATTORNEYS FOR D&T

TAB A

ROA 000366

**D&T IMPORTS SOUTH CAROLINA, INC.**

*Note: This online database was last updated on 6/24/2012 6:01:31 PM.  
See our Disclaimer.*

**DOMESTIC / FOREIGN:**

Foreign

**STATUS:**

Good Standing

**STATE OF INCORPORATION**

NEVADA

**ORGANIZATION:**

Profit

**REGISTERED AGENT INFORMATION****REGISTERED AGENT NAME:**

PARACORP INCORPORATED

**ADDRESS:**

2 OFFICE PARK CT

**CITY:**

COLUMBA

**STATE:**

SC

**ZIP:**

29223

**SECOND ADDRESS:**

STE 103

**FILE DATE:**

06/04/2012

**EFFECTIVE DATE:**

06/04/2012

**DISSOLVED DATE:**

N/A

**Corporation History Records**

| CODE      | FILE DATE  | COMMENT   | Document |
|-----------|------------|-----------|----------|
| Authority | 06/04/2012 | AUTHORITY |          |

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.

Physical Address: Edgar Brown Building - 1205 Pendleton Street Suite 525 Columbia, SC 29201

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTHTEENTH JUDICIAL CIRCUIT

Charles Sonnenberg, Festival Corp., )  
Phillip Pulley and Robert Foster )

C/A No. 2012-CP-46-2286

**COPY**

Plaintiffs,

v.

**RESPONSE TO MOTION TO  
DISSOLVE EX PARTE TRO**

D&T Imports South Carolina, Inc., )  
A Nevada Corporation, d/b/a )  
Area 51 Fireworks, and York )  
County, a political subdivision of )  
the State of South Carolina )

Defendants.

FILED-RECEIVED  
2012 JUN 28 AM 9:12  
DAVID HAMILTON  
C.C.P. & S.S.  
YORK COUNTY, SC

Plaintiffs respond to the Motion of Defendant D&T Imports South Carolina, Inc.

("D&T") to Dissolve Ex Parte TRO as follows:

**PROCEDURAL BACKGROUND**

This action involves an attempt by D&T to develop a parcel of real estate in York County in a manner that is specifically prohibited by deed restrictions recorded in its chain of title by a predecessor in interest. The relevant facts as set forth in the Verified Complaint are wholly uncontested by D&T in either its Motion or the Affidavit of Douglas A. Cianfrocca, and establish:

1. that the property located at 3620 Festival Drive in Fort Mill, South Carolina ("Property"), was originally owned by Crescent Resources, LLC ("Crescent"), which sold it on or about June 14, 2005 to Randazzo Properties, LLC ("Randazzo");

2. that the deeds conveying the Property from Crescent to Randazzo contain a specific covenant and restriction prohibiting the sale of fireworks or the operation of a bingo parlor or other similar recreation facility on the Property ("Deed Restriction");
3. that Randazzo lost the Property in foreclosure to TD Bank, which acquired it pursuant to a Master in Equity Deed dated May 23, 2011;
4. that D&T purchased the Property on or about April 6, 2012; and
5. that D&T purchased the Property with actual or constructive notice that that the Property is burdened with the Deed Restriction. Neither the Motion nor the Cianfrocca Affidavit deny that D&T had knowledge of the existence of the Deed Restriction.

Although not a party to private deed restrictions, York County is subject to the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (the "Enabling Act"), which requires, as part of the local government permitting process, that the County inquire as to whether a "parcel of land is restricted by any recorded covenant that is contrary to, conflicts with or prohibits the permitted activity." S.C. Code Sec. 6-29-1145(A). Accordingly, and as reflected by the official records of the York County Planning Department, the County's permit application form asks the applicant "Is this parcel of land restricted by any recorded covenant that is contrary to, conflicts with or prohibits the activity that is being applied for?" Twice in response to this question, on April 27, 2012, and again on May 22, 2012, D&T failed to respond at all. See Affidavit of Stephen Allen, with relevant records attached hereto as Exhibit "A."

D&T's omission of fact is particularly significant because the Enabling Act specifically prohibits the County from issuing any permits to an applicant if it has notice

of a conflicting covenant burdening the subject property. S.C. Code Sec. 6-29-1145(B)(3). However, despite the fact that D&T failed to answer the question regarding the existence of the Deed Restriction, for unknown reasons D&T obtained demolition and construction permits to proceed with the renovation and upfitting of the Property to sell fireworks in April and May of 2012.

Once D&T began work on the Property, a number of neighboring property owners including the Plaintiffs contacted York County to notify it of the existence of the Deed Restriction. York County then notified D&T that it could not issue any further permits or a certificate of occupancy unless D&T could satisfy the requirements of Section 6-29-1145(B)(3) by providing written proof that the Deed Restriction had been waived or released.

Because D&T had construction crews actively working on the Property with the apparent intent to open in time for the July 4<sup>th</sup> holiday, and because permits had already been issued by York County without release of the Deed Restriction, Plaintiffs were compelled to file suit and to seek an order temporarily restraining further permitting or work on the Property. At the time the Verified Complaint was filed, the South Carolina Secretary of State's office reported no record that D&T had registered to do business in this state, and therefore service of the Verified Complaint was perfected upon the Secretary of State pursuant to law. Plaintiffs have no reason to doubt that D&T registered to do business in this state on or about June 4, 2012, except for the fact that the Secretary of State's office reported no such record on June 19.

On June 21, 2012, this Court issued a Temporary Restraining Order ("TRO") halting all further activity on the Property by D&T and temporarily enjoining York

County from issuing any further permits or approvals. On June 25, 2012, D&T filed the Motion seeking to dissolve the TRO.

### ARGUMENT

#### **1. Bond**

D&T first argues that the TRO should be dissolved because the Court did not require a bond in its order. While Plaintiffs formally proposed to tender a \$250.00 bond in their Motion for Injunctive Relief, Plaintiffs acknowledge that the TRO itself does not specify the amount of security to be required. Nevertheless, the failure to require the posting of a bond is not a jurisdictional defect in the issuance of the TRO, and the Court is free to amend its order to require execution of a sufficient bond. AJG Holdings, LLC v. Dunn, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (Ct. App. 2009).

The amount of the bond to be required is a matter to be left to the discretion of the court under Rule 65(c), "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Here, the basis for the TRO was D&T's attempt to ignore the requirement of providing proof of release of the Deed Restriction under Section 6-29-1145, and the fact that York County had issued permits in spite of the prohibition under that statute. York County concedes that permits were in fact issued despite the County having actual notice of the Deed Restriction, and without obtaining proof of release. Since D&T has not complied with the requirements of 6-29-1145, it has not been harmed in any way, and the amount of security required should be minimal. So too, York County has not argued for an increased bond, and have consented to the entry of the TRO.



## **2. Restraint of General and Ordinary Business**

D&T next argues that the TRO should be dissolved because it was issued *ex parte* and suspends D&T's general and ordinary business. As indicated in the documents filed by D&T with York County, D&T is not in the general and ordinary business of upfitting or renovating commercial buildings, but rather sells fireworks under the name Area 51 Fireworks. D&T specifically hired contractors to perform the work required to upfit and renovate the Property, but D&T cannot legally engage in its general and ordinary business until such time as it obtains the proper permits from York County. Since it cannot obtain those permits until it complies with S.C. Code Sec. 6-29-1145, it is not engaging in any business that can be suspended. Clearly, the TRO suspends the activities required of D&T as a prerequisite to it doing business, but since it cannot yet legally do business, there has been no improper *ex parte* suspension.

## **3. Irreparable Injury**

D&T also contends that the Verified Complaint and TRO insufficiently explain why the injury that Plaintiffs contend will occur is irreparable, yet at the same time asserts that it will suffer financial harm by not being able to open for business on or before June 28, 2012. Cianfrocca Affidavit, ¶4. To be clear, it is undisputed that the July 4<sup>th</sup> holiday is the source of substantial sales in the retail fireworks business, and Plaintiffs agree that a substantial portion of the revenues generated occur between the middle of June and July 4<sup>th</sup>. Also apparent is the fact that D&T had omitted material information from its permit applications to York County that may have triggered delays beyond the July 4<sup>th</sup> season, and was frenetically working to obtain a certificate of occupancy before the Deed Restriction became an issue. Additionally, as set forth in the

Affidavit of Ryland Kieffer, allowing D&T to operate a retail fireworks store over the Deed Restriction, when Plaintiffs have relied on the Deed Restriction in making long term business commitments, will have substantial financial consequences and threaten the existence of Pulley and Foster's business. Se Exhibit "B," attached hereto.

So too, the fact that D&T had been rushing to quickly open Area 51 for business raised the possibility that it would claim it had already invested money in the attempt, and would be harmed by not being allowed to open. The Cianfrocca Affidavit confirms this strategy, as D&T now argues that if it is not allowed to open on June 28, 2012, it will suffer lost profits, risk default on loans and be unable to sell inventory it has purchased in anticipation of being open. *Ex parte* relief was therefore justified, and preserves the status quo while the Court is allowed to consider the merits of the parties' positions. Moreover, the Court's Order insures that York County complies with the mandate under 6-29-1145 not to issue any permits or authorizations over the Deed Restriction.

Our Supreme Court has held that the key questions of irreparable harm and inadequate remedy at law subsume a balancing of equities, which in this case favors maintaining the status quo established by the Order. Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 587 694 S.E.2d 15, 17 (2010). By failing to disclose the existence of the Deed Restriction in the permit applications, and proceeding with development of the Property in a manner prohibited by the Deed Restriction, D&T comes into this Court with unclean hands, and cannot claim damages resulting from their own acts and omissions.

#### 4. Enforcement of the Deed Restriction

Finally, D&T argues that Plaintiffs have no right to object to the issuance of permits under S.C. Code Sec. 6-29-1145. Mixing case law concerning private claims for enforcement of restrictive covenants with non-binding commentary from the South Carolina Association of Counties ("SCAC"), D&T ignores the fact that the Enabling Act creates an administrative requirement separate and apart from a civil action to enforce a deed restriction generally. In both cases, however, property owners other than D&T have a say in the process.

The requirements of Section 6-29-1145 are straightforward. When D&T sought permission to remodel the Property to open Area 51 Fireworks, it was required to answer a simple question: was the Property subject to a covenant that prohibited the proposed use? This question created a dilemma for D&T. In light of the existence of the Deed Restriction in D&T's chain of title, it could not truthfully answer "no." However, if it answered "yes," the Enabling Act prohibited York County from issuing any permits until a release or court order could be procured, endangering D&T's schedule to open in time for the July 4<sup>th</sup> season. Instead, D&T left this question blank, and for unknown reasons, it was nonetheless issued permits for demolition and remodeling on the Property. In seeking *ex parte* injunctive relief, the Plaintiffs simply sought to preserve the status quo and to prevent further authorizations to be issued in violation of S.C. Code Sec. 6-29-1145.

D&T relies on SCAC commentary as authority for interpreting the Enabling Act when no interpretation is needed. See Exhibit "C," attached hereto. The language used by the General Assembly does not limit "other property holders" to mean only those

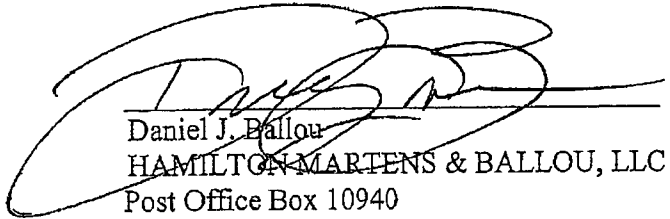
property holders who are similarly bound by the covenant. Had the Legislature intended to so limit the scope of the statute, it could have done so, but it did not. So too, the Enabling Act provides that the County "must not issue a permit" if it has actual notice of a covenant from "any other source, including but not limited to other property holders." S.C. Code Sec. 6-29-1145(B)(3). Once the County has actual notice of the Deed Restriction, even the SCAC agrees that the burden is placed squarely upon D&T (and not the County or other property holders) to prove that the restriction has been waived or is no longer valid. Until such proof is provided, and the County issues permits in compliance with the Enabling Act, D&T has no right to conduct business contrary to the Deed Restriction.

It seems clear that D&T believed it was easier to beg forgiveness than to seek permission, but its strategy came with risks, as apparently set forth in the Cianfrocca Affidavit. Whatever losses it claims it will suffer because of delays are the result of its own actions. Now that its progress in disregard of the Deed Restriction has been halted, it cannot complain to have been damaged because it failed to carry the administrative burden placed upon it by the Enabling Act.

### CONCLUSION

A decision to dissolve an injunction or restraining order rests in the sound discretion of the Court. None of the factors cited by D&T justify any alteration of the Court's Order, and Plaintiffs request that the Order temporarily restraining D&T be converted into a preliminary injunction pending resolution of the merits of the case.

June 27, 2012



Daniel J. Ballou  
HAMILTON MARTENS & BALLOU, LLC  
Post Office Box 10940  
Rock Hill, South Carolina 29731  
803/329-7672

ATTORNEYS FOR PLAINTIFFS  
PHILLIP PULLEY AND ROBERT FOSTER

B. Bayles Mack  
MACK & MACK  
101 Allison Street  
Fort Mill, South Carolina 29715

ATTORNEYS FOR PLAINTIFFS CHARLES  
SONNENBERG & FESTIVAL CORP.

EXHIBIT

A

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTHTEENTH JUDICIAL CIRCUIT

Charles Sonnenberg, Festival Corp., )  
Phillip Pulley and Robert Foster, )  
Plaintiffs, )

C/A No. 2012-CP-46-2286

v. )

RECORDS CUSTODIAN AFFIDAVIT

D&T Imports South Carolina, Inc., )  
A Nevada Corporation, d/b/a )  
Area 51 Fireworks, and York )  
County, a political subdivision of )  
the State of South Carolina )  
Defendants. )

FILED-RECEIVED  
2012 JUN 26 PM 12:13  
DAVID HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, SC

The undersigned, being duly sworn, state as follows:

1. My name is Stephen Allen. I am Planning Services Manager for York County, South Carolina ("York County"), and am familiar with and act as a custodian of the official planning and development records for York County.
2. Attached to this affidavit are true and correct copies of the applications of D&T Imports South Carolina, Inc. regarding its requests for permits to develop the property located at 3620 Festival Drive, Fort Mill, South Carolina. These records were requested by counsel for the Plaintiffs in the above action pursuant to a written request under the South Carolina Freedom of Information Act, S.C. Code Sec. 30-4-10, et seq.
3. The attached records were kept in the course of the regularly conducted business activity of York County and were prepared and maintained as a regular practice and custom.
4. The attached records were prepared by or maintained by York County personnel in the ordinary course of business at or near the time of the act, condition, or event,

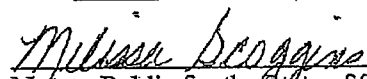
ROA 000377

reported thereon, and by a person or persons with knowledge of and a business duty to record or transmit those matters.

FURTHER AFFIANT SAYETH NOT.

  
Stephen Allen

Sworn to and subscribed before me  
This 25<sup>th</sup> day of June, 2012.

