MOTION AND PETITION TO REINSTATE APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-CP-23-07837

BLACKSTONE AND CHASE, LLC, MARK T. THOMAS, TENSLEY E. THOMAS, AND BRADLEY W. KERR,

Appellants,

v.

MARGARET H. DURHAM LIVING TRUST, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING COMPANY, LLC, EZ GLIDE 350, LLC, MARGARET H. DURHAM, JAMES W. DURHAM, HELEN W. SHOCKLEY, AND TAMALA D. CRANE,

Respondents.

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SC Court of Appeals

MOTION AND PETITION TO REINSTATE APPEAL

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APPELLANTS' MOTION AND PETITION TO REINSTATE APPEAL

Appellants hereby submit this motion and petition to reinstate appeal in response to the Court's Order entered and dated on April 4, 2019 ("Order"), dismissing Appellants' appeal pursuant to: (1) Rule 59(e) of the South Carolina Rules of Civil Procedure for the Court's reconsideration to alter or amend the Court's Order; (2) Rule 221(c) of the South Carolina Appellate Court Rules for a petition when the Court dismisses Appellants' Appeal; and, (3) Rule 260(a) of the South Carolina Appellate Court Rules for a petition to reinstate Appellants' appeal by leave of the Court upon good cause shown herein. This motion for reinstatement is divided into several sections as set forth below. Each section provides multiple grounds for reconsideration of the Court's Order to reinstate the appeal by Appellants making a show of good cause. Rule 260(a), SCACR. Collectively, pursuant to these grounds for reconsideration, Appellants seek rulings on matters that the Court did not address in its Order; Appellants seek the Court's reasons for deciding certain matters where no reasons are given; and Appellants seek for the Court to reconsider its findings and correct its errors based on the record and the law. Appellants show the following:

PROCEDURAL HISTORY

1.

The record will show that Respondent **MARGARET H. DURHAM LIVING TRUST** filed for a writ of ejectment against Appellant **BLACKSTONE AND CHASE, LLC**, on or around October 16, 2017, before the Gantt Summary Court unbeknownst to Plaintiffs (Case No. 2017CV2311003419). On or around October 23, 2017, the Gantt Summary Court issued a Rule to Show Cause or a Rule to Vacate, and for the writ of ejectment to occur on or around December 12, 2017 (Case No. 2017CV2311003419). Appellants never received notice of Respondent **MARGARET H. DURHAM LIVING TRUST**'s filing for a writ of ejectment until independently discovering a writ of ejectment had been filed against Appellants on or around December 8, 2017 (Case No. 2017CV2311003419).

Appellants filed a Notice of Motion for Preliminary Injunction, a Motion for Preliminary Injunction and Writ of Supersedeas, and a Memorandum in Support of Appellants' Motion for

Preliminary Injunction on or around December 8, 2017, before the Gannt Summary Court (Case No. 2017CV2311003419). The Gantt Summary Court held a hearing for Appellants' Motion for Preliminary Injunction and Writ of Supersedeas on or around January 29, 2018 (Case No. 2017CV2311003419). The Gantt Summary Court ruled that Respondent **MARGARET H. DURHAM LIVING TRUST**'s removal of the tenant by changing the locks and dispossession of the Plaintiffs' personal property on the premises before ever filing for a writ of ejectment was unlawful (Case No. 2017CV2311003419). Moreover, the Gantt Summary Court acknowledged the issue of Appellants not receiving proper notice of the writ of ejectment and stated that the amount of dispute exceeded the Gantt Summary Court's jurisdiction over the matter (Case No. 2017CV2311003419). *See* Exhibit A.

2.

Before the Greenville County Circuit Court, Appellants also filed for a Notice of Intent to Appeal on or around December 11, 2017, and an Amended Notice of Intent to Appeal on or around January 11, 2018 (Case No. 2017-CP-23-07820). The Gantt Summary Court filed the Magistrate's Appeal Return on January 10, 2018, and again on February 5, 2018 (Case No. 2017-CP-23-07820). Exhibit A. Respondent **MARGARET H. DURHAM LIVING TRUST** filed a Response to Amended Appeal on February 7, 2018 (Case No. 2017-CP-23-07820). Appellants filed a Response to the Respondent's Response to Amended Appeal on February 8, 2018 (Case No. 2017-CP-23-07820). Respondent **MARGARET H. DURHAM LIVING TRUST** filed an Affidavit for Respondent **JAMES W. DURHAM** on February 8, 2018 (Case No. 2017-CP-23-07820). The Affidavit included an admission to the Defendant **MARGARET H. DURHAM LIVING TRUST** repeatedly reentering the premises in non-emergency situations and locking out the Plaintiffs from the premises on or around July 28, 2017, before ever filing for a writ of ejectment on or around October 16, 2017, along with a locksmith receipt made out to Respondent **HELEN W. SHOCKLEY** (Case No. 2017-CP-23-07820). *See* Exhibit B.

Contemporaneously with Appellants' Notice of Intent to Appeal, Appellants filed a Complaint for Declaratory Relief on December 12, 2017, before the Greenville County Circuit Court (Case No. 2017-CP-23-07857). Respondents filed a Motion to Dismiss Respondents' Complaint for Declaratory Relief on December 28, 2017 (Case No. 2017-CP-23-07857). Appellants' filed Appellants' Response to Respondents' Motion to Dismiss on January 10, 2018

(Case No. 2017-CP-23-07857). Because the Gantt Summary Court declined to rule on Appellants' Motion for Preliminary Injunction, Appellants filed a Motion for Preliminary Injunction and a Memorandum in Support of Appellants' Motion for Preliminary Injunction on February 2, 2018, which is still pending (Case No. 2017-CP-23-07857). Respondents filed Respondents' Memorandum in Support of their Motion to Dismiss on February 7, 2018 (Case No. 2017-CP-23-07857). Appellants filed Appellants' Response to Respondents' Memorandum in Support of Respondents' Motion to Dismiss on February 8, 2017 (Case No. 2017-CP-23-07857). The Greenville County Circuit Court heard Respondents' Motion to Dismiss Appellants' Complaint for Declaratory Relief on February 8, 2018 (Case No. 2017-CP-23-07857). Exhibit C. On February 28, 2018, the Greenville County Circuit Court ruled on Respondents' Motion to Dismiss to allow Appellants to file an amended complaint (Case No. 2017-CP-23-07857). The Greenville County Circuit Court's order was a consolidation of these three cases into one (Case No. 2017-CP-23-07857) as well as to operate as a dismissal of the writ of ejectment before the Gantt Summary Court for lack of jurisdiction (Case No. 2017CV2311003419). *See* Exhibit A.

3.

Appellants filed Appellants' Amended Complaint on March 16, 2018, of which was the first formal lawsuit filed against Respondents pursuant to the Greenville County Circuit Court's order on February 28, 2018. Respondents filed Respondents' Motion to Dismiss of Appellants' Amended Complaint on March 30, 2018. Appellants filed Appellants' Response to the Respondents' Motion to Dismiss and Memorandum in Support thereof on April 10, 2018. Appellants' Response to Respondents' Motion to Dismiss and Memorandum in Support thereof requested the Greenville County Circuit Court's permission to amend the complaint, cure any noted defects or deficiencies, and rectify any issues raised by Respondents on March 30, 2018. Respondents filed Respondents' Memorandum in Support of their Motion to Dismiss on April 17, 2018. Appellants filed Appellants' Response to Respondents' Memorandum in Support of their Motion to Dismiss on April 20, 2018. The Greenville County Circuit Court for the Respondents' Motion to Dismiss Appellants' Amended Complaint was heard on April 21, 2018. Exhibit C.

Appellants' filed Appellants' Second Amended Complaint on May 8, 2018. Respondents filed an Answer and Counterclaim on May 31, 2018. Appellants filed Appellants' Motion to

Dismiss and Motion to Strike Respondents' Answer and Counterclaim on June 29, 2018. On page 3 of Appellants' Motion to Dismiss and Motion to Strike Respondents' Answer and Counterclaim, Appellants argued that Appellants "hereby move to dismiss and strike any claims for breach of contract or breach of contract accompanied by fraudulent acts concerning the lease agreement as asserted in Defendants' Counterclaim, pursuant to Rules 12(b)(6), 12(c), and 12(f) of the South Carolina Rules of Civil Procedure." Exhibit B. Respondents filed Respondents' Response to Appellants' Motion to Strike and Motion to Dismiss Respondents' Answer and Counterclaim filed on August 23, 2018. On page 3 in Respondents' Response to Appellants' Motion to Strike and Motion to Dismiss Respondents' Answer and Counterclaim, Respondents claimed:

> A valid contract was formed between Landlord and Kerr when he signed the Lease on behalf of Blackstone and Chase, LLC. Blackstone and Chase, LLC ratified the Lease when its member, Kerr, knowing the terms of the Lease, took possession of the premises and made payment upon the Lease for Blackstone and Chase, LLC. Exhibit B.

Appellants filed Appellants' Memorandum in Support of Appellants' Motion to Dismiss and Motion to Strike Respondents' Answer and Counterclaim on August 24, 2018. On page 12 of Appellants' Memorandum in Support of Appellants' Motion to Dismiss and Motion to Strike Respondents' Answer and Counterclaim, Appellants moved to strike Respondents' counterclaims for breach of contract and breach of contract accompanied by fraudulent acts. *See* Exhibit B.

4.

The Greenville County Circuit Court heard Appellants' Motion to Dismiss and Motion to Strike Defendants' Answer and Counterclaim on August 29, 2018. Exhibit C. In an order entered on October 3, 2018, the Greenville County Circuit Court ruled that: (1) the lease agreement was a valid contract with respect to Defendants' counterclaims for breach of contract and breach of contract accompanied by fraudulent acts; (2) Plaintiffs were liable to Defendants who were occupants of the building and not parties to the lease agreement for smoke damage; (3) the landlord was contractually authorized to evict Plaintiffs from the premises and distrain Plaintiffs' personal property therein without resorting to the judicial process; (4) Plaintiffs waived the right to challenge the lease agreement; and, (5) Plaintiffs were estopped from challenging the lease

agreement. Plaintiffs requested a motion for partial summary judgment on the following issues for Plaintiffs' causes of action: (1) forcible entry and detainer; (2) wrongful dispossession; (3) claim and delivery; (4) conversion; and, (5) unjust enrichment to Plaintiffs' personal property and security deposit. *See* Exhibits A, B, C. On October 5, 2018, Appellants filed Appellants Notice and Motion for Reconsideration to Alter or Amend a Judgment. Appellants specifically referenced errors for both motion for partial summary judgment Plaintiffs requested a motion to strike and a motion for partial summary judgment for Defendants' counterclaims related to the existence of lease agreement in Defendants' causes of action for breach of contract and breach of contract accompanied by fraudulent acts. *See* Exhibit B.

On October 15, 2018, Respondents filed Respondents' Response to Appellants' Motion for Reconsideration to Alter or Amend a Judgment arguing that a commercial landlord, or lessor, may circumvent the judicial process to evict a tenant, or lessee, from the premises based on contractual language within the lease agreement. *See* Exhibit B. On October 29, 2018, and October 30, 2018, the Greenville County Circuit Court denied Appellants' Motion Appellants' Motion for Reconsideration to Alter or Amend a Judgment. Appellants filed a Notice of Appeal before this Court on November 2, 2018. This Court requested memoranda from the parties on January 23, 2019. Respondents filed a memorandum before this Court on January 30, 2019. Appellants filed a memorandum before this Court on February 4, 2019. This Court denied Appellants' appeal in an order entered on April 4, 2019. Exhibit A.

FACTS

5.

The record will show that, on or around April 8, 2017, and July 28, 2017, Appellants were denied access to the premises pursuant to a commercial lease between Appellant **BRADLEY W. KERR** and Respondent **MARGARET H. DURHAM LIVING TRUST** for the first floor of 17 W. North Street, Greenville, South Carolina ("Premises"). The commercial lease was executed prior to the formation of Appellant **BLACKSTONE AND CHASE, LLC**, and Appellants **TENSLEY E. THOMAS** and **MARK T. THOMAS** never saw the lease until after Respondents evicted Appellants from the Premises. On or around July 28, 2017, Respondent **HELEN W. SHOCKLEY**, acting as an agent of the **MARGERET H. DURHAM LIVING TRUST**, signed the receipt to change the locks to the premises thereby forcibly disseizing the premises from the Appellants in a hostile landlord-tenant dispute.

Respondent **MARGARET H. DURHAM LIVING TRUST** belatedly filed for a writ of ejectment before the Gantt Summary Court on or around October 16, 2017. To date, Respondent **MARGARET H. DURHAM LIVING TRUST** has not filed for a writ of distraint to seize Appellants' personal property located on the Premises. To date, Appellants have not had access to Appellants' personal property or trade fixtures, including Appellants' business records relevant to this litigation, located on the Premises since on or around July 28, 2017. Appellants cannot fully participate in discovery or file taxes accurately without Appellants' business records.

6.

Appellants have not had access to the Premises since on or around July 28, 2017, when Respondents, whether acting individually or through that Respondent's agent, locked out Appellants from the Premises and distrained Appellants' personal property on the Premises in violation of South Carolina law. Being that Respondent **MARGARET H. DURHAM LIVING TRUST** is a fictitious legal entity, Respondents **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** were primarily responsible for corresponding with Appellants during the scope of their employment for any of the abovenamed Respondents. However, Respondents **MARGARET H. DURHAM, JAMES W. DURHAM, HELEN W. SHOCKLEY**, and **TAMALA D. CRANE** were all involved in the demise of the hostile landlord-tenant relationship between Appellants and Respondents in a mismanaged family affair to act egregiously in disregard of Appellants' rights to the Premises and personal property therein.

7.

The specific provision of the lease agreement in dispute allegedly permits Respondents to circumvent the judicial process for evicting Appellants from the Premises:

> 20.2 Lessor's Remedies. In addition to its other remedies, Lessor, upon an Event of Default by Lessee, will have the immediate right, after any applicable grace period expressed herein, to terminate and cancel this Lease or to reenter and remove all persons and properties from the Premises and dispose of such property as it deems fit, or both. *If Lessor reenters the Premises, either with or without legal process, it may either terminate this Lease or from time to time without terminating this Lease, make such alterations and repairs as may be necessary or appropriate to relet the Premises, and relet the Premises upon such terms and conditions as Lessor deems advisable without any responsibility on Lessor whatsoever to account to Lessee for any surplus rents collected.* No retaking of possession of the Premises by Lessor will be deemed as an election to terminate this Lease unless a written notice of such intention is given by Lessor to Lessee at the time of reentry, but, notwithstanding any such reentry or reletting without termination, Lessor

> may at any time thereafter elect lo terminate for such previous Event of Default. In the event of an election of termination by Lessor, whether before or after reentry, Lessor may recover from Lessee damages, including the costs of recovering the Premises, and Lessee will remain liable to Lessor for the total rental (which may at Lessor's election be accelerated to be due and payable in full as of the date of the Event of Default) as would have been payable by Lessee hereunder for the remainder of the Term less the rentals actually received from any reletting. If any rent owing under this Lease is collected by or through an attorney or if the Lessor retains the services of an attorney for the pursuit or enforcement of any matter encompassed within or implied by the terms of this Lease, then and in any such events Lessee agrees to pay Lessor's reasonable attorneys' fees to the extent not prohibited by applicable law. Exhibit A (emphasis added).

8.

The record will show that Respondents attempted to circumvent the statutory requirement to eject a tenant from the premises through the judicial process by magic language in a contract in a proposed order adopted by the lower court:

> *To the extent the Court is to rule on the pleadings before it, Landlord was contractually authorized to evict the Plaintiffs without resort to the judicial process and to distrain or seize the property within the premises to cover damages incurred by Landlord.* Section 20.2 of the Lease between Landlord and Plaintiffs authorizes the Landlord to "reenter and remove all persons and properties from the Premises and dispose of such property as it deems fit." Such remedy may be resorted to "with or without legal process." *Id.* In commercial leases, the provisions of the contract control. See *KBR Development v. Yansy Realty, Inc.* 2005 WL 7083858, No. 2005-UP-217, 2. (S.C. Court of Appeals) ("The lease provided KBR with the self-help option of repossessing the property if lease payments were overdue by fifteen days. Therefore, KBR acted within their legal rights."). Improvements made to the real estate by Plaintiffs become the property of Landlord under Section 9.4 of the Lease. *Id.* ("All Lessee Alterations, including, but not limited to, all walls, railings, carpeting, floor and wall coverings and other permanent real estate fixtures (excluding, however, Lessee's moveable trade fixtures and equipment) made by, for, or at the direction of Lessee, will when made, become the property of Lessor and will remain upon the Premises at the expiration or earlier termination of this Lease.") Trade fixtures installed by Plaintiffs become the property of Landlord if not removed by the termination of the Lease. *Id.* ("Any trade fixtures or equipment not removed by Lessee at the expiration or earlier termination of this Lease will, at the Lessor's option, become the property of the Lessor or Lessor will be entitled to remove and dispose of such property.") Consequently, Landlord was within its contractual rights to take the actions complained of by Plaintiffs . . . The written Lease between Blackstone and Chase, LLC and The Margaret H. Durham Living Trust is valid and enforceable. Order, *Blackstone and Chase, LLC et al. v. Margaret H. Durham Living Trust et al.*, No. 2017-CP-23-07837 (Judge G. Thomas Cooper, Jr., October 3, 2018) (emphasis added). Exhibits A, B.

The record will show that, on February 7, 2018, Respondents filed an affidavit from Respondent

JAMES W. DURHAM and a locksmith receipt signed by Respondent **HELEN W. SHOCKLEY** and dated on July 28, 2017, in Respondents' Response to Amended Appeal from Appellants' appeal from Gantt Summary Court. The record will show that Respondents, whether acting individually or as agents of another Respondent, forcibly evicted Appellants from the premises on or around July 28, 2017. However, Respondents never applied for a writ of ejectment until on or around October 16, 2016, after-the-fact. The record will show that Appellants never abandoned the premises, were forcibly dispossessed from the Premises, and were unlawfully dispossessed of Appellants' personal property located therein. Exhibits B, C.

RECITATION OF THE LAW

9.

Under Rule 201 of the South Carolina Appellate Court Rules, Appellants may appeal an order allowable by law from a final judgment, appealable order, or appealable decision:

> (a) Judgments, Orders and Decisions Subject to Appeal. Appeal may be taken, as provided by law, from any final judgment, appealable order or decision. The procedure for petitioning for a writ of certiorari to review final judgments in post-conviction relief cases is provided by Rule 243. Further, the review of decisions of the State Board of Canvassers in election cases shall be by petition for a writ of certiorari under S.C. Code Ann. §§ 7-17-250 and 7-17-270.
> (b) Who May Appeal. Only a party aggrieved by an order, judgment, sentence or decision may appeal. Rule 201, SCACR.

As provided by law, appellate jurisdiction applies to an intermediate judgment, order, or decree that involves the merits of the action or an order affecting a substantial right in an action in the court of common pleas. S.C. Code Ann. § 14-3-330(1)-(2). An interlocutory order is issued by the court prior to the conclusion of the underlying litigation in a final judgment disposing of the case from the court. *See Wallace v. Interamerican Tr. Co.*, 246 S.C. 563, 568, 144 S.E.2d 813, 816 (1965).

Regardless of an interlocutory order related to a partial motion for summary judgment or motion to strike under Rules 12(c) and 12(f) of the South Carolina Rules of Civil Procedure, the South Carolina Appellate Court retains jurisdiction if the interlocutory order involves the merits of the action or affects a substantial right in an action by the lower court's order or decision under the facts and circumstances of the case. *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011); *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988); *Henderson v. Wyatt*, 8 S.C. 112 (1877). Specifically, South Carolina Law provides that the South Carolina Appellate

Court has jurisdiction under the following circumstances:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver. S.C. Code Ann. § 14-3-330.

10.

First, an interlocutory order is immediately appealable when the order involves the merits of the action that "finally determines some substantial matter forming the whole or part of some cause of action or defense." *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006); *Thornton,* 391 S.C. at 306. The interlocutory order is appealable when no further act "must be done by the trial court prior to a determination of the parties' rights." *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. at 7. In this case, two standards of appeal exist: (1) the granting of partial summary judgment as to a cause of action or allegations; and, (2) the denial of a motion to strike allegations or a cause of action in a complaint, or counterclaim. If the judgment determines the applicable law without leaving open questions of fact, then the judgment operates as a final judgment. *See Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993). Therefore, an interlocutory order that forecloses whole or part of a cause of action without leaving open questions of fact is immediately appealable because of the judgment's finality on that substantial matter. The issue is whether the lower court's order establishes and applies principles of law that finally affect the merits of the case or deprives a party the benefit of a final hearing. *Tatnall v. Gardner*, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002). When the lower court denies a motion to strike a cause of action in a counterclaim, or essential element(s) within that cause of action, the lower court, in effect, decides the merits of the case foreclosing part of or a whole cause of action or defense and establishes the law in the case as a binding adjudication—not as a mere expression or statement in dicta. *See Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992);

Weil v. Weil, 299 S.C. 84, 89, 382 S.E.2d 471, 473-74 (Ct. App. 1989). Subsequent appellate review is limited to the evidence presented in the case during litigation. *See Arnold*, 309 S.C. at 172.

11.

Secondly, an interlocutory order is immediately reviewable upon appeal if the order affects substantial rights and determines the action in effect that prevents a judgment reviewable upon appeal. *Hagood v. Sommerville*, 362 S.C. 191, 195-97, 607 S.E.2d 707, 709 (2005). Immediate appeals on interlocutory orders are permitted when the substantial right cannot be vindicated after the case concludes on appeal, and the error in the interlocutory order cannot be corrected on appeal subsequent to the conclusion of the underlying litigation. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). While appeals of interlocutory orders are not designed for piecemeal litigation, the issue is determining whether an error in an interlocutory order prejudices a party to an extent that a new trial or appellate review will not cure the error upon the conclusion of the underlying litigation. *Id.* at 93-94. Furthermore, judgments are construed in its entirety to determine the lower court's intent. When the language is plain and unambiguous, then the literal meaning of the language gives effect to the ruling. *Weil*, 299 S.C. at 90-91.

The finality of the judgment, order, or decree operates, in effect, to dispose of a cause of action in part of in full, or the whole subject-matter, for all parties leaving no further questions or directions for future decisions as to the parties' rights but execution and enforcement of such a determination. *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 41-42, 21 S.E.2d 209, 212 (1942). The manner of the judgment, order, or decree divests some right(s) of the party. *Id.* The two-issue rule applies to a decision that is based on more than on ground whereby "the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010); *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 451-52, 814 S.E.2d 643, 653-54 (Ct. App. 2018). Moreover, appellate review is permitted when ruling on appeal will avoid unnecessary litigation, the lower court decides the merits of the case, the lower court establishes the law of the case, or any of the above. *See Skywaves I Corp.*, 423 S.C. at 459-61; *see also Watson*, 407 S.C. at 459; *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002).

When a court denies a plaintiff's motion to strike a cause of action, or allegations therein to essential elements, or a motion for partial summary judgment, based on an erroneous application of the law and consideration of undisputed facts, then the denial may operate in effect based on the lower

court's language to dismiss and strike essential elements of plaintiff's causes of action, or plaintiff's causes of action, before a plaintiff ever has a chance to test the plaintiff's claim on the merits or a plaintiff's substantial rights under that cause of action. *See Thornton*, 391 S.C. at 304; *Pruitt v. Bowers*, 330 S.C. 483, 488-89, 499 S.E.2d 250, 253 (Ct. App. 1998); *Collins v. Sigmon*, 299 S.C. 464, 466, 385 S.E.2d 835, 836 (1989); *compare* Rule 12(b) (motion to dismiss), *with* Rule 12(f), SCRCP (motion to strike). Courts must adhere to "the basic principle . . . that, in order to avoid the danger that [courts] might dispose of viable claims prematurely, courts must allow the parties to develop an adequate record." *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 293 (4th Cir. 1989).

12.

When the lower court denies a motion to strike a cause of action in a counterclaim, the issue must be preserved in a motion to strike a counterclaim and a motion for reconsideration to amend or alter the previous order that applied to the issues ruled upon and issues not ruled upon before filing a subsequent appeal. Rule 12(f), SCRCP; S.C. Code Ann. § 14-3-330(2); *see Grooms v. Med. Soc'y of S.C.*, 298 S.C. 399, 401-04, 380 S.E.2d 855, 857-58 (Ct. App. 1989); *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 372-73, 628 S.E.2d 902, 919 (Ct. App. 2006). The failure to preserve the issue operates as a waiver of that issue. *See Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991). A motion to strike allegations in a pleading is permissible under Rule 12(f) of the South Carolina Rules of Civil Procedure:

> Upon motion pointing out the defects complained of, and made by a party before responding to a pleading or, if no responsive pleading is required within 30 days after the service of the pleading upon him or upon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

A motion to strike operates to challenge a theory of recovery alleged in a complaint, or counterclaim. *See Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 114, 682 S.E.2d 871, 874 (Ct. App. 2009); *Grooms*, 298 S.C. at 401-04. A cause of action "accrues the moment the defendant breaches a duty owed to the plaintiff." *Grooms*, 298 S.C. at 402.

By contrast, a defense or counterclaim with no substantial relation to the dispute between the parties is irrelevant because the allegations or denials have no connection to or effect upon the cause of action. *See Aetna Cas. & Sur. Co. v. Golightly*, 289 S.C. 408, 410, 338 S.E.2d 153, 154 (1985); *Olympic Radio & Television, Inc. v. Baker*, 230 S.C. 383, 386-87, 95 S.E.2d 636, 637-38 (1956). If Respondents

fail to state allegations to support a viable cause of action that would entitle Respondents to recover on any theory of the case, then Respondents' cause of action should be dismissed. *See Hackworth*, 385 S.C. at 114-15. In a motion to strike, the standard is "whether a party should be allowed to plead a defense or other matter . . . ." *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990). A motion to strike a sham allegation or pleading "presents a question of fact to be determined by the court upon evidence." *Ins. Co. of N. Am. v. Hyatt*, 290 S.C. 159, 163, 348 S.E.2d 532, 535 (Ct. App. 1986). A motion to strike should be granted when "the pleading is manifestly false and made in bad faith." *Id.*

The standard for reviewing an order denying a motion to strike is abuse of discretion as to whether the lower court issued an order that "was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). Abuse of discretion for denying a motion to strike does not occur when "either real cause for doubt [to a question in dispute], or it is clear that the ends of justice may well be promoted by a trial on the merits." *Mayes v. Paxton*, 313 S.C. 109, 115, 437 S.E.2d 66, 69-70 (1993). If the motion to strike merely pertains to raising a doubtful question, or that justice may best be promoted by a trial on the merits, then fair, judicial discretion does not warrant granting a motion to strike accordingly. *See id.* Alternatively, if the facts are clear and undisputed as to whether the challenged defenses or cause(s) of action are insufficient, or further developing the issues in a trial on the merits is unnecessary to find the challenged defenses or cause(s) of action insufficient as a matter of law, then fair, judicial discretion warrants granting a motion to strike accordingly. *See id.* An abuse of discretion occurs when the lower court does not account for the latter. *See id.* When the lower court's ruling is controlled by the erroneous application of the law or factual conclusions without evidentiary support, then an abuse of discretion arises. *Steinke v. S.C. Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999). When questions of law are concerned related to a motion to strike, the appellate court may decide the question of law as a matter of law without deference to the lower court. *See Skywaves I Corp.*, 423 S.C. at 456-59.

13.

When the lower court makes impermissible findings of fact or conclusions of law denying a motion to strike, such a ruling is prejudicial to the moving party for a motion to strike. *See Skywaves I Corp.*, 423 S.C. at 456-59. The moving party regarding the lower court's denial of a

motion to strike bears the burden to show clear prejudicial error to the moving party. *See Rimer v. State Farm Mut. Auto. Ins. Co.*, 248 S.C. 18, 26, 148 S.E.2d 742, 746 (1966). The record must show error and that the complaining party was prejudiced by that error. *Watts v. Bell Oil Co.*, 266 S.C. 61, 63, 221 S.E.2d 529, 530-31 (1976). By admitting incompetent evidence that has some probative value on a material issue of fact within the case, the evidence is presumptively prejudicial unless the issue of fact is undisputed. *Id.* Additionally, loss of earnings related to a theory of recovery pled in a cause of action, or permissible recovery of attorney's fees by contract or statute for a party to assert and protect that party's rights related to an element of damage, such factors may be attributable to a clear showing of prejudice to the moving party for a motion to strike from the lower court's denial of the motion to strike. *See Rimer*, 248 S.C. at 26-27. Essentially, if damages would accrue from the denial of the motion to strike, and those damages relate to an element of damages in the causes of action pled by the moving party, then such damages that incur to the moving party warrant a clear showing of prejudice. *See id.* Therefore, if the pecuniary loss or damages is related to an element of damages for any causes of action, then the pecuniary loss complained of resulting from the denial of a motion to strike warrants a clear showing of prejudice. *See Daniels v. Coleman*, 253 S.C. 218, 225-28, 169 S.E.2d 593, 596-98 (1969).

Additionally, prejudice may also occur when a party may not maintain that party's action or defense on the merits when "presentation of the merits will be subserved since the admissions, if not dispositive, involve key factual elements of Plaintiffs' causes of action." *Baughman v. AT&T*, 306 S.C. 101, 110, 410 S.E.2d 537, 542 (1991). When the allegations in a pleading are indefinite or uncertain, and the precise charge or defense is unapparent, prejudice flows from the party to answer and affirm such allegations. *Ellen v. King*, 227 S.C. 481, 488, 88 S.E.2d 598, 602 (1955). When responding to the allegations in a complaint, Respondents must adhere to Rule 8(b) of the South Carolina Rules of Civil Procedure. Rule 8(b), SCRCP. Under Rule 8(d) of the South Carolina Rules of Civil Procedure, "[a]llegations made in a complaint that are not denied in the answer are deemed admitted." *Motors Ins. Corp. v. State by & ex rel. Dep't of Highways & Pub. Transp.*, 313 S.C. 279, 281, 437 S.E.2d 555, 556-57 (Ct. App. 1993). A party is bound by that party's pleadings when alleged in an Answer or Counterclaim. *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992). Ultimately, Respondents must deny Appellants'

allegations unequivocally. Respondents may not palter in Respondents' responsive pleading when Appellants charged Respondents with an act under Appellants' Complaint. *Cantey v. Summersett & Co.*, 149 S.C. 513, 527, 147 S.E. 635, 640 (1929). When pleading denials in an answer, inconsistent denials may deem the answer "frivolous when it is clearly insufficient on its face, and does not controvert the material points of the complaint, and is presumably interposed for mere purposes of delay." *Guar. Tr. Co. v. Kibler*, 105 S.C. 513, 519, 90 S.E. 159, 160 (1916). Essentially, prejudice may also occur when a party must defend the merits of an invalid claim. *See Patton v. Miller*, 420 S.C. 471, 489-93, 804 S.E.2d 252, 261-63 (2017).

By contrast, Rule 11 of the South Carolina Civil Procedures requires that:

> The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay . . . If a pleading, motion or other paper is not signed or does not comply with this Rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. Rule 11, SCRCP.

The application of Rule 11 of the South Carolina Rules of Civil Procedure requires that a party's position must have supporting grounds to the best of that party's knowledge, information, and belief. To order default or dismissal, and in a manner that is reasonable as not to foreclose a decision based on the merits of the case, the Court must "determine that there is some element of bad faith, willfulness, or gross indifference to the rights of other litigants." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542-43, 489 S.E.2d 679, 682 (Ct. App. 1997).

ARGUMENT

14.

Appellants raise the following exceptions to particular statements, findings, and conclusions in the Order and Appellants respectfully request that the Court reconsider the same based on the record and the evidence and arguments identified herein. The Court's Order issued on April 4, 2019, erroneously dismisses Appellants' appeal because the lower court erred: (1) denying Appellants' motion to strike Respondents' causes of action for a breach of contract and a breach of contract accompanied by

fraudulent acts, specifically the validity of Section 20.2 in the lease agreement as a valid provision in the contract; and, (2) granting partial summary judgment in favor of Respondents regarding the lease agreement being a valid contract that essentially struck essential elements of Appellants causes of action in effect. The issue before the Court is a simple legal question: Whether a landlord must engage in the judicial process before evicting a tenant from the premises. The answer is yes.

The lower court's ruling on validating the lease agreement and granting a landlord, or lessor, the power to circumvent the statutory requirements requiring a landlord to engage the judicial process before evicting a tenant, or lessee, is a clear error of law and abuse of discretion that has no legal basis in South Carolina common law, the South Carolina Code governing landlord-tenant relationships, the South Carolina Constitution, or the Federal Constitution. Appellants' substantive rights are prejudiced by the due process violation from Appellants' deprivation of property, or an interest in that property: (1) divesting Appellants of Appellants' property interest in the possession of the Premises and Appellants' personal property located therein; and, (2) divesting Appellants of property, or a property interest, when creating a windfall to Respondents exercising multiple landlord remedies of dispossession of the Premises, distraint of Appellants' personal property located therein, including business records required for litigation, and acceleration of the terms and conditions of the lease agreement. Moreover, the lower court's ruling is inapposite to South Carolina law and Federal law. Therefore, the lower court, as a state actor, violated Appellants' constitutional rights. *See* 42 U.S.C. § 1983; U.S. Const. amend. 1, XIV; S.C. Const. art. I, § 2; *see* S.C. Code Ann. §§ 27-37-10 to -160; S.C. Code Ann. §§ 27-39-10 to -360; *Gentry v. Recreation, Inc.*, 192 S.C. 429, 435, 7 S.E.2d 63, 65 (1940). Hence, proceeding with litigation subjects Appellants to waive Appellants' constitutional rights prohibiting the deprivation of property, or an interest in that property, without due process. *See Noisette*, 304 S.C. at 58.

15.

In a cause of action for breach of contract, a party must establish "the existence and terms of the contract, defendant's breach of one or more of the contractual terms, and damages resulting from the breach." *Taylor v. Cummins Atl.*, 852 F. Supp. 1279, 1286 (D.S.C. 1994). With a breach of contract, "the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). More importantly, this cause of action depends upon the existence of a contract. *Taylor*, 852 F. Supp. at 1286. The cause of action for breach of contract accompanied by fraudulent actions comprise of the following

elements: "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Harper v. Ethridge*, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986). The common elements of fraud and deceit are not required in this cause of action. *Id.* Under this cause of action, a "fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design." *Id.* However, essential to this cause of action, Defendants must prove the existence of the lease as a contract. *Crawford v. Limehouse & Sons, Inc.*, Civil Action No. 2:10-2094-CWH-BM, 2010 U.S. Dist. LEXIS 131291, at *5-6 (D.S.C. Nov. 10, 2010). By contrast, an illegal contract, or a provision thereunder, is void and unenforceable if the contract: (1) violates public policy; or, (2) circumvents the statutory requirements for ejecting a tenant from the leased premises. *See Berkebile v. Outen*, 311 S.C. 50, 53 n.2, 426 S.E.2d 760, 762 (1993) (reifying that no court must "enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution"). The dispositive issue is whether a landlord for a commercial lease is required to engage in the judicial process before forcibly removing the tenant from the premises regardless of creative wordsmithing in the lease agreement stating anything to the contrary. The answer is yes. The statutory requirements to evict a tenant, whether the tenant is a residential tenant or a commercial tenant, follows the same judicial process that are essentially grounded in the constitutional rights of due process before suffering the deprivation of property, or an interest in that property. *See* S.C. Code Ann. §§ 27-37-10 to -160; *Gentry*, 192 S.C. at 435.

Under landlord-tenant law in South Carolina, the landlord and tenant have either statutory duties, contractual duties, or both by virtue of the dichotomous nature of leases as both a lease and a transfer of estate as a tenement of land. *Burbach v. Inv'rs Mgmt. Corp. Int'l*, 326 S.C. 492, 496-97, 484 S.E.2d 119, 121-22 (Ct. App. 1997). The statutory duties imposed on the landlord and tenant incorporate the public's expression of the public's interest that is mutually exclusive of the contractual duties imposed by a lease as a contract. *See Rowland & Sons v. Bock*, 150 S.C. 490, 493, 148 S.E. 549, 550 (1929); S.C. Code Ann. §§ 27-33-10 to -50 (applying general definitions, court jurisdiction, and general provisions); S.C. Code Ann. §§ 27-35-10 to -180 (defining the statutory meanings of creation, construction, and termination for leasehold estates); S.C. Code Ann. §§ 27-37-10 to -160 (ejecting tenants); S.C. Code Ann. §§ 27-39-10 to -360 (distraining personal property of tenants). As a matter of statutory interpretation, unless the statutory provision allows for parties to agree differently, the statute controls regardless of what terms and conditions the private parties reach in agreement. *See* S.C. Code Ann. § 27-

35-75(A) ("[u]nless otherwise agreed to"); S.C. Code Ann. § 27-35-90 ("[u]nless otherwise agreed"); *see also Rorrer v. P.J. Club, Inc.*, 347 S.C. 560, 566, 556 S.E.2d 726, 729 (Ct. App. 2001) ("[P]enal statutes are strictly construed . . . ."). When the statute's meaning is plain and unambiguous, then the court may not apply the canons of statutory construction to interpret the clear and definite meaning of the legislative intent. *Rorrer*, 347 S.C. at 568. By contrast, when a party "seeks to recover a penalty for the failure on the part of to discharge some duty imposed by law, [that party] must bring [the party's] case clearly within the language and meaning of the statute awarding the penalty." *Id.* A writ of ejectment based on nonpayment of rent is a penal statute by which the court must evaluate the statute within context of the whole statute(s) and policy of the law. *See id.* The South Carolina Residential Landlord-Tenant Act is very analogous, comparative law designed to avoid oppressive conduct by landlords and tenant-abuse. S.C. Code Ann. §§ 27-40-10 to -940. For commercial leases, Title 27, Chapters 33, 35, 37, and 39 of the South Carolina Code primarily apply.

No applicable statutory construction or case precedent allow for an exception in commercial leases that a landlord may circumvent the judicial process when evicting tenants or distraining tenants' personal property. The first step in the legal analysis concerning Section 20.2 of the lease agreement, as a matter of law, is whether the lease agreement must respond to any liability the landlord, or lessor, may legally incur that accrues at the moment liability attaches to form a basis for that cause of action. *See Massey v. War Emergency Co-operative Ass'n*, 209 S.C. 292, 297, 39 S.E.2d 907, 911 (1946). The statutes governing landlord-tenant relationships warrant both an original and direct liability from the landlord, or lessor, to a damaged member of the public the statute(s) were designed to protect. *See id.* If the lease agreement does not comply with statutory principles of ejectment, then Appellants have a right to challenge the validity of such a contract as damaged members of the public the statutes were designed to protect by requiring all landlords to resort to the judicial process before evicting a tenant, or lessee, from the premises. Therefore, landlords, or lessors, have a statutory duty to engage in the judicial process before evicting a tenant, or lessee, from the premises rather than engage in a self-help eviction that no private contract may usurp:

> [T]he [landlord] did not have the right to use [a strong hand] in making a re-entry until a reasonable time had expired, or due diligence had been used to ascertain if the [tenant] asserted a right to the premises after the expiration of the tenancy, and if [the tenant] asserted such a right, that *the [landlord] could only eject [the tenant] by process of law*. *Rush v. Aiken Mfg. Co.*, 58 S.C. 145, 150, 36 S.E. 497, 499 (1900) (emphasis added).

Respondents admitted to breaching this duty, which is central to several of Appellants' causes of action as previously discussed in Appellants' Memorandum. Respondents liability on this issue is clear and undisputed. The lower court's erroneous application of the law is not based on supporting law nor the admissible facts in this case when denying Appellants' partial motion for summary judgment and motion to strike these counterclaims with the allegations therein purporting Section 20.2 of the lease agreement as enforceable.

16.

Appellants hereby incorporate into this Motion and Petition to Reinstate Appeal Appellants arguments presented in Appellants' Memorandum on Interlocutory Appeal filed before this Court on February 4, 2019, regarding the granting of partial summary judgment as to the validity of the lease agreement provision 20.2 in favor of Respondents ("Memorandum"). This Court denied further appellate review based on the principal that "[t]he denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict." *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). This Court also denied further appellate review because "[a]n interlocutory denial of summary judgment is not a final order and is subject to change by the trial court." *Baber v. Greenville Cty.*, 327 S.C. 31, 40, 488 S.E.2d 314, 319 (1997). The analysis is not the denial of summary judgment to Appellants, but the lower court's order and the effect of such an order ruled in favor of Respondents and essentially striking key elements of Appellants' causes of action rendering the decision as reviewable. S.C. Code Ann. § 14-3-330.

The lower court's intentions were clearly manifesting in plain and unambiguous language effecting the case including, but not limited to, the following: granting a partial motion for summary judgment in favor of Respondents deciding issues of merit to key elements of causes of action; striking elements of Appellants' causes of action as previously discussed in Appellants' memorandum; and, affecting the substantial rights of Appellants operates in a manner that subsequent litigation or appellate review would not cure despite the possibility of a different ruling by a different judge in subsequent litigation or post-trial appellate review. In *Ballenger*, the rule of law determined that "the denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings." 313

S.C. at 477. In *Baber*, the rule of law determined that "the trial judge retained jurisdiction to rule, after the presentation of the evidence, on the same issue previously the subject of a pre-trial summary judgment motion." 327 S.C. at 40. Whether a judge in the lower court may reserve the right to rule differently than a previous judge concerning a partial motion for summary judgment, the lower court's ruling in this case does not dissipate the effect of violating Appellants' constitutional rights in the interim or the prejudicial consequences that flow therefrom until another judge may decide the law differently during litigation. Appellants provided numerous examples of prejudicial issues flowing from the lower court's decision and corresponding analysis previously in Appellants' Memorandum.

Moreover, a violation of Appellants' constitutional rights has no temporal limitation with respect to one judge ruling in one manner and a subsequent judge ruling in a different manner during litigation in the rotation system of trial judges in the South Carolina Circuit Courts. Meaning, the violation of constitutional rights occurs exactly when the violation occurs. *See United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85 (1984). Therefore, if a subsequent judge rules differently from the previous judge on the issues presented upon appeal, then the subsequent judge's ruling does not cure the constitutional violation and the prejudicial effect flowing therefrom that already occurred from the previous judge's ruling. The Court's analysis on whether the issue is reviewable is properly characterized in the following legal question: Whether the constitutional violation of a ruling by one judge toward Appellants in an interlocutory order, including the prejudice to Appellants' substantial rights that flows therefrom, is cured by the discretion of a subsequent judge's ruling who may disregard deference to the previous judge's ruling in subsequent litigation or appellate review.

Based on Appellants' analysis previously in Appellants' Memorandum and herein, the answer is no. The time lapse from one judge ruling on an essential issue related to the merits of the litigation to another judge possibly ruling differently does not abate Appellants' loss of constitutional rights, protect substantial rights of Appellants, prevent the established law as erroneously applied in the case, or cure any potential waivers of such rights for subsequent appellate review in the interim. The Court's legal support deals with the possibility that a subsequent judge in the South Carolina Circuit Court system of rotating judges may rule differently, not that a subsequent judge must rule differently when the erroneous application of the law has already occurred. No crystal ball exists to foreshadow a subsequent judge will cure such defects from a previous ruling by a previous judge. Suggestion of the possibility for a subsequent judge to rule differently is no guarantee that erroneously established law concluding the

essential merits of litigation having the effect of a final order, or a previous ruling that substantially affected Appellants rights, will not permeate throughout subsequent litigation leaving Appellants no means to cure such defects in a subsequent appeal. *See Mayes*, 313 S.C. at 114 ("The trial judge's findings of fact are conclusive unless there is no evidence that reasonably supports them."); *Snell v. Parlette*, 273 S.C. 317, 322, 256 S.E.2d 410, 412 (1979). Reviewability, therefore, does not deal with suggestions of probability for a subsequent judge's discretion to disregard a previous ruling, but the effect of a ruling, the prejudice that flows therefrom, and Appellants' ability to cure such defects in a subsequent appeal. If the effect of a ruling and prejudice that flows therefrom cannot be cured in a subsequent appeal from one judge to another in subsequent litigation, then the previous ruling should be reviewable. This Court's jurisdiction was designed to prevent such defects from permeating in subsequent litigation and prejudicing Appellants' rights further when subsequent appellate review will not cure such defects. In this framework, Appellants seek the Court's reconsideration of the Court's analysis regarding the effect of the lower court's ruling of a partial motion for summary judgment in favor of Respondents as written pertaining to the erroneous application of law to validate Section 20.2 of the lease agreement.

17.

The lower court relied upon inapposite law to this case that is also an unpublished opinion with no precedential value. *KBR Dev. v. Yansy Realty*, No. 2005-UP-217, 2005 S.C. App. Unpub. LEXIS 361, at *4 n.3 (Ct. App. Mar. 24, 2005). Specifically, "[m]emorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268(d)(2), SCACR; *see* S.C. Code Ann. § 18-9-280 ("[T]he Court may file memorandum opinions in unanimous decisions when the Court determines that a full written opinion would have no precedential value . . ."). Therefore, the lower court may not rely upon this case as dispositive on the issue as to whether provisions of a lease agreement exclusively control commercial leases. Moreover, the lower court's reliance upon *KBR Dev.*, is also inapposite because the lower court based its ruling upon the interaction of Article 9 with secured lenders related to a landlord-tenant dispute thereby deciding the case on other grounds outside of the statutory principles of ejectment for the landlord to repossess the premises and distrain the tenant's personal property therein. In *KBR Dev.*, the case involved both a lease agreement for the rental of the premises and a promissory note to upfit the premises subject to Article 9 of the South Carolina Uniform Commercial Code for secured transactions.

S.C. Code Ann. § 36-9-102(65) (promissory notes); S.C. Code Ann. § 36-9-335 (accessions); S.C. Code Ann. § 36-9-103 (purchase-money secured interests); S.C. Code Ann. § 36-9-334 (purchase-money secured interests).

In this case, no application of Article 9 of the South Carolina Uniform Commercial Code exists as Respondents never entered into a promissory note with Appellants, funded the upfit for Appellants' barber shop on the Premises, or financially invested in Appellants' barber shop as a secured lender. Aside from this single case, Respondents cannot provide any other legal supporting basis that permits a landlord, or lessor, to circumvent the statutory requirements to evict a tenant, or lessor, without resorting to the judicial process beforehand based on admissible evidence and admissions of facts presented by Respondents before the lower court. Because, no such remedy for landlords, or lessors, by way of contractual drafting in lease agreements in commercial leases exists under South Carolina law outside the application of Article 9 of the South Carolina Uniform Commercial Code.

18.

Therefore, Respondents have no legal basis in South Carolina law, whether common law or by statute, supporting Section 20.2 of the lease agreement for Respondents to evict Appellants from the Premises without resorting to the judicial process for evicting tenants from the premises. Respondent **JAMES W. DURHAM** admitted to seeing Appellant **MARK T. THOMAS** on the Premises working on or around July 27, 2019. Respondents admitted to locking out Appellants and evicting Appellants from the Premises on or around July 28, 2017. Respondents admitted to dispossessing Appellants from the Premises and Appellants' personal property located therein on or around July 28, 2017, and subsequently thereafter. Defendants admitted to allowing Plaintiffs' employees to retrieve personal items when appearing for work on the premises, which occurred on the very same day Defendants locked out Plaintiffs from the premises on or around July 28, 2017. Respondents admitted to receiving a demand letter for repossession of the Premises from Appellants on or around August 4, 2017. Respondents admitted to receiving a demand letter for repossession of Appellants' personal property on the Premises from Appellants on or around September 27, 2017. Respondents admitted to applying for a writ of ejectment before Gantt Summary Court on or around October 16, 2017, after evicting Appellants from the Premises. Respondents admitted to never applying for a writ of distraint before any court in South Carolina. Exhibits A, B, C.

As a matter of law, the facts are clear and undisputed that, by resorting to Section 20.2 of the

lease agreement, Respondents failed to comply with South Carolina law in violation of Appellants' rights thereunder and unlawfully: (1) evicted Appellants from the Premises; and, (2) distrained Appellants' personal property located therein. The lower court based its validation of the lease agreement and Section 20.2 on inapposite law that violated Appellants' constitutional rights to property, or interests in that property, whether real or personal property. Section 20.2 of the lease agreement is invalid and against public policy. No law under South Carolina permits private parties of a contract to circumvent the judicial process for evicting tenants from the premises. In turn, Section 20.2 of the lease agreement invalidates the lease agreement as a valid contract and the lease agreement, as a contract, may not exist. Without the existence of the lease agreement as a contract, these causes of action must fail for pleading insufficient facts warranting these theories of recovery as to essential elements and allegations of these causes of action. Therefore, Respondents' causes of action for breach of contract and breach of contract accompanied by fraudulent acts must be stricken pertaining to Appellants' motion to dismiss and motion to strike allegations essential to these causes of actions. Because, allegations of the lease agreement as a valid agreement pertaining to Section 20.2 of the lease agreement is factually insufficient to support these causes of action in Respondents' counterclaims as a matter of law without any doubt nor would further development of this issue disputing Section 20.2 of the lease agreement warrant a trial on the merits.

19.

The lower court abused discretion when denying Appellants' motion to strike these causes of action and this decision must be reversed because validating Section 20.2 of the lease agreement is an erroneous application of the law as a matter of law to which this Court is not required to show any deference to the lower court on rulings as a question of law. The application of erroneous law and establishing such erroneous law in the case, until another judge decides not to follow a previous judge's decision, does not wash the taint of the erroneous law applied and prejudices Appellants in various aspects in the interim including, but not limited to, the following:

(1) discovery in litigation and the waiver of Appellants' rights in discovery that cannot be rectified during litigation, post-trial, or in a subsequent appeal;
(2) the ability to file taxes accurately without Appellants' business records within the exclusive dominion, control, and possession of Respondents;
(3) the adulterated salon products that have expired beyond their shelf-life located on the Premises within the exclusive dominion, control, and possession of Respondents that cannot be rectified during litigation, post-trial, or in a subsequent appeal;

(4) dispossession of Appellants' personal property located on the Premises within the exclusive dominion, control, and possession of Respondents that cannot be rectified during litigation, post-trial, or in a subsequent appeal;

(5) spoliation of Appellants' evidence located on the Premises within the exclusive dominion, control, and possession of Respondents that cannot be rectified during litigation, post-trial, or in a subsequent appeal;

(6) the inability to earn income from relocating the barber shop to another location and mitigate damages of loss of earnings for Respondent **BLACKSTONE AND CHASE, LLC**, because the Premises has been within the exclusive dominion, control, and possession of Respondents that cannot be rectified during litigation, post-trial, or in a subsequent appeal;

(7) the pecuniary loss of attorney's fees to assert and protect Appellants' rights in this landlord-tenant dispute that is an element of damages in causes of action pled in Appellants' Complaint; and,

(8) the waiver of Appellants' constitutional rights from deprivation of property, or a property interest, from the lower court's ruling dispossessing Appellants of the Premises, Appellants' personal property located therein, within the exclusive dominion, control, and possession of Respondents that cannot be rectified during litigation (from one judge's ruling until another judge rules differently), post-trial, or in a subsequent appeal.

The application of Rule 11 of the South Carolina Rules of Civil Procedure requires that Respondents exercise due diligence when attesting that Section 20.2 of the lease agreement is a valid provision and enforceable under South Carolina law to the best of Respondents' knowledge, information, belief, and supporting grounds for Respondents' position. Because Section 20.2 of the lease agreement is untenable and unenforceable under South Carolina law as previously discussed, purporting the lease validity to enforce this provision is grounds to be stricken. Rule 11, SCRCP. Appellants have repeatedly belabored the position that Section 20.2 of the lease agreement is unenforceable under South Carolina law in pleadings, motions, discussion with opposing counsel, oral arguments, and Appellants' Memorandum. That Appellants are prejudiced from the lower court's denial of Appellants' motion to strike undoubtedly occurs, especially when the lower court's order went beyond the scope of the motions before the court to establish erroneous law in violation of South Carolina law, operate to dismiss or strike essential elements of Appellants' causes of action, and violate Appellants' constitutional rights in manner that subsequent appellate review will not cure nor protect Appellants' substantial rights. The lower court thereby forces Appellants to waive such rights until another subsequent judge may possibly rule differently, whenever that may occur. Appellants' substantive rights are not subject to a game of chance depending on what a future judge assigned to the case may decide when a previous ruling has

already prejudiced Appellants accordingly in the interim.

The lower court's order dispossessed Appellants' rights from the unlawful dispossession of the Premises from Respondents' self-help eviction contrary to South Carolina law for evicting tenants; and, dispossessed Appellants' rights to Appellants' personal property, including business records required for discovery in litigation, located on the Premises giving all rights to said property to Respondents contrary to South Carolina law for distraining personal property. The lower court's order operated to violate Appellants' constitutional rights of due process before suffering the deprivation of property, or an interest in that property. Appellants cannot earn income from the barber shop when dispossessed of the Premises and Appellants' personal property located therein unlawfully. Appellants have incurred legal fees to assert and protect Appellants' rights that are permissible to recover by statute. The damages flowing therefrom are pled in the element of damages for Appellants' relevant cause(s) of action. Respondents have admitted to key facts of Appellants' key factual elements of Appellants' causes of action that do not warrant maintaining Respondents' causes of action or defenses in Respondents' counterclaim and Answer. Appellants face prejudice having to answer or affirm such allegations when such causes of action cannot be maintained by Section 20.2 of the lease agreement as an unenforceable provision. Hence, Appellants face prejudice from having to defend the merits of an invalid claim accordingly. Furthermore, the lower court's order forces Appellants to waive rights in discovery by compelling Appellants to full, unlimited disclosure in discovery without the ability to preserve any rights, privileges, or objections regarding the business records and personal property within the exclusive possession, dominion, and control of Respondents. Validating Section 20.2 of the lease agreement by the lower court's order, when the provision is clearly disputed, in effect admits incompetent evidence with probative value on the material issue of fact in the case for Appellants' causes of action that is presumptively prejudicial when said provision is unenforceable and contrary to South Carolina law.

CONCLUSION

These grounds for appeal have resulted in unnecessary litigation over the clear application of the law in South Carolina. The lower court definitively ruled on the merits of litigation for Appellants regarding the validity of Section 20.2 of the lease agreement and established the law in this case erroneously, which has, in effect, divested Appellants of Appellants' substantive rights without means to cure such defects in a subsequent appeal post-trial. Hence, the lower court's determination became a binding adjudication as the law established in the order would have become the established law of the

case had Appellants not filed an appeal. A decision by a future judge in subsequent litigation or a new trial will not cure violating Appellants' substantive rights or prejudice incurred by Appellants in the interim. Proceeding with litigation and trial may constitute a waiver of Appellants' substantial rights in Appellants' causes of action for a violation under South Carolina law and Federal law. Therefore, the finality of the order involves the merits of litigation and substantially affects the rights of Appellants.

WHEREFORE, for all the reasons set forth above: this motion be granted; this appeal is reinstated; upon reinstatement, the order dismissing this appeal is reversed; and, and such other and further relief as the Court deems just and proper.

Respectfully submitted this 17 day of April, 2019.

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ATTORNEY FOR APPELLANTS

South Carolina
Date: April 17, 2019

PROOF OF SERVICE OF MOTION AND PETITION TO REINSTATE APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-CP-23-07837

BLACKSTONE AND CHASE, LLC, MARK T. THOMAS, TENSLEY E. THOMAS, AND BRADLEY W. KERR,

Appellants,

v.

MARGARET H. DURHAM LIVING TRUST, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING COMPANY, LLC, EZ GLIDE 350, LLC, MARGARET H. DURHAM, JAMES W. DURHAM, HELEN W. SHOCKLEY, AND TAMALA D. CRANE,

Respondents.

PROOF OF SERVICE

I certify that I have served the Motion and Petition to Reinstate Appeal on Respondents

MARGARET H. DURHAM LIVING TRUST, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING COMPANY, LLC, EZ GLIDE 350, LLC, MARGARET H. DURHAM, JAMES W. DURHAM, HELEN W. SHOCKLEY, AND TAMALA D. CRANE, by depositing a copy of it in the United States Mail, postage prepaid, on April 17, 2019, addressed to the attorney of record, to the following address(es):

Margaret H. Durham Living Trust et al.	Margaret H. Durham Living Trust et al.
& Margaret H. Durham, Trustee	& Margaret H. Durham, Trustee
c/o Robert K. Merting	c/o Josh Hudson
501 Furman Road, Suite W	1052 North Church Street
Greenville, SC 29609	Greenville, SC 29601
Attorney for the Defendants	Attorney for the Defendants

Respectfully submitted this 17 day of April, 2019.

DICKSON DAVIS LAW FIRM, LLC

Deborah D. Davis, Esq.
SC Bar No.: 102942
439 Congaree Street, Mailbox 6
Greenville, SC 29607
(864) 729-3424 t
(864) 752-1424 f
d.davis@dicksondavislaw.com
www.dicksondavislaw.com

ATTORNEY FOR APPELLANTS

EXHIBIT A

STATE OF SOUTH CAROLINA)	**IN THE MAGISTRATE COURT**
)	
)	
COUNTY OF GREENVILLE)	
)	**2017-CP-23-07820**
Blackstone & Chase)	**2017-CV-231100-3419**
)	CIVIL CASE NUMBER
Appellant)	
)	**APPEAL RETURN**
VS)	
)	
Margaret H Durham)	
)	
Respondent)	

FILED-CLERK OF COURT
PAUL P. WICKENSIMER
GREENVILLE CO. SC
2018 JAN 10 PM 3:16

This matter was appealed by the Attorney, Deborah Davis, on December 11, 2017, on behalf of Appellant, Blackstone & Chase, who had never asked for a hearing within the 10 days allowed by law after receiving a notice to vacate their business for unpaid rent. Attorney, Deborah Davis, notified the court that she represented the Appellant well after the Writ of Ejectment had been filed to vacate the premises. No communication from the Appellant nor Attorney Davis until December 8, 2017, when Attorney Davis stated she viewed the Writ of Ejectment on the Greenville County *public index* and filed a Temporary Injunction the same date. There was never a letter of representation filed with the court nor had been submitted prior. A letter of representation was then filed with the court on December 11, 2017 after Attorney Davis filed the Temporary Injunction on December 8, 2017, to halt all proceedings.

ENTERED COMPUTER

Originally, a Writ of Ejectment was filed by Plaintiff and set to commence on December 12, 2017; however, prior to ejectment date, appellant presented a civil action appeal that had been filed in the Court of Common Pleas on December 11, 2017. Attorney Davis appeared as well in person again this date at 4:45 pm with actual Appeal notice and presented it to court prior to ejectment process taking place next day. Therefore, ejectment halted once again until defendant brought back to court to establish an appeal bond.

However, a court hearing has never been held due to Appellant not requesting or communicating with court after being served with the Eviction notice. An Injunction hearing is in process of being set, therefore Summary Court has no further factual background at this time. Court has not heard any facts in relation to this matter other than the paperwork filed by the Plaintiff requesting Defendant to vacate for unpaid rent and the *Temporary Injunction request for a hearing and the Appeal filed simultaneously* before the Writ of Ejectment by Attorney Davis. An Injunction hearing date is in process of being set and all parties including both Attornies will be notified of hearing.

Court will follow up with an addendum for the Appeal return as soon as Temporary Injunction hearing is held and facts relayed to court for the first time.

Respectively Submitted,

January 9, 2018

Judge Jacquelyn I. Duckett

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

2017CV2311003419
CIVIL CASE NUMBER

IN THE MAGISTRATE'S COURT

WRIT OF EJECTMENT
set out date 12.12.17 @ 11:30am

Margaret H. Durham Living Trust
P.O Box 10529
Greenville, SC 29609
(864) 349-2609

PLAINTIFF(S)
Vs
Blackstone And Chase, Llc Dba
Liberty Fine Cuts And Shaves
17 West North St.
Greenville, SC 29601

DEFENDANT(S)

TO THE SHERIFF/MAGISTRATE'S CONSTABLE:

Upon Judgment of this Court, rendered on the , you are hereby Ordered to proceed to the premises located at **17 West North St.**

Greenville, SC 29601.

Announce your identity and purpose and serve on the defendant(s) and all occupants a copy of this Writ of Ejectment. Inform them they have **twenty four (24) hours to voluntarily vacate** the premises. **If the premises appear unoccupied and no one responds** to your announced identity and purpose, the Writ of Ejectment shall be served by securely attaching a copy of the Writ in a conspicuous place on the premises.

If after 24 hours following the service or posting of the Writ, the occupants have not voluntarily vacated the premises, **a deputy sheriff may enter the premises** using only as much force as is necessary to effectuate the Ejectment.

Upon gaining access, you shall **remove from the premises any occupants and all items of personal property found on the premises. Such property may be deposited beside the public street or roadway.** All personal property removed from the premises and placed on a public street or roadway may be removed by the proper local government agency after forty eight (48) hours, excluding Saturdays, Sundays, and holidays. Such property may also be removed in the normal course of debris or trash collection before or after a period of forty eight (48) hours.

December 7, 2017

Gantt - Summary Court

_____, being duly sworn state that:

☐ I personally served a copy of this Writ on _____, an occupant of the rental unit

☐ On_____ 20____, at _____ the rental unit appeared unoccupied and no one responded when I announced my identity and intentions. I attached a copy of this Writ to a conspicuous part of the premise.

☐ On _____ 20____, at _____, which was not less than 24 hours from the posting date and time, I returned to the rental unit for the purpose of ejectment.

☐ Under my supervision, I had all persons and personal property removed and evicted from the rental unit placing all personal property beside the roadside.

☐ The rental unit was unoccupied. The Tenant and all occupants had vacated the unit.

☐ Informed by Plaintiff that case is settled.

Date: _____, 20____

_____
Sheriff/Deputy Sheriff/Constable

MV110 (Rev. 1/2015)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
)
)
)

2017CV2311003419
CIVIL CASE NUMBER

IN THE MAGISTRATE'S COURT

WRIT OF EJECTMENT
set out date 12.12.17 @ 11:30am

Margaret H. Durham Living Trust
P.O Box 10529
Greenville, SC 29609
(864) 349-2609

PLAINTIFF(S)
Vs
Blackstone And Chase, Llc Dba
Liberty Fine Cuts And Shaves
17 West North St.
Greenville, SC 29601

DEFENDANT(S)

TO THE SHERIFF/MAGISTRATE'S CONSTABLE:

Upon Judgment of this Court, rendered on the , you are hereby Ordered to proceed to the premises located at **17 West North St.**

Greenville, SC 29601.

Announce your identity and purpose and serve on the defendant(s) and all occupants a copy of this Writ of Ejectment. Inform them they have **twenty four (24) hours to voluntarily vacate** the premises. **If the premises appear unoccupied and no one responds** to your announced identity and purpose, the Writ of Ejectment shall be served by securely attaching a copy of the Writ in a conspicuous place on the premises.

If after 24 hours following the service or posting of the Writ, the occupants have not voluntarily vacated the premises, **a deputy sheriff may enter the premises** using only as much force as is necessary to effectuate the Ejectment.

Upon gaining access, you shall **remove from the premises any occupants and all items of personal property found on the premises. Such property may be deposited beside the public street or roadway.** All personal property removed from the premises and placed on a public street or roadway may be removed by the proper local government agency after forty eight (48) hours, excluding Saturdays, Sundays, and holidays. Such property may also be removed in the normal course of debris or trash collection before or after a period of forty eight (48) hours.

December 7, 2017

Grant - Summary Court

_____, being duly sworn state that:

☐ I personally served a copy of this Writ on _____, an occupant of the rental unit

☐ On_____ 20____, at _____ the rental unit appeared unoccupied and no one responded when I announced my identity and intentions. I attached a copy of this Writ to a conspicuous part of the premise.

☐ On _____ 20____, at _____, which was not less than 24 hours from the posting date and time, I returned to the rental unit for the purpose of ejectment.

☐ Under my supervision, I had all persons and personal property removed and evicted from the rental unit placing all personal property beside the roadside.

☐ The rental unit was unoccupied. The Tenant and all occupants had vacated the unit.

☐ Informed by Plaintiff that case is settled.

Date: _____, 20____

_____
~~Sheriff/Deputy Sheriff/Constable~~

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)

2017CV2311003419
CIVIL CASE NUMBER
MAGISTRATE'S COURT
RULE TO VACATE OR SHOW CAUSE

Margaret H. Durham Living Trust
P.O Box 10529
Greenville, SC 29609
(864) 349-2609

PLAINTIFF(S)

Vs

Blackstone And Chase, Llc Dba Liberty
Fine Cuts And Shaves
17 West North St.
Greenville, SC 29601

DEFENDANT(S)

Upon the application of the Plaintiff(s) listed above, which states:

TENANT HAS FAILED TO PAY RENT WHEN DUE OR DEMANDED.
THE TERMS OR CONDITIONS OF THE LEASE HAVE BEEN VIOLATED.

You the defendant(s) or lessee(s) of the premises located at the address listed above, **and all others,** are ordered to vacate the premises immediately pursuant to S.C. Code of Laws Section 27-37-10 or contact the

Gantt - Summary Court
1103 White Horse Road
Greenville, SC 29605
(864) 277-4429

within ten (10) days excluding date of service, for the purpose of showing why you and all occupants should not be ejected from these premises.

FAILURE TO VACATE THE PREMISES OR TO RESPOND WITHIN TEN (10) DAYS MAY RESULT IN THE ISSUANCE OF A WRIT OF EJECTMENT.

Monday, October 23, 2017

JUDGE, Gantt - Summary Court

Personally appeared before me, the undersigned deponent, being duly sworn, says that he attempted to serve the Rule to Vacate or Show Cause on Blackstone And Chase, Llc Dba Liberty Fine Cuts And Shaves on:

	DATE	TIME	INITIALS
1.	10-25-17	12:00	PB
2.	10-26-17	3:05	PB
3.			

DATE OF SERVICE _____

TIME OF SERVICE _____

SETTLED/DATE _____

VACANT/DATE _____

Sworn to and subscribed before me

This _____ day of _____, 20____.

PERSON SERVED & RELATIONSHIP IF NOT DEFENDANT:

NOTARY PUBLIC OR JUDGE

SIGNATURE OF SERVER

ON 11-2-17 I DEPOSITED IN THE UNITED STATES MAIL IN AN ENVELOPE ADDRESSED TO THE DEFENDANT(S) ABOVE WITH FIRST CLASS POSTAGE AFFIXED THERETO, A COPY OF THIS DOCUMENT.

MAGISTRATE'S CLERK

MV16

2017CV2311003419
CIVIL CASE NUMBER

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE MAGISTRATE'S COURT

Margaret H. Durham Living Trust
PLAINTIFF(S)

VS.

Blackstone & Chase, LLC d/b/a Liberty Fine Cuts and Shaves
DEFENDANT(S)

APPLICATION FOR EJECTMENT
(Eviction)

I, Margaret H. Durham Living Trust, plaintiff in this action, state that I am the landlord-lessor of premises within the jurisdiction of Magistrate Pedro which is described as: (address and description of premises – apartment, house, etc.)

2,050 square feet on the bottom floor of 17 West North Street, Greenville, SC

I further state that, with regard to the above described premises, a landlord-tenant relationship exists between myself and the defendant Blackstone & Chase, LLC d/b/a Liberty Fine Cuts and Shaves, the tenant-lessee, as evidenced by the following: (Attach lease papers or other written proof.)

Grounds for this ejectment are one or more of the following:

☒ The tenant fails or refuses to pay the rent when due or when demanded; or
☐ The term of tenancy or occupancy has ended; or
☒ The terms or conditions of the lease have been violated as follows:Defendant's use of the premises did not comply with all laws and ordinances, Defendant damaged the premises by fire and failed to promptly repair the damage, Defendant failed to notify Plaintiff of a change of insurance, and Defendant attempted to sublet the premises without Plaintiff's consent, among other things.

Sworn to before me
this 16th day of October, 2017.

Ellen S. Griffin Smith
Magistrate or Notary Public for South Carolina

My Commission expires 6.11.2023

PLAINTIFF (or his attorney)
Joshua J. Hudson
Roe Cassidy Coates & Price, P.A.

SCCA/732 (Amended 05/2008)

OFFICE LEASE AGREEMENT
17 WEST NORTH STREET
CITY OF GREENVILLE, SOUTH CAROLINA

THIS LEASE AGREEMENT CONTAINS A BINDING, IRREVOCABLE AGREEMENT TO ARBITRATE AND IS SUBJECT TO ARBITRATION PURSUANT TO TITLE 15, CHAPTER 48 (UNIFORM ARBITRATION ACT) OF THE SOUTH CAROLINA CODE OF LAWS

THIS OFFICE LEASE AGREEMENT (this "Lease") is made and entered into as of the of , by and between Margaret H. Durham Living Trust, ("Lessor"), Blackstone & Chase, LLC (hereinafter referred to as "Lessee"). dba/Liberty Fine Cuts and Shaves

WITNESSETH:

For and in consideration of the rent provided herein and the mutual covenants and agreements hereinafter set forth, the parties hereto agree for themselves, their successors and assigns, as follows:

Section 1. Premises.

1.1 Description of Premises. Lessor hereby leases to Lessee, and Lessee hereby accepts and rents from Lessor, that certain office space (the "Premises") containing a total of approximately 2,050 square feet within the building commonly known as 17 West North Street (the "Building"), which Building contains a total of approximately 10,000 square feet and is located within 17 West North Street, situated in the City of Greenville, Greenville County, South Carolina together with a nonexclusive right for itself and its invitees, licensees, employees, agents and contractors to use all common areas of the Project (as more particularly defined below). The Building and the Premises are more particularly shown and outlined in the site plan of the Project and the layout of the Building attached hereto as Exhibit 1.1 and incorporated herein by reference.

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Section 2. Term.

The term of this Lease (the "Term") will commence on the later date of the execution of this Lease by both Lessee and Lessor (the "Commencement Date") and will end at 11:59 p.m. on the date (the "Expiration Date") which is Sixty (60) months from the Rental Commencement Date (as defined in Section 3 hereof), unless the term is otherwise extended or sooner terminated as hereinafter expressly provided. As used herein, the term "Lease Year" will mean each successive 12-month period commencing on the first day of the Rental Commencement Date.

Section 3. Base Rent.

Beginning on the Rental Commencement Date and continuing throughout the Term, Lessee will pay to Lessor without notice, demand, reduction, abatement, set off or any defense, minimum base rent (the "Base Rent") in equal monthly installments, in advance, on or before the first day of each calendar month in accordance with the Base Rent Schedule attached hereto as Exhibit 3 and incorporated herein by reference.

Section 4. Security Deposit.

Lessee will pay to Lessor upon execution of this Lease a sum $5,200.00 (the "Security Deposit") as security for the full and faithful performance by Lessee of each and every term, covenant and condition of this Lease. Lessor will deposit the Security Deposit with a banking institution having federally insured deposits and all interest, if any, will accrue to Lessor's benefit. Lessor may combine the Security Deposit with other funds of Lessor as long as permitted by the laws of the State of South Carolina At the expiration of the term hereof, Lessor shall tender the Security Deposit to Lessee as long as Lessee is not in default hereunder. Upon an Event of Default by Lessee under this Lease, or if Lessee fails to perform any of the terms, provisions and conditions of this Lease as and when required, Lessor may use, apply, or retain the whole or any part of the Security Deposit for the payment of any sum due Lessor or which Lessor may expend or be required to expend by reason of the Event of Default or failure to perform including, but not limited to, any damages or deficiency in the reletting of the Premises, and Lessee will forthwith upon demand restore the Security Deposit to the original sum deposited; provided, however, that any such use, application or retention by Lessor of the whole or any part of the Security Deposit will not be or be deemed to be an election of remedies by Lessor or viewed as liquidated damages, it being expressly understood and agreed that, notwithstanding such use, application or retention, Lessor will have the right to pursue any and all other remedies available to it under the terms of this Lease or otherwise. In the event Lessee complies with all of the terms, covenants and conditions of this Lease, the Security Deposit, without interest and less amounts due from Lessee to Lessor, will be returned to Lessee within thirty (30) days after Lessee has vacated and surrendered the Premises in accordance with the terms hereof, so long as no Event of Default by Lessee will then be existing under the terms of this Lease. In the event of a sale of the Building or the Project, shall transfer the Security Deposit and accrued interest to the purchaser, and such transfer shall release Lessor from all liability for the return of the Security Deposit and accrued interest without any further action or documentation being required. Thereafter Lessee will look solely to the new landlord for the return of the Security Deposit and accrued interest.

Section 5. Additional Rent.

5.1 Operating Expenses. Lessee agrees to pay as additional rent its Proportionate Share (as hereinafter defined) of the amount paid by Lessor during the Term for operation and maintenance of the Project (including, without limitation, all the buildings and other improvements thereon) which are not attributable to a particular leased space within the Project (collectively, the "Operating Expenses"). Operating Expenses will include, but not be limited to, the following: (a) ad valorem taxes and assessments assessed against the Project (including, without limitation, all the buildings and other improvements thereon), (b) all expenses for operation,

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repair, replacement and maintenance as necessary to keep the common areas of the Project (including, without limitation, all the buildings and other improvements thereon) in good order, condition and repair, including but not limited to: utility charges, lighting facilities, and the HVAC system for the Project, , and (c) all insurance premiums for insurance policies maintained by Lessor pursuant to the terms hereof. Notwithstanding anything herein to the contrary, it is the intention of the parties that the Lessee shall be solely responsible for all expenses as defined above which are peculiar to the Premises and shall pay, as additional rent as set forth herein, its Proportional Share of all Operating Expenses associated with the common areas of the Project.

Notwithstanding anything contained to the contrary in this Lease, in no event shall Lessee's Proportionate Share include any of the following:

A. Reserves for future expenses or contingencies;

B. Any and all of Lessee's capital costs, capital improvements, capital alterations, capital repairs, capital equipment, capital tools, and/or any financing related fees, costs and expenses, and professional fees and disbursements incurred in connection therewith;

C. Lessee's overhead or administrative costs including, but not limited to, executive, property manager and personnel salaries and/or business-related expenses;

D. Any management fees;

E. Signs which identify other tenants of the Project, or the costs of repairing any defects in the design, materials, or workmanship of the Premises or common areas;

F. Advertising and promotional expenditures;

G. Accounting and legal fees attributable to any matters concerning any other tenant, prospective tenant, or other occupants of the Project;

H. Costs attributable to repairing or maintaining items which are covered by warranties or insurance required to be maintained by Lessor;

I. Costs attributable to repairs or maintenance performed in another tenant's or occupant's exclusive space which is not part of the common areas;

J. Costs which are reimbursable to Lessor by insurance or paid solely by other tenant(s) as a result of provisions contained in their specific leases or by third parties pursuant to law or contract;

K. Depreciation and amortization of equipment or debt;

L. Any and all of Lessor's payments for loan principal or interest, together with expenses thereto related in connection with such financing or any refinancing during the term of this Lease, and/or ground lease rental payments;

M. Any and all costs of selling, exchanging or refinancing the Project;

N. Costs incurred due to violations by Lessor of any of the terms and conditions of any lease in the Project;

O. Costs attributable to seeking and obtaining new tenants for, as well as retaining existing tenants in, the Project, including marketing fees, advertising expenses, brokerage commissions, rent or other rent concessions, vacancy costs, and/or to prepare space for

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such tenants;

P. Any and all of Lessor's costs to compel full performance under leases with all prior, existing, and prospective tenants in the Project, including without limitation all legal fees, costs and expenses to collect rent arrears and recover possession;

Q. Cost of services paid to Lessee, or to subsidiaries of affiliates of Lessor for services in the Project to the extent the same exceeds the cost of such services rendered by unaffiliated third parties on a comparable competitive basis;

R. Any sales, use, income, excise, and/or franchise taxes (provided that sales taxes on purchases which are Operating Expenses shall also be deemed Operating Expenses);

S. Any other costs that under generally accepted accounting principles and practices would not be considered an expense; and

T. Costs of complying with any statutes, codes, ordinances or regulations which are in effect from time to time during the term of the Lease (including, but not limited to any environmental or ADA matters) which are applicable to the common areas of the Project and which would reasonably be deemed a capital expenditure.

The proportionate share ("Lessee's Proportionate Share") of Operating Expenses to be paid by Lessee will be a percentage of the Operating Expenses based upon the proportion that the Premises' usable/rentable square footage bears to the total usable/rentable square footage of all buildings and other improvements on the Project excluding common areas and other areas of the Project not otherwise appropriate to such calculation; the parties agree that in making the final calculations of the Lessee's Proportionate Share the Lessor may give consideration to any BOMA calculations prepared by the design architect. Lessor will estimate the total amount of Operating Expenses to be paid by Lessee during each calendar year and Lessee will pay to Lessor one-twelfth (1/12) of such sum on the first day of each calendar month during each such calendar year, or part thereof, during the Term. Within sixty (60) days after the end of each calendar year during the Term, Lessor will submit to Lessee a statement of the actual amount of Operating Expenses for such calendar year, and within thirty (30) days after receipt of such statement, Lessee will pay any deficiency between the actual amount owed and the estimates paid during such calendar year, or in the event of overpayment, Lessor will, at Lessor's option, credit the amount of such overpayment toward the next installment of Operating Expenses, or refund the amount of such overpayment to Lessee. If the Rental Commencement Date is on other than the first day of a calendar year, or if the Expiration Date is on other than the last day of a calendar year, Lessee's share of the Operating Expenses for such calendar year will be apportioned pro rata.

5.2 Taxes.

Lessee will pay any and all taxes, documentary stamps or assessments of any nature imposed or assessed upon Lessee's occupancy of the Premises or upon Lessee's furniture, furnishings, trade fixtures, equipment, machinery, inventory, merchandise or other personal property located on the Premises and owned by or in the custody of Lessee promptly as all such taxes or assessments may become due and payable without any delinquency. If applicable in the jurisdiction where the Premises are located, Lessee will pay and be liable for all rental tax, sales, use and inventory taxes or other similar taxes, if any, levied or imposed by any city, state, county or other governmental body having authority, such payments to be in addition to all other payments required to be paid Lessor by Lessee under the terms of this Lease. Such payment will be made by Lessee directly to such governmental body if billed to Lessee, or if billed to Lessor, such payment will be paid concurrently with the payment of Base Rent, or such other charge upon which the tax is based, all as set forth herein. Notwithstanding the foregoing, Lessee will have the right, at its sole cost and expense, to contest any tax contemplated by this Section provided, however, that in the event of any such contest undertaken by the Lessee, Lessee agrees to hold Lessor harmless and indemnify Lessor from any and all costs or expenses, including attorney's fees.

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5.3 Other Additional Rent Provisions.

(a) Any and all amounts required to be paid by Lessee under this Section 5, any charges or expenses incurred by Lessor on behalf of Lessee (including any construction costs incurred by Lessor beyond the Improvement Allowance), together with all other sums required to be paid by Lessee to Lessor hereunder other than Base Rent, will be considered "Additional Rent" payable in the same manner and upon the same terms and conditions as the Base Rent. Any failure on the part of Lessee to pay such Additional Rent when and as the same will become due will entitle Lessor to the remedies available to it for non-payment of Base Rent. Lessee's obligations for payment of Additional Rent will begin to accrue on the Rental Commencement Date. As used in this Lease, the term "Rent" will include Base Rent and Additional Rent, except as otherwise expressly provided to the contrary.

(b) Notwithstanding anything in this Section 5 to the contrary, to the extent Lessor reasonably determines that some categories of Operating Expenses benefit premises in the Project disproportionately and/or some Operating Expenses relate to some but not all premises in the Project, such Operating Expenses will be allocated among the benefited premises as reasonably determined by Lessor and demonstrated by reasonable back-up documentation.

Section 6. Late Payments.

All unpaid Rent and other sums of whatever nature owed by Lessee to Lessor under this Lease and remaining unpaid five (5) days after the due date will bear a late penalty equal to five (5%) percent per month of the then amount due which will be Additional Rent hereunder. Acceptance by Lessor of any payment from Lessee hereunder in an amount less than that which is currently due will in no way affect Lessor's rights under this Lease and will in no way constitute an accord and satisfaction.

Section 7. Possession:

Lessor shall deliver possession of the demised premises to Lessee on or before March 1, 2016 8 RWK MHD

Section 8. Lessor's Modifications.

It is further agreed that this Lease is made by Lessor and accepted by Lessee with the distinct understanding and agreement that Lessor will have the right and privilege (but not the obligation) from time to time to (a) make additions, alterations and repairs to the Project (and any portion thereof, including the Building, (b) construct additional and demolish existing buildings and other improvements at the Project, and (c) sell all or any portion of the foregoing (a), (b) and (c) without any liability to Lessee therefore),. Notwithstanding the foregoing, Lessor shall not make any alterations to the Premises, the front of the Building, or the corridor leading to the Premises without Lessee's prior written consent. Lessor shall maintain a standard builder's risk policy in effect during such construction.

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Section 9. Alterations and Improvements.

9.1 Lessor's Consent Required. Lessee will not make or allow to be made any structural changes, alterations, additions or improvements to the Premises or, without Lessor's prior consent, place or allow to be placed signs on the Premises, the Building or the Project which are visible from outside the Premises. Lessee will not make or allow to be made any non-structural changes, alterations, additions or improvements in or to the Premises ("Lessee Alteration"), without first obtaining the written consent of Lessor and Lessor's approval in writing of detailed plans, specifications and drawings therefor. The work to be done under the Plans and Specifications shall not be deemed Lessee Alteration. Lessor's consent and approval pursuant to the foregoing will not be unreasonably withheld or delayed. Further, Lessor will have the right to approve the general contractor, subcontractors and all other persons and entities to be used by Lessee in connection with such work, which approval will not be unreasonably withheld or delayed. Lessee will deliver to Lessor a copy of all plans, specifications and drawings for any Lessee Alteration and will comply with the requirements of Sections 9.2 and 9.4.

9.2 Requirements. In the event Lessee desires to make any Lessee Alteration, Lessee will, prior to the commencement thereof, furnish Lessor with an original Builder's Risk policy of insurance in form and amount of coverage reasonably acceptable to Lessor, showing Lessee as named insured and Lessor as loss payee and additional insured. All Lessee Alterations will be performed in accordance with all legal requirements applicable thereto and in a good and workmanlike manner with first class materials at such time and in such manner as not to interfere with the progress of any work being performed by or on account of Lessor or any other lessee of the Project.

9.3 Lessor's Property on Expiration. All Lessee Alterations, including, but not limited to, all walls, railings, carpeting, floor and wall coverings and other permanent real estate fixtures (excluding, however, Lessee's moveable trade fixtures and equipment) made by, for, or at the direction of Lessee, will when made, become the property of Lessor and will remain upon the Premises at the expiration or earlier termination of this Lease, provided, however, that if requested by Lessor prior to the expiration of the term of this Lease, Lessee will, at its sole cost and expense, remove such Lessee Alterations and restore the premises to its condition prior to the making of such Lessee Alteration. If Lessee does not remove any such Lessee Alteration as required above, Lessor may remove the same, and Lessee will pay the reasonable cost of such removal to Lessor upon demand.

9.4 Protection Against Liens. Lessee will post a large and conspicuous notice that Lessor is not responsible for the materials and labor furnished to Lessee and will otherwise comply with the provisions of Section 29-5-80, Code of Laws of South Carolina, 1976, as amended, to protect Lessor from liability for any mechanic liens which may result from Lessee's work. Lessee agrees to keep the Premises free and clear of all mechanic liens. In the event that a lien is filed against the Premises or Lessor's property as a result of labor or material supplied to the Premises, Lessee agrees that within 30 days of the date any such lien is filed in the public records for Greenville County it will either obtain the release and discharge of such mechanic lien or bond off such mechanic lien. In the event Lessee fails to discharge such lien within such period of time, Lessor will have the right to either discharge or bond such lien and Lessee will immediately reimburse Lessor for all costs and expenses relating thereto. In all events, Lessee will be responsible for all expenses incurred by Lessor as a result of the filing of a mechanic's lien against the Premises, including reasonable attorneys' fees and expenses. Any failure to either satisfy such lien or bond it off shall be construed as an incident of default under the terms of this lease.

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Section 10. Use of Premises.

Lessee may use the Premises for any lawful retail and professional services type purpose. Lessor warrants and represents that such use does not and will not conflict with any exclusive use or restriction granted or to be granted to any other party. Lessee will not change its initial use of the Premises to be in violation of any such exclusives or restrictions created after the date hereof of which Lessee has been notified in writing. All use of the Premises will comply with all laws, ordinances, orders, rules and regulations (including without limitation, the zoning classifications existing as of the Rental Commencement Date) of any lawful governmental authority, agency or other public or private regulatory authority having jurisdiction over the Premises. Without limiting the generality of the above provision, the Premises will not be used for the treatment, storage, use or disposal of toxic or hazardous waste or substances, or any other substance, that is prohibited, limited or regulated by any governmental or quasi-governmental authority. Notwithstanding the foregoing, Lessee will have the right to use ordinary cleaning supplies and solvents in the ordinary course of business; provided, the same are stored and used in compliance with all applicable laws and ordinances. Lessee will save Lessor harmless from any penalties, fines, costs, expenses or damages resulting from failure so to comply. Lessee will not do any act or follow any practice relating to the Premises which will constitute a nuisance or detract in any way from the reputation of the Project as a first class retail and office development. Lessee's duties in this regard will include making arrangements at Lessee's expense for the proper storage and timely disposition of garbage and refuse and allowing no noxious or offensive odors, fumes, gases, smoke, dust, steam or vapors, or any loud or disturbing noise or vibrations to originate in or emit from the Premises. Lessee will save Lessor harmless from any claims, liabilities, penalties, fines, costs, expenses or damages resulting from the failure of Lessee to comply with the provisions of this Section 10.

Section 11. Lessor's Reservation of Rights.

11.1 Name, Signs, Keys and Common Areas. Lessor reserves the right to change the name of the Project; to install and maintain a sign or signs on the exterior of the Project (and any building therein); to hold passkeys to the Premises that are to be maintained and held in a secure capacity for use only by Lessor's property manager or any other party authorized by Lessor; to grant to other tenants of the Project a nonexclusive, revocable license to use and occupy, in common with Lessor and Lessee, the common areas of the Project; and to designate certain portions of such common areas of the Project as being for the exclusive use of particular tenants of the Project.

11.2 Relocation of Lessee. PURPOSELY LEFT BLANK

Section 12. Insurance.

12.1 Lessee's Required Coverage. Lessee covenants and agrees that from and after the date of occupancy by Lessee, Lessee will carry and maintain, at its sole cost and expense, the insurance required under Sections 12.1(a), (b), (c) and (d) below. All such policies of insurance will be issued in form acceptable to Lessor by insurance companies with a rating of not less than "A", if available, in the most current available "Best's Insurance Reports", and licensed to do business in the state in which the Building is located. Throughout the Term of this Lease, Lessee will carry and maintain the following types of insurance:

(a) Liability insurance in the Commercial General Liability form (or reasonable equivalent thereto) covering the Premises and Lessee's use thereof against claims for personal injury or death, property damage and product liability occurring upon, in or about the Premises, such insurance to be written on an occurrence basis (not a claims made basis), to be in combined single limit amounts not less than $1,000,000.00 and to have general aggregate limits of not less than $2,000,000.00 for each policy year. The general aggregate limits under the Commercial General Liability insurance policy or policies must apply separately to the Premises and to Lessee's use thereof (and not to any other location or use of Lessee) and such policy will contain an endorsement to that effect. Notwithstanding the foregoing, Lessee will have the right to carry the liability insurance provided above in the form of a blanket insurance policy, covering additional items or locations or insureds, provided, however, that: (1) Lessor, and any other parties in interest designated by Lessor to Lessee, from time to time, will be named as additional

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insureds thereunder as its interests may appear; (2) the coverage afforded Lessor and such other parties designated by Lessor will not be reduced or diminished by reason of use of such blanket policy of insurance; and (3) any such policy will provide, at a minimum, for the minimum liability limitations hereinabove provided in this Section 12 with respect to Lessee's interests in and to the Premises and the Project.