  
Notary Public for the State of South Carolina  
My Commission Expires: July 28, 2014



## COMMERCIAL BUILDING PERMIT APPLICATION

Permit #(office use) \_\_\_\_\_

Permit Cost \_\_\_\_\_

Plan Review# \_\_\_\_\_

Plan Review Project Name: Area 51 Fireworks Date Submitted: \_\_\_\_\_Project Address: 3620 Festival Dr. Fort Mill, SC Zip \_\_\_\_\_ Suite# \_\_\_\_\_Description of Work: Remodel/Alteration SC

\* Please allow 1-2 days for processing of permit once plans have been approved

\* New Building must provide Well/Septic Approval or tap fee verification

\* Permits requiring site plan approval cannot be issued until site plans are approved

## GENERAL CONTRACTOR INFORMATION:

Company: TLR Construction Co.  
GC License#: 115561  
Phone: 843 230-3713 / 843 458-2283  
E-mail: rick.ruonale@tlr-construction.comPLUMBING CONTRACTOR INFORMATION: TBDCompany: \_\_\_\_\_  
License#: \_\_\_\_\_  
Phone: \_\_\_\_\_  
E-mail: \_\_\_\_\_

## MECHANICAL CONTRACTOR INFORMATION:

Company: Melton Heating and Cooling  
GC License#: M 108071  
Phone: 843-236-8030  
E-mail: tlx15m@meltonheating-cooling.com

## ELECTRICAL CONTRACTOR INFORMATION:

Company: Melton Electric Co.  
GC License#: A 282182  
Phone: 843-236-8030  
E-mail: larrym@meltonelectric-sc.com

## APPLICANT INFORMATION:

Name: Rick Ruonale Address: \_\_\_\_\_  
Phone: 843 458-2283 E-mail: rick.ruonale@tlr-constructionProject Contract Amount: 350,000Gross Building Area 11,798 sq/ft

|                       | Existing sq/ft | New/vpft sq/ft | Sub total     |
|-----------------------|----------------|----------------|---------------|
| 4 <sup>th</sup> floor | _____          | _____          | _____         |
| 3 <sup>rd</sup> floor | _____          | _____          | _____         |
| 2nd floor             | _____          | _____          | _____         |
| Mezzanine             | _____          | _____          | _____         |
| 1 <sup>st</sup> floor | <u>11,798</u>  | <u>0</u>       | <u>11,798</u> |
| Basement              | _____          | _____          | _____         |
| Total:                | <u>11,798</u>  | <u>0</u>       | <u>11,798</u> |

## PERMIT TYPE:

☒ Existing Building with interior additions (Remodel)  
\*\*\*uplifts require copy of contract\*\*\*☐ New Building with no interior additions (shell)☐ New Building with completed interior☐ Exterior Addition to existing building☐ Electrical☐ Mechanical☐ Plumbing

Other \_\_\_\_\_

\*\*\*Acknowledgement of SC 6-29-1145\*\*\* Is this parcel of land is restricted by any recorded covenant that is contrary to, conflicts with, or prohibits the activity that is being applied for?

Rick Ruonale  
Print Applicant/Agent Name  
Property Owner(s)Rick Ruonale  
Applicant/ Agent Signature4/27/12  
DateDoug Cianfrocca  
Print Property Owner NameDoug Cianfrocca  
Property Owner Signature4/27/12  
Date

ROA 000379





\*Stop Work Order\*

Permit #(office use) \_\_\_\_\_  
Permit Cost \_\_\_\_\_  
Plan Review# \_\_\_\_\_

### COMMERCIAL BUILDING PERMIT APPLICATION

double fees

Plan Review Project Name: Area 51 Fireworks Date Submitted: \_\_\_\_\_

Project Address: 3620 Festival Dr. Fort Mill, SC Zip: \_\_\_\_\_ Suite#: \_\_\_\_\_

Description of Work: Remodel/Alteration

\* Please allow 1-2 days for processing of permit once plans have been approved

\* New Building must provide Well/Septic Approval or tap fee verification

\* Permits requiring site plan approval cannot be issued until site plans are approved

#### GENERAL CONTRACTOR INFORMATION:

Company: TLR Construction Co.  
GC License#: 115561  
Phone: 843 230-3713 / 843 458-2283  
E-mail: rick.ruonale@tlr-construction.com

#### PLUMBING CONTRACTOR INFORMATION: TBD

Company: \_\_\_\_\_  
License#: \_\_\_\_\_  
Phone: \_\_\_\_\_  
E-mail: \_\_\_\_\_

#### MECHANICAL CONTRACTOR INFORMATION:

Company: Melton Heating and Cooling  
GC License#: M 108071  
Phone: 843-236-8080  
E-mail: tlx15m@meltonheating-cooling.com

#### ELECTRICAL CONTRACTOR INFORMATION:

Company: Melton Electric Co.  
GC License#: M 2182  
Phone: 843-236-8030  
E-mail: larrym@meltonelectric-sc.com

#### APPLICANT INFORMATION:

Name: Rick Ruonale Address: \_\_\_\_\_  
Phone: 843 458-2283 E-mail: rick.ruonale@tlr-construction.com

|                          |                     |                |               |
|--------------------------|---------------------|----------------|---------------|
| Project Contract Amount: | <u>350,000</u>      |                |               |
| Gross Building Area      | <u>11,798</u> sq/ft |                |               |
|                          | Existing sq/ft      | New/uplt sq/ft | Sub total     |
| 4 <sup>th</sup> floor    | _____               | _____          | _____         |
| 3 <sup>rd</sup> floor    | _____               | _____          | _____         |
| 2nd floor                | _____               | _____          | _____         |
| Mezzanine                | _____               | _____          | _____         |
| 1 <sup>st</sup> floor    | <u>11,798</u>       | <u>0</u>       | <u>11,798</u> |
| Basement                 | _____               | _____          | _____         |
| Total:                   | <u>11,798</u>       | <u>0</u>       | <u>11,798</u> |

#### PERMIT TYPE:

☒ Existing Building with interior additions (uplt) (Remodel)  
\*\*\*uplts require copy of contract\*\*\*

☐ New Building with no interior additions (shell)

☐ New Building with completed interior

☐ Exterior Addition to existing building

☐ Electrical

☐ Mechanical

☐ Plumbing

Other \_\_\_\_\_

\*\*\*Acknowledgement of SC 6-29-1145\*\*\* Is this parcel of land is restricted by any recorded covenant that is contrary to, conflicts with, or prohibits the activity that is being applied for?

Rick Ruonale  
Print Applicant/Agent Name  
Property Owner(s)

Rick Ruonale  
Applicant/ Agent Signature

4/27/12  
Date

Doug Cian Procca  
Print Property Owner Name

Doug Cian Procca  
Property Owner Signature

4/27/12  
Date

ROA 000380

**York County**  
south carolina

Project #

20120100-0

Permit #(office use) 121318

Permit Cost ~~1400.00~~

Plan Review#

3820.00

COMMERCIAL BUILDING PERMIT APPLICATION

Plan Review Project Name: Area 51 Fireworks Date Submitted: \_\_\_\_\_

Project Address: 3620 Festival Dr, Fort Mill, SC Zip \_\_\_\_\_ Suite# \_\_\_\_\_

Description of Work: Remodel/Alteration

\* Please allow 1-2 days for processing of permit once plans have been approved

\* New Building must provide Well/Septic Approval or tap fee verification

\* Permits requiring site plan approval cannot be issued until site plans are approved

GENERAL CONTRACTOR INFORMATION:

Company: TLR Construction Co.  
GC License#: 115561  
Phone: 843-236-3713 / 843-458-2283  
E-mail: rick.ruonala@tlr-construction.com

PLUMBING CONTRACTOR INFORMATION: TBD

Company: \_\_\_\_\_  
License#: \_\_\_\_\_  
Phone: \_\_\_\_\_  
E-mail: \_\_\_\_\_

MECHANICAL CONTRACTOR INFORMATION:

Company: Melton Heating and Cooling  
GC License#: M # 108071  
Phone: 843-236-8030  
E-mail: tlx15m@meltonheating-cooling.com

ELECTRICAL CONTRACTOR INFORMATION:

Company: Melton Electric Co.  
GC License#: M # 2182  
Phone: 843-236-8030  
E-mail: larrym@meltonelectric-sc.com

APPLICANT INFORMATION:

Name: Rick Ruonala Address: \_\_\_\_\_  
Phone: 843-458-2283 E-mail: rick.ruonala@tlr-construction.com

Project Contract Amount: 350,000

Gross Building Area 11,798 sq/ft

|                       | Existing sq/ft | New/upfit sq/ft | Sub total     |
|-----------------------|----------------|-----------------|---------------|
| 4 <sup>th</sup> floor | _____          | _____           | _____         |
| 3 <sup>rd</sup> floor | _____          | _____           | _____         |
| 2nd floor             | _____          | _____           | _____         |
| Mezzanine             | _____          | _____           | _____         |
| 1 <sup>st</sup> floor | <u>11,798</u>  | <u>0</u>        | <u>11,798</u> |
| Basement              | _____          | _____           | _____         |
| Total:                | <u>11,798</u>  | <u>0</u>        | <u>11,798</u> |

PERMIT TYPE:

- ☒ Existing Building with interior additions (use) (Remodel)  
\*\*\*upfits require copy of contract\*\*\*
- ☐ New Building with no interior additions (shell)
- ☐ New Building with completed interior
- ☐ Exterior Addition to existing building
- ☐ Electrical
- ☐ Mechanical
- ☐ Plumbing
- Other \_\_\_\_\_

\*\*\*Acknowledgement of SC 6-29-1145\*\*\* Is this parcel of land restricted by any recorded covenant that is contrary to, conflicts with, or prohibits the activity that is being applied for? Yes

Rick Ruonala  
Print Applicant/Agent Name  
Property Owner(s)

Rick Ruonala  
Applicant/ Agent Signature

4/27/12  
Date

Doug Cianfrocca  
Print Property Owner Name

Doug Cianfrocca  
Property Owner Signature

4/27/12  
Date

ROA 000381



Permit #(office use) 12/249  
Permit Cost \_\_\_\_\_  
Plan Review# \_\_\_\_\_

### COMMERCIAL BUILDING PERMIT APPLICATION

Plan Review Project Name: AREA 51 FIREWORKS Date Submitted: \_\_\_\_\_  
Project Address: 3620 FESTIVAL DR Zip \_\_\_\_\_ Suite# \_\_\_\_\_

Description of Work: Alteration

- \* Please allow 1-2 days for processing of permit once plans have been approved
- \* New Building must provide Well/Septic Approval or tap fee verification
- \* Permits requiring site plan approval cannot be issued until site plans are approved

| GENERAL CONTRACTOR INFORMATION:                  | PLUMBING CONTRACTOR INFORMATION: |
|--------------------------------------------------|----------------------------------|
| Company: <u>TLR Construction Co</u>              | Company: _____                   |
| GC License#: <u>115561</u>                       | License#: _____                  |
| Phone: <u>843 458-2283</u>                       | Phone: _____                     |
| E-mail: <u>RICK.RUONALA@TLR-CONSTRUCTION.COM</u> | E-mail: _____                    |

| MECHANICAL CONTRACTOR INFORMATION: | ELECTRICAL CONTRACTOR INFORMATION: |
|------------------------------------|------------------------------------|
| Company: _____                     | Company: _____                     |
| GC License#: _____                 | GC License#: _____                 |
| Phone: _____                       | Phone: _____                       |
| E-mail: _____                      | E-mail: _____                      |

| APPLICANT INFORMATION:     |                                                  |
|----------------------------|--------------------------------------------------|
| Name: <u>RICK RUONALA</u>  | Address: <u>PO Box 50445</u>                     |
| Phone: <u>843 458-2283</u> | E-mail: <u>RICK.RUONALA@TLR-CONSTRUCTION.COM</u> |

| PERMIT TYPE:                                                                                                        |  |  |  |
|---------------------------------------------------------------------------------------------------------------------|--|--|--|
| <input type="checkbox"/> Existing Building with Interior additions (upfit)<br>***upfits require copy of contract*** |  |  |  |
| <input type="checkbox"/> New Building with no Interior additions (shell)                                            |  |  |  |
| <input type="checkbox"/> New Building with completed interior                                                       |  |  |  |
| <input type="checkbox"/> Exterior Addition to existing building                                                     |  |  |  |
| <input type="checkbox"/> Electrical                                                                                 |  |  |  |
| <input type="checkbox"/> Mechanical                                                                                 |  |  |  |
| <input type="checkbox"/> Plumbing                                                                                   |  |  |  |
| Other: <u>Demolition</u>                                                                                            |  |  |  |

| Project Contract Amount: <u>\$14,000.00</u> |                     |                 |           |
|---------------------------------------------|---------------------|-----------------|-----------|
| Gross Building Area                         | <u>14,000</u> sq/ft |                 |           |
| 4 <sup>th</sup> floor                       | Existing sq/ft      | New/upfit sq/ft | Sub total |
| 3 <sup>rd</sup> floor                       | _____               | _____           | _____     |
| 2nd floor                                   | _____               | _____           | _____     |
| Mezzanine                                   | _____               | _____           | _____     |
| 1 <sup>st</sup> floor                       | _____               | _____           | _____     |
| Basement                                    | _____               | _____           | _____     |
| Total:                                      | _____               | _____           | _____     |

\*\*\*Acknowledgement of SC 6-29-1145\*\*\* Is this parcel of land is restricted by any recorded covenant that is contrary to, conflicts with, or prohibits the activity that is being applied for?

|                            |                            |                |
|----------------------------|----------------------------|----------------|
| <u>RICK RUONALA</u>        | <u>[Signature]</u>         | <u>5/22/12</u> |
| Print Applicant/Agent Name | Applicant/ Agent Signature | Date           |
| Property Owner(s)          |                            |                |
| <u>Doug Cia Frocca</u>     | <u>[Signature]</u>         | <u>5/22/12</u> |
| Print Property Owner Name  | Property Owner Signature   | Date           |

ROA 000382



843-280-3774

Permit #(office use) 121249  
Permit Cost \_\_\_\_\_  
Plan Review# \_\_\_\_\_

## COMMERCIAL BUILDING PERMIT APPLICATION

Plan Review Project Name: AREA 51 FIREWORKS Date Submitted: \_\_\_\_\_  
Project Address: 3620 FESTIVAL DR Zip \_\_\_\_\_ Suite#: \_\_\_\_\_Description of Work: Alteration

\* Please allow 1-2 days for processing of permit once plans have been approved

\* New Building must provide Well/Septic Approval or tap fee verification

\* Permits requiring site plan approval cannot be issued until site plans are approved

## GENERAL CONTRACTOR INFORMATION:

Company: TLR Construction CoGC License#: 115561Phone: 843 453-2283E-mail: rick.ruonala@TLR-construction.com

## PLUMBING CONTRACTOR INFORMATION:

Company: \_\_\_\_\_

License#: \_\_\_\_\_

Phone: \_\_\_\_\_

E-mail: \_\_\_\_\_

## MECHANICAL CONTRACTOR INFORMATION:

Company: \_\_\_\_\_

GC License#: \_\_\_\_\_

Phone: \_\_\_\_\_

E-mail: \_\_\_\_\_

## ELECTRICAL CONTRACTOR INFORMATION:

Company: \_\_\_\_\_

GC License#: \_\_\_\_\_

Phone: \_\_\_\_\_

E-mail: \_\_\_\_\_

Name: Rick Ruonala

## APPLICANT INFORMATION:

Address: PO Box 50845Phone: 843 453-2283E-mail: rick.ruonala@TLR-construction.comProject Contract Amount: \$14,000.00Gross Building Area 16,000 sq/ft

|                       | Existing sq/ft | New/upfit sq/ft | Sub total |
|-----------------------|----------------|-----------------|-----------|
| 4 <sup>th</sup> floor | _____          | _____           | _____     |
| 3 <sup>rd</sup> floor | _____          | _____           | _____     |
| 2nd floor             | _____          | _____           | _____     |
| Mezzanine             | _____          | _____           | _____     |
| 1 <sup>st</sup> floor | _____          | _____           | _____     |
| Basement              | _____          | _____           | _____     |
| Total:                | _____          | _____           | _____     |

## PERMIT TYPE:

☐ Existing Building with interior additions (upfit)  
\*\*\*upfits require copy of contract\*\*\*☐ New Building with no interior additions (shell)☐ New Building with completed interior☐ Exterior Addition to existing building☐ Electrical☐ Mechanical☐ Plumbing☒ Other Demolition

\*\*\*Acknowledgement of SC 6-29-1145\*\*\* Is this parcel of land is restricted by any recorded covenant that is contrary to, conflicts with, or prohibits the activity that is being applied for?