(b) Insurance covering all of the items included in Lessee's leasehold improvements, trade fixtures, merchandise and personal property from time to time in, on or upon the Premises, in an amount not less than one hundred percent (100%) of their full replacement value from time to time during the Term, providing protection against perils included within the standard form of "all-risks" fire and casualty insurance policy, together with insurance against sprinkler damage, vandalism and malicious mischief.

(c) Business interruption insurance (including for loss of income and for extra expense) in an amount necessary to enable Lessee to maintain the capacity to operate in its normal course of business during periods of restoration.

(d) During any construction, reconstruction, renovation, remodeling or similar activity by Lessee, Lessee will also maintain Builder's risk insurance as required under Section 9.2 hereof.

12.2 Policy Requirements. Each of Lessee's insurance policies required in Sections 12.1(a) and (d) above will: (a) name Lessor, as well as any mortgagee or ground lessor of Lessor, as an additional insured; (b) provide that a certificate evidencing such insurance will be delivered to Lessor prior to possession of the Premises by Lessee and thereafter within thirty (30) days prior to the expiration of each such policy, and, as often as any such policy will expire or terminate; (c) contain a provision that the insurer will give to Lessor and such other parties in interest at least thirty (30) days notice in writing in advance of any material change, cancellation, termination or lapse, or the effective date of any reduction in the amounts of insurance; and (d) be written as a primary policy which does not contribute to and is not in excess of coverage which Lessor may carry. Notwithstanding the provisions of subparagraph (c) of the preceding sentance, Lessee will be responsible for providing Lessor with at least twenty-five (25) days notice in advance of any material change, cancellation, termination or lapse, or the effective date of any reduction in the amounts of insurance.

12.3 Lessor's Required Insurance. Lessor shall maintain, at its expense, pursuant to one policy or in combination with applicable "umbrella" policies, Commercial General Liability Insurance on an occurrence basis with a minimum limit of liability in the amount of Two Million Dollars ($2,000,000.00) and "All Risk" property insurance at least as broad as the Insurance Services Office's Causes of Loss Special Form, but excluding coverage for terrorism unless available at a commercially reasonable cost, insuring the Project, including the Premises, in an amount equal to one hundred percent (100%) of the full replacement cost thereof and so as to prevent the application of co-insurance provisions.

12.4 Waiver of Subrogation. Each party, on behalf of anyone claiming under or through it by way of subrogation or otherwise, waives all rights and causes of action against the other party and such party's agents and invitees for any liability arising out of any loss or damage in or to the Premises, the Project and the contents therein caused by (A) any peril normally covered under "All Risk" Special Form policies described in Section 12.3 (whether or not such party actually carries such insurance policies); or (B) if the scope of coverage is broader that in (A) above, then any peril actually covered under the property insurance maintained by such party. This release and waiver shall be complete and total even if such loss or damage may have been caused by the negligence of the other party or such party's agents or invitees and shall not be affected or limited by the amount of insurance proceeds available to the waiving party, regardless of the reason for such deficiency in proceeds. If one party's insurance carrier prohibits waiver of subrogation, then each party's release and waiver shall become null and void as each waiver is given in consideration for the other. Each party covenants that its insurance policies will contain waiver of subrogation endorsements, and, if such endorsements for any reason are about to become unavailable, it will give the other party not less than one (1) month's prior written notice of such impending unavailability. Any limitation on the scope of Lessor's or Lessee's waiver of rights pursuant to this Section shall in no event be deemed to apply to, nor shall the waiving party's right and benefits under such waiver be impaired or

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judgment, tends to impair the reputation of the Project or its desirability as a center for Office and Retail, and upon written notice from Lessor, Lessee will refrain from or discontinue such advertising.

A.12. All paneling, rounds or other wood products not considered furniture will be of fire retardant materials. Before installation of any such materials, certification of the materials' fire retardant characteristics will be submitted to Lessor or its agents, in a manner satisfactory to Lessor.

A.13. Lessor may waive any one or more of these Rules and Regulations for the benefit of any particular tenant or tenants, but no such waiver by Lessor will be construed as a waiver of such Rules and Regulations in favor of any other tenant or tenants, nor prevent Lessee from thereafter enforcing any such Rules and Regulations against any or all of the tenants of the Project. Notwithstanding the foregoing, Lessor hereby agrees to equitably enforce the observation and performance of the Rules and Regulations for the best interest of the Project as a whole.

A.14. These Rules and Regulations are in addition to, and will not be construed to in any way modify or amend, in whole or part, the terms, covenants, agreements and conditions of the main text (including Special Provisions) of the Lease, which text will control except as to any attempted waiver of any of these Rules and Regulations in the instance of conflict.

A.15. Lessor reserves the right to make such other and reasonable rules and regulations as in its judgment may from time to time be needed for safety, care and cleanliness of the Project, and for the preservation of good order therein. Such other Rules and Regulations will be effective upon written notification of Lessee

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diminished by, a deficiency in insurance proceeds caused by (1) the other party's failure to carry the insurance required by this Lease; (2) the other party's election to carry insurance in an amount less than one hundred percent (100%) of replacement cost; (3) any deductible under any insurance carried by the other party; or (4) any amount of insurance proceeds appropriated by Lessor's mortgagee or holder of a superior interest in such proceeds.

Section 13. Indemnification.

(a) (Intentionally Deleted)

(b) Lessee will defend, indemnify and hold harmless Lessor from and against any and all claims, losses, liabilities, causes of action, damages, or expenses, whether due to damage to the Premises, claims for injuries to persons or property, or administration or criminal action by a governmental authority, where such claims arise out of or from or related to the use or occupancy of the Premises by Lessee, its agents, employees, invitees, visitors, customers, or licensees, including costs and attorneys' fees incurred by Lessor to defend itself against any such claims, damages or expenses.

(c) Lessor will not be liable to Lessee for any damages, losses or injuries to the persons or property of Lessee which may be caused by the acts, neglect, omissions or faults of any persons, firms or corporations, except when such injury, loss or damage results from the sole gross negligence or willful misconduct of Lessor, his agents or employees. All personal property placed or moved into the Premises or Building will be at the risk of Lessee or the owner thereof, and Lessor will not be liable to Lessee for any damage to said personal property. Lessee will maintain at all times during the Term of this Lease an insurance policy or policies in any amount or amounts sufficient to indemnify Lessor or pay Lessor's damages, if any, resulting from any matters set forth hereinbefore.

(d) In case Lessor will be made a party to any litigation commenced against Lessee, Lessee will protect and hold Lessor harmless and will promptly pay all costs, expenses and reasonable attorneys' fees incurred or paid by Lessor in connection with such litigation.

(e) Notwithstanding any contrary provision contained in or implied from the terms of this Lease, Lessee will look solely (to the extent insurance coverage is not applicable or available) to the interest of Lessor (or its successor as Lessor hereunder) in the Building for the satisfaction of any judgment or other judicial process requiring the payment of money as a result of any negligence or breach of this Lease by Lessor (or its successor as Lessor hereunder) or of Lessor's managing agent (including any beneficial owners, partners, corporations and/or others affiliated or in any way related to Lessor or such successor or managing agent).

(f) Notwithstanding anything herein to the contrary, the indemnifications set forth herein will expressly survive expiration or termination of this Lease.

Section 14. Maintenance, Repairs and Services.

14.1 Lessor. During the Term of the Lease, Lessor will be responsible for repairs, replacement and maintenance to the Building including, without limitation, corridors, lobbies, the HVAC system, roof, exterior walls and structural portions, including foundation and subflooring, of the Premises and shall keep such items in good repair normal wear and tear excepted. If the cause of such repairs or replacements is the result of the negligence, misconduct or intentional acts or omissions of Lessee, its employees or agents, Lessee will pay Lessor the full amount of such expenses. If Lessor fails to repair, replace or maintain the Building as required hereunder and such failure remains uncured after the lapse of fifteen (15) days after written notice from Lessee, Lessee, at Lessee's option, may undertake the required repair, replacement or maintenance. Thereafter, Lessee shall deliver an invoice for the cost of such work to Lessor and Lessor shall pay the invoice within fifteen (15) days of the receipt thereof. If Lessor fails to pay said invoice within the time allowed, Lessee shall then be entitled to offset the amount of the invoice against Base Rent as Base Rent becomes due hereunder.

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14.2 Lessee. Lessee will be responsible for the repair, replacement and maintenance in good order and condition (normal wear and tear excepted) of all parts and components of the Premises, including but not limited to any approved signage, including, without limitation, the plumbing, wiring, electrical systems, glass and plate glass, equipment and machinery constituting fixtures, unless such repairs or replacements are required solely as a result of the gross negligence or willful misconduct of Lessor, its employees, invitees or licensees In the event Lessee fails to perform its obligations under this paragraph in a prompt manner, Lessor will give Lessee ten (10) days' prior written notice to perform such obligations, and thereafter, if Lessee fails to perform such obligations within said ten (10) day period, or if the performance of such obligations will take more than ten (10) days to complete, and Lessee fails to commence performance of such obligations within ten (10) days of Lessor's written notice or if Lessee fails to promptly and diligently pursue the performance of such obligation until completion, Lessor will have the right to perform such obligations on behalf of Lessee, in which event the cost of such performance, together with a service charge equal to fifteen percent (15%) of such cost, will be due and payable by Lessee to Lessor immediately upon demand as Additional Rent hereunder.

14.3 Lessor's Services. Lessor shall furnish the Premises with the following::

(a) Electricity for routine lighting and the use of general office machines such as typewriters, computer equipment, calculators and the like, which use 110 volt electric power;

(b) Heat and air conditioning during reasonable and usual business hours reasonably required for the occupation of the Premise, such heat and air conditioning to be provided by using the existing systems in the Building.

(c) [Intentionally Deleted];

(d) [Intentionally Deleted];

(e) [Intentionally Deleted];

(f) [Intentionally Deleted];

(g) Gas Heat if applicable; and

(h) Sewage and water.

Section 15. Trade Fixtures and Equipment.

Any trade fixtures or equipment installed by Lessee in the Premises at Leasee's expense will remain Lessee's personal property and Lessee will have the right at any time during the Term of this Lease to remove such fixtures or equipment. Upon removal of any fixtures or equipment, Lessee will immediately restore the Premises to substantially the same condition as they were when received by Lessee, ordinary wear and tear excepted. Prior to termination of this Lease, Lessee will remove all of Lessee's trade fixtures and equipment from the Premises and repair all damage to the Premises caused by such removal; provided, that if Lessee is in default hereunder, Lessor's approval will be required prior to any such removal. If Lessee fails to remove such fixtures or equipment prior to termination of this Lease, Lessee will pay Rent at the then current per diem rate for every day Lessee fails to remove such property. Subject to the foregoing provisions of this Section, any trade fixtures or equipment not removed by Lessee at the expiration or earlier termination of this Lease will, at the Lessor's option, become the property of Lessor or Lessor will be entitled to remove and dispose of such property and in such event Lessee will be obligated to pay Lessor for the cost thereof on demand; provided, however, Lessee will be liable for above payment of the Rent if Lessee fails to remove such property until Lessor elects to take such property.

Section 16. Damage or Destruction of Premises.

In the event of a fire or other casualty in the Premises, Lessee will immediately give notice thereof

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to Lessor. In the event of total or partial destruction of the Premises by fire or other casualty insured by Lessor, Lessor agrees to promptly restore and repair the Premises at Lessor's expense to the extent Lessor actually receives insurance proceeds therefor; provided, however, that in the event (a) the Premises are so destroyed that they cannot be repaired or rebuilt within one hundred eighty (180) days after the commencement of such repair or rebuilding as reasonably determined by Lessor; or (b) Lessor decides, in its sole and absolute discretion, not to restore and repair the Premises, or (c) the casualty to the Premises occurs in the final six (6) months of the term or any renewal term hereof then, either Lessor or Lessee may terminate and cancel this Lease by giving written notice to the other party within thirty (30) days following the date upon which Lessor notifies Lessee of the determinations described in (a) and/or (b) above or at anytime with respect to (c). Upon the giving of such notice of termination, all further obligations hereunder will thereupon cease and terminate. If no such notice is given, Lessor will make such repair or restoration of the Premises promptly and in such manner as not to unreasonably interfere with Lessee's use and occupancy of the Premises. Any proceeds from the fire and extended coverage insurance policies not utilized by Lessor in restoring or repairing the Premises will become the sole property of Lessor. Rent will proportionately abate during the time that the Premises or any part thereof are unusable by reason of such damage thereto. Except as provided herein, damage to or destruction of all or any portion of the Premises by fire or by any other cause will not terminate this Lease, nor entitle Lessee to surrender the Premises nor in any way affect Lessee's obligation to pay the Rent and other sums payable hereunder.

Section 17. Condemnation.

If all of the Premises or the Project is taken or condemned for a public or quasi-public use, or if a material portion of the Premises is taken or condemned for a public or quasi-public use and the remaining portion thereof is not usable by Lessee, in the reasonable judgment of Lessee and Lessor, this Lease will terminate as of the earlier of the date title to the condemned real estate vests in the condemnor or the date on which Lessee is permanently deprived of possession of the Premises. In such event, the Base Rent herein reserved and all Additional Rent and other sums payable hereunder will be apportioned and paid in full by Lessee to Lessor to that date, all Rent and other sums payable hereunder prepaid for periods beyond that date will forthwith be repaid by Lessor to Lessee, and neither party will thereafter have any liability hereunder, except that any obligation or liability of either party, actual or contingent, under this Lease which has accrued on or prior to such termination date will survive. If only part of the Premises is taken or condemned for a public or quasi-public use and this Lease does not terminate as provided above, Lessor to the extent of the award it actually receives, will restore the Premises to a condition and to a size as nearly comparable as reasonably possible to the condition and size thereof immediately prior to the taking, and there will be an equitable abatement of the Rent according to the value of the Premises before and after the taking. Pending such determination, if Lessee is entitled to a refund because of an overpayment of Rent, Lessor will make the same promptly, or in lieu thereof credit the amount thereof to future installments of Rent as they become due at Lessee's option. Lessor will be entitled to receive the entire award in any proceeding with respect to any taking, without deduction therefrom for any estate vested in Lessee by this Lease, and Lessee will receive no part of such award. Nothing herein contained will be deemed to prohibit Lessee from making a separate claim, against the condemnor, to the extent permitted by law, for the value of Lessee's moveable trade fixtures, machinery and moving expenses.

Section 18. Governmental Orders.

Lessee will be responsible for compliance with all laws, ordinances and regulations which are applicable to Lessee's particular use and manner of use of the Premises. In the event Lessee's particular use of the Premises violates any laws, ordinance or regulation including but not limited to the ADA, Lessee will bear all expense, cost and liability for compliance with such laws, ordinances and regulations. Lessee hereby agrees to indemnify, defend and hold Lessor harmless from any and all loss, cost, liability or expense, including without limitation reasonable attorneys' fees, resulting from Lessee's failure to comply with all laws, ordinances and regulations relating to Lessee's particular use and manner of use of the Premises.

Lessor shall deliver the Premises to Lessee in compliance with all applicable laws, ordinances and regulations which are not applicable solely because of Lessee's particular use of the Premises.

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Section 19. Lessor's Access To Premises.

Lessor's property manager and authorized employees, or any other party authorized by Lessor will have the right to enter the Premises at any time in the case of emergency, and at all reasonable times and upon reasonable notice for the purpose of making repairs, making connections, installing utilities, providing services to the Premises, the Building or for any other tenant, making connections, installing utilities, providing services to the Premises, the Building or for any other tenant, making inspections or showing the same to prospective purchasers or lenders, or both. Lessor and those persons authorized by it will have during the last one hundred twenty (120) days of the term hereof or any renewal term the right at reasonable times and upon reasonable notice to show the Premises to prospective tenants. Lessee will permit Lessor to erect, use and maintain pipes, conduits and/or ductwork in and through walls or above ceilings which are within or pass through the Premises with the prior written consent of Lessee which shall not be unreasonably withheld.

Section 20. Lessee Default.

20.1 Events of Default. Upon the occurrence of any one or more of the following events (the "Events of Default") by Lessee, Lessor will have the right to exercise any rights or remedies available in this Lease, at law and/or in equity. Events of Default will be: (a) Lessee's failure to pay when due any rental or other sum of money payable hereunder; (b) Lessee's failure to perform and/or observe, when and as required, any other of the terms, covenants or conditions contained in this Lease; (c) Lessee's failure to observe or perform any of the covenants in respect of assignment and subletting set forth in Section 22; (d) Lessee's failure to maintain the full amount of the Security Deposit as required pursuant to Section 4; (e) Lessee will become bankrupt or insolvent or file any debtor proceedings, or file pursuant to any statute a petition in bankruptcy or insolvency or for reorganization, or file a petition for the appointment of a receiver or trustee for all or substantially all of its assets, and such petition or appointment will not have been set aside within sixty (60) days from the date of such petition or appointment, or if such party makes an assignment for the benefit of creditors, or petitions for or enters into such an arrangement, or if Lessee acknowledges that Lessee is contemplating or commencing any restructuring, reorganization or other arrangement in connection with Lessee's failure or anticipated failure to pay debts as the same come due; and (f) Lessee vacates the Premises at any time (as reasonably determined by Lessor) or fails to occupy the Premises within thirty (30) days of the date for occupying as set forth herein. Notwithstanding the foregoing, an Event of Default shall not occur under (a), above, until Lessor has delivered a notice of default to Lessee and Lessee has failed to cure by a date ten (10) days after the receipt of such notice, or under (b), (c) or (d), above, until Lessor has delivered a notice of default to Lessee and Lessee has failed to cure by a date thirty (30) days after the date of receipt of such notice (or such longer period as may be reasonably required for such cure).

20.2 Lessor's Remedies. In addition to its other remedies, Lessor, upon an Event of Default by Lessee, will have the immediate right, after any applicable grace period expressed herein, to terminate and cancel this Lease or to reenter and remove all persons and properties from the Premises and dispose of such property as it deems fit, or both. If Lessor reenters the Premises, either with or without legal process, it may either terminate this Lease or from time to time without terminating this Lease, make such alterations and repairs as may be necessary or appropriate to relet the Premises, and relet the Premises upon such terms and conditions as Lessor deems advisable without any responsibility on Lessor whatsoever to account to Lessee for any surplus rents collected. No retaking of possession of the Premises by Lessor will be deemed as an election to terminate this Lease unless a written notice of such intention is given by Lessor to Lessee at the time of reentry, but, notwithstanding any such reentry or reletting without termination, Lessor may at any time thereafter elect to terminate for such previous Event of Default. In the event of an election of termination by Lessor, whether before or after reentry, Lessor may recover from Lessee damages, including the costs of recovering the Premises, and Lessee will remain liable to Lessor for the total rental (which may at Lessor's election be accelerated to be due and payable in full as of the date of the Event of Default) as would have been payable by Lessee hereunder for the remainder of the Term less the rentals actually received from any reletting. If any rent owing under this Lease is collected by or through an attorney or if the Lessor retains the services of an attorney for the pursuit or enforcement of any matter encompassed within or implied by the terms of this Lease, then and in any such events Lessee agrees to pay Lessor's reasonable attorneys' fees to the extent not prohibited by applicable law.

Section 21. Subordination and Attornment.

This Lease is subject and subordinate to any and all deeds to secure debt, mortgages, deeds of trust or other security instruments ("Security Instruments") now or hereafter placed on the property of which the Premises are a part, and this clause will be self-operative without any further instrument necessary to effect such subordination; however, if requested by Lessor, Lessee will promptly execute and deliver within ten (10) days to Lessor any such certificate or certificates requested by holders of security instrument evidencing subordination of this Lease to, or the assignment of this Lease as additional security for, such mortgages or deeds of trust. In no event, however, shall Lessee be made a party to enforcement actions under a Security Instrument or shall Lessee's leasehold interest be extinguished as a result of such an enforcement action unless Lessee is in default hereunder. In the event of the foreclosure of any Security Instruments, or in the event of a deed in lieu of the foreclosure of any Security Instruments, Lessee will, upon request of any person or party succeeding to the interest of Lessor as a result of said foreclosure or deed in lieu of foreclosure, automatically become the tenant of and attorn to such successor in interest without change in the terms or other provisions of this Lease; provided, however, that such successor in interest will not be (a) liable for any act or omission of any prior lessor; (b) subject to any offsets or defenses which Lessee may have against any prior lessor; (c) bound by any payment of rent for more than the then current month; (d) bound by any obligation to make any payment to Lessee; or (e) bound by any amendment or modification to this Lease made without the written consent of such holder or acquirer if Lessee has been notified in writing as to the identity of such successor in interest prior to such amendment or modification. Lessee will, upon request by Lessor, execute and deliver to Lessor or to any other person designated by Lessor, any instrument or instruments in form and content as reasonably requested by Lessor evidencing its agreement to so attorn and perform under this Lease.

Section 22. Assignment and Subletting.

Except as expressly permitted herein, Lessee will not assign, sublet, mortgage, pledge or encumber this Lease, the Premises, or any interest in the whole or in any portion hereof or thereof, without the prior written consent of Lessor (which consent will be in Lessor's sole and absolute discretion, but may not be unreasonably withheld). Lessee agrees to pay all reasonable attorneys' fees and costs incurred by Lessor in connection with any such proposed assignment or sublease. The transfer of any shares of stocks of Lessee, if Lessee is a corporation, the transfer of any partnership interest in Lessee, if Lessee is a partnership, the transfer of a beneficial interest in Lessee, if Lessee is a land trust, or the transfer of any other interest or happening of any other event, will be deemed an assignment requiring the consent of Lessor if any such transfer or event will effectively vest control of Lessee in an entity or person other than the entity or person then having such control. Lessee will provide Lessor with notice of any transfer of stock or interest immediately upon the occurrence thereof. Should Lessor consent to any sublease of all or any part of the Premises, Lessee shall remain liable for the Base Rent and other covenant obligations of the lessee hereunder. Any consent by Lessor to an assignment or sublease of Lessee's rights hereunder will be effective for that transaction only. Except as expressly provided herein, if Lessee makes any assignment, mortgage, sublease or pledge of this Lease or the Premises, Lessee will still remain liable for the performance of all terms of this Lease. The foregoing shall not prohibit Lessee from subletting or licensing individual rooms within the Premises. Further, Lessee shall have the unilateral right to assign this Lease to an assignee with equal or greater net worth with appropriate business experience which intends to use the Premises for a purpose compatible with the tenant mix of the Building upon the prior written consent of Lessor, which consent shall be within the sound business discretion of Lessor but which shall not be unreasonably withheld, and in such event Lessee shall no longer have obligations under this Lease.

Section 23. Transfer of Lessor's Interest.

If Lessor will sell, assign or transfer all or any part of its interest in the Premises or in this Lease to a successor in interest, Lessor will thereupon be released or discharged from all covenants and obligations hereunder without any further action or documentation being required, and Lessee will look solely to such successor in interest for performance of all of Lessor's obligations. Lessee's obligations under this Lease will in no manner be affected by Lessor's assignment hereunder, and Lessee will thereafter attorn and look solely to such successor in interest as

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the Lessor hereunder. Lessor shall give Lessee notice of the name and address of its transferee.

Section 24. Covenant of Quiet Enjoyment.

Lessor represents that it has full right and authority to lease the Premises and that Lessee will peacefully and quietly hold and enjoy the Premises subject to the terms of this Lease for the full Term hereof so long as it does not default in the performance of any of the terms hereof.

Section 25. Estoppel Certificates.

Within ten (10) days after a request by Lessor or any mortgagee or ground lessor of Lessor, Lessee will deliver a written estoppel certificate, in form supplied by or acceptable to Lessor, certifying any facts that are then true with respect to this Lease, including, but not limited to, that this Lease is in full force and effect, that no default exists on the part of Lessor or Lessee, that Lessee is in possession, that Lessee has commenced the payment of Rent, and that there are no defenses or offsets claimed by Lessee with respect to payment of Rent under this Lease or, if such defense or offsets exist, setting forth the same. Likewise, within ten (10) business days after a request by Lessee, Lessor will deliver to Lessee a similar estoppel certificate covering such matters as are reasonably required by Lessee.

Section 26. Force Majeure.

In the event Lessor or Lessee will be delayed, hindered or prevented from the performance of any act required hereunder, by reason of governmental restrictions, scarcity of labor or materials, strikes, fire, or any other reasons beyond their control, the performance of such act will be excused for the period of delay, and the period for performance of any such act will be extended as necessary to complete performance after the delay period. However, the provisions of this Section 26 will in no way be applicable to the obligations of Lessee or Lessor to pay, repay or reimburse any sums, monies, costs, charges or expenses owing from one to the other under this Lease, including without limitation, Lessee's obligations to pay any Rents hereunder.

Section 27. Remedies Cumulative -- Non-Waiver.

Unless otherwise specified in this Lease, no remedy of Lessor or Lessee will be considered exclusive of any other remedy, but each will be distinct, separate and cumulative with other available remedies. Each remedy available under this Lease or at law or in equity may be exercised by Lessor or Lessee from time to time as often as the need may arise. No course of dealing between Lessor and Lessee, or any delay or omission of Lessor or Lessee in exercising any right arising from the other party's default, will impair such right or be construed to be a waiver of default.

Section 28. Holding Over.

Lessee agrees to surrender to Lessor, at the end of the Term of this Lease (or any exercised renewal period thereof) and/or upon any cancellation of the Lease, the Premises in as good condition as the Premises was at the beginning of the Term of this Lease, ordinary wear and tear, and damage by fire or other casualty not caused by Lessee's negligence, excepted. Lessee agrees that if Lessee does not surrender said Premises to Lessor at the end of the Term of this Lease in the foregoing condition, Lessee will pay to Lessor 150% the amount of the current rental for each month or portion thereof that Lessee holds over; additionally, in the event the Lessee holds over for a period in excess of thirty (30) days, Lessee shall also pay all damages the Lessor may suffer on account of Lessee's failure to so surrender to Lessor possession of the Premises, and will indemnify and save Lessor harmless from and against all claims made by any succeeding Lessee of the Premises against Lessor on account of delay of Lessor in delivering possession of the Premises to said succeeding Lessee so far as such delay is occasioned by failure of Lessee to so surrender the Premises in accordance herewith or otherwise.

No receipt of money by Lessor from Lessee after termination of this Lease or the service of any notice of commencement of any suit or final judgment for possession will reinstate, continue or extend the Term of

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this Lease or affect any such notice, demand, suit or judgment.

No agreement to accept a surrender of the Premises will be valid unless made in writing and subscribed by a duly authorized representative or agent of Lessor.

Section 29. Notices.

Any notice allowed or required by this Lease will be in writing, and will be deemed effective upon receipt by the addressee thereof when sent by either (a) United States mail, via certified mail or registered mail, return receipt requested, with proper postage prepaid, or (b) nationally recognized overnight courier (for example, Federal Express). Notices will be addressed as follows:

Lessor:
Margaret H. Durham Living Trust
501 Furman Road
Greenville, SC 29609

Lessee:
Blackstone and Chase, LLC
41 Spur Street
Unit 20
Lyman, SC 29365

The addresses of Lessor and Lessee and the party, if any, to whose attention a notice or copy of same will be directed may be changed or added from time to time by either party giving notice to the other in the prescribed manner. Upon request, Lessee will also send a copy of all notices from Lessee to any mortgagee or ground lessor of Lessor; provided, however, that in no event will Lessee be required to send more than two (2) additional notices to any mortgagees or ground lessors.

Section 30. Leasing Commission.

[Intentionally left blank] $ 0

Section 31. Lessor Liability.

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No owner of the Premises, whether or not named herein, will have liability hereunder after he ceases to hold title to the Premises, except for obligations which may have theretofore accrued. Neither Lessor nor any member, director, shareholder, partner or principal, whether disclosed or undisclosed, of Lessor will be under any personal liability with respect to any of the provisions of this Lease, and if Lessor is in breach or default with respect to Lessor's obligations or otherwise under this Lease, Lessee will look solely to the equity of Lessor in the Premises for the satisfaction of Lessee's remedies.

Section 32. Surrender of Premises.

At the expiration or earlier termination of the Term of this Lease, Lessee will surrender the Premises and, subject to the terms of this Lease, all improvements, alterations and additions thereto, and keys therefor to Lessor, clean and neat, and in the same condition as at the Rental Commencement Date, normal wear and tear only excepted.

Section 33. Environmental Matters.

33.1 Lessee will not use, store, release, dispose of or generate any Hazardous Materials in, on or about the property or the premises. Furthermore, Lessee will indemnify and hold Lessor harmless from and against any and all claims, liabilities, and costs, (including reasonable attorneys' fees) which arise from the use, storage, release, disposal, or generation by Lessee or its agents, employees, contractors, or invitees of any Hazardous Materials (as hereinafter defined) in, on, or about the Property or the Premises.

33.2 If Lessee is notified in writing of a violation of the Premises with respect to any Environmental Law (as defined below) or if Lessee has actual knowledge of the incorporation of Hazardous Materials into the Premises after the date of possession by Lessee, Lessee shall promptly notify Lessor.

33.3 As used in this Agreement, the term "Hazardous Materials" means any substance, material, or waste now or hereafter determined by any federal, state or local governmental authority to be capable of posing a risk of injury to health, safety, or property. As used in this Agreement, the term "Environmental Law" means any federal, state or local statute, law, rule, regulation, ordinance, code, policy or rule of common law and any judicial or administrative interpretation thereof, including any judicial or administrative order, consent decree or judgment, relating to the environment, health, safety or Hazardous Materials.

33.4

Lessor represents that to the best of Lessor's knowledge the Project is free from Hazardous Materials and fully complies with all Environmental Laws. Lessor shall indemnify and hold Lessee harmless from all costs, claims, liens, causes of action, lawsuits and judgments (and all related legal fees and court costs) arising from Hazardous Materials on, about, under to within the Project except for events described in Section 33.1, above.

Section 34. No Representations.

Neither Lessor nor Lessor's agent has made any representations or promises, except such as are contained herein or endorsed hereon, to the Lessee respecting the condition of the Premises or any other matter or thing relating to the Premises or the Lease. The taking possession of the Premises by the Lessee will be conclusive evidence against Lessee or anyone holding under this Lease that the Premises were in good and satisfactory condition when possession of the Premises was so taken except for latent matters which could not have been reasonably ascertained by Lessee.

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37.9 Specific Waivers. Notwithstanding any other term or provision to the contrary contained in this Lease Agreement or which may be interpreted from the terms herein, the parties specifically agree that in the event of any default by the Lessee under any term or provision of this Agreement, the Lessor shall be required to mitigate its damages, provided, however, that such mitigation efforts shall be limited to the Lessor's reasonable efforts, exercised in a good faith manner, to re-let the premises within a period not to exceed ninety (90) days from the event of default. At the expiration of such ninety (90) day period the Lessor shall be under no further duty to mitigate its damages in any manner and may then, at its sole option, exercise any remedy provided in this Lease or available under South Carolina law. . **Further, both the Lessor and the Lessee expressly and mutually waive any and all rights which either may have to request a jury trial in any proceeding at law or in equity in any court of competent jurisdiction concerning the resolution of any disputes between them as to the terms, provisions, meanings, definitions or other matters set forth herein as well as the resolution of any action(s) between them in any manner related to or which may arise from or out of this Lease Agreement, the use of the premises, the overall project or any building constructed on the premises, whether contemplated or uncontemplated and whether the same are or may be brought to determine any responsibility, liability or to define the obligations undertaken herein by either party. All such matters of whatever form or definition shall be resolved by binding arbitration conducted pursuant to the terms of the South Carolina Uniform Arbitration Act, Section 15-48-10, et. seq. of the 1976 South Carolina Code of Laws, as amended. Additionally, if the Lessor in its sole judgment and discretion finds it necessary or appropriate to initiate any action or proceeding of whatever form or nature in any court of competent jurisdiction or before any arbitration panel for the nonpayment of any sums due under any term or provision of this Lease, then and in any such event(s) the Lessee specifically and expressly agrees that it will not raise or interpose any counterclaim or set-off of any nature or description whatsoever and further expressly acknowledges that vacating and fully restoring the premises are both conditions precedent to the Lessee initiating or maintaining any action against the Lessor for any breach by the Lessor under the terms of this Agreement.**

IN WITNESS WHEREOF, the parties have caused this Lease to be duly executed and sealed pursuant to authority duly given, as of the day and year first above written.

IN THE PRESENCE OF:

Helen Stockley

LESSOR:

Margaret H. Durham Living Trust

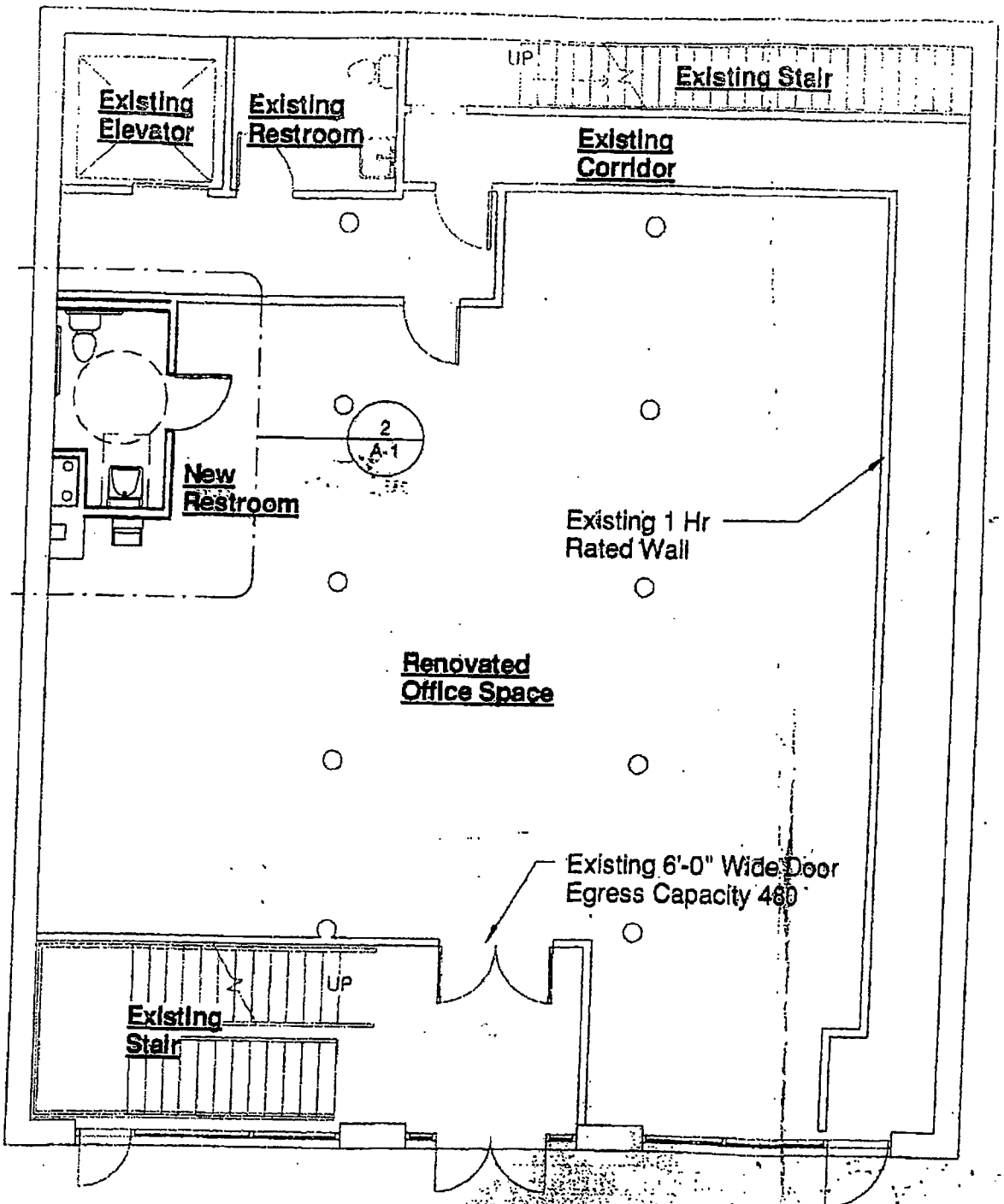
By: Margaret N. Durham
Its: Trustee

LESSEE:

By:
Its: Manager

Exhibit 1.1
Site Plan of the Project and Layout of the Building

EXHIBIT 1.1



1 Overall Floor Plan
1/8" = 1'-0"

MND

6' - 5"

Exhibit 3
Base Rent Schedule

A. BASE RENT - INITIAL TERM. Lessee agrees to pay Lessor total annual base rent of .

$3,200.00 monthly for 5 years beginning May 1st 2016 and ending May 1, 2021.

Security Deposit of $5,200.00 due at lease signing.

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BWK

Exhibit 37.5

RULES AND REGULATIONS

A.1. The sidewalks, and public portions of the Project, such as entrances passages, courts, vestibules, stairways, corridors or halls, and the parking areas, streets, alleys or ways surrounding or in the vicinity of the Project will not be obstructed, even temporarily, or encumbered by Lessee.

A.2. No curtains, blinds, shades, louvered openings, tinted coating, film or screens will be attached to or hung in, or used in connection with, any window, glass surface or door of the Premises, without the prior written consent of Lessor, unless installed by Lessor.

A.3. Without the prior written approval of Lessor (which approval will be at Lessor's sole and absolute discretion), no sign, advertisement, notice or other lettering will be exhibited, inscribed, painted or affixed by Lessee on any part of the outside of the Premises, Building or Project or on corridor walls or windows or other glass surfaces. In the event of the violation of the foregoing by Lessee, Lessor may remove same without any liability, and may charge the expense incurred by such removal, to Lessee. The care and maintenance of any such approved signs will be the sole responsibility of Lessee. If any sign is not maintained by Lessee, then Lessor will have right to maintain and charge Tenant with such charges to be due Lessor on the next rental payment date.

A.4. No showcases or other articles will be put in front of or affixed to any part of the exterior of the Premises or the Project.

A.5. The water and wash closets and other plumbing fixtures will not be used for any purposes other than those for which they were constructed, and no sweepings, rubbish, rags, or other substances will be thrown therein. All damages resulting from any misuse of the fixtures will be borne by Lessee.

A.6. Lessee will not in any way deface any part of the Premises or the Project.

A.7. No bicycles, vehicles, or animals of any kind will be brought into or kept in or about the Premises. No cooking will be done or permitted by Lessee on the Premises except in conformity to law and then only in the utility kitchen, if any, as set forth in Lessee's layout, which is to be primarily used by Lessee's employees for heating beverages and light snacks. Lessee will not cause or permit any unusual or objectionable odors to be produced upon or permeate from the Premises.

A.8. Neither Lessee, nor any of Lessee's employees, agents, visitors, or licensees, will at any time bring or keep upon the Premises any inflammable, combustible or explosive fluid, or chemical substance, other than reasonable amounts of cleaning fluids or solvents required in the normal operation of Lessee's business; provided, that the same are stored and used in compliance with all applicable laws and regulations.

A.9. No additional locks or bolts of any kind will be placed upon any of the doors or windows by Lessee, nor will any changes be made in existing locks or the mechanism thereof, without the prior written approval of Lessor and unless and until a duplicate key is delivered to Lessor. Lessee will, upon the termination of its tenancy, restore to Lessor all keys of stores and toilet rooms, either furnished to, or otherwise procured by, Lessee, and in the event of the loss of any keys so furnished, Lessee will pay to Lessor the cost thereof.

A.10. Lessee agrees that it will not employ any cleaning or maintenance contractor, nor any individual, firm or organization for such purpose, without Lessor's prior written consent, which will not be unreasonably withheld.

A.11. Lessor will have the right to prohibit advertising by Lessee which, in Lessor's reasonable

Addendum to Lease Contract
17 W. North Street
Greenville, SC 29601

Please name Margaret H. Durham Living Trust as additional insured on the Lessee's liability insurance.

Also, please be advised that the building has a security system that is set nightly. Usually not before 9 PM. If the Lessee has a need to be on premises after this hour please advise the Lessor in advance.

Lessee

Margaret H. Durham
Lessor

Addendum #2 to Lease Contract
17 W. North Street
Greenville, SC 29601

As an addendum to this contract the following paragraph has been added as of March 15th, 2016 due to previously unknown code requirements by the City of Greenville that necessitate an additional restroom within the rental space.

To circumvent this problem it is hereby agreed:

The future use of an adjacent additional restroom shall be allowed by the Lessor for use, as needed, by clients of the Lessee under the following terms.

It is fully understood and agreed to by all parties that this addendum agreement can be terminated at any time in the future, for any reason by Lessor, with a 90 day written notice.

Should the use of the additional restroom be terminated, at any time, Lessor and Lessee shall, as a possible remedy, explore the option of installing a second restroom within the rented space.

Due to the necessity of this addendum, the following becomes necessary:

1. All four (4) entrance doors serving the passage way to and from the hallway, restroom and rental space will require updating with regard to lock/unlock mechanisms. This shall be at the Lessor's expense and shall be Lessor's obligation.
2. It is agreed that Lessee shall, at the end of each work day or prior to leaving the building unoccupied, with out exception, lock the door separating the rented space from the condominium private hallway.
3. Due to the necessity of this addendum, it is agreed that the monthly rent shall increase from $3,200.00 to $3,250.00.

Lessee

3/15/16
Date

Lessor

3/21/16
Date

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE MAGISTRATE'S COURT
BLACKSTONE AND CHASE, LLC, Plaintiff(s), v. **MARGARET H. DURHAM LIVING TRUST,** Defendant(s).	2017CV2311003419 MAGISTRATE CIVIL CASE NO. **NOTICE OF MOTION FOR PRELIMINARY INJUNCTION** (WRONGFUL EVICTION UNDER SC. CODE § 27-37-140; FORCIBLE ENTRY AND DETAINER UNDER S.C. CODE § 15-67-410; TRESPASS UNDER S.C. CODE §§ 15-67-610, 27-5-110; CONVERSION UNDER S.C. CODE §15-69-20; FALSE ASSERTION OF THE LAW UNDER S.C. CODE § 15-75-60; UNFAIR TRADE PRACTICES UNDER S.C. CODE § 39-5-50; AND, ETC.)

TO: MARGARET H. DURHAM LIVING TRUST

PLEASE TAKE NOTICE THAT the Plaintiffs **BLACKSTONE AND CHASE, LLC, ET AL.** ("Plaintiff" individually or "Plaintiffs" collectively), pursuant to Title 39, Chapter 5, Section 50 of the South Carolina Code, and Rules 64 and 65 of the South Carolina Rules of Civil Procedure, move before the Presiding Judge of the Gannt Summary Court at such and time as may be set by the Court, for an Order granting the Plaintiffs' request for a preliminary injunction enjoining the above-named Defendants **MARGARET H. DURHAM LIVING TRUST ET AL.**, whether acting individually, through its agents, or collectively in concert with one another, from:

(1) unlawfully evicting the Plaintiffs from the Premises thereby preventing the Plaintiffs' access to the Premises to remove the Plaintiffs' personal property from the first floor of 17 West North Street, Greenville, South Carolina in Greenville County ("Premises") related to the landlord-tenant dispute;

(2) unlawfully dispossessing the Plaintiffs' of the Plaintiffs' property by using, moving, or exercising any control or possession over the Plaintiffs' personal property on the Premises or elsewhere;

(3) unlawfully withholding the Plaintiffs' property on the Premises or elsewhere in which third parties have a legal interest;

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(4) unlawfully making false assertions of the law with an improper eviction notice posted upon the Premises that is unauthorized by law;

(5) unlawfully, withholding, or allowing the spoliation of, evidence necessary to the landlord-tenant dispute for the Plaintiffs to assess the Plaintiffs' damages; and,

(6) defaming of the abovenamed Plaintiffs concerning the landlord-tenant dispute.

Should a hearing on the Plaintiffs' motion for a preliminary injunction not be held on or before December 12, 2017, the Plaintiffs move in the alternative for a temporary injunction or a temporary restraining order for the Plaintiffs' to reenter the Premises to recover the Plaintiffs' personal property and trade fixtures.

The Plaintiffs also respectfully request that this Court grant a hearing at the earliest possible moment and, at the appropriate time, convert the Temporary Restraining Order, if applicable, into a Temporary Injunction or a Preliminary Injunction. Although the Plaintiffs do not believe that a bond is required given the conduct that is occurring, the Plaintiff will post security as the Court deems appropriate.

Respectfully submitted this 4 day of December, 2017.

Deborah D. Davis, Esq.
SC Bar No.: 102942
Attorney for Plaintiffs

Dickson Davis Law Firm, LLC
439 Congaree Road
P.O. Box 6
Greenville, SC 29607
(864) 729-3424 t
(864) 752-1424 f
d.davis@dicksondavislaw.com
www.dicksondavislaw.com

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Robert K. Merting - Attorney at Law

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Contact

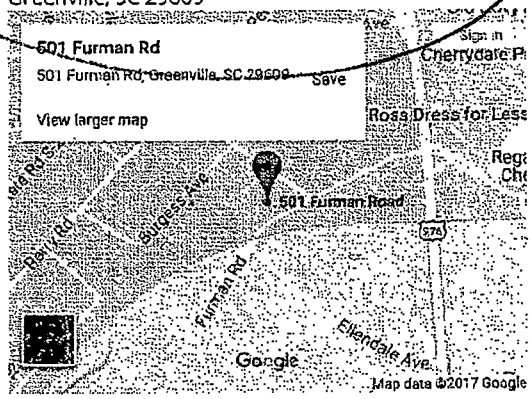
ROBERT K. MERTING

Phone: 843-830-5227

Email: robert@rkmerting.com

Office & Mailing:

501 Furman Rd. Suite W
Greenville, SC 29609



Your Name (required)

Your Email (required)

Your Phone Number

Concern

Your Message

Send

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Joshua J. Hudson

Practice Areas

Commercial litigation / Business disputes (http://www.roecassidy.com/practice-areas/commercial-corporate-litigation)
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P: 864.349.2606
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Download vCard (http://www.roecassidy.com/assets/downloads/joshua-j.vcf)

Paralegal:
Ellen Griffin
P: 864.349.2609

Biography

Josh is part of the commercial litigation team at Roe Cassidy. He represents corporate clients and banks in collections and contract litigation, and handles litigation in the United States Bankruptcy Court. Josh also represents individuals in real estate litigation, personal injury litigation, insurance defense, general civil litigation, and family law divorce litigation.

Prior to joining Roe Cassidy in July of 2013, Josh practiced in Kentucky for six years and Spartanburg, SC for one. He is a native of Danville, Kentucky and attended Wofford College, where he graduated with a Bachelor of Arts in English in 2001. In 2006, he received his Juris Doctor from Northern Kentucky University's Salmon P. Chase College of Law, where he was a member of the Moot Court Executive Board. He was admitted to the South Carolina state bar on February 8, 2012.

Education

Wofford College, B.A. 2001
N. Kentucky University, Salmon P. Chase College of Law, J.D, 2006

Memberships

South Carolina Bar Association;
Kentucky Bar Association;
Greenville County Bar Association;

South Carolina Bankruptcy Law Association
S.C. Board of Arbitrator and Mediator Certification, approved Circuit Court Mediator

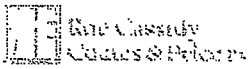
Admissions

Kentucky - 2006
South Carolina - 2012
United States District Court for the District of South Carolina - 2013
United States Court of Appeals, Fourth Circuit - 2017

ABOUT

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JAMES H. CASSIDY (HTTP://WWW.ROECASSIDY.COM/ATTORNEYS/JAMES-CASSIDY)
WILLIAM A. COATES (HTTP://WWW.ROECASSIDY.COM/ATTORNEYS/WILLIAM-COATES)
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LET'S TALK

Our law firm serves clients in the Upstate and throughout South Carolina. To learn more about how we can help you, please contact us (http://www.roecassidy.com/contact) today.

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May 16, 2017

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DICKSON DAVIS LAW FIRM

Gantt Summary Court
FILED
DEC 11 2017

December 8, 2017

VIA FAX 864-277-4376
Re: *Margaret H. Durham Living Trust v. Blackstone and Chase, LLC*
File ID: 2017-01-104
Case No.: 2017CV2311003419

Dear Honorable Jacquelyn I. Duckett:

Please be advised that the undersigned has been retained to represent Blackstone and Chase, LLC ("Tenant"), in the above captioned matter. Regarding the Writ of Ejectment filed by Margaret H. Durham Living Trust ("Landlord") on or around October 23, 2017, the Dickson Davis Law Firm, LLC ("Firm") has not received any notice on the behalf of the Tenant. As of today, on December 8, 2017, the Firm learned of the Writ of Ejectment entered on or around December 7, 2017, to be executed on or around December 12, 2017.

Today, the Firm has submitted a preliminary injunction on the Tenant's behalf to stay the Writ of Ejectment due to lack of notice provided to the Tenant regarding the Writ of Ejectment, the amount of dispute exceeding the jurisdiction for the magistrate court. Additionally, the Tenant will file for a Notice of Intent to Appeal on Monday, December 11, 2017, and deliver the same once the inclement weather resolves.

The Firm formally requests a hearing to move the court for either a new trial, and an extension of time to file the Tenant's Answer and Counterclaims, or, in the alternative, a dismissal of the case due to lack of jurisdiction to hear the claim as this case will ultimately come before the Circuit Court, and not the Magistrate Court, due to the amount of the dispute in excess of $7,500.00.

Respectfully submitted this 8 day of December, 2017.

Deborah D. Davis, Esq.
SC Bar No.: 102942
Attorney for Tenants

Dickson Davis Law Firm, LLC
439 Congaree Road
~~P.O. Box 6~~ MAILBOX 6
Greenville, SC 29607
(864) 729-3424 t
(864) 752-1424 f
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www.dicksondavislaw.com
/ddd

FAX COVER SHEET

TO	Honorable Jacquelyn I. Duckett
COMPANY	Gantt Summary Court
FAX NUMBER	18642774376
FROM	Deborah Davis
DATE	2017-12-09 01:46:31 GMT
RE	2017CV2311003419

COVER MESSAGE

Margaret H. Durham Living Trust v. Blackstone and Chase, LLC

Please see the attached letter of representation from the Dickson Davis Law Firm, LLC, for attorney Deborah D. Davis representing the Tenant Blackstone and Chase, LLC.

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DEC 11 2017

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE MAGISTRATE'S COURT
BLACKSTONE AND CHASE, LLC, Plaintiff(s), v. **MARGARET H. DURHAM LIVING TRUST,** Defendant(s).	2017CV2311003419 MAGISTRATE CIVIL CASE NO. **MOTION FOR PRELIMINARY INJUNCTION AND SUPERSEADAS** (WRONGFUL EVICTION UNDER SC. CODE § 27-37-140; FORCIBLE ENTRY AND DETAINER UNDER S.C. CODE § 15-67-410; TRESPASS UNDER S.C. CODE §§ 15-67-610, 27-5-110; CONVERSION UNDER S.C. CODE §15-69-20; FALSE ASSERTION OF THE LAW UNDER S.C. CODE § 15-75-60; UNFAIR TRADE PRACTICES UNDER S.C. CODE § 39-5-50; AND, ETC.)

COMES NOW, BLACKSTONE AND CHASE, LLC, ET AL. ("Plaintiff" individually or "Plaintiffs" collectively), as the Plaintiffs in the above-styled matter files this **MOTION FOR PRELIMINARY INJUNCTION** against the Defendants, **THE MARGARET H. DURHAM LIVING TRUST ET AL.** ("Defendant" individually or "Defendants" collectively), pursuant to Rules 62, 64 and 65 of the South Carolina Rules of Civil Procedure to stay the Writ of Ejectment entered by this Court, grant the Plaintiffs' request for a new trial, grant the Plaintiffs' request to file an Answer and Counterclaim, grant the Plaintiffs' request remove the case to Circuit Court based on lack of jurisdiction with the amount of controversy exceeding $7,500.00 upon appeal. The Plaintiffs seek declaratory relief and injunctive relief.[1]

In support of this motion, the Plaintiffs show the Court the following:

1.

The Plaintiff **BLACKSTONE AND CHASE, LLC** ("Tenant"), is alleging a wrongful eviction is occurring before the Tenant can file a suit on the merits. The Tenant offers the affidavit of Plaintiffs **BRADLEY W. KERR, MARK T. THOMAS,** and **TENSLEY E. THOMAS** ("Member" individually or "Members" collectively). *See* Exhibit A. Additionally the Tenant has filed a **COMPLAINT FOR DECLARATORY RELIEF** in conjunction with the Tenant's **MOTION FOR PRELIMINARY INJUNCTION.** *See* Exhibit B.

[1] The Plaintiffs have also filed a Complaint for Declaratory Judgment in conjunction with the Plaintiffs' Notice for Preliminary Injunction, the Plaintiffs' Motion for Preliminary Injunction, and the Plaintiffs' Memorandum in Support of the Plaintiff's Motion for Preliminary Injunction.

JURISDICTION AND VENUE

2.

The Plaintiffs have standing to bring the Plaintiffs' claim(s) pursuant to: Title 15, Chapter 67, Sections 410 and 610; Title 15, Chapter 69, Sections 10 to 30; Title 15, Chapter 75, Section 60; Title 27, Chapter 5, Section 110; Title 27, Chapter 37, Sections 10 and 140; Title 27, Chapter 39, Article 3, Section 210; Title 32, Chapter 3, Section 10; Title 39, Chapter 5, Section 50; and, other provisions of South Carolina law.

3.

Jurisdiction is proper in this Court. Rule 241 of the South Carolina Rules of Appellate Practice; Rule 18 of the South Carolina Rules of Magistrate Court; and, Title 27, Chapter 40, Article 7, and Section 27-40-800.

4.

Venue is proper in this Court. S.C. Code Ann. § 15-7-10.

STATEMENT OF FACTS

5.

Upon information and belief, and at all times material to the allegations herein, each Defendant was an agent, employee, or both of the remaining Defendants, performing the acts alleged herein within the course and scope of such agency or employment with the permission and consent of the other Defendants. Upon information and belief, the Plaintiffs believe that each of the Defendants performed the acts alleged herein by acting in concert with each of the other Defendants.

6.

Upon information and belief, on or around March 15, 2016, the **MARGARET H. DURHAM LIVING TRUST**, whether acting individually or through its agents in the ("Landlord"), named the Tenant on the lease agreement entered into between the Plaintiff **BRADLEY W. KERR** and the Defendant **MARGARET H. DURHAM**, acting as trustee for the Landlord, concerning the first floor of leased premises ("Premises") within 17 West North Street, Greenville, South Carolina 29601, in Greenville County ("Building"). *See* Exhibits A, C. The Tenant operated a salon on the Premises. *See* Exhibit A.

7.

Disputes have arising in this hostile landlord-tenant dispute. *See* Exhibit A. The validity of the Lease is in dispute. The Plaintiffs maintain that the resulting lease was an implied, oral lease subject to a month-to-month tenancy ("Undetermined Lease").

8.

At the beginning of this landlord-tenant dispute becoming hostile, a dispute concerning the Tenant's requirement to provide proof of general liability insurance to the Landlord arose on or around April 8, 2017. The Landlord disseized the Premises from the Tenant by placing chains on the doors of the salon. Upon the Tenant providing the Landlord proof of general liability insurance, the Landlord allowed the Tenant access to the Premises on or around April 9, 2017. *See* Exhibit A.

9.

At the climax of this landlord-tenant dispute, and on or around July 17, 2017, the Tenant received the Landlord's notice of default ("Notice of Default"). *See* Exhibits A, D. The only month in arrears subject to this landlord-tenant dispute is for July of 2017. The monthly rent for approximately $3,450.00, is also in dispute as well as other purported terms and conditions of the Lease. *See* Exhibit A. The Notice of Default permitted the Tenant to remain on the Premises until on or around July 27, 2017, giving the Tenant a ten (10) grace period to cure the default of nonpayment of rent. The Landlord alleged other grounds of default under the Lease per the Landlord's Notice of Default. *See* Exhibit D. None of the Landlord's other grounds of default under the Lease have been substantiated in fact or by law. Upon the Tenant's numerous requests to no avail, the Tenant never received a copy of the Lease from the Landlord. The terms and conditions of the Lease are in dispute as well as rent for July of 2017. *See* Exhibit A, E.

10.

On or around July 21, 2017, smoke resulted from a towel warmer incident on the Premises. Smoke was produced from a towel warmer left on too long, and the Greenville County Fire Department responded to the Premises. Subsequently, the Building was not rendered unusable. Notwithstanding, the Tenant never ceased operations of the salon on the Premises with little to no smoke damage arising from the incident. The amount of smoke damage is also in dispute. *See* Exhibit A, F, G.

11.

On or around July 27, 2017, the Landlord disseized the Premises from the Tenant again by changing the locks to the Premises thereby denying the Tenant access to the Premises as well

as dispossessing the Tenant of all the Tenant's personal property and trade fixtures therein. *See* Exhibit A, E, H, I.

12.

The Tenant's employees notified the Tenant on or around July 28, 2017, that the Landlord had changed the locks to the salon and posted an eviction notice on the doors of the salon. The eviction notice was not issued from a magistrate. The eviction notice prohibited anyone from entering the Premises, instructing third-parties with personal property on the Premises to contact the Landlord to reclaim that personal property. *See* Exhibit A, H, I.

13.

The Landlord, whether acting individually or through its agents, made false statements that the Tenant as abandoned the Premises to the Tenant's employees, the Tenant's customers, and a prospective business associate related to the Plaintiffs' business ventures separate from this Landlord-Tenant. *See* Exhibit A.

14.

The Plaintiffs allege in the attached Affidavits by the Plaintiffs that the Landlord, whether acting individually or through its agents, has violated the South Carolina law concerning the Lease by:

(1) forcibly entering into the rental premises for the Tenant located on the first floor of the Building ("Premises") to evict the Tenant by changing the locks to the Premises on or around July 27, 2017, without resorting to the judicial process;
(2) unlawfully detaining and distraining the Tenant's business assets and trade fixtures of the Tenant for nonpayment of rent in July of 2017 on or around July 27, 2017, without resorting to the judicial process that poses a risk for spoliation of evidence in potential, foreseeable litigation;
(3) unlawfully making false assertions of the law when posting an eviction notice, of which did not originate from a judge, that instructed the Tenant, or its employees, to not enter the premises and to call the Defendant **JAMES W. DURHAM**, who was acting as an agent for the Landlord, to reclaim any personal property on the Premises on or around July 27, 2017;
(4) unlawfully making false assertions of the law when locking the doors to the Premises to eject the Tenant from the Premises instead of resorting to the legal process that only allows only Magistrate Judge to issue a Warrant of Ejectment for a constable or sheriff from the county to remove the Tenant from the Premises; and,
(5) wrongfully defaming the Tenant as abandoning the Premises to the Tenant's employees, the Tenant's customers, and a prospective business associate related to the Plaintiffs' business ventures separate from this Landlord-Tenant.

15.

The Tenant never voluntarily surrendered the Premises to the Landlord. The Landlord locked out the Tenant from the Premises. *See* Exhibit A, D, E, H, I.

16.

To date, the Landlord, whether acting individually or through its agents, filed a writ of ejectment action before the Gannt court of law on October 23, 2017, to eject the Tenant from the Premises or distrain the Tenant's personal property and trade fixtures located therein. *See* Exhibit I. The Tenant never received notice of the Writ of Ejectment nor did opposing counsel serve notice to the Tenant's counsel. The Landlord only sought the court's assistance after forcibly evicting the Tenant from the Premises in violation of South Carolina law. *See* Exhibit J.

17.

The Landlord has effectively rendered the Tenant financial insolvent because of the Landlord's unlawful conduct. *See* Exhibit A, K. Based on what limited records the Tenant has within the Tenant's possession, the below represents an approximation of the Tenant's damages:

ITEM	**AMOUNT**
Leasehold Improvements	$95,000.00
Furniture, Fixtures, and Equipment	$25,415.99
Salon Products (total loss)	$18,891.27
Lost revenues	$119,958.10
Lost sponsorships	$19,300.00
Attorney Fees	$15,000.00
Court Costs	$TBD
TOTAL	**$293,565.36**

ARGUMENT AND CITATION OF AUTHORITY

18.

This Court has the authority "to issue orders and injunctions to restrain and prevent violations of [the South Carolina Unfair Trade Practices Act], and such orders and injunctions shall be issued without bond." S.C. Code Ann. § 39-5-50(a)-(b).

UNFAIR TRADE PRACTICES ACT PURSUANT TO S.C. Code Ann. § 39-5-20

19.

The Plaintiffs must show that: "(1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a [natural and proximate] result of the defendant's unfair or deceptive act(s)." *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006); S.C. Code Ann. § 39-5-20. Under landlord-tenant law in South Carolina, the

Landlord and Tenant have either statutory duties, contractual duties, or both by virtue of the dichotomous nature of leases as both a lease and a transfer of estate as a tenement of land. *Burbach v. Inv'rs Mgmt. Corp. Int'l*, 326 S.C. 492, 497, 484 S.E.2d 119, 121 (Ct. App. 1997). The statutory duties imposed on the Landlord and Tenant incorporate the public's expression of the public's interest that is mutually exclusive of the contractual duties imposed by a lease as a contract. See *Rowland & Sons v. Bock*, 150 S.C. 490, 493, 148 S.E. 549, 550 (1929); S.C. Code Ann. §§ 27-33-10 to -50 (applying general definitions, court jurisdiction, and general provisions); S.C. Code Ann. §§ 27-35-10 to -180 (defining the statutory meanings of creation, construction, and termination for leasehold estates); S.C. Code Ann. §§ 27-37-10 to -160 (ejecting tenants); S.C. Code Ann. §§ 27-39-10 to -360 (distraining personal property of tenants). Subsequently, the Lease qualifies as trade or commerce under the South Carolina Unfair Trade Practices Act. *Burbach*, 326 S.C. at 496.

South Carolina law has codified unfair and deceptive trade practices by landlords that impact the public interest into the causes of action for forcible entry and detainer of real property, claim and delivery of personal property, wrongful dispossession of leased property accordingly, and prohibiting sham legal processes or the false assertion of the law. *See* S.C. Code Ann. §§ 15-67-410 to -610 (prohibiting forcible entry and detainer of land or tenements); S.C. Code Ann. §§ 15-69-10 to -20 (allowing for recovery of personal property wrongfully dispossessed); S.C. Code Ann. § 15-75-60 (prohibiting sham legal processes by anyone falsely asserting authority of law); S.C. Code Ann. § 27-5-110 (prohibiting trespass onto land with a strong hand); S.C. Code Ann. § 27-37-140 (permitting tenants recovery from wrongful eviction). Tenant abuse by landlords is highly capable of repetition, affecting the public at large if offensive landlord practices are not deterred effectively. *See Burbach*, 326 S.C. at 497.

GROUNDS FOR PRELIMINARY INJUNCTION

20.

For this Court to issue a preliminary injunction as a drastic remedy, the Tenant "(1) it would suffer irreparable harm if the injunction is not granted: (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004); *Poynter Invs. v. Century Builders of Piedmont*, 387 S.C. 583, 587, 694 S.E.2d 15, 17 (2010). Irreparable harm refers to the loss of one's legal rights under the circumstances. *See Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 464, 626 S.E.2d 38, 41 (Ct. App. 2005). For whether the

Plaintiffs will likely succeed on the merits of the pending litigation, the Plaintiffs only need to present a question regarding the existence of a legal right based on a prima facie showing on the merits of the underlying case regardless of the case's outcome. *Id.* at 465-66. An inadequate remedy at law simply refers to money damages as inadequate to restore the parties to the status quo before the pending litigation, and the Court's intervention is necessary to preserve the existing status before litigation. *Id.* at 466-67.

THE PLAINTIFFS' IRREPARABLE HARM

21.

Such immediate and irreparable injury will result to the Tenant because the Tenant is left without any recourse to recover the Tenant's business assets, trade fixtures, business and accounting records, or other personal property still located within the Premises. The Landlord has effectively rendered the Tenant insolvent and unable to operate as a salon. The Landlord cannot wind up the Tenant's business affairs to resolve outstanding issues with the Tenant's creditors, vendors, or other third persons who have a legal interest in the property currently within the Landlord's possession. The Landlord's actions have caused the Tenant to breach other contracts unrelated to this Landlord-Tenant dispute. The Landlord has made improper, defamatory statements to prospective business partners that have impacted the Plaintiffs' ability to engage in separate and distinct business ventures unrelated to this Landlord-Tenant dispute.

Additionally, the Plaintiffs **BRADLEY W. KERR, MARK T. THOMAS,** and **TENSLEY E. THOMAS,** who are the Members of the Tenant, are accruing additional expenses to involuntarily vacate the premises prematurely without any of the Tenant's personal property, facing embarrassment and denial from current customers and other prospective business opportunities to rent another commercial space, and suffering from emotional distress from the loss of the Tenant's business due to the wrongful eviction by the Landlord, whether acting individually or through its agents.

THE PLAINTIFFS' LIKELIHOOD TO SUCCEED ON THE MERITS

22.

The Tenant has a strong likelihood to succeed on the merits of this Landlord-Tenant Dispute. South Carolina law has determined that the act of changing the locks to prevent access to the premises manifests a clear and unmistakable intention to disseize another from the land. *Parker v. Shecut,* 349 S.C. 226, 230-31, 562 S.E.2d 620, 623 (2002). The same conduct of forcible entry and detainer also equates to a wrongful eviction because the unlawful

dispossession of the leased premises by force that originates in trespass includes the wrongful dispossession of the leased premises. *Compare* S.C. Code Ann. § 15-67-420 (forcible entry and detainer), *with* S.C. Code Ann. § 27-37-140 (wrongful dispossession). The Tenant is suffering immediate and irreparable injury, loss, damages, or all of the above from the unlawful ejectment of the Tenant and distraint of the Tenant's personal property located within the Premises that amounts to the Tenant's wrongful eviction from the rental premises without entry of the requested injunctive relief. S.C. Code Ann. §§ 27-37-140, 27-39-10.

The Landlord may not violate public policy against self-help to eject the Tenant from the Premises or distrain the Tenant's property and trade fixtures located therein. *Compare* S.C. Code Ann. §§ 15-48-10 to -240 (enforcing valid arbitration provisions), *with* S.C. Code Ann. §§ 22-3-1310 (prohibiting trespass and conversion of personal property), S.C. Code Ann. § 27-5-110 (prohibiting the use of strong hand to enter land), S.C. Code Ann. §§ 15-67-410 to -470 (prohibiting the forcible entry and detainer of land), S.C. Code Ann. §§ 15-69-10 to -210 (prohibiting conversion and trespass on personal property), S.C. Code Ann. §§ 27-37-10 to -160 (requiring landlords to apply for a writ of ejectment before ejecting a tenant); S.C. Code Ann. §§ 27-39-10 to -360 (requiring landlords to apply for a writ of distraint before distraining a tenant's property for rent in arrears).

No landlord may use a strong hand to enter or re-enter onto the rental premises or seize the Tenant's personal property on the Premises for rent in arrears. S.C. Code Ann. §§ 22-3-1310; S.C. Code Ann. § 27-5-110; S.C. Code Ann. §§ 15-67-410 to -470; S.C. Code Ann. §§ 15-69-10 to -210; S.C. Code Ann. §§ 27-37-10 to -160; S.C. Code Ann. §§ 27-39-10 to -360. While the Landlord may have reserved the right to terminate the Undetermined Lease, the Landlord does not have the right to evict the Tenant forcibly without legal process at that time—no landlord has that right. *See Sharp v. Kinsman*, 18 S.C. 108, 114 (1882). Hence, the nature and characterization of the Undetermined Lease, or the type of tenancy, and whether the Landlord properly terminated the Undetermined Lease becomes irrelevant when an action for forcible entry and detainer lies under the circumstances. *See id.*

Undoubtedly, the Landlord clearly and unequivocally manifests an intent to terminate the Undetermined Lease when unlawfully entering the Premises to change to locks thereby denying the Tenant's access to the Premises. *See Parker*, 349 S.C. at 230-31. And, the Landlord's manner in disseizing the Premises from the Tenant is patently illegal and against public policy. *See State*

v. Bates, 87 S.C. 527, 530-31, 70 S.E. 170, 171 (1911). South Carolina's long-standing public policy against breaches of the peace and violence from wrongdoers and trespassers onto land is longstanding and codified in South Carolina's forcible entry and detainer statute: any show of force by using a strong hand to dispossess the Tenant of the Premises without resorting to the judicial process is unlawful. S.C. Code Ann. § 15-67-410.

The underlying facts to this Landlord-Tenant dispute clearly show that the Landlord failed to resort to the legal process for evicting the Tenant, or peaceably resolve this Landlord-Tenant dispute. The Landlord engaged in self-help to forcibly evict the Tenant from the Premises and seize the Premises along with the Tenant's trade fixtures and personal property located therein.

23.

South Carolina law prohibits "[s]ham legal processes involving persons impersonating government officials or employees, or by persons falsely asserting authority of law." S.C. Code Ann. § 15-75-60. Only a constable or deputy by the magistrate order issuing a Writ of Ejectment may post the Writ of Ejectment on the Premises, and remove the Tenant from the Premises. S.C. Code Ann. § 27-37-160. Additionally, only the officer by order of the magistrate court may enter the Premises to seize the Tenant's property for an action of distraint in the amount sufficient to pay the rent in arrears. S.C. Code Ann. § 27-39-240.

For the Landlord to assert authority of the law to hold the Tenant's personal property as a means of distraint is a false assertion of the law. *See* S.C. Code Ann. § 15-75-60.

The Landlord also posted a fake eviction notice to the Premises on or around July 27, 2017, prohibiting anyone to enter the Premises and to call the Landlord to retrieve personal property on the Premises. Only a constable or sheriff may post an eviction notice to the Premises or remove the Tenant's personal property on the Premises by the order of a magistrate judge. Thus, the Landlord falsely impersonated the authority of the law to evict the Tenant from the Premises and distrain the Tenant's personal property and trade fixtures located therein.

24.

The Plaintiffs may recover for damage to their reputation "as the result of the [Defendants'] communication to others of a false message about the plaintiff." *Holtzscheiter v. Thomson Newspapers*, 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998). Spoken defamation published to a third party is slander. *See id.* Slander per se is when the "[t]he defamatory meaning of a message or statement [is] obvious on the face of the statement." *Id.* Slander per se

that is actionable to degrade a business's reputation in the eyes of the peers, the community, or the public relates to "unfitness in one's business or profession" and presumes malice by the speaker. *Id.* at 510-11. Additionally, the Plaintiff must show that the defamatory statement was false when published to a third party, and the speaker either knew the defamatory "statement was false or had serious reservations about its truth." *Id.* at 512-13.

Here, the Landlord, whether individually or through its Agents, defamed the Tenant as abandoning the Premises to a prospective business associate related to the Plaintiffs' business ventures separate from this Landlord-Tenant Dispute. For the Landlord to make a statement that the Tenant abandoned the Princess implies the lack of financial fitness of that business. In fact, the Landlord wrongfully evicted the Tenant from the Premises. The Landlord knew that the Landlord changed the locks to deny the Tenant access to the Premises. Unquestionably, the Landlord knew that the statement was false, or seriously misleading, without accounting for the Landlord's unlawful conduct in this Landlord-Tenant dispute. Any listener of such a defamatory statement about the Tenant would question the financial soundness of the Plaintiffs before entering into a business venture with the Plaintiffs. The Plaintiffs are at risk for losing prospective economic opportunities because of the Landlord patently lying about the Plaintiffs abandoning the Premises.

INADEQUATE LEGAL REMEDY

25.

Any legal remedy would be inadequate in this case because the Landlord, whether acting individually or through its agents, engaged in self-help eviction is causing the catastrophic demise of the Tenant's business every day in lost profits and lost inventory. Without recovering the Tenant's personal property on the Premises, the Tenant cannot salvage or wind up its business to address outstanding customer order requests, vendors, or creditors.

26.

Any legal remedy would be inadequate in this case because the Landlord, whether acting individually or through its agents, has caused all of the Tenant's employees, including key personnel holding the license to operate as a salon, to resign rendering the Tenant unable to operate the premises as a salon without the Tenant's key personnel or staff.

27.

Any legal remedy would be inadequate in this case because the salon products currently within the Landlord's possession on the premises are subject to a limited shelf-life. Some, if not all, may have expired rendering the salon products worthless. The Landlord's conduct renders the Tenant unable to fulfill outstanding orders for salon products by the Tenant's customers.

28.

Any legal remedy would be inadequate in this case because the Landlord's improper ejectment and distraint results in the Tenant experiencing hardships from resolving issues with third parties who have a legal interest in the property currently within the Landlord's possession on the premises.

29.

Any legal remedy would be inadequate in this case because the Landlord is exclusively in possession of the Tenant's personal property located on the Premises, of which is critical evidence in potential foreseeable litigation to assess the Tenant's damages. Without access to the Premises to remove the Tenant's personal property, or recover the Tenant's business records, the evidence in potential litigation regarding this landlord-tenant dispute is subject to the intentional destruction and spoliation by the Landlord, whether acting individually or through its agents. *See Kershaw Cty. Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990) (implied holding that a different outcome ruling in favor of spoliation of evidence and appropriate sanctions were the defendants' intentional misconduct involved concealing or destroying evidence reasonably, foreseeable in litigation); *see generally* Kevin R. Eberle, SPOLIATION IN SOUTH CAROLINA, 19 S.C. LAW 26 (Sep. 2007) (discussing spoliation of evidence in South Carolina as the destruction of evidence or the failure to preserve evidence in pending or reasonably, foreseeable litigation).

PETITION FOR SUPERSEDEAS

30.

The Tenant must obtain a bond pursuant to Section 18-7-10 of the South Carolina Code.

31.

Pursuant to Rule 241(6), exigent circumstances exist that do not require advance notice due to the immediate ejection of the Tenant from the premises on December 12, 2017. As the ejectment is occurring concomitantly on the date of filing this motion, a response from the

opposing party would be too late as the Tenant is already being wrongfully dispossessed from the rental premises.

32.

For reasons already noted in the above section for the Tenant's request for a preliminary injunction, the Tenant will suffer "immediate and irreparable injury, loss or damage will result before the opposing party can respond." Rule 241, SCACR.

33.

The Tenant offers the affidavit of Plaintiffs **BRADLEY W. KERR, MARK T. THOMAS,** and **TENSLEY E. THOMAS** ("Member" individually or "Members" collectively) in support of the motion for a writ of supersedeas to stay the Writ of Ejectment entered on December 7, 2017.

34.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff moves that this court will award the Plaintiff with the following relief:

(1) the Court give leave to amend this motion as required;
(2) the Court stay the Writ of Ejectment issued against the Tenant on July 10, 2017, upon appeal to the Circuit Court of Greenville County;
(3) the court enter an order granting a writ of supersedeas as to the above-styled action;
(4) the Court give the Tenant a hearing on this preliminary injunction as soon as possible;
(5) in the alternative, the Court grant the Tenant's request for a new trial pursuant to Rule 59, extend the time for the Tenant to file an answer and counterclaim due to the Tenant's lack of notice received for the Rule to Show Cause or Vacate and the Writ of Ejectment, and allow for the Tenant to remove the case to Circuit Court with the amount of controversy greater than this Court's jurisdiction of $7,500.00;
(6) the Court grant the Tenant's request for supervised access to the rental premises for and the immediate return of the Tenant's personal property still located with the rental premises that is also evidence relevant to reasonable, foreseeable litigation;
(7) the Court grant the Tenant's request to stop interfering with the Tenant's personal property, or commit further waste upon the same;
(8) the Court grant the Tenant's request that the Landlord stop the false assertion of the law by removing the fake eviction notice from the lease premises;
(9) the Court grant the Tenant's request that the Defendants refrain from making any defamatory statements concerning the Tenant's wrongful eviction from the rental premises to third parties;
(10) the Tenant be awarded reasonable attorney's fees, cost and expenses pursuant to Section of the South Carolina Code; and,
(11) the Court grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 8 day of December, 2017.

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Attorney for Plaintiffs

STATE OF SOUTH CAROLINA)
)
GREENVILLE COUNTY)

RULE 11 OF SOUTH CAROLINA RULES OF CIVIL PROCEDURE CERTIFICATION

Undersigned counsel certifies that consultation would serve no useful purpose as to the foregoing motion(s).

Respectfully submitted this 8 day of December, 2017.

Deborah D. Davis, Esq.
SC Bar No.: 102942
Attorney for Plaintiffs

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE MAGISTRATE'S COURT
BLACKSTONE AND CHASE, LLC, Plaintiff(s), v. **MARGARET H. DURHAM LIVING TRUST,** Defendant(s).	2017CV2311003419 MAGISTRATE CIVIL CASE NO. **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** (WRONGFUL EVICTION UNDER SC. CODE § 27-37-140; FORCIBLE ENTRY AND DETAINER UNDER S.C. CODE § 15-67-410; TRESPASS UNDER S.C. CODE §§ 15-67-610, 27-5-110; CONVERSION UNDER S.C. CODE §15-69-20; FALSE ASSERTION OF THE LAW UNDER S.C. CODE § 15-75-60; UNFAIR TRADE PRACTICES UNDER S.C. CODE § 39-5-50; AND, ETC.)

INTRODUCTION

The Plaintiffs allege in the attached Affidavits by the Plaintiffs that the Defendant **MARGARET H. DURHAM LIVING TRUST**, whether acting individually or through its agents ("Landlord"), has violated the South Carolina law concerning a lease agreement allegedly entered between the Landlord and the Plaintiff **BLACKSTONE AND CHASE, LLC** ("Tenant") on or around March 15, 2016 ("Lease"). On or around April 8, 2017, and July 27, 2017, the Landlord engaged in a self-help eviction of the Tenant and distraint of the Tenant's personal property pursuant to the defective, written Lease without resorting to the judicial process. The Tenant offers the affidavit of the Plaintiffs **BRADLEY W. KERR, MARK T. THOMAS**, and **TENSLEY E. THOMAS** in support of the Plaintiffs' **COMPLAINT FOR DECLARATORY JUDGMENT**. The Plaintiffs seek declaratory relief and injunctive relief.[1]

STANDARD OF REVIEW

An injunction must be reasonably necessary before affording protection to legal rights in pending litigation. *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 464, 626 S.E.2d 38, 41 (Ct. App. 2005). For this Court to issue a preliminary injunction as a drastic remedy, the Tenant "(1) it would suffer irreparable harm if the injunction is not granted: (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch*

[1] The Plaintiffs have also filed a Notice for Preliminary Injunction, the Plaintiffs' Motion for Preliminary Injunction, the Plaintiffs' Complaint for Declaratory Judgment in conjunction with this Memorandum in Support of the Plaintiff's Motion for Preliminary Injunction.

Golf Co. v. Dunes W. Residential Golf Properties, Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004); *Poynter Invs. v. Century Builders of Piedmont*, 387 S.C. 583, 587, 694 S.E.2d 15, 17 (2010).

Irreparable harm occurs when money damages will not remedy the aggrieved party alone warranting the Court's intervention to maintain the status quo to avoid further injury to the aggrieved party. *Levine*, 367 S.C. at 464-65. For whether the Plaintiffs will likely succeed on the merits of the pending litigation, the Plaintiffs only need to present a question regarding the existence of a legal right based on a prima facie showing on the merits of the underlying case regardless of the case's outcome. *Id.* at 465-66. An inadequate remedy at law simply refers to money damages as inadequate to restore the parties to the status quo before the pending litigation, and the Court's intervention is necessary to preserve the existing status before litigation. *Id.* at 466-67. In a landlord-tenant dispute, an injunction is appropriate when equity will relieve a tenant from forfeiture due to the nonpayment of rent when the landlord enforces a penalty *in terrorem* to secure a payment for a specified amount of money. *Trakas v. Mitchell*, 111 S.C. 160, 169, 97 S.E. 245, 247 (1918) (Hydrick, J., dissenting).

STATEMENT OF THE PARTIES

The Plaintiff **BLACKSTONE AND CHASE, LLC**, is a South Carolina limited liability company organized on May 13, 2016, with its principal place of business in Greenville County, South Carolina, doing business as the 17th West North Street Parlor or Liberty Fine Cuts and Shaves ("Tenant"). The Plaintiffs **MARK T. THOMAS, TENSLEY E. THOMAS**, and **BRADLEY W. KERR**, who are the managing members of **BLACKSTONE AND CHASE, LLC**, are natural persons and residents of Greenville County, South Carolina ("Member" individually or "Members" collectively).

Upon information and belief, the Defendant **THE MARGARET H. DURHAM LIVING TRUST** ("Landlord") owns the property located at 17 West North Street, Greenville, South Carolina 29601, in Greenville County ("Building"). The Defendant **THE MARGARET H. DURHAM LIVING TRUST** was created on August 1, 2005, with its principal location in Greenville County, South Carolina, and the Building listed as its mailing address. The Landlord is an inter vivos trust, of which the Defendant **MARGARET H. DURHAM** is the settlor and trustee who still lives.

Upon information and belief, the Defendants **MARGARET H. DURHAM** and **JAMES W. DURHAM**, who is the spouse of the Defendant **MARGARET H. DURHAM**, maintain a personal residence on the third floor of the Building. The Defendant **TAMALA D. CRANE**, who is the daughter of the Defendants **JAMES W. DURHAM** and **MARGARET H. DURHAM**, is the Landlord's other tenant operating Studio 17, which is a yoga studio, on the second floor of the Building. Studio 17 is not a registered business with the South Carolina Secretary of State. Upon information and belief, **TAMALA D. CRANE** is a sole proprietor doing business as Studio 17.

Upon information and belief, the Defendants **MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING, LLC, EZ GLIDE 350, LLC, MARGARET H. DURHAM, JAMES W. DURHAM, TAMALA D. CRANE,** and **HELEN W. SHOCKLEY**, whether individually or through that Defendant's agents or employees, are affiliated with the Landlord as an agent of the Landlord ("Agent" individually or "Agents" collectively). The Defendants **MARGARET H. DURHAM, JAMES W. DURHAM, TAMALA D. CRANE,** and **HELEN W. SHOCKLEY** were acting in the scope of employment, or as an authorized agent, for the Defendants **MARGARET H. DURHAM LIVING TRUST, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING, LLC, EZ GLIDE 350, LLC,** or any and all of the above-named Defendants.

Upon information and belief, the Defendant **MULTIPLEX SYSTEMS, INC.,** is a South Carolina corporation organized on March 25, 1998, with its principal place of business in Greenville County, South Carolina, and does business as the Defendant **ICE RINK ENGINEERING AND MANUFACTURING, LLC**, the Defendant **EZ GLIDE 350, LLC**, or the trademark name EZ Glide 350® (collectively referred to as "Companies"). Upon information and belief, the Defendant **ICE RINK ENGINEERING AND MANUFACTURING, LLC**, is a South Carolina limited liability company organized on April 23, 2008, with its principal place of business in Greenville County, South Carolina. The Defendant **ICE RINK ENGINEERING AND MANUFACTURING, LLC**, is also a division of **MULTIPLEX SYSTEMS, INC.,** and does business as the Defendant **EZ GLIDE 350, LLC**, or the trademark name EZ Glide 350®. Upon information and belief, the Defendant **EZ GLIDE 350, LLC**, is a South Carolina limited liability company organized on April 23, 2008, with its principal place of business in Greenville

County, South Carolina. The Defendant **EZ GLIDE 350, LLC**, is also a division of **MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING, LLC**, or both, and does business under the trademark name EZ Glide 350®.

Upon information and belief, the Defendant **MARGARET H. DURHAM** is either an employee, agent, shareholder, member, trustee or any and all of the above for the Defendants **MARGARET H. DURHAM LIVING TRUST**, the Companies, or any and all of the above-named Defendants. The Defendant **JAMES W. DURHAM**, who also goes by Jimmy Durham, is either an employee, Chief Executive Officer, agent, shareholder, member, or any and all of the above for the Defendants **MARGARET H. DURHAM LIVING TRUST**, the Companies, or any and all of the above-named Defendants.

Upon information and belief, the Defendant **TAMALA D. CRANE**, Tami Durham or Tami Crane, is either an employee, Chief Operating Officer, agent, successor trustee, shareholder, member, or any and all of the above for the Defendants **MARGARET H. DURHAM LIVING TRUST**, the Companies, or any and all of the above-named Defendants. The Defendant **TAMALA D. CRANE** also does business as Studio 17, a yoga studio on the second floor of the Building, and holds herself out as the Chief Operating Officer of the Companies or any and all of the above-named Defendants. Upon information and belief, the Defendant **HELEN W. SHOCKLEY** is either an employee, agent, shareholder, member, or any and all of the above for the Defendants **MARGARET H. DURHAM LIVING TRUST**, the Companies, or any and all of the above-named Defendants. The Defendant **HELEN W. SHOCKLEY** is also the sister and employee of the Defendant **JAMES W. DURHAM.**

Upon information and belief, the Defendants **MARGARET H. DURHAM, JAMES W. DURHAM, TAMALA D. CRANE**, and **HELEN W. SHOCKLEY** are natural persons and residents of Greenville County in the State of South Carolina.

STATEMENT OF FACTS

The Durham family, including **JAMES W. DURHAM, MARGARET H. DURHAM, TAMALA D. CRANE**, and **HELEN W. SHOCKLEY** (individually or collectively referred to as "Durham family"), whether acting individually or as Agents of the Landlord, represented the Landlord during the scope of their employment or agency through the Defendants **MARGARET H. DURHAM LIVING TRUST** and the Companies. The Defendant **JAMES W. DURHAM** was the primary contact for the Tenant concerning any issues related to the Lease, and he held

himself out as acting on behalf of the Landlord. The Defendant **MARGARET H. DURHAM**'s personal interaction with the Tenant related to the Lease or the landlord-tenant dispute was very limited, if hardly at all. *See* Exhibit A, C.

While acting within the scope of employment or agency with the Companies, or any of the abovenamed defendants, the Defendant **HELEN W. SHOCKLEY** entered into an unauthorized, non-binding lease agreement with the Plaintiff **BRADLEY W. KERR** on or around March 8, 2016, when the Plaintiff **BRADLEY W. KERR** paid a security deposit of $5,200.00 to reserve the Premises and make leasehold improvements in anticipation of opening the salon on or around June 8, 2016. Per the preliminary discussions between the Plaintiff **BRADLEY W. KERR** and the Defendant **HELEN W. SHOCKLEY**, the Lease was contingent upon the Plaintiffs **TENSLEY E. THOMAS**, **MARK T. THOMAS**, and **BRADLEY W. KERR** forming the Tenant under South Carolina Secretary of State and obtaining the necessary licenses to open the salon on the Premises on or around June 8, 2016. *See* Exhibit A.

On or around March 15, 2016, the Landlord named the Tenant on the Lease before the Tenant ever came into existence under South Carolina law on May 13, 2016. On or around March 15, 2016, the Plaintiff **BRADLEY W. KERR** negotiated with the Defendant **HELEN W. SHOCKLEY** for approximately ninety (90) days rent free prior to rent starting on June 8, 2016. Even though the Plaintiff **BRADLEY W. KERR** signed the Lease, the Plaintiff **BRADLEY W. KERR** brought to the Defendant **HELEN W. SHOCKLEY**'s attention that the Lease terms on the rent due date were incorrect. The Defendant **HELEN W. SHOCKLEY** made handwritten changes that were initialed by both the Plaintiff **BRADLEY W. KERR** and the Defendant **MARGARET H. DURHAM** at separate times. *See* Exhibits A, C, L.

The Defendant **HELEN W. SHOCKLEY** was supposed to provide a new Lease with the additional changes—but she never did. The actual effective date of the Lease was never documented on the Lease, and thus the Lease never should have been effective until no earlier than June 8, 2016. *See* Exhibits A, C. Hence, the Tenant was a licensee during the interim from on or around March 15, 2016, until the Tenant took possession of the Premises on the opening day of the salon on or around June 8, 2016. The effective rent date and rent due date is conflicting. None of the Plaintiffs ever received a copy of the Lease from the Landlord while in possession of the Premises.

The Landlord, whether acting individually or through its Agents, acted in bad faith withholding a copy of the Lease from the Tenant while the Tenant was in possession of the Premises. After multiple requests by the Tenant to the Landlord, the Tenant finally received a copy of the Lease for the first time from the Tenant's general liability insurance carrier Penn National Insurance Company on or around September 28, 2017. The Landlord, whether acting individually or through its Agents, submitted a copy of the Lease to Penn National Insurance Company of the Landlord's own volition on or around September of 2017. *See* Exhibit C.