Rick Ruonala

Print Applicant/Agent Name

Property Owner(s)

[Signature]

Applicant/ Agent Signature

5/22/12

Date

Doug Cia Frocca

Print Property Owner Name

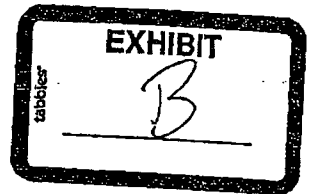
[Signature]

Property Owner Signature

5/22/12

Date

ROA 000383



STATE OF ARKANSAS       )  
                                  )  
COUNTY OF INDEPENDENCE )

AFFIDAVIT

PERSONALLY appeared before me, Ryland Kieffer, who, being duly sworn,  
deposes and says:

1. I am general manager of Fireworks World, a retail fireworks store owned by the Plaintiffs Phillip Pulley and Robert Foster at 3644 Festival Drive, Fort Mill, South Carolina. As such, I am personally familiar with the facts alleged in this matter and I make this affidavit based on my own personal knowledge.

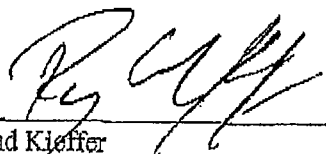
2. Fireworks World has operated at its current location since 2003. Prior to opening our current store, I approached Crescent Resources on behalf of Pulley and Foster seeking to purchase the property located at 3620 Festival Drive ("Property") for purposes of opening our store. We were informed by Crescent Resources' real estate agent that the Property would only be conveyed with a deed restriction prohibiting the sale of fireworks. In reliance on that statement, Pulley and Foster declined to purchase the Property and instead entered into a long term lease for our current location, where Fireworks World has operated ever since.

3. I know of several other fireworks retailers who have attempted to purchase the Property over the years, only to learn that it was deed restricted against the sale of fireworks. Instead, that site has been occupied by restaurants. In May of 2012, I learned that Area 51 Fireworks had acquired the Property, and had applied to York County for building permits to construct a retail fireworks store there. On that date I contacted York County Code Enforcement Officer George Wilmore and notified him that there was a deed restriction on the Property that prohibited the sale of fireworks.

4. The Property is better located than our current site for visibility, traffic and access and our business will be irreparably damaged by allowing the sale of fireworks on the Property. Because the Property is located directly between our site and the high traffic areas of Carowinds Boulevard and Interstate 77, and has superior access, the losses we expect to suffer if Area 51 is allowed to sell fireworks on the Property will threaten the financial viability and existence of our business. Most of our customers would have to pass the proposed Area 51 Property to get to ours, and it is likely that anyone who is drawn to our location by our advertising and marketing efforts will instead end up going to Area 51 by mistake or out of convenience. Calculating the losses Fireworks World will suffer if Area 51 is allowed to open on the Property would be extremely difficult given the highly competitive fireworks market existing in this area, although we reasonably believe that for the 2012 season alone, we would lose more than half of our sales, in excess of \$500,000.00.

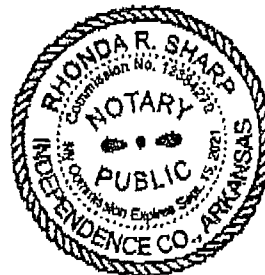
5. Neither I nor anyone else at Fireworks World has been contacted by the current owner of the Property to secure consent to waive or release the deed restriction prohibiting the sale of fireworks. We object to any issuance of permits by York County for use of the Property contrary to the deed restriction.

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Ryland Kleffer

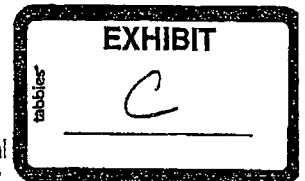
SWORN to and subscribed before me  
this 26<sup>th</sup> day of June, 2012.

  
\_\_\_\_\_  
Notary Public for Arkansas  
My Commission Expires: Sept. 15, 2021



ROA 000385

Aug. 8, 2007  
2007 Legislative Changes Related to Land Use and Planning



This *Technical Bulletin* outlines changes adopted by the General Assembly relating to local land use planning that counties need to be aware of. Please consult your county attorney, if you have questions about the interpretation or application of these changes. The SCAC staff is also available at 1-800-922-6081 to address general questions.

**Act No. 31 (R. 52, S. 266): The Priority Investment Act**

Act No. 31 is the S.C. Priority Investment Act. The General Assembly amended Title 6, Chapter 29 related to comprehensive plans to explicitly address affordable housing and transportation issues and create a formal process for interjurisdictional communication.

**Elements Required in Comprehensive Plans**

The act amends §6-29-510(D) to add two new elements and expanded a third element required in a local comprehensive plan.

The "housing element" outlined in §6-29-510(D)(6) has been expanded to require counties to analyze "unnecessary nonessential regulatory requirements." These are defined in §6-29-1110(6) as development standards and procedures that are determined by the local body as not essential to protect the public health, safety or welfare, and would otherwise make a proposed housing development economically infeasible. This section also requires the county to analyze the use of market-based incentives that may be offered to encourage development of affordable housing. Such incentives may include density bonuses, design flexibility and streamlined permitting processes.

A new "transportation element" has been added in §6-29-510(D)(8) that examines aspects of local transportation issues and likely funding. This element requires a more comprehensive examination of the county's transportation facilities, including major road improvements, new road construction, transit projects, pedestrian and bicycle projects. The transportation element must be developed in coordination with the current land use element found in §6-29-510(D)(7). Prior to the 2007 amendments, counties were required to consider their transportation networks as part of the broad "community facilities" element currently found in §6-29-510(D)(6). Formerly, there were no specific elements of the transportation network that had to be examined.

A "priority investment element" has been added in §6-29-510(D)(9). The priority investment element requires an analysis of likely sources of federal and state funding for public infrastructure that may be available, and a recommendation of projects for expenditure of those funds over the next 10 years. This element requires that the prioritization of projects must be done through coordination with adjacent and relevant jurisdictions and agencies. This section defines these groups as counties, municipalities, public service districts, school districts, public and private utilities, transportation agencies and other public entities that are affected by or have planning authority over the public project. Coordination requires the written notification by the local planning commission or its staff to the relevant and adjacent jurisdictions or agencies providing them the opportunity to submit comments to the planning commission or its staff concerning the project. Failure to identify or notify an adjacent relevant jurisdiction/agency does not invalidate the plan or give rise to a civil cause of action.

**Zoning Districts**

Act No. 31, amends §6-29-720(C)(7) by creating a new "priority investment zone." This new "zone" encourages counties to adopt market-based incentives or relax or eliminate unnecessary nonessential housing regulatory requirements to encourage private development in the priority investment zone. The use of the priority investment zone in an ordinance is optional. This section further encourages the county to provide that

"traditional neighborhood design" and "affordable housing" must be permitted within the priority investment zone.

#### **Zoning Ordinance Prerequisite**

Section 5 of the act amends §6-29-1130(A), the land development regulation provision, to require the adoption of the community facilities, housing and priority investment elements before the local government may prepare and recommend for adoption regulations governing the development of land within the jurisdiction. Prior to the 2007 amendments, only the adoption of the community facilities element was required.

#### **New and Expanded Definitions**

Act No. 31 also applied the definitions in §6-29-1110 to all of Chapter 29. It would be prudent to check the county ordinances for any impact from this change.

"Affordable housing" is defined in §6-29-1110(1) where the total cost for a dwelling unit for sale—including mortgage, amortization, taxes, insurance and condominium/association fees—constitute no more than 28 percent of the annual household income for a household earning no more than 80 percent of the area median income, by household size, as reported by U.S. Housing and Urban Development (HUD). In the case of rental units, the total cost for rent and utilities can constitute no more than 30 percent of the annual household income for a household earning no more than 80 percent of the area median income, by household size, as reported by HUD.

"Traditional neighborhood design" is defined in §6-29-1110(5) as development designs intended to enhance the appearance and functionality of a new development so that it functions like a traditional neighborhood or town. These designs make possible higher residential densities, a mixture of residential and commercial land uses, single- and multi-family housing types, and pedestrian- and bicycle-friendly roadways. Overall, the aim of this portion of the act is to encourage local governments to reevaluate their comprehensive plans in such a way as to slow the growth of sprawl, prioritize projects and funding, and create new stocks of affordable housing throughout the state.

#### **Effective Date**

Act No. 31 took effect May 23, 2007. Section 6 of the act provides that counties that have recently adopted comprehensive plans will not have to consider the new elements until the next review of the plan pursuant to §6-29-510(E), the five-year provision. It appears that the language of Section 6 requires a county that is currently reviewing their comprehensive plan to include the provisions of Act No. 31, if final action on the plan had not been taken prior to May 23, 2007. It is recommended that counties use their best efforts to address inclusion of each of the amended elements required. These best efforts will necessitate that some counties reevaluate project priorities pursuant to §6-29-510(D)(9). The prioritization of projects may require the county to reopen certain elements of their plan for public comment from adjacent jurisdictions and to give additional written notifications.

#### **Act No. 113 (R. 70, S. 65) — Permits and Restrictive Covenants**

Act No. 45 (R. 71, H. 3456), as amended by Act No. 113 (R. 170, S. 65) concerns permits issued by local governments that have notice of restrictive covenants by adding §6-29-1145 to the Code of Laws. The goal of §6-29-1145 is to reduce conflicts between private property holders that are parties to private agreements restricting otherwise lawful land activities. The legislation requires local governments to deny permit applications where there is actual knowledge of any recorded restrictive covenants which are in conflict with the requested use.

Section 6-29-1145(A) requires local governments to inquire in the permit application, or in written instructions provided to the applicant, if a tract or parcel of land is restricted by a recorded covenant that is contrary to, conflicts with or prohibits an activity for which a

ROA 000387



permit is being sought. This provision will require counties to evaluate their permit applications and add new language requiring an applicant to provide information about any private agreements restricting land use activities, or provide written instructions to the applicant concerning this issue.

Section 6-29-1145(B) requires that if the planning office has *actual notice* of a conflicting restrictive covenant, the permit not be issued. A local government has actual notice, if there is information about the existence of a conflicting restrictive covenant in any one of three specific instances; in the application for the permit, from any supporting materials supplied by the person seeking the permit, or from any other source, including other property holders. A local planning agency is not required to conduct a search in any records offices for filed restrictive covenants.

Act No. 113 was adopted to avoid any interpretation of §6-29-1145 that would require the county to perform a title search on property for which a permit has been requested. If the local government has actual notice, then a permit can only be approved if they have received confirmation from the applicant that the covenant has been waived. Section 6-29-1145(B)(3) states that the waiver can be by action of the other property holders subject to the covenant or by court order. The burden is upon the permit applicant to provide the written proof that the covenant has been waived or is no longer valid.

### Definitions

"Actual Notice" is defined in §6-29-1145(C)(1) not to be constructive notice of documents filed in local offices. The act explicitly does not require the local planning agency to conduct searches in any records offices for filed restrictive covenants.

A "restrictive covenant," as defined in §6-29-1145(C)(3), is not a restriction concerning a type of structure that may be built on a parcel of land. The clear import is that architectural appearance controls or mobile home prohibitions are to be disregarded.

"Permit," for purposes of §6-29-1145, is not defined. Section 6-29-1145(C)(1) states that permit does not mean an authorization to build or place a structure on a tract or parcel of land. It is likely that any activity, other than a building permit, tied to real property, tracts or parcels that require an authorization by local government will be affected by this act. Interpreting the act broadly, if a property owner will be required to seek approval from the local government for a particular land use, then the local government must inquire in the application if a restrictive covenant prohibits the use. If there is, then the land use cannot be approved. Based upon the broadest interpretation of the term "permit," the act will apply to a wide number of permits and land use applications, and will vary among counties based upon specific county ordinances.

The permits/applications affected by this legislation could include, but are not limited to, zoning variances, applications for rezoning, subdivision of lots, and stormwater and other environmental permits. It is also possible that in counties that have business license ordinances and ordinances governing the operation of home-based business that these activities will also fall under this legislation. County officials tasked with permitting development or planning should review their local ordinances governing land activity to determine the extent that this act will affect their permitting activity.

### Legal Liability

The potential liability to county government is likely to be minimal. Restrictive covenants are legal contracts and are only enforceable between the parties to the extent that they conform to applicable local, state or federal law. Disputes arising over the enforceability of an agreement would be between the parties. In §15-78-60(12) of the S.C. Tort Claims Act, counties retain sovereign immunity from liability from the licensing powers or functions exercised by a government entity, including the issuance or denial of a permit.

### Effective Date

ROA 000388

The inquiry and notice provisions in §6-29-1145 took effect June 27, 2007 and apply to any applications for a permit made on or after July 1, 2007.

[Click here to review the acts](#) discussed in this *Technical Bulletin*. Please consult your county attorney, if you have questions about the interpretation or application of these changes. SCAC's staff is also available to answer general questions at 1-800-922-6081.

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

Charles Sonnenberg, Festival Corp., Phillip  
Pulley and Robert Foster,

Plaintiffs,

vs.

D&T Imports South Carolina, Inc., a Nevada  
Corporation, d/b/a Area 51 Fireworks and  
York County, a political subdivision of the  
State of South Carolina,

Defendants.

IN THE COURT OF COMMON PLEAS  
C/A NO.: 2012-CP-46-02286

**NOTICE OF MOTION AND MOTION  
TO DISMISS COMPLAINT AGAINST  
D&T IMPORTS SOUTH CAROLINA,  
INC., A NEVADA CORPORATION  
D/B/A AREA 51 FIREWORKS**

TO: DANIEL J. BALLOU, ESQ.  
HAMILTON, MARTENS & BALLOU, LLC  
ATTORNEYS FOR PLAINTIFFS PULLEY AND FOSTER  
AND  
B. BAYLES MACK, ESQ.  
MACK & MACK  
ATTORNEYS FOR THE PLAINTIFFS SONNENBERG AND FESTIVAL  
CORP.

YOU WILL PLEASE TAKE NOTICE that the Defendant D&T Imports South Carolina, Inc. a Nevada Corporation, d/b/a Area 51 Fireworks, (hereinafter the "Defendants"), by and through its undersigned counsel, will move before the Presiding Judge of York County on the tenth (10<sup>th</sup>) day after service hereof or as soon thereafter as counsel may be heard for an order dismissing the Plaintiffs' Complaint against this Defendant pursuant to Rules 12(b)(1), 12(b)(6), 12(b)(7) and 19 of the South Carolina Rules of Civil Procedure.

As the Plaintiffs in this matter are not parties in the chain of title to the alleged deed restriction complained of in their Complaint, they have no standing to enforce any

deed restriction or restrictive covenant as relates to the Defendant. Further they have no standing pursuant to S.C. Code Ann. §6-29-1145 to bring this cause of action as no private right of action exists pursuant to that statute. Further, the Plaintiffs have failed to name Crescent Resources, Inc., the only party with any right, title, or interest in the deed restriction besides the Defendant so that failure to include Crescent Resources, Inc., as a necessary and indispensable party causes the Plaintiffs' claims to fail. Without Crescent Resources, Inc., as a party to this matter, any ruling by this Court would be rendered a nullity as the issue as to the deed restriction is ultimately by and between the Defendant and Crescent Resources, Inc.

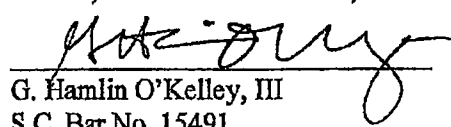
This Motion shall be supported by any and all memoranda, exhibits, affidavits or other documents to be submitted to this Court prior to the hearing of the matter.

Pursuant to Rule 11 SCRCP, counsel certifies that there is no duty of consultation connected with the filing of this Motion.

Please be present to defend if so minded.

Aug 16, 2012  
Mt Pleasant, SC

BUIST, BYARS & TAYLOR, LLC

  
G. Hamlin O'Kelley, III  
S.C. Bar No. 15491  
652 Coleman Blvd., Suite 200  
Mt. Pleasant, SC 29464  
Hamlin.okelley@buistbyars.com  
(843) 856-4488

Attorneys for the Defendant D&T Imports  
South Carolina, Inc., a Nevada Corporation,  
d/b/a Area 51 Fireworks

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

Charles Sonnenberg, Festival Corp., Phillip  
Pulley and Robert Foster,

Plaintiffs,

vs.

D&T Imports South Carolina, Inc., a Nevada  
Corporation, d/b/a Area 51 Fireworks and  
York County, a political subdivision of the  
State of South Carolina,

Defendants.

IN THE COURT OF COMMON PLEAS  
CIVIL ACTION NO. 2012-CP-46-02286

**MEMORANDUM IN SUPPORT OF  
THE DEFENDANT D&T IMPORTS  
SOUTH CAROLINA, INC., A NEVADA  
CORPORATION, D/B/A  
AREA 51 FIREWORKS'  
MOTION TO DISMISS COMPLAINT**

TO: THE HONORABLE S. JACKSON KIMBALL  
MASTER IN EQUITY FOR YORK COUNTY

The Defendant D&T Imports South Carolina, Inc., a Nevada Corporation, d/b/a Area 51 Fireworks (the "Defendant" or "D&T") respectfully submits this Memorandum in support of its Motion to Dismiss the Plaintiff's Complaint pursuant to Rules 12(b)(1), 12(b)(6), 12(b)(7) and 19 of the South Carolina Rules of Civil Procedure. For the reasons stated herein, the Defendant would respectfully request that the Court dismiss all claims asserted against it in this action.

**BACKGROUND**

D&T is the owner of real property located at 3620 Festival Drive in Fort Mill, South Carolina ("the Property"). (Complaint, p. 2). D&T acquired the property from TD Bank, N.A., by way of a Special Warranty Deed dated April 6, 2012. (Complaint, Exhibit E). TD Bank, N.A., had acquired the property as a result of this Court's Master Deed dated May 23, 2011, through a foreclosure action by Carolina First Bank against Randazzo Properties, LLC. (Complaint, Exhibit D). Randazzo Properties had acquired the Property from Crescent Resources, LLC, by a

quitclaim deed dated June 14, 2005. (Complaint, Exhibits B & C). The Plaintiff Sonnenberg owns property at 3644 Festival Drive which he acquired from Crescent Resources, LLC, in 1990 (Complaint, p. 2, Exhibit A).

The 2005 quitclaim deed from Crescent Resources, LLC, to Randazzo Properties, LLC, contained the following restrictive covenant:

The within described property is further conveyed subject to restrictions, covenants and reservations of record and further to the covenant and restriction that the following activities are prohibited on the subject property: the sale of fireworks or the operation of a bingo parlor or similar recreation facility.

(Complaint, Ex. C).

D&T acquired its interest in the property by way of the deed from TD Bank after the foreclosure. (Complaint, Exhibit E). The deed to D&T does not specifically reference the deed restriction prohibiting the sale of fireworks or the prohibition of bingo parlors or a similar recreation facility. (Complaint, Exhibit E). The deed from TD Bank to D&T states that the conveyance is subject to all obligations, restrictions, limitations, covenants, easements and other matters of record and governmental ordinances and regulations affecting the property. (*Id.*)

The Plaintiff Sonnenberg conducts business as Festival Corp. and has leased the adjacent property to Phillip Pulley and Robert Foster. (Complaint, pp. 2-3). Mr. Pulley and Mr. Foster collectively do business as FWK, Inc. and are fireworks retailers. (*Id.*)

The Defendant D&T Imports subject property and the Plaintiff's property were both originally owned by Crescent Resources, Inc. ("Crescent"). The Plaintiff has not named Crescent as a party to this lawsuit although Crescent is the only party with any right, title or interest in the deed restriction besides the Defendant D&T Imports.

**I. THE COURT LACKS SUBJECT MATTER JURISDICTION PURSUANT TO RULE 12(b)(1) SCRPC WHERE THERE IS NO LEGISLATIVE INTENT THAT THERE BE A PRIVATE CAUSE OF ACTION UNDER THE SOUTH CAROLINA LOCAL GOVERNMENT COMPREHENSIVE PLANNING ACT OF 1994**

This Court lacks subject matter jurisdiction to hear the matters complained of in the Plaintiffs' Complaint where there is no private right of action pursuant to the South Carolina Local Government Comprehensive Planning Act of 1994. S.C. Code Ann. § 6-29-1120, *et seq.* There is no right for a private individual to sue another private individual under the provisions of the South Carolina Local Government Comprehensive Planning Act of 1994 cited in the Plaintiffs' Complaint. *Id.* Where there is no private right of action, there can be no jurisdiction for this Court to hear the matter, *Hambrick v. GMAC Mortgage Corp.* 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), *reh'g denied, cert. denied*. All of the Plaintiffs' alleged claims and causes of action stem from their attempt to create a private cause of action under Section 6-29-1145 of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994. (Complaint, pp. 5-8). The main factor in determining whether a statute creates a private cause of action is legislative intent. *Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 245, 711 S.E.2d 908, 911 (2011).

Without legislative intent for a private cause of action, there can be no jurisdiction.

Pursuant to S.C. Code Ann. §6-29-1120, the legislative intent of the South Carolina Local Government Comprehensive Planning Act of 1994 is as follows:

- (1) to encourage the development of economically sound and stable municipalities and counties;
- (2) to assure the timely provision of required streets, utilities and other facilities and services to new land developments;
- (3) to assure the adequate provision of safe and convenient traffic access and circulation, both vehicular and pedestrian, in and through new land developments;
- (4) to assure the provision of needed public open spaces and building sites in new land developments through the declaration of land for recreational, education, transportation and other public purposes; and

- (5) to assure, in general, the wise and timely development of new areas, and redevelopment of previously development areas in harmony with the comprehensive plans of municipalities and counties.

S.C. Code Ann. § 6-29-1120.

Nowhere in the General Assembly's specified intent is there any right to sue for an alleged violation of the South Carolina Local Government Comprehensive Planning Act of 1994 cited in the Plaintiffs' Complaint. The Section cited, regarding the Plaintiffs' being "other property holders" only relates to the notice and determination of an existing covenant and restriction by a local planning agency, and not by any Court of this State. S.C. Code Ann. §6-29-1145(B)(3). That Section states:

(B) If a local planning agency has actual notice of a restrictive covenant on a tract or parcel of land that is contrary to, conflicts with, or prohibits the permitted activity:

- (1) in the application for the permit
- (2) from materials or information submitted by the person or persons requesting the permit; or
- (3) from any other source, including, but not limited to, other property holders, the local planning agency must not issue the permit unless the local planning agency receives confirmation from the applicant that the restrictive covenant has been released for the tract or parcel of land by action of the appropriate authority or property holders or by court order.

This Section affects only local planning agencies. *Id.* at 1145(A). It does not open the Courts up to lawsuits to determine the existence of a restrictive covenant.

Without the right to bring a private cause of action, this matter should be dismissed. The legislative intent to grant or withhold a private cause of action for violation of a statute or perform a statutory duty is determined primarily from the language of the statute. *Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 245, 711 S.E.2d 908, 911 (2011); *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007). The general rule is that a statute **which does not purport to establish civil liability, but merely makes provision to secure the safety or welfare of the public as an**



entity is not subject to construction establishing civil liability. *Doe v. Marion*, *id.* at 396, 645 S.E.2d at 248 (quoting *Dorman v. Aiken Communications, Inc.* 303 S.C. 63, 67, 398 S.E.2d 687, 689 (1990))(emphasis added). The South Carolina Local Government Comprehensive Plan Enabling Act of 1994 emphasizes public health, safety, economy, good order, appearance, convenience, morals, and general welfare requiring the harmonious, orderly, and progressive development of land within municipalities and counties of the State. S.C. Code Ann. § 6-29-1120. There could be no doubt that such a statute is for the safety or welfare of the public as an entity and not to establish civil liability. With no private cause of action, there can be no subject matter jurisdiction for this Court to hear the Plaintiffs' declaratory judgment action regarding the provisions of the South Carolina Local Government Comprehensive Plan Enabling Act of 1994, and accordingly, this matter should be dismissed.

**II. THE PLAINTIFFS HAVE NO STANDING TO SUE THE DEFENDANTS IN THIS MATTER AS THEY HAVE NO SUFFERED NO INJURY TO BE REDRESSED BY THE COURTS**

---

The Plaintiffs have no standing to bring this matter where they have suffered no injury and only seek to enforce a deed restriction which is not applicable to their property interests. In order for the Plaintiffs to bring this lawsuit, they must satisfy the following three-part test showing that they have, first, an "injury in fact" being an invasion of their legally protected interests which is a) concrete and b) actual or imminent, and not conjectural or hypothetical; second, there must be a causal connection between the injury and the conduct so that the injury is traceable to the action of the defendant, and third, it must be likely as opposed to speculative that the injury can be redressed by a favorable decision. *Sea Pines Ass'n for the Protection of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 601 550 S.E.2d 287, 291 (2001). The linchpin of this analysis is that the Plaintiffs must have a personal stake in the litigation. *Id.* at

600, 550 S.E.2d at 291. In other words, the party must be the real party in interest with a real interest with an injury of a personal nature, not merely a general one common to all members of the public. *Joytime Distribs & Amusement Co. v. State*, 338 S.C. 634, 639-40, 528 S.E.2d 647, 650 (1990). The burden of lack of standing is "substantially more difficult" where the party bringing the claim seeks to challenge government action. *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001). This is the substantially more difficult standing standard with which they cannot comply.

Nowhere in the Plaintiffs' complaint do they claim any injury –concrete, actual or imminent – resulting from the deed restriction in D&T's chain of title. They cannot. They are only seeking to bring a challenge to government action by York County in issuing a permit. The Plaintiffs have no injury where the Plaintiffs through Charles Sonnenberg took title to their property in 1990, some fifteen years before any deed restriction regarding fireworks was placed upon the Defendant D&T's property. (Complaint, Exhibits A & C) They cannot show that they have any personal stake in D&T's property or in the restriction on D&T's property without showing they are merely attempting to stifle competition as described in Paragraph 29 of their Complaint wherein the state that revenues will fall. This is a hypothetical and conjectural statement as no injury has actually taken place, rendering the Plaintiffs unable to satisfy the standing requirements under existing case law. The Plaintiffs are just as injured or uninjured as all members of the public meaning they cannot stand to sue. *Joytime Distribs & Amusement Co. v. State*, 338 S.C. 634, 639-40, 528 S.E.2d 647, 650 (1990). Prospective claims of injury without causal connection and without potential that this Court can redress the wrong would make the Plaintiffs unable to satisfy the test for standing, too. Without more, they have no standing to sue.

### **III. THE PLAINTIFFS FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION PURSUANT TO RULE 12(b)(6) SCRPC**

There are no facts sufficiently pled to constitute a cause of action against D&T. A motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the complaint and we must presume all well-pled facts to be true. *Gressette v. SCE&G*, 370 S.C. 377, 378-79, 635 S.E.2d 538, 539 (2006) citing *Overcash v. SCE&G*, 364 S.C. 569, 614 S.E.2d 619 (2005). This Court may "...dismiss a claim when the defendant demonstrates the plaintiff's failure to state facts sufficient to constitute a cause of action in the pleadings filed with the court." *Hambrick v. GMAC Mortgage Corp.*, 370 S.C. 118, 121, 634 S.E.2d 5, 7 (2007). The Plaintiffs fail to state any facts that would entitle them to bring a cause of action other than the fact that they are "other property owners" as defined in Section 6-29-1145 of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, which has no private cause of action. (Complaint, pp. 4-6). The Plaintiffs are not owners of D&T's property. (Complaint, p. 3). The Plaintiffs do not utilize the subject property nor do they have any ownership interest in it. (*Id.*) There are no facts complained of that alleges there is any injury caused by D&T or that D&T has in any way damaged the Plaintiffs due to the alleged deed restriction in D&T's chain of title. (*Id.*) Without stating facts alleging an injury or violation of a duty, contract or law, then there can be no complaint against it.

### **IV. THE PLAINTIFFS HAVE FAILED TO JOIN A NECESSARY PARTY PURSUANT TO RULES 12(b)(7) AND 19 SCRPC**

The Plaintiffs have failed to join Crescent Resources, Inc. ("Crescent") as a necessary and indispensable party that must be joined in this matter because Crescent is the only other party with any right, title or interest to the deed restriction which is the subject of this action as shown in the Exhibits to the Plaintiffs' Complaint. Crescent is necessary for the complete

adjudication of this matter because of its relationship to the Defendant D&T Imports. Crescent sold the subject property to Randazzo Properties, LLC in June 2005. (Complaint, Exhibits B & C). The deed restriction which is the subject of this dispute was included in both the Special Warranty Deed from Crescent to Randazzo as well as a Quit-Claim Deed from Crescent to Randazzo executed and recorded simultaneously. (*Id.*)

The subject property was then foreclosed upon by TD Bank, N.A. against Randazzo. (Complaint, ExhibitD) TD Bank, N.A. received title to the property via a Master's Deed recorded on June 2, 2011. (*Id.*) TD Bank, N.A., then conveyed the subject property to D&T by Limited Warranty Deed recorded on April 10, 2012 (Complaint, Ex. E). The Limited Warranty Deed does not include any deed restriction prohibiting the sale of fireworks on the subject property. (*Id.*) The deed restriction, although included in the Deeds from Crescent to Randazzo, does not state that it runs with the subject property nor was it included in the Master's Deed into TD and then in the Limited Warranty Deed from TD to the Defendant D&T Imports. The issue that is the subject of the Plaintiffs' Complaint relates to the effectiveness of the alleged deed restriction prohibiting the sale of fireworks on the subject property. The only party that has any insight into this issue is Crescent because of its relationship to the Plaintiffs and the Defendant D&T Imports. The Deeds from Crescent to Randazzo are the only reference to the deed restriction. There appears to be no other separately recorded restriction related to the subject property.

Crescent must be joined as a party pursuant to Rule 19 SCRCP because of its relationship to the parties. The Plaintiffs action against the Defendant D&T Imports should be dismissed because this Court will determine that Crescent is truly an indispensable party under Rule 19 SCRCP. Pursuant to Rule 19, the Court should consider the following factors to determine

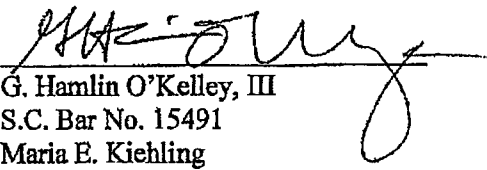
whether an action should proceed among the existing parties or should be dismissed: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the Plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. *See* Rule 19 SCRC. Any judgment rendered in this matter hinges on the effectiveness of deed restrictions included in prior conveyances related to the subject property. Without joining Crescent, this Court will be unable to determine if the deed restrictions were intended to run with the subject property. Any judgment rendered would be extremely prejudicial as to the Defendant D&T Imports without the joining of Crescent. Any prejudice cannot be lessened or avoided by protective provisions in the judgment as the Plaintiffs are alleging that the Defendant D&T Imports cannot utilize the subject property for the sale of fireworks, which the Plaintiffs do not have the right to bring as discussed *supra*. The Plaintiff is not entitled to a remedy because it lacks standing to bring this cause of action pursuant to S.C. Code Ann. § 6-29-1145 and failed to state facts sufficient to constitute a cause of action.

### CONCLUSION

For the reasons stated herein, the Defendant D&T Imports South Carolina, Inc., requests that this Court dismiss the Plaintiffs' Complaint with prejudice.