On or around April 8, 2017, when the Plaintiff **TENSLEY E. THOMAS** requested a copy of the Lease from the Defendant **HELEN W. SHOCKLEY**, the Landlord, whether acting individually or through its Agents, retaliated by placing chains on the front doors of the salon because the Tenant had not provided proof of insurance for the Tenant's general liability insurance policy. The Tenant's staff was not able to get into the salon that day to open the salon. The Plaintiffs **BRADLEY W. KERR** and **MARK T. THOMAS** viewed the Tenant's security system camera that morning, observing the Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** place chains on the doors to the Premises and rummage through the salon around the Tenant's countertops and cash registers. The Tenant delivered proof of insurance to the Landlord that day, and opened the salon again the following day on or around April 9, 2017. The Tenant experienced a loss in sales due to this first lock-out incident. *See* Exhibits A, E.

On or around July 7, 2017, at 3:14 P.M., and before the rent was due on July 8, 2017, the Defendant **JAMES W. DURHAM** demanded that: (1) the Tenant to pay rent before the rent was due; and, (2) the Tenant to provide proof of general liability insurance. The Landlord, whether individually or through its Agents, admitted to being on the sales floor of the salon unannounced and engaging the Tenant's staff by reporting that the Tenant's employees were also asking for their paychecks. *See* Exhibits A, E. That same day, in a very unprofessional and outrageous manner, the Defendant **HELEN W. SHOCKLEY** arrived on the sales floor of the salon unannounced, accosted the Tenant's staff, and boisterously demanded rent from the Tenant in front of the Tenant's staff and customers during the Tenant's normal business hours. The Tenant's staff was uncomfortable and left with the false impression that the Tenant was financially unstable. The Tenant's customers were shocked. The Members were embarrassed and humiliated by the actions of the Landlord, whether acting individually or through its Agents. As a result, the Members felt harassed by the Landlord. *See* Exhibits A, E.

The Plaintiff **TENSLEY E. THOMAS** called the Defendant **JAMES W. DURHAM**, confronting the Defendant **JAMES W. DURHAM** about the Defendant **HELEN W. SHOCKLEY**'s outrageous behavior on the sales floor in front of the Tenant's staff and customers while the salon was operating during normal business hours. *See* Exhibits A, E. Again, the Defendant **JAMES W. DURHAM** demanded that the Tenant must provide proof of general liability insurance by 12:01 A.M. on July 8, 2017, threatening to lock the Tenant out again if the Tenant did not do as the Defendant **JAMES W. DURHAM** demanded—dictating that the Tenant should not even bother opening the doors of the salon to open for business the next day upon failure to do as demanded in a commercially, unreasonable manner. *See* Exhibits A, E.

From July 13, 2017, to July 14, 2017, and while the Plaintiff **BRADLEY W. KERR** was out of town, the Plaintiff **MARK T. THOMAS** corresponded with the Defendant **HELEN W. SHOCKLEY** about paying the rent for July of 2017, requesting to pay any additional late fees. The Defendant **HELEN W. SHOCKLEY** quoted the rent and late fees for July of 2017 as $3,612.50, without any explanation for the late fees. Additionally, the Defendant **HELEN W. SHOCKLEY** refused to provide a copy of the Lease upon request to the Plaintiff **MARK T. THOMAS**. *See* Exhibits A, E. The Tenant received the Landlord's notice of default, which was dated as of July 13, 2017, from the Tenant's salon manager Heather M. Loring on or around July 17, 2017 ("Notice of Default"), alleging the following:

(1) the Tenant was in default for non-payment of rent for July of 2017 in the amount of $3,250.00, in addition to $200.00 for utilities payable to the Landlord and a 5% late fee penalty (total amount requested $3,612.50);
(2) the Tenant was in default for the Tenant's failure to notify the Landlord in advance of remaining in the salon after 9:00 P.M. to prevent false alarm reports;
(3) the Tenant was in default for the Tenant's breach of quiet enjoyment of the premises due to the Tenant hosting social events in the salon that supposedly detracted from the space's reputation as a "first class retail and office development"; and,
(4) the Tenant was in default for the Tenant's failure to comply with no-smoking ordinances involving public places within or near the Premises. *See* Exhibit D.

A legitimate dispute exists concerning the rent amount between the Landlord and the Tenant related to the rent for July of 2017. The Landlord, whether acting individually or through its Agents, repeatedly demanded rent before the rent was due on the eighth of the month. *See* Exhibit A, E. The Notice of Default alleged that the rent was due on July 1, 2017, instead of on July 8, 2017. *See* Exhibit D. On or around July 27, 2017, the Landlord forcibly evicted the

Tenant from the Premises by engaging in self-help and changing the locks to the Premises to evict the Tenant from the Premises without resorting to the judicial process. *See* Exhibit A, E.

Based on the limited accounting records available to the Tenant at this time, the Tenant's rent payment history to the Landlord is as follows:

PAYMENT TYPE	DATE	REF. NO.	AMOUNT	FROM	TO
TBD	06/08/16	TBD	$3,450.00	TBD	TBD
Check	09/08/16	3637	$3,400.00	Tensley Thomas	Jimmy Durham
Cash	09/08/16	N/A	$50.00	Tensley Thomas	Jimmy Durham
Cashier's Check	10/03/16	6830501887	$3,450.00	Mark Thomas	Jimmy Durham
Check	11/09/16	1022	$3,450.00	Blackstone & Chase	Margaret Durham
Check	12/10/16	1028	$3,450.00	Tensley Thomas	Jimmy Durham
Check	01/06/17	1029	$3,450.00	Tensley Thomas	Jimmy Durham
Check	02/08/17	39878	$3,450.00	Tensley Thomas	Jimmy Durham
Check	03/10/17	5025	$3,450.00	Blackstone & Chase	Jimmy Durham
Check	04/10/17	N/A	$3,450.00	Bradley Kerr	Cash (Margaret Durham)
Check	05/09/17	TBD	$3,250.00	TBD	TBD
Check	06/01/17	333169	$3,450.00	Blackstone & Chase	Jimmy Durham

Out of the known twelve (12) months when the Tenant made rent payments to the Landlord, the Landlord, whether acting individually or through its Agents, routinely accepted late rent payments for five (5) months of the tenancy period. And, separate from the Notice of Default for July of 2017, the Tenant made all late rent payments within two (2) days of the eighth of the month without ever receiving a notice of default from the Landlord.

Other issues surrounding the monthly rent payment of $3,450.00 also exist. The Lease required the Landlord to deliver the Premises in full compliance with "all applicable laws, ordinances[,] and regulations" pursuant to Section 18 of the Lease. However, the Greenville

Building codes require the Tenant to have access to the restroom on the first floor of the Building in the common areas. *See* Exhibit A, C. The Defendant **HELEN W. SHOCKLEY** charged the Tenant an additional $50.00 for the Tenant's access to that bathroom. During the time the Tenant was in possession of the Premises, the Defendant **HELEN W. SHOCKLEY** provided a proprietary, manual breakdown of the monthly utility expenses, which were normally $200.00 per month for twelve (12) of the thirteen (13) months the Tenant remained in possession of the Premises without providing substantiated documentation for arriving at the additional rent amount each month. *See* Exhibit A, E.

Moreover, the Defendants **JAMES W. DURHAM** and **MARGARET H. DURHAM** were commingling their personal property with the Landlord's property ignoring the trust form when the Landlord, whether acting individually or through its Agents, instructed the Tenant to employ the son-in-law of **JAMES W. DURHAM** and **MARGARET H. DURHAM**, who was acting under the scope of agency or employment for Indigo Ridge, Inc., to install the Tenant's internet for $234.99 by simply hooking up a wi-fi router for the Tenant to piggy back off the wi-fi internet connection for the personal residence of the Defendants **JAMES W. DURHAM** and **MARGARET H. DURHAM** on the third floor of the Building. *See* Exhibit A, K.

The Landlord's other alleged claims of the Tenant's default unrelated to the payment of rent are unfounded, unsubstantiated, and without merit lacking any basis in fact or the law. The Landlord's Notice of Default is capricious and arbitrary designed to forcibly remove the Tenant from the Premises without resorting to the judicial process.

The Landlord, whether acting in individually or through its Agents, shortened the Tenant's business hours, and not just for the times that the Tenant was open for business, but for when the Tenant would have access to the Premises to maintain salon operations. During one incident, when the Plaintiff **MARK T. THOMAS** was conducting an inventory of salon products after-hours, the Greenville County Police Department only received two false alarm reports on June 3, 2017, at 12:04 A.M. and 12:16 A.M. *See* Exhibit A, E. The Landlord was never fined for those false alarms. *See* Exhibit M. The Defendant **JAMES W. DURHAM** threatened that if the Tenant, whether individually or acting through its agents, was found in the common space of the outer double doors in front of the Tenant's salon after 10:00 P.M., then the Tenant's agents or employees would to be treated as criminal trespassers should the police arrive on the scene for merely being onsite to maintain salon operations. *See* Exhibit D, E.

The Landlord, whether acting individually or through its agents, greatly interfered with the Tenant's ability to maintain operations for the salon on the Premises. The Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** imposed new store hours on the Tenant to operate the salon for shorter business hours that solely benefited the Defendant **TAMALA D. CRANE**'s operation of yoga classes on the second floor of the Building. Or, more realistically, the Landlord was at the beck and call of the Defendant **TAMALA D. CRANE** to accommodate the her overly-sensitive hearing or her overly-sensitive use of the second floor of the Building unrelated to the Tenant's lawful, reasonable use of the Premises playing music for the Tenant's patrons during normal business hours. *See* Exhibit A, D, E.

The Tenant lost earning potential from the loss in store hours in the bustling, downtown Greenville area because the Defendant **TAMALA D. CRANE** incessantly complained about the Tenant to the Defendants **JAMES W. DURHAM, MARGARET H. DURHAM,** and **HELEN W. SHOCKLEY,** whether acting individually or collectively as an agent or employee of any of the abovenamed Defendants. The Landlord, whether acting individually or through its Agents, failed to recognize the Tenant's right to be in possession of the Premises to the exclusion of all others—including the Landlord—when repeatedly entered the Premises unannounced without providing the Tenant with reasonable notice in non-emergency situations as permitted by the Lease. *See* Exhibit K.

The Tenant was in full compliance with South Carolina law as a social host when offering the Tenant's salon patrons alcoholic beverages or refreshments as is customary to offer patrons at upscale salons. The allegations by the Landlord, whether acting individually or through its Agents, regarding serving alcohol on the Premises as unlawful and detracting from the Premises being a first-class retail or office development is unsubstantiated. The Defendant **JAMES W. DURHAM** was also a patron of the salon, who had regular haircuts at the salon from the Tenant's hairdresser Lauren Turner, also frequently enjoyed libations at the salon. Coincidentally, the Tenant hosted two private events involving libations and refreshments on the Premises, of which the Defendants **JAMES W. DURHAM** and **MARGARET H. DURHAM** attended and drank alcoholic beverages at these events. *See* Exhibits A, D.

The actions of third parties unrelated to the salon cannot be vicariously attributable to the Tenant. Any of the Tenant's employees violating the Tenant's no-smoking policy would be acting outside the scope of employment with the Tenant, and thus those employees' actions

would not be attributable vicariously to the Tenant. The public at large would dispose of cigarette butts on the sidewalks in front of the Building that was completely unrelated to the salon, which would not be attributable vicariously to the Tenant. The allegations by the Landlord, whether acting individually or through its Agents, regarding the Tenant being in violation of Greenville's no-smoking ordinances were unsubstantiated. *See* Exhibits A, D, E.

The Landlord, whether acting individually or through its Agents, improperly requested proof of the Tenant's general liability insurance contrary to the Landlord's Lease provisions in an arbitrary and capricious manner as grounds to prevent the Tenant's access to the Premises. *See* Exhibits A, C, E.

On July 27, 2017, the Plaintiff **MARK T. THOMAS** was conducting inventory of salon products at the salon around 8:30 P.M., of which the Plaintiff **TENSLEY E. THOMAS** observed the same through his home camera linked to the store security camera system. The Defendant **JAMES W. DURHAM** showed up at the salon unannounced, startling the Plaintiff **MARK T. THOMAS**. These two parties had a brief conversation in passing, and the Defendant **JAMES W. DURHAM** left shortly afterwards without mentioning the rent for July 2017. The Defendant **JAMES W. DURHAM** was lying in wait for the Tenant, whether acting individually or through its agents, to leave the premises for that day before changing the locks to the Premises. The Landlord waited to change the locks to prevent the Tenant's access to the Premises knowing that the Tenant would return back to the Premises on the next day thereafter. *See* Exhibits A, D, E.

On or around July 28, 2017, the Tenant discovered that the Landlord, whether acting individually or through its Agents, locked the Tenant out of the salon when the Tenant's salon manager Heather M. Loring let the Tenant know that her key did not work to open the salon. The Landlord, whether acting individually or through its Agents, placed a note on the door instructing the Tenant, or the Tenant's employees, not to enter the Premises. The Tenant's employees were to call the Defendant James W. Durham's phone number on the note. The note on the door, or the Landlord's eviction notice, was not posted from any court or magistrate by any officer of the law. The note directed the Tenant's employees to contact the Landlord to get their personal property from the salon. *See* Exhibits A, C, D, E, H, I.

When the Tenant's salon manager Heather M. Loring found the salon's doors locked that day, most of the Tenant's staff quit. Without the Tenant's salon manager Heather M. Loring, the

Tenant could not stay open as a salon having lost the Tenant's key personnel who held the Tenant's salon license. Because of the Landlord, whether acting individually or through its Agents, the Tenant could no longer operate as a salon. *See* Exhibits A, H.

On August 4, 2017, the Tenant sent a letter to the Landlord demanding that the Landlord open the salon back up for the Tenant to resume business as normal. The Landlord refused. The Landlord has never filed for an eviction before any court, nor sued the Tenant for nonpayment of rent related to the Tenant's personal property and trade fixtures, at that time. The last day of the business for the Tenant was on July 27, 2017, when the Landlord locked out the Tenant from the Premises and stole the Tenant's personal property and trade fixtures. The Landlord, whether acting individually or through its Agents, has wrongfully seized and dispossessed the Tenant of the Tenant's business assets on the Premises. As of July 28, 2017, the Tenant has not been able to get the Tenant's personal assets and trade fixtures located on the Premises. The Landlord only filed for a Writ of Ejectment after forcibly removing the Tenant from the Premises on or around October 23, 2017, and the Tenant never received notice of any ejectment proceedings. *See* Exhibit J.

Third parties have a legal interest in the Tenant's personal assets currently within the control and possession of the Landlord. The Tenant has creditors who have a legal interest in the Tenant's personal assets on the Premises that is the collateral to the Tenant's financing agreements such as the barber chairs in the salon. The Tenant cannot even surrender the collateral to resolve these other matters and other contracts with third parties because the Landlord has all the Tenant's personal assets and trade fixtures on the Premises. *See* Exhibit F, K.

On August 8, 2017, the Landlord responded to the Tenant's first demand letter, and the Landlord admitted in this response letter that the Landlord reentered and seized the property as a basis to accelerate the lease for $152,750.00. The Landlord made no mention of the Tenant voluntarily abandoning the property. Because, the Landlord has specific knowledge of forcibly removing the Tenant from the Premises when the Landlord changed the locks to the Premises on or around July 27, 2017. The Landlord had to wait until the Tenant left the Premises for the day, knowing full well that the Tenant would return on the next business day, to change the locks without the Tenant's knowledge when the Tenant was not onsite to witness the Landlord doing

so by placing brown paper into the windows and posting a do-not-enter sign on the doors. *See* Exhibits A, D, E, H, I.

On or around August 24, 2017, the Plaintiff **MARK T. THOMAS** saw and took photos of the Defendant **JAMES W. DURHAM** removing the Tenant's salon mats from the Premises, placing the salon mats into **JAMES W. DURHAM**'s personal car. On or around September 10, 2017, when the Plaintiff **MARK T. THOMAS** went to check on the Tenant's mail at the Premises, the Plaintiff **MARK T. THOMAS** saw the Defendant **MARGARET H. DURHAM** going through the Tenant's mailbox that is clearly labeled for the Tenant on the first floor. On or around September 14, 2017, the Landlord, whether acting individually or through its Agents, called the Tenant's general liability insurance carrier Penn National Insurance Company and requested that Penn National Insurance Company remove the Tenant's business property on the Premises. *See* Exhibit I. On or around September 27, 2017, the Tenant sent another demand letter to the Landlord requesting access to the salon to remove the Tenant's personal property and trade fixtures on the Premises. *See* Exhibit D.

To date, the Landlord, whether acting individually or through its Agents, has repeatedly denied the Tenant's requests to return the Tenant's personal property located on the Premises. And, the Landlord, whether acting individually or through its Agents, has not resorted to the judicial process nor filed an action for distraint regarding the Tenant's personal property located on the Premises at present in a proper manner or with proper notice.

Based on what limited records the Tenant has within the Tenant's possession, the below represents an approximation of the Tenant's furniture, fixtures, equipment, and leasehold improvements for the salon:

Item	**Value**	
HP Laser-Jet All in One Wireless Printer	$	450.00
2 Surface Pro 4 computers	$	1,600.00
2 HP All in One computers	$	2,000.00
3 Samsung TV	$	2,400.00
2 LG TV	$	1,600.00
1 Alarm System with monitor plus install	$	3,500.00
1 TV for monitor	$	400.00
Leasehold Improvements	$	95,000.00
Barber Salon Chairs & Equip.	$	12,469.00
LIFEAID Fridge	$	396.99

Grease, Inc.	$	300.00
Salon Mats (Ameriprise)	$	300.00
TOTAL	**$**	**120,415.99**

Based on what limited records the Tenant has within the Tenant's possession, the below represents an approximation of salon products that may have expired, or definitely have expired, and are now a total loss to the Tenant:

Date	Vendor	Description	Amount
7/25/2017	LIFEAID	Energy Drinks promotional materials	$ 94.93
10/11/2016	European Image Salon Suppliers, Inc.	Salon products	$ 754.09
5/24/2017	Suavecito, Inc.	Salon products	$ 221.00
2/7/2017	Absolute Board Co. (USA)	Salon products	$ 3,400.05
5/8/2017	Gussyup, LLC	Salon products	$ 1,175.75
Multiple	Grease, Inc.	Salon products (and design, miscellaneous proprietary value)	$ 3,245.45
	Rowdy Gents	Proprietary	$ 10,000.00
TOTAL			**$ 18,891.27**

Based on what limited records the Tenant has within the Tenant's possession, the below represents an approximation of the Tenant's lost sponsorships:

Date	Vendor	Invoice No.	Amount
2/6/2017	Metropolitan Arts Council	2016.012	$ 9,000.00
	City of Greenville		
	Harley Davidson		
	Ameripride		$ 300.00
	Radio Advertising		$ 10,000.00
TOTAL			**$ 19,300.00**

Additionally, the Landlord, whether acting individually or through its Agents, defamed the Tenant making false statements that the Tenant abandoned the Premises to the Tenant's employees, the Tenant's customers, and a prospective business associate related to the Plaintiffs' business ventures separate from this Landlord-Tenant. *See* Exhibit A.

The Landlord has effectively rendered the Tenant financial insolvent because of the Landlord's unlawful conduct. Based on what limited records the Tenant has within the Tenant's possession, the below represents an approximation of the Tenant's damages:

ITEM	AMOUNT
Leasehold Improvements	$95,000.00
Furniture, Fixtures, and Equipment	$25,415.99
Salon Products (total loss)	$18,891.27
Lost revenues	$119,958.10
Lost sponsorships	$19,300.00
Attorney Fees	$15,000.00
Court Costs	$TBD
TOTAL	**$293,565.36**

ARGUMENT AND CITATION OF AUTHORITY

This Court has the authority "to issue orders and injunctions to restrain and prevent violations of [the South Carolina Unfair Trade Practices Act], and such orders and injunctions shall be issued without bond." S.C. Code Ann. § 39-5-50(a)-(b). The Plaintiffs must show that: "(1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a [natural and proximate] result of the defendant's unfair or deceptive act(s)." *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). The Plaintiffs must establish that the Defendant(s) had "[a]n affirmative legal duty to act . . . created by statute, contract, relationship, status, property interest, or some other special circumstance." *Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003). The South Carolina Unfair Trade Practices Act broadly defines trade and commerce to include the sale or distribution of a thing of value that directly or indirectly, in the aggregate, affects South Carolina citizens. *Burbach v. Inv'rs Mgmt. Corp. Int'l*, 326 S.C. 492, 496, 484 S.E.2d 119, 121 (Ct. App. 1997).

"Whether an act or practice is unfair or deceptive" is a question of fact under the circumstances. *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000). South Carolina law defines an unfair trade practice as "offensive to public policy or which is immoral, unethical, or oppressive." *Id.* By contrast, a deceptive practice is any practice, act, or statement, whether truthful or false, that has a tendency to deceive. *Id.* Unfair or deceptive trade practices must impact the public interest if the potential likelihood of repetition exists,

whether those repetitive acts have occurred or may occur, warranting deterrence measures in the public's interest. *Id.* at 269-70.

Under landlord-tenant law in South Carolina, the Landlord and Tenant have either statutory duties, contractual duties, or both by virtue of the dichotomous nature of leases as both a lease and a transfer of estate as a tenement of land. *Burbach*, 326 S.C. at 497. The statutory duties imposed on the Landlord and Tenant incorporate the public's expression of the public's interest that is mutually exclusive of the contractual duties imposed by a lease as a contract. *See Rowland & Sons v. Bock*, 150 S.C. 490, 493, 148 S.E. 549, 550 (1929); S.C. Code Ann. §§ 27-33-10 to -50 (applying general definitions, court jurisdiction, and general provisions); S.C. Code Ann. §§ 27-35-10 to -180 (defining the statutory meanings of creation, construction, and termination for leasehold estates); S.C. Code Ann. §§ 27-37-10 to -160 (ejecting tenants); S.C. Code Ann. §§ 27-39-10 to -360 (distraining personal property of tenants). Subsequently, the Lease qualifies as trade or commerce under the South Carolina Unfair Trade Practices Act. *Burbach*, 326 S.C. at 496.

South Carolina law has codified unfair and deceptive trade practices by landlords that impact the public interest into the causes of action for forcible entry and detainer of real property, claim and delivery of personal property, wrongful dispossession of leased property accordingly, and prohibiting sham legal processes or the false assertion of the law. *See* S.C. Code Ann. §§ 15-67-410 to -610 (prohibiting forcible entry and detainer of land or tenements); S.C. Code Ann. §§ 15-69-10 to -20 (allowing for recovery of personal property wrongfully dispossessed); S.C. Code Ann. § 15-75-60 (prohibiting sham legal processes by anyone falsely asserting authority of law); S.C. Code Ann. § 27-5-110 (prohibiting trespass onto land with a strong hand); S.C. Code Ann. § 27-37-140 (permitting tenants recovery from wrongful eviction). Tenant abuse by landlords is highly capable of repetition, affecting the public at large if offensive landlord practices are not deterred effectively. *See Burbach*, 326 S.C. at 497.

Unquestionably, landlords who engage in self-help eviction pose a serious threat to the legitimacy of the judicial process when landlords take matters into their own hands to remove tenants from their property. *See Bradshaw v. Ashley*, 180 U.S. 59, 64, 21 S. Ct. 297, 299 (1901). The increased danger of breaching the peace through trespass and conversion is high, with a tendency to create potential violence unless such actions are properly deterred. *See State v. Bates*, 87 S.C. 527, 530-31, 70 S.E. 170, 171 (1911) ("The Court is the more strongly inclined to

respect its authority because the rule it lays down conserves the public peace and is in accord with the highest public policy."); *De Laine v. Alderman*, 31 S.C. 267, 275-76, 9 S.E. 950, 953 (1889); (reducing the status of a licensee to a mere intruder on the land when committing forcible and entry upon the land); *State v. Jones*, 14 S.C. 344, 344-45 (1880) (treating forcible entry and detainer historically as a criminal offense); *cf. Parker v. Shecut*, 349 S.C. 226, 230-31, 562 S.E.2d 620, 623 (2002) (holding disseizor liable for ouster of joint-owners when changing the locks to deny joint-owners access to the land).

Here, the Landlord has wrongfully evicted the Tenant twice on or around April 8, 2017, and June 27, 2017, by denying the Tenant access to the Premises. The Landlord has also unlawfully distrained the Tenant's personal property and trade fixtures on the Premises for rent in arrears. The Landlord is highly capable of committing self-help to evict a future tenant and wrongfully dispossess future tenants of their property without resorting to the legal process based on the repetitive conduct demonstrated toward the Tenant. Commercial tenants often have substantial investments into the leasehold estate by virtue of the commercial nature in the tenant's use and enjoyment of the leased premises. *See Kiriakides v. UA Commc'ns*, 312 S.C. 271, 276, 440 S.E.2d 364, 366-67 (1994). For purposes of ensuring stability for commercial tenants, the public interest is well-served by protecting commercial tenants—as business owners—from tenant abuse demonstrated by the Landlord against the Tenant.

I. THE PLAINTIFFS SUFFER FROM IRREPARABLE HARM BECAUSE OF THE LANDLORD ENGAGING IN A SELF-HELP EVICTION

The Tenant is suffering immediate and irreparable injury, loss, damages, or all of the above from the unlawful ejectment of the Tenant and distraint of the Tenant's personal property located within the Premises that amounts to the Tenant's wrongful eviction from the rental premises without entry of the requested injunctive relief. S.C. Code Ann. §§ 27-37-140, 27-39-10. Such immediate and irreparable injury will result to the Tenant because the Tenant is left without any recourse to recover the Tenant's business assets, trade fixtures, business and accounting records, or other personal property still located within the Premises. The Landlord has effectively rendered the Tenant insolvent and unable to operate as a salon. The Landlord cannot wind up the Tenant's business affairs to resolve outstanding issues with the Tenant's creditors, vendors, or other third persons who have a legal interest in the property currently within the Landlord's possession. The Landlord's actions have caused the Tenant to breach other contracts unrelated to this Landlord-Tenant dispute. The Landlord has made improper,

defamatory statements to prospective business partners that have impacted the Plaintiffs' ability to engage in separate and distinct business ventures unrelated to this Landlord-Tenant dispute.

Additionally, the Plaintiffs **BRADLEY W. KERR, MARK T. THOMAS,** and **TENSLEY E. THOMAS,** who are the Members of the Tenant, are accruing additional expenses to involuntarily vacate the premises prematurely without any of the Tenant's personal property, facing embarrassment and denial from current customers and other prospective business opportunities to rent another commercial space, and suffering from emotional distress from the loss of the Tenant's business due to the wrongful eviction by the Landlord, whether acting individually or through its agents.

II. THE PLAINTIFFS' LIKELIHOOD TO SUCCEED ON THE MERITS WARRANTS ENJOINING THE DEFENDANTS' ILLEGAL CONDUCT

The Tenant has a strong likelihood to succeed on the merits of this Landlord-Tenant Dispute. The underlying facts to this Landlord-Tenant dispute clearly show that the Landlord failed to resort to the legal process for evicting the Tenant, or peaceably resolve this Landlord-Tenant dispute. The Landlord engaged in self-help to forcibly evict the Tenant from the Premises and seize the Premises along with the Tenant's trade fixtures and personal property located therein.

Consequently, the Landlord's illegal actions subject to the Landlord to liability for the numerous violations of the law and separate causes of action arising out of the same conduct and transaction, including, but not limited to, the following:

(1) forcible entry and detainer of the Premises disseizing the Premises from the Tenant;
(2) wrongful dispossession of the Premises;
(3) trespass on the Tenant's personal property located on the Premises under an action for claim and delivery (i.e., replevin);
(4) conversion of the Tenant's property located on the Premises that are no longer viable for sale (or re-sale);
(5) breach of the Landlord's covenant to the Tenant's quiet use and enjoyment of the Premises;
(6) tortious interference with the Tenant's contractual relations;
(7) tortious interference with the Tenant's prospective economic relations;
(8) intentional (or negligent) infliction of emotional distress;
(9) defamation of the Tenant's financial unfitness in business;
(10) racial discrimination toward the Members of the Tenant; and,
(11) unfair trade practices.

Ultimately, all of these violations and causes of actions stem from the Landlord's wrongful eviction of the Tenant under an invalid, unauthorized, defective Lease that resulted in the Landlord's unlawful dispossession of the Premises and the Tenant's trade fixtures and personal property located therein.

A. THE LANDLORD HAS WRONGFULLY EVICTED THE TENANT FROM THE PREMISES IN AN UNLAWFUL MANNER BY COMMITTING FORCIBLE ENTRY AND DETAINER

The Tenant occupies the lands, or premises, of the Landlord with the Landlord's assent, whether express or implied, in a manner that is subordinated to the Landlord's title to the lands or premises. *Columbia R., G. & E. Co. v. Jones*, 119 S.C. 480, 490, 112 S.E. 267, 271 (1922). The Lease of the Premises is both a contract and a transfer of estate, which are mutually independent:

> While landlord-tenant relationships are frequently governed by contract, landlords have certain statutory duties, as do tenants. These duties protect the public interest in that they create a framework that governs landlord-tenant relationships regardless of the private arrangements parties have made between themselves. *Burbach*, 326 S.C. at 497.

A breach of contract under the Lease will not permit the Tenant to vacate as the leasehold estate exists independently, and is mutually exclusive from the characterization of the Lease as a contract.[2] *See Rowland*, 150 S.C. at 493. South Carolina law separates legal title to the land from

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[2] South Carolina law has, at times, conflated the nomenclature for the parties when applying principles of contract and property law to landlord-tenant law and failed to distinguish the landlord and tenant from the lessor and lessee. When a lease—as a contract—is not involved in the landlord-tenant dispute, determining the status of the landlord-tenant relationship is a prerequisite before referring to the parties as the landlord and tenant. *See Simon v. Kirkpatrick*, 141 S.C. 251, 257-65, 139 S.E. 614, 616-19 (1927). A lease is not always relevant in a landlord-tenant dispute because the lease may be invalid, expired, or nonexistent. *E.g.*, *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989) (expired lease and unenforceable, oral contract); *Barksdale v. Hinson*, 212 S.C. 1, 3, 46 S.E.2d 170, 171 (1948) (oral lease); *Wilson v. McAbee*, 256 S.C. 211, 217, 182 S.E.2d 313, 315 (1971) (defective, written lease).

Regardless of whether a lease governs the landlord-tenant relationship, South Carolina law governs landlords and tenants separately from the lease itself as mutually independent. *Burbach*, 326 S.C. at 497. Compliance with South Carolina law is mandatory by landlords and tenants alike, unless the statute expressly allows for private agreement to preempt the statute. *Compare id.* (holding landlords and tenants to statutory duties), *with* S.C. Code Ann. § 27-35-100 ("unless there be an express agreement to the contrary"), *and* S.C. Code Ann. § 27-35-110 ("[w]hen there is an express agreement, either oral or written"). Hence, when a lease is silent on the subject, then South Carolina law still applies in a gap-filling function.

By contrast, a lease is a dichotomy under both contract and property law whereby a lease is both a contract under contract law and a transfer in an estate of land as a leasehold estate under property law. Unless a lease is invalid, expired, nonexistent, or superseded by operation of law, the lease—as a contract—governs the relationship between the lessor and lessee regardless of whether the lessor and the lessee share the same status as the landlord and tenant respectively. Therefore, when the lease properly governs under the circumstances, then the parties are referred to as lessor and lessee. *See Simon v. Kirkpatrick*, 141 S.C. 251, 257-65, 139 S.E. 614, 616-19 (1927). This distinction between the nomenclature of the parties is important to avoid conflating other principles of contract and

the possession of the land in a leasehold estate, protecting one in possession of the land from "one who enters and takes lands from the possession of another." *See Bates*, 87 S.C. at 531.

The same conduct of forcible entry and detainer also equates to a wrongful eviction because the unlawful dispossession of the leased premises by force that originates in trespass includes the wrongful dispossession of the leased premises. *Compare* S.C. Code Ann. § 15-67-420 (forcible entry and detainer), *with* S.C. Code Ann. § 27-37-140 (wrongful dispossession). The actual dispossession of land by forcible entry and detainer—even by one with legal title to the land—is unlawful. S.C. Code Ann. § 15-67-420; *see Bates*, 87 S.C. at 531. The Tenant's "title to the rent is founded on the presumption that the tenant enjoys the thing during the contract." *Ripley v. Wightman*, 15 S.C.L. (4 McCord) (1828). Even though the Landlord is the owner of legal title to the Premises, the Landlord, whether acting individually or through its agents, did not have the right of possession to the Premises by the mere virtue of ownership. *See Bates*, 87 S.C. at 531 (holding that mere legal title to the land does not permit the owner to enter and dispossess the one in possession of that land to recover the owner's land).

i. THE LANDLORD COMMITTED FORCIBLE ENTRY AND DETAINER WHEN CHANGING THE LOCKS TO THE PREMISES DENYING THE TENANT ACCESS TO THE PREMISES

Forcible entry and detainer also originates in trespass that is more than bare trespass uses a strong hand. S.C. Code Ann. §§ 27-5-110, 15-67-410. The Tenant had the right of peaceable possession of the Premises to the exclusion of all others—including the Landlord—regardless of the status of the landlord-tenant relationship. *See Bates*, 87 S.C. at 531. Whether the tenancy had terminated, or the tenant was a holdover tenant, is irrelevant because:

> "[T]he [landlord] did not have the right to use [a strong hand] in making a re-entry until a reasonable time had expired, or due diligence had been used to ascertain if the [tenant] asserted a right to the premises after the expiration of the tenancy, and if [the tenant] asserted such a right, that *the [landlord] could only eject [the tenant] by process of law.*" *Rush v. Aiken Mfg. Co.*, 58 S.C. 145, 150, 36 S.E. 497, 499 (1900) (emphasis added).

The legal process for evicting a tenant requires the landlord to apply for a writ of ejectment before the magistrate court ("Writ of Ejectment"). S.C. Code Ann. § 27-37-20 (ejectment proceedings); S.C. Code Ann. § 27-37-160 (additional ejectment proceedings for

property law in landlord-tenant law. *See Gentry v. Recreation, Inc.*, 192 S.C. 429, 435, 7 S.E.2d 63, 65 (1940) (differentiating acceleration of ordinary debt under contract law from rent under property law).

commercial leases); S.C. Code Ann. § 27-37-160 (execution of ejectment by constable or deputy sheriff). Furthermore, the peaceable dispossession of a Tenant after either the expiration of the term, or proper termination of the estate with reasonable notice, refers to the Landlord engaging in the judicial process to evict the Tenant. *See Colonial Oil Co. v. Am. Oil Co.*, 43 F. Supp. 718, 723 (D.S.C. 1942); *Pure Oil Co. v. Strom*, 172 S.C. 77, 79, 172 S.E. 780, 781 (1934). "Upon application" under Title 27, Chapter 37, Section 10, means that the Landlord must apply to a Magistrate for a Writ of Ejectment to lawfully evict the Tenant from the Premises. *See Monarch Mills, Lockhart Plant v. Godshall*, 173 S.C. 286, 289, 175 S.E. 552, 553 (1934). Only the magistrate judge may order a constable or deputy to remove the Tenant from the Premises. S.C. Code Ann. § 27-37-160.

A forcible entry, or a strong hand, is any "unlawful entry upon the [actual] possession of another." *Bates*, 87 S.C. at 530 (holding the owner of land liable for constructing a fence to keep out the possessor of land); *Jones*, 14 S.C. at 345 (holding that a strong hand merely "amount[s] to more than a bare trespass"). Hence, the intent required for committing a forcible entry is merely "a deliberate invasion of [one's] possession" of land. *Bates*, 87 S.C. at 531. Therefore, the Landlord's entry—as the disseizor—under color of title to the Premises, is a forcible taking, a dispossession of the premises, and a misappropriation, or conversion, of the Tenant's trade fixtures or personal property located therein. *See Parker*, 349 S.C. at 230-31 (finding defendant disseized the land when changing the locks to prevent access to the land); *Colonial Oil Co.*, 43 F. Supp. at 723-25 (citing *Beaudrot v. S. Ry.*, 69 S.C. 160, 165-67, 48 S.E. 106, 107 (1904)).

South Carolina law prohibits using a strong hand unlawfully to enter the tenements of another. S.C. Code Ann. § 27-5-110 ("No person shall make any entry into any lands and tenements but in case entry is given by law; and in such case not with strong hand nor with multitude of people, but only in peaceable and easy manner."). South Carolina law prohibits the forcible entry and detainer of tenements by depriving another of a freehold interest in land wrongfully, or by force, to oust the other from the land:

> If any person be put out or disseized of any lands or tenements in forcible manner or put out peaceably and be afterwards holden out with strong hand, or, after such entry, any feoffment or discontinuance in any wise thereof be made to defraud and take away the right of the possessor, the party grieved in this behalf shall have an action against such disseizor. S.C. Code Ann. § 15-67-410.

Thus, the right to forcibly remove a Tenant from the Premises belongs squarely with the Magistrate—not the Landlord. S.C. Code Ann. §§ 27-37-10 to -160.

The Landlord, whether acting individually or through its agents, unlawfully and forcibly detained the Plaintiffs from the possession of the Premises with a strong hand contrary to Title 27, Chapter 5, Section 110 and Title 15, Chapter 67, Article 5, Section 410 of the South Carolina Code. The Landlord, whether acting individually or through its agents, disseized the Premises from the Tenant by controlling access to the Premises and changing the locks to the Premises. Therefore, the Landlord, whether acting individually or through its agents, unlawfully entered the Premises and took occupancy of the Premises with a strong hand in violation of South Carolina law. S.C. Code Ann. §§ 27-5-110, 15-67-410. Regardless of the terms of the Lease, the implied, oral lease, or whatever lease resulted from the defective Lease ("Undetermined Lease"), the Landlord has no legal basis for evicting the Tenant due to nonpayment of rent when the Landlord has never resorted to the judicial process. S.C. Code Ann. §§ 27-35-140, 27-37-10(A)(1). S.C. Code Ann. §§ 27-37-10 to -160 (ejecting tenants).

On or around April 8, 2017, the Plaintiffs **MARK T. THOMAS** and **BRADLEY W. KERR** viewed the security footage for the salon, witnessing the Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** placing chains on the doors to the salon and rummaging around the salon counters near where the mail and cash was kept in the cash registers. Upon providing the Landlord proof of general liability insurance, the Landlord removed the chains on the salon doors on or around April 9, 2017.

On or around July 27, 2017, the Plaintiff **MARK T. THOMAS** was on the Premises conducting inventory of salon products, of which the Defendant **JAMES W. DURHAM** saw and acknowledged the Plaintiff **MARK T. THOMAS** present on the Premises. The Defendant **JAMES W. DURHAM**, acting as an agent of the Landlord, entered onto the Premises unannounced while the Plaintiff **MARK T. THOMAS** was on the Premises that evening. The Tenant, whether acting individually or through its agents, returned to the Premises in the normal, ordinary course of business to open the salon on or around July 28, 2017. The Tenant's salon manager Heather M. Loring notified the Plaintiffs that the salon doors to the Premises were locked thereby denying any of the Tenant's employees access to the Premises. The Tenants employees were unable to open the salon on the premises on or around July 28, 2017, because

the Landlord, whether acting individually or through its agents, changed the locks to the doors on the Premises thus preventing the Tenant's access to the Premises.

ii. THE LANDLORD OUSTED THE TENANT WRONGFUL DISSPOSSESSING THE PREMISES FROM THE TENANT

South Carolina law allows the Tenant to recover for damages from the Landlord engaging in a wrongful dispossession of the Premises. S.C. Code Ann. § 27-37-140. Wrongful dispossession is when a defendant deprives the plaintiff possession of the land by way of a wrongful intrusion and entry into that land, originating from trespass. *See Bradshaw*, 180 U.S. at 64. South Carolina law defines "an actual eviction [as] an actual expulsion or physical ouster of the tenant from a material part of the premises." *Thomas v. Hancock*, 271 S.C. 273, 275, 246 S.E.2d 604, 605 (1978). The factual circumstances surrounding an "ouster must be of an unequivocal nature, and so distinctly hostile to the rights of the other [tenants] that the intention to disseize is clear and unmistakable." *See Freeman v. Freeman*, 323 S.C. 95, 99, 473 S.E.2d 467, 470 (Ct. App. 1996). South Carolina law has determined that the act of changing the locks to prevent access to the premises manifests a clear and unmistakable intention to disseize another from the land. *Parker*, 349 S.C. at 230-31.

Hence, an eviction is the tenant's involuntary relinquishment and surrender of one's possession of land. *See Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 563, 772 S.E.2d 882, 887 (Ct. App. 2015). An eviction is any act that directly deprives the tenant's possession of the leased premises or impairs the tenant's quiet use and enjoyment of the premises. *Id.* By contrast, Abandonment is the tenant's voluntary relinquishment and surrender of one's possession of land. *See Thomas*, 271 S.C. at 275 ("[T]he abandonment of the leased premises by the tenant under such circumstances as to constitute a voluntary surrender of possession is not an eviction."); *Barbee v. Winnsboro Granite Corp.*, 190 S.C. 245, 247, 2 S.E.2d 737, 738 (1939) (deciding the case based on the tenant's failure to show "any intention to return to the dwelling house for the purpose of living therein" as abandonment). Abandonment of the rental premises does not occur when the tenant, who was in prior possession of the premises, maintains the appropriate *animus revertendi*. *See Bradshaw*, 180 U.S. at 66.

On or around July 27, 2017, the Landlord, whether acting individually or through its Agents, unlawfully evicted the Tenant from the Premises by engaging in self-help instead of resorting to the judicial process for ejecting a tenant from the leased property. S.C. Code Ann. §§

27-37-10 to -160. The Landlord forcibly removed the Tenant from the Premises by chaining the doors to the Premises on or around April 8, 2017. Again, the Landlord forcibly removed the Tenant from the Premises by changing the locks to the Premises on or around July 27, 2017. To date, the Landlord has never applied for a writ of ejectment to evict the Tenant from the Premises. Here, the Landlord's act of changing the locks is unequivocally and distinctly hostile to the Tenant's right to possession of the Premises to forcibly evict the Tenant from the Premises without engaging the judicial process to do so. The Landlord's intention to disseize the Premises from the Tenant by changing the locks when the Tenant clearly intended to continue the normal, ordinary course of business is clear and unmistakable. The Landlord's conduct is exactly the type of conduct prohibited by law.

The Tenant sent the Landlord a notice demanding possession of the Premises to the Landlord on August 4, 2017. The Tenant's trade fixtures and personal property located on the Premises are all still within the Landlord's possession, which are required for the Tenant to maintain the operations for the salon either on the Premises or elsewhere. Clearly, the Tenant's actions under the circumstances do not indicate that the Tenant abandoned the Premises. The Tenant's actions also clearly manifest that the Tenant had every intention of returning to the Premises the very next day after July 27, 2017. Obviously, the Tenant did not abandon the Premises: The Landlord locked out the Tenant from the Premises. Abandonment, and principles of law relating to abandonment, are inapposite because the Tenant never abandoned the Premises or voluntarily surrendered the Premises.

B. THE LANDLORD HAS UNLAWFULLY DISTRAINED THE TENANT'S PERSONAL PROPERTY AND TRADE FIXTURES ON THE PREMISES FOR RENT IN ARREARS

The Landlord, whether acting individually or through its agents, unlawfully detained and distrained the Tenant's personal property located on the Premises pursuant to South Carolina law. S.C. Code Ann. §§ 15-69-10 to -210. Regardless of the terms of the Undetermined Lease, the Landlord has no legal basis for personally withholding the Tenant's personal property due to nonpayment of rent. S.C. Code Ann. §§ 27-39-10 to -360 (distraining personal property of tenants). The law of distress is now governed by statutory principles that require the Landlord to properly apply before the magistrate judge for a pre-distress hearing before the Landlord may distrain the Tenant's personal property on the Premises for rent in arrears. S.C. Code Ann. §§ 27-

39-210 to -360 (authorizing only a constable, special constable, or appointed officer with the sheriff's department to engage in notifying the Tenant and collecting the Tenant's personal property—not the landlord).

No Landlord has the authority to enter the Premises forcibly to take the Tenant's personal property by breaking, or changing, the locks to make distress for rent in arrears. *See Jones v. Parker*, 81 S.C. 214, 221, 62 S.E. 261, 264 (1908) (finding agents of landlord liable for forcibly entering and breaking the locks to seize the tenant's personal property, causing the pregnant tenant to miscarriage from the emotional distress); *cf. Parker*, 349 S.C. at 230-31. Regardless of whether the Tenant surrendered the Premises voluntarily or involuntarily, the Landlord may not seize the Tenant's personal property on the Premises by means of self-help. S.C. Code Ann. § 27-39-270 (prohibiting landlords from engaging in self-help to remove the tenant's personal property from the premises).

Where the Landlord lacks a security interest in the personal property seized, the Landlord's self-proclaimed, authorized self-help in the Lease is not authorized by South Carolina law. *Cf. McLean v. Godwin Props., Inc.*, 292 S.C. 518, 522, 357 S.E.2d 473, 475 (Ct. App. 1987) (holding boat seller liable for conversion under a claim and delivery action for repossessing the boat when the sellers refused to pay because the seller failed to provide a bill of sale). When third-parties have an interest in the Tenant's personal property on the Premises, and the Landlord has knowledge of third-parties having an interest in the Tenant's personal property on the Premises, the third-parties must receive notice, and third-parties may assert their rights accordingly before the magistrate judge. S.C. Code Ann. § 27-39-250. Only the magistrate judge has the authority to order an officer to enter the Premises to collect rent from the Tenant or seize the Tenant's personal property in the amount sufficient for the rent in arrears. S.C. Code Ann. § 27-39-240.

C. THE LANDLORD FALSELY ASSERTED AUTHORITY OF THE LAW WHEN ENGAGING IN A SELF-HELP EVICTION OF THE TENANT AND DISTRAINING THE TENANT'S PROPERTY FOR RENT IN ARREARS

South Carolina law prohibits "[s]ham legal processes involving persons impersonating government officials or employees, or by persons falsely asserting authority of law." S.C. Code Ann. § 15-75-60. Only a constable or deputy by the magistrate order issuing a Writ of Ejectment may post the Writ of Ejectment on the Premises, and remove the Tenant from the Premises. S.C.

Code Ann. § 27-37-160. Moreover, the Landlord may not falsely assert the law by holding out that the forcible entry and detainer of the Premises by the Landlord is lawful under the color of the law by muttering magic words in the Lease such as evicting a tenant "without legal process." *See* (prohibiting). Additionally, only the officer by order of the magistrate court may enter the Premises to seize the Tenant's property for an action of distraint in the amount sufficient to pay the rent in arrears. S.C. Code Ann. § 27-39-240. For the Landlord to assert authority of the law to hold the Tenant's personal property as a means of distraint is a false assertion of the law. *See* S.C. Code Ann. § 15-75-60.

The Landlord also posted a fake eviction notice to the Premises on or around July 27, 2017. Only a constable or sheriff may post an eviction notice to the Premises by the order of a magistrate judge. Thus, the Landlord falsely impersonated the authority of the law to evict the Tenant from the Premises. Only an officer appointed by the magistrate judge in an action for ejectment has the authority to remove the Tenant from the Premises—not the Landlord. South Carolina law affords the Tenant the opportunity to show cause before being evicted from the leased premises as a matter of due process. Also, the Landlord's fake eviction notice directed third-parties to contact the Landlord directly to remove any third-party personal property from the Premises. And, the Landlord coordinated with the Tenant's employees allowing the Tenant's employees to remove their personal property from the Premises. The constable, special constable, or an appointed officer of the sheriff department only has the authority under the law regarding to distrain the Tenant's personal property for rent in arrears and notify the Tenant accordingly. South Carolina law affords the Tenant the opportunity to pay for rent in arrears before seizing the Tenant's property as a matter of due process.

Thus, the Landlord falsely asserts the law in a sham, operating this false legal sham *in terrorem* upon any who would challenge the Landlord's authority or reasonableness. Consequently, the Landlord has superseded the law acting in a manner as if the law does not apply to the Landlord—violating the law once again by engaging in self-help. Again, the Landlord clearly engaged in patently, illegal behavior to remove the Tenant from and Premises distrain the Tenant's personal property without resorting to the judicial process. The Landlord is not that special to deserve special treatment or exemption from the judicial process based on magic words in a poorly, written Lease in a manner of self-proclamation to be above the law.

Clearly, the law does apply to the Landlord rendering magic words such as "without legal process" worthless.

D. THE LANDLORD DEFAMED THE TENANT AS ABANDONING THE PREMISES

The Plaintiffs may recover for damage to their reputation "as the result of the [Defendants'] communication to others of a false message about the plaintiff." *Holtzscheiter v. Thomson Newspapers*, 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998). Spoken defamation published to a third party is slander. *See id.* at 508. Slander per se is when the "[t]he defamatory meaning of a message or statement [is] obvious on the face of the statement." *Id.* Slander per se that is actionable to degrade a business's reputation in the eyes of the peers, the community, or the public relates to "unfitness in one's business or profession" and presumes malice by the speaker. *Id.* at 510-11. Additionally, the Plaintiff must show that the defamatory statement was false when published to a third party, and the speaker either knew the defamatory "statement was false or had serious reservations about its truth." *Id.* at 512-13.

Here, the Landlord, whether individually or through its Agents, defamed the Tenant as abandoning the Premises to the Tenant's employees, the Tenant's customers, and a prospective business associate related to the Plaintiffs' business ventures separate from this Landlord-Tenant Dispute. For the Landlord to make a statement that the Tenant abandoned the Princess implies the lack of financial fitness of that business. In fact, the Landlord wrongfully evicted the Tenant from the Premises. The Landlord knew that the Landlord changed the locks to deny the Tenant access to the Premises. Unquestionably, the Landlord knew that the statement was false, or seriously misleading, without acknowledging for the Landlord's unlawful conduct in this Landlord-Tenant dispute. Any listener of such a defamatory statement about the Tenant would question the financial soundness of the Plaintiffs before entering into a business venture with the Plaintiffs. The Plaintiffs are at risk for losing prospective economic opportunities because of the Landlord patently lying about the Plaintiffs abandoning the Premises.

III. THE PLAINTIFFS SUFFER FROM INADEQUATE LEGAL REMEDIES TO MAINTAIN THE STATUS QUO IN PENDING LITIGATION FOR THIS LANDLORD-TENANT DISPUTE

Any legal remedy would be inadequate in this case because the Landlord, whether acting individually or through its Agents, continue to engage in ongoing conduct in violation of South Carolina law. The Landlord, whether acting individually or through its Agents, engaged in self-help eviction causing the catastrophic demise of the Tenant's business every day in lost profits

and lost inventory. Without recovering the Tenant's personal property on the Premises, the Tenant cannot salvage or wind up its business to address outstanding customer order requests, vendors, or creditors. The Landlord, whether acting individually or through its Agents, has caused all of the Tenant's employees, including key personnel holding the license to operate as a salon, to resign rendering the Tenant unable to operate the premises as a salon without the Tenant's key personnel or staff. The Tenant's loyal customer base has vanished with the Landlord closing the Tenant's doors to conduct business. The Tenant cannot salvage this business venture of the salon to reestablish the salon elsewhere when the Landlord maintains all of the Tenant's personal property and trade fixtures on the Premises still.

Moreover, the salon products currently within the Landlord's possession on the premises are subject to a limited shelf-life. Some, if not all, may have expired rendering the salon products worthless. The Landlord's conduct renders the Tenant unable to fulfill outstanding orders for salon products by the Tenant's customers. The Landlord's wrongful eviction has damaged the reputation concerning the launch of the Tenant's proprietary brand of salon products that the Tenant is unable to promote or sell. The Landlord's improper ejectment and distraint results in the Tenant experiencing hardships from resolving issues with third parties who have a legal interest in the property currently within the Landlord's possession on the premises.

The Landlord, whether acting individually or through its Agents, perpetuates the falsity that the Tenant abandoned the Premises when the Landlord locked out the Tenant knowingly and with hostility to prevent the Tenant from returning to the Premises the very next day. The Landlord's conduct is interfering with the Tenant's ability to conduct business ventures unrelated to the salon in downtown Greenville.

The Landlord is exclusively in possession of the Tenant's personal property located on the Premises, of which is critical evidence in potential foreseeable litigation to assess the Tenant's damages. Without access to the Premises to remove the Tenant's personal property, or recover the Tenant's business records, the evidence in potential litigation regarding this landlord-tenant dispute is subject to the intentional destruction and spoliation by the Landlord, whether acting individually or through its agents. *See Kershaw Cty. Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990) (implied holding that a different outcome ruling in favor of spoliation of evidence and appropriate sanctions were the defendants' intentional misconduct involved concealing or destroying evidence reasonably foreseeable in

litigation); *see generally* Kevin R. Eberle, SPOLIATION IN SOUTH CAROLINA, 19 S.C. LAW 26 (Sep. 2007) (discussing spoliation of evidence in South Carolina as the destruction of evidence or the failure to preserve evidence in pending or reasonably, foreseeable litigation).

IV. CONCLUSION

The Defendants' conduct, whether acting individually or collectively, is patently illegal under South Carolina law. South Carolina law does not afford any Landlord the remedy of self-help to resolve landlord-tenant disputes. The Plaintiffs moves this Court to enjoin the unlawful, ongoing behavior of the Defendants, whether acting individually or collectively, that is wreaking devastation upon the Plaintiffs on numerous grounds as previously discussed.

Respectfully submitted this 8 day of December, 2017.

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Deborah D. Davis, Esq.
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Attorney for Plaintiffs

Gantt Summary Court
FILED
DEC 08 2017

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE MAGISTRATE'S COURT
BLACKSTONE AND CHASE, LLC, Plaintiff(s), v. MARGARET H. DURHAM LIVING TRUST, Defendant(s).	2017CV2311003419 MAGISTRATE CIVIL CASE NO. **CERTIFICATE OF SERVICE** (WRONGFUL EVICTION UNDER SC. CODE § 27-37-140; FORCIBLE ENTRY AND DETAINER UNDER S.C. CODE § 15-67-410; TRESPASS UNDER S.C. CODE §§ 15-67-610, 27-5-110; CONVERSION UNDER S.C. CODE §15-69-20; FALSE ASSERTION OF THE LAW UNDER S.C. CODE § 15-75-60; UNFAIR TRADE PRACTICES UNDER S.C. CODE § 39-5-50; AND, ETC.)

The undersigned hereby certifies that I served a copy of the foregoing **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION** in this action dated December 8, 2017, on December 8, 2017 upon the adverse party to the following address:

Margaret H. Durham c/o
Joshua J. Hudson
457 North Church Street
Greenville, SC 29601

Robert K. Mehring
501 Furman Road St, Suite h
Greenville, SC 29609

I have served a copy of the foregoing by one of the following methods:

- [x] (1) Delivering a copy personally to the adverse party;
- [ ] (2) Mailing a copy to the adverse party's last known address, by depositing the copy in the U.S. Mail in an envelope with sufficient postage affixed;
- [x] (3) Delivering it by commercial delivery service in accordance with Rule 4(d)(9), SCRCP; or,
- [ ] (4) Other pursuant to Rule 5(b)(1), SCRCP:

Respectfully submitted this 8 day of December, 2017.

Deborah D. Davis, Esq.
SC Bar No.: 102942
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Gantt Summary Court
FILED
DEC 08 2017

STATE OF SOUTH CAROLINA	)	**IN THE MAGISTRATE COURT**
	)	
	)	
COUNTY OF GREENVILLE	)	
	)	**2017-CP-23-07820**
Blackstone & Chase	)	**2017-CV-231100-3419**
	)	CIVIL CASE NUMBER
Appellant	)	
	)	**APPEAL RETURN**
VS	)	**ADDENDUM**
	)	
Margaret H Durham	)	
	)	
Respondent	)	

FILED-CLERK OF COURT
PAUL D. MCCRORKLE
GREENVILLE, S.C.
2018 FEB -5 PM 2:02

An Temporary Injunction hearing was held January 29, 2018, and all parties appeared except for Plaintiff, Margaret Durham Living Trust, but it was duly noted that the estate was represented by Josh Hudson and Robert Merting, Attorneys At Law. Attorney, Deborah Davis, appeared along with her client and 3 witnesses on behalf of defendant, Blackstone & Chase, LLC.

Testimony was provided in reference to the Lessor, Maragaret Durham Living Trust, actually *changing locks on the rental in advance of eviction* and disallowing the Lessee to enter the leased property located at 17 West North Street due to default in rent payments. It was duly noted that this was in violation of SC section (§ 27-40-760) which states "a landlord may not recover or take possession of the dwelling unit by action or otherwise, including willful diminution of required essential services to the tenant by interrupting or causing the interruption of services, except in case of abandonment, surrender, termination, or as permitted in this chapter".

Also, it was duly noted that Lessor had total dominion and control over the locked mailbox on the property and did not let Lessee know that an eviction had been filed, and *intercepted mail* addressed solely to the Tenant / Lessee.

The Lessor did not disclose to the tenant that these important court documents were being received clearly in violation once again of SC Statute (§ 27-40-420) which states the "Landlord must disclose to the tenant in writing at or before the commencement of the tenancy the name and address of an owner of the premises or a person authorized to act on behalf of the owner as agent, ***for purposes of service of process and receiving or receipting notices or demands".*** Ms Davis also asserted that the Lessor violated SC statute **(§ 27-40-910)** which states Landlord retaliatory conduct is prohibited.

Deborah Davis, Attorney, had already filed an appeal *in advance of this hearing* and declared that there is valuable property still at the business location and this property lawfully belongs to the defendant, her client, and Lessor will not allow defendant to retrieve. Ms. Davis stated the property value is clearly in excess of $7500.00 which would automatically place jurisdiction within the Court of Common Pleas where she has filed and appealed prior to this hearing date. Mr. Josh Hudson, Attorney, also stated that a court date has been set for February 8, 2018, as well with the higher court to determine property and to hear facts relating to seizure of property by his client, Margaret Durham Living Trust.

Attorney Josh Hudson requested that Court of Common Pleas be allowed to hear all facts relating to eviction and the property value which exceeds Magistrates Court $7500.00 limited jurisdiction. Also, Attorney Josh Hudson requested that since all facts will have to be relayed again to the higher court that this Injunction hearing be held in abeyance to allow Court of Common Pleas to determine liability and culpability. It was so granted to allow all parties to appear on scheduled trial date of February 8, 2018 with the Court of Common Pleas and Court of Common Pleas to determine judgment on all matters.

Respectively Submitted,

January 31, 2018

Judge Jacquelyn L. Duckett

ELECTRONICALLY FILED - 2018 Oct 03 3:17 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Blackstone and Chase, LLC; Mark T. Thomas; Tensley E. Thomas; and Bradley W. Kerr, Plaintiffs, v. Margaret H. Durham Living Trust; Multiplex Systems, Inc.; Ice Rink Engineering and Manufacturing Company, LLC; EZ Glide 350, LLC; Margaret H. Durham; James W. Durham; Helen W. Shockley; and Tamala D. Crane, Defendants.	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT C.A. No. 2017-CP-23-07837 **ORDER**

This matter arises out of a dispute between the parties over a written lease agreement and its interpretation and enforceability. The Plaintiffs are the tenants who were evicted and removed from the premises by the Defendants, the landlord, for failure to pay rent.

EXISTENCE OF LEASE SUMMARY JUDGMENT

Plaintiffs motioned verbally for summary judgment regarding the existence of a lease. Defendant Margaret H. Durham Living Trust (hereafter the "Landlord") entered into a contract for lease (the "Lease") of real property with Plaintiff Blackstone and Chase, LLC represented by Plaintiff Bradley W. Kerr. During Lease negotiations Kerr represented himself as a member of Blackstone and Chase, LLC and Plaintiffs acknowledge as much. Blackstone and Chase, LLC is a member managed limited liability company and

> "any member of a member-managed company . . . may sign and deliver any instrument transferring or affecting the company's interest in real property. The

ELECTRONICALLY FILED - 2018 Oct 03 3:17 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

> instrument is conclusive in favor of a person who gives value without knowledge of the lack of the authority of the person signing and delivering the instrument." S.C. Code Ann. §33-44-301(c).

Plaintiffs have provided no evidence of public restrictions upon the authority of the Members of Blackstone and Chase, LLC, and therefore, Landlord could rightly rely upon the inherent authority of Kerr to bind Blackstone and Chase, LLC as a member of the company.

After executing the Lease, Plaintiffs entered into the building and took possession of the premises as allowed in the Lease. Plaintiffs signed multiple addendums to the Lease. Plaintiffs admit in their Complaint that each and every Plaintiff made payment upon the Lease. Plaintiffs chose to benefit from the Lease and are therefore bound by the terms of the Lease. The acts of occupying the premises and paying upon the Lease were ratifications of the same by Plaintiffs.

That Kerr signed the contract with Landlord prior to the formation of Blackstone and Chase, LLC does not negate the enforceability of the Lease. The signatory to a pre-formation contract is personally liable upon the contract, and when a company "assumes the obligation [of a contract] by its own act after incorporation" it will also be held liable upon the contract. *Hansen v. Fields Co.*, 409 S.C. 541, 763 S.E.2d 31 (S.C., 2014). All members of Blackstone and Chase, LLC and the company itself made payment upon the Lease, Blackstone and Chase, LLC took possession of the premises under the Lease, and the signatory to the Lease became a member of the company able to bind the company in matters of real property. S.C. Code Ann. §33-44-301(c). The knowledge of the terms of the Lease known by the signatory Kerr is imputed to the company through its member Kerr who signed and received a copy of the Lease. *See Indep. Nat. Bank v. Buncombe Prof'l Park, LLC*, 411 S.C. 605, 608, 769 S.E.2d 663, 665 (2015) ("The rule is that a principal has constructive notice of all the material facts which its agent,

ELECTRONICALLY FILED - 2018 Oct 03 3:17 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

while acting in the scope of his authority, receives notice."). Blackstone and Chase, LLC ratified the Lease "by accepting its benefits with full knowledge of its terms." *Hansen, 541.*

Even had Plaintiff Blackstone and Chase, LLC not ratified the Lease, Kerr is still obligated to Landlord under the Lease, and any other occupants of the premises become guests of Kerr without the privilege of being tenants. Any attempt by Kerr to sublet or assign the Lease without Landlord's permission would be a violation of Section 22 of the Lease. Therefore, even had Blackstone and Chase, LLC not ratified the Lease, Kerr is still bound by the Lease, and any occupants of the premises occupied the premises under the Lease and through Kerr.

The Court finds a valid contract was formed between Landlord and Kerr when he signed the Lease on behalf of Blackstone and Chase, LLC, and the company ratified the Lease when its member, Kerr, knowing the terms of the Lease, took possession of the premises and made payment upon the Lease for Blackstone and Chase, LLC. A single member of an LLC may bind the company, and an operating agreement is ineffective against a party who gave value in good faith. S.C. Code Ann. §33-44-301(c). The other Plaintiffs received the benefit of the Lease, made payments upon the Lease, and recognized the Landlord as such thereby ratifying the contract.

SMOKE DAMAGE INCURRED BY DEFENDANTS

Defendants allege that more than the Landlord's real property was damaged by smoke caused by Plaintiffs, and that their claims were to include the personal property owned by all Defendants and not just Landlord. To the extent the Defendants' claims are unclear, the Court grants the Defendants motion to make a more definite statement.

Further, only Landlord is bound by the Lease, and the other Defendants who are occupants of the building are not so bound. Plaintiffs are liable to these Defendants for their tortious acts regardless of the nature of the Lease.

ELECTRONICALLY FILED - 2018 Oct 03 3:17 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

CONVERSION

Defendants allegations of conversion of personal property in the form of fixtures is a cause of action found in law. *Kutter v. Smith*, 69 U.S. 491, 495, 17 L. Ed. 830 (1864). Defendants are entitled to conduct discovery on this issue and a dismissal at this stage would be premature.

NUISANCE

Defendants allege that Plaintiffs music was played at a nuisance volume while Plaintiffs allege their music was not so voluminous. Defendants are entitled to conduct discovery on this issue and a dismissal at this stage would be premature.

ABUSE OF PROCESS

The Court has already acknowledged that Plaintiffs have made this case a "procedural Labyrinth" and admonished them for failing to abide by Rule 8(a). Order, February 28, 2018, Judge Perry H. Gravely. Plaintiffs continue this behavior showing a disregard of judicial economy. Plaintiffs multiple complaints against multiple persons without specificity of who took what action leaves Defendants and the Court in a quagmire parsing what the Plaintiffs mean.

There is a factual question on why Plaintiffs have brought such convoluted and lengthy filings, and under such circumstances, Defendants charge of Abuse of Process should remain for determination by a finder of fact.

DEFENDANTS MOTION TO STRIKE DEFENSES

Plaintiffs Motion for a More Definite Statement under Rule 12(e) regarding Defendants Second, Third, and Sixth Defenses is denied.

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FAILURE TO STATE A CLAIM PREVIOUSLY LITIGATE

Plaintiffs present thirteen causes of action in their Second Amended Complaint that are either new or rewritten from their previous Amended Complaint. Defendants earlier Motion to Dismiss for Failure to State a Claim was only heard for the earlier Amended Complaint that did not include the new and corrected causes of action. Defendants' current claim has not been previously litigated, and therefore the Defendants may assert this defense.

JUDGMENT ON THE PLEADINGS

Plaintiffs' Motion for Judgment on the Pleadings is inappropriate because there are numerous issues of fact. Plaintiffs and Defendants are at odds over the existence of the Lease, the validity of its clauses, its enforceability, the legality of the eviction and distraint, the existence of a nuisance, and even whether there was a fire or a smoke incident upon the premises. These issues necessitate discovery and later determination by the finder of fact.

To the extent the Court is to rule on the pleadings before it, Landlord was contractually authorized to evict the Plaintiffs without resort to the judicial process and to distrain or seize the property within the premises to cover damages incurred by Landlord.

Section 20.2 of the Lease between Landlord and Plaintiffs authorizes the Landlord to "reenter and remove all persons and properties from the Premises and dispose of such property as it deems fit." Such remedy may be resorted to "with or without legal process." *Id.* In commercial leases, the provisions of the contract control. See *KBR Development v. Yansy Realty, Inc.* 2005 WL 7083858, No. 2005-UP-217, 2. (S.C. Court of Appeals) ("The lease provided KBR with the self-help option of repossessing the property if lease payments were overdue by fifteen days. Therefore, KBR acted within their legal rights."). Improvements made to the real estate by Plaintiffs become the property of Landlord under Section 9.4 of the Lease. *Id.* ("All Lessee

ELECTRONICALLY FILED - 2018 Oct 03 3:17 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

Alterations, including, but not limited to, all walls, railings, carpeting, floor and wall coverings and other permanent real estate fixtures (excluding, however, Lessee's moveable trade fixtures and equipment) made by, for, or at the direction of Lessee, will when made, become the property of Lessor and will remain upon the Premises at the expiration or earlier termination of this Lease.") Trade fixtures installed by Plaintiffs become the property of Landlord if not removed by the termination of the Lease. *Id.* ("Any trade fixtures or equipment not removed by Lessee at the expiration or earlier termination of this Lease will, at the Lessor's option, become the property of the Lessor or Lessor will be entitled to remove and dispose of such property.") Consequently, Landlord was within its contractual rights to take the actions complained of by Plaintiffs.

ABANDONMENT, WAIVER, ESTOPPEL, LACHES AND UNCLEAN HANDS

Plaintiffs make a multitude of claims on events ongoing for more than a year and Defendants may respond to the same with any defense supported by the facts as determined by the fact finder. To rule upon said defenses prior to discovery is premature.

DEFAULT

Plaintiffs request to dismiss the Defendants defense of default is denied because the Lease was validly entered, and the Plaintiffs have waived the right to challenge it and are estopped from the same due to their actions availing themselves of the benefits of the Lease.

MITIGATION OF DAMAGES

Plaintiffs allege that Defendants have failed to mitigate damages by not reletting the property. However, Defendants allege they have been unable to relet the property due to Plaintiffs' failure to cooperate in the removal of personal property. These allegations are directly

ELECTRONICALLY FILED - 2018 Oct 03 3:17 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

contrary and present a factual dispute unripe for dismissal under SCRCP 12(b)(6) or summary judgment. Therefore, this claim must remain.

MOTION TO STRIKE PARAGRAPHS

Plaintiffs Second Amended Complaint includes multiple paragraphs. Defendants have denied the allegations of Plaintiffs, and Plaintiffs cannot re-characterize such denials. Plaintiffs must now proceed with Defendants response. Motion is denied.

CONCLUSION

Plaintiffs' arguments for summary judgment are premature. Defendants cannot be denied their defenses, and the Court will not dismiss Defendants Answer. Plaintiffs have brought multiple, redundant claims on what should be a simple case, and have filed lengthy pleadings with alternative arguments necessitating the complex defenses by Defendants. Plaintiff cannot now object to Defendants actions to defend themselves against such a Complaint. Therefore, Plaintiffs' Motion to dismiss and for partial summary judgment is denied.

Therefore, the Court orders as follows:

1) Plaintiffs Motion for Summary Judgment is denied.
2) Plaintiffs Motion to dismiss the counterclaims and defenses of Defendants is denied.
3) Defendants Motion to amend their counterclaims is granted.
4) The written Lease between Blackstone and Chase, LLC and The Margaret H. Durham Living Trust is valid and enforceable.

ELECTRONICALLY FILED - 2018 Oct 03 3:17 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Circuit Court Judge

October ____, 2018
Greenville, South Carolina

ELECTRONICALLY FILED - 2018 Oct 03 3:17 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

Greenville Common Pleas

Case Caption: Blackstone And Chase Llc , plaintiff, et al vs. Margaret H Durham Living Trust , defendant, et al

Case Number: 2017CP2307837

Type: Order/Summary Judgment

So Ordered

s/ Honorable G. Thomas Cooper, Jr. Circuit Judge 2126

ELECTRONICALLY FILED - 2018 Oct 29 9:35 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
	2017-CP-23-07837
Blackstone and Chase, LLC; Mark T. Thomas; Tensley E. Thomas; and Bradley W. Kerr Plaintiffs v. Margaret H. Durham Living Trust; Multiplex Systems, Inc.; Ice Rink Engineering and Manufacturing Company, LLC; EZ Glide 350, LLC; Margaret H. Durham; James W. Durham; Helen W. Shockley; and Tamala D. Crane Defendants	**ORDER DENYING PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT**

This Court has reviewed the Plaintiffs' Motion for Consideration to Alter or Amend Judgment and this Court's Order of October 3, 2018 denying Plaintiffs' Motion for Summary Judgment, denying Plaintiffs' Motion to Dismiss Defendants' Counterclaims, granting Defendants' Motion to Amend, and declaring the lease between the parties enforceable. After careful consideration of the Defendants' Motion, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES Defendant's Motion pursuant to Rule 59(e) SCRCP to Alter or Amend the Judgment entered on or about October 3, 2018.

Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

ELECTRONICALLY FILED - 2018 Oct 29 9:35 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

AND IT IS SO ORDERED.

_____

G. Thomas Cooper, Jr.
Presiding Judge, Seventh Judicial Circuit

October 28, 2018

ELECTRONICALLY FILED - 2018 Oct 29 9:35 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

Greenville Common Pleas

Case Caption: Blackstone And Chase Llc , plaintiff, et al vs. Margaret H Durham Living Trust , defendant, et al

Case Number: 2017CP2307837

Type: Order/Other

So Ordered

s/ Honorable G. Thomas Cooper, Jr. Circuit Judge 2126

ELECTRONICALLY FILED - 2018 Oct 30 8:36 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
	2017-CP-23-07837
Blackstone and Chase, LLC; Mark T. Thomas; Tensley E. Thomas; and Bradley W. Kerr	
	AMENDED
Plaintiffs	**ORDER DENYING PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT**
v.	
Margaret H. Durham Living Trust; Multiplex Systems, Inc.; Ice Rink Engineering and Manufacturing Company, LLC; EZ Glide 350, LLC; Margaret H. Durham; James W. Durham; Helen W. Shockley; and Tamala D. Crane	
Defendants	

This Court has reviewed the Plaintiffs' Motion for Consideration to Alter or Amend Judgment and this Court's Order of October 3, 2018 denying Plaintiffs' Motion for Summary Judgment, denying Plaintiffs' Motion to Dismiss Defendants' Counterclaims, granting Defendants' Motion to Amend, and declaring the lease between the parties enforceable. After careful consideration of the Plaintiffs' Motion, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES Plaintiffs' Motion pursuant to Rule 59(e) SCRCP to Alter or Amend this Court's Judgment entered on or about October 3, 2018. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

ELECTRONICALLY FILED - 2018 Oct 30 8:36 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

AND IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Presiding Judge, Thirteenth Judicial Circuit

October 28, 2018

ELECTRONICALLY FILED - 2018 Oct 30 8:36 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

Greenville Common Pleas

Case Caption: Blackstone And Chase Llc , plaintiff, et al vs. Margaret H Durham Living Trust , defendant, et al

Case Number: 2017CP2307837

Type: Order/Other

So Ordered

s/ Honorable G. Thomas Cooper, Jr. Circuit Judge 2126

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
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January 23, 2019

Mrs. Deborah Dickson Davis, Esquire
439 Congaree Road, Mailbox 6
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Mr. Robert Karl Merting, Esquire
501 Furman Rd.
Suite W
Greenville SC 29609

Mr. Joshua Jennings Hudson, Esquire
PO Box 10529
Greenville SC 29603

Re: Blackstone and Chase, LLC v. Margaret H. Durham
Appellate Case No. 2018-001976

Dear Counsel:

This Court has received the notice of appeal. A preliminary review of the order(s) challenged on appeal indicates they might not be immediately appealable.

Accordingly, it is requested that all parties serve and file a memorandum addressing the issue of appealability within ten (10) days of the date of this letter. The time limits for perfecting the appeal are held in abeyance pending the Court's consideration of the memoranda.

Very truly yours,

V. Clerk Deputy

CLERK

The South Carolina Court of Appeals

Blackstone and Chase, LLC; Mark T. Thomas; Tensley E. Thomas; and Bradley W. Kerr, Appellants,

v.

Margaret H. Durham Living Trust; Multiplex Systems, Inc.; Ice Rink Engineering and Manufacturing Company, LLC; EZ Glide 350, LLC; Margaret H. Durham; James W. Durham; Helen W. Shockley; and Tamala D. Crane, Respondents.

Appellate Case No. 2018-001976

ORDER

After careful consideration of the parties' filings, this appeal is dismissed because the underlying orders are not immediately appealable pursuant to section 14-3-330 of the South Carolina Code (2017). *See also Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994) (holding the denial of a motion for summary judgment is not immediately appealable because it does not finally determine anything about the merits or strike a defense); *Baber v. Greenville Cty.*, 327 S.C. 31, 40, 488 S.E.2d 314, 319 (1997) ("An interlocutory denial of summary judgment is not a final order and is subject to change by the trial court.")

FOR THE COURT CJ

Columbia, South Carolina

cc:

FILED
April 4, 2019

Deborah Dickson Davis, Esquire
Robert Karl Merting, Esquire
Joshua Jennings Hudson, Esquire

EXHIBIT B

ELECTRONICALLY FILED - 2018 Feb 07 2:33 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307820

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE THIRTEENTH
)	JUDICIAL CIRCUIT
COUNTY OF GREENVILLE)	
)	COMMON PLEAS CIVIL CASE NO.
Blackstone and Chase, LLC)	2017-CP-23-07820
(Tenant))	
)	MAGISTRATE CIVIL CASE NO.
Appellant,)	2017CV2311003419
)	
v.)	
)	
Margaret H. Durham Living Trust)	**RESPONSE TO AMENDED APPEAL**
(Landlord))	
)	
Respondent.)	
)	

LAW OF SELF HELP EVICTIONS

"The rule in this state is that, where the tenancy has terminated, the landlord may enter upon and retake possession of the premises, and he commits no trespass upon the real estate in so doing, even if force is used in making such entry, and therefore, in such a case, he is not liable to a civil action for trespass." *Barbee v. Winnsboro Granite Corporation,* 190 S.C. 245, 2 S.E.2d 737, 738 (1939) (citing *Rush v. Aiken Manufacturing Company,* 58 S.C. 145, 36 S.E. 497, 499, 79 Am.St.Rep. 836 (1900) (Concurring opinion Chief Justice McIver). In *Rush* the court held that a landlord could re-enter and seize the premises without incurring liability as a trespasser ab initio. *Id.* 36 S.E. at 499 ("he cannot be made liable as a trespasser ab initio on the real estate because of the use of force in making the entry, or because of the trespass upon the person of the tenant.") (citing *Willoughby v. Railroad Co.,* 32 S.C. 410, 11 S.E. 339 (S.C. 1890).

Barbee is one in a long line of cases that recognize that a contract can create a right to enter upon lands if a tenant defaults. In the predecessor case *Willoughby v. Ne. R. Co.* the SC Supreme Court upheld a contract created license to enter upon the lands of another and recover

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rented equipment when the lessee defaulted. *Willoughby v. Ne. R. Co.*, 11 S.E. 339, 32 S.C. 410 (S.C., 1890)("it is difficult to conceive how one can be regarded as a trespasser upon real estate when he has the permission of the owner to enter"). *Willoughby* was cited favorably in *Rush. Rush v. Aiken Mfg. Co.*, 58 S.C. 145, 36 S.E. 497, 499, 79 Am.St.Rep. 836 (1900) ("We are satisfied that the true doctrine is stated in *Willoughby v. Railroad Co.*").

Sometime after the decision in *Barbee*, self-help evictions were statutorily limited in residential contracts. *See e.g.* S.C. Code Ann. § 27-40-330(a)(1) (prohibiting the waiver of rights set out in this chapter); S.C. Code Ann. § 27-40-760 (limiting means for landlord to recover property). However, in commercial leases, the right to contract is not so limited and the parties are free to set different terms. *See e.g.* S.C. Code Ann. § 27-35-75 (A) (recognizing the right to alter statutory provisions in a commercial lease); *Hairston v. Carolina Wholesale Furniture*, 353 S.E.2d 701, 703 291 S.C. 371 (S.C. App., 1986)("the lease means what it says and says just what it means").

In the 2005 case *KBR Development, LLC v. Yansy Realty, Inc.* the SC Court of Appeals considered an action where a landlord re-entered leased premises after a default by the tenant. The Court observed "the lease provided [landlord] with the self-help option of repossessing the property if lease payments were overdue by fifteen days." *Id.* No. 2005-UP-217, 2005 WL 7083858 (S.C. Ct. App., 2005). After determining "[landlord] complied with the lease's notice requirements," the Court concluded "therefore, [landlord] acted within their legal rights" to repossess the premises. *Id.* The Court upheld the Trial Court's "fail[ure] to charge the jury on the law of unlawful eviction . . . [because] A trial court must charge the current and correct law." *Id.* (citations omitted). The Court further found that when landlord detained assets on the premises

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and conveyed the same it "was in lawful possession of the [premises] at the time it conveyed the equipment." *Id.* Therefore the tenant was denied recovery on their conversion claim.

Limitations on self-help evictions are designed to prevent violence or a breach of the peace. "Where the dispossession has been performed peaceably upon the termination of the tenancy, or after notice to quit, the majority of the Courts, including our own, refuse to allow any recovery by the one dispossessed." *Barbee v. Winnsboro Granite Corporation,* 190 S.C. 245, 2 S.E.2d 737, 738 (1939). *Barbee* provides a fruitful discussion regarding what constitutes peaceable entry upon a premises. "The entry by the owner, who is entitled to the immediate possession, by the mere act of unlocking a door of his own property, during the absence of a wrongful tenant, unaccompanied by any circumstances of force or violence, would in no way tend to a breach of the peace, or come within the evils to be prevented by the statute." *Id* at 739. "It is entirely well settled that, unless the tenant is driven off either by actual force applied to him, or as the only apparent way of avoiding its use [against him] at the time, he cannot be regarded as forcibly expelled, and there is no forcible entry." *Id.* internal citations omitted. For the force used by the landlord to be "unlawful [it] must be against the tenant himself." Id.

RELEVANT FACTS IN CASE

Blackstone and Chase, LLC Dba Liberty Fine Cuts and Shaves (hereafter "Tenant"), by and through their attorney, has appealed their eviction from the leased premises and moved for a preliminary injunction enjoining the Margaret H. Durham Living Trust (hereafter "Landlord") from enforcing the Writ of Ejectment ordered on December 7th, 2017.

On or about March 8, 2016, Tenant entered into a written lease agreement (hereafter "Lease") with Landlord for a commercial space located at 17 West North Street in the City of Greenville, South Carolina. The premises so leased were commercial in nature and was to be

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operated as a salon. Section 3 of the Lease provided that rent was due "on or before the first day of each calendar month." Lease between Blackstone and Chase and the Margaret H. Durham Living Trust, March 8, 2016, § 3.

Tenant was perpetually late in payment of rent. Tenant's Amended Appeal ¶ 12. In May of 2017, Landlord notified Tenant that late rent payments were unacceptable, and prompt payment was made for the month of June. *Id.* However, in July no rent payment was made. On July 13th, 2017 Landlord drafted a letter demanding rent and giving notice of default. The letter was mailed the next day and received by Tenant on July 17th, 2017. *Id.* ¶ 11. Said letter notified Tenant that failure to cure a default would result in termination of the lease agreement and eviction from the premises. Letter from Landlord to Tenant, July 13th, 2017.

The Lease requires that Landlord give Tenant notice of default, and where default is the failure to pay monies owed, ten days to cure said default. Lease § 20.1. Tenant was arrears in rent and Landlord provided notice of default on July 17th 2017. On July 28th, 2017, after the elapse of 10 days, Landlord exercised its contractual right to reenter the premises. *Id.* § 20.2.

Between the provision of notice on July 17th, 2017 and the re-entry of the premises by Landlord on July 28th, 2017, the Tenant caused a fire in the premises on July 21st, 2017. Greenville City Fire Report, July 21st, 2017. Said fire created significant smoke throughout the building. Landlord's agents, occupying another unit in the building as their residence, feared that a future occurrence may not end as well as the first. (Affidavit of James W. Durham.) Landlord's agents were alarmed to learn that Tenant repeated the behavior that caused the July 21st, 2017 fire, and they feared for their safety. *Id.*

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In light of the fire and the uncorrected behavior that caused it, Landlord was not amenable to providing any further extensions or grace periods to Tenant to pay rent or cure the defaults.

ARGUMENT

This case, like *KBR Development, LLC v. Yansy Realty, Inc.*, involves a commercial lease that specifically allows for self-help. Like the landlord KBR, Landlord "complied with the lease's notice requirements" and waited the contractual time before exercising the "self-help option of repossessing the property." *Id.* Tenant was given the time required by contract to cure their failure to pay rent, and they failed to do so. Landlord's agent and Tenant's agent spoke cordially the day before eviction and no offer to pay the rent demanded was made at that time. Tenant's Amended Appeal ¶ 14.

Landlord and Tenant are sophisticated parties who freely and voluntarily entered into a standard commercial lease. The provisions of the lease governed their behavior, limited their damages, and provided for remedies. Though Tenant may be unhappy with the bargain it struck, "it is not this Court's function to rewrite agreements between the parties. [Tenant] agreed to the lease's terms and is now bound by them." *Hairston v. Carolina Wholesale Furniture,* 353 S.E.2d 701, 703 291 S.C. 371 (S.C. App., 1986).

Landlord had a contractual option to terminate the tenancy by Tenant and "where the tenancy has terminated, the landlord may enter upon and retake possession of the premises." *Barbee v. Winnsboro Granite Corporation,* 190 S.C. 245, 2 S.E.2d 737, 738 (1939) (citing *Rush v. Aiken Manufacturing Company,* 58 S.C. 145, 36 S.E. 497, 79 Am.St.Rep. 836 (1900) (Concurring opinion Chief Justice McIver). Further, the Lease allows Landlord to recover damages and to dispose of any personal property remaining in the premises "as it deems fits."

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Lease § 20.2. "Where a man is licensed to do a thing, it necessarily implies that he may do everything without which the thing authorized to be done cannot be done." *Willoughby v. Ne. R. Co.*, 11 S.E. 339, 347, 32 S.C. 410 (S.C., 1890) (citing 1 Add. Torts, § 447, p. 452). Here, Landlord could not evict Tenant without first re-entering the premises, and it could not recover its damages without first taking possession of the property within the premises. Both actions, in light of *KBR*, *Barbee*, and *Willoughby*, are within the legal rights of Landlord.

Landlord repossessed the property without a breach of the peace. Its entry was accomplished by unlocking the door during the absence of Tenant. *Barbee v. Winnsboro Granite Corporation*, 190 S.C. 245, 2 S.E.2d 737, 738 (1939) ("The entry by the owner, who is entitled to the immediate possession, by the mere act of unlocking a door of his own property, during the absence of a wrongful tenant, unaccompanied by any circumstances of force or violence, would in no way tend to a breach of the peace, or come within the evils to be prevented by the statute."); *Willoughby v. Ne. R. Co.*, 11 S.E. 339, 32 S.C. 410 (S.C., 1890) ("A person licensed to enter upon the lands of another may use any means, even to the extent of actual force, necessary for the purpose, provided that in so doing he does not commit a breach of the peace."). Landlord posted notice of Tenant's eviction and avoided confrontation with Tenant. In fact, Landlord and Tenant have not talked directly with each other since July 27th, 2017. In no way was Landlord's action in breach of the peace or even near breach of the peace.

Landlord and Tenant, as commercial entities, entered into a commercial lease. The terms of the Lease were clear and specifically allow self-help evictions, detainer, and distraint. Self-help evictions in commercial leases are allowed in this state when accomplished without a breach of the peace. Landlord was able to peacefully enter the premises by the use of a key during Tenant's absence and thereupon evicted Tenant in accordance with the lease. This peaceful

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eviction, specifically authorized under the terms of the negotiated for lease, should be upheld by the Court.

Respectfully Submitted,

ROE CASSIDY COATES & PRICE, P.A.

s/ Joshua J. Hudson
Joshua J. Hudson (SC Bar # 100311)
jhudson@roecassidy.com
1052 North Church Street
Post Office Box 10529 (29603)
Greenville, South Carolina 29601
Tel: 864.349.2600
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AND

Robert K. Merting
R. K. Merting, LLC
501 Furman Road, Suite W
Greenville, South Carolina 29609

Attorneys for Landlord

Greenville, South Carolina

February 7, 2018

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS
Blackstone and Chase, LLC, Appellant, v. Margaret H. Durham Living Trust, Respondent.	C.A. No. 2017-CP-23-07820 **AFFIDAVIT OF JAMES W. DURHAM**

James W. Durham, after being duly sworn, deposes and states as follows:

1. My name is James W. Durham.

2. I am over 21 years of age.

3. I am under no disabilities.

4. I am competent to give this affidavit.

5. I am an authorized representative of the Respondent herein, Margaret H. Durham Living Trust ("Landlord").

6. The facts stated herein are facts that I could testify to at trial.

7. The facts stated herein are within my personal knowledge.

8. Landlord owns real property and improvements located at 17 W. North Street, in the Central Business District of Greenville, South Carolina (the "Property").

9. My wife, Margaret Durham, is the Settlor of the Margaret H. Durham Living Trust that owns the Property. She and I live on the third floor of the Property.

10. In March, 2016, we leased the first floor (street level) of the Property to the Appellant herein, Blackstone and Chase, LLC ("Tenant") for use as a barber shop. (The Office Lease Agreement ("Lease") is attached to Appellant's Appeal as Exhibit C.)

11. Throughout the tenancy, Tenant mistakenly believed that the rent was due by the 8th of each month because of an amendment to the Lease which indicated the Lease term began on the 8th of May, 2016 (Exhibit 3 of the Lease). However, Section 3 of the Lease is clear that payments were due by the 1st of each month.

12. Nevertheless, we accepted the late payments (often even later than the 8th) each and every month despite repeatedly informing Tenant that rent was due on the 1st. The only month during the fourteen month tenancy in which the payment was made on time was in June of 2017, after a stern warning by Landlord.