Respectfully submitted,

BUIST, BYARS & TAYLOR, LLC

  
G. Hamlin O'Kelley, III  
S.C. Bar No. 15491  
Maria E. Kiehling  
S.C. Bar No. 76799  
652 Coleman Blvd., Suite 200  
Mt. Pleasant, SC 29464  
(843) 856-4488  
Attorneys for the Defendant  
D&T Imports South Carolina, Inc.

Mt. Pleasant, South Carolina  
19 Sept, 2012

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

Charles Sonnenberg, Festival Corp., Phillip )  
Pulley and Robert Foster, )

Plaintiffs, )

vs. )

D&T Imports South Carolina, Inc., d/b/a )  
Area 51 Fireworks, and York County, )  
South Carolina, )

Defendants. )

Case No. 2012-CP-46-2286

**NOTICE OF AND MOTION TO  
RECOVER DAMAGES AGAINST BOND**

**To: Plaintiffs and their counsel, B. Bayles Mack, Esq. and Daniel J. Ballou, Esq. and the surety, Travelers Casualty and Surety Company of America (Travelers).**

**PLEASE TAKE NOTICE** that pursuant to Rule 65(c), SCRCF, defendant D&T Imports South Carolina, Inc., d/b/a Area 51 Fireworks, (D&T), through its undersigned counsel, hereby moves, at such time and place as is convenient to the Court and counsel, for entry of an order allowing D&T to recover damages against Bond No. 105806138 issued by Travelers (the "Bond"), based on the following grounds.

**Procedural Background**

Plaintiffs brought the above captioned action to prevent the construction of a fireworks store on 3620 Festival Drive, South Carolina (Subject Property), which is owned by D&T. The basis of a complaint was a restriction in the chain of title for the Subject Property that prevented the sale of fireworks. Preventing the construction and operation of a fireworks store on the Subject Property was the sole purpose of the above captioned action. As a part of the action,

Plaintiffs sought, and were awarded a temporary restraining order on June 21, 2012 (TRO) that stopped all work on D&T's property and prevented D&T from receiving any further permits from York County, South Carolina. Travelers issued the Bond in the amount of \$100,000 on June 28, 2012; subsequently increased to \$150,000 on July 3, 2102. As stated therein, the Bond was issued for the protection of D&T from "such damages and costs not exceeding the sum of One Hundred Fifty Thousand DOLLARS as [D&T] may sustain by reason of the temporary restraining order, if the Court shall finally decide that the Plaintiffs were not entitled thereto." (Bond, p.1.)

D&T moved to dissolve the TRO because S.C. Code Ann. § 6-29-1145 did not contain grounds to force the cessation of construction. The Court agreed and on June 28, 2102 entered an Order Modifying Temporary Restraining Order that vacated the TRO against D&T. (Order Modifying Temporary Restraining Order, p.2.) D&T then filed a motion to dismiss the Complaint pursuant to Rule 12(b)(1) and (6)

In response to the Complaint, D&T filed a motion to dismiss on the grounds Plaintiffs were not entitled to enforce the restrictive covenant, nor did they have any statutory standing under S.C. Code Ann. § 6-29-1145 to determine the validity of the covenant. The Court agreed and entered an order granting D&T's motion to dismiss all claims against D&T on September 28, 2012 (Order of Dismissal).

#### Grounds for and Amount of Damages Sought

A party is entitled to recover under a bond for "losses which resulted from not being allowed to exercise his own rights" as a result of the injunction, *Crawford v. Atlantic Coast Lumber Corporation*, 89 S.C. 456, 71 S.E. 1049, 1050 (1911). Rule 65(c), SCRPC, echoes this sentiment and states that the bond is required "for payment of such costs and damages as may be



incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." See also *Chambron v. Lost Colony Homeowners Association*, 317 S.C. 43, 451 S.E.2d 410 (1994); *Hylar v. Wheeler*, 240 S.C. 386, 126 S.E.2d 173, 175 (1962) ("[D]amages recoverable in an action on an injunction bond include all actual damages sustained by reason of the wrongful issuance of the injunction, that is, such damages as are the direct, natural, and proximate result of the injunction."); In addition, a "reasonable sum as counsel fees for procuring the dissolution of an injunction may be allowed as damages to be recovered in an action on the injunction bond, provided the injunctive relief is not merely ancillary to the main issue." *Walker v. Oswald*, 181 S.C. 278, 186 S.E. 916, 918 (1936), cited with approval by *Fici v. Koon*, 372 S.C. 341, 642 S.E.2d 602 (2007).

The Order Modifying Temporary Restraining Order and the Order of Dismissal are each a determination that Plaintiffs were not entitled to the issuance of the TRO or any injunction against D&T. D&T is entitled to make a claim under the Bond for damages that incurred as a result of the issuance of the TRO and subsequent injunctions. Examples of damages inflicted upon D&T as a result of the TRO and subsequent injunctions include D&T having to halt its construction efforts and then re-mobilize after dissolution of the TRO and dismissal of the claims against D&T. Such re-mobilization came at a total cost to D&T of at least \$34,025.00. D&T also incurred legal fees of at least \$39,701.97 to get the TRO dissolved and the claims against D&T dismissed. Given that the injunction against the construction and operation of a fireworks store was the main goal of the above captioned action, attorneys' fees are recoverable under the Bond. D&T has also suffered damages related to lost income resulting from the issuance of the TRO and subsequent injunctions. Finally, as this matter was wrongfully filed, D&T requests payment of the entire bond of One Hundred Fifty Thousand and No/100 (\$150,000.00) Dollars

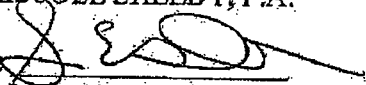
as compensation for its total losses during the time of the temporary restraining order and injunction.

This Motion shall be further supported by any and all memoranda and affidavits as shall be presented prior to the hearing of this matter.

**WHEREFORE**, for the foregoing reasons, the Motion should be granted and D&T should be awarded the entire amount of the Bond.

Date: 10/19/12

DRISCOLL SHEEDY, P.A.

By: 

James W. Sheedy

Susan E. Driscoll

11520 N. Community House Road

Suite 200

Charlotte, N.C. 28277

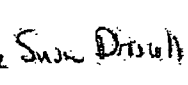
Telephone - (704) 341-2101

Facsimile - (704) 341-2105

jimsheedy@driscollsheedy.com

sdriscoll@driscollsheedy.com

BUIST, BYARS & TAYLOR, LLC

By:  

G. Hamlin O'Kelley, III

S.C. Bar No. 15491

Maria E. Kiehling

S.C. Bar No. 76799

652 Coleman Blvd., Suite 200

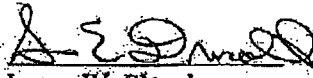
Mt. Pleasant, SC 29464

(843) 856-4488

ATTORNEYS FOR D&T

Date: 10/19/12

DRISCOLL SHEEDY, P.A.

By: 

James W. Sheedy

Susan E. Driscoll

11520 N. Community House Road

Suite 200

Charlotte, N.C. 28277

Telephone - (704) 341-2101

Facsimile - (704) 341-2105

jimsheedy@driscollsheedy.com

sdriscoll@driscollsheedy.com

ATTORNEYS FOR D&T

Driscoll Sheedy, P.A.  
Attorneys at Law

00097449.3

2

ROA 000406

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

Charles Sonnenberg, Festival Corp., Phillip )  
Pulley and Robert Foster, )

Plaintiffs, )

vs. )

Case No. 2012-CP-46-2286

D&T Imports South Carolina, Inc., d/b/a )  
Area 51 Fireworks, and York County, )  
South Carolina, )

Defendants. )

**MEMORANDUM IN SUPPORT OF MOTION  
TO RECOVER DAMAGES AGAINST BOND**

In support of its Motion to Recover Damages Against Bond dated October 19, 2012 (the "Motion"), D&T submits this Memorandum. The Memorandum is intended to amend and supplement the Motion, rather than repeat its contents, and focuses on just a few factual and legal points in advance of the hearing for the Court to consider. Except as otherwise defined herein, all capitalized terms shall have the meanings ascribed to them in the Motion.

**Substantive Background**

The TRO "enjoined D&T from renovating, building, upfitting or constructing the Property for the purpose of selling fireworks." (Order Modifying Temporary Restraining Order, p.1, ¶1). The Order Modifying Temporary Restraining Order vacated the TRO "as to construction activities on the Property," and allowed D&T "to proceed with such work at its own risk." (*Id.*, p.3, ¶1).

The Bond posted pursuant to the Order Modifying Temporary Restraining Order insured against such damages and costs "as Defendants may sustain by reason of the temporary restraining order, if the Court shall finally decide that the Plaintiffs were not entitled thereto." (Bond, p.1, ¶2). The Order made the Bond retroactive to the date of entry of the TRO. The Court found that "D&T's damages at this point [were] limited to additional construction costs related to delay caused by the TRO." (*Id.*, p.2, ¶6).

The Affidavit of Cianfrocca, including the attachment thereto of TLR Construction, just reiterates as set forth in the Motion that the additional construction costs related to delay caused by the TRO are \$34,025. The Affidavit of Sheedy states that local counsel for D&T incurred \$17,770.41 in legal fees and costs through the hearing on the motion to dissolve the TRO, which is less than the amount requested in the Motion. Counsel for Plaintiffs has also been informed of these amounts by telephone. Notice of the amount in additional construction costs was included in the Motion.<sup>1</sup> Notice of the claim for legal fees was also included in the Motion; however, the requested amount is reduced by this Affidavit. The Motion as hereby amended seeks \$51,795.41 against the Bond.

#### Discussion

The Bond complies with Rule 65(c), SCRPC, which requires that the surety be "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Within that statutory framework, the Court has

---

<sup>1</sup>*Englert, Inc. v. LeafGuard USA, Inc.*, 377 S.C. 129, 135, 659 S.E.2d 496, 499 (2008), *citing to Smith v. Hastie*, 267 S.C. 410, 626 S.E.2d 13 (Ct.App. 2005).

identified as actual damages the "additional construction costs related to delay caused by the TRO."

The law as cited in the Motion also allows for the recovery of attorneys' fees, inasmuch as this action was to prevent the opening of a fireworks store, so the injunctive relief was central rather than ancillary to the action. *Bulova Watch Co. v. Rogers-Kent, Inc.*, 181 F.Supp. 340, 344 (D.S.C. 1960) (referencing *Walker v. Oswald* for the recovery of attorneys' fees from an injunction bond). D&T is not claiming any damages after entry of the TRO. See *Chambron v. Lost Colony Homeowners Association*, 317 S.C. 43, 451 S.E.2d 410 (1994).

D&T is entitled to an award from the Bond in the amount of \$51,795.41. This is the total injury to D&T proximately resulting from the wrongful enjoinder by Plaintiffs of D&T's construction activities. Contrary to prior decisional law, *Walker v. Preacher*, 188 S.C. 60, 198 S.E. 168, 169 (1938), interpreting the statute as mandating that damages against a bond must be sought in the same case by enforcement of the security, the subsequent Rule 65(c) unequivocally provides, "... liability [on the Bond] may be enforced on motion without necessity of an independent action." D&T has made the Motion as suggested by the Rule. D&T has no objection to the dismissal of the above captioned matter, provided, however, its claim against the Bond is unimpaired. D&T quickly filed the Motion fearing entry of the dismissal would discharge the Bond thereby impairing D&T's claim against the Bond.

**WHEREFORE**, D&T asks that the Motion be granted, it be awarded \$51,795.41 from the Bond, the surety be directed to remit such sum to D&T and the case then be dismissed if that is the wish of County and Plaintiffs.

Date: 10/31/12

DRISCOLL SHEEDY, P.A.

By: J. W. Sheedy

James W. Sheedy

Susan E. Driscoll

11520 N. Community House Road

Suite 200

Charlotte, N.C. 28277

Telephone - (704) 341-2101

Facsimile - (704) 341-2105

jimsheedy@driscollsheedy.com

sdriscoll@driscollsheedy.com

STATE OF SOUTH CAROLINA )

COUNTY OF YORK )

Charles Sonnenberg, Festival Corp.,  
Phillip Pulley and Robert Foster,

Plaintiffs, )

v. )

D&T Imports South Carolina, Inc.,  
A Nevada Corporation, d/b/a  
Area 51 Fireworks, and York  
County, a political subdivision of the  
State of South Carolina,

Defendants. )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

C/A No. 2012-CP-46-2286

**AFFIDAVIT OF  
DOUGLAS A. CIANFROCCA**

PERSONALLY APPEARED before me, Douglas A. Cianfrocca who being duly sworn  
deposes and says:

1. He is the Secretary/Treasurer of D&T Imports South Carolina, Inc., a Nevada corporation qualified to do business in South Carolina (the "Corporation").
2. That neither he nor, to his knowledge, the Corporation's registered agent, (i) received any notice of the Temporary Restraining Order (the "TRO") in the above-captioned matter (ii) received any notice of a hearing relating to the TRO or (iii) has been served with a Summons and Complaint.
3. That he and other officers and employees of the Corporation have been diligently working to have the business open on or before Thursday, June 28, 2012.
4. That approximately 80% of the annual revenues of a fireworks operator in South Carolina is collected between the middle of June and the Fourth of July.

ROA 000411



5. That if the TRO remains in place, the Corporation will be unable to open as contemplated on June 28, 2012 and will suffer the following damages:

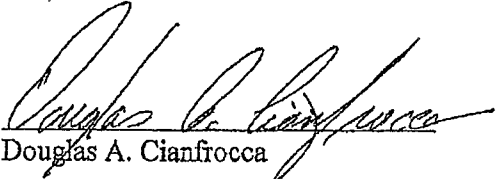
(a) Estimated Loss of Profits in the amount of \$54,000 per day.

(b) The Corporation will default under its existing mortgage loan because the Corporation will be unable to close the pending refinance of its loan with the Small Business Administration (the "SBA"). The SBA will not fund the refinance with a TRO in place. The existing loan matures July 9, 2012, and a default under that loan due to the inability to refinance may lead to foreclosure of the mortgage on the property, an adverse credit rating which may affect the ability to borrow in the future, and the imposition of additional costs, including additional interest, collection costs and attorney's fees.

(c) Default under an existing construction contract in the amount of \$373,570.00 for improvements to the property. There may be additional sums due to the contractor, who has been forced to stop work, despite having workers in York County on site, ready to complete construction.

(d) \$500,000 worth of fireworks inventory has been purchased for this location, which will be unable to be sold during the busiest period of time for a fireworks operator if the TRO remains in place.

(e) Employees of the Corporation have traveled to South Carolina and are prepared to commence work, and if the TRO remains in place, the Corporation will incur additional labor costs attributable to these employees and additional transportation expenses.

  
Douglas A. Cianfrocca

SWORN before me this \_\_\_\_ day of June, 2012

(Affix Seal)

\_\_\_\_\_  
NOTARY PUBLIC OF \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

\*See Attached  
California wording.

# Jurat

State of California

County of San Bernardino

Subscribed and sworn to (~~or affirmed~~) before me on this 25<sup>th</sup> day of June

2012 by Douglas A. Cianfrocca

proved to me on the basis of satisfactory evidence to be the person ☒ who appeared before me.