13. After the early part of the tenancy, Tenant's business seemed to not be going well. Subsequently, Tenant began stocking and serving liquor and beer. Tenant created a bar area with large displays of various liquors, installed signage of all sizes around the barber shop and placed portable signs outside on the W. North Street sidewalk advertising the alcohol, and kept the refrigerator stocked with beer.

14. There was heavy alcohol consumption, primarily on Thursday and/or Friday nights, and mostly after the barber shop had closed. We became extremely concerned from a liability standpoint. Law enforcement was contacted on several occasions, most commonly due to the Property alarm being activated after hours.[1]

15. At all times relevant hereto, Tenant never had a liquor license.

[1] An Addendum to the Lease indicated that the Property alarm was set nightly after 9:00 pm and if Tenant needed to be on the premises after that time, Landlord needed to be informed.

16. In early spring, 2017, I had a long conversation with Tensley S. Thomas, who I learned was a partner in the business. Mr. Thomas informed me that he had put his entire retirement from Duke Energy into the business and that it was not going well at all.

17. Around this time, Tenant's employees began informing me when I spoke with them that their pay checks were bouncing or they were not getting paid at all.

18. On April 6, 2017, while I was out of town, my wife Margaret received a certificate of insurance from Kendall & Associates Insurance dated March 22, 2017 indicating that Tenant's commercial liability insurance as required by the Lease had been cancelled as of March 21, 2017. Margaret called Kendall & Associates and was advised by a representative that the coverage had been cancelled due to non-payment of the last month's premium. The Lease requires a 30 day notice of any change in insurance, yet Tenant had provided none.

19. On April 10, 2017, we were advised over the phone that coverage had been reinstated and would remain in force until July 8, 2017.

20. On May 15, 2017, the fire marshal conducted a building inspection and issued an order to correct on Tenant, a copy of which is attached hereto.

21. The July 8th expiration date for Tenant's subsequently obtained liability insurance came and went and again, Tenant failed to provide the required change of insurance notice.

22. On July 10, 2017, Margaret spoke with another representative at Kendall & Associates and they emailed her an updated certificate of insurance for the period of July 8, 2017 to July 8, 2018.

23. On July 18, 2018 a Kendal & Associates representative confirmed to Margaret that coverage was in effect, but had only been paid through August 1, 2017. Lack of funds forced Tenant to arrange for a monthly installment payment plan that carried with it immediate

cancellation terms for non-payment. With such a plan, it would be impossible for Tenant to notify Landlord 30 days prior to any change or cancellation of insurance coverage.

24. On July 13, 2017, well after the July rent payment was due, we sent Tenant a Notice of Default by certified mail in compliance with the Lease terms, which was signed for on July 17, 2017.

25. On July 21, 2017, the fire department responded to the Property's alarm and discovered that a roasting pan used as a towel warmer in the barber shop was left on overnight and was on fire. The smoke damage incurred as a result is estimated at approximately $100,000 to remedy.

26. According to the fire marshal, this was due to an absolute failure and disregard of Tenant to do what they had been instructed to do back in May.

27. When we spoke to Penn National, Tenant's insurance company about this on July 24, 2017, we were informed that they were unable to locate the policyholder.

28. Landlord never heard from Tenant with regard to the fire.

29. After this event, I intentionally entered the premises every night to ensure that all the improperly used cooking devices had been disconnected as the fire department had instructed the Tenant to do until the warmers could be replaced with UL approved "towel warmers."

30. On the night of July 27, 2017, at around 8:30 p.m., I walked into the parlor through the rear doorway unaware that Mark Thomas, a Tenant partner, was behind the counter and just in front of the partition wall that Tenant had constructed.

31. I proceeded to each cooker as usual and found that one cooker was still plugged in, still on high heat, and still full of towels.

32. When I noticed Mr. Thomas he simply looked at me and said "I'm sorry."

33. I unplugged the cooker and while we were standing there, Mr. Thomas said nothing about the default notice or rent due.

34. I then exited the premises and Mr. Thomas did as well shortly thereafter.

35. On July 28, 2017, more than ten days after the notice was sent, in order to protect my wife and me who live in the Property, we locked the doors. (*See* ABC Locksmiths, LLC receipt, attached hereto.)

36. From July 17, 2017 forward, Tenant made no attempt to keep the business open, retrieve personal property, mail, pay rent or discuss terms or its intent with us until August 5th, when we received a letter from Tenant's previous attorney, Cole R. Portney.

37. Due to Tenant's total disregard of the fire marshal's demands, we corrected the most dangerous violations, all of which could affect the entire building and its occupants, two of whom are my wife and me who reside in the Property.

38. Ultimately, we found it necessary to lock out the Appellant for the following reasons:

a. Adequate proof of insurance had not been provided;
b. The Fire Marshal's orders, including removal of an obstruction to access the electrical room for all levels of the building, were not followed after two and a half months;
c. Rent was past due;
d. Proof of a liquor license had not been shown; and
e. The expected use of the property was for a barber shop facility and not an after-hours night club, with alcohol being served to non-customers.

39. Currently, due to Tenant's pleadings, we are at a standstill and are unable to relet the premises until we can accomplish the following:

a. Correct the remaining infractions cited by the fire marshal that were neglected by Tenant;
b. Remove all temporary structures and other items placed within the space by Tenant so that the area can be cleaned of smoke residue by ServPro;

c. Hire a contractor to remove the paint that Tenant left on the expensive hardwood floor and walls of the premises in violation of the Lease terms;
d. Hire a contractor to remove the poorly constructed partitions, sinks at each station, plumbing, wiring, and other crudely installed structures that Tenant added to the space that cannot remain since it would be of no future value to anyone;
e. Remove the large laundry sink installed in the space by Landlord that has been destroyed by Tenant during the Lease period; and
f. Clean the space for future use.

40. The cost of repairs that are needed is currently estimated at $110,000.00. Accelerated rent stands at $152,750.00. Past due rent is $3,612.50.

41. The value of Tenant's personal property still located at the premises is, by Tenant's own valuation, worth $139,307.26, which is considerably less than what Landlord is owed.

42. Tenant admits that it is insolvent.

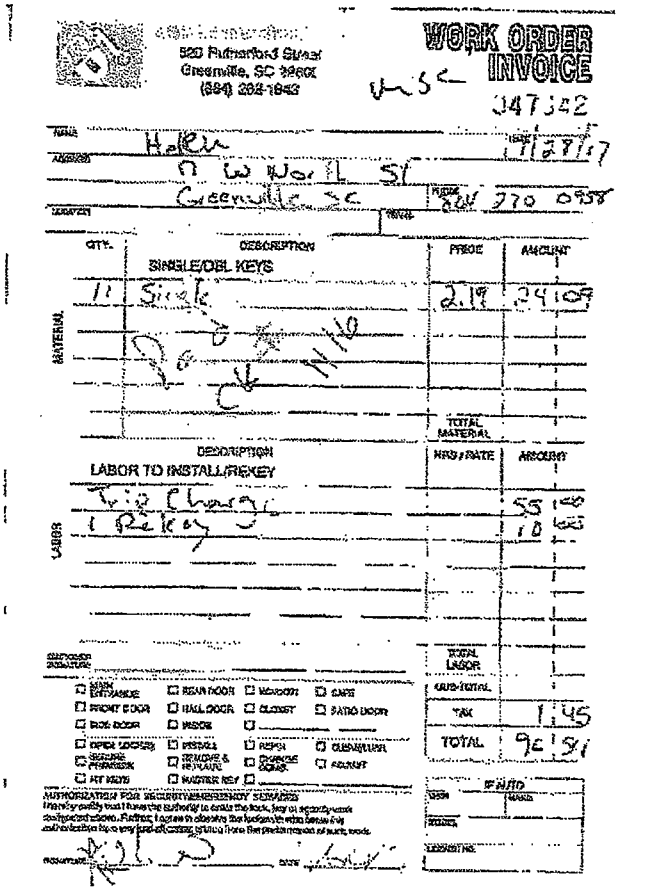
Further, the Affiant sayeth naught.

James W. Durham

Sworn to before me this 1st
day of February, 2018.
_____ SEAL
Notary Public for South Carolina
My Commission Expires: 9/24/22

Joshua J. Hudson
NOTARY PUBLIC
State of South Carolina
My Commission Expires
September 24, 2022

Exhibit B



520 Rutherford Street
Greenville, SC 29609
(864) 282-1943

WORK ORDER INVOICE

347342

NAME Haley DATE 11/27/17
ADDRESS 9 W Wo. IL St
Greenville SC PHONE 864 770 0958
SALESMAN RATING

QTY.	DESCRIPTION	PRICE	AMOUNT
	SINGLE/DBL KEYS		
11	Single	2.19	24 10
	TOTAL MATERIAL		

MATERIAL

DESCRIPTION	HRS / RATE	AMOUNT
LABOR TO INSTALL/REKEY		
Trip Charge		55 00
1 Rekey		10 00
	TOTAL LABOR	
	SUB-TOTAL	
	TAX	1 45
	TOTAL	96 97

LABOR

CUSTOMER SIGNATURE

☐ MAIN ENTRANCE ☐ REAR DOOR ☐ BEDROOM ☐ SAFE
☐ FRONT DOOR ☐ HALL DOOR ☐ CLOSET ☐ PATIO DOOR
☐ SIDE DOOR ☐ WINDOW ☐ _____
☐ OFFICE LOCKSET ☐ INSTALL ☐ REPAIR ☐ CLEAN/LUBE
☐ SECURITY PACKAGE ☐ REMOVE & REPLACE ☐ CHANGE LOCKS ☐ KEYLOCK
☐ KIT KEYS ☐ MASTER KEY ☐ _____

AUTHORIZATION FOR SECURITY/NECESSARY REPAIRS
I hereby certify that I have the authority to order the work, keys or security items listed and above. Further, I agree to observe the business hours and authorization by a responsible adult. Casting, grinding, hole fee please request at work, tools.

ASSIGNMENT _____ DATE _____

PAID

CASH
CHECK
CREDIT
CHECK NO.

ELECTRONICALLY FILED - 2018 May 07 5:07 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

STATE OF SOUTH CAROLINA **COUNTY OF GREENVILLE** **BLACKSTONE AND CHASE, LLC, MARK T. THOMAS, TENSLEY E. THOMAS, AND BRADLEY W. KERR** Plaintiff(s), v. **MARGARET H. DURHAM LIVING TRUST, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING COMPANY, LLC, EZ GLIDE 350, LLC, MARGARET H. DURHAM, JAMES W. DURHAM, HELEN W. SHOCKLEY, AND TAMALA D. CRANE,** Defendant(s).	**IN THE COURT OF COMMON PLEAS** **FOR THE THIRTEENTH JUDICIAL CIRCUIT** 2017-CP-23-07837 COMMON PLEAS CIVIL CASE NO. **SECOND AMENDED SUMMONS** **(Jury Trial Demanded)** (WRONGFUL EVICTION UNDER SC. CODE § 27-37-140; FORCIBLE ENTRY AND DETAINER UNDER S.C. CODE §§ 15-67-410, 15-67-610, 27-5-110; CONVERSION UNDER S.C. CODE §15-69-20; UNFAIR TRADE PRACTICES UNDER S.C. CODE § 39-5-50; AND ETC.)

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Respectfully submitted this 7 day of May, 2018.

/s/ Deborah D. Davis, Esq.
Deborah D. Davis, Esq.
SC Bar No.: 102942
Attorney for Plaintiffs

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STATE OF SOUTH CAROLINA **COUNTY OF GREENVILLE** **BLACKSTONE AND CHASE, LLC, MARK T. THOMAS, TENSLEY E. THOMAS, AND BRADLEY W. KERR** Plaintiff(s), v. **MARGARET H. DURHAM LIVING TRUST, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING COMPANY, LLC, EZ GLIDE 350, LLC, MARGARET H. DURHAM, JAMES W. DURHAM, HELEN W. SHOCKLEY, AND TAMALA D. CRANE,** Defendant(s).	**IN THE COURT OF COMMON PLEAS** **FOR THE THIRTEENTH JUDICIAL CIRCUIT** 2017-CP-23-07837 COMMON PLEAS CIVIL CASE NO. **SECOND AMENDED COMPLAINT** **(Jury Trial Demanded)** (WRONGFUL EVICTION UNDER SC. CODE § 27-37-140; FORCIBLE ENTRY AND DETAINER UNDER S.C. CODE §§ 15-67-410, 15-67-610, 27-5-110; CONVERSION UNDER S.C. CODE §15-; 69-20; UNFAIR TRADE PRACTICES UNDER S.C. CODE § 39-5-50; AND ETC.)

COMES NOW, BLACKSTONE AND CHASE, LLC, ET AL. ("Plaintiff" individually or "Plaintiffs" collectively), as Plaintiffs in the above-styled matter files this **SECOND AMENDED COMPLAINT** against Defendants, **MARGARET H. DURHAM LIVING TRUST ET AL.** ("Defendant" individually or "Defendants" collectively), showing the Court the following:

STATEMENT OF THE PARTIES

1. Plaintiff **BLACKSTONE AND CHASE, LLC**, is a South Carolina limited liability company organized on May 13, 2016, with its principal place of business in Greenville County, South Carolina, doing business as the 17th West North Street Parlor or Liberty Fine Cuts and Shaves on the first floor of 17 West North Street, Greenville, South Carolina 29601 ("Premises").
2. Plaintiffs **MARK T. THOMAS**, **TENSLEY E. THOMAS**, and **BRADLEY W. KERR**, who are the managing members of Plaintiff **BLACKSTONE AND CHASE, LLC**, are natural persons and residents of Greenville County, South Carolina ("Member" individually or "Members" collectively).
3. Plaintiffs **MARK T. THOMAS** and **BRADLEY W. KERR** primarily managed operations for Plaintiff **BLACKSTONE AND CHASE, LLC**. Plaintiff **MARK T. THOMAS** is the son of Plaintiff **TENSLEY E. THOMAS**. Plaintiff **TENSLEY E. THOMAS** is the financial investor for Plaintiff **BLACKSTONE AND CHASE, LLC**, and handled maintenance, repairs, and rent for the Premises.
4. Plaintiffs **TENSLEY E. THOMAS** and **MARK T. THOMAS** are African-American. Plaintiff **BRADLEY W. KERR** is Caucasian.
5. Defendant **MARGARET H. DURHAM LIVING TRUST** ("Landlord") currently owns the property located at 17 West North Street, Greenville, South Carolina 29601, in Greenville County ("Building") since on or around February 20, 2009.
6. Defendant **MARGARET H. DURHAM LIVING TRUST** was created on August 1, 2005, with its principal location in Greenville County, South Carolina. The Landlord is an inter vivos trust, of which Defendant **MARGARET H. DURHAM** is the settlor and trustee who still lives.

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7. Defendant **MULTIPLEX SYSTEMS, INC.**, is a South Carolina corporation organized on March 25, 1998, with its principal place of business in Greenville County, South Carolina, and does business as Defendants **ICE RINK ENGINEERING AND MANUFACTURING, LLC**, **EZ GLIDE 350, LLC**, or the trademark name EZ Glide 350® (collectively referred to as "Companies").
8. Defendant **ICE RINK ENGINEERING AND MANUFACTURING, LLC**, is a South Carolina limited liability company organized on April 23, 2008, with its principal place of business in Greenville County, South Carolina. Defendant **ICE RINK ENGINEERING AND MANUFACTURING, LLC**, is also a division of Defendant **MULTIPLEX SYSTEMS, INC.**, and does business as Defendant **EZ GLIDE 350, LLC**, or the trademark name EZ Glide 350®.
9. Defendant **EZ GLIDE 350, LLC**, is a South Carolina limited liability company organized on April 23, 2008, with its principal place of business in Greenville County, South Carolina. Defendant **EZ GLIDE 350, LLC**, is also a division of Defendants **MULTIPLEX SYSTEMS, INC.**, **ICE RINK ENGINEERING AND MANUFACTURING, LLC**, or both, and does business under the trademark name EZ Glide 350®.
10. Defendants **MULTIPLEX SYSTEMS, INC.**, **ICE RINK ENGINEERING AND MANUFACTURING, LLC**, **EZ GLIDE 350, LLC**, **MARGARET H. DURHAM**, **JAMES W. DURHAM**, **TAMALA D. CRANE**, and **HELEN W. SHOCKLEY**, whether individually or through that Defendant's agents or employees, are affiliated with the Landlord as an agent of the Landlord. Defendants **JAMES W. DURHAM**, **HELEN W. SHOCKLEY**, and **TAMALA D. CRANE** are all employees or agents of the Companies.
11. Defendants **MARGARET H. DURHAM**, **JAMES W. DURHAM**, **TAMALA D. CRANE**, and **HELEN W. SHOCKLEY** were acting in the scope of employment or agency for Defendants **MULTIPLEX SYSTEMS, INC.**, **ICE RINK ENGINEERING AND MANUFACTURING, LLC**, **EZ GLIDE 350, LLC**, with the knowledge and consent for any of the abovenamed Defendants when acting on behalf of the Landlord in this landlord-tenant dispute.
12. Defendant **MARGARET H. DURHAM** is, and holds herself out to be, either a settlor, employee, agent, shareholder, member, trustee or any of the above for any of the abovenamed Defendants as eighteen years or older and is competent.
13. Defendant **JAMES W. DURHAM**, who also goes by Jimmy Durham, is, and holds himself out to be, either an employee, Chief Executive Officer, agent, shareholder, member, or any of the above for any of the abovenamed Defendants as eighteen years or older and is competent.
14. Defendant **JAMES W. DURHAM** is the spouse of **MARGARET H. DURHAM.** Defendants **MARGARET H. DURHAM** and **JAMES W. DURHAM** maintain a personal residence on the third floor of the Building. Defendant **JAMES W. DURHAM** previously owned the Building as a member of the limited liability company **RIDLEY PIPER OF SC, LLC**, prior to on or around February 20, 2009.
15. Defendant **TAMALA D. CRANE**, who also goes by Tami Durham or Tami Crane, is, and holds herself out to be, either an employee, Chief Operating Officer, agent, successor trustee, shareholder,

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member, or any of the above for any of the abovenamed Defendants as eighteen years or older and is competent.

16. Defendant **TAMALA D. CRANE** is the daughter of **JAMES W. DURHAM** and **MARGARET H. DURHAM**. Defendant **TAMALA D. CRANE** is the Landlord's other tenant operating Studio 17, which is a yoga studio on the second floor of the Building, and a sole proprietor doing business as Studio 17.

17. Defendant **HELEN W. SHOCKLEY** is, and holds herself out to be, either an employee, agent, shareholder, member, or any of the above for any of the abovenamed Defendants as eighteen years or older and is competent. Defendant **HELEN W. SHOCKLEY** is the sister of Defendant **JAMES W. DURHAM**.

18. Defendant **MARGARET H. DURHAM**, as trustee for the Landlord, acted as an absentee landlord. Defendant **MARGARET H. DURHAM** knowingly consented and permitted Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** to act on the Landlord's behalf to direct the landlord-tenant relationship concerning the Premises.

19. Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** primarily directed the landlord-tenant relationship while acting during the scope and agency of the Companies, and with the knowledge and consent of the Landlord, for those Defendants and the Companies to act on the Landlord's behalf. Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** primarily corresponded with Plaintiffs from work emails, phone, or mailed correspondence affiliated with the Companies.

20. Defendants **MARGARET H. DURHAM**, **JAMES W. DURHAM**, **TAMALA D. CRANE**, and **HELEN W. SHOCKLEY** are natural persons and residents of Greenville County in the State of South Carolina.

21. Defendants **MARGARET H. DURHAM**, **JAMES W. DURHAM**, **TAMALA D. CRANE**, and **HELEN W. SHOCKLEY** are Caucasian.

JURISDICTION AND VENUE

22. Plaintiffs have standing to bring Plaintiffs' claim(s) pursuant to: Title 15, Chapter 67, Sections 410 and 610; Title 15, Chapter 69, Section 20; Title 27, Chapter 5, Section 110; Title 27, Chapter 37, Section 140; Title 32, Chapter 3, Section 10; and, other provisions of federal and South Carolina law.

23. Jurisdiction is proper in this Court. S.C. Code Ann. § 15-72-10.

24. Venue is proper in this Court. S.C. Code Ann. § 15-7-10.

STATEMENT OF FACTS

25. At all times material to the allegations herein, each Defendant was an agent, employee, or both of the remaining Defendants, performing the acts alleged herein within the course and scope of such agency or employment with the permission, knowledge, and consent of the other Defendants. Upon information and belief, Plaintiffs believe that each of Defendants performed the acts alleged herein by acting in concert with each of the other Defendants. *See* Exhibit A.

26. Plaintiff **BRADLEY W. KERR** paid a security deposit of $5,200.00 to the Landlord on or around March 8, 2016. Exhibit B.

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27. In the absence of the Landlord or Defendant **MARGARET H. DURHAM**, Plaintiff **BRADLEY W. KERR** signed the Landlord's Office Lease Agreement ("Lease") on or around March 15, 2016, before Defendant **HELEN W. SHOCKLEY**.
28. The Lease was for a tenancy term of five (5) years without reference to an effective date. Exhibit B.
29. As a condition precedent to signing the Lease, Plaintiff **BRADLEY W. KERR** placed Defendant **HELEN W. SHOCKLEY** on notice that Plaintiffs were required to obtain and maintain a barber's license pursuant to the South Carolina Board of Barber Examiners for Plaintiffs to operate as a barber shop on the Premises ("Barber Shop") through the employment of key personnel. Exhibit C.
30. On or around March 15, 2016, the base rent for the Premises was $3,200.00. Exhibit B.
31. At the time of execution, the Lease was executed as an incomplete document. The exhibits were not attached to the Lease. The Lease is missing page numbers. And, entire sections of the Lease appear to be missing per the gaps in the numbering of sections in the Lease. Exhibit B.
32. Defendant **HELEN W. SHOCKLEY** made various, handwritten modifications to the Lease, but never sent Plaintiffs a revised copy of the Lease as promised to Plaintiff **BRADLEY W. KERR**. Exhibit C.
33. The legal status of the parties involved in the landlord-tenant relationship is in dispute.
34. Plaintiff **BRADLEY W. KERR** acted on behalf of Plaintiff **BLACKSTONE AND CHASE, LLC**, to enter into a contract for the commercial lease of the Premises subject to approval by the Members of Plaintiff **BLACKSTONE AND CHASE, LLC**. Exhibit C.
35. Plaintiff **BRADLEY W. KERR** signed the Lease before Plaintiff **BLACKSTONE AND CHASE, LLC**, was formed as a limited liability company with the South Carolina Secretary of State on or around May 13, 2016. Exhibit D.
36. Plaintiffs **MARK T. THOMAS** and **TENSLEY E. THOMAS** never signed, received a copy, nor saw the terms and conditions of the Lease when Plaintiffs possessed the Premises. Exhibit C.
37. The Landlord never obtained a majority approval of the Lease from the Members of Plaintiff **BLACKSTONE AND CHASE, LLC**, pursuant to the that Plaintiffs' operating agreement dated as of May 27, 2016. Exhibits C, D.
38. Whether the contract was formed by the Lease or a subsequent oral contract is in dispute. Exhibits B, C.
39. Whether an express contract was formed, and a landlord-tenant relationship existed, is not in dispute.
40. Plaintiffs entered and took possession of the Premises on or around March 15, 2016. Exhibit C.
41. Rent for the premises was deferred until June 8, 2016. Exhibit C.
42. Plaintiffs **MARK T. THOMAS** and **TENSLEY E. THOMAS** never met Defendants **MARGARET H. DURHAM**, **JAMES W. DURHAM**, **HELEN W. SHOCKLEY**, or **TAMALA D. CRANE** until on or around March 15, 2016. Exhibit C.
43. Defendants **JAMES W. DURHAM**, **MARGARET H. DURHAM**, **TAMALA D. CRANE**, and **HELEN W. SHOCKLEY** did not know the other Members of Plaintiff **BLACKSTONE AND CHASE, LLC**, were

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African-American until on or around March 15, 2016, and after Plaintiff **BRADLEY W. KERR** signed the Lease. Exhibit C.

44. During the upfitting process, Plaintiffs discovered that the Landlord delivered the Premises to Plaintiffs in noncompliance with local building and municipal regulations under Sections 10 and 18 of the Lease on or around March 15, 2016, and subsequently thereafter. Exhibit C.

45. Section 18 of the Lease states the "Lessor shall deliver the Premises to the Lessee in compliance with all applicable laws, ordinances[,] and regulations which are not applicable solely because of [the] Lessee's particular use of the Premises." Exhibit B.

46. Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** required Plaintiffs to bear the costs of rectifying the deficiencies of the Premises as delivered with local building and municipal regulations that were not particular to the Plaintiffs' use of the Premises. *See* Exhibits B, C, E.

47. The Landlord delivered the Premises with only one restroom available. *See* Exhibits B, C, E.

48. Local building and municipal regulations required the Premises to have two restrooms available. *See* Exhibits B, C.

49. On or around March 15, 2016, Defendant **HELEN W. SHOCKLEY** increased the rent by $50.00 per month for Plaintiffs' access to a second bathroom in the common area on the first floor. Exhibit B.

50. Plaintiffs experienced great difficulty with Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** during the upfitting process for the Premises. *See* Exhibits B, C, E.

51. Plaintiffs employed subcontractors **JEFFREY FULLER** and **ROBERT AUSTIN** ("Subcontractors" collectively), who reported to the Plaintiff **TENSLEY E. THOMAS**, to upfit the Premises on or around March through June of 2016. Exhibits C, E.

52. The Subcontractors are African-American. Exhibit C.

53. Defendant **JAMES W. DURHAM** provided conflicting instructions to the Subcontractors that contradicted the building inspector's instructions for the Premises to pass inspection. Exhibits C, E.

54. Defendant **HELEN W. SHOCKLEY** represented to Plaintiff **TENSLEY E. THOMAS** that the Subcontractors were inept to perform the work despite the pre-existing conditions of the Premises. *See* Exhibits C, E.

55. During the upfitting process, the Subcontractors reported mistreatment of racial discrimination by Defendants **HELEN W. SHOCKLEY** and **JAMES W. DURHAM** to the Plaintiff **TENSLEY E. THOMAS**. Exhibit C.

56. Defendant **JAMES W. DURHAM** often referred to the Subcontractors in the presence of Defendant **HELEN W. SHOCKLEY** and Plaintiff **TENSLEY E. THOMAS** as "you boys" in the anachronistic terminology for racial discrimination toward African-Americans males regardless of age. Exhibit C.

57. The Subcontractors were grown men in their fifties and sixties. Exhibit C.

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58. Defendant **JAMES W. DURHAM** complained to Plaintiff **BRADLEY W. KERR** in a racially derogatory manner about the Subcontractors as "knuckleheads" when in mid-sentence changing the word from "niggers" to "knuckleheads." Exhibit C.
59. Plaintiffs expended more than $100,000.00 upfitting the Premises and investing in trade furniture, equipment, and fixtures since on or around March 15, 2016. Exhibits C.
60. Subsequently thereafter, Plaintiff **BRADLEY W. KERR** primarily corresponded to the Landlord though Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** at the request of Plaintiffs **TENSLEY E. THOMAS** and **MARK T. THOMAS** to avoid racial tensions or confrontations. *See* Exhibit C.
61. On or around June 8, 2016, the monthly rent of $3,450.00, was due on the eighth of each month. *See* Exhibits B, E.
62. Plaintiffs' proportionate share of the overall utilities for the Building is in dispute. *See* Exhibit B.
63. On or around June 8, 2016, Defendant **HELEN W. SHOCKLEY** increased the monthly rent to approximately $200.00 per month for utilities without providing substantial justification to do so. *See* Exhibit E.
64. Section 5 of the Lease provided that Plaintiffs were responsible for paying Plaintiffs' proportionate share of the overall utilities for the Building. Exhibit B.
65. Plaintiffs operated an upscale Barber Shop on the Premises open to the public from on or around June 8, 2016, until on or around July 27, 2017. Exhibit C.
66. Plaintiffs employed persons and serviced customers from all backgrounds of race, color, religion, or national origin. Exhibit C.
67. Plaintiffs had a strong following of African-American patrons due to Plaintiffs **MARK T. THOMAS** and **TENSLEY E. THOMAS** being African-American. *See* Exhibit C.
68. Defendant **JAMES W. DURHAM** was also a patron of Plaintiff **BLACKSTONE AND CHASE, LLC.** *See* Exhibit C.
69. **JOSHUA PEPPER**, who is African-American, worked for Plaintiff **BLACKSTONE AND CHASE, LLC**, from on or around November of 2016 until April of 2017. Exhibit C.
70. Plaintiffs' employee **JOSHUA PEPPER**, who serviced Defendant **JAMES W. DURHAM**, reported racial mistreatment by Defendant **JAMES W. DURHAM** to the Plaintiffs. *See* Exhibit C.
71. Defendant **JAMES W. DURHAM** specifically instructed **JOSHUA PEPPER** to not talk to him at all while performing barber services by visibly removing his hearing aids to show that no communication with **JOSHUA PEPPER** was desired while receiving salon services and products from the Plaintiffs. *See* Exhibit C.
72. After **JOSHUA PEPPER** reported mistreatment of racial discrimination by Defendant **JAMES W. DURHAM**, Plaintiffs reassigned either Plaintiffs' employees **LAUREN TURNER** or **JENNY WORLEY**, who are Caucasian, to service Defendant **JAMES W. DURHAM** instead. *See* Exhibit C.

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73. After Defendant **MARGARET H. DURHAM** saw **JOSHUA PEPPER** exit the second restroom in the common area, Defendant **MARGARET H. DURHAM** was startled. Plaintiffs lacked access to the second restroom subsequently thereafter for approximately two weeks. *See* Exhibit C.

74. While Plaintiffs were in possession of the Premises, Defendants repeatedly entered the Premises unannounced without providing Plaintiffs' with reasonable notice in non-emergency situations. *See* Exhibits A, C.

75. Defendant **TAMALA D. CRANE**, whether acting individually or through her agents, repeatedly allowed patrons of Studio 17 to use Plaintiffs' restrooms and lobby area attributable to the operation of Studio 17. *See* Exhibit C.

76. Under Section 24 of the Lease, the Landlord covenanted to afford Plaintiffs' quiet enjoyment of the Premises for the full term of the Lease. Plaintiffs would "peacefully and quietly hold and enjoy the Premises subject to the terms of this Lease . . ." Exhibit B

77. Under Section 19 of the Lease, the Landlord was required to provide reasonable notice to Plaintiffs before entering the Premises during reasonable times "for the purpose of making repairs, making connections, installing utilities, providing services to the Premises, the Building or any other tenant, making inspections or showing the same to prospective purchasers or lenders . . ." unless an emergency arose warranting the Landlord's entry onto the Premises. Exhibit B; *see also* S.C. Code Ann. § 27-35-75.

78. From on or around January 2017 to April 2017, Defendants **JAMES W. DURHAM**, **MARGARET H. DURHAM**, **TAMALA D. CRANE**, and agents or employees of **TAMALA D. CRANE** repeatedly complained to Plaintiffs about playing music for the Plaintiff's patrons. *See* Exhibits C, E.

79. Little to no insulation existed between the first two floors of the Building to reduce sounds from business operations on either floor for the Barber Shop or Studio 17. *See* Exhibit C.

80. Defendant **TAMALA D. CRANE**, whether acting individually or through her agents, repeatedly entered the Premises to complain about Plaintiffs' music, including rap music. *See* Exhibits C, E.

81. Consequently, Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** reduced Plaintiffs' hours of operation to be open for the public. *See* Exhibits C, E.

82. Plaintiffs originally operated the Barber Shop on the Premises as open to the public from 9:00 A.M. to 9:00 P.M. *See* Exhibits C, E.

83. To accommodate Defendant **TAMALA D. CRANE**'s complaints, Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** changed Plaintiffs' hours of operations from 9:00 A.M. to 7:00 P.M., and again from 9:00 A.M. to 6:00 P.M. *See* Exhibits C, E.

84. On or around March 2, 2017, Defendant **TAMALA D. CRANE** complained to her parents, Defendants **JAMES W. DURHAM** and **MARGARET H. DURHAM**, regarding the light in the common area on the first floor, of which was not Plaintiffs' responsibility to maintain. Exhibit E.

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85. On or around March of 2017, Defendant **JAMES W. DURHAM** requested that Plaintiffs share the Premises with another family member to operate an HVAC business. Plaintiffs declined. Exhibit C.

86. Subsequently thereafter, the landlord-tenant relations became hostile. *See* Exhibits C, E.

87. On or around April 8, 2018, Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** locked out Plaintiffs from the Premises by placing chains on the doors to the Premises and rummaging through the Barber Shop around Plaintiffs' countertops and cash registers. *See* Exhibits C, E.

88. Plaintiffs never received a notice of default from the Landlord concerning Plaintiffs' general liability insurance coverage related to the Premises. *See* Exhibit C.

89. Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** denying Plaintiffs' access to the Premises was unjustified based on Plaintiffs' ability to provide proof of general liability insurance. *See* Exhibit E.

90. Plaintiffs delivered proof of general liability insurance to Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** on or around April 8, 2017. Exhibits C, E.

91. Plaintiffs reopened subsequently thereafter, but Plaintiffs experienced an interruption to business operations and a loss of sales from this lock-out incident. *See* Exhibit C.

92. On or around April 8, 2017, Defendant **HELEN W. SHOCKLEY** refused to provide a copy of the Lease to Plaintiff **TENSLEY E. THOMAS** upon request. *See* Exhibits C, E.

93. On or around April 11, 2017, Defendant **HELEN W. SHOCKLEY** complained to Plaintiffs about Plaintiffs' employees smoking on the public sidewalks during breaks and random children sleeping on the stairs leading up to Defendant **TAMALA D. CRANE**'s yoga studio. *See* Exhibits C, E.

94. On or around May 26, 2017, Defendant **JAMES W. DURHAM** further reduced Plaintiffs' access to the Premises after 9:00 P.M. for maintaining operations after-hours. *See* Exhibits C, E.

95. On or around June 3, 2017, Plaintiff **MARK T. THOMAS** conducted a routine inventory of salon products on the Premises after-hours, and a false alarm went off when he left the Premises. Exhibits C, F.

96. The Landlord was never fined for this false-alarm incident. *See* Exhibits C, E, F.

97. On or around June 5, 2017, Defendant **JAMES W. DURHAM** threatened to have Plaintiffs, or Plaintiffs employees, agents, or patrons, arrested onsite for criminal trespass if found in the common space of the outer double doors in front of the Barber Shop after 10:00 P.M. *See* Exhibit E.

98. On or around June 15, 2017, Defendant **HELEN W. SHOCKLEY** threatened Plaintiffs with fines if Plaintiffs set off the false alarm again. *See* Exhibit E.

99. On or around July 6, 2017, Defendant **HELEN W. SHOCKLEY** admitted to Plaintiffs that the rent was due on the eighth of the month despite the patent ambiguities in the Lease. *See* Exhibit E.

100. On or around July 7, 2017, a legitimate dispute arose over the amount of rent for the Premises.

101. On or around July 7, 2017, Defendant **JAMES W. DURHAM** demanded from Plaintiffs: (1) pay rent before the rent was due on July 8, 2017; (2) provide proof of general liability insurance by July 8,

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2017; and, (3) threatened to lock out Plaintiffs again from the Premises for failure to comply with his demands. Exhibits C, E.

102. On or around July 7, 2017, Defendant **HELEN W. SHOCKLEY** arrived on the Premises unannounced, accosted Plaintiffs' staff and Plaintiff **MARK T. THOMAS**, and boisterously demanded rent from Plaintiffs' prematurely in front of Plaintiffs' staff and customers during normal business hours. *See* Exhibits C, E.

103. Because of **HELEN W. SHOCKLEY**'s unprofessional and outrageous behavior, Plaintiffs' staff was uncomfortable and left with the false impression that Plaintiffs were financially unstable and Plaintiffs' patrons were shocked. Exhibit C.

104. Subsequently thereafter, Plaintiffs felt harassed, embarrassed, and humiliated by Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY**. Exhibit C.

105. From July 13, 2017, to July 14, 2017, Plaintiff **MARK T. THOMAS** corresponded with Defendant **HELEN W. SHOCKLEY** and requested to pay rent with any additional late fees provided that Defendant **HELEN W. SHOCKLEY** provide a copy of the Lease. Exhibits C, E.

106. On or around July 14, 2017, Defendant **HELEN W. SHOCKLEY** refused to provide **MARK T. THOMAS** with a copy of the Lease. Exhibits C, E.

107. For Plaintiffs **MARK T. THOMAS** and **TENSLEY E. THOMAS**, Plaintiffs' staff, and Plaintiffs' Subcontractors, all were of the belief that Defendant **JAMES W. DURHAM** was the landlord for the Premises prior to this landlord-tenant dispute. Exhibit C.

108. On or around July 17, 2017, Plaintiffs received the Landlord's notice of default dated as of July 13, 2017 ("Notice of Default") indicating Defendant **MARGARET H. DURHAM LIVING TRUST** as the Landlord. Exhibit G.

109. The Landlord's Notice of Default was based on unjustified allegations:

(1) Plaintiffs were in default for non-payment of rent for July of 2017 in the amount of $3,250.00, in addition to $200.00 for utilities payable to the Landlord and a 5% late fee penalty (total amount requested $3,612.50);
(2) Plaintiffs had ten (10) days to cure the default of non-payment of rent;
(3) Plaintiffs were in default for Plaintiffs' failure to notify the Landlord in advance of remaining in the Barber Shop after 9:00 P.M. to prevent false alarm reports;
(4) Plaintiffs were in default for Plaintiffs' breach of quiet enjoyment of the premises due to Plaintiffs hosting social events in the Barber Shop that purportedly detracted from the space's reputation as a "first class retail and office development"; and,
(5) Plaintiffs were in default for Plaintiffs' failure to comply with no-smoking ordinances involving public places within or near the Premises. Exhibit G.

110. A legitimate dispute concerning the rent amount exists as herein described.

111. The Landlord's Notice of Default permitted Plaintiffs to remain on the Premises for ten (10) days upon receipt of the Notice of Default by Plaintiffs on or around July 17, 2017, before the Landlord could legally proceed with further legal action and resort to the judicial process for evicting Plaintiffs. *See* Exhibit G.

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112. A dispute exists concerning the rent due date for the Premises due to patent discrepancies in the Lease and representations made by Defendant **HELEN W. SHOCKLEY**. *See* Exhibit C.
113. Defendants **MARGARET H. DURHAM**, **JAMES W. DURHAM**, and **HELEN W. SHOCKLEY** routinely accepted rent payments from Plaintiffs on or around the eighth of each month.
114. Additionally, Defendants **JAMES W. DURHAM** and **MARGARET H. DURHAM** commingled their personal property with the Landlord's property by accepting rent payments into their personal name. *See* Exhibit H.
115. In 2017, Plaintiff **TENSLEY E. THOMAS** personally paid for most of the rent payments made payable to Defendants **JAMES W. DURHAM** and **MARGARET H. DURHAM**. *See* Exhibits C, H.
116. Defendants never personally contacted Plaintiff **TENSLEY E. THOMAS**, as the financial investor of Plaintiff **BLACKSTONE AND CHASE, LLC**, to resolve the landlord-tenant dispute or rent for July of 2017. *See* Exhibit C.
117. Section 20.1 of the Lease entitled Plaintiffs to cure any alleged defaults unrelated to the payment of rent after thirty (30) days after receiving a notice of default from the Landlord or longer, if reasonably necessary to do so. *See* Exhibit B.
118. Plaintiffs were in full compliance using the Premises in a lawful, reasonable manner during the normal, ordinary course of business and as a social host. *See* Exhibit C.
119. Plaintiffs never sold any alcohol or liquor on the Premises. Defendants **JAMES W. DURHAM** and **MARGARET H. DURHAM** participated in partaking Plaintiffs' refreshments and libations whether at Plaintiffs' special events or as patrons. *See* Exhibit C.
120. Plaintiffs complied with the Landlord's no-smoking policy on or near the Premises. *See* Exhibit C.
121. Section 10 of the Lease that purportedly prohibits Plaintiffs from using the Premises in a manner to create "a nuisance or detract in any way from the reputation of the Project as a first class retail and office development" without defining the term first class retail and office development. Exhibit B.
122. On or around July 21, 2017, the **GREENVILLE COUNTY FIRE DEPARTMENT** responded to a fire alarm on the Premises related to smoke rising from a towel-warmer. *See* Exhibits A, C, I.
123. No fire ever occurred on the Premises. *See* Exhibits A, C, I.
124. All smoke from the towel-warmer incident was cleared out of the Premises by the **GREENVILLE COUNTY FIRE DEPARTMENT** that same morning with little to no smoke damage arising from the incident. *See* Exhibits A, C, I
125. Plaintiffs resumed operations at the Barber Shop subsequently thereafter. *See* Exhibits C, I.
126. The Building was still useable and habitable, and Studio 17 operational. *See* Exhibits A, C, I.
127. Whether the Lease is enforceable in full or in part is in dispute.
128. Section 20.2 of the Lease is a questionable provision that purportedly permits the Landlord to reenter the Premises and dispose of Plaintiffs' personal property with or without legal process. *See* Exhibit B.

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129. On or around July 27, 2018, Plaintiff **MARK T. THOMAS** conducted inventory of salon products on the Premises around 8:30 P.M. Exhibit C.

130. That evening, Defendant **JAMES W. DURHAM** entered the Premises unannounced in a non-emergency situation unbeknownst to **MARK T. THOMAS**, and startled **MARK T. THOMAS**. Exhibits A, C.

131. On or around July 28, 2018, Defendant **HELEN W. SHOCKLEY** denied Plaintiffs' access to the Premises by changing the locks to the Premises prior to resorting to the judicial process for ejectment. Exhibits A, C.

132. On or around July 28, 2017, the Landlord, whether acting individually or through its Agents, posted a "Do Not Enter" sign and placed brown paper in the windows of the Premises to close the Barber Shop without Plaintiffs' consent. Exhibits A, C, J.

133. Subsequently thereafter, Defendant **JAMES W. DURHAM** instructed Plaintiffs' staff that the Barber Shop was closed, allowed Plaintiffs' staff to reclaim any personal property on the Premises, and informed Plaintiffs' staff to seek employment elsewhere. *See* Exhibit C.

134. Consequently, Plaintiffs' staff quit, Plaintiffs' customers were turned away, and Plaintiffs were unable to fulfill online orders for salon products located within the Premises. *See* Exhibits A, C, J, K.

135. Plaintiffs could not maintain operations as a Barber Shop because the key personnel **HEATHER M. LORING**, who held Plaintiffs' barber license, resigned in reliance upon the statements made by Defendant **JAMES W. DURHAM**. Exhibits A, C, J.

136. Subsequently thereafter, Defendant **JAMES W. DURHAM** informed third parties, including **ZACH HINES**, that Plaintiffs abandoned the Premises when he knew Defendant **HELEN W. SHOCKLEY** locked out Plaintiffs. *See* Exhibit A, C.

137. Plaintiffs never abandoned the Premises. Plaintiffs were locked out. Exhibits A, C, E.

138. On or around August of 2017, Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** attempted to file an insurance claim with **PENN NATIONAL INSURANCE COMPANY**, who is the general liability insurance carrier for Plaintiffs, related to the towel-warmer incident. Exhibits C, L.

139. On August 4, 2017, Plaintiffs sent a demand letter to the Landlord for the Landlord to return possession of the Premises to Plaintiffs. The Landlord refused. Exhibits C, G.

140. On August 8, 2017, the Landlord responded to Plaintiffs' first demand letter, and the Landlord admitted in this response letter that the Landlord reentered and seized the property as a basis to accelerate the lease for $152,750.00. Exhibits C, G.

141. On or around August 24, 2017, Defendant **JAMES W. DURHAM** removed Plaintiffs' salon mats from the Premises and placed the same into his personal car. Exhibits C, G, J.

142. On or around September 10, 2017, Defendant **MARGARET H. DURHAM** removed Plaintiffs' mail from Plaintiffs' mailbox on the Premises. Exhibits C, G, J.

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143. On or around September 27, 2017, Plaintiffs sent a second demand letter to the Landlord for the Landlord to return Plaintiffs' personal property on the Premises. The Landlord refused. Exhibits C, G, J.

144. The Landlord applied for a writ of ejectment before the Gantt Summary Court on or around October 16, 2017, well after already physically removing and evicting Plaintiffs from the Premises. Exhibit B.

145. On or around December 11, 2017, **PENN NATIONAL INSURANCE COMPANY** denied the Landlord's claim for any damage resulting from the towel-warmer incident. *See* Exhibit L.

146. Section 12.4 of the Lease clearly indemnifies Plaintiffs, even if the loss was caused by either party's negligence under that waiver and subrogation provision. *See* Exhibit B.

147. Section 16 of the Lease expressly holds the Landlord responsible for restoring the Premises. *See* Exhibit B.

148. To date, the Landlord never filed for a writ of distraint to lawfully withhold and dispose of Plaintiffs' personal property still located on the Premises. *See* S.C. Code Ann. §§ 27-39-210 to -360.

149. Plaintiffs have not had access to Plaintiffs' personal property located within the Premises since on or around July 28, 2017. Exhibits B, C.

150. Section 15 of the Lease states that any trade fixtures and equipment belonging to Plaintiffs on the Premises will remain as Plaintiffs' personal property. Exhibit B.

151. To date, the Landlord has repeatedly denied Plaintiffs' requests to return Plaintiffs' personal property located on the Premises since July 28, 2017. Exhibits G, J.

152. Third-parties, who have a preexisting contractual relationship with Plaintiffs unrelated to this action, also have a legal interest in Plaintiffs' personal property currently within the control, possession, and dominion of the Landlord. *See* Exhibits C, M.

153. Consequently, Plaintiffs cannot resume operations for a Barber Shop on the Premises or elsewhere. *See* Exhibit C.

154. Plaintiffs **TENSLEY E. THOMAS** and **MARK T. THOMAS** have suffered emotional distress from the racial discrimination exhibited by Defendants toward them in this landlord-tenant dispute. Exhibit C.

FOR A FIRST CAUSE OF ACTION
(Preliminary or Permanent Injunction pursuant to Rule 65, SCRCP against Defendants MARGARET H. DURHAM LIVING TRUST, MARGARET H. DURHAM, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING, LLC, EZ GLIDE 350, LLC, JAMES W. DURHAM, and HELEN W. SHOCKLEY)

155. Plaintiffs reallege all above paragraphs as if specifically contained herein.

156. Plaintiffs are likely to succeed on the merits of their claims.

157. Plaintiffs have suffered, and will likely continue to suffer, irreparable harm in the absence of preliminary relief insofar as the Landlord, whether acting individually or through the abovenamed Defendants, has:

(1) has dispossessed Plaintiffs of the Premises and Plaintiffs' personal property located therein;

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(2) wrongfully evicted Plaintiffs without resorting to the judicial process;
(3) falsely asserted to third-parties that Plaintiffs have abandoned the Premises when the Landlord locked out Plaintiffs from the Premises;
(4) prevented Plaintiffs from operating the Barber Shop on the Premises or anywhere else; and,
(5) created hardship for Plaintiffs to adequately prepare for litigation by denying Plaintiffs access to Plaintiffs' personal property and business records located on the Premises.

158. As a result, Plaintiffs have an inadequate remedy at law warranting injunctive relief.

159. All of Plaintiffs' staff have quit at the instruction of the Landlord.

160. Third-parties with a property interest in Plaintiffs' personal property cannot reclaim the collateral currently within the exclusive dominion, possession, and control of the Landlord.

161. The Landlord has rendered Plaintiff **BLACKSTONE AND CHASE, LLC**, financially insolvent to operate as a business anywhere and created financial hardships with Plaintiffs' vendors and creditors.

162. Plaintiffs seek to protect Plaintiffs' rights under South Carolina law through injunctive relief to uphold those rights by requesting the immediate return of Plaintiffs' personal property and enjoining Defendants' defamation to Plaintiffs' reputation.

FOR A SECOND CAUSE OF ACTION
(Forcible Entry and Detainer pursuant to S.C. Code Ann. §§ 15-67-410 to -470 against all Defendants MARGARET H. DURHAM LIVING TRUST, MARGARET H. DURHAM, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING, LLC, EZ GLIDE 350, LLC, JAMES W. DURHAM, HELEN W. SHOCKLEY)

163. Plaintiffs reallege all above paragraphs as if specifically contained herein.

164. Upon forming a landlord-tenant relationship, Plaintiffs had the exclusive right of possession to the Premises.

165. Plaintiffs operated Plaintiffs' Barber Shop on the Premises pursuant to Plaintiffs' rights and privileges under the Lease, or subsequent oral contract, forming the landlord-tenant relationship ("Contract").

166. Defendants **MARGARET H. DURHAM**, **JAMES W. DURHAM**, and **HELEN W. SHOCKLEY**, while acting in the scope of employment or agency, and with the knowledge and consent of the Landlord, unlawfully and forcibly disseized the Premises from Plaintiffs repeatedly without resorting to the judicial process beforehand in violation of South Carolina law and the Landlord is liable under respondeat superior. S.C. Code Ann. §§ 15-67-410, 27-37-10 to -160.

167. Defendants committed trespass repeatedly on the Premises that substantially interfered with Plaintiffs' possession of the Premises by voluntarily and intentionally entering the Premises without Plaintiffs' consent, taking possession of the Premises, and denying Plaintiffs' use of the Premises.

168. Defendants unlawfully engaged in a self-help eviction repeatedly with the intent to permanently dispossess and disseize the Premises from Plaintiffs with a strong hand when locking out Plaintiffs from the Premises. *See* S.C. Code Ann. §§ 27-5-110, 27-37-10 to -160.

169. Defendants had knowledge of forcibly removing Plaintiffs from the Premises when ousting Plaintiffs from the Premises repeatedly.

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170. To date, Plaintiffs are unable to reclaim possession of the Premises from the Landlord.

171. Defendants have acted intentionally, willfully, and with reckless disregard for Plaintiffs' rights to the exclusive possession of the Premises when engaging in a self-help eviction.

172. Plaintiffs have suffered damages from the abovenamed Defendants' conduct, and Plaintiffs are entitled to treble damages to be determined at trial along with the costs of this action. S.C. Code Ann. § 15-67-420.

FOR A THIRD CAUSE OF ACTION
(Claim and Delivery pursuant to S.C. Code Ann. §§ 15-69-10 to -210 against Defendants MARGARET H. DURHAM LIVING TRUST, MARGARET H. DURHAM, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING, LLC, EZ GLIDE 350, LLC, JAMES W. DURHAM, and HELEN W. SHOCKLEY)

173. Plaintiffs reallege all above paragraphs as if specifically contained herein.

174. Plaintiffs had the exclusive right of possession to Plaintiffs' personal property, including Plaintiffs' trade fixtures, on the Premises.

175. Plaintiffs possessed personal property on the Premises pursuant to Plaintiffs' rights and privileges under the Contract.

176. Since July 28, 2017, Defendants **MARGAET H. DURHAM**, **JAMES W. DURHAM**, and **HELEN W. SHOCKLEY**, while acting in the scope of employment or agency, and with the knowledge and consent of the Landlord, unlawfully dispossessed Plaintiffs' personal property located on the Premises repeatedly without resorting to the judicial process beforehand in violation of South Carolina law and the Landlord is liable under respondeat superior. S.C. Code Ann. §§ 15-69-10 to -30, 27-39-210 to -360.

177. Defendants knowingly committed trespass repeatedly on Plaintiffs' personal property within the Premises that substantially interfered with Plaintiffs' possession of Plaintiffs' personal property by intentionally and voluntarily removing Plaintiffs' personal property from the Premises and denying the use of the Plaintiffs' personal property on the Premises.

178. To date, Defendants still maintain exclusive dominion, possession, and control of Plaintiffs' personal property on the Premises without Plaintiffs' consent.

179. Plaintiffs have approximately $121,252.75 or more in Plaintiffs' furniture, fixtures, equipment, and leasehold improvements for the Barber Shop. *See* Exhibit M.

180. Plaintiffs have approximately $22,000.00 or more in Plaintiffs' salon products on the Premises, of which may have, or have, expired and are now a total loss to Plaintiffs. *See* Exhibit M.

181. Plaintiffs have suffered damages of over approximately $143,252.75 or more from the Landlord wrongfully distraining Plaintiffs' personal property on the Premises. *See* Exhibits C, M.

182. To date, Plaintiffs are unable to reclaim possession of Plaintiffs' personal property from the Landlord because of the abovenamed Defendants engaging in a self-help eviction. *See* Exhibits C, G.

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183. The abovenamed Defendants have acted intentionally, willfully, and with reckless disregard for Plaintiffs' rights to the exclusive possession of Plaintiffs' personal property on the Premises.

184. In the alternative, the abovenamed Defendants were negligent, reckless, willful and wanton causing further damage, or total destruction, to Plaintiffs' personal property, including total loss of salon products that have a limited shelf-life of less than ninety (90) days, and encroached upon Plaintiffs' obligations to third-party vendors or creditors related to the Plaintiffs' personal property.

185. Plaintiffs are entitled to the immediate delivery of Plaintiffs' personal property, actual and punitive damages when replevin is not feasible, or both. S.C. Code Ann. §§ 15-69-10, -210.

FOR A FOURTH CAUSE OF ACTION
(Conversion of Personal Property pursuant to S.C. Code Ann. § 15-19-10(2) against Defendants MARGARET H. DURHAM LIVING TRUST, MARGARET H. DURHAM, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING, LLC, EZ GLIDE 350, LLC, JAMES W. DURHAM, and HELEN W. SHOCKLEY)

186. Plaintiffs reallege all above paragraphs as if specifically contained herein.

187. Plaintiffs own, or have a property interest in, personal property on the Premises, which is currently within the Landlord's exclusive control, possession, and dominion.

188. Since July 28, 2017, Defendants **MARGAET H. DURHAM**, **JAMES W. DURHAM**, and **HELEN W. SHOCKLEY**, while acting in the scope of employment or agency, and with the knowledge and consent of the Landlord, wrongfully seized and dispossessed Plaintiffs of Plaintiffs' personal property on the Premises in disregard of Plaintiffs' rights and the Landlord is liable under respondeat superior.

189. Defendants knew that Plaintiffs were the owners to Plaintiffs' personal property on the Premises.

190. Defendants repeatedly refused to return Plaintiffs' personal property thereby converting Plaintiffs' personal property to the Landlord's use without Plaintiffs' consent.

191. Defendants recklessly, willfully, and intentionally took, retained, converted, and denied Plaintiffs possession and use of Plaintiffs' personal property with conscious indifference to Plaintiffs' rights.

192. Plaintiffs are entitled to any damages Plaintiffs have suffered as a result of Defendants' unlawful retention, destruction, depreciated value, total loss, or disposal of Plaintiffs' property with actual and punitive damages to be determined at trial.

FOR A FIFTH CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Acts against all Defendants)

193. Plaintiffs reallege all above paragraphs as if specifically contained herein.

194. On or around March 15, 2016, Plaintiffs entered into a contract with the Landlord for the commercial lease of the Premises that created a landlord-tenant relationship, whether the contract was formed by the Lease or a subsequent oral contract ("Contract").

195. Patent ambiguities exist in the Lease as presented. No effective date of the Lease is present to dictate the actual effective date of delivery of the Lease. The Lease purports discrepancies for the actual due

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date of monthly rent on the eighth of each month, and the beginning of the lease term on June 8, 2016, at the time of execution on or around March 15, 2016. *See* Exhibit B.

196. Plaintiffs were, at all times, in substantial compliance with the Contract.

197. The Landlord's Notice of Default did not terminate the Contract or the landlord-tenant relationship.

198. The Landlord had a duty to uphold the covenant of quiet use and enjoyment to the Premises that is also implied in the Contract and under South Carolina law.

199. Plaintiffs were entitled to the peaceful and quiet use, possession, and enjoyment of the Premises.

200. Plaintiffs had a right to use the Premises for lawfully related purposes in a reasonable manner without interference from the Landlord, other tenants in the Building, or other residents in the Building.

201. Defendants **MARGAET H. DURHAM**, **JAMES W. DURHAM**, **TAMALA D. CRANE**, and **HELEN W. SHOCKLEY**, while acting in the scope of employment or agency for any of the abovenamed Defendants, and with the knowledge and consent of the Landlord, materially breached the covenant of quiet enjoyment to the Premises under the Contract by repeatedly and substantially interfering with Plaintiffs' use of the Premises on or around January of 2017, and on numerous occasions subsequently thereafter as herein described, and the Landlord is liable under respondeat superior:

(1) limiting Plaintiffs' access to the second bathroom repeatedly;
(2) permitting patrons of Defendant **TAMALA D. CRANE**'s yoga studio to enter the Premises repeatedly without Plaintiffs' consent;
(3) shortening Plaintiffs' hours of operations for being open to the public;
(4) limiting Plaintiffs' access to the Premises to maintain business operations after-hours;
(5) repeatedly and unlawfully entering the Premises during a non-emergency in violation of Section 19 of the Lease and Title 27, Chapter 35, Section 75 of the South Carolina Code;
(6) repeatedly denying Plaintiffs' access to the Premises and the Plaintiff's personal property located therein in violation of Title 27, Chapter 5, Section 110, Title 15, Chapter 67, Section 410, and Title 15, Chapter 67, Section 410 of the South Carolina Code; and,
(7) other such acts that may be revealed through discovery and proven at trial.

202. Furthermore, The Landlord had duty of care under the Contract to uphold the implied covenant of good faith and fair dealing when performing and enforcing the terms and conditions of the Contract.

203. Defendants **MARGAET H. DURHAM**, **JAMES W. DURHAM**, and **HELEN W. SHOCKLEY**, while acting in the scope of employment or agency for any of the abovenamed Defendants, and with the knowledge and consent of the Landlord, materially breached the Landlord's duty of good faith and fair dealing under the Contract as herein described, and the Landlord is liable under respondeat superior:

(1) withholding a copy of the Lease from Plaintiffs **MARK T. THOMAS** and **TENSLEY E. THOMAS**;
(2) delivering the Premises in non-compliance with local building and municipal regulations in violation of Section 18 of the Lease;
(3) attempting to file a claim against Plaintiffs' general liability insurance policy for smoke damages that clearly indemnified Plaintiffs while little to no smoke damage occurred;
(4) ignoring the trust form when Defendants **MARGARET H. DURHAM** and **JAMES W. DURHAM** received rent payments in their personal names instead of in the name of Defendant **MARGARET H. DURHAM LIVING TRUST**;
(5) failing to mitigate damages by allowing Plaintiffs to reclaim Plaintiffs' personal property on the premises and lease the Premises to a new tenant in violation of Section 37.9 of the Lease;

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(6) instructing Plaintiffs' employees that the Barber Shop was closed and to seek employment elsewhere, including key personnel holding the license for Plaintiffs to operate as a Barber Shop lawfully in violation of Section 24 of the Lease; and,
(7) other such acts that may be revealed through discovery and proven at trial.

204. Defendants **JAMES W. DURHAM**, **MARGARET H. DURHAM**, and **HELEN W. SHOCKLEY**, while acting in the course of scope and agency, and with the knowledge and consent of the Landlord, acted in bad faith in a commercially unreasonable manner concerning the Contract and the Landlord is liable under respondeat superior. The Landlord's breach of contract was unlawful, unfair, and dishonest under the totality of the circumstances as herein described:

(1) Defendants used Section 12 of the Lease regarding Plaintiff **BLACKSTONE AND CHASE, LLC**'s general liability insurance policy *in terrorem* as an arbitrary and capricious manner to deny Plaintiffs' use of the Premises in violation of Section 24 of the Lease;
(2) the Landlord's Notice of Default alleged meritless claims serving only to threaten Plaintiffs with eviction, intimidate Plaintiffs despite the Plaintiff's investment in the Premises, and interfere with Plaintiffs' leasehold rights;
(3) Section 10 of the Lease concerning the vague and ambiguous term "first class retail and office development" is unenforceable as a pretextual basis to threaten and evict Plaintiffs based on arbitrary and capricious standard that invalidates the Landlord's consideration as illusory;
(4) Section 20.2 of the Lease is an unenforceable provision as the Landlord may not circumvent the judicial process before evicting Plaintiffs by means of forcible entry and detainer;
(5) The Landlord's remedies under Section 20.2, the use of the premises under Section 10, and the arbitration clause under Section 37.9 in the Lease operate as both unconscionable provisions and a forfeiture of Plaintiffs' right to the Premises at the arbitrary and capricious discretion of the Landlord;
(6) Defendants unlawfully terminated the Contract by engaging in a self-help eviction without resorting to the judicial process; and,
(7) other such acts that may be revealed through discovery and proven at trial.

205. Defendants acted in bad faith when unfairly dealing with Plaintiffs in the Landlord's nonperformance of the terms and conditions of the Contract, rising to the level of being so fundamental and substantial and ultimately defeating the purpose and the subject matter of the Lease.

206. Defendants' unlawful conduct destroys the subject matter of the Lease—Plaintiffs' use and enjoyment of the Premises.

207. Defendants' unlawful conduct destroys any and all consideration by Plaintiffs to use and possess the Premises.

208. Defendants' unlawful conduct violates public policy against engaging in a self-help eviction to evict a tenant from the premises without resorting to the judicial process that no such conduct may prevail as a matter of public interest.

209. Defendants' conduct was done intentionally and foreseeable to cause injury to Plaintiffs.

210. Defendants acted intentionally, willfully, and with reckless disregard for Plaintiffs' rights and privileges under the covenant of quite use and enjoyment and the covenant of good faith and fair dealing.

211. Defendants' breach of contract directly and proximately caused Plaintiffs ongoing damages that exceed $380,000.00.

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212. As a result, Plaintiffs are entitled to recover actual, incidental, consequential, and punitive damages to be determined at trial. In the alternative, and if the Court does not invalidate the Lease, whether in part or in full, then, as a direct and proximate result of Defendants' conduct, Plaintiff **BRADLEY W. KERR** is entitled to a rescission of the Lease along with any incidental or consequential damages to be determined at trial.

FOR A SIXTH CAUSE OF ACTION
(Wrongful Eviction pursuant to S.C. Code Ann. § 27-37-140 against Defendants MARGARET H. DURHAM LIVING TRUST, MARGARET H. DURHAM, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING, LLC, EZ GLIDE 350, LLC, JAMES W. DURHAM, and HELEN W. SHOCKLEY)

213. Plaintiffs reallege all above paragraphs as if specifically contained herein.

214. Defendants **JAMES W. DURHAM**, **MARGARET H. DURHAM**, and **HELEN W. SHOCKLEY**, while acting in the course of scope and agency, and with the knowledge and consent of the Landlord, terminated the Contract unlawfully when wrongfully disseizing, dispossessing, and physically ousting Plaintiffs from the Premises repeatedly without resorting to the judicial process in violation of South Carolina law, and the Landlord is liable under respondeat superior. S.C. Code Ann. §§ 15-67-410, 27-37-140.

215. When Defendants changed the locks to deny Plaintiffs access to the Premises, the Landlord terminated the Contract unlawfully on or around July 28, 2018.

216. By doing the acts described herein, Defendants wrongfully dispossessed the Premises from Plaintiffs for which the Contract entitles Plaintiffs to possess and use.

217. Plaintiffs never voluntarily abandoned the Premises.

218. Plaintiffs objectively manifested sufficient conduct that any reasonable person under the circumstances would conclude that Plaintiff **BLACKSTONE AND CHASE, LLC**, intended to return to the Premises on the next business day in the ordinary course of business. Plaintiffs employed staff to operate the Barber Shop, who attempted to enter the Premises on or around April 8, 2017, and July 28, 2017. The Members also worked onsite. Defendant **JAMES W. DURHAM** saw Plaintiff **MARK T. THOMAS** working on the Premises in the evening on or around July 27, 2017.

219. The abovenamed Defendants intended to cause injury to Plaintiffs by these wrongful acts and to harass and intimidate Plaintiffs into involuntarily abandoning Plaintiffs' rights to use the Premises.

220. Defendants' conduct was despicable and carried on with a willful and conscious disregard of Plaintiffs' rights, and Defendants acted with malice.

221. As a proximate result of such wrongful acts, Plaintiffs have suffered ongoing damages.

222. Plaintiffs are entitled to recover actual and punitive damages to be determined at trial.

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FOR A SEVENTH CAUSE OF ACTION
(Intentional Interference with Contractual Relations against Defendants MARGARET H. DURHAM LIVING TRUST, MARGARET H. DURHAM, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING, LLC, EZ GLIDE 350, LLC, JAMES W. DURHAM, and HELEN W. SHOCKLEY)

223. Plaintiffs reallege all above paragraphs as if specifically contained herein.

224. Defendants **MARGARET H. DURHAM**, **JAMES W. DURHAM**, and **HELEN W. SHOCKLEY**, while acting in the course of scope and agency, and with the knowledge and consent of the Landlord, intentionally interfered with Plaintiffs' contractual relations with Plaintiffs' employees, customers, vendors, and creditors, and the Landlord is liable under respondeat superior.

225. Defendants knew that Plaintiffs were a party to employment contracts with Plaintiffs' staff.

226. Defendants knew that Plaintiffs maintaining good relations with Plaintiffs' staff was critical to running a successful Barber Shop.

227. Defendant **HELEN W. SHOCKLEY** acted with an improper purpose to harass Plaintiffs and incite financial security in Plaintiffs' employees when engaging Plaintiffs' employees repeatedly concerning rent for the Premises before the rent was due.

228. Defendant **JAMES W. DURHAM** acted with an improper purpose when informing Plaintiffs' staff that Plaintiffs' Barber Shop was closed and to seek employment elsewhere causing Plaintiffs' loss of key personnel and staff to run Plaintiffs' Barber Shop.

229. Defendants knew that Plaintiffs were a party to third-party contracts with Plaintiffs' customers, vendors, and creditors, involving the sale of salon products and services on the Premises and online.

230. Defendants knew that Plaintiffs selling salon products and services on the Premises and online was an important part of Plaintiffs' success.

231. Defendants acted with improper purpose to unlawfully distrain Plaintiffs' personal property without resorting to the judicial process causing Plaintiffs' breach of contract with Plaintiffs' customers, vendors, and creditors related to providing salon products and services.

232. Defendants knew that Plaintiffs were a party to third-party contracts involving the promotion and advertising of the Barber Shop within the Greenville community.

233. Defendants knew that Plaintiffs promoting and advertising the Barber Shop was an important part of Plaintiffs' success.

234. Defendants acted with improper purpose to induce Plaintiffs into involuntarily vacating the Premises when unlawfully evicting Plaintiffs from the Premises without resorting to the judicial process causing Plaintiffs' subsequent breach of contract with Plaintiffs' creditors and vendors.

235. Plaintiffs were injured when Defendants purposefully closed Plaintiffs' Barber Shop on the Premises on or around July 28, 2017:

(1) Plaintiffs suffered a loss of personnel to operate the Barber Shop;

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(2) Plaintiffs suffered a loss of revenues from Plaintiffs' customers, whether on the Premises or online, to pay Plaintiffs' employees, vendors, and creditors;
(3) Plaintiffs suffered a loss of outstanding expenses related to the Barber Shop with third-party creditors and vendors; and,
(4) Plaintiffs suffered a loss of expenses related to the promotion, advertising, and marketing of the Barber Shop to include damages of approximately $19,300.00 or more.

236. Defendants acted intentionally and recklessly in an utter, willful disregard of Plaintiffs' contractual rights with third-parties that constituted wrongful interference with the contracts between Plaintiffs and Plaintiffs' staff, customers, third-party vendors, and third-party creditors.

237. Plaintiffs suffered damages as a direct, proximate and foreseeable result of the willful and intentional misconduct of Defendants.

238. As a result from Defendants' disregard of Plaintiffs' contractual relations, Plaintiffs are entitled to actual and punitive damages to be determined at trial.

FOR AN EIGHTH CAUSE OF ACTION
(Trade Slander *per se* against Defendants MARGARET H. DURHAM LIVING TRUST, MARGARET H. DURHAM, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING, LLC, EZ GLIDE 350, LLC, JAMES W. DURHAM, and HELEN W. SHOCKLEY)

239. Plaintiffs reallege all above paragraphs as if specifically contained herein.

240. Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY**, while acting in the course of scope and agency, and with the knowledge and consent of the Landlord, and with evil motive and actual malice, willfully and wrongfully publicly disparaged Plaintiffs, the Barber Shop, and Plaintiffs' reputation with the intent to injure, disgrace, and defame Plaintiffs and in wanton and reckless disregard for the falsity of their utterances, and the Landlord is liable under respondeat superior.

241. On or around July 7, 2017, Defendant **HELEN W. SHOCKLEY** falsely represented Plaintiffs' financial position when demanding rent from Plaintiffs' employees in front of Plaintiffs' customers during business hours on the sales floor threatening to kick out Plaintiffs for nonpayment of rent before the rent was due.

242. Defendant **HELEN W. SHOCKLEY** knew this representation to be false because Plaintiff **TENSLEY E. THOMAS** ensured Plaintiffs' financial obligations with the Landlord.

243. On or around July 28, 2017, Defendant **JAMES W. DURHAM** falsely instructed Plaintiffs' employees that Plaintiffs' Barber Shop was closed, the employees seek employment elsewhere, and Plaintiffs abandoned the Premises.

244. From on or around August of 2017, Defendant **JAMES W. DURHAM** made false statements to **ZACH HINES**, a prospective business partner of Plaintiffs, that Plaintiffs abandoned the Premises.

245. Defendant **JAMES W. DURHAM** knew the statement of Plaintiffs closing the Barber Shop and abandoning the Premises to be false because Defendant **HELEN W. SHOCKLEY** ordered the locksmith to lock out Plaintiffs from the Premises.

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246. Such disparaging remarks impugned the reputation of Plaintiffs as unprofessional and mismanaged that operated to disregard the rights of Plaintiffs' employees, customers, and business acquaintances with the natural consequence of diminishing Plaintiffs' success with the Barber Shop, or other businesses unrelated to the Barber Shop, and resulting in damages.

247. The conduct of Defendants constituted trade slander per se against Plaintiffs' business or trade.

248. Defendants' despicable conduct was malicious and carried out in willful and conscious disregard for the truth, professional reputation of Plaintiffs, and the rights of Plaintiffs.

249. Plaintiffs are entitled to actual and punitive damages to be determined at trial.

FOR A NINTH CAUSE OF ACTION

(Racial Discrimination pursuant to Civil Rights Act of 1964 and the Civil Rights Act of 1991 pursuant to 42 U.S.C. §§ 1981, 1982, 1983 against all Defendants)

250. Plaintiffs reallege all above paragraphs as if specifically contained herein.

251. Plaintiff **TENSLEY E. THOMAS**, Plaintiff **MARK T. THOMAS**, Plaintiffs' agents or employees, or Plaintiffs' patrons, experienced racial discrimination from Defendants during this landlord-tenant relationship.

252. Plaintiffs **TENSLEY E. THOMAS** and **MARK T. THOMAS**, Plaintiffs' independent contractors, Plaintiffs' staff, and Plaintiffs' patrons are members of a racial minority being African-American.

253. Defendants **MARGARET H. DURHAM**, **JAMES W. DURHAM**, **TAMALA D. CRANE**, and **HELEN W. SHOCKLEY**, while acting in the course of scope and agency, and with the knowledge and consent of the Landlord, possessed the intent for discriminating on the basis of race against African-Americans and the Landlord is liable under respondeat superior.

254. By the conduct described herein, Defendants intentionally violated the rights of Plaintiffs and members of the protected class under the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. 42 U.S.C. §§ 1981(a)-(b), 2000a.

255. Defendants' discrimination against the Plaintiffs and members of the protected class is in violation of the rights secured to Plaintiffs and the members of the protected class by the Civil Rights Act of 1964, and as amended.

256. Defendants' racial discrimination occurred during a protected activity of making and enforcing the Contract.

257. Title 42, Chapter 21, Subchapter I of the United States Code prohibits racial discrimination during the making or enforcing of a contract, which includes leases. 42 U.S.C. §§ 1981(a)-(b), 1982.

258. Defendants' racial discrimination interfered with Plaintiffs' contractual interests related to the use and possession of the Premises and the Plaintiffs' personal property located therein.

259. Plaintiffs have standing on Plaintiff **BLACKSTONE AND CHASE, LLC**'s behalf or to vindicate the rights and immunities it may enjoy, especially with the interests are germane to its staff or patrons.

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260. Plaintiff **TENSLEY E. THOMAS**, Plaintiff **MARK T. THOMAS**, and Plaintiffs' African-American staff and patrons engaged in conduct similarly situated to others outside of the protected class of African-Americans.

261. Plaintiff **TENSLEY E. THOMAS**, Plaintiff **MARK T. THOMAS**, and Plaintiffs' African-American staff and patrons suffered the ultimate sanction of expulsion from the Premises when Defendants' dispossessed and disseized the Premises from the Plaintiffs on or around July 28, 2017, with the improper purpose to deny African-Americans on the Premises.

262. Defendants acted with the improper purpose in the landlord-tenant relationship in a racially discriminatory manner to avoid contact or exposure to African-Americans on the Premises.

263. The conduct of Defendants was so arbitrary on its face supporting a rational inference of racial discrimination toward the Plaintiffs by:

(1) Defendants inducing the Plaintiffs to relocate the Barber Shop at another location before on or around June 8, 2016, after discovering Plaintiffs **TENSLEY E. THOMAS** and **MARK T. THOMAS** were African-American with racial animus;
(2) withholding a copy of the Lease from Plaintiffs **TENSLEY E. THOMAS** and **MARK T. THOMAS** in an arbitrary and capricious manner with racial animus;
(3) physically ousting the Plaintiffs long before filing for a writ of ejectment without mitigating damages to rent the Premises to another tenant with racial animus;
(4) denying Plaintiffs' access to the Premises and the Plaintiffs' property located therein in an arbitrary and capricious manner with racial animus; and
(5) other such acts that may be revealed through discovery and proven at trial.

264. Defendants engaged in disparate or markedly hostile treatment thereby inferring racially discriminatory intent as described herein:

(1) Defendants' conduct was so profoundly contrary to the manifest financial interests of the Landlord to maintain an active tenant on the Premises when attempting to accelerate the Lease for $152,750.00;
(2) Defendants' conduct was so far outside the widely-accepted business norms when referring to the Subcontractors during the upfitting process as "you boys" and "knuckleheads" thus inferring the racially discriminatory terminology of "niggers";
(3) the Landlord's Notice of Default alleging the Plaintiffs to be in violation of upholding the Premises as a first-class retail establishment under Section 10 of the Lease was a pretextual basis to deny African-Americans on the Premises, especially compared to the patrons of Studio 17 as predominantly Caucasian; and,
(4) other such acts that may be revealed through discovery and proven at trial.

265. As a result of Defendants' intentional violation of the Plaintiffs' rights secured by the Civil Rights Act of 1964, Plaintiffs and members of the protected class have suffered anguish, humiliation, distress, inconvenience and loss of enjoyment of life.

266. Defendants have acted with malice or reckless indifference to the rights of the above-named African-American Plaintiffs and members of the protected class.

267. Plaintiffs are entitled to actual and punitive damages from racial discrimination concerning Defendants' racial discrimination by making and enforcing the Lease in violation of the Civil Rights Act of 1964. 42 U.S.C. § 1983. In the alternative, Plaintiffs are entitled to injunctive relief from racial

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discrimination concerning Defendants' racial discrimination by entering and closing a place of public accommodations in violation of the Civil Rights Act of 1964. 42 U.S. Code § 2000a–3(a).

FOR A TENTH CAUSE OF ACTION

(Intentional Infliction of Emotional Distress all Defendants)

268. Plaintiffs reallege all above paragraphs as if specifically contained herein.

269. By reason of the landlord-tenant relationship between the Landlord and Plaintiffs, the Landlord was in a special relationship to Plaintiffs having the power to seriously damage Plaintiffs' interest, security, and enjoyment of the Premises for Plaintiffs' Barber Shop on the Premises.

270. Defendants have committed conduct that was extreme and outrageous as herein described, including, but not limited to, the following: committing forcible entry and detainer in violation of public policy; trade slander; nullifying Plaintiffs' ability to conduct business elsewhere when unlawfully retaining Plaintiffs' personal property to do so; and, engaging in racially discriminatory conduct toward Plaintiffs **TENSLEY E. THOMAS**, **MARK T THOMAS**, and Plaintiffs' African-American employees and patrons.

271. Defendants acted with the intent to harass and annoy Plaintiffs, force Plaintiffs to involuntarily vacate the Premises, and cause Plaintiffs severe, emotional distress.

272. Defendants intended with substantial certainty to cause Plaintiffs to suffer extreme emotional and psychological distress and anguish when Plaintiffs learned of the wrongful eviction.

273. As direct and proximate result of Defendants' conduct, Plaintiffs have suffered severe emotional distress.

274. The acts of Defendants were willful, wanton, deliberate, malicious, oppressive and designed to cause Plaintiffs economic and personal injury. Plaintiffs are entitled to actual and punitive damages to be determined at trial.

FOR AN ELEVENTH CAUSE OF ACTION

(Negligent Infliction of Emotional Distress against all Defendants)

275. Plaintiffs reallege all above paragraphs as if specifically contained herein.

276. Defendants were negligent and careless of the probability that Defendants' acts would cause Plaintiffs severe emotional and psychological distress and anguish.

277. Defendants acted with reckless disregard for the probability that Defendants' acts would cause Plaintiffs severe emotional and psychological distress and anguish.

278. Defendants recklessly caused Plaintiffs emotional distress by engaging in a self-help eviction to forcibly remove Plaintiffs from the Premises and unlawfully distrain Plaintiffs' personal property without resorting to the legal process.

279. Defendants knew Plaintiffs would be injured and still acted with reckless disregard for the probability that Defendants' acts would cause Plaintiffs severe emotional and psychological distress and anguish.

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280. As a direct and proximate result of the acts of each Defendant, individually and collectively as joint and several tortfeasors, Plaintiffs suffered severe emotional distress. Plaintiffs are entitled to actual and punitive damages to be determined at trial.

FOR A TWELFTH CAUSE OF ACTION

(Unfair Trade Practices Act pursuant to S.C. Code Ann. §§ 39-5-10 to -730 against all Defendants)

281. Plaintiffs reallege all above paragraphs as if specifically contained herein.

282. Defendants engaged in deceptive acts, including but not limited to the acts, representations, and omissions set forth in herein, that amount to unfair and deceptive acts or practices in the conduct of commerce and trade.

283. Defendants have breached Plaintiffs' rights by engaging in unfair and deceptive trade practices that affect commerce in violation of South Carolina law. S.C. Code Ann. § 39-5-10.

284. The conduct of Defendants has been immoral, unethical, oppressive, and unscrupulous that has caused substantial injury to Plaintiffs.

285. Defendants have acted intentionally, willfully, and with reckless disregard for Plaintiffs' rights and for the established public policy in South Carolina.

286. As a result of the foregoing, Plaintiffs have been, and continue to be, injured.

287. As a direct and proximate result of this breach, Plaintiffs have suffered damages.

288. Plaintiffs are entitled to damages, reasonable attorney's fees, and the costs incurred in this action. Plaintiffs are also entitled to treble damages resulting from Defendants' unfair and deceptive trade practices. S.C. Code Ann. § 39-5-140.

FOR A THIRTEENTH CAUSE OF ACTION

(Unjust Enrichment against all Defendants)

289. Plaintiffs reallege all above paragraphs as if specifically contained herein.

290. Defendants, while acting in the course of scope and agency, and with the knowledge and consent of the Landlord, have been unjustly enriched at Plaintiffs' expense.

291. Plaintiffs conferred a benefit upon Defendants by entering the Premises, upfitting the Premises, maintaining the Premises, and establishing a Barber Shop that was outfitted with the Plaintiffs' personal property.

292. Plaintiffs did not confer these benefits gratuitously upon Defendants, but with the expectation that Plaintiffs would be able to maintain exclusive dominion, control, and possession of the Premises and Plaintiffs' personal property to the exclusion of all others in exchange for paying monthly rent.

293. As a result of the deceptive or negligent acts of the Defendants, Plaintiffs have never been reimbursed for these benefits:

(1) Plaintiffs are entitled to a reimbursement for the wrongful dispossession or conversion of the Plaintiffs' personal property on the Premises;
(2) Plaintiffs are entitled to a refund of $50.00 per month since June 8, 2016, which totals to $650.00 for 13 months of paying a superfluous amount of additional rent;

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(3) Plaintiffs are entitled to a reasonable refund of funds expended by the Plaintiffs that personally benefited Defendants **JAMES W. DURHAM** and **MARGARET H. DURHAM**;
(4) Plaintiffs are entitled to an accounting of the actual utilities attributable to the Plaintiffs' proportionate use of the Building, Defendant **TAMALA D. CRANE**'s use of the Building, and Defendants **JAMES W. DURHAM** and **MARGARET H. DURHAM**'s use of the Building in the form of additional rent from June 8, 2016, to July 8, 2017;
(5) Plaintiffs are entitled to a refund of leasehold improvements, of which were not particular to the Plaintiffs' use of the Building, that the Plaintiffs expended to bring the existing structure of the Building within compliance of local building and municipal regulations at the time of delivery;
(6) Plaintiffs are entitled to a refund of the Plaintiffs' security deposit for $5,200.00; and,
(7) other such amounts that may be revealed through discovery and proven at trial.

294. As a result of the foregoing, Plaintiffs are entitled to restitution for the Plaintiffs' losses. Defendants have been unjustly enriched in an amount to be determined at trial.

DAMAGES

295. As a result of above-stated actions, and through reckless, intentional, willful and wanton actions of Defendants, whether acting individually, in concert, or through that Defendant's agents, Plaintiffs have sustained actual, ongoing damages in the amount of approximately $380,107.88, and still continue to suffer damages.

WHEREFORE, the Plaintiff prays that:

(1) the Court give leave to amend this Complaint as required;
(2) the Court give the Plaintiffs a hearing on the preliminary injunction;
(3) the Court find the Defendant(s) wrongfully or negligently dispossessed the Plaintiffs of the Plaintiffs' personal property located on the Premises, and enjoin the Defendant(s) immediately from remaining in possession of the Plaintiffs' personal property located therein pursuant to S.C. Code § 15-69-210;
(4) the Court permanently enjoin the Defendant(s) from further trade slander against the Plaintiffs;
(5) the Plaintiffs have a trial by jury;
(6) for all causes of actions, the Plaintiffs be awarded actual and punitive damages in an amount to be determined at trial;
(7) for all causes of actions, the Plaintiffs be awarded to pre-judgment and post-judgment interest as allowed by law;
(8) for all causes of actions, the Plaintiffs be awarded all costs of the action;
(9) for all causes of actions, the Plaintiffs be awarded reasonable attorney fees as applicable by statute; and
(10) the Plaintiffs have such other and further relief as the Court deems just and proper.

Respectfully submitted, this 7 day of May , 2018 .

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Blackstone and Chase, LLC; Mark T. Thomas; Tensley E. Thomas; and Bradley W. Kerr, Plaintiffs, v. Margaret H. Durham Living Trust; Multiplex Systems, Inc.; Ice Rink Engineering and Manufacturing Company, LLC; EZ Glide 350, LLC; Margaret H. Durham; James W. Durham; Helen W. Shockley; and Tamala D. Crane, Defendants.	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT C.A. No. 2017-CP-23-07837 **ANSWER AND COUNTERCLAIM**

PLEASE TAKE NOTICE that Defendants, Margaret H. Durham Living Trust; Multiplex Systems, Inc.; Ice Rink Engineering and Manufacturing Company, LLC; EZ Glide 350, LLC; Margaret H. Durham; James W. Durham; Helen W. Shockley; and Tamala D. Crane, answering the Second Amended Complaint ("Complaint") of the Plaintiffs, allege and state that each and every allegation of the Complaint not admitted herein is hereby denied, strict proof of all denied allegations is demanded, and:

FOR A FIRST DEFENSE

1. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 1 of the Complaint, and therefore deny the same.

2. Defendants admit that Mark T. Thomas, Tensley E. Thomas, and Bradley W. Kerr are natural persons. Defendants are without sufficient information to either admit or deny the remaining allegations of Paragraph 2 of the Complaint, and therefore deny the same.

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3. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 3 of the Complaint, and therefore deny the same.

4. Defendants admit, to the best of its knowledge, Paragraph 4 of the Complaint.

5. Defendants admit Paragraph 5 of the Complaint.

6. Defendants admit Paragraph 6 of the Complaint.

7. Defendants admit Paragraph 7 of the Complaint.

8. Defendants admit Paragraph 8 of the Complaint.

9. Defendants admit Paragraph 9 of the Complaint.

10. Defendants admits that to the extent the named Defendants, other than the Margaret H. Durham Living Trust, acted on behalf of the landlord, that said named Defendants acted on behalf of and as agents or employees of the Margaret H. Durham Living Trust. Defendants deny the remaining allegations of Paragraph 10 of the Complaint.

11. Defendants deny the allegations of Paragraph 11 of the Complaint.

12. The allegations of Paragraph 12 of the Complaint are incomprehensible and Defendants deny the same.

13. The allegations of Paragraph 13 of the Complaint are incomprehensible and Defendants deny the same.

14. Defendants admit that James W. Durham and Margaret H. Durham are married and maintain a personal residence on the third floor of 17 W. North Street. Defendants further admit that James W. Durham was a member of Ridley Piper of SC, LLC and that said LLC owned the building at 17. W. North Street. Defendants deny the remaining allegations of Paragraph 14.

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15. The allegations of Paragraph 15 of the Complaint are incomprehensible and Defendants deny the same.

16. Defendants admit the familial relationship of Tamala D. Crane as the daughter of James W. Durham and Margaret H. Durham. Defendants further admit that Tamala D. Crane operates Studio 17 on the second floor of the Premises. Defendants deny the remaining allegations of Paragraph 16 of the Complaint.

17. The allegations of Paragraph 17 of the Complaint are incomprehensible and Defendants deny the same.

18. Defendant admits that the Landlord, as a paper entity, acted through its agents. Defendants deny the remaining allegations of Paragraph 18 of the Complaint.

19. Defendant admits that the Landlord, as a paper entity, acted through its agents. Defendants deny the remaining allegations of Paragraph 19 of the Complaint.

20. Defendants admit the allegations of Paragraph 20 of the Complaint.

21. Defendants admit the allegations of Paragraph 21 of the Complaint.

22. Paragraph 22 states a legal conclusion to which no response is required. To the extent a response is required, Defendants deny the allegations of Paragraph 22.

23. Defendants admit the allegations of Paragraph 23 of the Complaint.

24. Defendants admit the allegations of Paragraph 24 of the Complaint.

25. Defendants admit that all co-defendants acted as agents or employees of the Defendant the Margaret H. Durham Living Trust. Defendants deny the remaining allegations of Paragraph 25 of the Complaint.

26. Defendants admit the allegations of Paragraph 26 of the Complaint.

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27. Defendants admit that Plaintiff Bradley W. Kerr signed the Lease in the presence of Defendant Helen W. Shockley. Defendants deny the remaining allegations of Paragraph 27 of the Complaint.

28. Defendants admit the term of the lease was for five years. Defendants deny the remaining allegations of Paragraph 28 of the Complaint.

29. Defendants deny the allegations of Paragraph 29 of the Complaint.

30. Defendants admit the allegations of Paragraph 30 of the Complaint.

31. Defendants deny the allegations of Paragraph 31 of the Complaint.

32. Defendants deny the allegations of Paragraph 32 of the Complaint.

33. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 33 of the Complaint, and therefore deny the same.

34. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 34 of the Complaint, and therefore deny the same.

35. Defendants admit that Bradley W. Kerr signed the lease. Defendants are without sufficient information to either admit or deny the remaining allegations of Paragraph 35 of the Complaint, and therefore deny the same.

36. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 36 of the Complaint, and therefore deny the same.

37. Defendants deny the allegations of Paragraph 37 of the Complaint.

38. Defendants deny the allegations of Paragraph 38 of the Complaint.

39. Defendants deny the allegations of Paragraph 39 of the Complaint.

40. Defendants admit the allegations of Paragraph 40 of the Complaint.

41. Defendants deny the allegations of Paragraph 41 of the Complaint.

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42. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 42 of the Complaint, and therefore deny the same.

43. Defendants admit the allegations of Paragraph 43 of the Complaint.

44. Defendants deny the allegations of Paragraph 44 of the Complaint.

45. The allegations of Paragraph 45 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 45 of the Complaint are denied, and strict proof of the allegations is demanded.

46. Defendants deny the allegations of Paragraph 46 of the Complaint.

47. Defendants admit the allegation of Paragraph 47 of the Complaint.

48. Defendants deny the allegations of Paragraph 48 of the Complaint.

49. Defendants deny the allegations of Paragraph 49 of the Complaint.

50. Defendants deny the allegations of Paragraph 50 of the Complaint.

51. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 51 of the Complaint, and therefore deny the same.

52. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 52 of the Complaint, and therefore deny the same.

53. Defendants deny the allegations of Paragraph 53 of the Complaint.

54. Defendants deny the allegations of Paragraph 54 of the Complaint.

55. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 55 of the Complaint, and therefore deny the same.

56. Defendants deny the allegations of Paragraph 56 of the Complaint.

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57. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 57 of the Complaint, and therefore deny the same.

58. Defendants deny the allegations of Paragraph 58 of the Complaint.

59. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 59 of the Complaint, and therefore deny the same.

60. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 60 of the Complaint, and therefore deny the same.

61. Defendants deny the allegations of Paragraph 61 of the Complaint.

62. Defendants deny the allegations of Paragraph 62 of the Complaint.

63. Defendants deny the allegations of Paragraph 63 of the Complaint.

64. The allegations of Paragraph 64 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 64 of the Complaint are denied, and strict proof of the allegations is demanded.

65. Defendants admit that Plaintiffs operated a business on the premises. Defendants are without sufficient information to either admit or deny the remaining allegations of Paragraph 65 of the Complaint, and therefore deny the same.

66. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 66 of the Complaint, and therefore deny the same.

67. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 67 of the Complaint, and therefore deny the same.

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68. Defendants admit that James W. Durham was a customer from time to time of the Parlor operated by Plaintiffs. Defendants deny any further allegations of Paragraph 68 of the Complaint.

69. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 69 of the Complaint, and therefore deny the same.

70. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 70 of the Complaint, and therefore deny the same.

71. Defendants deny the allegations of Paragraph 71 of the Complaint.

72. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 72 of the Complaint, and therefore deny the same.

73. Defendants deny the allegations of Paragraph 73 of the Complaint.

74. Defendants deny the allegations of Paragraph 74 of the Complaint.

75. Defendants deny the allegations of Paragraph 75 of the Complaint.

76. The allegations of Paragraph 76 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 76 of the Complaint are denied, and strict proof of the allegations is demanded.

77. The allegations of Paragraph 77 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 77 of the Complaint are denied, and strict proof of the allegations is demanded.

78. Defendants deny the allegations of Paragraph 78 of the Complaint as stated.

79. Defendants deny the allegations of Paragraph 79 of the Complaint.

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80. Defendants deny the allegations of Paragraph 80 of the Complaint as stated.

81. Defendants deny the allegations of Paragraph 81 of the Complaint.

82. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 82 of the Complaint, and therefore deny the same.

83. Defendants deny the allegations of Paragraph 83 of the Complaint.

84. Defendants deny the allegations of Paragraph 84 of the Complaint.

85. Defendants deny the allegations of Paragraph 85 of the Complaint.

86. Defendants deny the allegations of Paragraph 86 of the Complaint.

87. Defendants admit that Plaintiffs were barred from entering the premises. Defendants deny all further allegations of Paragraph 87 of the Complaint.

88. Defendants deny the allegations of Paragraph 88 of the Complaint.

89. Defendants deny the allegations of Paragraph 89 of the Complaint.

90. Defendants admit that Plaintiffs delivered proof of general liability insurance but deny further allegations of Paragraph 90 of the Complaint including those regarding timing.

91. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 91 of the Complaint, and therefore deny the same.

92. Defendants deny the allegations of Paragraph 92 of the Complaint.

93. Defendants admit notifying Plaintiffs regarding smoking in or near the building and of the presence of unknown children. Defendants deny the remaining allegations of Paragraph 93 of the Complaint.

94. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 94 of the Complaint, and therefore deny the same.

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95. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 95 of the Complaint, and therefore deny the same.

96. The Defendants admit that the City of Greenville threatened future fines but did not levy current fines for false-alarms caused by Plaintiffs.

97. Defendants deny the allegations of Paragraph 97 of the Complaint.

98. Defendants admit notifying Plaintiffs that they would be responsible for future fines caused by false alarms. Defendants deny the remaining allegations of Paragraph 98 of the Complaint.

99. Defendants deny the allegations of Paragraph 99 of the Complaint.

100. Defendants deny the allegations of Paragraph 100 of the Complaint.

101. Defendants deny the allegations of Paragraph 101 of the Complaint.

102. Defendants deny the allegations of Paragraph 102 of the Complaint.

103. Defendants deny the allegations of Paragraph 103 of the Complaint.

104. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 104 of the Complaint, and therefore deny the same.

105. Defendants admit that Plaintiff Mark T. Thomas communicated with Defendant Helen W. Shockley regarding rent, late fees, and the payment of same. Defendants deny the remaining allegations of Paragraph 105 of the Complaint.

106. Defendants deny the allegations of Paragraph 106 of the Complaint as stated.

107. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 107 of the Complaint, and therefore deny the same.

108. Defendants admit the allegations of Paragraph 108 of the Complaint.

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109. The allegations of Paragraph 109 of the Complaint refer to the written Notice of Default sent to Plaintiffs by Landlord. The contents of the Notice of Default speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 64 of the Complaint are denied, and strict proof of the allegations is demanded.

110. Defendants deny the allegations of Paragraph 110 of the Complaint.

111. Defendants deny the allegations of Paragraph 111 of the Complaint.

112. Defendants deny the allegations of Paragraph 112 of the Complaint.

113. Defendants admit that Plaintiffs rent payments were accepted even when late.

114. Defendants deny the allegations of Paragraph 114 of the Complaint.

115. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 115 of the Complaint, and therefore deny the same.

116. Defendants deny the allegations of Paragraph 116 of the Complaint.

117. The allegations of Paragraph 117 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 117 of the Complaint are denied, and strict proof of the allegations is demanded.

118. Defendants deny the allegations of Paragraph 118 of the Complaint.

119. Defendants admit acceptance of champagne at a celebratory event hosted by Plaintiffs. Defendants deny the remaining allegations of Paragraph 119 of the Complaint.

120. Defendants deny the allegations of Paragraph 120 of the Complaint.

121. The allegations of Paragraph 121 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and

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no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 121 of the Complaint are denied, and strict proof of the allegations is demanded.

122. Defendants admit the Fire Department responded to an incident on the premises on July 21, 2017.

123. Defendants deny the allegations of Paragraph 123 of the Complaint.

124. Defendants deny the allegations of Paragraph 124 of the Complaint.

125. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 125 of the Complaint, and therefore the same are denied.

126. Defendants admit the second and third story of the building were usable after restorative measures were taken to clear smoke and smoke damages from the premises. Defendants deny the remaining allegations of Paragraph 126 of the Complaint.

127. Defendants deny the allegations of Paragraph 127 of the Complaint.

128. The allegations of Paragraph 128 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 128 of the Complaint are denied, and strict proof of the allegations is demanded.

129. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 129 of the Complaint, and therefore deny the same.

130. Defendants admit that James W. Durham entered the Premises on the night of July 27, 2017. Defendants deny the remaining allegations of Paragraph 130 of the Complaint.

131. Defendants admit the Landlord changed the locks on the premises on July 28, 2017. Defendants deny the remaining allegations of Paragraph 131 of the Complaint.

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132. Defendants admit the Landlord posted the premises and closed the windows on or around July 28, 2017. Defendants deny the remaining allegations of Paragraph 132 of the Complaint.

133. Defendants admit the Landlord allowed Plaintiffs' staff to retrieve personal belongings from the premises. The Defendants deny the remaining allegations of Paragraph 133 of the Complaint.

134. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 134 of the Complaint, and therefore deny the same.

135. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 135 of the Complaint, and therefore deny the same.

136. Defendants deny the allegations of Paragraph 136 of the Complaint.

137. Defendants deny the allegations of Paragraph 127 of the Complaint.

138. Defendants admit the Landlord attempted to file an insurance claim for the fire.

139. Defendants admit the allegations of Paragraph 139 of the Complaint.

140. Defendants deny the allegations of Paragraph 140 of the Complaint.

141. Defendants deny the allegations of Paragraph 141 of the Complaint.

142. Defendants deny the allegations of Paragraph 142 of the Complaint.

143. Defendants admit the allegations of Paragraph 143 of the Complaint.

144. Defendants admit the allegations of Paragraph 144 of the Complaint.

145. Defendants admit the allegations of Paragraph 145 to the extent they refer to the actions of Penn National Insurance company. Defendants deny the remaining allegations of Paragraph 145 of the Complaint.

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146. The allegations of Paragraph 146 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 146 of the Complaint are denied, and strict proof of the allegations is demanded.

147. The allegations of Paragraph 147 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 147 of the Complaint are denied, and strict proof of the allegations is demanded.

148. Defendants admit that Landlord has not filed for a writ of distraint and deny all allegations that such filing or writ is necessary under the Lease Agreement.

149. Defendants admit the allegations of Paragraph 149 of the Complaint.

150. The allegations of Paragraph 150 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 150 of the Complaint are denied, and strict proof of the allegations is demanded.

151. Defendants deny the allegations of Paragraph 151.

152. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 152 of the Complaint, and therefore deny the same.

153. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 153 of the Complaint, and therefore deny the same.

154. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 154 of the Complaint, and therefore deny the same.

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155. Paragraph 155 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, the Defendants deny the allegations of Paragraph 155 of the Complaint.

156. Defendants deny the allegations of Paragraph 156 of the Complaint.

157. Defendants deny the allegations of Paragraph 157 of the Complaint.

158. Defendants deny the allegations of Paragraph 158 of the Complaint.

159. Defendants deny the allegations of Paragraph 159 of the Complaint.

160. Defendants deny the allegations of Paragraph 160 of the Complaint.

161. Defendants deny the allegations of Paragraph 161 of the Complaint.

162. Defendants deny the allegations of Paragraph 162 of the Complaint.

163. Paragraph 163 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, the Defendants deny the allegations of Paragraph 163 of the Complaint.

164. Defendants deny the allegations of Paragraph 164 of the Complaint.

165. Defendants admit Plaintiffs operated a Barber Shop pursuant to the lease. Defendants deny the remaining allegations of Paragraph 165 of the Complaint.

166. Defendants deny the allegations of Paragraph 166 of the Complaint.

167. Defendants deny the allegations of Paragraph 167 of the Complaint.

168. Defendants deny the allegations of Paragraph 168 of the Complaint.

169. Defendants deny the allegations of Paragraph 169 of the Complaint.

170. Defendants admit that Plaintiffs cannot claim possession of the Premises.

171. Defendants deny the allegations of Paragraph 171 of the Complaint.

172. Defendants deny the allegations of Paragraph 172 of the Complaint.

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173. Paragraph 173 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, the Defendants deny the allegations of Paragraph 173 of the Complaint.

174. Defendants deny the allegations of Paragraph 174 of the Complaint.

175. Defendants admit that Plaintiffs in the past possessed personal property on the premises pursuant to the Lease Agreement.

176. Defendants deny the allegations of Paragraph 176 of the Complaint.

177. Defendants deny the allegations of Paragraph 177 of the Complaint.

178. Defendants deny the allegations of Paragraph 178 of the Complaint.

179. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 179 of the Complaint, and therefore deny the same.

180. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 180 of the Complaint, and therefore deny the same.

181. Defendants deny the allegations of Paragraph 181 of the Complaint.

182. Defendants deny the allegations of Paragraph 182 of the Complaint.

183. Defendants deny the allegations of Paragraph 183 of the Complaint.

184. Defendants deny the allegations of Paragraph 184 of the Complaint.

185. Defendants deny the allegations of Paragraph 185 of the Complaint.

186. Paragraph 186 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, the Defendants deny the allegations of Paragraph 186 of the Complaint.

187. Defendants deny the allegations of Paragraph 187 of the Complaint as stated.

188. Defendants deny the allegations of Paragraph 188 of the Complaint.

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189. Defendants deny the allegations of Paragraph 189 of the Complaint.

190. Defendants deny the allegations of Paragraph 190 of the Complaint.

191. Defendants deny the allegations of Paragraph 191 of the Complaint.

192. Defendants deny the allegations of Paragraph 192 of the Complaint.

193. Paragraph 193 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, the Defendants deny the allegations of Paragraph 193 of the Complaint.

194. Defendants admit entering into a written Lease Agreement with Plaintiffs for the premises. Defendants deny the remaining allegations of Paragraph 194 of the Complaint.

195. Defendants deny the allegations of Paragraph 195 of the Complaint.

196. Defendants deny the allegations of Paragraph 196 of the Complaint.

197. Defendants deny the allegations of Paragraph 197 of the Complaint.

198. The Defendants deny that the Landlord had any obligation beyond those explicitly in the Lease Agreement. Defendants deny the remaining allegations of Paragraph 198 of the Complaint.

199. Paragraph 199 states a legal conclusion to which no response is required. To the extent a response is required, Defendants deny the allegations of Paragraph 199.

200. Defendants deny the allegations of Paragraph 200 of the Complaint as stated.

201. Defendants deny the allegations of Paragraph 201 of the Complaint.

202. Defendants deny the allegations of Paragraph 202 of the Complaint.

203. Defendants deny the allegations of Paragraph 203 of the Complaint.

204. Defendants deny the allegations of Paragraph 204 of the Complaint.

205. Defendants deny the allegations of Paragraph 205 of the Complaint.

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206. Defendants deny the allegations of Paragraph 206 of the Complaint.

207. Defendants deny the allegations of Paragraph 207 of the Complaint.

208. Defendants deny the allegations of Paragraph 208 of the Complaint.

209. Defendants deny the allegations of Paragraph 209 of the Complaint.

210. Defendants deny the allegations of Paragraph 210 of the Complaint.

211. Defendants deny the allegations of Paragraph 211 of the Complaint.

212. Defendants deny the allegations of Paragraph 212 of the Complaint.

213. Paragraph 213 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, Defendants deny the allegations of Paragraph 213 of the Complaint.

214. Defendants deny the allegations of Paragraph 214 of the Complaint.

215. Defendants deny the allegations of Paragraph 215 of the Complaint.

216. Defendants deny the allegations of Paragraph 216 of the Complaint.

217. Defendants deny the allegations of Paragraph 217 of the Complaint.

218. Defendants admit that James W. Durham saw Plaintiff Mark T. Thomas on the premises on July 27, 2017. Defendants deny the remaining allegations of Paragraph 218 of the Complaint.

219. Defendants deny the allegations of Paragraph 219 of the Complaint.

220. Defendants deny the allegations of Paragraph 220 of the Complaint.

221. Defendants deny the allegations of Paragraph 221 of the Complaint.

222. Defendants deny the allegations of Paragraph 222 of the Complaint.

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223. Paragraph 223 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, Defendants deny the allegations of Paragraph 223 of the Complaint.

224. Defendants deny the allegations of Paragraph 224 of the Complaint.

225. Defendants deny the allegations of Paragraph 225 of the Complaint.

226. Defendants deny the allegations of Paragraph 226 of the Complaint.

227. Defendants deny the allegations of Paragraph 227 of the Complaint.

228. Defendants deny the allegations of Paragraph 228 of the Complaint.

229. Defendants deny the allegations of Paragraph 229 of the Complaint.

230. Defendants deny the allegations of Paragraph 230 of the Complaint.

231. Defendants deny the allegations of Paragraph 231 of the Complaint.

232. Defendants deny the allegations of Paragraph 232 of the Complaint.

233. Defendants deny the allegations of Paragraph 233 of the Complaint.

234. Defendants deny the allegations of Paragraph 234 of the Complaint.

235. Defendants deny the allegations of Paragraph 235 of the Complaint.

236. Defendants deny the allegations of Paragraph 236 of the Complaint.

237. Defendants deny the allegations of Paragraph 237 of the Complaint.

238. Defendants deny the allegations of Paragraph 238 of the Complaint.

239. Paragraph 239 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, Defendants deny the allegations of Paragraph 239 of the Complaint.

240. Defendants deny the allegations of Paragraph 240 of the Complaint.

241. Defendants deny the allegations of Paragraph 241 of the Complaint.

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242. Defendants deny the allegations of Paragraph 242 of the Complaint.

243. Defendants deny the allegations of Paragraph 243 of the Complaint.

244. Defendants deny the allegations of Paragraph 244 of the Complaint.

245. Defendants deny the allegations of Paragraph 245 of the Complaint.

246. Defendants deny the allegations of Paragraph 246 of the Complaint.

247. Defendants deny the allegations of Paragraph 247 of the Complaint.

248. Defendants deny the allegations of Paragraph 248 of the Complaint.

249. Defendants deny the allegations of Paragraph 249 of the Complaint.

250. Paragraph 250 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, Defendants deny the allegations of Paragraph 250 of the Complaint.

251. Defendants deny the allegations of Paragraph 251 of the Complaint.

252. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 252 of the Complaint, and therefore deny the same.

253. Defendants deny the allegations of Paragraph 240 of the Complaint.

254. Defendants deny the allegations of Paragraph 254 of the Complaint.

255. Defendants deny the allegations of Paragraph 255 of the Complaint.

256. Defendants deny the allegations of Paragraph 256 of the Complaint.

257. Paragraph 257 of the Complaint is a statement of law and not an allegation, and therefore does not require an answer. To the extent an answer is required, Defendants deny the allegations of Paragraph 257 of the complaint.

258. Defendants deny the allegations of Paragraph 258 of the complaint.

259. Defendants deny the allegations of Paragraph 259 of the complaint.

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260. Defendants deny the allegations of Paragraph 260 of the Complaint.

261. Defendants deny the allegations of Paragraph 261 of the Complaint.

262. Defendants deny the allegations of Paragraph 262 of the Complaint.

263. Defendants deny the allegations of Paragraph 263 of the Complaint.

264. Defendants deny the allegations of Paragraph 264 of the Complaint.

265. Defendants deny the allegations of Paragraph 265 of the Complaint.

266. Defendants deny the allegations of Paragraph 266 of the Complaint.

267. Defendants deny the allegations of Paragraph 267 of the Complaint.

268. Paragraph 268 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, Defendants deny the allegations of Paragraph 268 of the Complaint.

269. Defendants deny the allegations of Paragraph 269 of the Complaint.

270. Defendants deny the allegations of Paragraph 270 of the Complaint.

271. Defendants deny the allegations of Paragraph 271 of the Complaint.

272. Defendants deny the allegations of Paragraph 272 of the Complaint.

273. Defendants deny the allegations of Paragraph 273 of the Complaint.

274. Defendants deny the allegations of Paragraph 274 of the Complaint.

275. Paragraph 275 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, Defendants deny the allegations of Paragraph 275 of the Complaint.

276. Defendants deny the allegations of Paragraph 276 of the Complaint.

277. Defendants deny the allegations of Paragraph 277 of the Complaint.

278. Defendants deny the allegations of Paragraph 278 of the Complaint.

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279. Defendants deny the allegations of Paragraph 279 of the Complaint.

280. Defendants deny the allegations of Paragraph 280 of the Complaint.

281. Paragraph 281 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, Defendants deny the allegations of Paragraph 281 of the Complaint.

282. Defendants deny the allegations of Paragraph 282 of the Complaint.

283. Defendants deny the allegations of Paragraph 283 of the Complaint.

284. Defendants deny the allegations of Paragraph 284 of the Complaint.

285. Defendants deny the allegations of Paragraph 285 of the Complaint.

286. Defendants deny the allegations of Paragraph 286 of the Complaint.

287. Defendants deny the allegations of Paragraph 287 of the Complaint.

288. Defendants deny the allegations of Paragraph 288 of the Complaint.

289. Paragraph 289 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, Defendants deny the allegations of Paragraph 289 of the Complaint.

290. Defendants deny the allegations of Paragraph 290 of the Complaint.

291. Defendants deny the allegations of Paragraph 291 of the Complaint.

292. Defendants deny the allegations of Paragraph 292 of the Complaint.

293. Defendants deny the allegations of Paragraph 293 of the Complaint.

294. Defendants deny the allegations of Paragraph 294 of the Complaint.

295. Defendants deny the allegations of Paragraph 295 of the Complaint.

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FOR A SECOND DEFENSE
(Failure to State a Claim)

296. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

297. The Complaint fails to set forth claims upon which relief can be granted.

FOR A THIRD DEFENSE
(Abandonment, Waiver, Estoppel, Laches, Unclean Hands)

298. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

299. The Complaint is barred, in whole or in part, by the doctrines of abandonment, waiver, estoppel, laches, and/or unclean hands.

FOR A FOURTH DEFENSE
(Default)

300. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

301. Plaintiffs' claims for damages are barred by their own default in the performance of the Lease Agreement.

FOR A FIFTH DEFENSE
(Failure to Mitigate)

302. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

303. Plaintiffs' claims for damages are barred by their failure to mitigate any damages they incurred, which are denied and referenced solely for purpose of this defense.

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FOR A SIXTH DEFENSE
(Affirmative Defenses)

304. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

305. Defendants raise each and every affirmative defense which is required to be set forth in the Defendants' Answer pursuant to SCRCP 8(c), reserving unto themselves the right to amend their pleadings to set forth with specificity the basis for such defenses which may appear appropriate as a result of the evidence and legal principals involved which show the same to be applicable. Defendants have insufficient knowledge and information upon which to form a belief as to whether they may have additional, as yet unstated, separate defenses available. Defendants reserve the right to assert further defenses in the event that they determine that such defenses are appropriate.

COUNTERCLAIM

FACTS

306. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

307. Defendant Margaret H. Durham Living Trust ("Landlord") owns and operates a multiple story, mixed-use building in downtown Greenville ("Property").

308. Landlord has three units in said building each comprising the majority of a single floor of the building.

309. Landlord leases the 3rd floor to the Defendants James W. Durham and Margaret H. Durham for use as a personal residence.

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310. Landlord leases the 2nd floor to Studio 17, a fitness studio owned and operated by Defendant Tamala D. Crane, daughter of Defendants James W. Durham and Margaret H. Durham.

311. Landlord leases the 1st floor unit ("Premises") as commercial space to third parties.

312. The Premises are part of the designated emergency exit for the elevator and basement area of the building.

313. The Premises contain substantial infrastructure for utilities that serve the entire building.

314. Due to the nature of the building, location of infrastructure within the building, and access to the building, Landlord rents the Premises below average market rate.

315. Landlord, through its agents, negotiated and executed a Lease Agreement with Plaintiff Blackstone and Chase, LLC ("Blackstone") on March 8, 2016.

316. Plaintiff Bradley W. Kerr held himself out as the representative and authorized agent of Blackstone.

317. Bradley W. Kerr entered into the Lease Agreement on behalf of and under the authorization of Blackstone on March 8, 2016.

318. Plaintiffs Blackstone, Tensley E. Thomas, and Mark T. Thomas were bound by the actions of Bradley W. Kerr and further ratified those actions by accepting the benefits of the Lease Agreement and making payments under the Lease Agreement.

319. Landlord made clear to Blackstone that the Premises were leased at a sub-market rate because Landlord had to access building infrastructure within the Premises on a regular basis

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and that the Premises were the designated emergency exit path from the building per fire department regulations.

320. Landlord made clear to Blackstone that the building and the Premises were an historic location in Greenville and had been painfully and carefully restored to pristine condition, that any upfitting and fixtures could not be attached to the Premises, and that the Premises must be returned to their original conditions upon termination of the Lease.

321. The Lease Agreement provided to Blackstone a two-month time period for upfit of the Premises.

322. At the time Blackstone took occupancy of the Premises under the Lease Agreement the Premises were in compliance with Greenville building codes.

323. Blackstone fabricated large fixtures within the Premises which required electrical and plumbing work and which occupied much of the internal walls of the Premises.

324. Said fixtures, and the supporting electrical and plumbing work, had to be constructed to Greenville Code and without attachment to the original surfaces of the Premises.

325. Plaintiffs conducted such installation solely for their benefit and not for the benefit of Landlord, nor to bring the Premises generally within compliance with Greenville Code.

326. During the installation of said fixtures, Plaintiffs did damage the Premises by damaging and altering the Premises.

327. Due to the nature of the fixtures and the installation, removal of the fixtures in accordance with the Lease Agreement will further damage the Premises.

328. Plaintiffs' intended use of the Premises and large fixtures required the use of a second restroom not required by previous tenants and not anticipated by the inspector.

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329. Landlord, at Plaintiffs' request, agreed to amend the Lease Agreement and lease an additional restroom and appurtenant space to Plaintiffs at a nominal rate.

330. Landlord bore the cost of upfitting the additional restroom and appurtenant space.

331. Plaintiffs opened operations at the Premises as Liberty Fine Cuts and Shaves.

332. Plaintiffs worked with Jason Bible, who Landlord believed to be a partner or owner of Blackstone.

333. While operating as Liberty Fine Cuts and Shaves, Landlord's 2nd floor tenant notified Plaintiffs that the music from the 1st floor was so voluminous as to interfere with the 2nd floor operations.

334. The management of Liberty Fine Cuts and Shaves came to the 2nd floor, listened to the music, coordinated with staff on the 1st floor, and found a volume for the music agreeable to all.

335. Music emanating from the Premises during normal operations was not objectionable while Plaintiffs continued operations as Liberty Fine Cuts and Shaves.

336. Some time in October of 2016, Plaintiffs quit doing business as Liberty Fine Cuts and Shaves and began operations under new management as 17 W. N. Street Parlor.

337. After the change in name, music emanating from the Premises became a significant nuisance to the operation of other tenants in the building.

338. Defendant Tamala D. Crane, respectful of her position as a tenant, refrained from direct communications with other tenants and provided notices to Landlord about all complaints with the building regardless of the source of said complaints.

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339. Individual instructors from Studio 17 who had friendly relations with Plaintiffs did communicate directly with Plaintiffs regarding the unacceptable volume emanating from the Premises.

340. The notices, communications, and complaints were to no avail, and Plaintiffs continued to play music or other amplified entertainment at or above nuisance volume.

341. Plaintiffs' voluminous music and other entertainment was a nuisance to Landlord and Landlord's other tenants and did impede the operations of other tenants and alienated business of other tenants and thereby Landlord.

342. Plaintiffs' staff commonly smoked in the common area of the building or immediately outside the entrance.

343. Said smoking caused a pungent haze to form in the stairwell creating a stench offensive to the health-conscience customers of the 2nd floor tenant.

344. The Lease Agreement required Plaintiff to comply with all local ordinances and codes.

345. Greenville City Ordinances prohibit smoking inside public buildings or within ten feet of an entrance to a public building.

346. Plaintiffs' violation of said ordinance caused the harm said ordinance is intended to prevent in that Plaintiffs' smoking created a repugnant environment that reeked of smoke.

347. Landlord notified Plaintiffs that there was no smoking allowed in the building or within 10 feet of the entrance of the building.

348. Plaintiffs' response was to move smoking to within 10 feet of another entrance to the building and immediately in front of the signs for the 2nd floor tenant.

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349. The 2nd floor tenant, Studio 17, a fitness studio, received unwanted association with an unhealthy habit and suffered a loss of reputation.

350. This loss of reputation and association with a known cancerous vice served as a further nuisance to a tenant of the Landlord.

351. The Lease Agreement requires Plaintiffs to maintain general liability insurance protection for the benefit of both Plaintiffs and Landlord.

352. The Lease Agreement further requires Plaintiffs to notify Landlord at least thirty days in advance of the expiration, cancellation, termination, lapse, or change of any insurance policy.

353. Sometime in the winter of 2016-2017, the Plaintiffs began a month-to-month general liability insurance policy.

354. Said policy effectively expired at the end of each month unless renewed.

355. Plaintiffs failed to pay the renewal fee for insurance on at least one occasion causing the insurance to lapse.

356. Plaintiffs did not, and in fact were unable, to provide Landlord with the notice required under the lease.

357. Plaintiffs failure to maintain adequate insurance and the ability to notify Landlord of a change as required was a material breach of the Lease Agreement.

358. Plaintiffs, by the terms of the lease, were responsible for general maintenance of the Premises.

359. Plaintiffs breached the lease and failed to maintain one of the toilets in a professional manner.

360. Said toilet overflowed for an extended period of time.

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361. Said overflow damaged the floor of the restroom and caused water to collect in the basement, further damaging the building.

362. Landlord had to step in and remedy the situation at its own cost.

363. On or about May 15, 2017, the Greenville Fire Department inspected the Premises and cited Plaintiffs for multiple violations.

364. Plaintiffs failed to correct these violations.

365. On or about July 21, 2017, the Greenville Fire Department responded to a fire alarm at the Premises.

366. The Premises was filled with smoke, and smoke was visible in the other floors of and immediately exterior to the building.

367. Margaret H. Durham returned from watering plants outside and entered her residence to a smoky haze permeating the building and the fire alarm sounding.

368. Landlord, through its evacuating agents, immediately began an inspection of the building from the 3rd floor down as the Greenville Fire Department arrived with multiple fire brigades.

369. Landlord and the Greenville Fire Department quickly determined the smoke was emanating from the first floor.

370. After several minutes inspecting the Premises with multiple firemen, the Greenville Fire Department determined that the source of the fire was the improper use of roasting pans as towel warmers.

371. Plaintiffs negligently and continually used multiple roasting pans as towel warmers in disregard for safety and the law.

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372. Plaintiffs knew that James W. Durham and Margaret H. Durham used the building as their residence.

373. Plaintiffs negligently left the roasting pan plugged in and turned on overnight and unattended.

374. With the determination that the building was safe and the fire extinguished, the Landlord returned and began taking restorative measures to mitigate smoke damage.

375. The fire created by Plaintiffs' negligence caused significant smoke damage.

376. The Greenville Fire Department re-inspected the Premises on July 21, 2017 and determined that the violations from May 15, 2017 had not been corrected.

377. The Greenville Fire Department inquired of management why the violations had not been fixed, and management responded it was "because the shop owner comes into the shop after hours and just re-arranges things without the shop manager's knowledge."

378. The Greenville Fire Department advised Landlord that it would be held responsible if the violations were not corrected.

379. The failure of Plaintiffs to comply with safety ordinances and the resulting fire created an emergency situation to which Landlord had to respond until the ordinances were met and the situation remedied.

380. The Landlord immediately began taking precautions to ensure that violations were corrected.

381. Landlord also undertook the duty to ensure that no roasting pan was left on at night to cause another fire incident.

382. Such precaution was to both protect the building and the personal safety of the residents of the building.

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383. On the evening of July 27, 2017, James W. Durham, acting on behalf of Landlord, entered the Premises after closing hours on his way home and checked the status of the roasting pans.

384. Upon entering the Premises, James W. Durham found the lights off and the 1st floor dark.

385. James W. Durham made his way to the line of roasting pans and began checking each one-by-one to ensure they were unplugged as required by the Greenville Fire Department.

386. James W. Durham reached a roasting pan that was plugged in and turned on, and this discovery caused him to utter an exclamation.

387. Upon his exclamation, Mark T. Thomas spoke out of the dark and uttered a simple "I'm sorry."

388. James W. Durham acknowledged Mark T. Thomas, unplugged the hot roasting pan, and checked the remaining roasting pans as he made his exit.

389. This incident placed Landlord in fear of losing its building and James W. Durham and Margaret H. Durham in fear for their safety.

390. The Lease Agreement provided that rent was due upon the first of the month.

391. Plaintiffs routinely paid rent late even though Landlord had notified them verbally and in writing that rent was to be paid on the first of the month.

392. As of July 13, 2017, Plaintiffs had failed to pay rent.

393. As of July 13, 2017, Plaintiffs had exhausted all deadlines and grace periods for the paying of rent.

394. Landlord promptly notified Plaintiffs of said breach of the Lease Agreement in a writing received by Plaintiffs on July 17, 2017.

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395. Landlord, in accordance with the Lease Agreement, waited ten days for Plaintiffs to cure their default.

396. At the expiration of the tenth day, Plaintiffs had not cured their default.

397. Plaintiffs did not notify Landlord that there was a rent dispute prior to the expiration of the tenth day.

398. Upon exhaustion of the time for Plaintiffs to cure their default, the Landlord acted within the authority of the Lease Agreement and executed its contractual right to repossess the Premises.

399. Landlord evaluated the condition of the Premises and determined that the cost to return the Premises to the original condition, as required by the Lease Agreement, would be greater than the fair market value of the property within the Premises.

400. Landlord acted within the authority of the Lease Agreement and executed its contractual right of distraint of the personal property in the Premises to cover the damages already incurred and the necessary expenses to fulfill Plaintiffs' obligations under the Lease Agreement.

401. Plaintiffs, through a multitude of legal actions, have prevented Landlord from cleaning up and reletting the Premises and thereby have prevented Landlord from mitigating damages.

402. Landlords inability to relet the Premises is a continuing, accruing damage.

FIRST COUNTERCLAIM
(Breach of Contract)

403. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

404. Landlord has fully performed all conditions of the Lease Agreement.

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405. Plaintiffs have breached the Lease Agreement in the following particulars, which are not all inclusive:

a. Failing to pay rent on time;

b. Failing to pay rent;

c. Failing to abide by the terms of the Lease Agreement in upfitting the Premises;

d. Failing to maintain appropriate general liability insurance;

e. Failing to perform adequate maintenance on the Premises;

f. Maintaining a hazardous environment;

g. Using the Premises for unauthorized activities; and

h. Failing to follow City Ordinances;

406. Plaintiffs breaches of the Lease Agreement have caused Landlord actual damages.

407. Consequently, Plaintiffs are liable to Landlord for actual and consequential damages, including rent acceleration and cost to restore the Premises to its condition prior to the Lease Agreement, prejudgment interest, costs and attorneys' fees.

SECOND COUNTERCLAIM
(Breach of Contract Accompanied by Fraudulent Act)

408. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

409. In addition to the breaches of contract by Plaintiffs, the circumstances described herein show a pattern of behavior and motive that demonstrate both a fraudulent intent relating to the breach, and fraudulent acts accompanying the breach.

410. Specifically, Plaintiffs committed the following fraudulent acts, which are not all inclusive:

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a. Knowingly and willfully violated City Ordinances creating an unsafe environment which resulted in a fire.

b. Knowingly and willfully violated City Ordinances by smoking within the Premises or ten feet of the doors of the premises and thereby damaging the reputation of the Landlord and other tenants within the building.

c. Knowingly and willfully served alcohol on the premises without a license and as a routine business practice.

d. Knowingly and willfully offered for sale product on the Premises that impugned the character of the building as a first-class space for office or retail.

e. Upon notification of Landlord, promised to pay rent late, remained in the Premises using the same for their own purpose, and failed to pay rent at all.

411. The fraudulent acts of Plaintiffs are characterized by dishonesty in fact and unfair dealing.

412. Landlord has been damaged by these breaches and is entitled to all damages flowing from these breaches, punitive damages, costs and interest.

THIRD COUNTERCLAIM
(Negligence / Gross Negligence)

413. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

414. Plaintiffs owed Landlord a duty to utilize proper procedures and appropriate equipment to carry out their business in a manner that did not place the building and occupants in jeopardy.

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415. Landlord would show that Plaintiffs negligently, recklessly, willfully, wantonly, intentionally and grossly negligently breached their duty to Landlord in failing to utilize proper procedures and appropriate equipment to carry out their business, which led to fire hazards and ultimately smoke damage to the Premises.

416. As a direct and proximate result of Plaintiffs' negligent, reckless, willful, wanton, intentional and grossly negligent acts, omissions and/or delicts as enumerated hereinabove, Landlord was seriously injured due to the damage done to the Premises. Therefore, Landlord requests judgment against Plaintiffs, jointly and severally, for actual and punitive damages with interest thereon.

FOURTH COUNTERCLAIM
(Conversion)

417. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

418. Plaintiffs utilized fixtures and upfits to the Premises in violation of the terms of the Lease Agreement.

419. Plaintiffs' fixtures and upfits, due to the size and installation, have required excessive time and expense to remove and return the Premises to its pre-lease condition.

420. Plaintiffs converted the Premises to their own use.

421. As a direct and proximate result of the Plaintiffs' conversion of the Premises, Landlord has been significantly damaged and is entitled to recover actual damages from Plaintiffs.

FIFTH COUNTERCLAIM
(Private Nuisance)

422. Defendants reallege and incorporate the allegations set forth above to the extent

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they are consistent with this defense.

423. Plaintiffs' intentional acts in continuing to play loud music and smoke in common areas and near the Property despite repeated requests from Landlord and other tenants to cease doing so caused Defendants an unreasonable interference with the use and enjoyment of the Property, as hereinbefore described.

424. Defendants sustained damages as hereinbefore described, including temporary and/or permanent reduction in value of the Property, interference with the use of and loss of enjoyment of the Property, and mental and emotional distress.

SIXTH COUNTERCLAIM
(Abuse of Process)

425. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

426. Plaintiffs' filing of this action constitutes an abuse of process in that this action is not taken to redress any injury sustained by Plaintiffs as a result of Defendants' conduct, but rather was initiated primarily to promote Plaintiffs' ulterior purposes to gain objectives not legitimate in the use of the process, specifically attempting to get Defendants to help pay for the losses incurred from Plaintiffs' failed business venture.

427. Plaintiffs' filing of this action constitutes an abuse of process in that Plaintiffs did not undertake this action in good faith because Plaintiffs knew that they were not entitled to the relief asserted in this action.

428. By unjustifiably filing this action against Defendants, Plaintiffs committed willful acts in the use of the process not proper in the conduct of the proceeding, aimed at an object not legitimate in the use of the process, and for the primary purpose of achieving a collateral aim.

429. Defendants have been harmed in that they have incurred actual and special

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damages which result directly and immediately from the willful conduct of Plaintiffs, including but not limited to costs and attorneys' fees to defend this action, and Plaintiffs are liable to Defendants for those damages along with the expense of measures reasonably necessary to counteract the abuse of process, including litigation, attorneys' fees and costs in an amount to be determined, plus prejudgment interest and punitive damages in an amount to be determined.

430. As a direct result of Plaintiffs' abuse of process, Defendants are entitled to the aforementioned actual, special, and punitive damages plus prejudgment interest.

WHEREFORE, having fully answered, Defendants pray that this Court enter judgment awarding them the following relief:

1. Dismissing Plaintiffs' Complaint with prejudice;

2. Declaring that Plaintiffs are entitled to no recovery from Defendants;

3. Taxing the costs of this action against Plaintiffs;

4. Awarding Defendants their attorneys' fees;

5. Granting Defendants a trial by jury on all issues so triable;

6. Awarding Defendants a judgment on the Counterclaims against Plaintiffs, including actual damages and special damages, plus prejudgment interest and punitive damages in an amount to be determined; and

7. Granting such other relief in favor of Defendants as the Court deems proper.

(Signature page follows)

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Respectfully Submitted,

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Greenville, South Carolina

May 31, 2018

ELECTRONICALLY FILED - 2018 Jun 29 3:00 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

STATE OF SOUTH CAROLINA **COUNTY OF GREENVILLE**	**IN THE COURT OF COMMON PLEAS** **FOR THE THIRTEENTH JUDICIAL CIRCUIT**
BLACKSTONE AND CHASE, LLC, MARK T. THOMAS, TENSLEY E. THOMAS, AND BRADLEY W. KERR, Plaintiff(s), v. **MARGARET H. DURHAM LIVING TRUST, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING COMPANY, LLC, EZ GLIDE 350, LLC, MARGARET H. DURHAM, JAMES W. DURHAM, HELEN SHOCKLEY, AND TAMALA D. CRANE,** Defendant(s).	2017-CP-23-07837 CIVIL ACTION NO. **PLAINTIFFS' NOTICE AND MOTION TO STRIKE AND MOTION TO DISMISS DEFENDANTS' ANSWER AND COUNTERCLAIM**

TO: MARGARET H. DURHAM LIVING TRUST
MULTIPLEX SYSTEMS, INC.
ICE RINK ENGINEERING AND MANUFACTURING COMPANY, LLC
EZ GLIDE 350, LLC
MARGARET H. DURHAM
JAMES W. DURHAM
HELEN W. SHOCKLEY
TAMALA D. CRANE

PLEASE TAKE NOTICE THAT Plaintiffs **BLACKSTONE AND CHASE, LLC, ET AL.** ("Plaintiff" individually or "Plaintiffs" collectively), by and through the undersigned counsel, and pursuant to Rules 12(b)(6), 12(c), 12(e), and 12(f) of the South Carolina Rules of Civil Procedure, hereby move this Court for an order granting Plaintiffs' Motion to Strike responses in Defendants' Answer and allegations in Defendants' Counterclaims as well as Plaintiffs' Motion to Dismiss Defendants' Counterclaim. The date, time, and location for this hearing will be set by the Court at a later time.

This motion is supported by applicable law, the pleadings in this action, and accompanying memorandum, including supporting exhibits and documents, which Plaintiffs hereby gives notice and reserves the right to file in support of this motion and rely on the memorandum and all applicable law during a hearing on this matter. Plaintiffs show the Court:

I. DEFENDANTS' COUNTERCLAIM FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AGAINST PLAINTIFFS. S.C.R.C.P. RULE 12(B)(6).

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A. DEFENDANTS FAILED TO ESTABLISH THE EXISTENCE OF THE LEASE AS A CONTRACT BARRING CAUSES OF ACTION RELATED TO BREACH OF CONTRACT AND BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACTS

Plaintiffs move to dismiss Defendants' Counterclaim for breach of contract and breach of contract accompanied by fraudulent acts because Defendants' lease agreement was not binding on Plaintiffs as an unauthorized lease agreement. Defendants may not deny facts presumptively within the Defendants' knowledge or matters of public record to put such facts in issue. *Clanton's Auto Auction Sales, Inc. v. Campbell*, 230 S.C. 65, 71, 94 S.E.2d 172, 175 (1956). Such evidence of email correspondence by opposing party and the lease agreement submitted by Defendants to the Gantt Magistrate Court is admissible as substantive evidence that is an admission made by party opponent under Rule 801(d)(2) of the South Carolina Rules of Evidence.

The lease agreement was never executed with the authority of a majority of members from Plaintiff **BLACKSTONE AND CHASE, LLC**. The lease agreement was executed prior to the formation of Plaintiff **BLACKSTONE AND CHASE, LLC**, as an entity with the South Carolina Secretary of State. The lease agreement was an *ultra vires* contract because the lease agreement was signed on or around March 13, 2016, by Plaintiff **BRADLEY W. KERR**. But, Plaintiff **BLACKSTONE AND CHASE, LLC**, was not formed yet until on or around May 13, 2016. S.C. Code Ann. §§ 32-3-10, 27-35-10 to -30; *see Huguenot Mills v. Jempson & Co.*, 68 S.C. 363, 366, 47 S.E. 687, 688 (1904); *Pearce v. Madison & I. R. Co.*, 62 U.S. (21 How.) 441, 443 (1859). Such information as to the status of Plaintiff **BLACKSTONE AND CHASE, LLC**, as an entity was a matter of public record with the South Carolina Secretary of State. S.C. Code Ann. §§ 33-44-101 to -210. Defendants admitted that only Plaintiff **BRADLEY W. KERR** signed the lease agreement. Defendants admitted that Plaintiffs **MARK T. THOMAS** and **TENSLEY E. THOMAS** never signed the lease agreement, and the lease agreement failed to show their signatures. Defendants admitted to never meeting Plaintiffs **MARK T. THOMAS** and **TENSLEY E. THOMAS** until after the lease was executed. Therefore, Defendants admitted that Defendants never obtained a majority of members from Plaintiff **BLACKSTONE AND CHASE, LLC**, to sign the lease agreement as required by the Operating Agreement for Plaintiff **BLACKSTONE AND CHASE, LLC**.

Defendants were placed on notice that neither Plaintiffs **MARK T. THOMAS** or **TENSLEY E. THOMAS** saw the lease agreement when both parties requested from Defendants a copy of the lease repeatedly via email to Defendant **HELEN W. SHOCKLEY**, who Defendants admitted was an agent of the landlord and Defendant **MARGARET H. DURHAM LIVING**

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TRUST. Plaintiffs **MARK T. THOMAS** and **TENSLEY E. THOMAS** never viewed the lease agreement while Plaintiff **BLACKSTONE AND CHASE, LLC**, was in possession of the premises. Plaintiffs **MARK T. THOMAS** and **TENSLEY E. THOMAS** never ratified terms and conditions of a lease agreement they never saw. *Anthony v. Padmar, Inc.*, 320 S.C. 436, 452, 465 S.E.2d 745, 755 (Ct. App. 1995); *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 77, 124 S.E.2d 602, 604 (1962); *Moore v. Hardaway Contracting Co.*, 193 S.C. 299, 305, 8 S.E.2d 511, 513 (1940). Clearly, no ratification of the lease agreement by Plaintiffs **MARK T. THOMAS** or **TENSLEY E. THOMAS** ever occurred under the circumstances. Thus, Defendants failed to prove the existence of the lease agreement as a contract. *Taylor v. Cummins Atl.*, 852 F. Supp. 1279, 1286 (D.S.C. 1994) (breach of contract); *Crawford v. Limehouse & Sons, Inc.*, Civil Action No. 2:10-2094-CWH-BM, 2010 U.S. Dist. LEXIS 131291, at *5-6 (D.S.C. Nov. 10, 2010) (breach of contract accompanied by fraudulent acts).

Plaintiffs hereby move to dismiss and strike any claims for breach of contract or breach of contract accompanied by fraudulent acts concerning the lease agreement as asserted in Defendants' Counterclaim, pursuant to Rules 12(b)(6), 12(c), and 12(f) of the South Carolina Rules of Civil Procedure.

B. DEFENDANTS' FAILED TO COMPLY STRICTLY WITHIN THE TERMS OF THE LEASE AGREEMENT BARRING ALLEGED SMOKE DAMAGES FOR BREACH OF CONTRACT, BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACTS, AND NEGLIGENCE

Plaintiffs move to dismiss Defendants' Counterclaim for smoke damage to the premises, to the extent said damage is alleged in any of Defendants' specific causes of action. Plaintiffs referenced to the aforementioned Lease Agreement, which was drafted by Defendants on the landlord's behalf. The lease agreement was previously submitted by Defendants before Gantt Summary Court as well as with the Plaintiffs' Second Amended Complaint. Defendants rely on the lease agreement in their own pleadings. Plaintiffs asserted said lease agreement provides a specific remedy for smoke damage in Section 16 of the lease agreement. That remedy placed the burden of repair on the landlord and Defendant **MARGARET H. DURHAM LIVING TRUST.** Defendants' Counterclaim contained no facts that indicated Defendants performed any repairs to the premises due to smoke damage, which is required by the Defendants' lease agreement. Accordingly, Plaintiffs asserted Defendants' failure to comply with the terms of their own lease agreement that disallowed this requested relief.

Plaintiffs hereby move to dismiss any claims for smoke damage to the building, as asserted in Defendants' Counterclaim, pursuant to Rule 12(b)(6) and 12(c) of the South Carolina Rules of Civil Procedure.

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C. DEFENDANTS' CLAIM FOR CONVERSION TO REAL PROPERTY FAILED AS A MATTER OF LAW BECAUSE CONVERSION ONLY APPLIES TO PERSONAL PROPERTY

Defendants cause of action for conversion should be dismissed because the tort of conversion only applies to personal property—not real property. *Hawkins v. City of Greenville*, 358 S.C. 280, 297, 594 S.E.2d 557, 566 (Ct. App. 2004) ("[A] conversion action does not lie when alleging the exercise of dominion or control over real property."). A claim for conversion concerning real property will fail as a matter of law. *Hawkins*, 358 S.C. at 297-98. The tort of conversion under South Carolina common law "is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights." *Crane v. Citicorp Nat'l Servs.*, 313 S.C. 70, 73, 437 S.E.2d 50, 52 (1993) (emphasis added). To maintain a cause of action for conversion, Defendants must "establish *either title to or right to the possession of the personal property*." *Crane*, 313 S.C. at 73 (emphasis added). Here, Defendants alleged conversion of the premises, which is real property, due to Plaintiffs' trade fixtures on the premises and upfitting of the premises. This cause of action was an utter misapplication of the tort of conversion and must fail as a matter of law.

Plaintiffs hereby move to dismiss Defendants' cause of action for conversion as asserted in Defendants' Counterclaim, pursuant to Rules 12(b)(6), 12(c), and 12(f) of the South Carolina Rules of Civil Procedure.

D. DEFENDANTS' CLAIM FOR NUISANCE FAILED TO SHOW DEFENDANTS OPERATED UNLAWFULLY OR IN AN UNREASONABLE MANNER WARRANTING DISMISSAL

Defendants cause of action for private nuisance should be dismissed because Defendants failed to allege the elements of private nuisance. Whether an establishment or business is a private nuisance depends on the "the correlative rights of the parties–the right of one generally to make such lawful use of his property as he may desire and the right of the other to be protected in the reasonable enjoyment of his property." *Young v. Brown*, 212 S.C. 156, 169, 46 S.E.2d 673, 679 (1948). A business conducting a lawful business on the property must operate in a lawful or reasonable manner to prevent the unreasonable interference with another's lawful use and enjoyment of that person's property and material injury or great annoyance to others. *Winget v. Winn-Dixie Stores, Inc.*, 242 S.C. 152, 159, 130 S.E.2d 363, 367 (1963). By contrast, "every annoyance or disturbance of a landowner from the use made of property by a neighbor does not constitute a nuisance." *Id.* The dispositive issue is whether one's use of the property causes injury to another's legal rights—not whether the other person is merely "annoyed or disturbed by the operation of the business in question." *Id.* When living in

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organized communities and mixed use of property, one must have reasonable expectations of suffering some inconvenience and annoyance from neighboring businesses when operating the business on the property in a reasonable manner. *See id.*

A lawful business should not be liable for a private nuisance "on account of every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or over-sensitive person." *Young*, 212 S.C. at 169-70. Whether one's particular use of property is reasonable, or a private nuisance, is largely a factual determination made upon factors such as location, characterization of the neighborhood, nature of the use of one's property, extent and frequency of the complaining injury, and the effect on another's enjoyment of life, health, and property. *Winget*, 242 S.C. at 160. Additionally, a business operating on property lawfully and located in a commercial zone for retail business does not permit the landowner to "recover for depreciation in value of [the landowner's] property, which resulted solely from the location of the business of the defendants in an area which had been zoned by the proper authorities for such type of business." *Id.* at 163-64.

Plaintiffs enforced a strict no-smoking policy with Plaintiffs' employees on or near the Premises. Hence, any of Plaintiffs' employees violating the no-smoking policy acted outside the scope of employment, and thus those employees' actions were not be attributable to Plaintiffs. A business is only liable for the acts of its employees within the scope of employment. *See Genovese v. Bergeron*, 327 S.C. 567, 574, 490 S.E.2d 608, 612 (Ct. App. 1997); *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145-46, 425 S.E.2d 764, 773 (Ct. App. 1992). Defendants' distaste for smoking by third-parties' conduct unrelated to Plaintiffs operating a business on the Premises did not warrant a private nuisance. Defendants placed commercially unreasonable expectations upon Plaintiffs to police the public sidewalks near the building and improperly step into the shoes of law enforcement to monitor no-smoking ordinances in downtown Greenville, South Carolina.

Merely operating a business, even when located within a residential area, in a manner that is normal and necessary to the incidental operations thereof did not warrant a nuisance. Plaintiffs played music for Plaintiffs' patrons during normal business hours in a reasonable manner. Defendants admitted that the Building is old. Naturally, to any reasonable observer, little insulation existed between the first two floors of the building. Plaintiffs heard the patrons of Studio 17 over the music played on the Premises. Studio 17 heard the music played on the Premises. And, Plaintiffs were never fined for a noise ordinance violation.

A nuisance never occurred just because Defendants find smoking by third-parties distasteful that was merely incidental to living in a busy downtown area with heavy traffic by the

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public and third-parties. A nuisance never occurred just because the other Defendants, as tenants, were annoyed by Plaintiffs' music that was merely incidental to operating a retail store. A nuisance does not operate the protect the sensitive needs of one tenant's use of the property over another tenant's reasonable use of the property incidental to operating a retail business. Defendants may not claim depreciation in value to the premises for a perceived annoyance merely incidental to operating a lawful business or unattributable to Plaintiffs by acts of third-parties unrelated to Plaintiffs.

Plaintiffs hereby move the Court that Defendants' cause of action for nuisance should be stricken and dismissed. S.C.R.C.P. Rules 12(b)(6), (f).

E. DEFENDANTS CLAIM FOR ABUSE OF PROCESS FAILED BECAUSE PLAINTIFFS ASSERTED LEGITIMATE, LEGAL RIGHTS AUTHORIZED BY LAW

Defendants' claim for abuse of process should be dismissed because Plaintiffs merely asserted a legitimate, legal right within the judicial process. The cause of action for the tort of abuse of process "provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Food Lion, Inc. v. United Food & Commer. Workers Int'l Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002). The elements for the abuse of process tort include: (1) an ulterior purpose; and, (2) a willful act using the judicial process that is improper for regularly conducting the proceeding. *Id.* An ulterior purpose is when the judicial process is used to gain an illegitimate objective. *Id.* The element of willful act is some definite, overt act using the judicial process that is improper because the act is either unauthorized by the process or directed at an illegitimate, collateral objective in the regular use of the judicial process. *Id.* at 71. However, no ulterior purpose, however, exists when a party merely seeks to the right to access property as the subject matter of the dispute. *Davis v. Epting*, 317 S.C. 315, 319-20, 454 S.E.2d 325, 328 (Ct. App. 1994). Thus, merely asserting a legitimate, legal right within the judicial process is not grounds for abuse of process. *See id.*

Here, no misuse of the judicial process exists when Plaintiffs exercised legitimate, legal rights by statutory tenancy principles concerning allegations of forcible entry and detainer, claim and delivery, wrongful dispossession, and so forth related to Defendants locking out Plaintiffs from the premises. Defendants obtained a writ of ejectment without ever notifying Plaintiffs' counsel of any pleadings concerning Defendants' application for a writ of ejectment in violation of Plaintiffs' constitutional rights to due process. Within five days of the order for a writ of ejectment, Plaintiffs had the right to appeal the writ of ejectment. Plaintiffs pursued a complaint for declaratory relief because third parties have an interest in Plaintiffs' personal property located on the premises in the exclusive dominion, control, and possession of Defendants since

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on or around July 28, 2017. Plaintiffs merely defended Plaintiffs' legal rights under the circumstances in this lititgation.

Plaintiffs hereby move to dismiss Defendants' cause of action for abuse of process as asserted in Defendants' Counterclaim, pursuant to Rules 12(b)(6), 12(c), and 12(f) of the South Carolina Rules of Civil Procedure.

II. DEFENDANTS FAILED TO PROVIDE A MORE DEFINITE STATEMENT THAT PLAINTIFFS CANNOT FRAME A RESPONSE. S.C.R.P. RULE 12(e).

Defendants failed to respond to Plaintiffs' Second Amended Complaint with definiteness by combining conflicting admissions and allegations in both the Answer and Counterclaim that was so vague, ambiguous, and conflicting to frame any kind of response. S.C.R.C.P. Rule 12(e). Defendants failed to state the Second Defense, Third Defense, and Sixth Defense in Defendants' Answer with definiteness for (1) dismissing any of Plaintiffs' causes of action in Plaintiffs' Second Amended Complaint, (2) abandonment, waiver, estoppel, laches, and unclean hands, and (3) affirmative defenses respectively in a manner that was so vague or ambiguous to frame any kind of response. S.C.R.C.P. Rule 12(e).

Plaintiffs hereby move to dismiss the Second Defense, Third Defense, and Sixth Defense in Defendants' Answer pursuant to Rules 12(b)(6), 12(e), and 12(f) as discussed below.

III. DEFENDANTS' DEFENSES WERE SUBJECT TO A MOTION TO STRIKE AS REDUNDANT, INSUFFICIENT, IMPERTINENT, AND SCANDALOUS WHEN DEFENDANTS ADMITTED TO ULTIMATE FACTS WARRANTING FORCIBLE ENTRY AND DETAINER AND CLAIM AND DELIVERY

A. DEFENDANTS' DEFENSE FOR A MOTION TO DISMISS PLAINTIFFS' CLAIMS ARE REDUNDANT AND INSUFFICIENT WITHOUT ANY LEGAL SUPPORT OR PREVIOUSLY LITIGATED

Defendants' Second Defense in Defendants' Answer with should be dismissed and stricken. S.C.R.C.P. Rule 12(f). Only two causes of actions were modified in Plaintiffs' Second Amended Complaint: Breach of Contract to Breach of Contract Accompanied by Fraudulent Acts; and, Racial Discrimination. The supporting arguments for amending the cause of action for racial discrimination was already discussed in a previous response before the hearing on April 21, 2018, and the same argument presented before the court in the same hearing without objection from Defendants. The cause of action for breach of contract accompanied by fraudulent actions comprise of the following elements: "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Harper v. Ethridge*, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986). The common elements of fraud and deceit were not required in this cause of action. *Id.* Under this

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cause of action, a "fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design." *Id.* Plaintiffs alleged all elements pertaining to this cause of action accordingly. For the remainder causes of action in Plaintiffs' Second Amended Complaint were previously litigated in two prior hearings on or around April 10, 2018, and May 8, 2018. Therefore, this defense was completely redundant to assert for the third time in this case as to the remaining causes of action. S.C.R.C.P. Rule 12(f).

Plaintiffs hereby request that this motion to dismiss defense be stricken and dismissed. S.C.R.C.P. Rule 12(f).

B. DEFENDANTS' DEFENSES OF ABANDONMENT, WAIVER, ESTOPPEL, LACHES AND UNCLEAN HANDS WERE INSUFFICIENT AS PLED TOGETHER AS ONE DEFENSE AND FAIL AS A MATTER OF LAW. S.C.R.P. RULE 10(b).

Defendants' Third Defense for abandonment, waiver, estoppel, laches, and unclean hands should be stricken as Defendants admitted to locking out Defendants from the premises on or around July 28, 2018, denying Plaintiffs access to the premises, and denying Plaintiffs access to the premises to retrieve Plaintiffs' personal property located therein. Hence, Defendants admitted Plaintiffs did not voluntarily surrender the premises or Plaintiffs' personal property located therein. Therefore, based on Defendants' admissions in Defendants' Answer, Plaintiffs' Second and Third Cause of Action for Forcible Entry and Detainer and Claim and Delivery respectively should be decided in favor of Plaintiffs conclusively based on the pleadings under Rule 12(c) of the South Carolina Rules of Civil Procedure.

Plaintiffs hereby request that these affirmative defenses be stricken and dismissed. S.C.R.C.P. Rule 12(f). Additionally, Plaintiffs hereby move the Court for judgment on the pleadings with respect to Plaintiffs' causes of action for (1) forcible entry and detainer and (2) claim and delivery. S.C.R.C.P. Rule 12(c).

1. DEFENDANTS ADMITTED THAT PLAINTIFFS NEVER ABANDONED THE PREMISES OR PLAINTIFFS' PERSONAL PROPERTY LOCATED THEREIN

First, Plaintiffs never abandoned the premises. South Carolina law defines "an actual eviction [as] an actual expulsion or physical ouster of the tenant from a material part of the premises." *Thomas v. Hancock*, 271 S.C. 273, 275, 246 S.E.2d 604, 605 (1978). Hence, an eviction is the tenant's involuntary relinquishment and surrender of the one's possession of land. *See Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 563, 772 S.E.2d 882, 887 (Ct. App. 2015). An eviction is any act that directly deprives the tenant's possession of the leased premises or impairs the tenant's quiet use and enjoyment of the premises. *Id.* By contrast, abandonment is the tenant's voluntary relinquishment and surrender of one's possession of land. *See Thomas*, 271 S.C. at 275. Abandonment of the premises does not occur when the tenant,

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who was in prior possession of the premises, maintains the appropriate *animus revertendi*. *See Bradshaw v. Ashley*, 180 U.S. 59, 66, 21 S. Ct. 297, 299-300 (1901).

Defendants failed to allege any elements of abandonment to show Plaintiffs' voluntary surrender of the premises or Plaintiffs' personal property located therein. Defendants admitted to locking out Plaintiffs from the premises on or around July 28, 2017. Defendants admitted that Defendant **JAMES W. DURHAM** saw Plaintiff **MARK T. THOMAS** on the premises in the evening of July 27, 2017. Defendants admitted to allowing Plaintiffs' employees to retrieve personal items when appearing for work on the premises, which occurred on the very same day Defendants locked out Plaintiffs from the premises on or around July 28, 2017. Defendants admitted that Defendants never applied for a writ of ejectment to evict Plaintiffs from the premises until on or around October 16, 2017. Defendants admitted to never filing for a writ of distraint. Defendants admitted to receiving a letter from Plaintiffs demanding the return of possession of the premises from Defendants to Plaintiffs. Defendants admitted to receiving a letter from Plaintiffs demanding the return of Plaintiffs' personal property. Plaintiffs clearly manifested an intent to return to the premises and a right to Plaintiffs' personal property located therein. Defendants changing the locks to the premises was the very definition of performing an actual eviction of Plaintiffs from the premises. To suggest otherwise defied common sense and reason.

Plaintiffs hereby request that this abandonment defense be stricken and dismissed. S.C.R.C.P. Rules 12(b), 12(c), 12(f).

2. **DEFENDANTS' DEFENSE OF ESTOPPEL FAILED BECAUSE DEFENDANTS WERE PRESUMED TO HAVE KNOWLEDGE OF MATTERS OF PUBLIC RECORD AND IN A SUPERIOR POSITION TO KNOW DEFENDANTS EVICTED PLAINTIFFS FROM THE PREMISES WITHOUT RESORTING TO THE JUDICIAL PROCESS.**

Second, Defendants never alleged any elements for waiver and estoppel. When claiming waiver and estoppel, "[w]aiver generally involves the relinquishment of a known or existing right." *McCarty v. Piedmont Mut. Ins. Co.*, 81 S.C. 152, 156, 62 S.E. 1, 2 (1908). Additionally, Defendants must allege the elements of estoppel: "(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; and (2) reliance upon the conduct of the party estopped." *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 (2000). Waiver and estoppel must relate to the substance of the contract. *McCarty*, 81 S.C. at 156-57. Furthermore, the party in a superior position to know, or should have known, the truth of the facts in question may not claim justifiable reliance on another's conduct to that person's detriment under the elements of estoppel. *See Anthony*, 320 S.C. at 452; *cf.* S.C. Code Ann. § 33-44-301. And, "[a]n estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made." *McCarty*, 81 S.C. at 156-57. Hence, Defendants had the duty

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to exercise due diligence and good faith when performing under the lease agreement, or a subsequent oral contract, to ascertain whether Plaintiffs asserted "a right to the premises after the expiration of the tenancy." *Rush v. Aiken Mfg. Co.*, 58 S.C. 145, 150, 36 S.E. 497, 499 (1900); *Mallard v. Duke*, 131 S.C. 175, 189-91, 126 S.E. 525, 530-31 (1925) (implying the Landlord has a duty "to exercise due diligence or for want of good faith in performing the [lease] agreement").

With respect to having an unauthorized agent of Plaintiff **BLACKSTONE AND CHASE, LLC**, sign the lease prior to forming as a business, the circumstances indicated that all parties understood that Plaintiff **BLACKSTONE AND CHASE, LLC**, would not be open to the public for business until on or around June 8, 2016. Defendants admitted that Plaintiffs were allowed approximately two months to upfit the property from on or around March 15, 2016, of which Plaintiffs did not pay rent during the upfitting process. Defendants were in a position to know whether Defendants were paid for Plaintiffs being in possession of the Premises from on or around March 15, 2016, during the upfitting process. Clearly, Plaintiff **BLACKSTONE AND CHASE, LLC**, was in its formative stages to get ready and open for business to the public as a barber shop. Moreover, Defendants had every opportunity to request organizational documents and verify the same with the South Carolina Secretary of State as a matter of public record. Defendants had every opportunity while Plaintiffs were in possession of the premises to have the other members of Plaintiff **BLACKSTONE AND CHASE, LLC**, sign the lease agreement. But, Defendants never exercised due diligence to ensure the lease agreement was binding on Plaintiff **BLACKSTONE AND CHASE, LLC.**

Because Defendants admitted to locking out Plaintiffs from the premises on or around July 28, 2017, Defendants were in a superior position, or should have known, the truth of facts in question that Plaintiffs never voluntarily surrendered possession to the premises or Plaintiffs' personal property located therein. Defendants cannot rely on the defense of waiver estoppel under the circumstances having evicted Plaintiffs from the premises before resorting to the judicial process to do so. Defendants' attempt to resort to the judicial process after the fact of evicting Plaintiffs from the premises did not cure the illegality of forcible entry and detainer that had already occurred.

Plaintiffs hereby request that this waiver and estoppel defense be stricken and dismissed. S.C.R.C.P. Rules 12(b)(6), 12(f).

3. DEFENDANTS' DEFENSE OF LACHES FAILED BECAUSE DEFENDANTS ADMITTED TO ENGAGING IN A SELF-HELP EVICTION

Third, the affirmative defense of laches is within the court's discretion to determine the applicability of the defense. *Brown v. Butler*, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001). Defendants must assert more than mere delay. *Id.* Defendants must show unreasonable

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delay and prejudice that delay. *Id.* Defendants never alleged any of the elements for laches. Defendants never alleged Plaintiffs' causing an unreasonable delay in a manner that prejudiced Defendants. Plaintiffs asserting valid legal rights in the face of claims for forcible entry and detainer and claim and delivery did not warrant a defense of laches. Moreover, because Defendants created the burden on Plaintiffs of depriving Plaintiffs' possession of the premises and Plaintiffs' personal property located therein, including Plaintiffs' business records relevant to this case, Defendants were in a position to know that doing so would create an undue hardship upon Plaintiffs to proceed with civil litigation, file taxes accurately, operate a business elsewhere, and so forth. To allege otherwise defied common sense and reason.

To date, Defendants admitted that Defendants have never filed a writ of distraint to seize Plaintiffs' personal property located on the premises. Defendants never filed for a writ of ejectment until months after already evicting Plaintiffs from the premises through a self-help eviction. Defendants created an unreasonable delay for Plaintiffs when dispossessing the premises and Plaintiffs' personal property for almost a year to date. Plaintiffs suffered prejudice because Plaintiffs lacked Plaintiffs' business records to adequately prepare for litigation, discovery, and file taxes accordingly, for example. Plaintiffs suffered undue hardship from having to recreate limited business records from independent sources, of which the compilation was submitted as exhibits to the Plaintiffs' Second Amended Complaint.

Plaintiffs hereby request that this laches defense be stricken and dismissed. S.C.R.C.P. Rules 12(b)(6), 12(f).

4. DEFENDANTS' DEFENSE OF UNCLEAN HANDS FAILED BECAUSE DEFENDANTS VIOLATED SOUTH CAROLINA LAW BY ADMITTED TO EVICTING PLAINTIFFS WITHOUT RESORTING TO THE JUDICIAL PROCESS

Fourth, Defendants never alleged Plaintiffs' misconduct in a manner that prejudices Defendants. The doctrine of unclean hands refers to barring a party from recovering in an action in equity when that party behaves unfairly concerning some misconduct in the subject matter of litigation in a manner that operates to prejudice the defendant. *Anderson Cty. v. Preston*, 420 S.C. 546, 578, 804 S.E.2d 282, 298-99 (Ct. App. 2017). Unclean hands refer to such misconduct that is not criminal in nature or necessarily justifies legal proceedings, but neither does the doctrine of unclean hands demand the party to lead a blameless life. *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 815, 65 S. Ct. 993, 997-98 (1945). Rather, unclean hands mean "[a]ny willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim [he who comes into equity must come with clean hands] by the chancellor." *Id.* By contrast, Defendants must operate with clean hands that "means a clean record with respect to the transaction with the defendants

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themselves and not with respect to others." *Arnold v. Spartanburg*, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943). Clean hands in equity refers to one acting "fairly and without fraud or deceit as to the controversy in issue." *Precision Instrument Mfg. Co.*, 324 U.S. at 814-15.

By contrast, the legal process for evicting a tenant requires the landlord to apply for a writ of ejectment before the magistrate court. S.C. Code Ann. § 27-37-20 (ejectment proceedings); S.C. Code Ann. § 27-37-160 (additional ejectment proceedings for commercial leases); S.C. Code Ann. § 27-37-160 (execution of ejectment by constable or deputy sheriff). South Carolina law prohibits using a strong hand unlawfully to enter the tenements of another. S.C. Code Ann. § 27-5-110. South Carolina law prohibits the forcible entry and detainer of tenements by depriving another of a freehold interest in land wrongfully, or by force, to oust the other from the land. S.C. Code Ann. § 15-67-410. "Upon application" under Title 27, Chapter 37, Section 10 of the South Carolina Code means that the landlord must apply to a magistrate judge for a writ of ejectment to lawfully evict the tenant from the premises. *See Monarch Mills, Lockhart Plant v. Godshall*, 173 S.C. 286, 289, 175 S.E. 552, 553 (1934). Only the magistrate judge may order a constable or deputy to remove the tenant from the premises. S.C. Code Ann. § 27-37-160. Thus, the right to forcibly remove a tenant from the premises belongs squarely with the magistrate judge—not the landlord. S.C. Code Ann. §§ 27-37-10 to -160. A landlord may not apply for a writ of ejectment after-the-fact to cure an illegal eviction procured by illegal means of forcible entry and detainer.

Defendants admitted to evicting Plaintiffs without resorting to the judicial process. Defendants never had a contractual right to circumvent South Carolina law when evicting a tenant. Defendants operated in the subject matter of litigation with unclean hands flouting South Carolina law when engaging in a self-help eviction thus barring Defendants from relief in equity or at law.

Plaintiffs hereby request that this unclean hands defense be stricken and dismissed. S.C.R.C.P. Rule 12(f).

C. DEFENDANTS' DEFENSE OF DEFAULT UNDER THE LEASE AGREEMENT FAILS BECAUSE THE LEASE AGREEMENT IS NOT BINDING ON PLAINTIFFS NOR GRANTED A CONTRACTUAL RIGHT TO ENGAGE IN A SELF-HELP EVICTION

Defendants' Fourth Defense for default in Defendants' Answer should be stricken as the lease agreement is not binding on Plaintiff **BLACKSTONE AND CHASE, LLC**, as previously discussed. The defective lease agreement did not prevent the formation of a landlord-tenant relationship was not formed or a subsequent oral contract in the place of the defective lease agreement. That a landlord-tenant relationship existed was not in dispute. That a contract was formed between Plaintiff **BLACKSTONE AND CHASE, LLC**, and Defendant **MARGARET H. DURHAM LIVING TRUST** was not in dispute. The lease agreement never governed the landlord-

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tenant relationship. No lease agreement—as a contract—may grant a contractual right to circumvent South Carolina law regarding a writ of ejectment or a writ of distraint.

When the issue of forcible entry and detainer existed, the status of a lease agreement or a subsequent oral contract was moot. Defendants had no legal basis for evicting Plaintiffs from the premises due to nonpayment of rent when Defendants never resorted to the judicial process at the time of doing so on or around July 28, 2017. S.C. Code Ann. §§ 27-37-10 to -160 (ejecting tenants). Defendants may not cure this fatal defect after-the-fact either as a feigned attempt to legitimize an illegal eviction that has already occurred. Notwithstanding, Defendants may not attempt to recover possession of the premises, accelerate the lease agreement, and remain in possession of Plaintiffs' personal property nor may any court enforce that outcome without violating Plaintiffs' constitutional rights against unreasonable seizures. *See Kiriakides v. UA Commc'ns*, 312 S.C. 271, 276, 440 S.E.2d 364, 366-67 (1994); *Gentry v. Recreation, Inc.*, 192 S.C. 429, 435-37, 7 S.E.2d 63, 65-67 (1940).

Plaintiffs hereby request that this default defense be stricken and dismissed as a constitutional violation of Plaintiffs' rights. S.C.R.C.P. Rules 12(c), (f).

D. DEFENDANTS' DEFENSE FOR FAILURE TO MITIGATED FAILED BECAUSE DEFENDANTS ADMITTED THAT PLAINTIFFS WERE IN NO POSITION TO PREVENT DAMAGES OR DAMAGES ALREADY OCCURRED AFTER DEFENDANTS EVICTED PLAINTIFFS

Defendants' Fifth Defense for failure to mitigate in Defendants' Answer should be stricken and dismissed as inapplicable to Plaintiffs when Plaintiffs are not in a position to prevent damages or damages have already accrued. Under the doctrine of avoidable consequences, "[a] party who has suffered injury or damage from the actionable conduct of another is under a duty to make all reasonable efforts to minimize the damages incurred and cannot recover damages that might have been avoided by the use of reasonable care and diligence." *Hughes v. Oconee Cty.*, No. 2007-UP-461, 2007 S.C. App. Unpub. LEXIS 438, at *12 (Ct. App. Oct. 11, 2007). The injured party is held to a prudent person standard: "An injured party is required to do what an ordinary, prudent person would do under similar circumstances to mitigate his damages." *Id.* The duty to mitigate losses applies to leases. *See United States Rubber Co. v. White Tire Co.*, 231 S.C. 84, 94-97, 97 S.E.2d 403, 409-10 (1956). The landlord has a duty to mitigate the landlord's losses by re-letting the premises under landlord-tenant law. *Id.* The duty to mitigate damages applies to the owner of the property claiming negligence by another "to use reasonable means to minimize the damages . . . ." *Newman v. Brown*, 228 S.C. 472, 480, 90 S.E.2d 649, 653 (1955). But, the duty to mitigate damages under the doctrine of avoidable consequences does not apply when one cannot prevent damages or damages have already accrued. *Id.* at 480-81.

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Defendants failed to assert a valid defense. Defendants had a duty to mitigate losses that is not attributable to Plaintiffs, both implied by law and under the lease agreement. When Defendants locked Plaintiffs out from the premises, the status quo resulted in Plaintiffs accruing more damages from the loss and conversion of Plaintiffs' personal property and loss of profits with Defendants shutting down Plaintiffs business on the premises. By being uncooperative in failing to return Plaintiffs' personal property to Plaintiffs and allowing Plaintiffs' access to the premises to restore the premises to preexisting conditions, Defendants failed to mitigate Defendants' damages by retaining a new tenant and exacerbating Plaintiffs' damages in this landlord-tenant dispute. Defendants' failure to re-let the premises at this point was a direct result of Defendants taking the law into their own hands on or around July 28, 2017, with no one to blame but themselves. Defendants placed Plaintiffs into a bona fide gordian knot when engaging in a self-help eviction creating undue hardship on Plaintiffs to preserve Plaintiffs' rights in this landlord-tenant dispute. The situation is beyond inimical and ludicrous.

Here, Defendants admitted to locking out Plaintiffs from the premises and re-entering the premises. Ergo, Plaintiffs could not prevent further damage to Plaintiffs' personal property or to restore the premises to preexisting conditions. Because, Plaintiffs did not have access to the premises or an opportunity to remove Plaintiffs' personal property from the premises. Defendants may not claim one hand Plaintiffs' failure to mitigate damages when Defendants must bear the duty to mitigate damages and re-let the premises to another tenant. By denying Plaintiffs of the premises and Plaintiffs' personal property located therein without filing for a writ of ejectment or a writ of distraint at the time of locking out Plaintiffs from the premises, Defendants left Plaintiffs defenseless to preserve Plaintiffs' interests as well as third parties' interests in the personal property on the premises.

Plaintiffs hereby request that this failure to mitigate defense be stricken and dismissed as a misapplication of the law concerning the doctrine of avoidable consequences. S.C.R.C.P. Rules 12(b)(6), 12(f).

IV. PLAINTIFF MOVES TO STRIKE MULTIPLE PARAGRAPHS WITHIN DEFENDANTS' ANSWER AND COUNTERCLAIM FOR PATENT EQUIVOCATION IN ADMISSIONS AND ALLEGATIONS. S.C.R.P. RULES 8(B), 8(E), 12(F).

A. DEFENDANTS' ANSWER MADE ADMISSIONS PALTERING WITH INCONSISTENT DENIALS

Defendants' responses in Defendants' Answer were contradictory as a matter of admitted facts and inapposite to controlling law governing landlord-tenant relationships as an insufficient defense, redundant, immaterial, impertinent, or scandalous in nature and Defendants' responses should be stricken in part or in full for paragraphs 10, 15, 16, 17, 18, 27,

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28, 31, 32, 33, 35, 36, 37, 39, 41, 42, 44, 46, 48, 49, 51, 52, 53, 54, 61, 63, 64, 65, 68, 74, 78, 80, 83, 84, 87, 90, 92, 93, 94, 96, 97, 99, 100, 101, 105, 106, 109, 111, 112, 113, 114, 115, 119, 121, 123, 126, 128, 129, 130, 131, 134, 137, 139, 140, 141, 142, 143, 150, 151, 152, 153, 157, 160, 164, 165, 166, 167, 168, 169, 171, 174, 177, 178, 182, 185, 187, 188, 189, 190, 194, 195, 196, 197, 198, 200, 201, 202, 203, 204, 209, 214, 215, 216, 217, 218, 225, 226, 229, 230, 234, 242, 245, 252, 258, 269, 278, 290, 291, 292, and 293. Further analysis will be fully explained in a supporting memorandum of this motion. S.C.R.C.P. Rule 12(f).

A. DEFENDANTS' COUNTERCLAIMS INCORPORATED ADMISSIONS IN DEFENDANTS' ANSWER PALTERING WITH INCONSISTENT ALLEGATIONS IN DEFENDANTS' COUNTERCLAIM

Defendants' factual allegations in Defendants' Counterclaim were contradictory as a matter of admitted facts and inapposite to controlling law governing landlord-tenant relationships as an insufficient defense, redundant, immaterial, impertinent, or scandalous in nature and Defendants' allegations should be stricken in part or in full for paragraphs 307, 308, 309, 310, 312, 313, 314, 315, 317, 318, 319, 320, 322, 324, 325, 326, 327, 328, 329, 332, 337, 340, 341, 342, 343, 344, 346, 348, 349, 350, 351, 352, 357, 359, 360, 361, 364, 370, 371, 373, 375, 376, 377, 379, 380, 381, 382, 387, 389, 390, 391, 393, 397, 398, 399, 400, 401, 402, 404, 405, 406, 407, 409, 410, 411, 412, 414, 415, 416, 418, 419, 420, 421, 423, 424, 426, 427, 428, 429, and 430. Further analysis will be fully explained in a supporting memorandum of this motion. S.C.R.C.P. Rules 12(b)(6), (f).

V. CONCLUSION

For the reasons asserted herein, Plaintiffs move the Court pursuant to Rules 12(b)(6), 12(c), 12(e), and 12(f) of the South Carolina Rules of Civil Procedure, for an order granting Plaintiffs' Motion to Strike responses in Defendants' Answer and allegations in Defendants' Counterclaims as well as Plaintiffs' Motion to Dismiss Defenses in Defendants' Answer and Counterclaim. Plaintiffs reserve the right to submit a memorandum in support of their Motion prior to hearing.

Respectfully submitted this 29 day of June, 2018.

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June 29, 2018

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STATE OF SOUTH CAROLINA **COUNTY OF GREENVILLE**	**IN THE COURT OF COMMON PLEAS** **FOR THE THIRTEENTH JUDICIAL CIRCUIT**
BLACKSTONE AND CHASE, LLC, MARK T. THOMAS, TENSLEY E. THOMAS, AND BRADLEY W. KERR, Plaintiff(s), v. **MARGARET H. DURHAM LIVING TRUST, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING COMPANY, LLC, EZ GLIDE 350, LLC, MARGARET H. DURHAM, JAMES W. DURHAM, HELEN SHOCKLEY, AND TAMALA D. CRANE,** Defendant(s).	2017-CP-23-07837 CIVIL ACTION NO. **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that I served a copy of the foregoing **PLAINTIFFS' NOTICE AND MOTION TO DISMISS AND MOTION TO STRIKE DEFENDANTS' ANSWER AND COUNTERCLAIM** in this action dated June 29, 2018, on June 29, 2018, upon the adverse party electronically to the following:

Margaret H. Durham Living Trust et al.	Margaret H. Durham Living Trust et al.
& Margaret H. Durham, Trustee	& Margaret H. Durham, Trustee
c/o Robert K. Merting	c/o Josh Hudson
501 Furman Road, Suite W	1052 North Church Street
Greenville, SC 29609	Greenville, SC 29601
Attorney for the Defendants	Attorney for the Defendants

I have served a copy of the foregoing by one of the following methods:

- ☐ (1) Delivering a copy personally to the adverse party;
- ☐ (2) Mailing a copy to the adverse party's last known address, by depositing the copy in the U.S. Mail in an envelope with sufficient postage affixed;
- ☐ (3) Delivering it by commercial delivery service in accordance with Rule 4(d)(9), SCRCP; or,
- ☒ (4) Other pursuant to Rule 5(b)(1), SCRCP: electronic filing.

Respectfully submitted this 29 day of June, 2018.

DICKSON DAVIS LAW FIRM, LLC

/s/ Deborah D. Davis, Esq.

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Blackstone and Chase, LLC; Mark T. Thomas; Tensley E. Thomas; and Bradley W. Kerr, Plaintiffs, v. Margaret H. Durham Living Trust; Multiplex Systems, Inc.; Ice Rink Engineering and Manufacturing Company, LLC; EZ Glide 350, LLC; Margaret H. Durham; James W. Durham; Helen W. Shockley; and Tamala D. Crane, Defendants.	C.A. No. 2017-CP-23-07837 **DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO STRIKE AND MOTION TO DISMISS DEFENDANTS' ANSWER AND COUNTERCLAIM**

PLEASE TAKE NOTICE that Defendants, Margaret H. Durham Living Trust; Multiplex Systems, Inc.; Ice Rink Engineering and Manufacturing Company, LLC; EZ Glide 350, LLC; Margaret H. Durham; James W. Durham; Helen W. Shockley; and Tamala D. Crane, responding to Plaintiffs' Motion to Strike and Motion to Dismiss Defendants' Answer and Counterclaim, state as follows:

EXISTENCE OF LEASE

SECTION I SUBSECTION A

Defendant Margaret H. Durham Living Trust (hereafter the "Landlord") entered into a contract for lease (the "Lease") of real property with Plaintiff Blackstone and Chase, LLC on or about March 13, 2016 as represented by Plaintiff Bradley W. Kerr. Kerr represented to Landlord that he had authority to enter into the Lease on behalf of Blackstone and Chase, LLC and his partners, Plaintiffs Mark T. Thomas and Tensley E. Thomas. Landlord relied upon this

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representation and Plaintiffs should be estopped from claiming otherwise now.

Plaintiffs entered into the building and took possession of the premises as provided for in the Lease. Plaintiffs signed two addendums to the Lease. Each and every Plaintiff made payment upon the Lease during the year or so that Plaintiffs occupied the premises. Plaintiffs ratified the Lease, recognized the obligations under the Lease, and accepted the benefits of the Lease. Plaintiffs unequivocally chose to benefit from the Lease and therefore to be bound by the terms of the Lease. Even in the present suit, Plaintiffs bring their claims under the Lease.

Kerr represented himself as a member of Blackstone and Chase, LLC and is a member pursuant to the Operating Agreement provided by Plaintiffs. Blackstone and Chase, LLC is a member managed limited liability company as declared in the Articles of Organization filed with the SC Secretary of State. "Any member of a member-managed company . . . may sign and delivery any instrument transferring or affecting the company's interest in real property. The instrument is conclusive in favor of a person who gives value without knowledge of the lack of the authority of the person signing and delivering the instrument." S.C. Code Ann. §33-44-301(c). The Articles of Organization of Blackstone and Chase, LLC place no restrictions upon the authority of the members, and Landlord had no way of knowing the contents of the Blackstone and Chase, LLC Operating Agreement because the same is not a public document filed with the state. Therefore, Landlord could rely upon the inherent authority of Kerr to bind Blackstone and Chase, LLC as a member of the company.

Plaintiffs make much of the fact that Kerr entered into the Lease prior to the formation of Blackstone and Chase, LLC. It is true that the signatory to a pre-formation contract is personally liable upon that contract. It is also true that when a limited liability company "assumes the obligation [of a contract] by its own act after incorporation" it will be held liable upon the

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contract. *Hansen v. Fields Co.*, 409 S.C. 541, 763 S.E.2d 31 (S.C., 2014). An LLC ratifies a contract implicitly "by accepting its benefits with full knowledge of its terms." *Id.* Here, all members of the LLC and the LLC itself made payment upon the Lease, the LLC took possession of the premises under the Lease, and the signatory to the Lease became a member of the LLC able to singlehandedly bind the LLC in matters of real property. S.C. Code Ann. §33-44-301(c). The knowledge of the terms of the Lease known by the signatory Kerr are imputed to the LLC through its member Kerr who signed and received a copy of the Lease. *See Indep. Nat. Bank v. Buncombe Prof'l Park, LLC*, 411 S.C. 605, 608, 769 S.E.2d 663, 665 (2015) ("The rule is that a principal has constructive notice of all the material facts which its agent, while acting in the scope of his authority, receives notice."). Blackstone and Chase, LLC knew the terms of the Lease, accepted the benefits of the Lease, and made payments upon the Lease thereby ratifying the same.

In the alternative, if Plaintiff Blackstone and Chase, LLC disclaims ratifying the Lease, then the Lease is still between Kerr and Landlord, and any other occupants of the premises become mere guests of Kerr without the privilege of being tenants of the building. Kerr, in accordance with Section 22 of the Lease, cannot assign or sublet the premises without the prior written consent of the Landlord, and no such consent was sought or given. Therefore, Kerr is still bound by the terms of the Lease, and any occupants of the premises occupied the premises under the Lease and through Kerr.

A valid contract was formed between Landlord and Kerr when he signed the Lease on behalf of Blackstone and Chase, LLC. Blackstone and Chase, LLC ratified the Lease when its member, Kerr, knowing the terms of the Lease, took possession of the premises and made payment upon the Lease for Blackstone and Chase, LLC. A single member of the LLC may bind

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the LLC in this instance, and the Operating Agreement is ineffective against a party who gave value in good faith. S.C. Code Ann. §33-44-301(c). The other Plaintiffs received the benefit of the Lease, made payments upon the Lease, and recognized the Landlord as such thereby ratifying the contract. Ergo, a valid contract in the form of the Lease was formed between Landlord and Kerr and subsequently ratified by the other Plaintiffs.

CURING SMOKE DAMAGE

SECTION I. SUBSECTION B.

Defendants, including Landlord, have been damaged by the fire incident caused by Plaintiffs. Defendants have taken steps to ameliorate this damage and have delayed other steps in light of this litigation. Such steps will come to light during discovery.

Further, only Landlord is bound by the Lease, and the other Defendants who are occupants of the building are not so bound. Plaintiffs are liable to these Defendants for their tortious acts regardless of the nature of the Lease.

In the alternative, Plaintiffs have asserted multiple times that there is no contract between Blackstone and Chase, LLC and Landlord. While Landlord disagrees with this assertion, in the event the Court rules against Landlord the terms of the Lease will not limit Landlord's recovery for smoke damage.

CONVERSION

SECTION I. SUBSECTION C.

Defendants are not alleging that Plaintiffs converted real property. Plaintiffs converted fixtures within the building for their own use, permanently damaging them and constructively converting them, in violation of the Lease and the law. *Kutter v. Smith*, 69 U.S. 491, 495, 17 L.

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Ed. 830 (1864). In any event, Defendants are entitled to conduct discovery on this issue and a dismissal at this stage would be premature.

NUISANCE

SECTION I. SUBSECTION D.

The determination of a nuisance is based primarily upon the facts of the case. Here, Defendants have alleged the facts will show that Plaintiffs allowed their employees to break city ordinances and smoke within ten feet of the building entrance. Further, Defendants have alleged that Plaintiffs played music at a nuisance level that made it difficult for the second-floor occupants to conduct their business. Both of these actions damaged the business of the second-floor occupants and thereby harmed Landlord by making their building less desirable to other tenants.