K. Mirabella-Gross  
Signature

(Notary seal)



## OPTIONAL INFORMATION

### DESCRIPTION OF THE ATTACHED DOCUMENT

Affidavit of Douglas A. Cianfrocca  
(Title or description of attached document)

(Title or description of attached document continued)

Number of Pages \_\_\_\_\_ Document Date \_\_\_\_\_

(Additional information)

### INSTRUCTIONS FOR COMPLETING THIS FORM

*The wording of all Jurats completed in California after January 1, 2008 must be in the form as set forth within this Jurat. There are no exceptions. If a Jurat to be completed does not follow this form, the notary must correct the verbiage by using a jurat stamp containing the correct wording or attaching a separate jurat form such as this one which does contain proper wording. In addition, the notary must require an oath or affirmation from the document signer regarding the truthfulness of the contents of the document. The document must be signed AFTER the oath or affirmation. If the document was previously signed, it must be re-signed in front of the notary public during the jurat process.*

- State and County information must be the State and County where the document signer(s) personally appeared before the notary public.
- Date of notarization must be the date that the signer(s) personally appeared which must also be the same date the jurat process is completed.
- Print the name(s) of document signer(s) who personally appear at the time of notarization.
- Signature of the notary public must match the signature on file with the office of the county clerk.
- The notary seal impression must be clear and photographically reproducible. Impression must not cover text or lines. If seal impression smudges, re-seal if a sufficient area permits, otherwise complete a different jurat form.
  - ◆ Additional information is not required but could help to ensure this jurat is not misused or attached to a different document.
  - ◆ Indicate title or type of attached document, number of pages and date.
- Securely attach this document to the signed document

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

Charles Sonnenberg, Festival Corp., Phillip )  
Pulley and Robert Foster, )

Plaintiffs, )

vs. )

D&T Imports South Carolina, Inc., d/b/a )  
Area 51 Fireworks, and York County, )  
South Carolina, )

Defendants. )

**AFFIDAVIT OF ATTORNEYS' FEES**

Case No. 2012-CP-46-2286

**PERSONALLY APPEARED** before me James W. Sheedy who, being duly sworn, deposes  
and says that:

1. He is an attorney for D&T Imports South Carolina, Inc., d/b/a Area 51 Fireworks (D&T) in the above matter.
2. The above captioned action sought to prevent D&T from constructing, opening and operating a fireworks store at 3620 Festival Drive, South Carolina (Subject Property).
3. Sheedy and his partner, Susan Driscoll, were hired by D&T to defend the above matter until other counsel were secured.
4. They have been involved in this matter as counsel for D&T since June of 2012. As counsel for D&T, Sheedy and she drafted a motion to dissolve TRO, a response to a motion for preliminary injunction (PI), a motion to recover damages against a bond and several affidavits. He appeared at the hearing on the motion to dissolve TRO and for entry of a PI, and will appear at the hearing on the motion to recover damages. He also engaged in numerous communications

Driscoll Sheedy, P.A.  
Attorneys at Law

00097919.2

- 1 -

ROA 000415

telephonically and electronically with D&T's corporate counsel in San Francisco, CA. He communicated at various times with Plaintiff's counsel in an effort to resolve the above matter. Driscoll and he researched and advised D&T on certain legal issues related to the TRO. Driscoll bills at an hourly rate of \$190; he bills at the rate of \$300 per hour.

5. He has been in practice almost 30 years. Driscoll and he have decisions in favor of their clients from the South Carolina and North Carolina appellate courts, the South Carolina federal district courts and the Fourth Circuit. They have also appeared in the United States Supreme Court and received a decision in their favor.

6. D&T has incurred \$17,770.41 in actual fees and costs prior to the dissolution of the TRO. He is informed and believes that an award of attorneys' fees in this case of \$17,770.41 for legal services rendered by Driscoll Sheedy, P.A., would be reasonable and appropriate under the circumstances.

Further the affiant sayeth naught.

By: J. W. Sheedy  
James W. Sheedy,  
Attorney for D&T

Sworn to before me this 31<sup>st</sup>  
day of October, 2012  
Lisa K. McGuire  
Notary Public for North Carolina  
My Commission Expires: 8/26/2017

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

Charles Sonnenberg, Festival Corp., Phillip )  
Pulley and Robert Foster, )

Plaintiffs, )

vs. )

D&T Imports South Carolina, Inc., d/b/a )  
Area 51 Fireworks, and York County, )  
South Carolina, )

Defendants. )

Case No. 2012-CP-46-2286

**SUPPLEMENTAL AFFIDAVIT OF ATTORNEYS' FEES**

**PERSONALLY APPEARED** before me James W. Sheedy who, being duly sworn, deposes and says that:

1. He is an attorney for D&T Imports South Carolina, Inc., d/b/a Area 51 Fireworks (D&T) in the above matter.
2. This affidavit is submitted to supplement the Affidavit of Attorneys' Fees submitted prior to the hearing on November 1, 2012.
3. Upon instruction from the Court, counsel for D&T reviewed its invoices to make sure there were no charges unrelated to the requested interim injunctive relief. After doing so and upon discovery of a handful of such charges, he deducted \$2,022.00 from the attorneys' fees total. Invoices attached hereto as **Exhibit A** detail the time billed to D&T by Driscoll Sheedy, P.A. through July 20, 2012 for services related to the requested temporary injunctive relief. The total amount of actual fees and costs incurred in connection with the requested temporary injunctive relief is

Driscoll Sheedy, P.A.  
Attorneys at Law

00098026.2

- 1 -

ROA 000417

\$15,748.41. This number is slightly lower than the \$17,770.41 presented at the hearing. He is informed and believes that an award of attorneys' fees in this case of \$15,748.41 for legal services rendered by Driscoll Sheedy, P.A., would be reasonable and appropriate under the circumstances.

Further the affiant sayeth naught.

By: *J W Sheedy*  
James W. Sheedy,  
Attorney for D&T

Sworn to before me this 27<sup>th</sup>  
day of November, 2012

*Lisa D. McGuire*  
Notary Public for North Carolina  
My Commission Expires: 08/26/2017

# Exhibit A





A PROFESSIONAL ASSOCIATION | ATTORNEYS AT LAW

Please remit to:  
Ballantyne Office

Ballantyne 11520 N. Community House Road  
Suite 200 | Charlotte, NC 28277  
South Carolina Office 222 E. Main Street  
Suite 204 | Rock Hill, SC 29730  
www.driscollsheedy.com

Doug Cianfrocca  
D&T Imports South Carolina, Inc.  
2657 Windmill Parkway, #404  
Henderson NV 89074

Client #: DT  
File #: 12JWS130  
As of Date: 06/30/2012  
Invoice #: 17057

RE: Charles Sonnenberg, et al.

| DATE       | TKPR | DESCRIPTION OF SERVICES RENDERED                                                                                                                                                                                                                                                                                                   | TIME | AMOUNT   |
|------------|------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|----------|
| 06/08/2012 | JWS  | TC Phillips about fireworks dispute                                                                                                                                                                                                                                                                                                | .30  | 90.00    |
| 06/21/2012 | JWS  | 4 e-mails Randy; TC Randy                                                                                                                                                                                                                                                                                                          | .50  | 150.00   |
| 06/22/2012 | JWS  | Instr AW; 2 vm Randy; revise ltr;<br>e-mail and TC Randy; 2 e-mails Doug;<br>e-mail Randy; e-mail Hebert; e-mail<br>and vm Randy; 2 e-mails Doug                                                                                                                                                                                   | 1.20 | 360.00   |
| 06/23/2012 | SED  | E-mails re: motion to dissolve TRO                                                                                                                                                                                                                                                                                                 | .10  | 19.00    |
| 06/23/2012 | JWS  | Draft and revise motion; 14 e-mails<br>Muller, Phillips and Settle; 2 vm and<br>TC Doug C; vm and TC Phillips                                                                                                                                                                                                                      | 5.60 | 1,680.00 |
| 06/24/2012 | SED  | Revise motion to dissolve; review<br>grantor's ability to enforce<br>restriction; e-mails JWS                                                                                                                                                                                                                                      | 2.70 | 513.00   |
| 06/24/2012 | JWS  | TC SED; final e-mail and court<br>communications; e-mail pldgs; e-mail<br>client; 2 e-mails court; TC Maryann;<br>vm and TC Randy; TC Kendree; e-mail<br>and vm Doug; vm and TC Doug; confer<br>SED; vm and TC Bayles; e-mail Beth;<br>TC Doug; 2 e-mails Beth; e-mail Doug<br>M about Winter; 4 e-mails Sumner; 2<br>e-mails Beth | 2.80 | 840.00   |
| 06/25/2012 | SED  | Draft letter and certificate of<br>service; prep pkg for Court; revise<br>e-mail to Judge Kimball; T/C JWS re:<br>authorization to do business; e-mail<br>Court re: hearing scheduled @ 3:00<br>6/26; conf re: Winter case and<br>standard; prep case law notebook for<br>hearing                                                  | 2.10 | 399.00   |

ROA 000420

|                |                                                                                                                                                                                                                                                                                                |      |          |
|----------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|----------|
| 06/25/2012 JWS | 25 e-mails SED, Settle, Doug C;<br>review and finalize motion to<br>dissolve                                                                                                                                                                                                                   | 2.90 | 870.00   |
| 06/26/2012 SED | T/C JWS re: TRO; research Act, bond<br>and G&O; revise memo for TRO hearing                                                                                                                                                                                                                    | 1.10 | 209.00   |
| 06/26/2012 JWS | TC SED; read Miller Pond; hearing<br>prep; e-mail Motz; e-mil and TC<br>Settle; 2 e-mails Dan; e-mails<br>Michael; e-mails all counsel in case;<br>5 e-mails Lynn and Maryann; read<br>affidavit; 2 e-mails Dan and Doug;<br>e-mails AW; rsch on -1145 exception<br>for definition of "permit" | 3.60 | 1,080.00 |
| 06/27/2012 SED | Vm from JWS; research "adequate<br>remedy"; e-mail JWS; review Response                                                                                                                                                                                                                        | .90  | 171.00   |
| 06/27/2012 JWS | TC and e-mail SED; revise memo; vm<br>Randy; e-mail Doug; 3 e-mails Settle;<br>rsch on -1145; read response; read<br>affidavits; e-mails Ernie; 2 e-mails<br>Doug                                                                                                                              | 2.10 | 630.00   |
| 06/28/2012 SED | T/C JWS re: TRO hearing                                                                                                                                                                                                                                                                        | .20  | 38.00    |
| 06/28/2012 JWS | Prepare for hearing; trip to York;<br>attend long hearing; 2 TC Beth; vm<br>and TC Randy; 2 e-mails Randy; TC<br>Doug C; confer Beth after hearing; 2<br>e-mails Ballou; e-mail Judge; e-mail<br>clients; read order; e-mail Dan                                                               | 5.20 | 1,560.00 |
| 06/30/2012 JWS | Draft motion to dissolve; rsch on<br>nominal bond; e-mail client; e-mail<br>SED; TC SED; 2 e-mails Doug; revise<br>motion; vm and TC Randy; 3 vm and 2<br>TC Doug C.                                                                                                                           | 3.10 | 930.00   |

TOTAL SERVICES RENDERED: 34.40 \$9,539.00

TIMEKEEPER SUMMARY:

|        |                              |                            |            |
|--------|------------------------------|----------------------------|------------|
| JWS    | - James W. Sheedy, Partner   | 27.30 HRS @ \$ 300.00/HR = | 8,190.00   |
| SED    | - Susan E. Driscoll, Partner | 7.10 HRS @ \$ 190.00/HR =  | 1,349.00   |
| Totals |                              | 34.40                      | \$9,539.00 |

|                       |                            |         |
|-----------------------|----------------------------|---------|
| 06/25/2012            | York County Clerk of Court | 25.00   |
| 06/28/2012            | Mileage to Hearing         | 39.68   |
| TOTAL COSTS ADVANCED: |                            | \$64.68 |

D&T Imports South Carolina, Inc.  
File #: 12JWS130

Page#: 3  
Invoice #: 17057

|                   |                   |
|-------------------|-------------------|
| PREVIOUS BALANCE: | 0.00              |
| CURRENT CHARGES:  | 9,603.68          |
| LESS PAYMENTS:    | 0.00              |
| TOTAL AMOUNT DUE: | <u>\$9,603.68</u> |

ROA 000422

# Driscoll SHEEDY

A PROFESSIONAL ASSOCIATION | ATTORNEYS AT LAW

Please remit to:  
Ballantyne Office

Ballantyne: 11520 N. Community House Road  
Suite 200 | Charlotte, NC 28277  
South Carolina Office: 222 E. Main Street  
Suite 204 | Rock Hill, SC 29730  
www.driscollsheedy.com

Doug Cianfrocca  
D&T Imports South Carolina, Inc.  
2657 Windmill Parkway, #404  
Henderson NV 89074

Client #: DT  
File #: 12JWS130  
As of Date: 07/31/2012  
Invoice #: 17124

RE: Charles Sonnenberg, et al.

| DATE       | TKPR | DESCRIPTION OF SERVICES RENDERED                                                                                                                                                                                                                     | TIME | AMOUNT   |
|------------|------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|----------|
| 07/01/2012 | SED  | Revise response; research bond requirement and private right of action for whistleblower statutes                                                                                                                                                    | 1.10 | 209.00   |
| 07/01/2012 | JWS  | Revise resp; cont'd rsch; finalize resp; e-mail SED; e-mails M&VA attys; e-mail Doug; TC SED; 2 e-mails Doug                                                                                                                                         | 2.30 | 690.00   |
| 07/02/2012 | SED  | Final revisions to Response; draft letter to Clerk and Certificate of Service; T/C JWS re: results of PI hearing                                                                                                                                     | 1.30 | 247.00   |
| 07/02/2012 | JWS  | E-mail SED; revise brief; rsch on statute; e-mails Judge; e-mail SED; e-mail Balou; 2 TC Beth; TC Randy; attend hearing; trip to York; 2 TC Beth; vm and TC Randy; 2 TC Doug; conf call Doug and Kendree; e-mail Dan, Judge and client; review order | 6.10 | 1,830.00 |
| 07/03/2012 | JWS  | 2 TC Kendree; 3 e-mails Ballou; 2 e-mails Judy; compare orders; e-mail Doug                                                                                                                                                                          | 1.10 | 330.00   |
| 07/05/2012 | JWS  | TC, vm and e-mails Gail                                                                                                                                                                                                                              | .40  | 120.00   |
| 07/10/2012 | JWS  | 2 e-mails Gail; e-mail reply to Gail; TC Gail; 2 more e-mails Gail                                                                                                                                                                                   | .60  | 180.00   |
| 07/11/2012 | JWS  | 4 e-mails Gail                                                                                                                                                                                                                                       | .40  | 120.00   |
| 07/13/2012 | JWS  | 3 e-mails Gail                                                                                                                                                                                                                                       | .30  | 90.00    |
| 07/14/2012 | JWS  | 3 e-mails Dan; e-mail Gail                                                                                                                                                                                                                           | .40  | 120.00   |
| 07/16/2012 | JWS  | 2 e-mails Doug; vm Kendree                                                                                                                                                                                                                           | .30  | 90.00    |
| 07/18/2012 | JWS  | 4 e-mails Kendree; 3 e-mails Grant                                                                                                                                                                                                                   | .70  | 210.00   |
| 07/20/2012 | JWS  | 2 e-mails Doug                                                                                                                                                                                                                                       | .20  | 60.00    |

ROA 000423

|                          |                                                                                                      |       |            |
|--------------------------|------------------------------------------------------------------------------------------------------|-------|------------|
| 07/21/2012 SED           | E-mails JWS; draft extension letter                                                                  | .80   | 152.00     |
| 07/21/2012 JWS           | 2 e-mails Doug and Gail; 7 e-mails<br>SED; e-mail Doug and Gail; read YC's<br>answer; 3 e-mails Gail | 1.60  | 480.00     |
| 07/23/2012 JWS           | Conf SED; e-mail Gail; vm and TC Doug                                                                | .40   | 120.00     |
| 07/24/2012 JWS           | Revise extension ltr; e-mail Dan ; 2<br>e-mails Gail                                                 | .60   | 180.00     |
| 07/25/2012 SED           | E-mails JWS; research method to<br>dismiss on grounds of standing                                    | .90   | 171.00     |
| 07/25/2012 JWS           | 10 e-mails Gail; e-mail SED                                                                          | 1.10  | 330.00     |
| 07/26/2012 JWS           | E-mails Shirley about transcript;<br>e-mails Alister; 2 e-mails SED                                  | .50   | 150.00     |
| 07/27/2012 SED           | E-mail Fisher; T/C Ballou's office<br>re: extension of time                                          | .10   | 19.00      |
| 07/27/2012 JWS           | E-mails Alister; e-mails Gail,<br>Alister, and SED; 2 e-mails Dan                                    | 1.10  | 330.00     |
| 07/29/2012 JWS           | Vm Gail; e-mail Alister                                                                              | .30   | 90.00      |
| TOTAL SERVICES RENDERED: |                                                                                                      | 22.60 | \$6,318.00 |