Plaintiffs disagree with these assertions and thus there is a factual question appropriate for hearing by a jury. Plaintiffs' assertion that the music played was "in a reasonable manner" is conclusory, not supported by facts, and not persuasive. There is nothing "normal and necessary" in allowing, or even tolerating, employees consistently breaking city ordinances while at work. Plaintiffs do have responsibility for the actions of their employees in the playing of music and smoking on premises, and the results of Plaintiffs' actions were the harm of Defendants business interest.

ABUSE OF PROCESS

SECTION 1. SUBSECTION E.

Plaintiffs operated a floundering business that ultimately failed and left behind it a series of unpaid liabilities. Landlord exercised its contractual right to repossess the premises to stop incurring further damages and to limit the palpable risk of fire that Plaintiffs' continued

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operation presented.

Landlord has attempted in good faith to settle this matter and turn over the disputed personal property to Plaintiffs, and yet Plaintiffs have refused to accept the same. Plaintiffs have brought specific third-party claims of property to Defendants' attention, and Defendants have released the disputed property to the third parties. However, when Defendants have notified Plaintiffs of third party claims, the Plaintiffs have refused to allow the release of the property. Plaintiffs continue to allege that third parties are claiming property currently within the premises, yet Plaintiffs are the only ones preventing the release of personal property to those third parties.

Plaintiffs have been harmed by their poor business practices, which are the cause of their loss. Rather than face this loss, the Plaintiffs have tabulated their entire investment and claimed the loss to be solely caused by Landlord's eviction. The Plaintiffs are not entitled to shift the loss from their poor business decisions onto the Defendants, and their attempt to do the same is an abuse of process.

In perpetuating this abuse, Plaintiffs have filed an Appeal from their Eviction when they did not desire to re-enter the premises, filed an improper, long, and terribly confusing Declaratory Judgment Action, and made a failed Motion for a Preliminary Injunction. When admonished on their "tidy" forty-eight-page complaint, Plaintiffs responded with an Amended Complaint of 33 pages consisting of some 300 paragraphs and containing in excess of 600 pages of exhibits. Again, Plaintiffs were instructed to limit their verbosity, and again Plaintiffs propounded a 25-page, 13 causes of action complaint for a simple tenancy dispute. Even here, in their Motion to Dismiss, Plaintiffs file an 18-page Notice and Motion reserving "the right to submit a memorandum in support of their Motion prior to hearing" and without reasoning or fact attempt to strike 200 paragraphs of Defendants answer for being "an insufficient defense,

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redundant, immaterial, impertinent, or scandalous in nature."

Plaintiffs have shown a callous disregard of judicial economy and routinely allege a series of complaints against a series of persons without attempting to apply the same in a definitive and clear manner. This leaves Defendants and the Court mired in the quagmire of determining what the Plaintiffs mean before they can respond to a pleading. Under such circumstances, Defendants charge of Abuse of Process should remain for determination by a finder of fact.

DEFENDANTS MOTION TO STRIKE DEFENSES

SECTION II.

Plaintiffs make a Motion for More Definite Statement under Rule 12(e) regarding Defendants Second, Third, and Sixth Defenses. Plaintiffs are not required to file a responsive pleading to Defendants' defenses, and Plaintiffs' Motion on this point does not promote judicial economy.

To the extent that a responsive pleading is allowed, Defendants readily acknowledge that not all facts have come to light, and that it may be necessary in the future to amend the pleadings once further facts and arguments have been uncovered. In the interim, Defendants preserve their affirmative defenses by exerting the same in their entirety.

FAILURE TO STATE A CLAIM PREVIOUSLY LITIGATED

SECTION III. SUBSECTION A.

Plaintiffs presented thirteen causes of action in their Second Amended Complaint that are either new or have been substantially reworked from the versions in their previous Amended Complaint. While Defendants did make a Motion to Dismiss for Failure to State a Claim, said arguments were heard only once and for an earlier, incomplete, version of the complaint.

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Plaintiffs' were specifically instructed to rework their complaint and "to set forth with specificity which causes of actions apply to each individual Defendant respectively." The Second Amended Complaint therefore is composed of new or modified claims, and the Court could not rule upon any causes of action or allegations not already stated in the complaint. "The trial court must dispose of a motion for failure to state a cause of action based solely upon the allegations set forth on the face of the complaint." *Brown v. Leverette,* 291 S.C. 364, 366, 353 S.E.2d 697, 698 (S.C., 1987).

At Defendants' prior Motions, Plaintiffs had not set forth the allegations with the specificity required by the Court, and therefore the Court could not rule on a Motion to Dismiss for Failure to State a Claim of the new allegations properly stated. Thus, this issue has not been previously litigated. Defendants have reason to believe that Plaintiffs have failed to state a claim against many of the Defendants in many of the causes of action, and therefore the Defendants assert this defense.

ABANDONMENT, WAIVER, ESTOPPEL, LACHES AND UNCLEAN HANDS

SECTION III. SUBSECTION B. (FIRST ARGUMENT)

Plaintiffs have made a multitude of claims based on events that happened during a time period spanning more than a year. The Defendants have a right to respond and exert a defense to each and every such claim as they arise. The defenses which Plaintiffs attempt to deny Defendants are valid defenses to many of these claims and the applicability of such defenses are factual matters to be determined by the fact finder. As examples, and not as an exhaustive list, Defendants provide below examples of how these defenses may be raised in this case.

Plaintiffs failed, and have never denied they failed, to pay the contractual rent required of them to lease the premises. This failure to pay rent, and the subsequent failures to remedy the

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breach of contract, invoke abandonment of the premises. Plaintiffs breach of the contract, both continually in the means in which they operated the business and their failure to pay rent, leaves them with unclean hands and therefore estopped from invoking equity as a remedy. Plaintiffs accepted the benefits of the contract and therefore are estopped from denying the existence of the same. Plaintiffs did not question the status of the Lease until after they were in breach of it, made continuous payments upon the Lease for a year, and therefore waived any objections they may have had and further are prevented by laches from questioning the existence of the Lease now.

JUDGMENT ON THE PLEADINGS

SECTION III. SUBSECTION B. (SECOND ARGUMENT)

Plaintiffs' Motion for Judgment on the Pleadings is inappropriate because there are numerous issues of fact. To the extent the Court were inclined to rule on the pleadings before it, Landlord was contractually authorized to evict the Plaintiffs without resort to the judicial process and to distrain or seize the property within the premises to cover damages incurred by Landlord.

Section 20.2 of the Lease between Landlord and Plaintiffs authorizes the Landlord to "reenter and remove all persons and properties from the Premises and dispose of such property as it deems fit." Such remedy may be resorted to "with or without legal process." *Id.* Any improvement made to the real estate by Plaintiffs become the property of Landlord under Section 9.4 of the Lease. *Id.* ("All Lessee Alterations, including, but not limited to, all walls, railings, carpeting, floor and wall coverings and other permanent real estate fixtures (excluding, however, Lessee's moveable trade fixtures and equipment) made by, for, or at the direction of Lessee, will when made, become the property of Lessor and will remain upon the Premises at the expiration or earlier termination of this Lease.") Further, trade fixtures installed by Plaintiffs become the property of Landlord if not removed by the termination of the Lease. *Id.* ("Any trade fixtures or

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equipment not removed by Lessee at the expiration or earlier termination of this Lease will, at the Lessor's option, become the property of the Lessor or Lessor will be entitled to remove and dispose of such property.") Consequently, Landlord was well within its contractual rights to take the actions complained of by Plaintiffs and took said actions to minimize any future damages that Plaintiffs were likely to cause.

ABANDONMENT

SECTION I. SUBSECTION B. SUB-SUBSECTION 1.

Plaintiffs abandoned the premises when they failed to pay rent on time, failed to pay rent when demanded, and subsequently left the premises without any offer or attempt to pay rent in arrears. As of July 1st, 2017, Plaintiffs' rent was due to Landlord. Since this time, Plaintiffs have failed to tender rent when demanding possession of the premises and even during face-to-face conversations with Landlord's agent.

"Failure to pay the rent agreed upon when due, or a reasonable rent for use and occupation when demanded, shall terminate all tenancies." S.C. Code Ann. §27-35-140. "Abandonment of contract by one party is the giving up of the right to a benefit due from the other party. A contract will be treated as abandoned when the acts of one party inconsistent with its existence are acquiesced in by the other party." *Ro-lo Enterprises v. Hicks Enterprises, Inc.*, 362 S.E.2d 888, 294 S.C. 111 (S.C. App., 1987) (internal citations omitted).

Here, Plaintiffs unequivocally failed to pay rent when due, failed to pay rent when demanded, and failed to provide any promise, objection, or even a comment upon rent on the final day to cure their breach. Landlord accepted that Plaintiffs had abandoned their interest in the premises and acted to secure the premises against unlawful entry. Plaintiffs' tenancy upon the

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premises ended no later than their failure to pay rent when demanded, and their intent to return or not after such date is ineffective to maintain possession of the premises.

Plaintiffs abandoned the premises when it failed to pay rent, and Landlord merely acknowledge and acquiesced to such abandonment when it secured the premises after the fact.

WAIVER AND ESTOPPEL

SECTION I. SUBSECTION B. SUB-SUBSECTION 2.

Defendants raise the defenses waiver and estoppel for multiple purposes including those discussed above. Plaintiffs waived their interest in the Lease and their possession in the premises when they failed to pay rent as due and again upon demand. Plaintiffs waived their right to challenge the terms of the Lease when they took advantage of the same and occupied the premises. Plaintiffs further waived their right to challenge the terms of the Lease when each and every Plaintiff, individually, ratified the Lease by making payment upon the same.

Plaintiff Kerr represented that he had the authority to bind Plaintiff Blackstone and Chase, LLC and entered into the Lease upon their behalf. Blackstone and Chase, LLC then proceeded to accept the benefits of the Lease, occupy the premises, and make payment upon the Lease. Plaintiffs Mark Thomas and Tensley Thomas assisted with Blackstone and Chase, LLC occupying the premises and also made payment upon the Lease. Plaintiffs are estopped from denying that a binding Lease was entered into as each and every plaintiff benefited from the Lease and personally made payment upon the Lease. For the Plaintiffs to now deny that a Lease was created when they openly represented to Landlord that Plaintiffs and Landlord were creating a Lease raises the specter of fraud.

While Plaintiffs were occupying the premises, a rent dispute was never raised. Rather, Plaintiffs simply failed to tender rent when due, as promised, and after demanded. Plaintiffs'

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"rent dispute" was not raised until the present suit; well after the termination of any tenancy held by Plaintiffs. Therefore, Plaintiffs have waived this argument and are estopped from raising it now.

There are many assertions by Plaintiffs within this claim that are inconsistent with their prior actions. Such claims are barred by waiver and estoppel, and Defendant will make the argument of such defenses as each issue arrives.

LACHES SECTION I. SUBSECTION B. SUB-SUBSECTION 3.

Plaintiffs willingly accepted the benefit of the Lease with Landlord, made payment upon the same, and represented to Landlord that said Lease was entered into with Plaintiffs' authority and therefore was binding. Landlord relied upon these representations when allowing Plaintiffs to occupy the premises and remain in the premises. Plaintiffs' argument to invalidate the Lease, after representing it existed and accepting the benefit of its existence for more than a year, is barred by the doctrine of laches. The same is true of the alleged rent dispute which Plaintiffs attempt to raise for the first time in their complaint and after tenancy has been terminated.

UNCLEAN HANDS

SECTION I. SUBSECTION B. SUB-SUBSECTION 4.

Defendants raise the defense of unclean hands against Plaintiffs for their conduct in entering the Lease and in execution of the same. Plaintiff Kerr represented he had authority to enter into the Lease and bind Plaintiff Blackstone and Chase, LLC. Landlord relied upon this assertion and entered into the Lease giving the valuable consideration of use of the Premises. Now Plaintiffs argue that no Lease was formed, that Kerr deceived Landlord, and that the tenancy should be considered one at law rather than by contract.

Plaintiff is quick to state that "clean hands in equity refers to one acting 'fairly and

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without fraud or deceit as to the controversy in issue.'" Plaintiffs Motion citing *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-15, 65 S. Ct. 993, 997. Plaintiffs acted in deceit, if not in fraud, when they represented having authority to bind Blackstone and Chase, LLC but now claim that they did not have such authority. Such deceit was carried on throughout the term of the Lease when each and every Plaintiff made payment upon the Lease without raising question of its existence.

Plaintiffs further acted with unclean hands when they created a private nuisance, broke city ordinances, failed to pay their rent, and failed to keep promises that rent would be paid. Plaintiffs here do not have "a clean record with respect to the transaction with the defendants." *Arnold v. Spartanburg*, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943). Therefore, the doctrine of unclean hands is applicable and bars Plaintiffs from seeking recovery in equity.

DEFAULT

SECTION I. SUBSECTION C.

Plaintiffs continue to deny the existence of the Lease which they entered into, but denial does not invalidate the Lease nor make it disappear. The Lease was agreed to, signed, amended twice in writing, paid upon a dozen times, and relied upon by all parties. The terms of the Lease govern the relationship between Plaintiffs and Landlord, and Landlord can assert its contractual rights under the Lease.

Plaintiffs attempt to dismiss the Defendants defense of default should fail because the Lease was validly entered, or the Plaintiffs have waived the right to challenge it and are estopped for the same, as discussed above.

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MITIGATION OF DAMAGES

SECTION I. SUBSECTION D.

Plaintiffs have repeatedly forbidden Landlord from removing property from the premises and restoring the same to the condition it was in prior to the Lease. Plaintiffs have threatened Defendants with charges of spoliation if Landlord removes records from the premises.

Landlord has taken steps to pack all property in the premises and to clean the same in anticipation of re-letting the premises. However, Landlord has been unwilling to remove the personal property from within the premises when Plaintiffs have made multiple demands on the same.

Until Plaintiffs allow Landlord to take reasonable action to restore the premises to their original condition, Landlord cannot re-let the premises. This failure to mitigate damages falls upon the Plaintiffs who have repeatedly and aggressively demanded that personal property within the premises not be removed from the premises.

Further, Plaintiffs allegedly are accruing damages to third parties that claim some of the personal property within the premises. Defendants do not know these third parties and can take no action to mitigate these damages. When Plaintiffs have brought such third parties to Landlord's attention, Landlord arranged a mutually agreeable return of the third parties alleged property to said third parties. However, when Landlord has brought to Plaintiffs' attention a third party claiming ownership of property within the premises, Plaintiffs have denied the return of said property to said third party. Again, Defendants have attempted to mitigate damages only to be frustrated by Plaintiffs.

As a third example, Defendants have offered to sell the inventory within the premises while it is still marketable. Plaintiffs have, unreasonably and without a factual basis, denied the

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marketability of the same and refused to agree to a sale of the inventory. This unreasonable refusal to sell has delayed the liquidation of inventory that is perishable and will soon perish.

On multiple accounts Landlord and Defendants have attempted to work with Plaintiffs to mitigate damages, and more often than not Plaintiffs have only offered up reasons why no action can be taken. This is a failure to mitigate damages on their part and only serves to exacerbate any problems within the dispute.

MOTION TO STRIKE PARAGRAPHS

SECTION IV.

Defendants, quite frankly, are unsure how to respond to this section. To the extent that further analysis will be fully explained in a supporting memorandum by Plaintiffs, as alleged in the Motion, Defendants will address it at that time.

CONCLUSION

Plaintiffs here choose to overanalyze prematurely the defenses of Defendants and to object to the same as unclear. A responsive pleading is not required of Plaintiffs in response to Defendants' defenses, and the attempt to deny Defendants the ability to defend themselves before the case, and Plaintiffs' arguments, can be fully developed is disingenuous of Plaintiffs. Plaintiffs have brought multiple, redundant claims on what should be a simple case, and have filed lengthy pleadings with a plethora of alternative arguments necessitating the complex defenses by Defendants that will be more fully developed as the case evolves. To deny Defendants the use of these defenses right out of the starting gate would be a denial of due process. Therefore, Plaintiffs' Motion should be denied and Plaintiffs should be required to answer Defendants' counterclaims.

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Respectfully Submitted,

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August 23, 2018

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STATE OF SOUTH CAROLINA **COUNTY OF GREENVILLE**	**IN THE COURT OF COMMON PLEAS** **FOR THE THIRTEENTH JUDICIAL CIRCUIT**
BLACKSTONE AND CHASE, LLC, MARK T. THOMAS, TENSLEY E. THOMAS, AND BRADLEY W. KERR, Plaintiff(s), v. **MARGARET H. DURHAM LIVING TRUST, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING COMPANY, LLC, EZ GLIDE 350, LLC, MARGARET H. DURHAM, JAMES W. DURHAM, HELEN SHOCKLEY, AND TAMALA D. CRANE,** Defendant(s).	2017-CP-23-07837 CIVIL ACTION NO. **PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS AND MOTION TO STRIKE DEFENDANTS' ANSWER AND COUNTERCLAIM**

PLEASE TAKE NOTICE that Plaintiffs seek to respond to Defendants' Answer and Counterclaim filed on May 31, 2018, with a memorandum supporting Plaintiffs' Motion to Dismiss and Motion to Strike Defendants' Answer and Counterclaim filed on June 29, 2018. Plaintiffs' show the following:

PROCEDURAL HISTORY

This evolution of this case is a procedural quagmire. The parties were engaged in settlement negotiations for this landlord-tenant dispute that begun on or around August 24, 2017, and the settlement negotiations ended on or around October 18, 2017. Meanwhile, and without notifying counsel for Plaintiffs, Defendant **MARGARET H. DURHAM LIVING TRUST** filed for a writ of ejectment against the Plaintiff **BLACKSTONE AND CHASE, LLC**, on or around October 16, 2017, before the Gannt Summary Court unbeknownst to Plaintiffs (Case No. 2017CV2311003419). On or around October 23, 2017, the Gannt Summary Court issued a Rule to Show Cause or a Rule to Vacate, and for the writ of ejectment to occur on or around December 12, 2017 (Case No. 2017CV2311003419). Plaintiffs never received notice of Defendant **MARGARET H. DURHAM LIVING TRUST**'s filing for a writ of ejectment until independently discovering a writ of ejectment had been filed against the Plaintiffs on or around December 8, 2017 (Case No. 2017CV2311003419).

Plaintiffs filed a Notice of Motion for Preliminary Injunction, a Motion for Preliminary Injunction and Writ of Supersedeas, and a Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction on or around December 8, 2017, before the Gannt Summary Court (Case No. 2017CV2311003419). The Gantt Summary Court held a hearing for Plaintiffs' Motion for

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Preliminary Injunction and Writ of Supersedeas on or around January 29, 2018 (Case No. 2017CV2311003419). The Gantt Summary Court ruled that Defendant **MARGARET H. DURHAM LIVING TRUST**'s removal of the tenant by changing the locks and dispossession of the Plaintiffs' personal property on the premises before ever filing for a writ of ejectment was unlawful (Case No. 2017CV2311003419). Moreover, the Gantt Summary Court acknowledged the issue of Plaintiffs not receiving proper notice of the writ of ejectment, and also stated that the amount of dispute exceeded the Gantt Summary Court's jurisdiction over the matter (Case No. 2017CV2311003419).

Before the Greenville County Circuit Court, Appellants (Plaintiffs) also filed for a Notice of Intent to Appeal on or around December 11, 2017, and an Amended Notice of Intent to Appeal on or around January 11, 2018 (Case No. 2017-CP-23-07820). The Gantt Summary Court filed the Magistrate's Appeal Return on January 10, 2018, and again on February 5, 2018 (Case No. 2017-CP-23-07820). Respondent (Defendant) **MARGARET H. DURHAM LIVING TRUST** filed a Response to Amended Appeal on February 7, 2018 (Case No. 2017-CP-23-07820). Appellants (Plaintiffs) filed a Response to the Respondent's Response to Amended Appeal on February 8, 2018 (Case No. 2017-CP-23-07820). Respondent (Defendant) **MARGARET H. DURHAM LIVING TRUST** filed an Affidavit for the Defendant **JAMES W. DURHAM** on February 8, 2018 (Case No. 2017-CP-23-07820). The Affidavit included an admission to the Defendant **MARGARET H. DURHAM LIVING TRUST** repeatedly reentering the premises in non-emergency situations and locking out the Plaintiffs from the premises on or around July 28, 2017, before ever filing for a writ of ejectment on or around October 16, 2017, along with a locksmith receipt made out to Defendant **HELEN W. SHOCKLEY** (Case No. 2017-CP-23-07820).

Contemporaneously with Plaintiffs' Notice of Intent to Appeal, Plaintiffs filed a Complaint for Declaratory Relief on December 12, 2017, before the Greenville County Circuit Court (Case No. 2017-CP-23-07857). Defendants filed a Motion to Dismiss Plaintiffs' Complaint for Declaratory Relief on December 28, 2017 (Case No. 2017-CP-23-07857). Plaintiffs filed Plaintiffs' Response to Defendants' Motion to Dismiss on January 10, 2018 (Case No. 2017-CP-23-07857). Because the Gantt Summary Court declined to rule on Plaintiffs' Motion for Preliminary Injunction, Plaintiffs filed a Motion for Preliminary Injunction and a Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction on February 2, 2018, which is still pending (Case No. 2017-CP-23-07857). Defendants filed Defendants' Memorandum in Support of their Motion to Dismiss on February 7, 2018 (Case No. 2017-CP-23-07857). Plaintiffs filed Plaintiffs' Response to Defendants' Memorandum in Support of Defendants' Motion to Dismiss on February 8, 2017 (Case No. 2017-CP-23-07857).

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The Court heard Defendants' Motion to Dismiss the Plaintiffs' Complaint for Declaratory Relief on February 8, 2018 (Case No. 2017-CP-23-07857). On February 28, 2018, the Court ruled on Defendants' Motion to Dismiss to allow Plaintiffs to file an amended complaint because the Court did not recognize Plaintiffs' Complaint for Declaratory Relief as a Complaint for Declaratory Relief (Case No. 2017-CP-23-07857). The Court's order was a consolidation of these three cases into one (Case No. 2017-CP-23-07857) as well as to operate as a dismissal of the writ of ejectment before the Gantt Summary Court for lack of jurisdiction (Case No. 2017CV2311003419).

Plaintiffs filed Plaintiffs' Amended Complaint on March 16, 2018, of which is the first formal lawsuit filed against Defendants pursuant to the Court's order on February 28, 2018. Plaintiffs intended that Plaintiffs' Amended Complaint replace Plaintiffs' Complaint for Declaratory Relief in its entirety. Defendants filed Defendants' Motion to Dismiss of Plaintiffs' Amended Complaint on March 30, 2018. Plaintiffs filed Plaintiffs' Response to the Defendants' Motion to Dismiss and Memorandum in Support thereof on April 10, 2018. Plaintiffs' Response to Defendants' Motion to Dismiss and Memorandum in Support thereof requested the Court's permission to amend the complaint, cure any noted defects or deficiencies, and rectify any issues raised by Defendants on March 30, 2018. Defendants filed the Defendants' Memorandum in Support of their Motion to Dismiss on April 17, 2018. Plaintiffs filed Plaintiffs' Response to Defendants' Memorandum in Support of their Motion to Dismiss. The hearing for the Defendants' Motion to Dismiss the Plaintiffs' Amended Complaint was on April 21, 2018. Plaintiffs filed Plaintiffs' Second Amended Complaint on May 8, 2018. Defendants filed an Answer and Counterclaim on May 31, 2018. Plaintiffs filed Plaintiffs' Motion to Dismiss and Motion to Strike Defendants' Answer and Counterclaim on June 29, 2018. Defendants filed Defendants' Response to Plaintiffs' Motion to Strike and Motion to Dismiss Defendants' Answer and Counterclaim filed on August 23, 2018. Plaintiffs' Parties have a hearing on Plaintiffs' Motion to Dismiss and Motion to Strike Defendants' Answer and Counterclaim on August 29, 2018.

FACTUAL BACKGROUND

On or around April 8, 2017, and July 28, 2017, Plaintiffs were denied access to the premises pursuant to a commercial lease between Plaintiff **BRADLEY W. KERR** and Defendant **MARGARET H. DURHAM LIVING TRUST** for the first floor of 17 W. North Street, Greenville, South Carolina ("Premises"). The commercial lease was executed prior to the formation of Plaintiff **BLACKSTONE AND CHASE, LLC**, and Plaintiffs **TENSLEY E. THOMAS** and **MARK T. THOMAS** never saw the lease until after Defendants evicted Plaintiffs from the Premises. On or around July 28, 2017, Defendant **HELEN W. SHOCKLEY**, acting as an agent of the

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MARGERET H. DURHAM LIVING TRUST, signed the receipt to change the locks to the premises thereby forcibly disseizing the premises from the Plaintiffs in a hostile landlord-tenant dispute. Defendant **MARGARET H. DURHAM LIVING TRUST** belatedly filed for a writ of ejectment before the Gantt Summary Court on or around October 23, 2017. To date, Defendant **MARGARET H. DURHAM LIVING TRUST** has not filed for a writ of distraint to seize Plaintiffs' personal property located on the Premises. To date, Plaintiffs have not had access to Plaintiffs' personal property or trade fixtures, including Plaintiffs' business records relevant to this litigation, located on the Premises since on or around July 28, 2017. Plaintiffs cannot fully participate in discovery or file taxes accurately without Plaintiffs' business records.

Plaintiffs have not had access to the Premises since on or around July 28, 2017, when Defendants, whether acting individually or through that Defendant's agent, locked out Plaintiffs from the Premises and distrained the Plaintiffs' personal property on the Premises in violation of South Carolina law. Being that Defendant **MARGARET H. DURHAM LIVING TRUST** is a fictitious legal entity, Defendants **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** were primarily responsible for corresponding with the Plaintiffs during the scope of their employment for any of the abovenamed Defendants. However, the Defendants' **MARGARET H. DURHAM**, **JAMES W. DURHAM**, **HELEN W. SHOCKLEY**, and **TAMALA D. CRANE** were all involved in the demise of the hostile landlord-tenant relationship between the Plaintiffs and the Defendants in a mismanaged family affair to act egregiously in disregard of the Plaintiffs' rights to the premises and personal property therein.

STANDARD OF REVIEW

I. MOTION TO DISMISS

Rule 12(b)(6) of the South Carolina Rules of Civil Procedure provides that the court dismiss a cause of action if the moving party claims that the non-moving party failed to "state facts sufficient to constitute a cause of action." Furthermore, Rule 12(b) provides that:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. S.C.R.C.P. Rule 12(b).

Hence, failure to state a cause of action may be treated in the manner as one for summary judgment against that issue under Rule 56 of the South Carolina Rules of Civil Procedure. While a 12(b)(6) motion to dismiss is a drastic remedy, Defendants must allege a factual basis to support each cause of action with the ultimate facts that "the evidence upon the trial will

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prove." *Stroud v. Riddle*, 260 S.C. 99, 103, 194 S.E.2d 235, 237 (1973). A 12(b)(6) motion to dismiss may not survive "if facts alleged and inferences reasonably deducible therefrom would [not] entitle the plaintiff to any relief on any theory of the case." *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).

Defendants must provide fair notice to Plaintiffs and to the court in the manner of pleading the ultimate facts as alleged to support each cause of action. *See Watts v. Metro Sec. Agency*, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001). Moreover, a cause of action in a complaint is fatally defective if the complaint fails to allege the elements of a cause of action. *Ardis v. Cox*, 314 S.C. 512, 515-16, 431 S.E.2d 267, 269 (Ct. App. 1993). Failure to allege the elements to a cause of action warrants dismissal of the cause of action. *Id.* Generally, a 12(b)(6) motion to dismiss does not apply to affirmative defenses. *Spence v. Spence*, 368 S.C. 106, 123-24, 628 S.E.2d 869, 878 (2006). However, if the affirmative defense fails to dispute an issue of fact or the pleadings disclose the facts completely whereby nothing further will be developed in pre-trial discovery or at trial, then a 12(b)(6) motion to dismiss affirmative defenses may apply under those circumstances. *Id.*

II. MOTION TO STRIKE

By contrast, a motion to strike allegations in a pleading is permissible under Rule 12(f) of the South Carolina Rules of Civil Procedure:

> Upon motion pointing out the defects complained of, and made by a party before responding to a pleading or, if no responsive pleading is required within 30 days after the service of the pleading upon him or upon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

Irrelevant defenses raised in an answer to a complaint may be stricken to have no substantial connection to the controversy or cause of action. *Aetna Cas. & Sur. Co. v. Golightly*, 289 S.C. 408, 410, 338 S.E.2d 153, 154 (1985); *see also* S.C.R.C.P. Rule 12(f). Also, a motion to strike challenges the theory of recovery in the pleading. *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 114, 682 S.E.2d 871, 874 (Ct. App. 2009). If Defendants fail to state allegations to support a viable cause of action that would entitle Defendants to recover on any theory of the case, then Defendants' cause of action should be dismissed. *See id.* at 114-15.

Under Rule 8(d) of the South Carolina Rules of Civil Procedure, "[a]llegations made in a complaint that are not denied in the answer are deemed admitted." *Motors Ins. Corp. v. State by & ex rel. Dep't of Highways & Pub. Transp.*, 313 S.C. 279, 281, 437 S.E.2d 555, 556-57 (Ct. App. 1993). A party is bound by that party's pleadings when alleged in an Answer or Counterclaim:

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> It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action. *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992).

When responding to the allegations in a complaint, Defendants must adhere to Rule 8(b) of the South Carolina Rules of Civil Procedure:

> A party shall state in short and plain terms the facts constituting his defenses to each cause of action asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. S.C.R.C.P. Rule 8(b).

When pleading denials in an answer, inconsistent denials may deem the answer "frivolous when it is clearly insufficient on its face, and does not controvert the material points of the complaint, and is presumably interposed for mere purposes of delay." *Guar. Tr. Co. v. Kibler*, 105 S.C. 513, 519, 90 S.E. 159, 160 (1916). Defendants are "bound: (1) To deny these allegations; (2) or to say that [Defendants] had no knowledge or information about them sufficient to form a belief; (3) or to state new matter which constitutes a defense thereto." *Id.*

A denial based on lack of knowledge is not a sufficient denial when pleading inconsistent denials to vital allegations in a complaint charging Defendants with liability: "A denial is predicated on knowledge; a lack of belief is predicated on ignorance." *Id.* Nor may Defendants deny facts presumptively within the Defendants' knowledge or matters of public record to put such facts in issue. *Clanton's Auto Auction Sales, Inc. v. Campbell*, 230 S.C. 65, 71, 94 S.E.2d 172, 175 (1956). If Defendants, whether individually or by that Defendant's agent, had the information related to the substance of the allegation, Defendants may not "deny knowledge or information sufficient to form a belief because [Defendants] had the information." *Blackwell v. First Nat'l Bank*, 185 S.C. 427, 435, 194 S.E. 339, 343 (1937). The named principal, such as counsel for Defendants, as a Defendant "speaks from the viewpoint of the agent making the verification in its behalf." *Id.* Ultimately, Defendants must deny Plaintiffs' allegations unequivocally. Defendants may not palter in Defendants' responsive pleading when Plaintiffs charged Defendants with an act under the Plaintiffs' Complaint. *Cantey v. Summersett & Co.*, 149 S.C. 513, 527, 147 S.E. 635, 640 (1929).

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III. MOTION FOR MORE DEFINITE STATEMENT

Under Rule 12(e) of the South Carolina Rules of Civil Procedure, Plaintiffs may move for a more definite statement if Defendants submit "a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." S.C.R.C.P. Rule 12(e). Each affirmative defense must be stated separately in Defendants' answer to a complaint:

> All averments of the facts of a cause of action or defense and demands for relief shall be made in consecutive numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each cause of action and each defense shall be stated in a separate cause of action or defense. S.C.R.C.P. 10(b).

While Defendants may state a cause of action or defense in the alternative or hypothetically when pleading in an Answer or Counterclaim under Rule 8(e)(2) of the South Carolina Rules of Civil Procedure, Defendants may not jumble causes of action under one cause of action to the point that a party cannot frame a responsive pleading under Rule 12(e). *Henderson v. Gould, Inc.*, 288 S.C. 261, 263, 341 S.E.2d 806, 808 (Ct. App. 1986).

LEGAL ARGUMENT

I. DEFENDANTS FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED IN DEFENDANTS' COUNTERCLAIM

A. DEFENDANTS FAIL TO SHOW THE EXISTENCE OF THE LEASE AGREEMENT AS A BINDING CONTRACT WARRANTING DISMISSAL

In a cause of action for breach of contract, a party must establish "the existence and terms of the contract, defendant's breach of one or more of the contractual terms, and damages resulting from the breach." *Taylor v. Cummins Atl.*, 852 F. Supp. 1279, 1286 (D.S.C. 1994). With a breach of contract, "the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). More importantly, this cause of action depends upon the existence of a contract. *Taylor*, 852 F. Supp. at 1286.

A contract is an agreement between two parties provide sufficient and valuable consideration to act or not act. *Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co.*, 313 S.C. 215, 220, 437 S.E.2d 122, 125-26 (Ct. App. 1993). Defendants must prove "[t]he essential elements of a contract [including] an offer, an acceptance, and valuable consideration." *Taylor*, 852 F. Supp. at 1286. An offer is the objective manifestation of mutual assent to the bargain. *Id.* An offer is not binding unless the offer is definite stating the material terms and conditions

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intended to create a legal relationship upon acceptance of those terms and conditions. *McLaurin v. Hamer*, 165 S.C. 411, 420, 164 S.E. 2, 5 (1932).

The distinction between preliminary negotiations and an offer depends on a meeting of the minds as to the final expression of the agreement in the written contract. *Id.* Preliminary negotiations are akin to general invitations to make an offer. *Id.* Compliance with the requirements under a general invitation is merely an offer that "may or may not be accepted by the other party." *Id.* Under the contract principles of mutual assent, a meeting of the minds is required to form a contract that objectively manifests an intent by the parties to enter into a contract. *Player v. Chandler*, 299 S.C. 101, 104-05, 382 S.E.2d 891, 893-94 (1989). Mutual assent "is not based on secret purpose or intention on the part of one of the parties, stored away in [only one party's] mind[,] and not brought to the attention of the other party . . ." *Id.* Thus, the landlord may not "mislead [the] Tenant, or to conceal[,] [] material facts regarding the lease, its terms, or [the] Landlord's expectations." *See Newman v. AFC Enters.*, No. 2007-UP-135, 2007 S.C. App. Unpub. LEXIS 331, at *14 (Ct. App. Mar. 29, 2007).

Under South Carolina law, the lease must still be a valid contract that represents a meeting of the minds "with regard to *all* essential and material terms of the [lease] agreement...[including] *a definite agreement as to the extent and boundary of the property to be leased, the term of the lease, the rental as well as the time and manner of payment*." *Player*, 299 S.C. at 104-05; *see also Columbia R., G. & E. Co. v. Jones*, 119 S.C. 480, 491-92, 112 S.E. 267, 270-71 (1922). Additionally, "the essential elements of a binding lease agreement were said to be *the grant of possession and exclusive use and enjoyment of the property*, definite consideration or rent, and a certain term." *B-L-S Constr. Co. v. St. Stephen Knitwear, Inc.*, 276 S.C. 612, 614, 281 S.E.2d 129, 130 (1981) (emphasis added); *Columbia R., G. & E. Co.*, 119 S.C. at 490-91. If "the reasonable rental value of the leased premises [is] subject to different interpretations[,]" then the reasonable rent or compensation is a question of fact presented to either the factfinder, whether a judge or jury. *Sapp v. Wheeler*, 402 S.C. 502, 509, 741 S.E.2d 565, 569 (Ct. App. 2013). Notwithstanding, if the landlord and tenant fail to expressly determine the rent for the Premises, then "the law will presume a promise to pay a reasonable rent or compensation . . ." *S.C. Terminal Co. v. S.C. & Ga. R.R. Co.*, 52 S.C. 1, 18, 29 S.E. 565, 572 (1898).

The parties' intention and understanding at the time of executing the lease governs whether the parties have met the implied conditions, or conditions precedent, before the lease becomes binding and effective. *Sifonios v. Town of Surfside Beach*, 414 S.C. 269, 274-77, 777 S.E.2d 425, 428-29 (Ct. App. 2015); *Dean v. Dean*, 229 S.C. 430, 436, 93 S.E.2d 206, 209

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(1956). Additionally, a written lease is only valid upon delivery, regardless of whether manual delivery occurs, provided that the terms, acts, or words manifest a clear intent to convey an interest in the land from the lessor to the lessee. *Sifonios*, 414 S.C. at 276. The lease "is simply not binding until the written agreement is executed and delivered, even if all of the terms have been agreed upon." *Id.* at 274-77. Merely signing a lease may not render the lease binding—especially when signing the lease occurs outside of each party's presence. *Id.*

Furthermore, an *ultra vires* contract is unlawful and void because the limited liability company, "by the law of its creation, is incapable of making it . . ." *Howard & Foster Co. v. Citizens' Nat'l Bank*, 133 S.C. 202, 211, 130 S.E. 758, 761 (1926) (finding that an implied contract may result from the *ultra vires* contract); *cf. Skalowski v. Joe Fisher, Inc.*, 152 S.C. 108, 126-29, 149 S.E. 340, 347-48 (1929) (Watts, J., dissenting) (charging the knowledge to the one contracting with the corporation as to whether the contract is authorized by the corporation). When a member acts *ultra vires* on behalf of a pre-organized limited liability company, the other party's instrument still must not violate the South Carolina Statute of Frauds when the other party had notice, whether actual or constructive notice, that the signing member lacked authority for a nonexistent limited liability company. *Compare* S.C. Code Ann. § 32-3-10 (voiding unauthorized contracts under the statute of frauds), *with* S.C. Code Ann. § 33-44-301 (allowing estoppel to uphold unauthorized contracts if the party offering consideration lacked notice of the other party being an unauthorized party). The Statute of Frauds requires that a lease for more than one year, or incapable of being performed in a year, must be "in writing and signed by the party to be charged therewith or some person thereunto by [that party] lawfully authorized." S.C. Code Ann. § 32-3-10; *see also* S.C. Code Ann. §§ 27-35-10 to -20; *Player*, 299 S.C. at 105; *Fulmer v. London, Liverpool & Globe Fire Ins. Co.*, 172 S.C. 525, 527, 174 S.E. 466, 467 (1934) (ruling that "a principal, disclosed or undisclosed, is bound by the acts of his agent done within the scope of his authority"). Thus, under South Carolina law, no lease—as a contract involving tenements of land—is valid against the party to be charged when the lease is signed by a person unauthorized to do so. S.C. Code Ann. § 32-3-10.

Moreover, when the tenant is a limited liability company, the operating agreement for the limited liability company governs whether the party signing the lease is authorized to bind the limited liability company to the terms and conditions of the Lease. S.C. Code Ann. §§ 33-44-101 to -504. Thus, agency principles govern the authority of the members acting on behalf of the tenant to bind the tenant to the lease. *See* S.C. Code Ann. § 33-44-301. For the principal to ratify an unauthorized contract entered into by its agent, the principal must: (1) accept the benefits under the contract; (2) have full knowledge of the facts; and, (3) manifest an intention to

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adopt the contract. *Anthony v. Padmar, Inc.*, 320 S.C. 436, 452, 465 S.E.2d 745, 755 (Ct. App. 1995). Ratification may not be implied "against a principal who is ignorant of the facts." *Moore v. Hardaway Contracting Co.*, 193 S.C. 299, 305, 8 S.E.2d 511, 513 (1940). And, the principal must either ratify or reject the contract in toto (i.e., no partial acceptance or rejection of the terms and conditions of the contract). *Fuller*, 240 S.C. at 77. When constructive notice of an agent's acts impute to the principal still requires that the agent acted within the scope of authority on behalf of the principal. Indep. Nat'l Bank v. Buncombe Prof'l Park, LLC, 411 S.C. 605, 608, 769 S.E.2d 663, 665 (2015). Prior to the formation of a limited liability company, an agent acting on behalf of the principal must do so within the scope of authority of the principal. If the principal never views or signs the contract, knowledge of the contract may not be imputed to the principal. *Anthony v. Padmar, Inc.*, 320 S.C. 436, 452, 465 S.E.2d 745, 755 (Ct. App. 1995). The principal(s) must still have knowledge of **all** the terms and conditions of the contract in question and accept the terms and conditions of the contract in full before ratification of the same may occur.

If an agent acts for an undisclosed principal, then the agent may be held personally liable unless the circumstances present the parties' mutual intention never to hold the agent individually liable. *See Broom v. Marshall*, 284 S.C. 530, 539-40, 328 S.E.2d 639, 644-46 (Ct. App. 1984); S.C. Code Ann. § 33-44-301 (allowing for estoppel defenses in cases where an innocent party, who lacks notice, contracts with an unauthorized individual); *cf.* S.C. Code Ann. § 33-2-104 (finding promoter and the corporation jointly and severally liable for pre-incorporation transactions related to corporations). Moreover, the business judgment rule may also apply to agents acting on the behalf of limited liability companies—even prior to formation as a limited liability company—as long as the agent acts in good faith, with ordinary care, and in the best interests of the partnership that became a limited liability company. *Compare 16 Jade St., LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 348, 728 S.E.2d 448, 453 (2012) (borrowing concepts from corporation law to apply to limited liability companies), *with Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 603, 538 S.E.2d 15, 27 (Ct. App. 2000) (applying the business judgment rule to partnerships).

The subject of this action concerns an unauthorized, unlawful, defective written lease agreement between Defendant **MARGARET H. DURHAM LIVING TRUST** and Plaintiff **BRADLEY W. KERR** that violates the Statute of Frauds pursuant to South Carolina law as an *ultra vires* contract. S.C. Code Ann. §§ 32-3-10, 27-35-10 to -30; *see Huguenot Mills v. Jempson & Co.*, 68 S.C. 363, 366, 47 S.E. 687, 688 (1904); *Pearce v. Madison & I. R. Co.*, 62 U.S. (21 How.) 441, 443 (1859) (charging the knowledge to the public to ascertain the authority

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of a corporation's agents). The lease agreement speaks for itself in that the lease agreement does not contain signatures from the other members of Plaintiff **BLACKSTONE AND CHASE, LLC**, who are Plaintiffs **TENSLEY E. THOMAS** and **MARK T. THOMAS**. Defendants **MARGARET H. DURHAM LIVING TRUST**, **MARGARET H. DURHAM**, **JAMES W. DURHAM**, or **HELEN W. SHOCKLEY** did not verify the formation documents for Plaintiff **BLACKSTONE AND CHASE, LLC**, to ensure Plaintiff **BRADLEY W. KERR** was authorized to sign on behalf of Plaintiffs **TENSLEY E. THOMAS** or **MARK T. THOMAS**. Nor did Defendants verify that Plaintiffs **TENSLEY E. THOMAS** or **MARK T. THOMAS** approve and ratify the lease agreement upon discovering them as the other owners of Plaintiff **BLACKSTONE AND CHASE, LLC**, on or around March 15, 2016. The simple solution would have been for Defendants to have Plaintiffs **TENSLEY E. THOMAS**, **MARK T. THOMAS**, and **BRADLEY W. KERR** sign a new lease agreement or a modification addendum to the lease agreement. But, that never happened.

A simple search in publicly available records by Defendants on the South Carolina Secretary of State would have revealed that **BLACKSTONE AND CHASE, LLC**, had not been formed yet at the time of the lease agreement. Defendants admitted to not meeting Plaintiffs **TENSLEY E. THOMAS** or **MARK T. THOMAS** until after Plaintiff **BRADLEY W. KERR** signed the lease agreement. Defendants had every opportunity to have the other members verify the lease agreement and ratify the same. But, Defendants never did so. And, upon multiple requests by Plaintiffs **TENSLEY E. THOMAS** and **MARK T. THOMAS**, Defendants refused providing a copy of the lease agreement to them when Defendants were clearly in possession of the lease agreement when submitting an insurance claim to **PENN NATIONAL INSURANCE COMPANY** and filing for a writ of ejectment after-the-fact. Defendants were put on notice that neither Plaintiffs **TENSLEY E. THOMAS** nor **MARK T. THOMAS** viewed the lease when requesting a copy of the same. Therefore, Defendants knew, or should have known, that Defendants lacked ratification of the lease agreement by Plaintiffs **TENSLEY E. THOMAS** and **MARK T. THOMAS** as well as a majority approval by members of Plaintiff **BLACKSTONE AND CHASE, LLC**, when a majority of Plaintiff **BLACKSTONE AND CHASE, LLC**, never viewed the lease until after Plaintiffs were unlawfully evicted from the Premises by Defendants. By the time Plaintiffs **TENSLEY E. THOMAS** and **MARK T. THOMAS** requested copies of the lease from Defendants, Plaintiff **BLACKSTONE AND CHASE, LLC**, was a formed entity that would have prompted Defendants to exercise due diligence by requesting the formation documents of Plaintiff **BLACKSTONE AND CHASE, LLC.**

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Simply put, the lease agreement did not govern the landlord-tenant relationship that ensued nor a subsequent oral contract that formed in place, if applicable, of the unauthorized, unlawful, defective written lease agreement between Defendant **MARGARET H. DURHAM LIVING TRUST** and Plaintiff **BRADLEY W. KERR.** Plaintiff **BRADLEY W. KERR** acted in the best interests of Plaintiff **BLACKSTONE AND CHASE, LLC.** Plaintiffs made rent payments, utility payments, and maintained general liability insurance while in possession of the Premises accordingly as instructed by Defendant **HELEN W. SHOCKLEY** and **JAMES W. DURHAM.** Furthermore, the lease agreement does not represent a meeting of the minds as to all the essential terms of the lease with respect to the rent amount and attendant utilities, the Premises with respect to additional restrooms required by local municipal ordinances and regulations, the due date of rent payments (i.e., time and manner of rent payment), and general liability insurance. Therefore, the lease agreement is not a complete or final expression of the parties' intent regarding the lease of the Premises and is not binding on Plaintiffs.

Moreover, just because the lease agreement fails as a contract governing the landlord-tenant dispute does not equate to the absence of a contract governing the landlord-tenant relationship. Plaintiffs allege to the existence of a contract between the parties. However, Plaintiffs allege that the contract formed was not the purported lease agreement, but a subsequent oral agreement governed by statutory tenancy principles. Even with a subsequent, oral agreement, such agreement expired as of June of 2017 rendering Plaintiffs month-to-month tenants at best. Nonetheless, Defendants rely only the lease agreement as the contract governing the landlord-tenant relationship and fail to establish the lease agreement existed or was properly formed.

Plaintiffs hereby move the Court that Defendants' First Counterclaim for a breach of action should be dismissed and paragraphs 404 through 407 stricken. S.C.R.C.P. Rules 12(b)(6), (f).

B. DEFENDANTS' FAIL TO STATE A CLAIM FOR A BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACTS WARRANTING DISMISSAL

Defendants' cause of action for a breach of contract is subsumed within the cause of action for a breach of contract accompanied by fraudulent acts. The cause of action for breach of contract accompanied by fraudulent actions comprise of the following elements: "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Harper v. Ethridge*, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986). The common elements of fraud and deceit are not required in this cause of action. *Id.* Under this cause of action, a "fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's

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property by design." *Id.* However, essential to this cause of action, Defendants must prove the existence of the lease as a contract. *Crawford v. Limehouse & Sons, Inc.*, Civil Action No. 2:10-2094-CWH-BM, 2010 U.S. Dist. LEXIS 131291, at *5-6 (D.S.C. Nov. 10, 2010).

First, the cause of action for a breach of contract and breach of contract accompanied by fraudulent acts are not two separate causes of action and recovery under both causes of action are barred under the doctrine of election of remedies to prevent double recovery. *See Tomlinson v. Mixon*, 367 S.C. 467, 471, 626 S.E.2d 43, 45 (Ct. App. 2006). For separate causes of action, "two or more remedies must be available to the complaining party at the time of the election and these remedies must be inconsistent." *Id.* Actual and punitive damages from the breach of contract with respect to the breach of the contract, but not the making of a contract, are available under the cause of action for breach of contract accompanied by fraudulent acts. *Osborn v. Univ. Med. Assocs. of the Med. Univ. of S.C.*, 278 F. Supp. 2d 720, 740 (D.S.C. 2003). A cause of action for breach of contract accompanied by fraudulent acts permits recovery of actual damages from the breach of contract only if "clear and convincing evidence of a fraudulent act accompanying the alleged breach of contract." *Id.* Therefore, Defendants must plead one cause of action or the other, but Defendants cannot recover under both causes of action.

Second, this cause of action must fail because Defendants fail to allege that the lease is a valid, binding contract on Plaintiff **BLACKSTONE AND CHASE, LLC**, as previously discussed.

Plaintiffs hereby move the Court that Defendants' Second Counterclaim for a breach of action accompanied by fraudulent acts should be dismissed and paragraphs 409 through 412 stricken. S.C.R.C.P. Rules 12(b)(6), (f).

C. DEFENDANTS' CLAIM FOR NEGLIGENCE FAILS FOR WANT OF DAMAGES WARRANTING DISMISSAL

Plaintiffs will present supporting arguments for dismissing this cause of action at oral argument. Plaintiffs will also present supporting arguments for striking paragraphs 121, 123, 126, 364 through 382, and 414 through 414 at oral argument. Plaintiffs hereby move the Court that Defendants' Third Counterclaim for negligence or gross negligence should be dismissed and paragraphs 121, 123, 126, 364 through 382, and 414 through 416 stricken. S.C.R.C.P. Rules 12(b)(6), (f).

D. DEFENDANTS FAIL TO STATE A CLAIM FOR CONVERSION BY MISAPPLYING A CLAIM FOR CONVERSION TO REAL PROPERTY

Defendants cause of action for conversion should be dismissed because the tort of conversion only applies to personal property—not real property. *Hawkins v. City of Greenville*,

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358 S.C. 280, 297, 594 S.E.2d 557, 566 (Ct. App. 2004) ("[A] conversion action does not lie when alleging the exercise of dominion or control over real property."). A claim for conversion concerning real property will fail as a matter of law. Id. at 297-98. The tort of conversion under South Carolina common law "is the unauthorized assumption and exercise of the right of ownership *over goods or personal chattels* belonging to another, to the alteration of the condition or the exclusion of the owner's rights." *Crane v. Citicorp Nat'l Servs.*, 313 S.C. 70, 73, 437 S.E.2d 50, 52 (1993) (emphasis added).

Conversion relates to one's dominion of another's personal property without the owner's consent and depriving the owner's rights to the personal property. *Sherer-Gillett Co. v. Moore-Barnes Co.*, 114 S.C. 387, 389, 103 S.E. 766, 766 (1920) ("[A] a conversion is the unlawful exercise of dominion over the property of another."); *Young v. Corbitt Motor Truck Co.*, 148 S.C. 511, 529, 146 S.E. 534, 540 (1929). Conversion occurs when one wrongfully takes, illegally assumes ownership, illegally uses, misuses, or wrongfully detains another's personal property. *Ladson v. Mostowitz*, 45 S.C. 388, 391, 23 S.E. 49, 50 (1895). Ultimately, conversion is the deprivation of another's personal property either wholly or for a period of time in a manner that is inconsistent with or subversive of the owner's right of possession to the personal property. *Id.*

To maintain a cause of action for conversion, Defendants must "establish *either title to or right to the possession of the personal property.*" *Crane*, 313 S.C. at 73 (emphasis added). An action for conversion accrues when the wrongful act is complete, which normally coincides and the demand and refusal to return another's personal property unless otherwise shown under the circumstances at the time of the taking. *Roberts v. James*, 160 S.C. 291, 296-97, 158 S.E. 689, 691 (1931). Generally, knowledge of the conversion is irrelevant unless the conversion was fraudulently concealed or the taker was put on notice of the wrongful act. *Id.*

Furthermore, South Carolina law defines fixtures accordingly:

> A fixture is generally defined as an article which was a chattel, but by being physically annexed to the realty by one having an interest in the soil becomes a part and parcel of it. By mere affixation the chattel does not become a fixture. The test for determining whether an item remains personalty or becomes a fixture include the following criteria: (1) mode of attachment, (2) character of the structure or article, (3) the intent of the parties making the annexation, and (4) the relationship of the parties. *Carson v. Living Word Outreach Ministries, Inc.*, 315 S.C. 64, 70, 431 S.E.2d 615, 618 (Ct. App. 1993).

Moreover, tenants have the right to remove their fixtures from the premises when the lease terminates. *Id.*

Here, Defendants allege conversion of the Premises related to preexisting fixtures already annexed to the Premises prior to Plaintiffs entering and taking possession of the

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Premises. The Defendants' fixtures are affixed to the Premises as part of the building's infrastructure prior to Plaintiffs entering and taking possession of the Premises. During the upfitting process, Plaintiffs required access to some of the annexed fixtures on the Premises to install Plaintiffs' fixtures on the Premises. The Premises was essentially a bare space with four walls, one bathroom with a utility sink, and floors. Therefore, the fixtures in question related to Defendants' claims of conversion are in fact considered part and parcel of the Premises as real property and not chattel. Defendants consented to Plaintiffs' fixtures during the upfitting process between March 15, 2016, and June 8, 2016. When Defendants' locked out Plaintiffs from the Premises, Defendants afforded Plaintiffs no opportunity to remove Plaintiffs' fixtures and trade fixtures on the Premises. Therefore, Defendants should be estopped and barred from claiming conversion by Defendants' unlawful conduct when engaging in a self-help eviction.

In paragraph 320, Defendants allege that "Landlord made clear to Blackstone that the building and the Premises were an historic location in Greenville and had been painfully and carefully restored to pristine condition, that any upfitting and fixtures could not be attached to the Premises, and that the Premises must be returned to their original conditions upon termination of the Lease." Any fixtures on the Premises prior to the Plaintiffs taking possession is not separate personal property but part and parcel of the Premises as real property being affixed to the Premises and the infrastructure in a permanent manner. This cause of action is an utter misapplication of the tort of conversion and must fail as a matter of law. Moreover, when Defendants locked out Plaintiffs from the Premises, Plaintiffs had no opportunity to restore the Premises to the original condition. Defendants consented to the upfitting of the Premises by Plaintiffs prior to Plaintiffs opening up the barber shop on the Premises on or around June 8, 2016. Defendants are barred from claiming damages when Defendants' conduct ensued the cause of any damages to the Premises for failure to mitigate damages when engaging in a self-help eviction.

Plaintiffs hereby move the Court that Defendants' Fourth Counterclaim for conversion should be dismissed and paragraphs 327, 418 through 421 stricken. S.C.R.C.P. Rules 12(b)(6), (f).

E. DEFENDANTS MISCONSTRUE THE LAW OF NUISANCE THAT IS INAPPLICABLE TO THE FACTS AS ALLEGED TO PLAINTIFFS' LAWFUL CONDUCT ON THE PREMISES WARRANTING DISMISSAL

Whether an establishment or business is a private nuisance depends on the "the correlative rights of the parties--the right of one generally to make such lawful use of his property as he may desire and the right of the other to be protected in the reasonable enjoyment of his property." *Young v. Brown*, 212 S.C. 156, 169, 46 S.E.2d 673, 679 (1948). A business

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conducting a lawful business on the property must operate in a lawful or reasonable manner to prevent the unreasonable interference with another's lawful use and enjoyment of that person's property and material injury or great annoyance to others. *Winget v. Winn-Dixie Stores, Inc.*, 242 S.C. 152, 159, 130 S.E.2d 363, 367 (1963). By contrast, "every annoyance or disturbance of a landowner from the use made of property by a neighbor does not constitute a nuisance." *Id.* The dispositive issue is whether one's use of the property causes injury to another's legal rights—not whether the other person is merely "annoyed or disturbed by the operation of the business in question." *Id.* When living in organized communities and mixed use of property, one must have reasonable expectations of suffering some inconvenience and annoyance from neighboring businesses when operating the business on the property in a reasonable manner. *See id.*

While one may use one's property for any lawful purpose, one must balance one's use of property with the right of another's reasonable and comfortable enjoyment of that person's property. *Young*, 212 S.C. at 169-70. Comfortable enjoyment of one's property refers to both mental or physical comfort of the property in one of generally ordinary tastes and susceptibilities. *Id.* A lawful business should not be liable for a private nuisance "on account of every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or over-sensitive person." *Id.* Whether one's particular use of property is reasonable, or a private nuisance, is largely a factual determination made upon factors such as location, characterization of the neighborhood, nature of the use of one's property, extent and frequency of the complaining injury, and the effect on another's enjoyment of life, health, and property. *Winget*, 242 S.C. at 160. Additionally, a business operating on property lawfully and located in a commercial zone for retail business does not permit the landowner to "recover for depreciation in value of [the landowner's] property, which resulted solely from the location of the business of the defendants in an area which had been zoned by the proper authorities for such type of business." *Id.* at 163-64.

Section 10 of the lease agreement prohibits Plaintiffs from using the Premises in a manner to create "a nuisance or detract in any way from the reputation of the Project as a first class retail and office development." However, first-class remains undefined in the lease agreement. Defendants claimed Plaintiffs' employees violated Defendants' no-smoking policy on the Premises and near the Premises as well as played music too loud for Plaintiffs' patrons.

Plaintiffs enforced a strict no-smoking policy with Plaintiffs' employees on or near the Premises. Hence, any of Plaintiffs' employees violating the no-smoking policy would be acting outside the scope of employment, and thus those employees' actions would not be attributable

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to Plaintiffs. A business is only liable for the acts of its employees within the scope of employment. *See Genovese v. Bergeron*, 327 S.C. 567, 574, 490 S.E.2d 608, 612 (Ct. App. 1997); *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145-46, 425 S.E.2d 764, 773 (Ct. App. 1992). Defendants' distaste for smoking is by third-parties' conduct on a public sidewalk unrelated to Plaintiffs operating a business on the Premises does not warrant a private nuisance.

Additionally, the Building was a mixed-use building with businesses operating on the first two floors and a personal residence on the third floor amongst a bustling downtown area in Greenville. The Building was in an area of heavy traffic and close to special events. Moreover, the Building is also close to other business establishments, including bars serving alcohol. Due to the location of the Building, pedestrians often littered cigarettes on the sidewalk unrelated to Plaintiffs' business. Plaintiffs often swept up litter on sidewalks in front of the Premises from the public's use of the sidewalks. Defendants placed commercially unreasonable expectations upon Plaintiffs to police the public sidewalks near the Building and improperly step into the shoes of law enforcement to monitor no-smoking ordinances in downtown Greenville, South Carolina.

Merely operating a business, even when located within a residential area, in a manner that is normal and necessary to the incidental operations thereof does not warrant a nuisance. Plaintiffs played music for Plaintiffs' patrons during normal business hours in a reasonable manner. Defendants admitted that the Building is old. Naturally, to any reasonable observer, little insulation existed between the first two floors of the Building. Plaintiffs could hear the patrons of Studio 17 over the music played on the Premises. Studio 17 could hear the music played on the Premises. And, Plaintiffs were never fined for a noise ordinance violation.

Defendants knew the nature of Plaintiffs' business as a barber shop and retail store to provide salon services and products. As is customary with barber shops and salons, these businesses often play music for their patrons. Plaintiffs cannot prevent noise reaching the second floor of the Building anymore than Defendants could prevent noise reaching the Premises from Studio 17 without doing more to insulate sound between the two floors. Defendants were in a superior position to know the infrastructure of the Building, install adequate insulation between the first two floors, and elect a tenant operating a commercial business that did not cater to the public if noise control was paramount to the operation of Studio 17 and the personal residence on the third floor. Or, Defendants had the opportunity to operate and live elsewhere than in close proximity to the public and bars in a bustling downtown area.

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A nuisance does not occur just because Defendants find smoking by third-parties distasteful that is merely incidental to living in a busy downtown area with heavy traffic by the public and third-parties. A nuisance does not occur just because the other Defendants, as tenants, are annoyed by Plaintiffs' music that is merely incidental to operating a retail store. A nuisance does not operate the protect the sensitive needs of one tenant's use of the property over another tenant's reasonable use of the property incidental to operating a retail business.

Plaintiffs hereby move the Court that Defendants' Fifth Counterclaim for nuisance should be dismissed and paragraphs 423 through 424 stricken. S.C.R.C.P. Rules 12(b)(6), (f).

F. DEFENDANTS FAIL TO ADHERE TO CODE PLEADING TO DESCRIBE EACH ELEMENT IN TERMS OF THE FACTS FOR ABUSE OF PROCESS WARRANTING DISMISSAL

The cause of action for the tort of abuse of process "provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Food Lion, Inc. v. United Food & Commer. Workers Int'l Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002). The elements for the abuse of process tort include: (1) an ulterior purpose; and, (2) a willful act using the judicial process that is improper for regularly conducting the proceeding. *Id.* An ulterior purpose is when the judicial process is used to gain an illegitimate objective. *Id.* The element of willful act is some definite, overt act using the judicial process that is improper because the act is either unauthorized by the process or directed at an illegitimate, collateral objective in the regular use of the judicial process. *Id.* at 71. However, no ulterior purpose, however, exists when a party merely seeks to the right to access property as the subject matter of the dispute. *Davis v. Epting*, 317 S.C. 315, 319-20, 454 S.E.2d 325, 328 (Ct. App. 1994). Thus, merely asserting a legitimate, legal right within the judicial process is not grounds for abuse of process. *See id.*

Here, no misuse of the judicial process exists when Plaintiffs have legal rights by statutory tenancy principles concerning allegations of forcible entry and detainer, claim and delivery, wrongful dispossession, and so forth related to Defendants locking out Plaintiffs from the premises. Defendants obtained a writ of ejectment without ever notifying Plaintiffs' counsel of any pleadings concerning Defendants' application for a writ of ejectment. Within five days of the order for a writ of ejectment, Plaintiffs had the right to appeal the writ of ejectment. The right to appeal a writ of ejectment is extremely time sensitive. The failure of notice pursuant to the notice statute for writ of ejectments bears constitutional issues with due process that prominent scholars have raised as problematic in the statutory language in the notice provision. Plaintiffs pursued a complaint for declaratory relief because third parties have an interest in Plaintiffs' personal property located on the premises in the exclusive dominion, control, and possession of

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Defendants since on or around July 28, 2017. Plaintiffs have had to negotiate terms of settlements with third parties to avoid litigation due to loss of income from Plaintiffs inability to operate a business on the premises and loss of personal property from Plaintiffs' inability to reclaim Plaintiffs' personal property located therein.

Defendants' conduct in this hostile landlord-tenant dispute is egregious and catastrophic to Plaintiffs. No amount of wordsmithing in a contract may circumvent the judicial process for evicting a tenant from the premises. No landlord has a contractual right to avoid the judicial process and engage in a self-help eviction when the tenant never voluntarily surrendered the premises or the tenant's personal property therein. Defendants admitted to ousting the tenant before ever resorting to the judicial process. Defendants admitted to never filing for a writ of distraint to distrain Plaintiffs' personal property on the Premises. Even the Gantt Summary Court informed Defendants that Defendants violated South Carolina law by engaging in a self-help eviction. Plaintiffs are well within Plaintiffs' rights to protect Plaintiffs' legal interests as well as third parties' legal interests in the landlord-tenant dispute as authorized by South Carolina law. Plaintiffs are merely asserting Plaintiffs' legal rights in this landlord-tenant dispute.

By contrast, Defendants abused the legal process in the attempt to apply for a writ of ejectment after the fact when Defendants had already evicted Plaintiffs from the Premises. Defendants had the ulterior motive to cure Defendants' eviction by making the eviction legitimate through the Gantt Summary Court. Defendants engaged in the judicial process by applying for a writ of ejectment with Gantt Summary Court and failed to notify the court of Plaintiffs' counsel representing Plaintiffs. Defendants willfully directed judicial process for a writ of ejectment with the illegitimate, collateral objective to cure an illegal eviction that had already occurred. The statutory regime for evicting tenants does not prescribe self-help eviction nor exist to cure illegal conduct. The law on evictions is clear. Defendants' conduct in violation of the law is also clear.

Plaintiffs hereby move the Court that Defendants' Sixth Counterclaim for abuse of process should be dismissed and paragraphs 426 through 430 stricken. S.C.R.C.P. Rules 12(b)(6), (f).

II. DEFENDANTS' ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS SUFFER FROM A LACK OF DEFINITENESS IN PALTERING RESPONSES FOR PLAINTIFFS TO RESPOND ACCORDINGLY

Plaintiffs have previously addressed Defendants 'affirmative defenses in Plaintiffs Notice and Motion to Strike and Motion to Dismiss Defendants' Answer and Counterclaim on June 29, 2018. As a further explanation, Defendants' Third Defense for abandonment, waiver, estoppel, laches, and unclean hands fail to comply with Rules 8(e), 10(b), and 12(e) of the South Carolina

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Rules of Civil Procedure. These defenses are problematic when jumbled together into one defense without sufficiently enumerating the factual allegations supporting the elements of these individual defenses. Moreover, as previously discussed, Defendants' equitable defenses should be stricken and barred as a consequence for engaging in a self-help eviction.

Respectfully submitted this 24 day of August , 2018 .

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ELECTRONICALLY FILED - 2018 Aug 24 1:24 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

STATE OF SOUTH CAROLINA **COUNTY OF GREENVILLE**	**IN THE COURT OF COMMON PLEAS** **FOR THE THIRTEENTH JUDICIAL CIRCUIT**
BLACKSTONE AND CHASE, LLC, MARK T. THOMAS, TENSLEY S. THOMAS, AND BRADLEY W. KERR Plaintiff(s), v. **MARGARET H. DURHAM LIVING TRUST, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING COMPANY, LLC, EZ GLIDE 350, LLC, MARGARET H. DURHAM, JAMES W. DURHAM, HELEN W. SHOCKLEY, AND TAMALA D. CRANE,** Defendant(s).	2017-CP-23-07837 COMMON PLEAS CIVIL CASE NO. **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that I served a copy of the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS AND MOTION TO STRIKE DEFENDANTS' ANSWER AND COUNTERCLAIM** in this action dated August 24, 2018, on August 24, 2018, upon the adverse party electronically to the following:

Margaret H. Durham Living Trust et al.	Margaret H. Durham Living Trust et al.
& Margaret H. Durham, Trustee	& Margaret H. Durham, Trustee
c/o Robert K. Merting	c/o Josh Hudson
501 Furman Road, Suite W	1052 North Church Street
Greenville, SC 29609	Greenville, SC 29601
Attorney for the Defendants	Attorney for the Defendants

I have served a copy of the foregoing by one of the following methods:

- ☐ (1) Delivering a copy personally to the adverse party;
- ☐ (2) Mailing a copy to the adverse party's last known address, by depositing the copy in the U.S. Mail in an envelope with sufficient postage affixed;
- ☐ (3) Delivering it by commercial delivery service in accordance with Rule 4(d)(9), SCRCP; or,
- ☒ (4) Other pursuant to Rule 5(b)(1), SCRCP: electronic filing.

Respectfully submitted this 24 day of August, 2018.

/s/ Deborah D. Davis, Esq.
Deborah D. Davis, Esq.
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Certificate of Electronic Notification

Recipients

Joshua Hudson - Notification transmitted on 09-04-2018 03:47:31 PM.

Robert Merting - Notification transmitted on 09-04-2018 03:47:31 PM.

Charles Williams - Notification transmitted on 09-04-2018 03:47:31 PM.

Deborah Davis - Notification transmitted on 09-04-2018 03:47:31 PM.

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****** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2017CP2307837

Official File Stamp:	09-04-2018 03:47:12 PM
Court:	CIRCUIT COURT Common Pleas Greenville
Case Caption:	Blackstone And Chase Llc , plaintiff, et al vs. Margaret H Durham Living Trust , defendant, et al
Event(s):	
Order/Order Cover Sheet $25.00	
Document(s) Submitted:	Proposed Order/Other
Filed by or on behalf of:	Joshua Jennings Hudson

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Charles O. Williams, III for Blackstone And Chase Llc et al

Robert Karl Merting for Margaret H Durham et al

Joshua Jennings Hudson for Margaret H Durham et al

Deborah Dickson Davis for Blackstone And Chase Llc et al

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Blackstone and Chase, LLC; Mark T. Thomas; Tensley E. Thomas; and Bradley W. Kerr, Plaintiffs, v. Margaret H. Durham Living Trust; Multiplex Systems, Inc.; Ice Rink Engineering and Manufacturing Company, LLC; EZ Glide 350, LLC; Margaret H. Durham; James W. Durham; Helen W. Shockley; and Tamala D. Crane, Defendants.	C.A. No. 2017-CP-23-07837 **ORDER**

This matter arises out of a dispute between the parties over a written lease agreement and its interpretation and enforceability. The Plaintiffs are the tenants who were evicted and removed from the premises by the Defendants, the landlord, for failure to pay rent.

EXISTENCE OF LEASE SUMMARY JUDGMENT

Plaintiffs motioned verbally for summary judgment regarding the existence of a lease. Defendant Margaret H. Durham Living Trust (hereafter the "Landlord") entered into a contract for lease (the "Lease") of real property with Plaintiff Blackstone and Chase, LLC as represented by Plaintiff Bradley W. Kerr. During Lease negotiations Kerr represented himself as a member of Blackstone and Chase, LLC and Plaintiffs acknowledge as much. Blackstone and Chase, LLC is a member managed limited liability company and

> "any member of a member-managed company . . . may sign and deliver any instrument transferring or affecting the company's interest in real property. The

> instrument is conclusive in favor of a person who gives value without knowledge of the lack of the authority of the person signing and delivering the instrument." S.C. Code Ann. §33-44-301(c).

Plaintiffs have provided no evidence of public restrictions upon the authority of the Members of Blackstone and Chase, LLC, and therefore, Landlord could rightly rely upon the inherent authority of Kerr to bind Blackstone and Chase, LLC as a member of the company.

After executing the Lease, Plaintiffs entered into the building and took possession of the premises as allowed in the Lease. Plaintiffs signed multiple addendums to the Lease. Plaintiffs admit in their complaint that each and every Plaintiff made payment upon the Lease. Plaintiffs chose to benefit from the Lease and are therefore bound by the terms of the Lease. The acts of occupying the premises and paying upon the Lease were ratifications of the same by Plaintiffs.

That Kerr signed the contract with Landlord prior to the formation of Blackstone and Chase, LLC does not negate the enforceability of the Lease. The signatory to a pre-formation contract is personally liable upon the contract, and when a company "assumes the obligation [of a contract] by its own act after incorporation" it will also be held liable upon the contract. *Hansen v. Fields Co.*, 409 S.C. 541, 763 S.E.2d 31 (S.C., 2014). All members of Blackstone and Chase, LLC and the company itself made payment upon the Lease, Blackstone and Chase, LLC took possession of the premises under the Lease, and the signatory to the Lease became a member of the company able to singlehandedly bind the company in matters of real property. S.C. Code Ann. §33-44-301(c). The knowledge of the terms of the Lease known by the signatory Kerr is imputed to the company through its member Kerr who signed and received a copy of the Lease. *See Indep. Nat. Bank v. Buncombe Prof'l Park, LLC*, 411 S.C. 605, 608, 769 S.E.2d 663, 665 (2015) ("The rule is that a principal has constructive notice of all the material facts which its

agent, while acting in the scope of his authority, receives notice."). Blackstone and Chase, LLC ratified the Lease "by accepting its benefits with full knowledge of its terms." *Hansen, 541.*

Even had Plaintiff Blackstone and Chase, LLC not ratified the Lease, Kerr is still obligated to Landlord under the Lease, and any other occupants of the premises become mere guests of Kerr without the privilege of being tenants. Any attempt by Kerr to sublet or assign the Lease without Landlord's permission would be a violation of Section 22 of the Lease. Therefore, even had Blackstone and Chase, LLC not ratified the Lease, Kerr is still bound by the Lease, and any occupants of the premises occupied the premises under the Lease and through Kerr.

The Court finds a valid contract was formed between Landlord and Kerr when he signed the Lease on behalf of Blackstone and Chase, LLC, and the company ratified the Lease when its member, Kerr, knowing the terms of the Lease, took possession of the premises and made payment upon the Lease for Blackstone and Chase, LLC. A single member of an LLC may bind the company, and an operating agreement is ineffective against a party who gave value in good faith. S.C. Code Ann. §33-44-301(c). The other Plaintiffs received the benefit of the Lease, made payments upon the Lease, and recognized the Landlord as such thereby ratifying the contract.

SMOKE DAMAGE INCURRED BY DEFENDANTS

Defendants allege that more than the Landlord's real property was damaged by smoke caused by Plaintiffs, and that their claims were to include the personal property owned by all Defendants and not just Landlord. To the extent the Defendants' claims are unclear, the Court grants the Defendants motion to make a more definite statement.

Further, only Landlord is bound by the Lease, and the other Defendants who are occupants of the building are not so bound. Plaintiffs are liable to these Defendants for their tortious acts regardless of the nature of the Lease.

CONVERSION

Defendants allegations of conversion of personal property in the form of fixtures is a cause of action found in law. *Kutter v. Smith*, 69 U.S. 491, 495, 17 L. Ed. 830 (1864). Further, said act may be in violation of the Lease between the parties. In any event, Defendants are entitled to conduct discovery on this issue and a dismissal at this stage would be premature.

NUISANCE

Defendants allege that Plaintiffs music was played at a nuisance volume while Plaintiffs allege their music was not so voluminous. Such allegations are classic disputes of the facts appropriate for consideration for the fact finder. The same conclusion is true of Defendants allegations of Plaintiffs' employees smoking within the prohibited distance of the entrance.

ABUSE OF PROCESS

Plaintiffs have filed, and continue to file, voluminous and incomprehensible documents in this preceding. Plaintiffs filed an appeal from their eviction when they did not desire to re-enter the premises, filed an improper, long, and terribly confusing Declaratory Judgment Action, and made a failed Motion for a Preliminary Injunction. When admonished on their "tidy" forty-eight-page Complaint, Plaintiffs responded with an Amended Complaint of 33 pages consisting of some 300 paragraphs and containing in excess of 600 pages of exhibits. Again, Plaintiffs were instructed to limit their verbosity, and again Plaintiffs propounded a 25-page, 13 causes of action complaint for a simple tenancy dispute. In this Motion to Dismiss, Plaintiffs file an 18-page Notice and Motion reserving "the right to submit a memorandum in support of their Motion prior to hearing" and without reasoning or fact attempt to strike 200 paragraphs of Defendants answer for being "an insufficient defense, redundant, immaterial, impertinent, or scandalous in nature." Finally, Plaintiffs filed four separate memorandums in support of this motion.

The Court has already acknowledged that Plaintiffs have made this case a "procedural Labyrinth" and admonished them for failing to abide by Rule 8(a). Order, February 28, 2018, Judge Perry H. Gravely. Plaintiffs continue this behavior showing a callous disregard of judicial economy. Plaintiffs multiple complaints against multiple persons without specificity of who took what action leaves Defendants and the Court in a quagmire parsing what the Plaintiffs mean.

Plaintiffs operated a business that failed to pay its rent. When Landlord exercised its contractual right to repossess the premises Plaintiffs attempted to shift their losses to the Landlord. In litigating this claim, Plaintiffs have made unnecessarily lengthy and cumbersome filings causing Defendants to incur certainly numerous extra expenses. Plaintiffs dispute the same and allege that the company was not failing. There is a factual question on why Plaintiffs have brought such convoluted and lengthy filings, and under such circumstances, Defendants charge of Abuse of Process should remain for determination by a finder of fact.

DEFENDANTS MOTION TO STRIKE DEFENSES

Plaintiffs Motion for a More Definite Statement under Rule 12(e) regarding Defendants Second, Third, and Sixth Defenses is denied. Plaintiffs are not required to file a responsive pleading to Defendants' defenses, and Plaintiffs' Motion on this point does not promote judicial economy. Defendants are entitled to retain all of their defenses until discovery shows otherwise.

FAILURE TO STATE A CLAIM PREVIOUSLY LITIGATED

Plaintiffs present thirteen causes of action in their Second Amended Complaint that are either new or rewritten from their previous Amended Complaint. Defendants earlier Motion to Dismiss for Failure to State a Claim was only heard for the earlier Amended Complaint that did not include the new and corrected causes of action. Defendants current claim has not been previously litigated, and therefore the Defendants may assert this defense.

JUDGMENT ON THE PLEADINGS

Plaintiffs' Motion for Judgment on the Pleadings is inappropriate because there are numerous issues of fact. Plaintiffs and Defendants are at odds over the existence of the Lease, the validity of its clauses, its enforceability, the legality of the eviction and distraint, the existence of a nuisance, and even whether there was a fire or a smoke incident upon the premises. These issues necessitate discovery and later determination by the finder of fact.

To the extent the Court is to rule on the pleadings before it, Landlord was contractually authorized to evict the Plaintiffs without resort to the judicial process and to distrain or seize the property within the premises to cover damages incurred by Landlord.

Section 20.2 of the Lease between Landlord and Plaintiffs authorizes the Landlord to "reenter and remove all persons and properties from the Premises and dispose of such property as it deems fit." Such remedy may be resorted to "with or without legal process." *Id.* In commercial leases, the provisions of the contract control. See *KBR Development v. Yansy Realty, Inc.* 2005 WL 7083858, No. 2005-UP-217, 2. (S.C. Court of Appeals) ("The lease provided KBR with the self-help option of repossessing the property if lease payments were overdue by fifteen days. Therefore, KBR acted within their legal rights."). Improvements made to the real estate by Plaintiffs become the property of Landlord under Section 9.4 of the Lease. *Id.* ("All Lessee Alterations, including, but not limited to, all walls, railings, carpeting, floor and wall coverings and other permanent real estate fixtures (excluding, however, Lessee's moveable trade fixtures and equipment) made by, for, or at the direction of Lessee, will when made, become the property of Lessor and will remain upon the Premises at the expiration or earlier termination of this Lease.") Trade fixtures installed by Plaintiffs become the property of Landlord if not removed by the termination of the Lease. *Id.* ("Any trade fixtures or equipment not removed by Lessee at the

expiration or earlier termination of this Lease will, at the Lessor's option, become the property of the Lessor or Lessor will be entitled to remove and dispose of such property.") Consequently, Landlord was within its contractual rights to take the actions complained of by Plaintiffs.

ABANDONMENT, WAIVER, ESTOPPEL, LACHES AND UNCLEAN HANDS

Plaintiffs make a multitude of claims on events ongoing for more than a year and Defendants may respond to the same with any defense supported by the facts as determined by the fact finder. To rule upon said defenses prior to discovery is premature.

ABANDONMENT

Defendants' allege Plaintiffs abandoned the premises when they failed to timely pay rent, failed to pay rent on demand, and subsequently left the premises without any offer or attempt to pay rent in arrears. Plaintiffs counter they have a right of possession despite not paying rent.

"Failure to pay the rent agreed upon when due, or a reasonable rent for use and occupation when demanded, shall terminate all tenancies." S.C. Code Ann. §27-35-140. "Abandonment of contract by one party is the giving up of the right to a benefit due from the other party. A contract will be treated as abandoned when the acts of one party inconsistent with its existence are acquiesced in by the other party." *Ro-lo Enterprises v. Hicks Enterprises, Inc.*, 362 S.E.2d 888, 294 S.C. 111 (S.C. App., 1987) (internal citations omitted). Under the most generous interpretation of the Lease, Plaintiffs' rent was due no later than July 8th, 2017. Landlord was contractually entitled to demand rent after a five-day grace period and did so tendering Plaintiffs a demand on July 17th. Plaintiffs then had ten days to cure the default, which they failed to do. Said failure ended Plaintiffs tenancy and was an abandonment of the Lease.

WAIVER AND ESTOPPEL

Defendants raise the defenses waiver and estoppel generally against the claims of

Plaintiffs. Said defenses are appropriate where the actions of Plaintiffs raise a factual question whether a cause of action has been waived, such as the alleged lockout early in 2017, or the Plaintiffs are judicially estopped from certain allegations such as Plaintiff Kerr did not have authority to take an action which he held himself out as authorized to do. The parties allege facts at odds with each other, and therefore Defendants appropriately raise these defenses.

LACHES

Plaintiffs willingly accepted the benefit of the Lease with Landlord, made payment upon the same, and represented to Landlord that said Lease was entered into with Plaintiffs' authority and therefore was binding. Landlord relied upon these representations when allowing Plaintiffs to occupy the premises and remain in the premises. Plaintiffs' argument to invalidate the Lease, after representing it existed and accepting the benefit of its existence for more than a year, is barred by the doctrine of laches. The same is true of the alleged rent dispute which Plaintiffs attempt to raise for the first time in their complaint and after tenancy has been terminated.

UNCLEAN HANDS

Plaintiffs declare "clean hands in equity refers to one acting 'fairly and without fraud or deceit as to the controversy in issue.'" Plaintiffs Motion citing *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-15, 65 S. Ct. 993, 997. Kerr acted in deceit, if not in fraud, when he represented having authority to bind Blackstone and Chase, LLC but now claims he did not have said authority. Such deceit was carried on throughout Plaintiffs occupancy when each and every Plaintiff made rent payments without questioning the Lease. Defendants are entitled to raise the defense of unclean hands against such actions by the Plaintiffs.

Further Defendants may also raise the defense of unclean hands in regards to Plaintiffs actions creating a private nuisance, breaking city ordinances, failing to pay rent, and failing to

keep promises that rent would be paid. Plaintiffs here do not have "a clean record with respect to the transaction with the defendants." *Arnold v. Spartanburg*, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943). Therefore, the doctrine of unclean hands is applicable and bars Plaintiffs from seeking recovery in equity.

DEFAULT

Plaintiffs request to dismiss the Defendants defense of default is denied because the Lease was validly entered, and the Plaintiffs have waived the right to challenge it and are estopped from the same due to their actions availing themselves of the benefits of the Lease.

MITIGATION OF DAMAGES

Plaintiffs allege that Defendants have failed to mitigate damages by not reletting the property. However, Defendants allege they have been unable to relet the property due to Plaintiffs' failure to cooperate in the removal of personal property. These allegations are directly contrary and present a factual dispute unripe for dismissal under SCRCP 12(b)(6) or summary judgment. Therefore, this claim must remain.

MOTION TO STRIKE PARAGRAPHS

Plaintiffs Second Amended Complaint includes multiple cumbersome paragraphs, paragraphs that are difficult and unascertainable of interpretation, and many accusations as to the legality of Defendants actions. Defendants have denied the allegations of Plaintiffs, and Plaintiffs cannot re-characterize such denials that include denials of legal opinions as now only referring to actions. Plaintiffs have created Defendants difficulties and must now proceed with Defendants response.

CONCLUSION

Plaintiffs arguments for summary judgment are premature at best. Defendants cannot be denied their defenses, and the Court will not dismiss, paragraph by paragraph, Defendants Answer where that answer is a good faith effort at responding to the confusing complaint of Plaintiffs. Plaintiffs have brought multiple, redundant claims on what should be a simple case, and have filed lengthy pleadings with a plethora of alternative arguments necessitating the complex defenses by Defendants. Plaintiff cannot now object to Defendants actions to defend themselves against such a Complaint. Therefore, Plaintiffs' Motion to dismiss and for partial summary judgment is denied.

Therefore, the Court orders as follows:

1) Plaintiffs Motion for Summary Judgment is denied.
2) Plaintiffs Motion to dismiss the counterclaims and defenses of Defendants is denied.
3) Defendants Motion to amend their counterclaims is granted.
4) The written Lease between Blackstone and Chase, LLC and The Margaret H. Durham Living Trust is valid and enforceable.

IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Circuit Court Judge

September ____, 2018
Greenville, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT
2017-CP-23-07837
CIVIL ACTION NO.

BLACKSTONE AND CHASE, LLC, MARK T. THOMAS, TENSLEY E. THOMAS, AND BRADLEY W. KERR,

Plaintiff(s),

v.

MARGARET H. DURHAM LIVING TRUST, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING COMPANY, LLC, EZ GLIDE 350, LLC, MARGARET H. DURHAM, JAMES W. DURHAM, HELEN W. SHOCKLEY, AND TAMALA D. CRANE,

Defendant(s).

PLAINTIFFS' NOTICE AND MOTION FOR RECONSIDERATION TO ALTER OR AMEND A JUDGMENT

TO: MARGARET H. DURHAM LIVING TRUST
MULTIPLEX SYSTEMS, INC.
ICE RINK ENGINEERING AND MANUFACTURING COMPANY, LLC
EZ GLIDE 350, LLC
MARGARET H. DURHAM
JAMES W. DURHAM
HELEN W. SHOCKLEY
TAMALA D. CRANE

PLEASE TAKE NOTICE that Plaintiffs hereby submit this motion for reconsideration to alter or amend the Court's Order entered and dated on October 3, 2018 ("Order"), pursuant to rule 59(e) of the South Carolina Rules of Civil Procedure. This motion for reconsideration is divided into several sections as set forth below. Each section provides multiple grounds for reconsideration of the Court's Order. Collectively, pursuant to these grounds for reconsideration, Plaintiffs seek rulings on matters that the Court did not address in its Order; Plaintiffs seek the Court's reasons for deciding certain matters where no reasons are given; and Plaintiffs seek for the Court to reconsider its findings and correct its errors based on the record and the law. Plaintiffs' show the following:

FACTS

On October 3, 2018, the Court issued an Order denying Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs' Motion to Strike Defendants' Answer, and Plaintiffs' Motion to Dismiss Defendants' Counterclaims. Plaintiffs requested a motion for partial summary judgment on the following issues for Plaintiffs' causes of action: (1) forcible entry and detainer; (2) wrongful dispossession; (3) claim and delivery; (4) conversion; and, (5) unjust enrichment to

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Plaintiffs' personal property and security deposit. Plaintiffs requested a motion to strike and a motion for partial summary judgment on the following issues for Defendants' counterclaims: (1) the existence of lease agreement in Defendants' causes of action for breach of contract and breach of contract accompanied by fraudulent acts; (2) negligence (or gross negligence); (3) conversion; (4) private nuisance; and, (6) abuse of process. Plaintiffs requested a motion to strike and a motion for partial summary judgment on the following issues for Defendants' defenses: (1) abandonment; and, (2) default. Plaintiffs requested a motion to strike Defendants' defenses: (1) motion to dismiss; (2) abandonment, waiver, estoppel, laches, and unclean hands; (3) failure to mitigate; and, (4) inconsistent pleadings. Plaintiffs requested a motion for a more definite statement for Defendants' second, third, and sixth defenses of: (1) failure to state a claim; (2) abandonment, waiver, estoppel, laches, and unclean hands; and, (3) affirmative defenses. Defendants made an oral motion to make a more definite statement for negligence in the hearing on August 27, 2018.

The Court denied Plaintiffs' motion to dismiss Defendants' counterclaims for: (1) conversion; (2) private nuisance; and, (3) abuse of process. The Court denied Plaintiffs' motion to strike Defendants' defenses: (1) failure to state a claim; (2) default; (3) mitigation of damages; (4) abandonment, waiver, estoppel, laches, and unclean hands. The Court denied Plaintiffs' motion to strike Defendants' inconsistent pleadings. The Court denied Plaintiffs' motion for a more definite statement for Defendants' second, third, and sixth defenses of: (1) failure to state a claim; (2) abandonment, waiver, estoppel, laches, and unclean hands; and, (3) affirmative defenses. The Court granted Defendants' motion to make a more definite statement with respect to Defendants' claim for negligence.

The Court ruled that: (1) the lease agreement was a valid contract with respect to Defendants' counterclaims for breach of contract and breach of contract accompanied by fraudulent acts; (2) Plaintiffs were liable to Defendants who were occupants of the building and not parties to the lease agreement for smoke damage; (3) the landlord was contractually authorized to evict Plaintiffs from the premises and distrain Plaintiffs' personal property therein without resorting to the judicial process; (4) Plaintiffs waived the right to challenge the lease agreement; and, (5) Plaintiffs were estopped from challenging the lease agreement.

GROUNDS FOR RECONSIDERATION BASED ON EXCEPTIONS TO PARTICULAR STATEMENTS, FINDINGS, AND CONCLUSIONS IN THE ORDER

Plaintiffs raise the following exceptions to particular statements, findings, and conclusions in the Order and Plaintiffs respectfully request that the Court reconsider the same based on the record and the evidence and arguments identified herein.