TIMEKEEPER SUMMARY:

|        |                              |                            |            |
|--------|------------------------------|----------------------------|------------|
| JWS    | - James W. Sheedy, Partner   | 18.40 HRS @ \$ 300.00/HR = | 5,520.00   |
| SED    | - Susan E. Driscoll, Partner | 4.20 HRS @ \$ 190.00/HR =  | 798.00     |
| Totals |                              | 22.60                      | \$6,318.00 |

|            |                                 |        |
|------------|---------------------------------|--------|
| 06/25/2012 | Federal Express                 | 56.00  |
| 06/27/2012 | Computerized Research (Westlaw) | 981.18 |
| 07/26/2012 | Dallas Reporting, Inc.          | 811.55 |

TOTAL COSTS ADVANCED: \$1,848.73

PREVIOUS BALANCE: 9,603.68

CURRENT CHARGES: 8,166.73

LESS PAYMENTS: 0.00

TOTAL AMOUNT DUE: \$17,770.41

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

) IN THE COURT OF COMMON PLEAS  
) SIXTEENTH JUDICIAL CIRCUIT

Charles Sonnenberg, Festival Corp., Phillip )  
Pulley and Robert Foster, )

)  
) Plaintiffs, )

)  
) vs. )

) Case No. 2012-CP-46-2286

)  
) D&T Imports South Carolina, Inc., d/b/a )  
) Area 51 Fireworks, and York County, )  
) South Carolina, )

)  
) Defendants. )  
)

**SUPPLEMENTAL MEMORANDUM IN SUPPORT  
OF MOTION TO RECOVER DAMAGES AGAINST BOND**

As a supplement to its Memorandum in Support dated October 31, 2012 accompanying its Motion to Recover Damages Against Bond dated October 19, 2012 (the "Motion"), D&T submits this additional short Memorandum. Except as otherwise defined herein, all capitalized terms shall have the meanings ascribed to them in the Motion.

**Discussion**

"The damages recoverable in an action on an injunction bond include *all* damages sustained by reason of the wrongful issuance of the injunction, that is such damages as are the direct, natural, and proximate result of the injunction." *Hylar v. Wheeler*, 240 S.C. 386, 392, 126 S.E.2d 173, 175 (1962) (Emphasis added.). A bond is required for the issuance of an injunction, including a TRO, "to pay *any damages* that the defendant may sustain by reason of the issuance of the injunction." *Id.* at 395, 126 S.E.2d at 176 (Emphasis in original.). In *Hylar*, the movant was awarded damages

against the bond not only for the lost rental value of the property while it was in possession of the defendant, but also for waste committed to the property during the period of time the defendant was in possession. Such damages included the removal of interior doors, light fixtures, sink tops, 530 linear feet of fencing and two gates, damage to trees in the yard of the home, as well as damage to the walls and floors resulting from "the deposit of trash and garbage thereon." *Id.* at 394, 126 S.E.2d at 176. The Court reasoned that the "foregoing damages could hardly be reasonably attributed to normal wear and tear and use of the property" and that the bond was issued to pay "such damages as might sustain from the retention of possession by [defendant] because of the injunction." *Id.* at 394, 395.<sup>1</sup>

The case law is clear that a movant is entitled to recover all damages that result from the issuance of the temporary restraining order or temporary injunction. *Chambron v. Lost Colony Homeowners Association*, 317 S.C. 43, 45, 451 S.E.2d 410, 411 (Ct.App. 1994) (housing, meals and attorneys' fees awarded during period of temporary injunction). The issuing party is not allowed to quibble over whether such party would have taken some other course of action to avoid the damages. If the damages result from the issuance of the injunctive relief, then the movant is entitled to recover against the bond.

D&T believed correctly that the TRO had been issued wrongfully and that it would eventually be able to move forward with the construction project. As a result, D&T instructed TLR

---

<sup>1</sup> See also *Rochester Buckhart Action Group v. Young*, 394 Ill. App. 3d 773, 779, 914 N.E.2d 1251, 1258 (Ill. App. 4 Dist. 2009) (Case remanded back to trial court to allow hog farmer to "prove any damages he incurred as a result of the preliminary injunction" that halted construction of his planned expansion.); *South Central Tennessee Railroad Authority v. Harakas*, 44 S.W.3d 912 (Tenn. Ct. App. 2000) (Homeowners allowed to present affidavit showing \$10,000 in damages, including \$6,740 "in construction costs due to the delay caused by the issuance of the TRO and the temporary injunction.").

to remain on site to avoid the expense of demobilization and then remobilization once the TRO was dissolved. Despite its efforts to minimize expense, it is clear from the testimony of Rick Ruonala, the Rule 30(b)(6), SCRCF, designee of TLR Construction, that D&T was damaged as a result of the injunction in the amount of \$34,025. But for the issuance of the TRO, TLR and its subcontractors would not have been forced to sit idle at the construction site, incurring costs but not doing work. The downtime delayed the project and forced TLR to extend the project by fourteen (14) extra days that would not have been necessary, but for the delay caused by the TRO. (Depos. Tr. Ruonala, p. 11.) Those fourteen days<sup>2</sup> translated into a direct, additional cost to D&T of \$34,025. It is entitled to recover this amount, plus its attorneys' fees incurred for dissolution of the TRO<sup>3</sup>, from the bond.

It does not matter that D&T has not yet received a certificate of occupancy for the property. If D&T wanted the mobilized contractor to finish the work but for the injunction, D&T was within its business judgment to require the work be finished even though a certificate of occupancy was not yet ready to be issued. The damages D&T is seeking to recover from the bond do not flow from the failure to receive a certificate of occupancy, but from the fact its construction crew was stuck on site without being able to perform any work. The TRO was the reason for this downtime.

**WHEREFORE**, D&T asks that it be awarded \$49,773.41<sup>4</sup> from the Bond, the surety be directed to remit such sum to D&T and the case then be dismissed if that is the wish of County and Plaintiffs.

---

<sup>2</sup> If Plaintiffs had not enjoined D&T, D&T would not have had to wait for County to retract its stop work order.

<sup>3</sup> See *Chambron v. Lost Colony Homeowners Association*, 317 S.C. 43, 451 S.E.2d 410 (1994).

<sup>4</sup> D&T submitted a Supplemental Affidavit of Attorneys' fees, with invoices attached as an exhibit thereto, that shows \$15,748.41 was incurred by D&T to dissolve the TRO.



Date: 1/15/13

DRISCOLL SHEEDY, P.A.

By: James W. Sheedy

James W. Sheedy

Susan E. Driscoll

11520 N. Community House Road  
Suite 200

Charlotte, N.C. 28277

Telephone - (704) 341-2101

Facsimile - (704) 341-2105

jimsheedy@driscollsheedy.com

sdriscoll@driscollsheedy.com

ATTORNEYS FOR D&T

COURT OF THE STATE OF SOUTH CAROLINA  
ORK

LES SONNENBERG, FESTIVAL CORP, PHILLIP PULLEY & ROBERT FOSTER

BOND NO. 105806138

Plaintiffs,

-against-

INDEX NO. \_\_\_\_\_

**UNDERTAKING ON TEMPORARY  
RESTRAINING ORDER**

D&T Imports South Carolina, Inc.; A Nevada  
Corporation, dba Area 51 Defendants,  
Fireworks, and York County, a political subdivision  
of the State of South Carolina

WHEREAS, the Plaintiffs, CHARLES SONNENBERG, FESTIVAL CORP, PHILLIP PULLEY & ROBERT FOSTER have applied for a TEMPORARY RESTRAINING ORDER in the above entitled action, restraining the Defendants, D&T Imports South Carolina, Inc., A Nevada Corporation, dba from doing things as more fully set forth in the order about to be signed. Area 51 Fireworks, and York County, a political subdivision of the State of SC

Now, therefore Travelers Casualty and Surety Company of America  
having an office and principal place of business for the State of CONNECTICUT, at  
One Tower Square Hartford, CT 06183 as Surety, does hereby,  
pursuant to the Statute in such case made and provided, undertake that the Plaintiff, will pay to the  
Defendants, D&T Imports South Carolina, Inc and York County  
so enjoined, such damages and costs not exceeding the sum of ( \$100,000.00 ) One Hundred Thousand  
DOLLARS as Defendants may sustain by reason of the temporary restraining order, if the Court shall  
finally decide that the Plaintiffs were not entitled thereto; such damages and costs to be ascertained by  
a reference, or otherwise as the Court may direct.

Dated: June 28, 2012

Travelers Casualty and Surety Company of America

By: Dolores Sims

Attorney-In-Fact

FILED-RECEIVED

2012 JUL -2 PM 12:22

DAVID HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, SC

ROA 000429

POWER OF ATTORNEY

Farmington Casualty Company  
Fidelity and Guaranty Insurance Company  
Fidelity and Guaranty Insurance Underwriters, Inc.  
Seaboard Surety Company  
St. Paul Fire and Marine Insurance Company

St. Paul Guardian Insurance Company  
St. Paul Mercury Insurance Company  
Travelers Casualty and Surety Company  
Travelers Casualty and Surety Company of America  
United States Fidelity and Guaranty Company

act No. 219001

Certificate No. 002635234

ALL MEN BY THESE PRESENTS: That Seaboard Surety Company is a corporation duly organized under the laws of the State of New York, that St. Paul and Marine Insurance Company, St. Paul Guardian Insurance Company and St. Paul Mercury Insurance Company are corporations duly organized under the laws of the State of Minnesota, that Farmington Casualty Company, Travelers Casualty and Surety Company, and Travelers Casualty and Surety Company of America are corporations duly organized under the laws of the State of Connecticut, that United States Fidelity and Guaranty Company is a corporation duly organized under the laws of the State of Maryland, that Fidelity and Guaranty Insurance Company is a corporation duly organized under the laws of the State of Iowa, and that Fidelity and Guaranty Insurance Underwriters, Inc. is a corporation duly organized under the laws of the State of Wisconsin (herein collectively called the "Companies"), and that the Companies do hereby make, constitute and appoint

Allan E. Meadors, James M. Adams, Cindy Price, Stephen A. Ware, Andrew B. Meadors, Scarlett M. Ray, and Dolores Sims

of the City of Little Rock, State of Arkansas, their true and lawful Attorney(s)-in-Fact, each in their separate capacity if more than one is named above, to sign, execute, seal and acknowledge any and all bonds, recognizances, conditional undertakings and other writings obligatory in the nature thereof on behalf of the Companies in their business of guaranteeing the fidelity of persons, guaranteeing the performance of contracts and executing or guaranteeing bonds and undertakings required or permitted in any actions or proceedings allowed by law.

IN WITNESS WHEREOF, the Companies have caused this instrument to be signed and their corporate seals to be hereto affixed, this 26th day of September, 2008

Farmington Casualty Company  
Fidelity and Guaranty Insurance Company  
Fidelity and Guaranty Insurance Underwriters, Inc.  
Seaboard Surety Company  
St. Paul Fire and Marine Insurance Company

St. Paul Guardian Insurance Company  
St. Paul Mercury Insurance Company  
Travelers Casualty and Surety Company  
Travelers Casualty and Surety Company of America  
United States Fidelity and Guaranty Company



State of Connecticut  
City of Hartford ss.

By: George W. Thompson  
George W. Thompson, Senior Vice President

On this the 26th day of September, 2008, before me personally appeared George W. Thompson, who acknowledged himself to be the Senior Vice President of Farmington Casualty Company, Fidelity and Guaranty Insurance Company, Fidelity and Guaranty Insurance Underwriters, Inc., Seaboard Surety Company, St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Mercury Insurance Company, Travelers Casualty and Surety Company, Travelers Casualty and Surety Company of America, and United States Fidelity and Guaranty Company, and that he, as such, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing on behalf of the corporations by himself as a duly authorized officer.

In Witness Whereof, I hereunto set my hand and official seal.  
My Commission expires the 30th day of June, 2011.



Marie C. Tetreault  
Marie C. Tetreault, Notary Public

WARNING: THIS POWER OF ATTORNEY IS INVALID WITHOUT THE RED BORDER

This Power of Attorney is granted under and by the authority of the following resolutions adopted by the Boards of Directors of Farmington Casualty Insurance Company, Fidelity and Guaranty Insurance Underwriters, Inc., Seaboard Surety Company, St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Mercury Insurance Company, Travelers Casualty and Surety Company, Travelers America, and United States Fidelity and Guaranty Company, which resolutions are now in full force and effect, reading as follows:

**RESOLVED**, that the Chairman, the President, any Vice Chairman, any Executive Vice President, any Senior Vice President, any President, the Treasurer, any Assistant Treasurer, the Corporate Secretary or any Assistant Secretary may appoint Attorneys-in-Fact of the Company and may give such appointee such authority as his or her certificate of authority may prescribe to sign with the Company's seal bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or contract of said officers or the Board of Directors at any time may remove any such appointee and revoke the power given him or her; and it is

**FURTHER RESOLVED**, that the Chairman, the President, any Vice Chairman, any Executive Vice President, any Senior Vice President or any Vice President delegate all or any part of the foregoing authority to one or more officers or employees of this Company, provided that each such delegation is in writing, and it is

**FURTHER RESOLVED**, that any bond, recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking, shall be valid and binding upon the Company when (a) signed by the President, any Vice Chairman, any Executive Vice President, any Senior Vice President or any Vice President, any Second Vice President, the Treasurer, any Assistant Treasurer, the Corporate Secretary or any Assistant Secretary and duly attested and sealed with the Company's seal by a Secretary or Assistant Secretary; or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact and Agents pursuant to the power prescribed in his or her certificate or their certificates of authority or by one or more Company officers pursuant to a written delegation of authority; and it is

**FURTHER RESOLVED**, that the signature of each of the following officers: President, any Executive Vice President, any Senior Vice President, any Vice President, any Assistant Vice President, any Secretary, any Assistant Secretary, and the seal of the Company may be affixed by facsimile to any power of attorney or to any certificate relating thereto appointing Resident Vice Presidents, Resident Assistant Secretaries or Attorneys-in-Fact for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, and any such power of attorney or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by such facsimile signature and facsimile seal shall be valid and binding on the Company in the future with respect to any bond or understanding to which it is attached.

I, Kori M. Johanson, the undersigned, Assistant Secretary, of Farmington Casualty Insurance Company, Fidelity and Guaranty Insurance Company, Fidelity and Guaranty Insurance Underwriters, Inc., Seaboard Surety Company, St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Mercury Insurance Company, Travelers Casualty and Surety Company, Travelers Casualty and Surety Company of America, and United States Fidelity and Guaranty Company do hereby certify that the above and foregoing is a true and correct copy of the Power of Attorney executed by said companies, which is in full force and effect and has not been revoked.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said companies this 28th day of June, 20 12.

WARNING: THIS POWER OF ATTORNEY IS INVALID WITHOUT THE RED BORDER

*Kori M. Johanson*

Kori M. Johanson, Assistant Secretary



To verify the authenticity of this Power of Attorney, call 1-800-421-3880 or contact us at [www.travelersbond.com](http://www.travelersbond.com). Please refer to the Attorney-In-Fact number, the above-named individuals and the details of the bond to which the power is attached.

FILED-RECEIVED  
2012 JUL -2 PM 12:23  
DAVID HAMILTON  
C.C. CP & G.S. SC  
YORK COUNTY, SC

WARNING: THIS POWER OF ATTORNEY IS INVALID WITHOUT THE RED BORDER

ROA 000431

COURT OF THE STATE OF SOUTH CAROLINA  
COUNTY OF YORK

CHARLES SONNENBERG, FESTIVAL CORP, PHILLIP PULLEY & ROBERT FOSTER

Plaintiffs,

-against-

BOND NO. 105806138

INDEX NO. \_\_\_\_\_

UNDERTAKING ON TEMPORARY  
RESTRAINING ORDER

D&T Imports South Carolina, Inc.; A Nevada  
Corporation, dba Area 51 Defendants,  
Fireworks, and York County, a political subdivision  
of the State of South Carolina

WHEREAS, the Plaintiffs, CHARLES SONNENBERG, FESTIVAL CORP, PHILLIP PULLEY & ROBERT FOSTER have applied for a TEMPORARY RESTRAINING ORDER in the above entitled action, restraining the Defendants, D&T Imports South Carolina, Inc., A Nevada Corporation, dba from doing things as more fully set forth in the order about to be signed. Area 51 Fireworks, and York County, a political subdivision of the State of SC

Now, therefore Travelers Casualty and Surety Company of America having an office and principal place of business for the State of CONNECTICUT at One Tower Square Hartford, CT 06183 as Surety, does hereby, pursuant to the Statute in such case made and provided, undertake that the Plaintiff, will pay to the Defendants, D&T Imports South Carolina, Inc and York County so enjoined, such damages and costs not exceeding the sum of ( \$100,000.00 ) One Hundred Thousand DOLLARS as Defendants may sustain by reason of the temporary restraining order, if the Court shall finally decide that the Plaintiffs were not entitled thereto; such damages and costs to be ascertained by a reference, or otherwise as the Court may direct.

Dated: June 28, 2012

Travelers Casualty and Surety Company of America

By: Didoras Simis  
Attorney-In-Fact

FILED-RECEIVED

2012 JUL -2 PM 12:23

DAVID HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, SC

COPY

ROA 000432

**TRAVELERS** **POWER OF ATTORNEY**

Farmington Casualty Company  
 Fidelity and Guaranty Insurance Company  
 Fidelity and Guaranty Insurance Underwriters, Inc.  
 Seaboard Surety Company  
 St. Paul Fire and Marine Insurance Company

St. Paul Guardian Insurance Company  
 St. Paul Mercury Insurance Company  
 Travelers Casualty and Surety Company  
 Travelers Casualty and Surety Company of America  
 United States Fidelity and Guaranty Company

Attorney-In Fact No. 219001

Certificate No. 002635234

KNOW ALL MEN BY THESE PRESENTS: That Seaboard Surety Company is a corporation duly organized under the laws of the State of New York, that St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company and St. Paul Mercury Insurance Company are corporations duly organized under the laws of the State of Minnesota, that Farmington Casualty Company, Travelers Casualty and Surety Company, and Travelers Casualty and Surety Company of America are corporations duly organized under the laws of the State of Connecticut, that United States Fidelity and Guaranty Company is a corporation duly organized under the laws of the State of Maryland, that Fidelity and Guaranty Insurance Company is a corporation duly organized under the laws of the State of Iowa, and that Fidelity and Guaranty Insurance Underwriters, Inc. is a corporation duly organized under the laws of the State of Wisconsin (herein collectively called the "Companies"), and that the Companies do hereby make, constitute and appoint

Allan B. Meadors, James M. Adams, Cindy Price, Stephen A. Ware, Andrew B. Meadors, Scarlett M. Ray, and Dolores Sims

of the City of Little Rock, State of Arkansas, their true and lawful Attorney(s)-in-Fact, each in their separate capacity if more than one is named above, to sign, execute, seal and acknowledge any and all bonds, recognizances, conditional undertakings and other writings obligatory in the nature thereof on behalf of the Companies in their business of guaranteeing the fidelity of persons, guaranteeing the performance of contracts and executing or guaranteeing bonds and undertakings required or permitted in any actions or proceedings allowed by law.

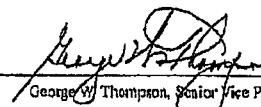
IN WITNESS WHEREOF, the Companies have caused this instrument to be signed and their corporate seals to be hereto affixed, this 26th day of September, 2008

Farmington Casualty Company  
 Fidelity and Guaranty Insurance Company  
 Fidelity and Guaranty Insurance Underwriters, Inc.  
 Seaboard Surety Company  
 St. Paul Fire and Marine Insurance Company

St. Paul Guardian Insurance Company  
 St. Paul Mercury Insurance Company  
 Travelers Casualty and Surety Company  
 Travelers Casualty and Surety Company of America  
 United States Fidelity and Guaranty Company



State of Connecticut  
 City of Hartford ss.

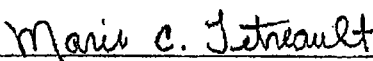
By: 

George W. Thompson, Senior Vice President

On this the 26th day of September, 2008, before me personally appeared George W. Thompson, who acknowledged himself to be the Senior Vice President of Farmington Casualty Company, Fidelity and Guaranty Insurance Company, Fidelity and Guaranty Insurance Underwriters, Inc., Seaboard Surety Company, St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Mercury Insurance Company, Travelers Casualty and Surety Company, Travelers Casualty and Surety Company of America, and United States Fidelity and Guaranty Company, and that he, as such, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing on behalf of the corporations by himself as a duly authorized officer.

In Witness Whereof, I hereunto set my hand and official seal.  
 My Commission expires the 30th day of June, 2011.



  
 Mario C. Tetreault, Notary Public

**COPY**

WARNING: THIS POWER OF ATTORNEY IS INVALID WITHOUT THE RED BORDER

This Power of Attorney is granted under and by the authority of the following resolutions adopted by the Boards of Directors of Farmington Casualty Company, Fidelity and Guaranty Insurance Company, Fidelity and Guaranty Insurance Underwriters, Inc., Seaboard Surety Company, St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Mercury Insurance Company, Travelers Casualty and Surety Company, Travelers Casualty and Surety Company of America, and United States Fidelity and Guaranty Company, which resolutions are now in full force and effect, reading as follows:

**RESOLVED**, that the Chairman, the President, any Vice Chairman, any Executive Vice President, any Senior Vice President, any Vice President, any Second Vice President, the Treasurer, any Assistant Treasurer, the Corporate Secretary or any Assistant Secretary may appoint Attorneys-in-Fact and Agents to act for and on behalf of the Company and may give such appointee such authority as his or her certificate of authority may prescribe to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any of said officers or the Board of Directors at any time may remove any such appointee and revoke the power given him or her; and it is

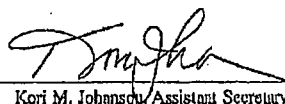
**FURTHER RESOLVED**, that the Chairman, the President, any Vice Chairman, any Executive Vice President, any Senior Vice President or any Vice President may delegate all or any part of the foregoing authority to one or more officers or employees of this Company, provided that each such delegation is in writing and a copy thereof is filed in the office of the Secretary; and it is

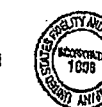
**FURTHER RESOLVED**, that any bond, recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking shall be valid and binding upon the Company when (a) signed by the President, any Vice Chairman, any Executive Vice President, any Senior Vice President or any Vice President, any Second Vice President, the Treasurer, any Assistant Treasurer, the Corporate Secretary or any Assistant Secretary and duly attested and sealed with the Company's seal by a Secretary or Assistant Secretary; or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact and Agents pursuant to the power prescribed in his or her certificate or their certificates of authority or by one or more Company officers pursuant to a written delegation of authority; and it is

**FURTHER RESOLVED**, that the signature of each of the following officers: President, any Executive Vice President, any Senior Vice President, any Vice President, any Assistant Vice President, any Secretary, any Assistant Secretary, and the seal of the Company may be affixed by facsimile to any power of attorney or to any certificate relating thereto appointing Resident Vice Presidents, Resident Assistant Secretaries or Attorneys-in-Fact for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, and any such power of attorney or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by such facsimile signature and facsimile seal shall be valid and binding on the Company in the future with respect to any bond or undertaking to which it is attached.

I, Kori M. Johanson, the undersigned, Assistant Secretary, of Farmington Casualty Company, Fidelity and Guaranty Insurance Company, Fidelity and Guaranty Insurance Underwriters, Inc., Seaboard Surety Company, St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Mercury Insurance Company, Travelers Casualty and Surety Company, Travelers Casualty and Surety Company of America, and United States Fidelity and Guaranty Company do hereby certify that the above and foregoing is a true and correct copy of the Power of Attorney executed by said Companies, which is in full force and effect and has not been revoked.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seals of said Companies this 28th day of June, 20 12.

  
Kori M. Johanson, Assistant Secretary



To verify the authenticity of this Power of Attorney, call 1-800-421-3880 or contact us at [www.travelersbond.com](http://www.travelersbond.com). Please refer to the Attorney-in-Fact number, the above-named individuals and the details of the bond to which the power is attached.

FILED-RECEIVED

2012 JUL -2 PM 12:23

DAVID HAMILTON  
C.C.C.P. & G.S.  
YORK COUNTY, SC

COPY

WARNING: THIS POWER OF ATTORNEY IS INVALID WITHOUT THE RED BORDER

ROA 000434

Extremely Urgent

HAMILTON MARTENS & BALLON  
130 E MAIN ST  
ROCK HILL SC 29730-4575

LEG-1024

P. IN

S. NIESLE I:

X

1030

1298EE/E019054 2717  
LLF0XYC SCROCI02 US 2578 Jul 11.1.3 LP2944  
US 2578 HIP 11.1.3 LP2944

PATTY RORTON  
801-372-5200  
MEADORS ADAMS LBR  
101 SOUTH SPRING STREET  
LITTLE ROCK AR 72203

SHIP TO:

DANIEL J. BALLOU  
803-329-7609  
HAMILTON MARTENS & BALLON  
130 EAST MAIN STREET  
ROCK HILL SC 29730

SC 297 0-01



UPS NEXT DAY AIR

TRACKING #: 1Z 986 E7E 01 9054 2717

1

UPS NEXT DAY AIR

TRACKING #: 1Z 986 E7E 01 9054 2717

1



LLF0XYC SCROCI02 US 2578 Jul 02 08:40:25 2012 HIP 11.1.3 LP2944

Page 1 of 1

UPS Next Day Air  
UPS Worldwide Express  
UPS 2nd Day Air

ROA 000435





2012CP4602286

### INCREASE CERTIFICATE

Principal: Charles Sonnenberg, Festival Corp, Phillip Pulley & Robert Foster

Bond No. 105806138  
License No.  
Amount of Bond: \$100,000.00  
Hereby increased to: \$150,000.00

Obligee: Circuit Court for York County, 16th Circuit

As of July 2, 2012, the amount of the above described bond is increased from the sum of \$100,000.00 to the sum of \$150,000.00, but the liability of the Surety for any acts or defaults occurring before the effective date hereof shall in no event exceed the total sum of \$100,000.00, and the aggregate liability of the Surety for any acts or defaults, whenever committed, shall in no event exceed the total sum of \$150,000.00, it being the intent hereof to preclude cumulative liability. This certificate, when signed by the Principal shall become a part of the said bond.

Signed, sealed and dated July 10, 2012

Travelers Casualty and Surety Company of America

By

Dolores Sims

Attorney-in-Fact

I hereby consent to the above increase.

Witness my hand and seal this 17 day of July, 2012

Phil Pulley

(Seal)  
Principal

FILED-RECEIVED  
2012 JUL 27 PM 3:19  
DAVID HAMILTON  
CLERK & S.  
YORK COUNTY, SC

### INSTRUCTIONS TO AGENTS - IMPORTANT

Do not deliver this certificate to the Obligeo until it has been dated and signed by the Principal. One signed copy must be returned to the Surety.

THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

---

APPEAL FROM YORK COUNTY  
Equity Court

The Honorable S. Jackson Kimball, Master-in-Equity

---

Case No.: 2012-CP-46-02286

---

Charles Sonnenberg, Festival Corp., Phillip Pulley  
and Robert Foster. ....  
Plaintiffs,

Of whom Phillip Pulley and Robert Forster are the Appellants,

v.

D&T Imports South Carolina, Inc., a Nevada Corporation,  
d/b/a Area 51 Fireworks, and York County, a political  
subdivision of the State of South Carolina, .....  
Defendants,

Of whom D&T Imports South Carolina, Inc., a Nevada Corporation,  
d/b/a Area 51 Fireworks is the Respondent.

Appellate Case No.: 2013-000604

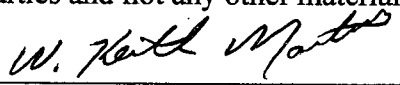
---

CERTIFICATE OF COUNSEL

---

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

September 25, 2013.

  
\_\_\_\_\_  
W. Keith Martens  
HAMILTON MARTENS BALLOU  
& CARROLL, LLC  
P.O. Box 10940  
Rock Hill, South Carolina 29731  
(803) 329-7672  
ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

---

APPEAL FROM YORK COUNTY  
Equity Court

The Honorable S. Jackson Kimball, Master-in-Equity

---

Case No.: 2012-CP-46-02286

---

Charles Sonnenberg, Festival Corp., Phillip Pulley  
and Robert Foster. ....  
Plaintiffs,

Of whom Phillip Pulley and Robert Forster are the Appellants,

v.

D&T Imports South Carolina, Inc., a Nevada Corporation,  
d/b/a Area 51 Fireworks, and York County, a political  
subdivision of the State of South Carolina, .....  
Defendants,

Of whom D&T Imports South Carolina, Inc., a Nevada Corporation,  
d/b/a Area 51 Fireworks is the Respondent.

Appellate Case No.: 2013-000604

**RECEIVED**

OCT 18 2013

**SC Court of Appeals**

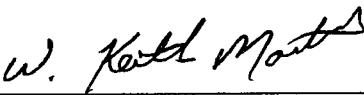
---

**CERTIFICATE OF COMPLIANCE**

---

The undersigned hereby certifies that the Final Brief complies with Rule 211(b).

September 25, 2013.

  
\_\_\_\_\_  
W. Keith Martens  
HAMILTON MARTENS BALLOU  
& CARROLL, LLC  
P.O. Box 10940  
Rock Hill, South Carolina 29731  
(803) 329-7672  
ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

---

APPEAL FROM YORK COUNTY  
Equity Court

The Honorable S. Jackson Kimball, Master-in-Equity

---

Case No.: 2012-CP-46-02286

---

Charles Sonnenberg, Festival Corp., Phillip Pulley  
and Robert Foster. . . . . Plaintiffs,

Of whom Phillip Pulley and Robert Forster are the Appellants,

v.

D&T Imports South Carolina, Inc., a Nevada Corporation,  
d/b/a Area 51 Fireworks, and York County, a political  
subdivision of the State of South Carolina, . . . . . Defendants,

Of whom D&T Imports South Carolina, Inc., a Nevada Corporation,  
d/b/a Area 51 Fireworks is the Respondent.

---

CERTIFICATE OF SERVICE

---

The undersigned, an employee of Hamilton Martens Ballou & Carroll, LLC  
certifies that the RECORD ON APPEAL was served upon Respondent's counsel of  
record by depositing same in the United States Mail, with sufficient postage affixed and  
addressed as follows:

**RECEIVED**

SEP 30 2013

**SC Court of Appeals**

James Sheedy  
Driscoll Sheedy, PA  
11520 North Community House Road  
Suite 200  
Charlotte, NC 28277

The is the 27<sup>th</sup> day of September, 2013

  
\_\_\_\_\_  
L. Melia Sweatt