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I. COMMERCIAL LEASES ARE SUBJECT TO THE JUDICIAL PROCESS BEFORE EJECTING A TENANT

Regarding Plaintiffs' motion for partial judgment on the pleadings with respect to Plaintiffs' causes of action forcible entry and detainer, wrongful dispossession, claim and delivery, and conversion, the Order on pages 5-6 relies upon inapposite law to this case that is also an unpublished opinion with no precedential value. *KBR Dev. v. Yansy Realty*, No. 2005-UP-217, 2005 S.C. App. Unpub. LEXIS 361, at *4 n.3 (Ct. App. Mar. 24, 2005). Specifically, "[m]emorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268(d)(2), SCACR; *see* S.C. Code Ann. § 18-9-280 ("[T]he Court may file memorandum opinions in unanimous decisions when the Court determines that a full written opinion would have no precedential value . . ."). Therefore, the Court may not rely upon this case as dispositive on the issue as to whether provisions of a lease agreement exclusively control commercial leases. Such a construction of the law renders Title 27, Chapter 37, Section 10 of the South Carolina Code as superfluous with respect to commercial leases and results in an inequitable miscarriage of justice to Plaintiffs.

Moreover, the Court's reliance upon *KBR Dev.*, is also inapposite because the court based its ruling upon the interaction of Article 9 with secured lenders related to the landlord-tenant dispute thereby deciding the case on other grounds outside of the statutory principles of ejectment for the landlord to repossess the premises and distrain the tenant's personal property therein. In *KBR Dev.*, the case involved both a lease agreement for the rental of the premises and a promissory note to upfit the premises subject to Article 9 of the South Carolina Uniform Commercial Code for secured transactions. The lessor was required to build the structure of the barbeque restaurant for the lessee, and the lessee was required to finance the upfitting of the new building. However, the lessee could not afford to upfit the barbeque restaurant. Subsequently, the lessor financed the upfitting of the same and the lessee signed a promissory note regarding the lessor upfitting the new restaurant building.

In *KBR Dev.*, the lessor filed an action to collect on the promissory note, which permitted a thirty-day notice before repossessing the premises and goods, fixtures, or accessions therein from the upfitting of the barbeque restaurant. The lessee was in default for approximately three months. A promissory note is "an instrument that evidences a promise to pay a monetary obligation . . . ." S.C. Code Ann. § 36-9-102(65). Because the lessor was the financier of the upfitting for the barbeque restaurant by virtue of the promissory note, the lessor also had a purchase-money security interest in the goods that became fixtures or accessions during the upfitting of the barbeque restaurant. *See* S.C. Code Ann. § 36-9-335 (accessions); S.C. Code

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Ann. § 36-9-103 (purchase-money secured interests); S.C. Code Ann. § 36-9-334 (purchase-money secured interests). Under Article 9 of the South Carolina Commercial Code, a secured party's rights after default include the agreement between the parties. S.C. Code Ann. § 36-6-901. In this case, while the outcome would have been the same due to the promissory note pursuant to Article 9 of the South Carolina Uniform Commercial Code, the analysis of the lease, which was backed by personal guarantees of the lessee(s), was folded into the analysis of the promissory note that permitted repossession on independent grounds other than the lease agreement. Therefore, the legal basis for deciding this case did not pertain to statutory principles of ejectment for the landlord to repossess the premises by virtue of the lease agreement as the exclusive means of controlling the commercial landlord-tenant relationship. The Order is based on an erroneous application of the law.

By contrast, an illegal contract is void and unenforceable if the contract: (1) violates public policy; or, (2) circumvents the statutory requirements for ejecting a tenant from the leased premises. *See Berkebile v. Outen*, 311 S.C. 50, 53 n.2, 426 S.E.2d 760, 762 (1993) (reifying that no court must "enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution"). **The dispositive issue is whether a landlord for a commercial lease is required to engage in the judicial process before forcibly removing the tenant from the premises regardless of creative wordsmithing in the lease agreement stating anything to the contrary. The answer is yes.** The statutory requirements to evict a tenant, whether the tenant is a residential tenant or a commercial tenant, follows the same judicial process that are essentially grounded in the constitutional rights of due process before suffering the deprivation of property, or an interest in that property. *See* S.C. Code Ann. §§ 27-37-10 to -160; *Gentry v. Recreation, Inc.*, 192 S.C. 429, 435, 7 S.E.2d 63, 65 (1940).

Under landlord-tenant law in South Carolina, the landlord and tenant have either statutory duties, contractual duties, or both by virtue of the dichotomous nature of leases as both a lease and a transfer of estate as a tenement of land. *Burbach v. Invt's Mgmt. Corp. Int'l*, 326 S.C. 492, 496-97, 484 S.E.2d 119, 121-22 (Ct. App. 1997). The statutory duties imposed on the landlord and tenant incorporate the public's expression of the public's interest that is mutually exclusive of the contractual duties imposed by a lease as a contract. *See Rowland & Sons v. Bock*, 150 S.C. 490, 493, 148 S.E. 549, 550 (1929); S.C. Code Ann. §§ 27-33-10 to -50 (applying general definitions, court jurisdiction, and general provisions); S.C. Code Ann. §§ 27-35-10 to -180 (defining the statutory meanings of creation, construction, and termination for leasehold estates); S.C. Code Ann. §§ 27-37-10 to -160 (ejecting tenants); S.C. Code Ann. §§ 27-39-10 to -360 (distraining personal property of tenants).

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As a matter of statutory interpretation, unless the statutory provision allows for parties to agree differently, the statute controls regardless of what terms and conditions the private parties reach in agreement. *See* S.C. Code Ann. § 27-35-75(A) ("[u]nless otherwise agreed to"); S.C. Code Ann. § 27-35-90 ("[u]nless otherwise agreed"); *see also Rorrer v. P.J. Club, Inc.*, 347 S.C. 560, 566, 556 S.E.2d 726, 729 (Ct. App. 2001) ("[P]enal statutes are strictly construed . . . ."). When the statute's meaning is plain and unambiguous, then the court may not apply the canons of statutory construction to interpret the clear and definite meaning of the legislative intent. *Rorrer*, 347 S.C. at 568. By contrast, when a party "seeks to recover a penalty for the failure on the part of to discharge some duty imposed by law, [that party] must bring [the party's] case clearly within the language and meaning of the statute awarding the penalty." *Id.* A writ of ejectment based on nonpayment of rent is a penal statute by which the court must evaluate the statute within context of the whole statute(s) and policy of the law. *See id.* The South Carolina Residential Landlord-Tenant Act is very analogous comparative law designed to avoid oppressive conduct by landlords and tenant-abuse. S.C. Code Ann. §§ 27-40-10 to -940. For commercial leases, Title 27, Chapters 33, 35, 37, and 39 of the South Carolina Code primarily apply.

Title 27, Chapters 33, 35, 37, and 39 of the South Carolina Code were substantially amended in 1962 with subsequent modifications thereafter over the years. Older case law in South Carolina prior to 1962 purports the landlord's ability to engage in a self-help eviction when the tenant has abandoned the property or when and the tenancy status relates to a tenancy at will: "a landlord may peaceably dispossess a tenancy at will after expiration of the term." *Colonial Oil Co. v. Am. Oil Co.*, 43 F. Supp. 718, 723 (D.S.C. 1942) (*citing Barbee v. Winnsboro Granite Corp.*, 190 S.C. 245, 251, 2 S.E.2d 737, 739 (1939)); *but see Trakas v. Mitchell*, 111 S.C. 160, 170-71, 97 S.E. 245, 248 (1918) (Hydrick, J., dissenting) (disfavoring forfeitures and strictly construing forfeiture provisions in leases in equity "when fair dealing and good conscience require it"). However, South Carolina subsequently passed legislation changing the effect of these line of cases relegating a very narrow scope for self-help in landlord-tenant disputes:

> When a tenant abandons premises theretofore occupied by him the landlord may enter and take possession thereof, making distraint as herein provided of any property found thereon, including the property exempt from distress by the provisions of Section 27-39-230 and the term of a tenant abandoning premises used and occupied by him as such shall be deemed ended by such abandonment. Absence from the property for fifteen days after default in the payment of rent shall be construed as abandonment. S.C. Code Ann. § 27-35-150.

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By contrast, the same does not apply when a lease governs the terms and conditions of tenancy provided that the lease does not conflict with other statutory tenancy principles. *See Burbach*, 326 S.C. at 496-97; *Berkebile*, 311 S.C. at 53 n.2.

In 1962, South Carolina enacted law that have substantially displaced these older lines of cases and require a statutory process to peaceably evict a tenant through the judicial process. S.C. Code Ann. §§ 15-67-410 to -470 (forcible entry and detainer); S.C. Code Ann. §§ 27-37-10 to -160 (ejecting tenants); S.C. Code Ann. §§ 27-39-10 to -360 (distraining personal property of tenants). Hence, South Carolina law created new governing statutory ejectment principles that take precedence over older case law ruling in the contrary:

> Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, -- a government which retains adequate authority to secure the peace and good order of society. *Home Bldg. & Loan Asso. v. Blaisdell*, 290 U.S. 398, 435, 54 S. Ct. 231, 239 (1934).

Moreover, the South Carolina Supreme Court overruled older case law strictly construing the statutory principles of ejectment: "[A] forfeiture for a trivial or immaterial breach of a commercial lease should not be enforced." *Kiriakides v. UA Commc'ns*, 312 S.C. 271, 276, 440 S.E.2d 364, 366-67 (1994) (overruling "*Wright v. Player*, 233 S.C. 223, 104 S.E.2d 289 (1958); *Billips v. Hawkins*, 298 S.C. 435, 381 S.E.2d 210 (Ct. App. 1989); *Beard v. Ryder/P-I-E Nationwide, Inc.*, 292 S.C. 250, 355 S.E.2d 872 (Ct. App. 1987); and *Hairston v. Carolina Wholesale Furniture Co.*, 291 S.C. 371, 353 S.E.2d 701 (Ct. App. 1987) to the extent that they are inconsistent with this holding"). The factors for determining whether a breach is a substantial, material breach are as follows:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. *Kiriakides*, 312 S.C. at 276 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981)).

Thus, any breach of a commercial lease must be tempered by equitable principles to avoid a forfeiture of the lease. *See Litchfield Co. of S.C. v. Kiriakides*, 290 S.C. 220, 225-27, 226, 349

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S.E.2d 344, 347-49 (S.C. App. 1986) ("[E]quity will relieve against a forfeiture of a lease incurred by the breach of a covenant to pay rent.").

As a matter of public policy, no landlord has the right to evict the tenant forcibly without legal process at that time. *See Sharp v. Kinsman*, 18 S.C. 108, 114 (1882); *see also Parker v. Shecut*, 349 S.C. 226, 230-31, 562 S.E.2d 620, 623 (2002) (exemplifying a disseizor of land). For example, under the South Carolina Landlord-Tenant Residential Act, the parties to a lease are prohibited from contracting in a manner that circumvents the statutory requirements for properly resorting to the judicial process before evicting a tenant from the premises. *See* S.C. Code Ann. § 27-40-330. The spirit of the South Carolina Residential Landlord-Tenant Act prohibiting landlord and tenants to contract in violation (or retaliation) of either party's rights or remedies under statutory principles of landlord-tenant law should also apply to commercial leases as the risk of oppressive landlords and tenant-abuse applies to all types of leases whether residential or commercial.

Therefore, the Order's reliance on *KBR Dev.* is misplaced and antiquated in light of modern statutes governing the ejectment process for both residential and commercial tenants alike. No dispute exists that Defendants locked Plaintiffs out so Plaintiffs, or Plaintiffs' employees, could not access the premises on or around July 28, 2017. No dispute exists that Defendants refused Plaintiffs reentry to the Premises subsequently thereafter. No dispute exists that Defendants repossessed the premises before resorting to the judicial process. No dispute exists that Defendants took possession of Plaintiffs' personal property on the premises when changing the locks to deny Plaintiffs' access to the premises. No dispute exists that Plaintiffs demanded the return of Plaintiffs' personal property from Defendants after Defendants locked out Plaintiffs from the premises. No dispute exists that Defendants refused to return Plaintiffs' personal property on the premises subsequently thereafter. **Ergo, no dispute exists that Defendants are liable to Plaintiffs for forcible entry and detainer and claim and delivery by engaging in a self-help eviction. With respect to the issue of forcible entry and detainer, wrongful dispossession, claim and delivery, and conversion, the existence of the lease agreement as a valid contract is moot because no lease, whether contractual or statutory, will absolve any landlord from circumventing the judicial process to evict a tenant.** Plaintiffs' motion for partial summary judgment on the issue of forcible entry and detainer, wrongful dispossession, claim and delivery, and conversion should be granted in Plaintiffs' favor.

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I. THE LEASE AGREEMENT IS NOT A VALID CONTRACT AND DOES NOT GOVERN THE LANDLORD-TENANT RELATIONSHIP BETWEEN PLAINTIFFS AND DEFENDANT MARGARET H. DURHAM LIVING TRUST

Regarding Plaintiffs' motion to dismiss, motion to strike, and motion for partial summary judgment with respect to the existence of the lease agreement as a valid contract in connection with both Defendants' counterclaims for breach of contract and breach of contract accompanied by fraudulent acts and Defendants' defense of default, the Order on pages 1-3 and 5-6 apply the law erroneously. **The dispositive issue was whether the lease agreement was a valid contract.** For a cause of action for a breach of contract and a breach of contract accompanied by fraudulent acts, the existence of a contract is essential or these causes of action will fail as a matter of law without this element. *Taylor v. Cummins Atl.*, 852 F. Supp. 1279, 1286 (D.S.C. 1994) (breach of contract); *Crawford v. Limehouse & Sons, Inc.*, Civil Action No. 2:10-2094-CWH-BM, 2010 U.S. Dist. LEXIS 131291, at *5-6 (D.S.C. Nov. 10, 2010) (breach of contract accompanied by fraudulent acts). Defendants may not deny facts presumptively within the Defendants' knowledge or matters of public record to put such facts in issue. *Clanton's Auto Auction Sales, Inc. v. Campbell*, 230 S.C. 65, 71, 94 S.E.2d 172, 175 (1956). Defendants' causes of action for breach of contract and breach of contract accompanied by fraudulent acts both reference to the lease agreement to support the element of an existence of a contract. ¶403-412, Defendants' Answer and Counterclaim. By contrast, a lease is not always relevant in a landlord-tenant dispute because the lease may be invalid, expired, or nonexistent. *E.g.*, *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989) (expired lease and unenforceable, oral contract); *Barksdale v. Hinson*, 212 S.C. 1, 3, 46 S.E.2d 170, 171 (1948) (oral lease); *Wilson v. McAbee*, 256 S.C. 211, 217, 182 S.E.2d 313, 315 (1971) (defective, written lease).

A limited liability company is a limited liability company that is organized under Title 33, Chapter 44 of the South Carolina Code. S.C. Code Ann. § 33-44-101(9). The organization of a limited liability company must meet certain substantive and procedural requirements to come into existence with the South Carolina Secretary of State. S.C. Code Ann. §§ 33-44-105 to -112 (substantive requirements); S.C. Code Ann. §§ 33-44-201 to -210 (procedural requirements). **The signatory of a limited liability company must be a member, and presumably acting with appropriate authority, of an existing limited liability company to "sign and deliver any instrument transferring or affecting the company's interest in real property." S.C. Code Ann. § 33-44-301(c). Hence, whether a limited liability company exists is a matter of public record with the South Carolina Secretary of State. Therefore, the agency of members and liability of the same for limited liability companies only apply to a limited liability company organized under South Carolina law with a certificate of existence**

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issued by the South Carolina Secretary of State pursuant to the South Carolina Uniform Limited Liability Company Act of 1996. S.C. Code Ann. §§ 33-44-301 to -303.

The general rule is that a limited liability company is not liable for promoter pre-incorporation contracts or torts. *Hansen v. Fields Co., LLC*, 409 S.C. 541, 547-48, 549-50, 763 S.E.2d 31, 34-36 (2014). A promoter of a limited liability company "is a person who acts to organize the entity by preparing it to transact business and establishing it." *Id.* at 547 n.5. **No agency relationship exists "between a promoter and a non-existent corporate entity." *Id.* at 549-50. If no agency relationship exists between the promoter and the non-existent entity, then no constructive knowledge of all the material facts received by the promoter may be imputed to the non-existent entity. *See Indep. Nat'l Bank v. Buncombe Prof'l Park, LLC*, 411 S.C. 605, 608-09, 769 S.E.2d 663, 665 (2015) (citing *Crystal Ice Co. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979)).** If the promoter of a limited liability company never committed a tort, then the complaining party has no recourse for the alleged wrong. *See Hansen*, 409 S.C. at 549-50. Public policy protects innocent investors from being financially harmed from tortious conduct of which they were ignorant to promote potential investment in businesses. *Id.*

Whether a limited liability company is liable for promoter pre-incorporation contracts or torts depends entirely on whether a limited liability company expressly ratifies the contract or implicitly ratifies the contract "by accepting its benefits *with full knowledge of its terms*." *Id.* at 547-48 (emphasis added). For the principal to ratify an unauthorized contract entered into by its agent, the principal must: (1) accept the benefits under the contract; (2) have full knowledge of the facts; and, (3) manifest an intention to adopt the contract. *Anthony v. Padmar, Inc.*, 320 S.C. 436, 452, 465 S.E.2d 745, 755 (Ct. App. 1995). Ratification may not be implied "against a principal who is ignorant of the facts." *Moore v. Hardaway Contracting Co.*, 193 S.C. 299, 305, 8 S.E.2d 511, 513 (1940). And, the principal must either ratify or reject the contract in toto (i.e., no partial acceptance or rejection of the terms and conditions of the contract). *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 77, 124 S.E.2d 602, 610 (1962). **Thus, merely accepting benefits under the contract is not sufficient to ratify the terms and conditions of a contract. The principal must have full knowledge of the terms and conditions of the contract.**

In *Hansen*, two promoters, Hansen and Fields, were trying to finance a deal to purchase a water bottling company in South Carolina. When Hansen discovered that Fields was trying to exclude Hansen from the deal, Hansen filed suit against Fields and the related entities to the deal. The court overturned the verdict for Hansen's contract claims because Hansen failed to prove that the other entities ratified the conduct of Fields. In *Indep. Nat. Bank*, a valid agency

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existed between an agent and the limited liability company with regard to entering a mortgage with the bank that was subordinated to an earlier mortgage unbeknownst to the bank. Because a valid agency relationship existed, the limited liability company was imputed with the knowledge that the agent received when acting within the scope of authority granted by the limited liability company.

At the time of the lease agreement on or around March 15, 2016, Plaintiff **BLACKSTONE AND CHASE, LLC**, did not exist as a limited liability company until May 13, 2016, that was discoverable as a matter of public record, as an undisputed fact. Plaintiffs **TENSLEY E. THOMAS**, **MARK T. THOMAS**, and **BRADLEY W. KERR** took possession of the premises on or around March 15, 2016, which is an undisputed fact. The lease agreement is not made out to Plaintiff **BRADLEY W. KERR** individually. The preamble and recital named Plaintiff **BLACKSTONE AND CHASE, LLC**. Section 29 named Plaintiff **BLACKSTONE AND CHASE, LLC**, as the lessee. Exhibit B, Plaintiffs' Amended Complaint. The lease agreement is clear that the lessee was Plaintiff **BLACKSTONE AND CHASE, LLC**, not Plaintiff **BRADLEY W. KERR** in the individual capacity. And, the lease agreement is clear that Defendant **MARGARET H. DURHAM LIVING TRUST** entered into a lease agreement with a limited liability company that was not yet in existence.

Because Plaintiff BLACKSTONE AND CHASE, LLC, was not formed yet, no agency relationship existed between Plaintiff BRADLEY W. KERR and Plaintiff BLACKSTONE AND CHASE, LLC. Moreover, Plaintiffs TENSLEY E. THOMAS and MARK T. THOMAS cannot ratify a contract in which they are ignorant of the terms and conditions of the same. Neither of these Plaintiffs were parties to the lease agreement, and they asked repeatedly for a copy of the lease agreement from Defendants to no avail. Defendants' counsel refused to provide Plaintiffs' counsel with a copy of the lease agreement upon request during settlement negotiations. Defendants admitted to not meeting these Plaintiffs until after March 15, 2016. Therefore, the lease agreement is not a valid contract and does not govern the landlord-tenant relationship between Plaintiffs and Defendant MARGARET H. DURHAM LIVING TRUST. This conclusion does not negate whether a subsequent oral contract or a landlord-tenant relationship was formed consequently. Plaintiffs' motion for partial summary judgment on the lease agreement as an invalid contract should be granted. Plaintiffs' motion to dismiss and motion to strike Defendants' causes of action for breach of contract and breach of contract accompanied by fraudulent acts should be granted. Plaintiffs' motion to strike Defendants' defense for default should be granted.

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II. DEFENDANTS' COUNTERCLAIM FOR CONVERSION MUST FAIL AS A MATTER OF LAW

Regarding Plaintiffs' Motion to Dismiss and Strike Defendants' cause of action for conversion the Order on page 4 relies upon inapposite law to this case. *See Kutter v. Smith*, 69 U.S. (2 Wall.) 491, 497 (1865). In *Kutter*, the landlord-tenant dispute arose out of the lessee erecting a house on the land with the lessor having the right to purchase said house pursuant to the lease agreement in the state of Illinois. The case also introduced the concept of trade fixtures used for the convenience of the tenant's trade. *Kutter*, 69 U.S. at 497. By contrast, the erection of the house was deemed the fixture in question. The U.S. Supreme Court ruled that the lower court applying the law of conversion to the house—as a fixture—was a mistake of law. *Id.* ("Time is given by law for the removal of such fixtures, and any interposition, on the part of the lessor, to prevent the removal, is, in law, a conversion and an injury resulting from the act of the lessor, for which he must respond in damages."). Rather, the rule of law in *Kutter* is that if the tenant affixed a building onto the land, the building became part of the land and the property of the landowner. 69 U.S. at 497. Therefore, conversion of the house, as a fixture, was inapplicable.

State law defines fixtures, which is "a mixed question of law and fact . . . unless the facts are susceptible of but one inference." *Carson v. Living Word Outreach Ministries, Inc.*, 315 S.C. 64, 70, 431 S.E.2d 615, 618 (Ct. App. 1993). Fixtures are defined as "goods that have become so related to particular real property that an interest in them arises under real property law." S.C. Code Ann. § 36-9-102(41). In South Carolina, whether personal property retains its status as personal property (i.e., a trade fixture) or as a fixture annexed to real property depends on the following test:

> A fixture is generally defined as an article which was a chattel, but by being physically annexed to the realty by one having an interest in the soil becomes a part and parcel of it. By mere affixation the chattel does not become a fixture. The test for determining whether an item remains personalty or becomes a fixture include the following criteria: (1) mode of attachment, (2) character of the structure or article, (3) the intent of the parties making the annexation, and (4) the relationship of the parties. *Carson*, 315 S.C. at 70.

Meaning, if the fixture becomes annexed to real property, and is characterized as part of the real property, then the fixture is considered part and parcel of the real property. In that instance, the fixture loses its characterization of being personal property.

Defendants' cause of action for conversion should be dismissed because the tort of conversion only applies to personal property—not real property. *Hawkins v. City of Greenville*, 358 S.C. 280, 297, 594 S.E.2d 557, 566 (Ct. App. 2004) ("[A] conversion action does not lie

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when alleging the exercise of dominion or control over real property."). In landlord-tenant disputes, the tenant's fixtures when annexed to the premises are presumed to belong to the tenant provided that removal of the same does not materially injure the premises. *Carson*, 315 S.C. at 70. Moreover, in the lease agreement under Section 15, "[a]ny trade fixtures or equipment installed by Lessee in the Premises at Lessee's expense will remain Lessee's personal property and Lessee will have the right at any time during the Term of this Lease to remove such fixtures or equipment . . . [and must] restore the Premises to substantially the same condition as they were when received by Lessee, ordinary wear and tear excepted." Exhibit B, Plaintiffs' Amended Complaint.

Defendants alleged conversion to the fixtures within the building with respect to Plaintiffs' fixtures. P. 4, Defendants' Response to Plaintiffs' Motion to Strike and Motion to Dismiss Defendants' Answer and Counterclaim. In Defendants' Fourth Counterclaim, Defendants state: "Plaintiffs converted the Premises to their own use . . . [and] [a]s a direct and proximate result of Plaintiffs' conversion of the Premises, Landlord has been significantly damaged and is entitled to recover actual damages from Plaintiffs." ¶420-21, Defendants' Answer and Counterclaim. At the hearing on August 27, 2018, Defendants alleged the fixtures were related to the infrastructure of the building. Defendants' cause of action is logically unsound because the fixtures on the premises with respect to the infrastructure is part and parcel of real property that was preexisting before Plaintiffs took possession of the premises—not personal property. Defendants' counterclaim denotes the premises, not personal property. Moreover, if Defendants admitted to locking out Plaintiffs from the premises without resorting to the judicial process, then Plaintiffs are clearly unable to remove Plaintiffs' personal property therein or restore the premises in a bona fide gordian knot of an impossible, inequitable ruling tantamount to a miscarriage of justice for Plaintiffs. The Court's denial of Plaintiffs' motion to strike and dismiss this cause of action is based on an error of law. Plaintiffs' motion to strike, motion to dismiss, and partial motion for summary judgment on Defendants' cause of action for conversion should be granted.

III. DEFENDANTS STILL MUST BEAR THE BURDEN OF PROVING ELEMENTS OF NEGLIGENCE CONCERNING SMOKE DAMAGE THAT ARE STILL IN DISPUTE

Regarding Plaintiffs' Motion to Dismiss and Strike Defendants' cause of action for negligence in the Order on page 3 asserts incorrectly that Plaintiffs are liable for smoke damages to other occupants in the building. In a negligence cause of action, plaintiff must show "(1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages." *See Moore v. Weinberg*, 383

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S.C. 583, 588-89, 681 S.E.2d 875, 878 (2009). Regardless of the status of the lease, Defendants must prove damages as an essential element, which remains disputed at this time. ¶122-26, Plaintiffs' Amended Complaint; ¶413-416, Defendants' Answer and Counterclaim. Also, Defendants failed to allege damages in Defendants' Answer and Counterclaim. With discovery pending, the facts are still in dispute on this issue before determining liability on the matter as stated in the Order.

The Court granted Defendants' motion to amend Defendants' Answer and Counterclaim to make a more definite statement. Plaintiffs' motion to strike and a motion for partial summary judgment on Defendants' counterclaim for negligence is still unresolved. The Court's ruling on this issue unclear.

IV. DEFENDANTS' COUNTERCLAIM FOR ABUSE OF PROCESS MUST FAIL

Regarding Plaintiffs' Motion to Dismiss and Strike Defendants' cause of action for abuse of process in the Order on page 4, the Court asserts Plaintiffs showing a disregard for judicial economy that does not comport with Plaintiffs' right to assert a legitimate, legal right within the judicial process. Judicial process and judicial economy are not one and the same concept. The cause of action for the tort of abuse of process "provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Food Lion, Inc. v. United Food & Commer. Workers Int'l Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002). The elements for the abuse of process tort include: (1) an ulterior purpose; and, (2) a willful act using the judicial process that is improper for regularly conducting the proceeding. *Id.* An ulterior purpose is when the judicial process is used to gain an illegitimate objective. *Id.* The element of willful act is some definite, overt act using the judicial process that is improper because the act is either unauthorized by the process or directed at an illegitimate, collateral objective in the regular use of the judicial process. *Id.* at 71. However, no ulterior purpose, however, exists when a party merely seeks to the right to access property as the subject matter of the dispute. *Davis v. Epting*, 317 S.C. 315, 319-20, 454 S.E.2d 325, 328 (Ct. App. 1994). Thus, merely asserting a legitimate, legal right within the judicial process is not grounds for abuse of process. *See id.*

From the very beginning, Plaintiffs have touted that the law does not support Defendants' proposition that the provisions of the lease govern commercial leases. Judge Duckett in the Gantt Summary Court informed Defendants that evicting Plaintiffs without resorting to the judicial process was unlawful. Statutory tenancy principles, case law, and public policy do not support a self-help eviction. A dispute over one month's rent of less than $3,500.00 versus Plaintiffs' livelihood is extreme and is, arguably, a forfeiture. Attempting to

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repossess the premises, accelerate the lease, and distrain the tenant's personal property is also, arguably, unconstitutional creating a windfall to the landlord and violating a tenant's due process rights to due process for the deprivation of property. Both the Federal Constitution and the South Carolina Constitution extend protection to individuals from any state actor who deprives any citizen of the United States "under [the] color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983; U.S. CONST. amend. 1, XIV; S.C. CONST. art. I, § 2. The Fourth Amendment vests to the people "[t]he right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. The physical trespass of property by the government is not necessary to affect a seizure of property because unlawful seizure may occur "when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85 (1984).

Forfeiture provisions, such as acceleration or liquidated damages provisions, are designed to penalize the tenant by collecting future, unearned rent and unforeseeable, speculative damages that are far more than the actual damages sustained by the landlord unless the landlord makes a good faith attempt to mitigate the landlord's damages by reletting the premises. *Gentry*, 192 S.C. at 436-37. An illegal eviction would operate as a forfeiture of all the tenant's rights under the lease, or subsequent oral contract, which is usually disfavored under South Carolina law. *Litchfield Co.*, 290 S.C. at 221. As a matter of unsettled law, whether the landlord's election of remedies related to eviction, acceleration, and distraint for rent in arrears is valid under substantive due process remains at issue when the result produces a windfall in favor of the landlord as an unreasonable seizure of the premises and the tenant's personal property and trade fixtures located therein. *See Gentry*, 192 S.C. at 436-37; *Kiriakides*, 312 S.C. at 276. Here, no misuse of the judicial process exists when Plaintiffs exercised legitimate, legal rights by statutory tenancy principles concerning allegations of forcible entry and detainer, claim and delivery, wrongful dispossession, and so forth related to Defendants locking out Plaintiffs from the premises. The facts are egregious.

While settlement negotiations were still in process (that ultimately failed), and Defendant **MARGARET H. DURHAM LIVING TRUST** knew Plaintiffs were represented by counsel, Defendant **MARGARET H. DURHAM LIVING TRUST** filed a writ of ejectment without providing notice to Plaintiffs' counsel—knowing full well that Plaintiffs lacked access to the premises and Defendants checked Plaintiffs' mail regularly. Plaintiffs discovered the writ of ejectment, literally less than 48 hours from the ejectment, and filed a preliminary injunction and a notice of intent to appeal on constitutional grounds for lack of due process for lack of notice. Plaintiffs had the right

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to appeal the writ of ejectment. Plaintiffs pursued a complaint for declaratory relief because third parties have an interest in Plaintiffs' personal property located on the premises in the exclusive dominion, control, and possession of Defendants since on or around July 28, 2017. Plaintiffs have worked with Defendants regarding any and all third parties who have a legitimate interest in Plaintiffs' personal property on the premises to release said property. Any outstanding claims are either unknown or denied as illegitimate claims to Plaintiffs' personal property on the premises. Plaintiffs heeded Judge Gravely's order to amend Plaintiffs' complaint at Defendants' first motion to dismiss hearing. Judge Stilwell found no technical deficiencies at Defendants' second motion to dismiss hearing. Both judges questioned Defendants regarding filing for a writ of ejectment after-the-fact.

Without access to Plaintiffs' business records for over a year, Plaintiffs had to reconstruct what Plaintiffs could from independent sources. At the hearing on February 28, 2018, Judge Gravely asked Defendants whether Plaintiffs could at least have access to Plaintiffs' business records. Plaintiffs attempted to work out a solution with Defendants to that effect, which did not prevail in any meaningful agreement without Defendants compromising Plaintiffs' rights and interests despite the actual or high risk of spoliation of evidence by this point—before discovery actually began. Defendants have long been aware of Plaintiffs' quandary to prepare for litigation without Plaintiffs' business records for discovery and have refused to return Plaintiffs' business records, repeatedly. Plaintiffs have merely defended Plaintiffs' legal rights under the circumstances in this litigation in a most inequitable situation.

Plaintiffs' motion to dismiss and motion to strike Defendants' cause of action for abuse of process should be granted.

WHEREFORE, Plaintiffs request that this Motion be granted and the Court amend its Order and Judgment in accordance with the above-requested relief, give leave to amend this motion as required, and such other and further relief as the Court deems just and proper.

Respectfully submitted this 5 day of October , 2018 .

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SC Bar No.: 102942
Attorney for Plaintiffs

ELECTRONICALLY FILED - 2018 Oct 05 8:50 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

STATE OF SOUTH CAROLINA **COUNTY OF GREENVILLE**	**IN THE COURT OF COMMON PLEAS** **FOR THE THIRTEENTH JUDICIAL CIRCUIT**
BLACKSTONE AND CHASE, LLC, MARK T. THOMAS, TENSLEY S. THOMAS, AND BRADLEY W. KERR Plaintiff(s), v. **MARGARET H. DURHAM LIVING TRUST, MULTIPLEX SYSTEMS, INC., ICE RINK ENGINEERING AND MANUFACTURING COMPANY, LLC, EZ GLIDE 350, LLC, MARGARET H. DURHAM, JAMES W. DURHAM, HELEN W. SHOCKLEY, AND TAMALA D. CRANE,** Defendant(s).	2017-CP-23-07837 COMMON PLEAS CIVIL CASE NO. **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that I served a copy of the foregoing **PLAINTIFFS' NOTICE AND MOTION FOR RECONSIDERATION TO ALTER OR AMEND A JUDGMENT** in this action dated October 5, 2018, on October 5, 2018, upon the adverse party electronically to the following:

Margaret H. Durham Living Trust et al.	Margaret H. Durham Living Trust et al.
& Margaret H. Durham, Trustee	& Margaret H. Durham, Trustee
c/o Robert K. Merting	c/o Josh Hudson
501 Furman Road, Suite W	1052 North Church Street
Greenville, SC 29609	Greenville, SC 29601
Attorney for the Defendants	Attorney for the Defendants

I have served a copy of the foregoing by one of the following methods:

- [ ] (1) Delivering a copy personally to the adverse party;
- [ ] (2) Mailing a copy to the adverse party's last known address, by depositing the copy in the U.S. Mail in an envelope with sufficient postage affixed;
- [ ] (3) Delivering it by commercial delivery service in accordance with Rule 4(d)(9), SCRCP; or,
- [X] (4) Other pursuant to Rule 5(b)(1), SCRCP: electronic filing.

Respectfully submitted this 5 day of October, 2018.

/s/ Deborah D. Davis, Esq.
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ELECTRONICALLY FILED - 2018 Oct 15 9:31 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Blackstone and Chase, LLC; Mark T. Thomas; Tensley E. Thomas; and Bradley W. Kerr, Plaintiffs, v. Margaret H. Durham Living Trust; Multiplex Systems, Inc.; Ice Rink Engineering and Manufacturing Company, LLC; EZ Glide 350, LLC; Margaret H. Durham; James W. Durham; Helen W. Shockley; and Tamala D. Crane, Defendants.	C.A. No. 2017-CP-23-07837 **DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION TO ALTER OR AMEND A JUDGMENT**

PLEASE TAKE NOTICE that Defendants, Margaret H. Durham Living Trust; Multiplex Systems, Inc.; Ice Rink Engineering and Manufacturing Company, LLC; EZ Glide 350, LLC; Margaret H. Durham; James W. Durham; Helen W. Shockley; and Tamala D. Crane, responding to Plaintiffs' Motion to Reconsider, state as follows:

VALIDITY OF LEASE

Plaintiffs admit "Plaintiff Bradley W. Kerr acted on behalf of Plaintiff Blackstone and Chase, LLC, to enter into a contract for the commercial lease of the Premises subject to approval by the members of Plaintiff Blackstone and Chase, LLC." Second Amended Complaint ¶ 34. Kerr did not inform Margaret H. Durham Living Trust ("Landlord") that his authority was limited in any manner, and rather he held himself out as an authorized agent of Blackstone and Chase, LLC. Kerr received a copy of the Lease at signing, and Kerr later became a member of the Blackstone and Chase, LLC formed in South Carolina. *Id.* at ¶ 2.

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That Blackstone and Chase, LLC was not formed in South Carolina until after the signing of the Lease by Kerr does not change the analysis in this case. Plaintiffs overlook that Blackstone and Chase, LLC could have been formed in any one of the other 49 states and that Landlord cannot be reasonably required to ignore the representations of Plaintiffs and exhaustively search for the formation of Blackstone and Chase, LLC. Even if Blackstone and Chase, LLC was not created,

> the law is well settled that: 'If a single individual assumes to act as a corporation and to contract as such, where there is no corporation either de jure or de facto, he will be individually liable on the contract; and individual liability will also attach to all of the stockholders or members of a pretended but nonexisting corporation on contracts entered into in its name if they have expressly or impliedly authorized the contract.' Campbell v. Rukamp, 260 Mich. 43, 244 N.W. 222, 223 (Mich., 1923) (citing 14 C. J. p. 200).

Thus, Kerr would be personally liable on the Lease unless Blackstone and Chase, LLC later ratified the Lease.

"While initially not liable for a promoter's contracts, a corporation may become liable for a promoter's preformation contract either through expressly ratifying the contract or through implicitly ratifying it by accepting its benefits with full knowledge of its terms." Hansen v. Fields Co., 409 S.C. 541, 763 S.E.2d 31, 35 (S.C., 2014). Here, a member of Blackstone and Chase, LLC, Kerr, had full knowledge of the terms of the lease, and that knowledge, by virtue of Kerr being an agent (i.e. member) for the principal Blackstone and Chase, LLC, is imputed to Blackstone and Chase, LLC. *See Indep. Nat. Bank v. Buncombe Prof'l Park*, LLC, 411 S.C. 605, 608, 769 S.E.2d 663, 665 (2015). Blackstone and Chase, LLC accepted the benefit of the Lease by occupying the Premises, and Blackstone and Chase, LLC, and each and every one of its members, made payment upon the Lease. Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction P. 8.; Affidavit of Tensley E. Thomas, November 17, 2017, ¶ 90.; Affidavit of Mark T. Thomas, November 13, 2017, ¶ 83.; and Affidavit of Bradley W. Kerr,

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November 20, 2017, ¶ 79.

The Court is correct in finding that a valid contact was created when Kerr and Landlord signed the Lease, that the Lease was enforceable against Kerr, and that the Lease was ratified by Blackstone and Chase, LLC when it accepted the benefits from the Lease, made payments upon the Lease, and knew the terms of the Lease through the knowledge of its agent and member Kerr. As such, the Lease is valid and in place between Landlord and Blackstone and Chase, LLC, and the Plaintiffs could only occupy the Premises under the Lease.

ENFORCABILITY OF COMMERCIAL LEASES

> "The law in this state regarding the construction and interpretation of contracts is well settled. When it is perfectly plain and capable of legal construction, the language itself determines the full force and effect of the document.
>
> Courts are without authority to alter a contract by construction or to make a new contract for the parties. Their duty is limited to the interpretation of the contract made by the parties themselves ... 'regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully.'" Conner v. Alvarez, 285 S.C. 97, 328 S.E.2d 334, 336 (S.C., 1985) (internal citations omitted).

Thus, is the general rule on enforcing contracts in South Carolina. The Court, when applying this rule, may look to unpublished opinions, much as it looks to out of state opinions, for their persuasive authority. Indeed, the South Carolina Supreme Court openly does the same. *See Toth v. Square D Company*, 298 S.C. 6, 10, 377 SE 2d 584, 586-587 (1989) ("Although we recognize that *Francisco* is a memorandum opinion without precedential value, it nonetheless indicates that we have already implicitly allowed retroactive application of *Small.*") The Court was correct to look to *KBR Development v. Yansy Realty, Inc.* for its reasoning, arguments, and insight on how the S.C. Court of Appeals will consider the enforceability of a lease. 2005 WL 7083858, No. 2005-UP-217 (S.C. Court of Appeals). *KBR Development* specifically addresses a self-help eviction alleged "unlawful" and decides the issue upon the contract provision allowing self-help

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evictions. *Id.* at 2 ("The lease provided KBR with the self-help option of repossessing the property if lease payments were overdue by fifteen days. Therefore, KBR acted within their legal rights."). In light of the general rule regarding the enforceability of contracts, the persuasive power of *KBR Developments* is well observed by the Court.

Plaintiffs ask the Court to do implicitly what the South Carolina Legislature refused to do explicitly. That is, the Plaintiffs would have the Court apply the South Carolina Residential Landlord-Tenant Act to commercial leases. *See Plaintiffs' Notice and Motion for Reconsideration to Alter or Amend a Judgment*, P. 7 ("The Spirit of the South Carolina Residential Landlord-Tenant Act prohibiting landlord and tenants to contract in violation (or retaliation) of either party's rights or remedies under statutory principles of landlord-tenant law should also apply to commercial leases.") This is directly contrary to the letter of the law. *See* S.C. Code Ann. § 27-40-110 ("This chapter applies to, regulates, and determine rights, obligations, and remedies under a rental agreement, wherever made, for a dwelling unit located in this State."). The Court cannot extend the law to that which the Legislature chose to exclude. *Consumer Advocate v. South Carolina Dept. of Ins.*, 397 S.C. 599, 602, 725 S.E.2d 708, 710 (Ct. App. 2012) ("The court has no right to add words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy.") (internal citations omitted). The South Carolina Legislature realized that commercial leases are between sophisticated parties who are aware of their rights and are free to contract away those rights as they deem fit and specifically excluded them from the South Carolina Residential Landlord-Tenant Act. *See* S.C. Code Ann. § 27-35-75 ("Unless otherwise agreed to in a commercial lease agreement. . .").

Plaintiffs argue that SC law was amended after 1962 to prohibit, in general, self-help evictions. However, the Legislature, when crafting the South Carolina Residential Landlord-

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Tenant Act, explicitly prohibited self-help evictions for residential leases. S.C. Code Ann. § 27-40-760. A cannon of statutory construction is that no language may be superfluous. *16 Jade Street, LLC v. R. Design Const. Co., LLC.*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012) ("Similarly, we are to construe a statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.'") (internal citations omitted). To hold that another section of statute prohibits self-help evictions on all leases would make the clear language of S.C. Code Ann. § 27-40-760 superfluous. Such a finding is to be avoided, and therefore the Court is right to conclude that the General Assembly, in prohibiting self-help evictions in residential leases, recognized that generally self-help evictions are allowable. *See Barbee v. Winnsboro Granite Corp.*, 190 S.C. 245, 2 S.E.2d 737, 738 (1939) ("The rule recognized and followed in this State is also found in the concurring opinion of Chief Justice McIver in Rush v. Aiken Mfg. Co., supra, as follows [58 S.C. 145, 36 S.E. 499]: "As I understand it, the rule in this state is that, where the tenancy has terminated, the landlord may enter upon and retake possession of the premises.")

The parties here were commercial entities who entered a contract with specific rights for the Landlord in event of a breach, to deny the Landlord its rights now is to redraft the contract and is contrary to the rule in South Carolina. Further, the SC Court of Appeals has considered this issue where and determined that the contract governs. Hence, the Court is correct to uphold the Lease.

ABUSE OF PROCESS CLAIM

Plaintiffs' voluminous filings, including filing an appeal from the eviction when Plaintiffs did not intent to reoccupy the Premises and filing an inappropriate Declaratory Judgment action, are acts improper for regularly conducting a proceeding for such a dispute. Plaintiffs'

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misapplication of U.S. Constitutional law and South Carolina Constitutional law against a private actor in *Plaintiffs' Notice and Motion for Reconsideration to Alter or Amend A Judgment* is a non sequitur and reveals a continued pattern of abuse designed to wear down Defendants.

Defendants have alleged that Plaintiffs are attempting to shift the loss caused by the failure of their business from themselves to Defendants. Such a shift is an ulterior purpose outside the proper use of the legal process, and Defendants' claim, supported by a factual question, should remain for determination by a finder of fact.

CONCLUSION

The Court has considered the arguments presented by Counsel and ruled appropriately. Plaintiffs do not present new arguments heretofore unconsidered, and the Courts decision should remain unchanged for the reasons presented above. Defendants do not here attempt to exhaustively respond to Plaintiffs, but rather have responded to those issues which are dispositive and most relevant and important. If the Court wishes for an exhaustive response, the Defendants will provide the same upon request.

WHEREFORE Defendants request that the Court deny Plaintiffs' Motion to Reconsider.

(Signature page follows)

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Respectfully Submitted,

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October 15, 2018

ELECTRONICALLY FILED - 2018 Oct 29 3:52 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Blackstone and Chase, LLC; Mark T. Thomas; Tensley E. Thomas; and Bradley W. Kerr, Plaintiffs, v. Margaret H. Durham Living Trust; Multiplex Systems, Inc.; Ice Rink Engineering and Manufacturing Company, LLC; EZ Glide 350, LLC; Margaret H. Durham; James W. Durham; Helen W. Shockley; and Tamala D. Crane, Defendants.	C.A. No. 2017-CP-23-07837 **AMENDED ANSWER AND COUNTERCLAIM**

PLEASE TAKE NOTICE that Defendants, Margaret H. Durham Living Trust; Multiplex Systems, Inc.; Ice Rink Engineering and Manufacturing Company, LLC; EZ Glide 350, LLC; Margaret H. Durham; James W. Durham; Helen W. Shockley; and Tamala D. Crane, answering the Second Amended Complaint ("Complaint") of the Plaintiffs, allege and state that each and every allegation of the Complaint not admitted herein is hereby denied, strict proof of all denied allegations is demanded, and:

FOR A FIRST DEFENSE

1. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 1 of the Complaint, and therefore deny the same.

2. Defendants admit that Mark T. Thomas, Tensley E. Thomas, and Bradley W. Kerr are natural persons. Defendants are without sufficient information to either admit or deny the remaining allegations of Paragraph 2 of the Complaint, and therefore deny the same.

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3. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 3 of the Complaint, and therefore deny the same.

4. Defendants admit, to the best of its knowledge, Paragraph 4 of the Complaint.

5. Defendants admit Paragraph 5 of the Complaint.

6. Defendants admit Paragraph 6 of the Complaint.

7. Defendants admit Paragraph 7 of the Complaint.

8. Defendants admit Paragraph 8 of the Complaint.

9. Defendants admit Paragraph 9 of the Complaint.

10. Defendants admits that to the extent the named Defendants, other than the Margaret H. Durham Living Trust, acted on behalf of the landlord, that said named Defendants acted on behalf of and as agents or employees of the Margaret H. Durham Living Trust. Defendants deny the remaining allegations of Paragraph 10 of the Complaint.

11. Defendants deny the allegations of Paragraph 11 of the Complaint.

12. The allegations of Paragraph 12 of the Complaint are incomprehensible and Defendants deny the same.

13. The allegations of Paragraph 13 of the Complaint are incomprehensible and Defendants deny the same.

14. Defendants admit that James W. Durham and Margaret H. Durham are married and maintain a personal residence on the third floor of 17 W. North Street. Defendants further admit that James W. Durham was a member of Ridley Piper of SC, LLC and that said LLC owned the building at 17. W. North Street. Defendants deny the remaining allegations of Paragraph 14.

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15. The allegations of Paragraph 15 of the Complaint are incomprehensible and Defendants deny the same.

16. Defendants admit the familial relationship of Tamala D. Crane as the daughter of James W. Durham and Margaret H. Durham. Defendants further admit that Tamala D. Crane operates Studio 17 on the second floor of the Premises. Defendants deny the remaining allegations of Paragraph 16 of the Complaint.

17. The allegations of Paragraph 17 of the Complaint are incomprehensible and Defendants deny the same.

18. Defendant admits that the Landlord, as a paper entity, acted through its agents. Defendants deny the remaining allegations of Paragraph 18 of the Complaint.

19. Defendant admits that the Landlord, as a paper entity, acted through its agents. Defendants deny the remaining allegations of Paragraph 19 of the Complaint.

20. Defendants admit the allegations of Paragraph 20 of the Complaint.

21. Defendants admit the allegations of Paragraph 21 of the Complaint.

22. Paragraph 22 states a legal conclusion to which no response is required. To the extent a response is required, Defendants deny the allegations of Paragraph 22.

23. Defendants admit the allegations of Paragraph 23 of the Complaint.

24. Defendants admit the allegations of Paragraph 24 of the Complaint.

25. Defendants admit that all co-defendants acted as agents or employees of the Defendant the Margaret H. Durham Living Trust. Defendants deny the remaining allegations of Paragraph 25 of the Complaint.

26. Defendants admit the allegations of Paragraph 26 of the Complaint.

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27. Defendants admit that Plaintiff Bradley W. Kerr signed the Lease in the presence of Defendant Helen W. Shockley. Defendants deny the remaining allegations of Paragraph 27 of the Complaint.

28. Defendants admit the term of the lease was for five years. Defendants deny the remaining allegations of Paragraph 28 of the Complaint.

29. Defendants deny the allegations of Paragraph 29 of the Complaint.

30. Defendants admit the allegations of Paragraph 30 of the Complaint.

31. Defendants deny the allegations of Paragraph 31 of the Complaint.

32. Defendants deny the allegations of Paragraph 32 of the Complaint.

33. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 33 of the Complaint, and therefore deny the same.

34. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 34 of the Complaint, and therefore deny the same.

35. Defendants admit that Bradley W. Kerr signed the lease. Defendants are without sufficient information to either admit or deny the remaining allegations of Paragraph 35 of the Complaint, and therefore deny the same.

36. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 36 of the Complaint, and therefore deny the same.

37. Defendants deny the allegations of Paragraph 37 of the Complaint.

38. Defendants deny the allegations of Paragraph 38 of the Complaint.

39. Defendants deny the allegations of Paragraph 39 of the Complaint.

40. Defendants admit the allegations of Paragraph 40 of the Complaint.

41. Defendants deny the allegations of Paragraph 41 of the Complaint.

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42. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 42 of the Complaint, and therefore deny the same.

43. Defendants admit the allegations of Paragraph 43 of the Complaint.

44. Defendants deny the allegations of Paragraph 44 of the Complaint.

45. The allegations of Paragraph 45 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 45 of the Complaint are denied, and strict proof of the allegations is demanded.

46. Defendants deny the allegations of Paragraph 46 of the Complaint.

47. Defendants admit the allegation of Paragraph 47 of the Complaint.

48. Defendants deny the allegations of Paragraph 48 of the Complaint.

49. Defendants deny the allegations of Paragraph 49 of the Complaint.

50. Defendants deny the allegations of Paragraph 50 of the Complaint.

51. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 51 of the Complaint, and therefore deny the same.

52. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 52 of the Complaint, and therefore deny the same.

53. Defendants deny the allegations of Paragraph 53 of the Complaint.

54. Defendants deny the allegations of Paragraph 54 of the Complaint.

55. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 55 of the Complaint, and therefore deny the same.

56. Defendants deny the allegations of Paragraph 56 of the Complaint.

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57. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 57 of the Complaint, and therefore deny the same.

58. Defendants deny the allegations of Paragraph 58 of the Complaint.

59. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 59 of the Complaint, and therefore deny the same.

60. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 60 of the Complaint, and therefore deny the same.

61. Defendants deny the allegations of Paragraph 61 of the Complaint.

62. Defendants deny the allegations of Paragraph 62 of the Complaint.

63. Defendants deny the allegations of Paragraph 63 of the Complaint.

64. The allegations of Paragraph 64 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 64 of the Complaint are denied, and strict proof of the allegations is demanded.

65. Defendants admit that Plaintiffs' operated a business on the premises. Defendants are without sufficient information to either admit or deny the remaining allegations of Paragraph 65 of the Complaint, and therefore deny the same.

66. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 66 of the Complaint, and therefore deny the same.

67. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 67 of the Complaint, and therefore deny the same.

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68. Defendants admit that James W. Durham was a customer from time to time of the Parlor operated by Plaintiffs. Defendants deny any further allegations of Paragraph 68 of the Complaint.

69. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 69 of the Complaint, and therefore deny the same.

70. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 70 of the Complaint, and therefore deny the same.

71. Defendants deny the allegations of Paragraph 71 of the Complaint.

72. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 72 of the Complaint, and therefore deny the same.

73. Defendants deny the allegations of Paragraph 73 of the Complaint.

74. Defendants deny the allegations of Paragraph 74 of the Complaint.

75. Defendants deny the allegations of Paragraph 75 of the Complaint.

76. The allegations of Paragraph 76 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 76 of the Complaint are denied, and strict proof of the allegations is demanded.

77. The allegations of Paragraph 77 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 77 of the Complaint are denied, and strict proof of the allegations is demanded.

78. Defendants deny the allegations of Paragraph 78 of the Complaint as stated.

79. Defendants deny the allegations of Paragraph 79 of the Complaint.

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80. Defendants deny the allegations of Paragraph 80 of the Complaint as stated.

81. Defendants deny the allegations of Paragraph 81 of the Complaint.

82. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 82 of the Complaint, and therefore deny the same.

83. Defendants deny the allegations of Paragraph 83 of the Complaint.

84. Defendants deny the allegations of Paragraph 84 of the Complaint.

85. Defendants deny the allegations of Paragraph 85 of the Complaint.

86. Defendants deny the allegations of Paragraph 86 of the Complaint.

87. Defendants admit that Plaintiffs were barred from entering the premises. Defendants deny all further allegations of Paragraph 87 of the Complaint.

88. Defendants deny the allegations of Paragraph 88 of the Complaint.

89. Defendants deny the allegations of Paragraph 89 of the Complaint.

90. Defendants admit that Plaintiffs delivered proof of general liability insurance but deny further allegations of Paragraph 90 of the Complaint including those regarding timing.

91. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 91 of the Complaint, and therefore deny the same.

92. Defendants deny the allegations of Paragraph 92 of the Complaint.

93. Defendants admit notifying Plaintiffs regarding smoking in or near the building and of the presence of unknown children. Defendants deny the remaining allegations of Paragraph 93 of the Complaint.

94. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 94 of the Complaint, and therefore deny the same.

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95. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 95 of the Complaint, and therefore deny the same.

96. The Defendants admit that the City of Greenville threatened future fines but did not levy current fines for false-alarms caused by Plaintiffs.

97. Defendants deny the allegations of Paragraph 97 of the Complaint.

98. Defendants admit notifying Plaintiffs that they would be responsible for future fines caused by false alarms. Defendants deny the remaining allegations of Paragraph 98 of the Complaint.

99. Defendants deny the allegations of Paragraph 99 of the Complaint.

100. Defendants deny the allegations of Paragraph 100 of the Complaint.

101. Defendants deny the allegations of Paragraph 101 of the Complaint.

102. Defendants deny the allegations of Paragraph 102 of the Complaint.

103. Defendants deny the allegations of Paragraph 103 of the Complaint.

104. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 104 of the Complaint, and therefore deny the same.

105. Defendants admit that Plaintiff Mark T. Thomas communicated with Defendant Helen W. Shockley regarding rent, late fees, and the payment of same. Defendants deny the remaining allegations of Paragraph 105 of the Complaint.

106. Defendants deny the allegations of Paragraph 106 of the Complaint as stated.

107. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 107 of the Complaint, and therefore deny the same.

108. Defendants admit the allegations of Paragraph 108 of the Complaint.

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109. The allegations of Paragraph 109 of the Complaint refer to the written Notice of Default sent to Plaintiffs by Landlord. The contents of the Notice of Default speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 64 of the Complaint are denied, and strict proof of the allegations is demanded.

110. Defendants deny the allegations of Paragraph 110 of the Complaint.

111. Defendants deny the allegations of Paragraph 111 of the Complaint.

112. Defendants deny the allegations of Paragraph 112 of the Complaint.

113. Defendants admit that Plaintiffs rent payments were accepted even when late.

114. Defendants deny the allegations of Paragraph 114 of the Complaint.

115. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 115 of the Complaint, and therefore deny the same.

116. Defendants deny the allegations of Paragraph 116 of the Complaint.

117. The allegations of Paragraph 117 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 117 of the Complaint are denied, and strict proof of the allegations is demanded.

118. Defendants deny the allegations of Paragraph 118 of the Complaint.

119. Defendants admit acceptance of champagne at a celebratory event hosted by Plaintiffs. Defendants deny the remaining allegations of Paragraph 119 of the Complaint.

120. Defendants deny the allegations of Paragraph 120 of the Complaint.

121. The allegations of Paragraph 121 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and

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no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 121 of the Complaint are denied, and strict proof of the allegations is demanded.

122. Defendants admit the Fire Department responded to an incident on the premises on July 21, 2017.

123. Defendants deny the allegations of Paragraph 123 of the Complaint.

124. Defendants deny the allegations of Paragraph 124 of the Complaint.

125. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 125 of the Complaint, and therefore the same are denied.

126. Defendants admit the second and third story of the building were usable after restorative measures were taken to clear smoke and smoke damages from the premises. Defendants deny the remaining allegations of Paragraph 126 of the Complaint.

127. Defendants deny the allegations of Paragraph 127 of the Complaint.

128. The allegations of Paragraph 128 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 128 of the Complaint are denied, and strict proof of the allegations is demanded.

129. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 129 of the Complaint, and therefore deny the same.

130. Defendants admit that James W. Durham entered the Premises on the night of July 27, 2017. Defendants deny the remaining allegations of Paragraph 130 of the Complaint.

131. Defendants admit the Landlord changed the locks on the premises on July 28, 2017. Defendants deny the remaining allegations of Paragraph 131 of the Complaint.

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132. Defendants admit the Landlord posted the premises and closed the windows on or around July 28, 2017. Defendants deny the remaining allegations of Paragraph 132 of the Complaint.

133. Defendants admit the Landlord allowed Plaintiffs' staff to retrieve personal belongings from the premises. The Defendants deny the remaining allegations of Paragraph 133 of the Complaint.

134. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 134 of the Complaint, and therefore deny the same.

135. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 135 of the Complaint, and therefore deny the same.

136. Defendants deny the allegations of Paragraph 136 of the Complaint.

137. Defendants deny the allegations of Paragraph 127 of the Complaint.

138. Defendants admit the Landlord attempted to file an insurance claim for the fire.

139. Defendants admit the allegations of Paragraph 139 of the Complaint.

140. Defendants deny the allegations of Paragraph 140 of the Complaint.

141. Defendants deny the allegations of Paragraph 141 of the Complaint.

142. Defendants deny the allegations of Paragraph 142 of the Complaint.

143. Defendants admit the allegations of Paragraph 143 of the Complaint.

144. Defendants admit the allegations of Paragraph 144 of the Complaint.

145. Defendants admit the allegations of Paragraph 145 to the extent they refer to the actions of Penn National Insurance company. Defendants deny the remaining allegations of Paragraph 145 of the Complaint.

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146. The allegations of Paragraph 146 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 146 of the Complaint are denied, and strict proof of the allegations is demanded.

147. The allegations of Paragraph 147 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 147 of the Complaint are denied, and strict proof of the allegations is demanded.

148. Defendants admit that Landlord has not filed for a writ of distraint and deny all allegations that such filing or writ is necessary under the Lease Agreement.

149. Defendants admit the allegations of Paragraph 149 of the Complaint.

150. The allegations of Paragraph 150 of the Complaint refer to the written Lease Agreement between the parties. The contents of the Lease Agreement speak for themselves and no response is required from the Defendants. To the extent a response is required the allegations of Paragraph 150 of the Complaint are denied, and strict proof of the allegations is demanded.

151. Defendants deny the allegations of Paragraph 151.

152. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 152 of the Complaint, and therefore deny the same.

153. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 153 of the Complaint, and therefore deny the same.

154. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 154 of the Complaint, and therefore deny the same.

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155. Paragraph 155 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, the Defendants deny the allegations of Paragraph 155 of the Complaint.

156. Defendants deny the allegations of Paragraph 156 of the Complaint.

157. Defendants deny the allegations of Paragraph 157 of the Complaint.

158. Defendants deny the allegations of Paragraph 158 of the Complaint.

159. Defendants deny the allegations of Paragraph 159 of the Complaint.

160. Defendants deny the allegations of Paragraph 160 of the Complaint.

161. Defendants deny the allegations of Paragraph 161 of the Complaint.

162. Defendants deny the allegations of Paragraph 162 of the Complaint.

163. Paragraph 163 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, the Defendants deny the allegations of Paragraph 163 of the Complaint.

164. Defendants deny the allegations of Paragraph 164 of the Complaint.

165. Defendants admit Plaintiffs operated a Barber Shop pursuant to the lease. Defendants deny the remaining allegations of Paragraph 165 of the Complaint.

166. Defendants deny the allegations of Paragraph 166 of the Complaint.

167. Defendants deny the allegations of Paragraph 167 of the Complaint.

168. Defendants deny the allegations of Paragraph 168 of the Complaint.

169. Defendants deny the allegations of Paragraph 169 of the Complaint.

170. Defendants admit that Plaintiffs cannot claim possession of the Premises.

171. Defendants deny the allegations of Paragraph 171 of the Complaint.

172. Defendants deny the allegations of Paragraph 172 of the Complaint.

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173. Paragraph 173 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, the Defendants deny the allegations of Paragraph 173 of the Complaint.

174. Defendants deny the allegations of Paragraph 174 of the Complaint.

175. Defendants admit that Plaintiffs in the past possessed personal property on the premises pursuant to the Lease Agreement.

176. Defendants deny the allegations of Paragraph 176 of the Complaint.

177. Defendants deny the allegations of Paragraph 177 of the Complaint.

178. Defendants deny the allegations of Paragraph 178 of the Complaint.

179. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 179 of the Complaint, and therefore deny the same.

180. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 180 of the Complaint, and therefore deny the same.

181. Defendants deny the allegations of Paragraph 181 of the Complaint.

182. Defendants deny the allegations of Paragraph 182 of the Complaint.

183. Defendants deny the allegations of Paragraph 183 of the Complaint.

184. Defendants deny the allegations of Paragraph 184 of the Complaint.

185. Defendants deny the allegations of Paragraph 185 of the Complaint.

186. Paragraph 186 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, the Defendants deny the allegations of Paragraph 186 of the Complaint.

187. Defendants deny the allegations of Paragraph 187 of the Complaint as stated.

188. Defendants deny the allegations of Paragraph 188 of the Complaint.

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189. Defendants deny the allegations of Paragraph 189 of the Complaint.

190. Defendants deny the allegations of Paragraph 190 of the Complaint.

191. Defendants deny the allegations of Paragraph 191 of the Complaint.

192. Defendants deny the allegations of Paragraph 192 of the Complaint.

193. Paragraph 193 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, the Defendants deny the allegations of Paragraph 193 of the Complaint.

194. Defendants admit entering into a written Lease Agreement with Plaintiffs for the premises. Defendants deny the remaining allegations of Paragraph 194 of the Complaint.

195. Defendants deny the allegations of Paragraph 195 of the Complaint.

196. Defendants deny the allegations of Paragraph 196 of the Complaint.

197. Defendants deny the allegations of Paragraph 197 of the Complaint.

198. The Defendants deny that the Landlord had any obligation beyond those explicitly in the Lease Agreement. Defendants deny the remaining allegations of Paragraph 198 of the Complaint.

199. Paragraph 199 states a legal conclusion to which no response is required. To the extent a response is required, Defendants deny the allegations of Paragraph 199.

200. Defendants deny the allegations of Paragraph 200 of the Complaint as stated.

201. Defendants deny the allegations of Paragraph 201 of the Complaint.

202. Defendants deny the allegations of Paragraph 202 of the Complaint.

203. Defendants deny the allegations of Paragraph 203 of the Complaint.

204. Defendants deny the allegations of Paragraph 204 of the Complaint.

205. Defendants deny the allegations of Paragraph 205 of the Complaint.

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206. Defendants deny the allegations of Paragraph 206 of the Complaint.

207. Defendants deny the allegations of Paragraph 207 of the Complaint.

208. Defendants deny the allegations of Paragraph 208 of the Complaint.

209. Defendants deny the allegations of Paragraph 209 of the Complaint.

210. Defendants deny the allegations of Paragraph 210 of the Complaint.

211. Defendants deny the allegations of Paragraph 211 of the Complaint.

212. Defendants deny the allegations of Paragraph 212 of the Complaint.

213. Paragraph 213 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, Defendants deny the allegations of Paragraph 213 of the Complaint.

214. Defendants deny the allegations of Paragraph 214 of the Complaint.

215. Defendants deny the allegations of Paragraph 215 of the Complaint.

216. Defendants deny the allegations of Paragraph 216 of the Complaint.

217. Defendants deny the allegations of Paragraph 217 of the Complaint.

218. Defendants admit that James W. Durham saw Plaintiff Mark T. Thomas on the premises on July 27, 2017. Defendants deny the remaining allegations of Paragraph 218 of the Complaint.

219. Defendants deny the allegations of Paragraph 219 of the Complaint.

220. Defendants deny the allegations of Paragraph 220 of the Complaint.

221. Defendants deny the allegations of Paragraph 221 of the Complaint.

222. Defendants deny the allegations of Paragraph 222 of the Complaint.

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223. Paragraph 223 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, Defendants deny the allegations of Paragraph 223 of the Complaint.

224. Defendants deny the allegations of Paragraph 224 of the Complaint.

225. Defendants deny the allegations of Paragraph 225 of the Complaint.

226. Defendants deny the allegations of Paragraph 226 of the Complaint.

227. Defendants deny the allegations of Paragraph 227 of the Complaint.

228. Defendants deny the allegations of Paragraph 228 of the Complaint.

229. Defendants deny the allegations of Paragraph 229 of the Complaint.

230. Defendants deny the allegations of Paragraph 230 of the Complaint.

231. Defendants deny the allegations of Paragraph 231 of the Complaint.

232. Defendants deny the allegations of Paragraph 232 of the Complaint.

233. Defendants deny the allegations of Paragraph 233 of the Complaint.

234. Defendants deny the allegations of Paragraph 234 of the Complaint.

235. Defendants deny the allegations of Paragraph 235 of the Complaint.

236. Defendants deny the allegations of Paragraph 236 of the Complaint.

237. Defendants deny the allegations of Paragraph 237 of the Complaint.

238. Defendants deny the allegations of Paragraph 238 of the Complaint.

239. Paragraph 239 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, Defendants deny the allegations of Paragraph 239 of the Complaint.

240. Defendants deny the allegations of Paragraph 240 of the Complaint.

241. Defendants deny the allegations of Paragraph 241 of the Complaint.

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242. Defendants deny the allegations of Paragraph 242 of the Complaint.

243. Defendants deny the allegations of Paragraph 243 of the Complaint.

244. Defendants deny the allegations of Paragraph 244 of the Complaint.

245. Defendants deny the allegations of Paragraph 245 of the Complaint.

246. Defendants deny the allegations of Paragraph 246 of the Complaint.

247. Defendants deny the allegations of Paragraph 247 of the Complaint.

248. Defendants deny the allegations of Paragraph 248 of the Complaint.

249. Defendants deny the allegations of Paragraph 249 of the Complaint.

250. Paragraph 250 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, Defendants deny the allegations of Paragraph 250 of the Complaint.

251. Defendants deny the allegations of Paragraph 251 of the Complaint.

252. Defendants are without sufficient information to either admit or deny the allegations of Paragraph 252 of the Complaint, and therefore deny the same.

253. Defendants deny the allegations of Paragraph 240 of the Complaint.

254. Defendants deny the allegations of Paragraph 254 of the Complaint.

255. Defendants deny the allegations of Paragraph 255 of the Complaint.

256. Defendants deny the allegations of Paragraph 256 of the Complaint.

257. Paragraph 257 of the Complaint is a statement of law and not an allegation, and therefore does not require an answer. To the extent an answer is required, Defendants deny the allegations of Paragraph 257 of the complaint.

258. Defendants deny the allegations of Paragraph 258 of the complaint.

259. Defendants deny the allegations of Paragraph 259 of the complaint.

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260. Defendants deny the allegations of Paragraph 260 of the Complaint.

261. Defendants deny the allegations of Paragraph 261 of the Complaint.

262. Defendants deny the allegations of Paragraph 262 of the Complaint.

263. Defendants deny the allegations of Paragraph 263 of the Complaint.

264. Defendants deny the allegations of Paragraph 264 of the Complaint.

265. Defendants deny the allegations of Paragraph 265 of the Complaint.

266. Defendants deny the allegations of Paragraph 266 of the Complaint.

267. Defendants deny the allegations of Paragraph 267 of the Complaint.

268. Paragraph 268 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, Defendants deny the allegations of Paragraph 268 of the Complaint.

269. Defendants deny the allegations of Paragraph 269 of the Complaint.

270. Defendants deny the allegations of Paragraph 270 of the Complaint.

271. Defendants deny the allegations of Paragraph 271 of the Complaint.

272. Defendants deny the allegations of Paragraph 272 of the Complaint.

273. Defendants deny the allegations of Paragraph 273 of the Complaint.

274. Defendants deny the allegations of Paragraph 274 of the Complaint.

275. Paragraph 275 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, Defendants deny the allegations of Paragraph 275 of the Complaint.

276. Defendants deny the allegations of Paragraph 276 of the Complaint.

277. Defendants deny the allegations of Paragraph 277 of the Complaint.

278. Defendants deny the allegations of Paragraph 278 of the Complaint.

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279. Defendants deny the allegations of Paragraph 279 of the Complaint.

280. Defendants deny the allegations of Paragraph 280 of the Complaint.

281. Paragraph 281 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, Defendants deny the allegations of Paragraph 281 of the Complaint.

282. Defendants deny the allegations of Paragraph 282 of the Complaint.

283. Defendants deny the allegations of Paragraph 283 of the Complaint.

284. Defendants deny the allegations of Paragraph 284 of the Complaint.

285. Defendants deny the allegations of Paragraph 285 of the Complaint.

286. Defendants deny the allegations of Paragraph 286 of the Complaint.

287. Defendants deny the allegations of Paragraph 287 of the Complaint.

288. Defendants deny the allegations of Paragraph 288 of the Complaint.

289. Paragraph 289 of the Complaint contains no new allegations, and no answer is required. To the extent an answer is required, Defendants deny the allegations of Paragraph 289 of the Complaint.

290. Defendants deny the allegations of Paragraph 290 of the Complaint.

291. Defendants deny the allegations of Paragraph 291 of the Complaint.

292. Defendants deny the allegations of Paragraph 292 of the Complaint.

293. Defendants deny the allegations of Paragraph 293 of the Complaint.

294. Defendants deny the allegations of Paragraph 294 of the Complaint.

295. Defendants deny the allegations of Paragraph 295 of the Complaint.

FOR A SECOND DEFENSE

(Failure to State a Claim)

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296. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

297. The Complaint fails to set forth claims upon which relief can be granted.

FOR A THIRD DEFENSE
(Abandonment, Waiver, Estoppel, Laches, Unclean Hands)

298. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

299. The Complaint is barred, in whole or in part, by the doctrines of abandonment, waiver, estoppel, laches, and/or unclean hands.

FOR A FOURTH DEFENSE
(Default)

300. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

301. Plaintiffs' claims for damages are barred by their own default in the performance of the Lease Agreement.

FOR A FIFTH DEFENSE
(Failure to Mitigate)

302. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

303. Plaintiffs' claims for damages are barred by their failure to mitigate any damages they incurred, which are denied and referenced solely for purpose of this defense.

FOR A SIXTH DEFENSE
(Affirmative Defenses)

304. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

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305. Defendants raise each and every affirmative defense which is required to be set forth in the Defendants' Answer pursuant to SCRCP 8(c), reserving unto themselves the right to amend their pleadings to set forth with specificity the basis for such defenses which may appear appropriate as a result of the evidence and legal principals involved which show the same to be applicable. Defendants have insufficient knowledge and information upon which to form a belief as to whether they may have additional, as yet unstated, separate defenses available. Defendants reserve the right to assert further defenses in the event that they determine that such defenses are appropriate.

COUNTERCLAIM

FACTS

306. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

307. Defendant Margaret H. Durham Living Trust ("Landlord") owns and operates a multiple story, mixed-use building in downtown Greenville ("Property").

308. Landlord has three units in said building each comprising the majority of a single floor of the building.

309. Landlord leases the 3rd floor to the Defendants James W. Durham and Margaret H. Durham for use as a personal residence, and said Defendants maintain this unit as their primary residence which includes a significant amount of personal property within the unit and access to the same.

310. Landlord leases the 2nd floor to Studio 17, a fitness studio owned and operated by Defendant Tamala D. Crane, daughter of Defendants James W. Durham and Margaret H.

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Durham, and Mrs. Crane maintains this unit as a business that includes personal property located within the unit.

311. Landlord leases the 1st floor unit ("Premises") as commercial space to third parties.

312. The Premises are part of the designated emergency exit for the elevator and basement area of the building.

313. The Premises contain substantial infrastructure for utilities that serve the entire building.

314. Due to the nature of the building, location of infrastructure within the building, and access to the building, Landlord rents the Premises below average market rate.

315. Landlord, through its agents, negotiated and executed a Lease Agreement with Plaintiff Blackstone and Chase, LLC ("Blackstone") on March 8, 2016.

316. Plaintiff Bradley W. Kerr held himself out as the representative and authorized agent of Blackstone.

317. Bradley W. Kerr entered into the Lease Agreement on behalf of and under the authorization of Blackstone on March 8, 2016.

318. Plaintiffs Blackstone, Tensley E. Thomas, and Mark T. Thomas were bound by the actions of Bradley W. Kerr and further ratified those actions by accepting the benefits of the Lease Agreement and making payments under the Lease Agreement.

319. Landlord made clear to Blackstone that the Premises were leased at a sub-market rate because Landlord had to access building infrastructure within the Premises on a regular basis and that the Premises were the designated emergency exit path from the building per fire department regulations.

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320. Landlord made clear to Blackstone that the building and the Premises were an historic location in Greenville and had been painfully and carefully restored to pristine condition, that any upfitting and fixtures could not be attached to the Premises, and that the Premises must be returned to their original conditions upon termination of the Lease.

321. The Lease Agreement provided to Blackstone a two-month time period for upfit of the Premises.

322. At the time Blackstone took occupancy of the Premises under the Lease Agreement, the Premises were in compliance with Greenville building codes.

323. Blackstone fabricated large fixtures within the Premises which required electrical and plumbing work and which occupied much of the internal walls of the Premises.

324. Said fixtures, and the supporting electrical and plumbing work, had to be constructed to Greenville Code and without attachment to the original surfaces of the Premises.

325. Plaintiffs conducted such installation solely for their benefit and not for the benefit of Landlord, nor to bring the Premises generally within compliance with Greenville Code.

326. During the installation of said fixtures, Plaintiffs did damage the Premises by compromising and altering the Premises.

327. Due to the nature of the fixtures and the installation, removal of the fixtures in accordance with the Lease Agreement will further damage the Premises.

328. Plaintiffs' intended use of the Premises and large fixtures required the use of a second restroom not required by previous tenants and not anticipated by the inspector.

329. Landlord, at Plaintiffs' request, agreed to amend the Lease Agreement and lease an additional restroom and appurtenant space to Plaintiffs at a nominal rate.

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330. Landlord bore the cost of upfitting the additional restroom and appurtenant space.

331. Plaintiffs opened operations at the Premises as Liberty Fine Cuts and Shaves.

332. Plaintiffs worked with Jason Bible, who Landlord believed to be a partner or owner of Blackstone.

333. While operating as Liberty Fine Cuts and Shaves, Landlord's 2nd floor tenant notified Plaintiffs that the music from the 1st floor was so voluminous as to interfere with the 2nd floor operations.

334. The management of Liberty Fine Cuts and Shaves came to the 2nd floor, listened to the music, coordinated with staff on the 1st floor, and found a volume for the music agreeable to all.

335. Music emanating from the Premises during normal operations was not objectionable while Plaintiffs continued operations as Liberty Fine Cuts and Shaves.

336. Some time in October of 2016, Plaintiffs quit doing business as Liberty Fine Cuts and Shaves and began operations under new management as 17 W. N. Street Parlor.

337. After the change in name, music emanating from the Premises became a significant nuisance to the operation of other tenants in the building.

338. Defendant Tamala D. Crane, respectful of her position as a tenant, refrained from direct communications with other tenants and provided notices to Landlord about all complaints with the building regardless of the source of said complaints.

339. Individual instructors from Studio 17 who had friendly relations with Plaintiffs did communicate directly with Plaintiffs regarding the unacceptable volume emanating from the Premises.

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340. The notices, communications, and complaints were to no avail, and Plaintiffs continued to play music or other amplified entertainment at or above nuisance volume.

341. Plaintiffs' voluminous music and other entertainment was a nuisance to Landlord and Landlord's other tenants and did impede the operations of other tenants and alienated business of other tenants and thereby Landlord.

342. Plaintiffs' staff commonly smoked in the common area of the building or immediately outside the entrance.

343. Said smoking caused a pungent haze to form in the stairwell creating a stench offensive to the health-conscience customers of the 2nd floor tenant.

344. The Lease Agreement required Plaintiff to comply with all local ordinances and codes.

345. Greenville City Ordinances prohibit smoking inside public buildings or within ten feet of an entrance to a public building.

346. Plaintiffs' violation of said ordinance caused the harm said ordinance is intended to prevent in that Plaintiffs' smoking created a repugnant environment that reeked of smoke.

347. Landlord notified Plaintiffs that there was no smoking allowed in the building or within 10 feet of the entrance of the building.

348. Plaintiffs' response was to move smoking to within 10 feet of another entrance to the building and immediately in front of the signs for the 2nd floor tenant.

349. The 2nd floor tenant, Studio 17, a fitness studio, received unwanted association with an unhealthy habit and suffered a loss of reputation.

350. This loss of reputation and association with a known cancerous vice served as a further nuisance to a tenant of the Landlord.

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351. The Lease Agreement requires Plaintiffs to maintain general liability insurance protection for the benefit of both Plaintiffs and Landlord.

352. The Lease Agreement further requires Plaintiffs to notify Landlord at least thirty days in advance of the expiration, cancellation, termination, lapse, or change of any insurance policy.

353. Sometime in the winter of 2016-2017, the Plaintiffs began a month-to-month general liability insurance policy.

354. Said policy effectively expired at the end of each month unless renewed.

355. Plaintiffs failed to pay the renewal fee for insurance on at least one occasion causing the insurance to lapse.

356. Plaintiffs did not, and in fact were unable, to provide Landlord with the notice required under the lease.

357. Plaintiffs failure to maintain adequate insurance and the ability to notify Landlord of a change as required was a material breach of the Lease Agreement.

358. Plaintiffs, by the terms of the lease, were responsible for general maintenance of the Premises.

359. Plaintiff's breached the lease and failed to maintain one of the toilets in a professional manner.

360. Said toilet overflowed for an extended period of time.

361. Said overflow damaged the floor of the restroom and caused water to collect in the basement further damaging the building.

362. Landlord had to step in and remedy the situation.

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363. On or about May 15, 2017, the Greenville Fire Department inspected the Premises and cited Plaintiffs for multiple violations.

364. Plaintiffs failed to correct these violations.

365. On or about July 21, 2017, the Greenville Fire Department responded to a fire alarm at the Premises.

366. The Premises was filled with smoke, and smoke was visible in the other floors of and immediately exterior to the building.

367. Margaret H. Durham returned from watering plants outside and entered her residence to an odoriferous smoky haze permeating the building and the fire alarm sounding.

368. Landlord, through its evacuating agents, immediately began an inspection of the building from the 3rd floor down as the Greenville Fire Department arrived with multiple fire brigades.

369. Landlord and the Greenville Fire Department quickly determined the smoke was emanating from the first floor.

370. After several minutes inspecting the Premises with multiple firemen, the Greenville Fire Department determined that the source of the fire was the improper use of roasting pans as towel warmers.

371. Plaintiffs negligently and continually used multiple roasting pans as towel warmers in disregard for safety and the law.

372. Plaintiffs knew that James W. Durham and Margaret H. Durham used the building as their residence.

373. Plaintiffs negligently left the roasting pan plugged in and turned on overnight and unattended.

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374. With the determination that the building was safe and the fire extinguished, the Landlord returned and began taking restorative measures to mitigate smoke damage.

375. The fire created by Plaintiffs' negligence caused significant smoke damage to both the building and the personal property located within the building.

376. The Greenville Fire Department re-inspected the Premises on July 21, 2017 and determined that the violations from May 15, 2017 had not been corrected.

377. The Greenville Fire Department inquired of management why the violations had not been fixed, and management responded it was "because the shop owner comes into the shop after hours and just re-arranges things without the shop manager's knowledge."

378. The Greenville Fire Department advised Landlord that it would be held responsible if the violations were not corrected.

379. The failure of Plaintiffs to comply with safety ordinances and the resulting fire created an emergency situation to which Landlord had to respond until the ordinances were met and the situation remedied.

380. The Landlord immediately began taking precautions to ensure that violations were corrected.

381. Landlord also undertook the duty to ensure that no roasting pan was left on at night to cause another fire incident.

382. Such precaution was to both protect the building and personal property in the building and the personal safety of the residents of the building.

383. On the evening of July 27, 2017, James W. Durham, acting on behalf of Landlord, entered the Premises after closing hours on his way home and checked the status of the roasting pans.

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384. Upon entering the Premises, James W. Durham found the lights off and the 1st floor dark.

385. James W. Durham made his way to the line of roasting pans and began checking each one-by-one to ensure they were unplugged as required by the Greenville Fire Department.

386. James W. Durham reached a roasting pan that was plugged in and turned on, and this discovery caused him to utter an exclamation.

387. Upon his exclamation, Mark T. Thomas spoke out of the dark and uttered a simple "I'm sorry."

388. James W. Durham acknowledged Mark T. Thomas, unplugged the hot roasting pan, and checked the remaining roasting pans as he made his exit.

389. This incident placed Landlord in fear of losing its building and James W. Durham and Margaret H. Durham in fear for their safety.

390. The Lease Agreement provided that rent was due upon the first of the month.

391. Plaintiffs routinely paid rent late even though Landlord had notified them verbally and in writing that rent was to be paid on the first of the month.

392. As of July 13, 2017, Plaintiffs had failed to pay rent.

393. As of July 13, 2017, Plaintiffs had exhausted all deadlines and grace periods for the paying of rent.

394. Landlord promptly notified Plaintiffs of said breach of the Lease Agreement in a writing received by Plaintiffs on July 17, 2017.

395. Landlord, in accordance with the Lease Agreement, waited ten days for Plaintiffs to cure their default.

396. At the expiration of the tenth day, Plaintiffs had not cured their default.

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397. Plaintiffs did not notify Landlord that there was a rent dispute prior to the expiration of the tenth day.

398. Upon exhaustion of the time for Plaintiffs to cure their default, the Landlord acted within the authority of the Lease Agreement and executed its contractual right to repossess the Premises.

399. Landlord evaluated the condition of the Premises and determined that the cost to return the Premises to the original condition, as required by the Lease Agreement, would be greater than the fair market value of the property within the Premises.

400. Landlord acted within the authority of the Lease Agreement and executed its contractual right of distraint of the personal property in the Premises to cover the damages already incurred and the necessary expenses to fulfill Plaintiffs' obligations under the Lease Agreement.

401. Plaintiffs, through a multitude of legal actions, have prevented Landlord from cleaning up and reletting the Premises and thereby have prevented Landlord from mitigating damages.

402. Landlords inability to relet the Premises is a continuing, accruing damage.

FIRST COUNTERCLAIM
(Breach of Contract)

403. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

404. Landlord has fully performed all conditions of the Lease Agreement.

405. Plaintiffs have breached the Lease Agreement in the following particulars, which are not all inclusive:

a. Failing to pay rent on time;

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b. Failing to pay rent;

c. Failing to abide by the terms of the Lease Agreement in upfitting the Premises;

d. Failing to maintain appropriate general liability insurance;

e. Failing to perform adequate maintenance on the Premises;

f. Maintaining a hazardous environment;

g. Using the Premises for unauthorized activities; and

h. Failing to follow City Ordinances;

406. Plaintiffs breaches of the Lease Agreement have caused Landlord actual damages.

407. Consequently, Plaintiffs are liable to Landlord for actual and consequential damages, including rent acceleration and cost to restore the Premises to its condition prior to the Lease Agreement, prejudgment interest, costs and attorneys' fees.

SECOND COUNTERCLAIM
(Breach of Contract Accompanied by Fraudulent Act)

408. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

409. In addition to the breaches of contract by Plaintiffs, the circumstances described herein show a pattern of behavior and motive that demonstrate both a fraudulent intent relating to the breach, and fraudulent acts accompanying the breach.

410. Specifically, Plaintiffs committed the following fraudulent acts, which are not all inclusive:

a. Knowingly and willfully violated City Ordinances creating an unsafe environment which resulted in a fire.

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b. Knowingly and willfully violated City Ordinances by smoking within the Premises or ten feet of the doors of the premises and thereby damaging the reputation of the Landlord and other tenants within the building.

c. Knowingly and willfully served alcohol on the premises without a license and as a routine business practice.

d. Knowingly and willfully offered for sale product on the Premises that impugned the character of the building as a first-class space for office or retail.

e. Upon notification of Landlord, promised to pay rent late, remained in the Premises using the same for their own purpose, and failed to pay rent at all.

411. The fraudulent acts of Plaintiffs are characterized by dishonesty in fact and unfair dealing.

412. Landlord has been damaged by these breaches and is entitled to all damages flowing from these breaches, punitive damages, costs and interest.

THIRD COUNTERCLAIM
(Negligence / Gross Negligence)

413. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

414. Plaintiffs owed Landlord and the Defendants who occupied other units within the building, namely Margaret H. Durham, James W. Durham, and Tamala D. Crane, a duty to utilize proper procedures and appropriate equipment to carry out their business in a manner that did not place the building and occupants in jeopardy.

415. Said Defendants would show that Plaintiffs negligently, recklessly, willfully, wantonly, intentionally and grossly negligently breached their duty to said Defendants in failing

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to utilize proper procedures and appropriate equipment to carry out their business, which led to fire hazards and ultimately smoke damage to the Premises and the significant personal property within the premises.

416. As a direct and proximate result of Plaintiffs' negligent, reckless, willful, wanton, intentional and grossly negligent acts, omissions and/or delicts as enumerated hereinabove, said Defendants were seriously injured due to the damage done to the Premises and the personal property within the Premises. Therefore, said Defendants request judgment against Plaintiffs, jointly and severally, for actual and punitive damages with interest thereon.

FOURTH COUNTERCLAIM
(Conversion)

417. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

418. Plaintiffs utilized fixtures and upfits to the Premises in violation of the terms of the Lease Agreement.

419. Plaintiffs' fixtures and upfits, due to the size and installation, have required excessive time and expense to remove and return the Premises to its pre-lease condition.

420. Plaintiffs converted the Premises to their own use.

421. As a direct and proximate result of the Plaintiffs' conversion of the Premises, Landlord has been significantly damaged and is entitled to recover actual damages from Plaintiffs.

FIFTH COUNTERCLAIM
(Private Nuisance)

422. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

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423. Plaintiffs' intentional acts in continuing to play loud music and smoke in common areas and near the Property despite repeated requests from Landlord and other tenants to cease doing so caused Defendants an unreasonable interference with the use and enjoyment of the Property, as hereinbefore described.

424. Defendants sustained damages as hereinbefore described, including temporary and/or permanent reduction in value of the Property, interference with the use of and loss of enjoyment of the Property, and mental and emotional distress.

SIXTH COUNTERCLAIM
(Abuse of Process)

425. Defendants reallege and incorporate the allegations set forth above to the extent they are consistent with this defense.

426. Plaintiffs' filing of this action constitutes an abuse of process in that this action is not taken to redress any injury sustained by Plaintiffs as a result of Defendants' conduct, but rather was initiated primarily to promote Plaintiffs' ulterior purposes to gain objectives not legitimate in the use of the process, specifically attempting to get Defendants to help pay for the losses incurred from Plaintiffs' failed business venture.

427. Plaintiffs' filing of this action constitutes an abuse of process in that Plaintiffs did not undertake this action in good faith because Plaintiffs knew that they were not entitled to the relief asserted in this action.

428. By unjustifiably filing this action against Defendants, Plaintiffs committed willful acts in the use of the process not proper in the conduct of the proceeding, aimed at an object not legitimate in the use of the process, and for the primary purpose of achieving a collateral aim.

429. Defendants have been harmed in that they have incurred actual and special damages which result directly and immediately from the willful conduct of Plaintiffs, including

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but not limited to costs and attorneys' fees to defend this action, and Plaintiffs are liable to Defendants for those damages along with the expense of measures reasonably necessary to counteract the abuse of process, including litigation, attorneys' fees and costs in an amount to be determined, plus prejudgment interest and punitive damages in an amount to be determined.

430. As a direct result of Plaintiffs' abuse of process, Defendants are entitled to the aforementioned actual, special, and punitive damages plus prejudgment interest.

WHEREFORE, having fully answered, Defendants pray that this Court enter judgment awarding them the following relief:

1. Dismissing Plaintiffs' Complaint with prejudice;

2. Declaring that Plaintiffs are entitled to no recovery from Defendants;

3. Taxing the costs of this action against Plaintiffs;

4. Awarding Defendants their attorneys' fees;

5. Granting Defendants a trial by jury on all issues so triable;

6. Awarding Defendants a judgment on the Counterclaims against Plaintiffs, including actual damages and special damages, plus prejudgment interest and punitive damages in an amount to be determined; and

7. Granting such other relief in favor of Defendants as the Court deems proper.

Respectfully Submitted,

ROE CASSIDY COATES & PRICE, P.A.

/s/Joshua J. Hudson
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Attorneys for Defendants

Greenville, South Carolina

October 29, 2018

FAX COVER SHEET

TO	Shelby
COMPANY	S.C. Appellate Clerk of Court
FAX NUMBER	18037341839
FROM	Deborah Davis
DATE	2019-04-18 06:43:15 GMT
RE	Case No. 2017-CP-23-07837

COVER MESSAGE

Shelby,

Please find Exhibit C for Appellants' Petition to Reinstate Appellants' Appeal for case no. 2017-CP-23-07837 via FedEx Tracking No. 775000928873. This fax concludes all exhibits for this petition.

Best Regards,

Deborah D. Davis, Esq.
Attorney at Law

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EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

BLACKSTONE AND CHASE, LLC, ET AL.

APPELLANTS,

-VS-

MARGARET H. DURHAM LIVING TRUST, ET AL.,

RESPONDENTS.

2017-CP-23-07837

TRANSCRIPT OF RECORD

FEBRUARY 8, 2018
GREENVILLE, SOUTH CAROLINA

BEFORE:

THE HONORABLE PERRY H. GRAVELY

APPEARANCES:

ATTORNEY FOR APPELLANTS:

DEBORAH D. DAVIS, ESQ.

ATTORNEY FOR RESPONDENTS:

JOSHUA J. HUDSON, ESQ.

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

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EXHIBITS

NO	DESCRIPTION	ID	EVIDENCE

(No Exhibits Were Presented During This Hearing)

THE COURT: The first case up here is Blackstone and Chase and Margaret Durham Living Trust and, I think, there's two different cases kind of swirling around here. Let me pull those files up, if you'll just bear with me a moment.

(Pause)

THE COURT: All right. I believe there's a motion to dismiss an appeal from magistrate's court.

MS. DAVIS: Yes, sir.

THE COURT: So I'm not sure ---

MR. HUDSON: Well, actually, Your Honor, if the appeal's listed first, I'm certainly happy to let ---

THE COURT: Right. Let's do the appeal first because I think that'll give me a good background I need. Yes.

MS. DAVIS: Your Honor, opposing counsel. May it please the Court? What we're here today on the notice of intent to appeal and the amended notice of intent to appeal is really limited in scope to just lack of notice for a defective service of process as well as challenging the constitutionality of Title 37, Chapter 27, section 30. It's not an effective or the most reasonably calculated means to provide sufficient notice to tenants under the circumstances.

We have federal case law, Green, that have -- that have analyzed our statute comparatively to another state statute, very similar. There's a lot of problems with the

statute in that magistrate judges are rubber-stamping applications for writ of ejectment.

So what's happening is we're seeing overall a lack of due process. And that happened here with my clients. So we have a constitutional issue as to a matter of the statute being constitutional in terms of many guidelines and providing reasonable notice to apprize parties for the opportunity to be heard under the constitutional rights of due process.

THE COURT: And ---

MS. DAVIS: The other ---

THE COURT: I'm sorry. Which particular statute are you ...

MS. DAVIS: It is Title 27, Chapter 37-30.

THE COURT: The whole chapter?

MS. DAVIS: The entire chapter.

THE COURT: Okay.

MS. DAVIS: (A) through (C).

THE COURT: So what section ---

MS. DAVIS: (A) is the only section that applies in this case because my clients never abandoned the property. So (B) and (C) don't apply under those circumstances. (A) would be the proper ...

The other thing about that statute, Your Honor, is that it incorporates Rule 4 and 5 of the South Carolina Rules of

Civil Procedure, which dictate the method of manner of service of process for writ of ejectments. So when you know that the tenant is represented by counsel, then it's the opposing party's responsibility who's applying for the writ of ejectment, the landlord's responsibility to properly inform the court in summary judgment of counsel representing the tenant.

I'd engaged in settlement discussions with Robert Merting, opposing counsel, Robert Merting in September. We had been in ongoing discussions.

Later on co-counsel, Josh Hudson, was brought into the picture. Josh Hudson, opposing counsel, Josh Hudson then filed for an application, writ of ejectment, however, none of those pleadings were served to me as was required by Rule 4, Rule 5 and Rule 4.2 of the South Carolina Rules of Professional Conduct when you know the opposing party is represented by counsel. Rule 5 also expresses the same, the same principal.

I discovered on December 8 about this writ of ejectment without any notice at all from opposing counsel. I was able to file a preliminary injunction against summary court. I was able to file a notice of intent to appeal the following Monday on the 11th or 12th, I believe. And then I filed a declaratory complaint for relief that following 12th, if I'm not mistaken.

So I never received notice. The landlord's agent through opposing counsel had full knowledge that the tenant has always been represented by me. That has not changed. So that is the second element when the notice of intent to appeal is defective service of process due to improper service of process when you know the opposing party is represented by counsel.

Those are really the only two issues on appeal, the constitutionality of the statute and then, second, defective service of process in violation of Rule 4 and 5 of the South Carolina Rules of Civil Procedure, especially when you're dealing with businesses and authorized agents to receive pleadings for businesses.

Rule 5 then goes to discuss about when an attorney represents a client, you are to serve the pleadings on that attorney or that client. And then Rule 4.2 of the South Carolina Rules of Professional Conduct prohibit sending notices, pleadings and so forth directly to your client when you know that client is represented by counsel without that counsel's consent. I've never consented that anyone should serve any pleadings directly on my client without my approval. And that's in essence the issue.

The third aspect, the only thing of record to really discuss was that Judge Duckett did, in fact, say that the eviction was illegal in violation of South Carolina law.

However, there is -- she had transposed the South Carolina Residential Landlord Tenant Act statute as opposed to the relevant statutes, which would be Title -- again, Title 27, Chapters 33, Chapters 37 -- Chapters 35, Chapters 37 and Chapters 39. Those are all the chapters that apply to commercial leases.

So her principle of law was sound. It's just that you would have to substitute kind of the statutes from Chapter 40, the South Carolina Residential Landlord Tenant Act with the corollary statutes that provide and present the same principle.

THE COURT: All right.

MS. DAVIS: Thank you, Your Honor.

MR. HUDSON: Good afternoon, Your Honor. Josh Hudson here for the Plaintiff and/or Defendant, I guess, depending on which action. But we represent Margaret H. Durham Living Trust, who is the landlord in this landlord tenant dispute.

First of all let me mention regarding Judge Duckett in magistrate's court, she made no rulings when we were there. We were there on a preliminary injunction motion made by the tenant. And the tenant gave its side of the story and then we moved to remove this to circuit court. We made no argument. And so she -- there were no rulings given.

She may have heard the tenant's side of the story and said, well, that's not allowed or whatever, but, there

again, there was -- there was no -- no orders issued.

The reason we removed this is the tenant filed three separate pleadings. One was the appeal of the writ of ejectment. One was the motion for preliminary injunction, which, again, we've asked for removal, but it's not yet made its way here, and a declaratory judgment action. All of these actions are alleging essentially the same thing.

Ideally what we'd like to do today is clean this thing up. What I'm confused about is in the appeal of the writ of ejectment, I'm confused as to what the tenant wants because I've never heard them say they want to get back in the property.

I think this is a landlord tenant dispute about damages. It needs to be consolidated into one action. We need to have a discovery period and then settle it that way, whether through settlement or through trial. But I'm not exactly sure what's going to be accomplished.

Certainly we dispute that we did anything wrong with the eviction, but I'm not exactly sure what a -- what an appeal and going back to magistrate's court is going to accomplish when what we really need to do is have an action here in circuit court where the tenant can give us a comprehensible pleading as to what exactly it wants because I'm, you know, there are pages and pages of pleadings here and I'm -- I don't think that the causes of action are done

appropriately because the prayers for relief are different than what's being alleged in the actual pleadings.

And so one of the things we've asked for in the next motion to be heard is that, you know, in the event that the declaratory judgment action goes forward, and is not dismissed, that we get a more definite statement of what it is we're responding to because, quite frankly, we aren't real sure.

There's -- they're alleging damages, we've got damages. There's certainly a lot of factual issues that have to be addressed. There's a lot of witnesses here that are going to have to be deposed or in some way interviewed. So there's a whole lot of discovery that has to take place. And I think for the Court's efficiency -- and certainly my assumption is the Court's not willing to try this thing at a fifteen minute motion hearing today.

But we need to -- we need to get this thing better organized, have a pleading that's, again, comprehensible. We will respond to that with our counterclaims, and we'll move forward in the appropriate manner.

The other issue that we've got -- I'm kind of skipping ahead, it's all the same to the parties here, is that in the pleadings the appeal is just the landlord and tenant. The preliminary injunction is just the landlord and tenant. The declaratory judgment action lists a whole lot of defendants

that have nothing to do with this.

And so one of the things that we put in our motion to dismiss, in the event that the Court doesn't dismiss the Dec Action, that we at least clean it up to the parties that are -- that are parties to the lease, which are Blackstone and Chase and the Margaret H. Durham Living Trust.

There's a lot of allegations against people in the pleadings that is -- it specifically said in the pleadings that those people are agents of the landlord. There's no allegations that those people did something outside of the scope of their -- their agency with the landlord.

So at the end of the day what -- Your Honor, what we'd like to do, and I think it would be best from an efficiency standpoint, is to consolidate these actions and move forward with some discovery. Unless Ms. Davis has some reason that we go back to magistrate's court or we continue arguing this eviction issue, I just don't -- I think we're past that at this point. And I would -- I would ask for her response on that. Thank you, Judge.

THE COURT: Yeah.

MS. DAVIS: Your Honor, first of all, what we're addressing right now at the moment is the notice of intent to appeal and what the issues of record related to that. So primarily most of what opposing counsel just talked to related to other things that we are not at this point

discussing.

What is at issue right now is what is on the record from Gantt Summary Court related to the notice of intent to appeal? I filed a preliminary injunction before the Gantt Summary Court. Opposing counsel made an oral motion on January 29th to remove the ruling before this Court on that hearing. Well, preliminary injunction is not before this Court.

Therefore, on February 2nd I then filed a preliminary injunction for this Court because the reason for preliminary junction in injunctive relief is that the opposing counsel, the landlord has forcibly locked out my client. All of my client's ---

THE COURT: All right.

MS. DAVIS: --- personal property ---

THE COURT: Let me stop you there. Well, what do you ultimately want ---

MS. DAVIS: We want our personal property out. We want that. We need that to prepare our defense or our -- for our lawsuit. All of our business records are still within their possession. All of the personal property is still within their possession since July 28th of 2017.

They locked out my client. The landlord locked out my client long before the application for the writ of ejectment was filed on October 16th of 2017.

THE COURT: Can they get their stuff?

MR. HUDSON: Your Honor, by their own pleadings they've declared that they're insolvent. And we've got a consent order for damages. So we'd love to give it back, but there's got to be a substantial bond put on it. By their own admission, the stuff, they say it's worth ---

THE COURT: I was just ---

MS. DAVIS: Objection, Your Honor.

THE COURT: I was just seeing if something could be worked out, but I can tell that's not going to happen. But, anyway, so I guess I'm going to hear -- I'll hear from you. Any response to what he said?

MS. DAVIS: Your Honor, in order for them to hold my client's property, they would have had to have filed a writ of distraint. And that is Title 27, Chapter 39. And that outlines the proper procedure for withholding a tenant's personal property.

And there's also provisions in there that when third parties have an improperty [sic] interest -- or a property interest in property on the premises that is within the sole, exclusive dominion and control, and possession of the landlord has been since -- since July 28th, then they are not, I mean, that has to be released back to third party.

We've got TimePayment Corporation, which is one of our vendors, who has a collateral in the barber chairs that are

in possession right now that we can't get that is causing my client to have to default on another contract unrelated to this case. So we've got third parties that have an interest.

We have another vendor that has displays that doesn't belong to Blackstone and Chase that we have to return. So there are third parties that also have an interest in the property located within the premises that is within the sole, exclusive dominion control, possession, wrongfully so, without the landlord ever filing for a writ of distraint or going through the proper procedures regarding doing anything or holding my client's property to sell it to recoup.

You can't -- what opposing counsel is trying to do is accelerate a trifecta of landlord remedies. They're trying to accelerate the loan. They've locked out my tenant. They've locked out my client. So they've got full possession. Accelerate the loan and hold all my tenant's -- all my client's property. At the same time, such a thing of having a trifecta of both landlord remedies is unheard of and unconstitutional, not to mention unsettled law under Gentry.

So we've got different things going on for the purpose of the notice of intent to appeal is to just dismiss their action. It's defective for service of process. It's in violation of my client's constitutional rights to due

process. It needs to be dismissed. It's defective.

It should have never been brought in magistrate court because the amount in controversy is far over seventy-five hundred dollars ($7500.00). The only reason it was brought was to try to attempt a feigned attempt to cure an illegal eviction that had already occurred months prior on July 28th.

Forceful entry and detainer is the intentional dispossession to permanently deprive the other of that property, which the landlord engaged in by changing the locks without providing a key to my clients.

THE COURT: Okay. All right. Anything else on the appeal issue? Let's talk about that. I'm obviously going to have to wade through all this, and I'm not sure that any judge is brilliant enough to really figure out a good solution to this, but I'm going to try. So, anyway.

I think, I mean, I've got all the information on the appeal, but I'm going to have to look at that. I don't want to cut anybody off, but I think that I've got plenty a handle on the appeal issues now. So, I mean, anything else you need as far as the appeal goes?

MS. DAVIS: The only other aspect as far as the declaratory complaint, it's not a lawsuit, Your Honor. It's really a preliminary issue if you boil it down to two things. One, was there ---

THE COURT: All right. This is his motion to dismiss, right?

MS. DAVIS: Right.

THE COURT: All right. Let's hear from him first since that's ---

MS. DAVIS: Yes, Your Honor.

THE COURT: It's his motion to dismiss, right? Am I correct? I'm ---

MR. HUDSON: That's correct, Your Honor.

THE COURT: --- really confused at this point, but I'll be glad to hear from you.

MR. HUDSON: Thanks, Judge.

THE COURT: It's been a long week.

MR. HUDSON: So essentially our motion to dismiss, at least at the outset, is -- because there's these other pleadings that have been filed, you know, alleging the same things, trying to get the same end result, which is they claim they've been damaged, we claim we've been damaged, is that this -- it's not the appropriate place for a declaratory judgment action because under the -- under the law of South Carolina declaratory judgment is not -- it's not applicable or necessary when it wouldn't terminate the uncertainty or the controversy giving rise to the proceeding. It's not going to resolve anything here.

We've got -- again, what we have here are claimed

damages on both sides. It needs to be brought forth in that way where we can have sufficient discovery and we can try to resolve it in that regard. I would -- and all of this is in our -- in the filing in our memorandum in support of our motion.

But I think beyond that, and probably more importantly is that there's a lot of defendants that have been named here that when you look at the pleadings have no contact as individuals or as entities and aren't parties to the contract, the lease -- the commercial lease agreement that we're about. There's even a tenant who happens to be the daughter of one of the -- one of the landlord's agents who's been named. She's got nothing to do with this at all.

And they're -- one of the landlord's agents, Jimmy Durham, owns other entities. They're named just because he owns them. And there's no allegations in the pleadings that those entities have anything to do with this contract.

And so we would, you know, in the event that the Court doesn't dismiss the Dec Action outright, we would certainly ask that all of the defendants, with the exception of the landlord, which is the Margaret H. Durham Living Trust, be dismissed.

And then finally what we're asking for that -- in the event that this pleading is allowed to go forward, that we get a more definite statement of what it is they want

because if you look at the -- at what's been filed, it's -- there are a number of potential causes of action in it, but they're not listed as causes of action.

They -- it just kind of goes through a synopsis of what the drafter thinks we did wrong, but doesn't list in the -- as causes of action doesn't list a remedy or a demand based on those causes of action. So we're not exactly sure what we're supposed to respond to.

Again, I think a Dec Action is improper here. I think this should have been brought as a complaint for damages. I don't know that the Court could necessarily order that it be rewritten, but it could certainly dismiss and she could refile. But we've got to know, you know, part of the -- the impetus for the motion to dismiss is. We've got to know what exactly we're responding to. And it's hard to tell from the way this thing is drafted.

So, again, I would reiterate, like I said before, that all this be consolidated into one action. I still didn't hear Ms. Davis say what exactly they want except for the, I guess, having the eviction overturned, which that still doesn't really get us anywhere. I mean, we'd certainly be willing to give them their property back for this whole thing to go away. I don't think they're willing to do that, but if she'll say that, we'll take care of it today.

THE COURT: Well, that's something y'all can talk

outside. All right. Response to motion to dismiss.

MS. DAVIS: Your Honor, the purpose of a declaratory -- a complaint for declaratory relief, it is not a cause of action like filing a lawsuit, it is for the purpose to determine uncertainty of legal rights under the circumstances.

So we have two things going on, two main -- you can take my entire complaint of declaratory relief and boil it down to two essential issues. One, did an unlawful, forcible entry and detainer occur under the circumstances? Two, is the lease valid?

And there's different ways -- laws of how the lease is invalid.

THE COURT: Well, but then again, according to what he said there, okay, say I answer those questions, what do you do with it then? You file an action ---

MS. DAVIS: Well, the problem is that the lease is invalidated whether ---

THE COURT: But ---

MS. DAVIS: --- in full ---

THE COURT: But that becomes an advisory order then for you to use in a subsequent action. So, I mean, ---

MS. DAVIS: No, it'll change the landlord/tenant relationship. So instead -- if the lease becomes invalidated, and I think there are very strong grounds for

invalidating the lease, then what happens is the nature of the landlord/tenant relationship changes where it is now you're dealing with Statute of Frauds, can't be longer than a year. And then after a year, does it renew for another year? Or does it renew month to month? Or is it at will tenancy?

So when you -- you've got case law, which I've outlined, that deal with defective leases. And there is a genuine issue as to if the lease is defective and if the lease is invalid, then what is the status of the tenant? Month to month? At will? Because then that changes the way that landlord/tenant law applies because now you're dealing with statutory tenancy principles and not the lease.

So there is a question before filing a lawsuit, if I'm going to file and say, well, this is invalid, but then we're now running into, okay, well, then what are we? What is this? I mean, we don't know -- my client -- we don't know what our rights are. It's a factual ---

THE COURT: So you want -- you want this Court to become a sounding board for figuring out what everybody's claims are before a lawsuit, and then you file a lawsuit based on whatever the declaratory judgment action ---

MS. DAVIS: We want to know the validity of the lease. I mean, there's also some problems in the lease like ---

THE COURT: But isn't that what a lawsuit's for outside

of a declaratory ---

MS. DAVIS: Not -- not necessarily. If you can determine the status of the lease and the validity of the lease and if the party's rights are uncertain under that lease, that is something at the Court's discretion, obviously. The Court has that discretion. But that is something the Court can resolve so we eliminate more time in litigation -- it streamlines our litigation ---

THE COURT: See, I think it just -- I just -- see, I guess I've been doing this a little longer. That's just going to triple the litigation in this courtroom if I accept your premise, I think.

MS. DAVIS: Well, it is at your ---

THE COURT: It adds a whole nother step to everybody, you know, why not just take it -- it gives you two bites at the apple is what it does.

MS. DAVIS: It -- from where I stand, it's more of trying to determine certainty as to where we stand because our position is that we don't believe that the lease is valid. And if the lease is not valid, then it does change the nature of the landlord/tenant relationship because there is a landlord/tenant relationship.

A lease is like a dichotomous thing. It is both a lease and an estate for the transfer of land. The estate transfer of land is governed by statutory principles unless

otherwise agreed is allowed by the statute, a lease as a contract.

So there is great deal of uncertainty as to what are we dealing with for me to write a complaint as to, okay, well, we're an at will tenant? Are we a month to month tenant? Because those are questions for either the trier of fact, whether it's a bench trial or a jury trial, those are questions of fact.

I see getting that out of the way, understanding, so we know what my client's rights are, before we actually file a complaint. There are problematics -- things with the lease. There's an arbitration clause that's compounded with the landlord's ability to reenter and repossess the lease with or without legal process.

And our position is that's going to render the whole -- that will render lease against -- void against public policy because that affords the tenant no opportunity to be heard to go through the judicial process as required by law. So one of the main disputes over all of this is whether a commercial lease as drafted can circumvent the statutory requirement for eviction under Title 27, Chapter 37 10.

So, yes, there's a great deal of uncertainty. This isn't us trying to take two bites out of the apple. We really need to know where we stand as a matter of the validity of this contract that's related to the forcible

entry and detainer.

It all flows from the landlord acting on reliance of this lease to repossess the premises without resorting to the judicial process. And that is directly from the lease. So there's a great deal of uncertainty. That essential critical issue will terminate and resolve a lot of uncertainty related to those items.

Now, the other thing is just -- a declaratory complaint is not required to terminate the entire controversy. It's very liberally construed. It's remedial relief to provide and declare rights for the parties under a contract such as this. So it's meant -- but it is at the Court's discretion. It is at your discretion.

I do think that this would be a valuable use of time to clarify what the legal rights are before we move on with litigation and go from there.

THE COURT: All right.

MS. DAVIS: As far as what we are wanting, we are wanting our personal property, our business records so we can properly prepare for litigation, which we've had to scramble through other third parties and pull together what we can get. But all of our business records are in the sole possession. We've stated that multiple times. We want our personal property. That's what we want.

The declaratory relief is asking for essentially the

forcible entry, the detainer issue which flows from the lease. And the lease has crossed out dates, it's vague, it's ambiguous, it doesn't have page numbers, it's missing sections, it's ---

THE COURT: Sounds like every other lease I've ever dealt with in this courtroom.

MS. DAVIS: I mean, you know, it's ---

THE COURT: Because the ones that are not like that don't come in here.

MS. DAVIS: Yeah. So, you know, ---

THE COURT: And I understand your point. I don't -- I don't, you know, I'll look at that as well.

MS. DAVIS: So ---

THE COURT: Anything else from you, Mr. Hudson?

MR. HUDSON: No, Your Honor. Thank you.

THE COURT: All right. Anything else? I, obviously, have to look at all this and probably take some medication and -- just kidding. All right. Well, let me -- I'll take a look at this, and I'll let y'all know what I -- what I come up with.

MR. HUDSON: Thank you, Your Honor.

MS. DAVIS: I do have one question for you, Your Honor.

THE COURT: All right.

MS. DAVIS: Based on, excuse me, ---

THE COURT: Now, this cannot be an advisory answer.

It's not a ---

MS. DAVIS: No.

THE COURT: Okay.

MS. DAVIS: Now, based on the fact that the preliminary injunction was not ruled in Gantt's Court, and that would have been brought before this Court, ---

THE COURT: It's not before me ---

MS. DAVIS: --- how do you want to address that?

THE COURT: I mean, it's not -- as far as, I mean, I don't have anything about a motion for injunction ---

MS. DAVIS: I'm sorry?

THE COURT: I said I have not heard a motion for injunction.

MS. DAVIS: Okay. So we don't ---

THE COURT: That was not on this roster.

MS. DAVIS: Okay. So it's not on the roster, ---

THE COURT: Right.

MS. DAVIS: --- but will it be on the roster, perhaps, at some point?

THE COURT: That's something that Steve ---

MS. DAVIS: Okay. Yeah, that's just one thing I just probably want clarification because the oral -- opposing counsel made the oral motion to remove. So the determination in the preliminary injunction before the Gantt Summary Court was never ruled on. So I guess depending on

how you rule on the notice of intent to appeal, either the Gantt Summary Court can rule on that. I don't want to create confusion.

THE COURT: Right. I'll look at that and see, but -- and then if it's something that needs to still be addressed after my ruling, then y'all will just have to make sure it gets scheduled.

MS. DAVIS: Okay.

THE COURT: All right.

MS. DAVIS: Thank you.

THE COURT: I mean, that takes care of that, doesn't it?

MS. DAVIS: Excuse me?

THE COURT: I said that would take care of that, doesn't it?

MS. DAVIS: What ---

THE COURT: Once I've ruled -- and I'll be real -- I'll give y'all an answer as soon as possible. And then if y'all still need a preliminary injunction hearing, then y'all can either get it scheduled, I guess, it's been removed up here or if it's in Gantt -- wherever it is ---

MS. DAVIS: I mean, it's in Gantt at the moment.

THE COURT: All right. Well, y'all will just have to figure that out.

MS. DAVIS: So, I mean, if that's -- if this turns the

case back to Gantt, then I'll need to withdraw the preliminary injunction before this Court and just let Gantt Summary ---

THE COURT: All right.

MS. DAVIS: --- Court handle it.

THE COURT: All right.

MS. DAVIS: So I just wanted to make sure to clarify whether ---

THE COURT: Okay.

MS. DAVIS: --- what to do.

THE COURT: All right.

MR. HUDSON: Thank you, Judge.

THE COURT: Thanks.

MS. DAVIS: Thank you, Your Honor.

(Hearing Ended at 2:38 pm)

(End of Requested Transcript of Record)

Certificate of Reporter

I, the undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Greenville County, South Carolina, on the 8th day of February 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

December 18, 2018

Susan W. Hudgins

Circuit Court Reporter

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	COURT OF COMMON PLEAS 2017-CP-23-07837
BLACKSTONE AND CHASE, LLC; MARK T. THOMAS; TENSLEY E. THOMAS; and BRADLEY W. KERR, PLAINTIFFS, vs. MARGARET H. DURHAM LIVING TRUST; MULTIPLEX SYSTEMS, INC.; ICE SINK ENGINEERING AND MANUFACTURING COMPANY, LLC; EZ GLIDE ESQ, LLC; MARGARET H. DURHAM; JAMES W. DURHAM; HELEN W. SHOCKLEY; and TAMALA D. CRANE, DEFENDANTS.	TRANSCRIPT OF RECORD

April 23, 2018
Greenville, South Carolina

B E F O R E:

THE HONORABLE ROBIN B. STILWELL, JUDGE

A P P E A R A N C E S:

DEBORAH DICKSON DAVIS, ESQ.
Attorney for the Plaintiffs

JOSHUA JENNINGS HUDSON, ESQ.
ROBERT KARL MERTING, ESQ.
Attorney for the Defendants

CHERYL A. SMITH
Circuit Court Reporter

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EXHIBITS

NO	DESCRIPTION	ID	EVD

There were no exhibits introduced.

P R O C E E D I N G S

(WHEREUPON, proceedings commenced at 11:07 a.m.)

THE COURT: The next case up is Blackstone and Chase, LLC, vs. Margaret H. Durham Living Trust. And that is Case Number 2017-CP-23-7837.

This would appear to be a motion to dismiss; am I correct?

MR. HUDSON: That's correct, Your Honor.

THE COURT: Okay. I'll be happy to hear from you.

MR. HUDSON: Thank you, Judge.

Your Honor, Josh Hudson and Robert Merting on behalf of the defendants, all of the defendants that have been named in the amended complaint before you.

MS. DAVIS: Your Honor, Deborah Davis representing the plaintiff Blackstone and Chase, Mark Thomas, Tensley E. Thomas and Bradley Kerr.

THE COURT: Okay. Thank you. Appreciate it.

MR. HUDSON: Your Honor, may it please the Court. I just want to give you a little bit of procedural background. We have been before the Court previously on a motion to dismiss. There were actually three filings, one an appeal from Magistrates Court, a preliminary injunction motion -- or preliminary injunction complaint, and then a declaratory judgment complaint.

Judge Gravely entered an order basically

consolidating and dismissing the two -- the appeal was dismissed, the preliminary injunction was dismissed, and the declaratory judgment action was dismissed with leave to refile, which is what was done here. And this motion to dismiss is what follows.

This is -- the long and the short of this, this is a landlord-tenant dispute. And one of the things that the judge, Judge Gravely said in his February 28th order was the Court does not believe that 48 pages for a landlord-tenant dispute falls within Rule 8 and hopes that this deficiency will be remedied with the amended complaint. The Court further noted that it's difficult, if not impossible, for the defendant/respondents to adequately respond to such a pleading.

What followed, Judge, is this. This is what was filed after that order. It is 33 pages containing 313 paragraphs, multiple pages of subparagraphs, 22 causes of action, 17 prayers for relief supported by 648 pages of exhibits. It includes claims for causes of action unknown in South Carolina, claims for causes of action already dismissed by the previous order, that would be the declaratory judgment, claims for causes of action blatantly misapplied, incomplete claims for various causes of action. The plaintiff, in the amended complaint, recycles Paragraph Numbers 182 to 198, and then basically

did exactly what they were ordered not to do the last time, which is to make this thing understandable.

So the initial motion before you is that we dismiss it outright. And if you want to take this in stages, I'm certainly happy to. I can give you all alternatives as well before Ms. Davis speaks. I'm happy to do whatever the Court ---

THE COURT: Yeah. Just give me the motion to dismiss and then give me the alternative as well, because some of those alternatives, after you articulate them on the record, maybe could be potentially acceptable to the plaintiff.

MR. HUDSON: Sure. Thank you, Judge.

So the first thing we would request in the event the complaint is not dismissed outright is that the defendants be limited to just the landlord. What's been alleged here is the plaintiffs have named entities that one of the defendants, Jimmy Durham, James Durham owns that have actually nothing to do with this situation at all, and they've named individuals who are acting in the scope of their agency with the landlord in doing the things that they've alleged to have done.

Everywhere that they're mentioned in the complaint, it states that they're acting in the scope of their employment with the landlord. There are no separate and

distinct allegations against any of these defendants. And so we would ask that they all be dismissed with the exception of the Margaret H. Durham Living Trust, which is the landlord in the lease agreement with the plaintiffs.

So first and foremost, if -- again, if this -- if the whole complaint is not dismissed, we would ask that, if nothing else, we clean this thing up to have the correct defendant, which would be the landlord.

In the event that the Court does not dismiss the complaint outright, we would, once again, ask that the plaintiffs amend their complaint to provide a more definite statement. For lack of a better term, the amended complaint is as unreadable as the initial complaint.

You know, Ms. Davis has a duty under Rule 11 to understand and bring about claims that she understands and that makes sense, and I think it's clear when you look at the amended complaint that she has not done that. So I think after the defendants are cleaned up, I think that we need to clean up the complaint outright. And I can help her do that by telling some of the causes of action that should probably not be included.

Intentional interference with prospective economic relations is not a recognized cause of action in South Carolina, so we would ask that that one be dismissed.

One of the causes of action that, interestingly, was not in the first complaint is racial discrimination. But what is cited in the complaint applies to establishments which serve the public in a place of accommodation. What that statute is there for would be for the tenant that was operating within the property that they were leasing. This rule does not apply to the landlord, and it certainly doesn't apply to a landlord of a commercial lease who has no other tenants. There's no -- this landlord has no other property. This is the only one. This particular code just, frankly, does not apply in this matter. It would apply if the tenant, which is a barbershop, if they were discriminating, it would apply. It does not apply to the landlord.

Civil conspiracy was alleged, but, again, first of all, civil conspiracy requires the acts of two or more people. All of the defendants that are -- all the people that are named in the complaint, it states in the complaint that they're acting in the capacity as employees of the landlord.

Second of all, there has to be special damages alleged, and nowhere in the complaint are there special damages. The only -- all of the damages are part and parcel of the other numerous causes of action.

Intentional infliction of emotional distress requires

a pleading of extreme and outrageous conduct. We would submit that there is no extreme and outrageous conduct here. There's, again, a dispute between a landlord and tenant where the tenant didn't pay its rent, landlord kicked them out. It's, quite frankly, as simple as that.

The negligent infliction of emotional distress, if you harken back to your law school days, this is the one where there has to be basically a bystander who witnesses some awful event and incurs emotional distress because of it. Without further comment, that should be dismissed.

Unfair trade practices, this is an action between two private parties, a landlord who owns one property, and the tenant who was in that property and defaulted on the lease. Certainly not anything that affects the public interest and would require that as a discernible cause of action.

And I think I missed one of the earlier ones. Declaratory relief was also pled, and that one was dismissed in Judge Gravely's previous order. So whether it be collateral estoppel or otherwise, that one should not go forward.

And finally, you know, I hate having to do this, but we're here, again, at my clients' expense. We would ask for sanctions under Rule 11, some sort of attorneys fees be compensated for having to rehash this again for the

second time. We are -- you know, this thing's been going on for months now, and we're no closer to getting anywhere towards discovery than we were when it started. So, unfortunately, we would ask that, under Rule 11, that the plaintiffs' attorney be sanctioned and that attorneys fees be provided. We can certainly provide an affidavit if that would help if the Court were inclined to do so.

You know, overall, Judge, we would just -- if nothing else, this thing needs to be cleaned up so we can defend it. I mean, there are -- buried in this thing, there are some claims that could potentially be argued, but we have to have the ability to know what they're asking for with a cohesive statement that we can respond to and then get into some discovery and figure out whether there is anything there. And so for that, Your Honor, we would ask that the Court rule on all these motions today.

Thank you.

THE COURT: Ms. Davis.

MS. DAVIS: Your Honor, may it please the Court.

THE COURT: Yes, ma'am.

MS. DAVIS: First of all, I'd like to just start off and address the issue of sanctions. Anytime you're dealing with a Rule 11 sanction or a South Carolina frivolous proceedings ---

THE COURT: You don't have to worry about that one.

You can move on.

MS. DAVIS: Okay. I've received no notice other than the motions themselves. I believe this could have been resolved by a phone call rather than having to bring this before the Court in that respect.

First of all, the motion to dismiss is improper in its format. A 12(b)(6) motion is a drastic remedy. You're essentially saying that the plaintiff lacks any relief whatsoever, any ground, legal grounds for relief whatsoever. And opposing counsel has just stated that, yeah, there are some claims to be argued. So by having said that, then that completely defeats the purpose of doing a 12(b)(6) motion. What really needs to happen here is the motion to strike causes of action or a motion for a more definite statement, which we've already gone through this.

Now, just to give some precontext, there is no intent here to injure, harass, delay or abuse the legal process. This entire dispute, the litigation began when the writ of ejectment was filed without providing notice to the plaintiffs. I myself discovered on December 8th, before the writ of ejectment was effective the following Tuesday and had to file a preliminary injunction before the Cantt Summary Court. I filed the notice of intent to appeal in Circuit Court and then a complaint for declaratory relief.

A lot of this was done very quickly, under pressure to protect my clients' rights because we received no notice. That is how this all started.

So with that in mind in context, Judge Gravely took what was going on, said, okay, basically, we're wiping the slate clean. We never intended the complaint for declaratory relief to be a formal lawsuit with causes of action and elements. That was never our intent.

In my response to the defendant's memorandum in support of their motion to dismiss, I requested to the Court to avoid confusion and further litigation over this issue. I hereby request the Court to withdraw and retract the complaint for declaratory relief in its entirety, have the amended complaint replace that document in its entirety, exhibits and all.

The exhibits related to this is just a demonstration. We have had no access to the business records, to the property. Everything, all my clients' personal property, business records, in order to prepare for litigation are within the sole possession, control and dominion of the landlord and has been since July 23, 2017. And during this process, opposing counsel also submitted an affidavit by James Durham and a receipt made out to Helen Durham that they did, in fact, lock out my client. They wholly admitted to this fact.

So in light of the circumstances, the complaint for declaratory relief was never intended to be a formal lawsuit, and never meant to provide that confusion to the Court. It was not recognized as a complaint for declaratory relief.

So in that vein, I hereby request to withdraw that document in that light and have the formal amended complaint. That is the actually formal lawsuit.

And within that context, the complaint for declaratory relief, the original one, was within the context of the pending writ of ejectment. We had legal issues. We had question to ascertain our clients' rights, the status of landlord dispute and so forth.

In the new amended complaint, the issue is consolidated, and it really boils down to one thing: Did the opposing parties commit forcible entry and detainer by trying to enforce an unenforceable provision in the lease that says the landlord, with or without legal process, may repossess the premises? And that is really the crux right there.

We are staving off litigation from third parties that have property interests that is currently within the sole possession, control and dominion of the landlord. I've already settled with American Express. I've got other creditors calling me. I've got Time Payment which has a

collateral interest, a security interest in the collateral of the barber chairs currently within the landlord's possession. We are trying to stave off litigation. We can't even contact and notify all vendors because all that information, personal, the business records are within the landlord's possession. So we have been at a very disadvantage from the very beginning.

Now, in response to the issues, that really should have been a motion to strike the causes of action that were brought up. Prospective economic relations, I mean, that's like saying a dog isn't a canine. Okay. I'm more than happy, that's a simple phone call that could have been made to amend that typo from "intentional interference with prospective economic relations" and change it to "intentional interference with prospective contractual relations."

The elements tracking that cause of action track the exact. That is a valid cause of action in South Carolina, and that's already been outlined in both my responses to the motion to dismiss and the memorandum. With supporting case law, it is a recognized element of action. That argument is moot.

As far as the racial discrimination goes, it is not a -- it will not defeat a complaint if there are defects that can be amended. A 12(b)(6) motion is drastic.

Typically, we are asking and requesting leave to amend that portion of the complaint, really to file it under 1981 and 1983 of the Civil Rights Act of 1964.

The facts in the complaint do support the racial animus, do support that we have minority, do support not only the making and enforcing of contract, which is 1981, also -- and that doesn't matter about public accommodations. So we do need to address and address and amend that. And it's really -- and if the Court finds that the statutory in South Carolina against the discrimination for public accommodations isn't applicable, I would argue that it creates an implied duty.

Now, one thing that opposing counsel wants to say is that the landlord, it applies only to the plaintiffs running a shop. No. It applies to a building.

So two-thirds of this building, one's a yoga studio on the second floor, first floor is a salon. Margaret Durham and James Durham reside on the third floor. In order to operate these two business, two-thirds of the business -- as a business, the lease refers to this building as a project development. You've got to get permits in city of occupancy. So that statute says a business license or permits, so it applies.

And also, that statute, there creates an implied duty that no one must suffer from racial discrimination in

places of public accommodation. So if you forcibly enter and detain to seize the premises, you've then cut off the prominent African-American clientele of my clients' strong following. You've then cut off my clients' African-American employees. You've then cut off -- two of the members of Blackstone and Chase are African-American. Therein lies the discrimination for public accommodation.

When you shut down that business and you have racial animus supporting, and there's a history and there's a pattern related to it, it's premature at this point. We're going to have to take depositions, we've got employee, we've got other witnesses of instances of racial discrimination. You know, it's premature at this point. We haven't even gotten to discovery. But we have a reasonable belief with the limited resources we have without any of the business records and the witnesses I have been able to contact, that I have a reasonable belief to support that. And not just under public accommodations, but under the Civil Rights Act of 1964, 1981 and 1983.

So that -- on that issue, civil conspiracy, in Allegra, there is a dissent on the element of special damages, and it's a fairly recent one. So you've got the -- I think it's the Todd Bott [phonetic] standard on special damages, that if the pleading requirement for

civil conspiracy, there's also a federal case that's in my memorandum and so forth, the case law. I hereby challenge that special damages as an element to be pled with civil conspiracy is really a duplicative, legal technicality against a double bar of recovery of damages. We already know there's a double bar of recovery on damages when you plead inconsistently. Not -- I believe South Carolina law and the Todd Bott standard conflate the requirement for pleading with the double bar of recovery on damages.

So if the Court does not agree with overruling the Todd Bott standard, then in the alternative, the special damages I'm more than happy to amend and put in the word "special." More than happy to do that.

And where are the special damages? I have alleged to them in my request for preliminary injunction within the complaint itself. Not only are my clients deprived of their business, their personal property since July 26, 2017, but they cannot operate a barbershop anywhere. Anywhere. They're not just out of business in this one location. They're out of business, period. And not because they didn't have customers knocking on the door and employees coming on the door the next day trying to get in to serve customers. So that's your special damages.

So you can plead -- in the alternative -- if you've

got preliminary injunction to stop that so we can get our property back, in the alternative, I can plead for special damages for the inability to conduct a barbershop anywhere. And that is not pled anywhere else in the complaint. That specific damage, that specific allegation is nowhere. The only mention is the preliminary injunction.

So in the alternative, if the Court finds that I am to plead special damages, although I do think that's a legal technicality, that should be overruled. In the alternative, I will provide that and amend accordingly.

As to the intentional infliction of emotional distress, I've already outlined various examples throughout. We've got Helen Shockley coming onto the premises demanding rent in front of the employees and customers, embarrassing my clients on the floor in public during open hours. We've got James Durham telling people that my clients are out of business. That's trade slander.

My client is sitting right here, the financial backer. He's paying me today, he's paying the entire venture for Blackstone and Chase. He's the one that's paying for everything. Rent was never -- he's the one. He could pay the rent. He could cut the check. That didn't happen. This became such a hostile landlord-tenant

dispute.

And so when you've got intentional infliction of emotional distress, my clients are suffering from the racial animus that is displayed towards them when Helen Shockley repeatedly refuses to give them copies of the lease. I had to get a copy of the lease from the insurance agency when the opposing counsel sent in a copy of the lease to file a claim for damages. I mean, it goes on and on.

And not to mention in this cause of action says all paragraphs are here included that come before. That's slander. I mean, intentional infliction of emotional distress is a parasitic tort, so it relies upon usually another wrong. I've got plenty of those. So I feel that that is moot, unwarranted. I've got example after example.

Negligent infliction of emotional distress, well, if we really want to go back to law school ---

THE COURT: I don't want to go back to law school.

MS. DAVIS: Yeah. Neither do I.

THE COURT: You either want one or the other, right?

MS. DAVIS: I'm sorry?

THE COURT: You're going to want one or the other, right? One or the other cause of action, right?

MS. DAVIS: Right. And that -- your pleading -- and

this is just a case of pleading inconsistent. We don't know. Based on discovery, it's either going to be one or the other. So we don't know that at this point. We've got to take depositions. But once we do finalize that, get through discovery, one of those are going to go, right? That's common sense. I have no problems with that.

But as far as the legal matter for motion to dismiss at this time, which I think is premature, negligent infliction of emotional distress is not limited to just bystander. That is one aspect. You've got other long-standing aspects like with the morgue when they do something with the body and cadaver. You've got a long-standing history. For one example, Spaugh was a case that I cited to where a woman goes through a mental breakdown because she was negligently given directions to get back home. This is all South Carolina case law.

Negligent infliction of emotional distress in Kincaid, it is ---

THE COURT: You just move onto the next one, okay?

MS. DAVIS: So those -- the Unfair Trade Practices Act, under that, the opposing counsel's main argument is that this isn't a matter of public interest. However, Burbach tells us differently. When we're dealing with landlord-tenant disputes, we do not want tenant abuse. We

do not want landlords taking the law into their own hands. We do not want public disorder and mayhem and changing the locks on tenants without going to a magistrate court.

I think tenant abuse applies. The Margaret H. Durham Living Trust is not just a landlord over my client. She's a landlord over many clients. She's got many tenants. And if she's going to do this to my client -- and not only did she lock out my client on July 28, 2017, but also April 8, 2017. We've got repetition. You're capable of that, you're capable of doing that to your other tenants.

So yes, there is a public interest. This is against public policy. And tenant abuse is a matter of public policy. And we don't want to live in Greenville, South Carolina or South Carolina encouraging this behavior of landlords.

THE COURT: You're just getting kind of ahead of yourself. You're starting to make some impassioned jury arguments, and understand I am very dispassionate about the law, okay?

MS. DAVIS: Other then that, Your Honor, the declaratory relief, just to wrap that, like I said, it was not meant to be the new. It's wiping the slate clean to reevaluate in the context of a formal lawsuit in that respect. We're not trying to disobey or willful the judge -- the judge's instruction. From our perspective, Judge

Gravely was consolidating and cleaning up this case for us to start afresh.

Thank you, Your Honor.

THE COURT: Yes ma'am. Thank you. I appreciate that.

So let's talk about some of the causes of action, because I think there's some areas for agreement and some areas in which you don't agree. And I will say, to begin with, as I look at the pleadings, from a very technical perspective, and I don't think there's much wrong with the pleadings, but from a practical perspective, it lacks focus.

And I will tell you as a practical matter, and understand I see the world differently than lawyers do in a lot of instances, in the way the summons and complaint is couched right now, it's impossible to try because you have so many competing causes of action. And at some point in time, you're going to have to make elections. A lot of the causes of action really are subsumed in a breach of contract, and some of the other ones are -- I wouldn't necessarily characterize it as a shotgun approach, but some of them are really, really difficult to sustain when you actually get in front of a jury because of all of the things you have to prove.

So, you know, there are a couple of these that I'm

going to dismiss as a matter of consent because it seems like y'all have decided that, and some of the other ones, we'll talk through very lightly.

Now, I will tell you some of them I'm not going to dismiss at this stage at a 12(b)(6), but I will tell you that just knowing what I know and sitting where I sit and having a lot of experience with these cases, a lot of these are either going to go by the wayside by concession, at a mediation, or by function of a summary judgment motion, but those that remain are probably going to go away at directed verdict. So what I would suggest to you is that you really should take a look at this and focus on those that you think are important because it's going to make it so much easier to prosecute this case. All right? It really is. And you're going to spend less time, and your client's going to spend less money fighting over the little things.

So what I would suggest to you is determine what's important, what's really important in here and pick out a few causes of action that you think, first of all, will survive the litigation process, and secondly, that are important to your client and will affect the remedy that you want to affect. Okay?

So your first cause of action, if I'm not mistaken, Ms. Davis, you voluntarily withdrawn, which is the

declaratory judgment action. Am I correct?

MS. DAVIS: The original complaint with declaratory relief, to retract that pleading for the amended complaint to replace it in its entirety, Your Honor.

THE COURT: Okay. And I see -- well, in your first cause of action, Paragraph 86 ---

MS. DAVIS: Is the declaratory relief.

THE COURT: --- you still have that, right?

MS. DAVIS: Yes.

THE COURT: But you're saying -- and I may have misunderstood that you're not seeking declaratory relief now.

MS. DAVIS: Right. I mean, I will consent to withdrawing that pleading.

THE COURT: Okay, okay.

MS. DAVIS: And it may be more appropriate just really on motion for summary judgment or a partial motion for summary judgment at this point.

THE COURT: Well, I mean, let's deal with it now, okay, because I don't know that you have a basis for declaratory relief, and you just told me that you don't. So do you want to waste any more time with it?

MS. DAVIS: No. The -- I'm sorry, Your Honor. To avoid confusion, the basis is there is an uncertainty in the language of the lease, and that is the entire premise

as opposing counsel -- excuse me -- of opposing counsel ---

THE COURT: Isn't that part of your broader breach of contract? Because the jury ultimately will determine from the evidence what the terms of the contract are. So that "dec" action, you're not actually looking for them to decide this is what the contract means. You're looking to determine what the terms of the agreement were between the parties and them to enter some judgment ---

MS. DAVIS: Yes, Your Honor.

THE COURT: --- for a breach thereof. So you just don't need a declaratory judgment, right?

MS. DAVIS: Yeah. If it makes it simple, and I am all for whatever to be simplified, I'll be happy to amend and take that out. And then we'll just move on and ---

THE COURT: Okay. Well, this is -- you don't have to make that decision, okay, because that one I'm going to dismiss, okay? Because I think it's superfluous in what you're trying to achieve in this, also, based on everything you've told me, okay?

MS. DAVIS: Yes, Your Honor.

THE COURT: All right. And believe me, to some degree, I'm not doing that against you. I'm doing it for you. You really, you need to clean this up.

Okay. Now, your second one is your preliminary

permanent injunction. Are you still looking for injunctive relief?

MS. DAVIS: Yes, Your Honor.

THE COURT: Okay. Now, what was the effect of Judge Gravely's order? Did he deny the request for preliminary injunctive relief?

MS. DAVIS: No.

Now, in Judge Gravely's order, it wasn't to dismiss. We had a preliminary injunction also filed before the Circuit Court. But we are still in the same status quo. We don't have our business records in order so, you know, maybe look at our damages and adjust them accordingly, get our witness information. We are unable to prepare for litigation without the personal property, returning them to vendors, you know, other third-party interests that have issues that we need to resolve. So yes, that is still very viable.

THE COURT: Okay. All right. But have you been before the Court on a request for preliminary injunctive relief?

MS. DAVIS: No, Your Honor.

MR. HUDSON: No, Your Honor.

THE COURT: No? Okay. All right.

Okay. So we'll leave that in there. And I think that may more appropriately be an issue for discovery.

But at the 12(b)(6), I'm looking at everything in the light most favorable to the nonmoving party, okay? So I'm going to leave that one in there.

Forcible entry and detainer pursuant to 15-67-410. All right. Does that section allow for a private right of action?

MS. DAVIS: Yes, Your Honor.

THE COURT: Okay. All right. Inasmuch as it has and there's an allegation, I'll view it in the light most favorable to the nonmoving party. We'll leave that in.

Wrongful eviction, I see that. You've got that in there, and there's an underlying dispute regarding that wrongful eviction. Now, and that may be one that you want to keep, but you need to determine whether that has -- that really is a larger part of your breach of contract action, okay?

MS. DAVIS: Yes, Your Honor.

THE COURT: Claim and delivery, I presume your issue is that you -- that they collected rents through distraint and took possession of some of the belongings.

MS. DAVIS: To clarify, Your Honor, they have never filed for a writ of distraint ever.

THE COURT: Okay.

MS. DAVIS: And they have seized the possessions of my client since July 25th. We've had no access to my

clients' personal property.

THE COURT: Okay. So you're looking for the return of personal property.

MS. DAVIS: Yes, Your Honor.

THE COURT: Okay. Good enough.

All right. I understand the trespass. Do you need a trespass to personal property in addition to a trespass to real property? The question is, is the Court going to make a distinction ultimately, and is the jury going to make a distinction ultimately, and is there a legal distinction between the two? Does the State of South Carolina recognize a right of trespass as to personal property?

MS. DAVIS: Yes, Your Honor. It's possible the trespass to real property could -- there's also a question of whether the lease was enforceable whether in full or in part, but that's the breach of contract separate.

THE COURT: I've got you.

MS. DAVIS: And the wrongful eviction also ---

THE COURT: I've got you. And I want you to understand what I'm talking about. That's probably just gratuitous.

MS. DAVIS: Just do the wrongful eviction and not the ---

THE COURT: I'm not going to make you dismiss it,

okay? But if you get in front of a jury and you try to argue trespass to real property and personal property, they're not going to understand the distinction and probably the judge isn't going to do that anyway, all right? It's going to be trespass. Trespass. And your factual allegations in those two causes of action are, you know, virtually the same, right? They came into the property, they shouldn't have, they took the stuff.

MS. DAVIS: Just consolidate.

THE COURT: So you've got damages that flow from a trespass, and you also have damages that flow from a potential contract action, okay?

MS. DAVIS: Okay.

THE COURT: And I'm not going to tell you -- I'm not going to dismiss that because I don't know the niceties right now, the distinction. I just think that one's probably superfluous, okay?

All right. You've got conversion. I understand that.

You've got negligence. You may -- and I'm not going to dismiss now because we're at 12(b)(6), but ultimately, you may have to make an election between the cause of action in tort or a cause of action in contract.

MS. DAVIS: Yes, Your Honor.

THE COURT: It may be one or the other.

MS. DAVIS: We recognize that.

THE COURT: And then unjust enrichment, you may -- and I'm not foretelling what will happen, but you may have to make an election as to whether you want to proceed in law or equity.

MS. DAVIS: Yes, Your Honor. And I think without having the business records and limited ability, we've done as much due diligence as we can. So as we go through discovery and take depositions, get our personal records back, then I do think we'll be able to streamline some of this.

THE COURT: Okay.

MS. DAVIS: And obviously, yes, you were right in that some of this we will have to make an election, do one or the other. You're correct.

THE COURT: Breach of covenant of quiet time use of the premises, that's essentially a breach of contract. And that's also -- well, it was probably covered under some of your statutory laws. Well, this is definitely subsumed in your breach of contract.

Your private nuisance, I don't know that your facts support a private nuisance under the law. Let me see.

MS. DAVIS: We have Helen Shockley coming in repeatedly on the floor in front of customers, in front of the employee, always asking for rent before it's due on

the 8th. There is a dispute over the due date being on the 1st versus the 8th. We also have -- you know, we have Tamala Crane coming down.

THE COURT: This is what I'll tell you to do. Go look at the law specifically with respect to nuisance, okay? And you decide whether it fits neatly under that. And then you're going to need to look and see if you want that and intentional infliction of emotional distress, because ultimately, you're chasing the same rabbit with those two causes of action.

Breach of contract and good faith and fair dealing, the tenets of good faith and fair dealing are included in the breach of contract action. You can ask for -- what I would suggest to you, that's a breach of contract. You ask for a charge on good faith and fair dealing at the trial of the case. So, again, I'm not ordering you to do that because that might be more semantics than anything else, but you need to clean that up.

Okay. Trade slander, I've been around a long time. I've never even heard of trade slander. What is that?

MS. DAVIS: Trade slander is when you make statements about the unfitness of another person's business, you make defamatory remarks about, oh, they're out of business. And that affects --

THE COURT: Is it a recognized cause of action --

MS. DAVIS: It is a valid cause of action. There is case law to support it.

THE COURT: --- in the state of South Carolina?

Do you agree with that, Mr. Hudson?

MR. HUDSON: Judge, I looked it up. I don't know that using the term "trade" in front of "slander" makes a whole lot of difference. There were a few cases that use that term. Whether it's recognized with actual elements, I'm not quite sure.

THE COURT: So it's a slander case.

MS. DAVIS: I pulled the elements straight from the case law defining trade slander.

THE COURT: Okay. All right. Then I'll defer to you in that regard. Learn something new every day.

Okay. Intentional interference with contractual relations. Okay. I understand that. You'll have to prove that.

Intentional interference with prospective economic relations, I think those are probably, at the end of the day, the same thing. I think that once you ---

MS. DAVIS: They're slightly different.

THE COURT: They're slightly different, but when you get to a jury, what you're going to find ---

MS. DAVIS: Well, Your Honor, with intentional interference with contractual relation means that there is

existing contracts. So, for example, on July 26th --

THE COURT: Oh, I've got it. I understand entirely. Believe me, I understand that semantic distinction.

MS. DAVIS: But the prospective is future business.

THE COURT: Oh, I've got it. I understand. I understand.

MS. DAVIS: Sorry, Your Honor.

THE COURT: But what I'm telling you is that generally speaking, those are going to be one and the same cause of action when you go to a jury. At some point, they're going to be the same. The only difference is the distinction in the type of damages that you're claiming, correct, whether they're existing or prospective.

MS. DAVIS: Uh-huh.

THE COURT: Okay. So I think that there is a cause of action which essentially, by the first name, that covers both of those. I don't think you have -- you can, in your supporting, in your factual recitations claim that the distinct types of damages incurred or a function of that first cause of action. Because I'll just tell you, those niceties ultimately are going to be lost on your jury. We can talk about them all the time. We might even have some fun talking about the vagaries and the nuances of the law, but those are lost on a jury. You've got to clean it up, okay? And that's going to help both of you, I think.

All right. You've got your racial discrimination. I'm not going to dismiss that at this point. I'm not sure I know exactly what you're alleging and under what statute your proceeding, but that's okay. I've read it and I understand that there's an outstanding cause of action and a fact in dispute, and as much as I've considered the 12(b)(6), under the rules of summary judgment, I'll not dismiss that.

Your civil conspiracy, I am going to dismiss that. There is a requirement for special damages. Now, I can tell you that having seen a lot of those cases, I don't know that I've ever seen one actually be successful. But the damages that you are asking for are certainly covered by all of the other causes of action that you have. If you think, at the close of your case on the merits, if you want, under Rule 15, to make a motion to amend your pleadings to allege civil conspiracy, the judge at the time can entertain that. But I don't know that you -- that at that point you're going to really, really want to be focused and you're not going to want to "bugger" up your jury argument, okay?

Intentional infliction of emotional distress, like I said, when you explained your nuisance, I mean, that's basically what you were telling me they were doing, so I think you need to decide which one you really want to

Chase, okay?

And then negligent infliction, you look at that, too. I understand the distinction between "intentional" and "negligent."

Unfair trade practices, again, those are very difficult causes of action to win. I don't know that I've ever seen one actually be successful with the exception of a few nonjury issues when it was really, really clear.

Rescission of contract, are you asking that you be allowed to rescind the contract?

MS. DAVIS: Bradley Kerr. Bradley Kerr is the only one who signed the contract prior to Blackstone and Chase being formed as a legal entity in the South Carolina state -- secretary of state.

THE COURT: Is Bradley Kerr one of your clients? Or is ---

MS. DAVIS: Yes. He's a member of Blackstone and Chase. There are three members.

THE COURT: So you're trying to rescind the contract as to Bradley Kerr, or you're saying the entire contract should be rescinded?

MS. DAVIS: He is arguing to rescind the contract ---

THE COURT: Okay. All right.

MS. DAVIS: --- in the individual.

THE COURT: I understand. I understand. You need to

decide how that affects your overall suit. If the contract is rescinded ab initio, it may cause problems for some of your breach of contract claims.

MS. DAVIS: And that's -- I mean, that's one of the issues is whether the lease itself is valid.

THE COURT: Okay.

MS. DAVIS: If the lease is not valid, then we're dealing with statutory ejectment, principle of statutory tenancy law. That was -- part of their, you know, intent behind the complaint for declaratory relief was because there were legitimate issues of my client.

THE COURT: Okay.

MS. DAVIS: So I think with either motion for summary judgment, we'll be able to -- some of those are going to -- it's either going to be one way or another. The contract is either going to have enforceable provisions -- some enforceable provisions but not others, or it's going to be invalid.

THE COURT: I've got you. Just don't create a situation where your causes of action are in conflict and so confusing that you have a hard time articulating them to a jury.

Okay. So I have dismissed the declaratory judgment. What was the other one I dismissed? Civil conspiracy.

MR. HUDSON: Civil conspiracy.

MS. DAVIS: Civil conspiracy.

THE COURT: Is there another one I dismissed?

MS. DAVIS: Unfair Trade Practices Act, Your Honor.

THE COURT: No. I didn't dismiss that, but you're going to have a hard time with that one.

MS. DAVIS: Yeah.

THE COURT: Okay. Just so you know.

Okay. Now, so those two causes of action are dismissed. I'll prepare a Form 4 dismissing those two causes of action pursuant to Rule 12(b)(6). And what I'll tell you is, again, Ms. Davis, you want to clean it up. Mr. Hudson, it might inure to your clients' benefit not to clean it up, because right now, the way the shotgun -- the shotgun blast is coming out, it's going to be very difficult for a jury, okay? So what I would suggest to you is y'all get busy doing discovery, go to your mediation and pare all this down and be ready to try it based on, you know, what you really think the issues are, okay?

MR. HUDSON: Your Honor, I didn't hear anything with regard to the defendants. I didn't hear an argument from Ms. Davis on that.

THE COURT: Individual defendants?

MR. HUDSON: Individual defendants.

THE COURT: Okay. And was it specifically Margaret

Durham, James Durham, Helen Shockley and Tamala D. Crane?

MR. HUDSON: And -- so there's -- all of the allegations against them in the complaint indicate that they are agents of the landlord. There are no allegations against Multiplex Systems, Ice Rink Engineering and EZ Glide 350. Those are just entities that are owned by Mr. Durham.

THE COURT: What's the basis for having them in the complaint, Ms. Davis?

MS. DAVIS: Your Honor, we've got -- this is basically a family enterprise. James Durham and Helen Durham worked in the scope of their employment with the businesses. They're -- all the e-mails are from their businesses regarding landlord-tenant matters.

Tamara D. Crane lives on the second floor. We don't know -- we know that she's an operating officer of one of these businesses, but we don't know whether she acted in the capacity of her parents who live on the third floor or of her own accord running her yoga studio. So, I mean, that -- without more, you know, just upon what information we do have, we believe that either she was acting as an agent for the landlord or of her own accord with the yoga studio completely unrelated to the businesses. We don't know.

THE COURT: Okay. So that's as to her. How about

the additional ---

MS. DAVIS: So the business are tied in because Helen and James -- Helen Shockley and James Durham are acting in the scope of employment with their businesses conducting and directing landlord-tenant relationship. You've also got Margaret Durham in the individual prohibiting my clients' access to their mail. That was part of the reason why we never received a notice because they knew they locked out -- the landlord knew that my client was locked down, yet told the Court to send a notice to the premises instead of to me when we were in settlement negotiations till October 20th, and the writ of ejectment was filed on the 16th of October. So, you know, I mean, that's why Margaret Durham is named in the individual. She's also a trustee.

So there are actions and conduct being performed not just in the scope of agency of the landlord, but individual misconduct. And so we're looking to hold them, not just the landlord, but these individuals for their individual misconduct related, whether in the scope of agency or not.

I mean, this is a family affair. This is all inbred, they're all -- I mean, that's why -- that is why we allege a civil conspiracy that I understand that dismissed to that effect, but the statement of the parties outlines the

relationship. And in the complaint within each cause of action, we say the landlord, whether acting through individually or through its agent. And if we don't know if the landlord, there was multiple parties, we put the defendant whether acting individually or through that defendant's agent.

THE COURT: Okay.

MS. DAVIS: And so that language is to encompass the parties.

THE COURT: Okay. In your complaint, and I'm looking at your complaint, and it's cumbersome so I can't get to what I want to see sometimes, have you alleged specific causes of action against specific individuals and/or to entities, or do you treat them all collectively as one?

MS. DAVIS: Collectively as one in certain parts. Where it's the landlord, we name the landlord. Where it's other entities and individuals, we've referenced them to the defendant whether acting individually or through that defendant's agent.

THE COURT: And, Mr. Hudson, in your review of the pleadings, has she articulated that with great enough specificity that you can determine who the respective causes of action are against?

MR. HUDSON: Not at all, Your Honor. In fact, quite the opposite. I think every single time that any of these

folks are mentioned, it says "in their capacity as agents or employees of the landlord." As best I can tell, there are no allegations about the -- or against these individuals acting as individuals. And, again, there are no allegations at all as to the entities that Mr. Durham owns.

You know, what I hear over here is that they may find something in the future, in which case, you know, they can, at that point, amend to bring these folks in if they've got some evidence. But as of now, the only party that should be a defendant here is the Margaret H. Durham Living Trust.

THE COURT: Okay, okay. This is what I want you to do. It's very hard to characterize them as acting within the scope of their employment and as agents and employees and then turn around and they have individual liability. In many of these causes of action, that's going to be mutually exclusive. So I'm going to give you 15 days to replead to set forth with specificity against whom these causes of action are, okay? And if you're naming them in their individual capacity, you need to articulate that in such a way.

MS. DAVIS: Just underneath that cause of action.

THE COURT: Well, however you want to do it. I'm no longer a lawyer. I got fired from being a lawyer. I was

such a dismal failure.

But you can -- or, yeah, or you can just, yes, say in the enumerated cause of action ---

MS. DAVIS: Sure.

THE COURT: --- as to whomever so that the defense can truly see what is outstanding against these individuals. So -- and it may be appropriate for many of them to be dismissed individually, and I suspect that a good number of them will. I'm just not yet ready to do that based on what I have before me because I don't want to make a dispositive decision about a substantive matter at 12(b)(6) unless there's just no argument about it, okay?

So replead that within 15 days, and, obviously, take out the ---

MS. DAVIS: Declaratory relief.

THE COURT: --- "dec" and the civil conspiracy.

MS. DAVIS: The civil conspiracy.

Did you also -- I'm just looking at my notes. Private nuisance, did you say you were going to dismiss ---

THE COURT: No. I told you you needed to look at that ---

MS. DAVIS: Okay.

THE COURT: --- and decide whether it fit under your

cause of action and decide whether private nuisance and intentional infliction of emotional distress is really chasing the same rabbit. And I believe it is. Okay. All right.

MS. DAVIS: But for sure, just to make sure I clarify, Your Honor ---

THE COURT: Sure.

MS. DAVIS: --- declaratory relief will not be in the amended complaint, the civil conspiracy will not be in the amended complaint. And just to summarize, the trespass through real property and personal property, to take a look at that. The private nuisance, take a look at that along with the intentional infliction of emotional distress and the trade slander. And I think that was the intentional -- with existing contractual or prospective, those two; is that correct, Your Honor?

THE COURT: Yeah. I think -- again, I think, you know, without ruling at this point, it's going to narrow. And I think you prosecute this case better if you go ahead and narrow it yourself and focus it, okay, when you replead. All right. I've narrowed it some for you.

MS. DAVIS: Yes, Your Honor.

THE COURT: You might want to take another look at it, okay?

All right. Anything ---

MS. DAVIS: And as well as each cause of action, do you want specifically to see which individuals applying rather than the generic language as ---

THE COURT: That's exactly right. That's exactly right. Because I presume, and I don't know this, but your breach of contract is probably not going to be against the individuals, but all of your tort actions probably are.

MS. DAVIS: Right, right.

THE COURT: That's what I assume. I don't know that ---

MS. DAVIS: Right.

THE COURT: -- and I'm not telling you that's the way it should be.

MS. DAVIS: That's an easy fix.

THE COURT: That's just what I assume.

Okay. All right. Anything further from defense?

MR. HUDSON: No, Your Honor. Thank you.

THE COURT: All right. I don't know if I've cleared anything up and it's probably confused you even more, but in any event, I'll do a Form 4 with respect to the two causes of action and the allowance to replead within 15 to specify which individuals and which defendants are subject to the particular causes of action.

MS. DAVIS: And, Your Honor, and the preliminary injunction as well?

THE COURT: Yeah. I'm not ruling on that today.

MS. DAVIS: Okay.

THE COURT: I'm not ruling on it. You can ask for a specific hearing on preliminary injunction from the clerk of court and they can schedule that, okay?

MS. DAVIS: Okay.

THE COURT: All right.

MR. HUDSON: Thank you, Judge.

THE COURT: Yes, sir. Good luck to you.

(WHEREUPON, proceedings concluded at 12:03 p.m.)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, CHERYL A. SMITH, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Greenville County, South Carolina, on the 23rd day of April, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 8, 2019

Cheryl A. Smith, CVR-M
Court Reporter

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Blackstone and Chase, LLC, et al. Plaintiff, -VS- Margaret H. Durham Living Trust, et al. Defendant.	COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT Case No(s).:2017CP2307837 TRANSCRIPT OF RECORD

August 27, 2018
Greenville, South Carolina

B E F O R E:

HONORABLE G. THOMAS COOPER, JR., Judge.

A P P E A R A N C E S:

DEBORAH D. DAVIS, Esquire
CHARLES O. "BO" WILLIAMS, Esquire
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Records are taken and produced via AudioScribe



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EXHIBITS PAGE

NO.	DESCRIPTION	ID	EV

PLAINTIFF EXHIBITS

(No exhibits offered.)

DEFENSE EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

PROCEEDINGS

(Proceedings begin on the 27th day of August, 2018 at approximately 11:54 a.m.)

THE COURT: All right. Ms. Davis, why don't you give me an overview of this case, and why you think I should strike the ---

MS. DAVIS: Yes, Your Honor.

THE COURT: --- defendant's answer?

MS. DAVIS: Yes, Your Honor. You are wanting an overview of the case, factually?

THE COURT: It's a green field; clean slate.

MS. DAVIS: Okay. Your Honor, on 9/28/2017, my client was denied access to the premises because Defendant had changed the locks to the premises.

THE COURT: What kind of premises?

MS. DAVIS: This is a commercial lease for a business. My clients are Blackstone and Chase; and they're members of Blackstone and Chase. They operated a barber shop ---

THE COURT: Barber shop.

MS. DAVIS: --- on the premises. Yes, Your Honor.

THE COURT: And you had a lease?

MS. DAVIS: There is an issue with the validity of the lease because on or around March 8th of 2016, Plaintiff Bradley Kerr had paid a 5200-dollar deposit to the defendants. On or around May --

THE COURT: Who? What? Who did?

MS. DAVIS: I'm sorry?

THE COURT: Who did?

MS. DAVIS: The plaintiff Bradley Kerr, my ---

THE COURT: Bradley Kerr.

MS. DAVIS: --- client. He's one of the members of Blackstone and ---

THE COURT: Okay.

MS. DAVIS: --- Chase. On or about March 15th of 2016, my clients entered and took possession of the premises and had about a two-month period of upfitting the premises, prior to opening up on June 8th of 2016.

THE COURT: Was that a written lease?

MS. DAVIS: The issue is that the lease was signed prior to Blackstone and Chase actually being formed as an entity with the South Carolina Secretary of State.

THE COURT: But it was -- there was a

written lease?

MS. DAVIS: There was a written lease.

THE COURT: What was the term of it?

MS. DAVIS: The term was allegedly for five years; a base rent of 3200; proportionate share of utilities, but it turned out to be about -- approximately $250 a month. The issue, Your Honor, is that two of the members never saw the lease. The members of Blackstone and Chase had not formed yet. This is an ultra vires contract prior to the formation of Blackstone and Chase, LLC, as a legally-formed entity.

THE COURT: What makes it ultra vires if the corporation was never formed?

MS. DAVIS: If the corporation was never formed, then only Plaintiff Blackstone and -- Plaintiff Bradley Kerr signed the lease. However, you have to have -- once the entity -- the lease is written to Blackstone and Chase, LLC.

THE COURT: Oh, it is?

MS. DAVIS: As the tenant, yes.

THE COURT: Okay. So the lease was --

MS. DAVIS: The landlord could have easily

gone to South Carolina Secretary of State and saw that it was not formed yet.

THE COURT: I see. So it wasn't just in Kerr's name; it was in the name of Blackstone and Chase.

MS. DAVIS: That is correct.

THE COURT: And Blackstone and Chase had not been formed?

MS. DAVIS: Correct.

THE COURT: All right. I'm with you.

MS. DAVIS: Now, just because it's an ultra vires contract, does not mean it is effective on that -- there's also some patent ambiguities as to the right date. There's handwritten, crossed-out portions of the lease when rent is due. There's no effective date to the lease. There is a dispute as to the due date of the rent being the 1st. My client say it's due on the 8th.

We had e-mails from Defendant Helen Shockley, who is an agent of the landlord, say that it was due on the 8th. So James -- Defendant James Durham, another agent of the landlord, is saying rent is due on the 1st. Defendant Helen Shockley is saying it's due on

the 8th. So one hand doesn't know what the other's doing.

We also have -- so as to -- there's also provision in the lease, Your Honor, Section 20, that says that the landlord can enter the premises to terminate the lease with or without legal process ---

THE COURT: Okay.

MS. DAVIS: --- to circumvent Title 27, Chapter 37 and Chapter 39 of the South Carolina Code, which does not permit any landlord to take possession, seize possession of the premises, dispossess the tenant, distrain their property, without resorting to judicial process.

THE COURT: Was that done?

MS. DAVIS: So in the lease --

THE COURT: Was that done?

MS. DAVIS: What?

THE COURT: Was that done?

MS. DAVIS: What's that?

THE COURT: What you just described to me.

MS. DAVIS: So the lease --

THE COURT: Did the landlord kick them out?

MS. DAVIS: The landlord kicked them out, that's correct, and changed the locks.

THE COURT: Okay.

MS. DAVIS: The night before changing the locks, Defendant James Durham admitted to seeing Mark Thomas on the premises. The day after ---

THE COURT: Mark Thomas.

MS. DAVIS: --- Blackstone and Chase employees showed up to the premises to work and could not enter the buildings. The locks were changed. So defendants have repeatedly, time and time again, tried to -- alleged that my clients abandoned the property, which is completely an opposite to when you change the locks, you are forcefully evicting the tenant from the premises. The tenants cannot go in there to restore the premises. The tenant cannot go in there to get their personal property. My clients have been without their personal property on the premises for over a year now, Your Honor.

THE COURT: Let me ask you something: Who is Margaret Durham, Multiplex Systems, Ice Rink Engineering and Manufacturing, EZ Glide, etc.,

etc., etc.? Who are all these other defendants?

MS. DAVIS: It's -- Margaret Durham Living Trust is the actual landlord. So the lease was between the trust and Blackstone and Chase, technically.

THE COURT: So you are operating under --

MR. DAVIS: Excuse me?

THE COURT: You are operating under a sublease?

MS. DAVIS: No, there's no sublease. Margaret Durham Living Trust owns 17 West North Street, the entire building. Margaret Durham and her husband Jimmy Durham live on a third floor; Mala D. Crane, their daughter, runs a business studio on the second floor ---

THE COURT: All right.

MS. DAVIS: --- and my clients rented the first floor and had a barber shop.

THE COURT: But why -- why didn't you rent it from Margaret Durham Trust?

MS. DAVIS: Because that is who, technically, owned the building. The building is owned by Margaret Durham --

THE COURT: Why didn't you lease from Margaret Durham? Where'd Blackstone come in?

MS. DAVIS: Margaret Durham is the trustee; Blackstone and Chase is my client, a tenant.

THE COURT: Okay.

MS. DAVIS: Blackstone and Chase is the tenant; Bradley Kerr, Mark Thomas, Tensley Thomas are all members of --

THE COURT: So they signed a lease with Margaret Durham Trust?

MS. DAVIS: The lease was Margaret Durham Trust --

THE COURT: Okay. Well, you didn't tell me that. Okay.

MS. DAVIS: So Margaret Durham Trust is --

THE COURT: Okay. I got it.

MS. DAVIS: Multiplex --

THE COURT: That doesn't matter. I just -- I got it. Keep going.

MS. DAVIS: And so -- and Your Honor, basically, here, this case is a forceful entry and detainer case.

THE COURT: I got it.

MS. DAVIS: In the defendant's answer and counterclaim, they had made admission to the ultimate facts: They've admitted that my client

paid rent; they accepted rent payment; they admitted my clients entered and took possession of the premises; they admitted that my client did upfitting; they admitted that my client was operating a barber shop on the premises.

And the landlord/tenant dispute arises in July. There's an issue over the due date. Then there's an issue of you're charging X amount and late fees. My client Mark Thomas requested for a copy of the lease because he'd never seen it; my client Tensley Thomas requested for a copy of the lease throughout the scope of the tenancy; and Margaret -- I'm sorry, excuse me -- Defendant Helen Shockley refused. So two members who have never seen a copy of this lease, requested it from the landlord, and the landlord specifically refuses saying that Plaintiff Bradley Kerr has been given a copy.

So now we've got a dispute brewing. And then on December -- I'm sorry, July 27th [verbatim], my client Mark Thomas is working onsite doing some lawn inventory. Defendant James Durham, who also lives on the third floor, enters unannounced, which was a habitual thing for him to enter unannounced with no

reason, onto the premises. Startles my client. Sees him there. He sees him. December 28th [verbatim], locks are changed by plaintiffs.

THE COURT: By judicial process?

MS. DAVIS: No judicial process. Not until well after the fact, October 16th, defendants, only then, applied for a writ of ejectment, well after having already evicted my clients from the premises without going before a magistrate court or circuit court. So on August 4th, defendants received a demand letter from my client for reposs -- you know, to take repossession of the premises. Defendants refused. So there are your ultimate facts.

My clients were entitled to possession of the premises. Defendants purposely, with a strong hand, such as in *Parker v. Shecut* -- is an example of the intent to permanently deprive another of use and possession of the land in question or tenement.

Well, changing the locks was an example in that case that showed a very clear and unequivocal manner of expressing the intent to permanently deprive and dispossess and seize the plaintiffs from the -- the premises from

the plaintiff.

THE COURT: Okay.

MS. DAVIS: So defendant have pled these facts. They've provided a receipt for changing of locks. They admit that they didn't file for a writ of ejectment until October.

THE COURT: What are you seeking?

MS. DAVIS: Excuse me? What I'm seeking is a partial motion for summary judgment on the pleadings because the defendant had pled the ultimate facts supporting plaintiff's cause of action, forceful entry, and detainer.

THE COURT: What are you seeking in your complaint?

MS. DAVIS: In my complaint, treble damages.

THE COURT: Okay.

MS. DAVIS: Now, once you understand that this is a forceful entry and detainer case, then claim and delivery also is very clear. Defendants knew that my clients had property in the premises. Defendants knew that my client ran a business with personal property, trade fixtures, on the premise. When Defendants locked out my clients, my clients, to this day,

have not been able to reclaim any of my clients' personal property on the premises.

And in addition, on September -- around September 27th of 2017, my clients sent a demand letter requesting for the return. And since then, there have been several more demands to return my clients' property.

THE COURT: All right.

MS. DAVIS: They know that it's my clients' property. We've made a written demand. The affidavit submitted with the complaint support what items, to the best of our knowledge without business records, items of all of our (Indiscernible) for destroying -- for recovery of personal property -- the affidavit, the amount, the value. But we have no business records. We're not -- we are not able to go to the premises and get a true itemize of what is being withheld, other than from pure memory or what we can salvage.

And so in addition to that, there are salon products on the premises. Those have limited shelf life, and quite a bit are dam -- are now no longer available for resale. So not only that, there are third parties who have interest

in the property, as well. One we have worked out with, Grover Bearden [phonetic]. We've worked that out. There's another claim by a Jason Bible; he does not have a legitimate claim against the property on the premises.

But more importantly, Your Honor, not only do the defendants admit that this is my clients' property on the premises, that they're in possession of it, they have yet to file a writ of distraint, to date, to distrain my client's personal property because Defendants believe that the value to restore the premises is greater than the value of my clients' personal property. That's not how distraint works. Distraint is only for rent and arrears.

THE COURT: All right. Let me hear from the defendants.

MR. HUDSON: Thank you, Judge. Josh Hudson here for defendants in this matter. Our position is that there is a valid lease. And Ms. Davis' co-counsel also argues that there is a valid lease. So starting right off the bat, we've got an issue of fact that we've got to hammer down in discovery. This matter was filed in December, I believe, of last year, and we're

still at the dismissal stage.

I think Ms. Davis' argument shows you that there's a lot going on behind the scenes in this matter that we're going to have to hash out. The bottom line is, there was a lease agreement with Blackstone and Chase that --

THE COURT: And your client?

MR. HUDSON: Blackstone and Chase is Ms. Davis' client.

THE COURT: I know that. I said with your client.

MR. HUDSON: With my client, yes, sir. Bradley Kerr --

THE COURT: Where is that lease?

MR. HUDSON: It's attached to the complaint, Your Honor.

THE COURT: Attached to the complaint?

MR. HUDSON: I believe so.

Wasn't that one exhibit? Was the lease an exhibit to your complaint?

MS. DAVIS: It's in the magistrate's return, Your Honor.

MR. HUDSON: There were a number of things filed initially, Your Honor. We narrowed them down to this one damage's action. The

plaintiffs have admitted they don't want back to the property; it's just strictly a damages action. So we've -- the Court has narrowed it down to this one particular complaint. But the lease is a part of the record.

Mr. Kerr -- it was signed by Mr. Kerr. Subsequently, the LLC was formed and all three members acted under the terms of the lease for about a year. During the course of that time, the -- the plaintiffs failed to have sufficient insurance coverage on the property, which was required under the lease; they stopped paying their rent; and they, ultimately, had a towel warmer that caused six figures worth of smoke damage in the property and jeopardized the safety of the rest of the tenants.

For our purposes today, Your Honor, we think it's absolutely premature that anything in this matter be dismissed. We've got valid negligence claims. We've got valid breach of contract claims. But we've also got a lot of discovery we've got to take, I think, depositions of all these guys who are -- we've got two of them claiming that one of them did something that he wasn't allowed to do and an

LLC that was formed afterwards. Our position is they were all acting as members of the LLC.

I think their testimony is going to be crucial to what our stance is, is that they caused a lot of damage to this landlord. He had no choice but -- in order to mitigate his damages to get them out of there. So for today's purposes, again, we would ask that you deny the motion to dismiss. There's also an argument from plaintiff's other counsel that --

THE COURT: What's the counterclaim about?

MR. HUDSON: Counterclaims are for breach of contract due to the failure to pay rent, due to the failure to have sufficient insurance coverage. Their -- and the towel warmer that caused the smoke damage was a violation of the lease agreement. That still has yet to be remedied. We've got quotes from SERVPRO to get the -- get the place cleaned up, and it's in excess of six figures.

The negligence also stems to the towel warmer incident. They were repeated warned not to have this towel warmer on overnight. They continued to do so. We've got a conversion action for the property. Within the -- within

the lease space, there were 100-year-old beams on the property. They've constructively converted -- violation of the lease -- by hammering a bunch of TVs and gizmos and that kind of thing into this historic property.

And then the abuse of process claim. We've got a failed business that they're trying to make money on through the court system.

And so again, we've got a number of things we've got to hammer out here to take discovery on. I think we're -- for -- we have well-expounded judicial economy here. We need to get into the meat of this thing. I think a motion to dismiss is a waste of everyone's time.

Now as far as -- Mr. Williams filed a memo this morning with regard to the -- the defendant's personal property claims. He says that our complaint wasn't sufficient in alleging personal property that the other defendants lost due to the smoke damage. I haven't had a chance -- it was just filed this morning. I haven't had a chance to look through our complete answer and counterclaims.

We believe that our allegations were

sufficient to show that all of the defendants sustained property damage. To the extent that that didn't occur, we would ask for leave to amend. And we'll put in the specific property damage that was damaged.

And then I'll let Mr. Williams speak to the other allegation. I can't remember what that was.

THE COURT: Well, let me hear from him. Mr. Williams?

MR. WILLIAMS: May it please the Court, Your Honor. Bo Williams here for the counterclaim defendants, Blackstone. I think, Your Honor, I've got a copy of -- just as a preference -- of my short memorandum. I don't know if you've had a chance to look at it.

THE COURT: No, I haven't. It would be nice if I could look at it on paper.

MR. WILLIAMS: I will bring that to you, along with a copy of the lease agreement and the e-mail that I will refer to.

THE COURT: All right. Thank you. Okay.

MR. WILLIAMS: Your Honor, it's -- my issues are pretty brief. In a nutshell, I would argue, Your Honor, that their counterclaim does

not contain allegation of any damage to personal property. I think I referred to paragraphs 415 and 416 in their counterclaim in my memorandum which -- 415 states, "Landlord would show that Plaintiffs negligently, recklessly, willfully, wantonly, intentionally and grossly negligently breached their duty to landlord in failing to utilize proper procedures and appropriate equipment to carry out their business, which led to fire hazards and, ultimately, smoke damage to the premises." And this goes back to the alleged towel warmer that caused smoke damage.

416 says, "As a direct and proximate result of Plaintiff's negligent, reckless, willful, wanton, intentional and grossly negligent acts, omissions and/or delicts as enumerated hereinabove, landlord was seriously injured due to the damage done to the premises. Therefore, landlord requests judgement against Plaintiffs, jointly and severally, for actual and punitive damages with interest thereon."

That is contained within their third cause of action for negligence and gross negligence. Your Honor, those paragraphs clearly only state

that the landlord is the one that has damages. They don't elicit any damages that were allegedly incurred by Multiplex Systems, Ice Rink Engineering and Manufacturing Company, EZ Glide --

THE COURT: How about that, Mr. Hudson?

MR. HUDSON: Your Honor, there were -- so first of all, there's no damages to Multiplex Systems, Ice Rink Engineering and EZ Glide. Those are entities owned by Mr. Durham that have no relation to this matter whatsoever.

THE COURT: They're not in the building?

MR. HUDSON: They're not in the building, no, Your Honor. We're, quite frankly, not sure why they were named. But James Durham, Helen Shockley and Tamala Crane -- James Durham and -- James Durham -- I'm sorry, James Durham and Margaret Durham live in the property. Tamala Crane has a yoga studio in the property. All of them sustained personal property damage due to the smoke damage that the plaintiffs caused. Now, to the extent that we don't specifically allege that personal property, we're happy to amend and do so, but I think it's pretty clear that our -- the damage we allege were the

defendants, plural; and those are the defendants that we represent. They all sustained damages. And again, we can narrow that down and put specifics in there, if need be. But certainly, they were alleged.

THE COURT: Well, if it was in the face of granting Mr. Williams' motion, you could do that, right?

MR. HUDSON: Sure.

MR. WILLIAMS: Your Honor, I think the complaint -- the counterclaim, the paragraphs they referenced speak for themselves. They only refer to the landlord and the premises, the fee simple property; it doesn't refer to any personal property.

The next section, Your Honor, and Mr. Hudson has indicated that I proclaim that the lease is valid. I don't know if the lease is valid. But they refer to the lease a lot in their counterclaim. I think to the extent -- it's a matter of law for the Court to determine whether the lease is a valid lease or not, which you have before you. If it is valid, then they have a duty to abide by the lease agreement, as well.

That lease agreement contains a couple of paragraphs that I think are at issue here. They stated in paragraph 307 that Margaret H. Durham Trust is the landlord. They refer to the lease that was executed on March 8th, 2016 and that we are bound by the lease in paragraph 318.

Section 16 of the lease agreement governs damage with the structure of the premises. And we will assert -- again, I'm only here to defend the alleged smoke damage, but we would assert that this section requires the landlord to make repairs to the premises in the case of smoke damage. This portion specifically says, "Lessor -- which is the landlord -- will make such repair or restoration of the premises promptly and in such manner as to not unreasonably interfere with Lessee's use and occupancy of the premises."

To our knowledge, this incident from July 21st occurred. We continued running our business. There was never -- our business was never stopped until they changed the locks on the door. So I think that the relevant part of that is if there were any repairs that needed to be made, it was incumbent on the lessor, or

the landlord, to do that. That's what Section 16 of the lease agreement required them to do.

Further, there is a subsection -- there is a waiver of subrogation clause in Section 12.4 in the contract. That states that each party on behalf of anyone claiming under or through it, by subrogation or otherwise, waives all rights and causes of action against the other party and such party's agents and invitees for any liability arising out of any loss or damage in or to the premises or the contents therein. This is the important portion. This release waiver shall be completed in total, even if such loss or damage may have been caused by the negligence of the other party, or such party's agents or invitees.

I think that's very important, Your Honor. There was e-mail correspondence between the carriers. The plaintiffs tried to make a claim -- I'm sorry, the defendant, the Trust, the landlord, tried to make a claim on our liability insurance. Our agent informed their agent that this doesn't apply because our insurance only goes to the property, to the contents; it doesn't go to the building itself.

And they responded that they thought we were liable for the smoke damage; and therefore, they wanted to claim under our insurance. Well, those particular policies are completely consistent with what was required in the lease agreement. We got the insurance we were supposed to. There's a waiver of subrogation clause and there's a damages section that required them to make whatever repairs they needed to.

THE COURT: You just have renters insurance?

MR. WILLIAMS: Correct. If the lease is valid and you look at it, it's their duty to repair it; not ours. And then they waive it, actually, against us or the carrier that would insure those issues. That's where we are, Your Honor. I realize it's the motion to dismiss stage, but I believe those causes and that the lease agreement is applicable and they say what they say.

THE COURT: All right.

Yes?

MR. HUDSON: Can I speak to that, Your Honor?

THE COURT: Sure.

MR. HUDSON: First of all, if the lease is valid, big "if," given that the person sitting next to Mr. Williams is claiming that the lease is not valid, I think it's premature to make that decision at this stage. We claim it is valid. But I also say that there were third parties who were damaged by this smoke damage who were named as defendants and counterclaimants in this matter, namely Tamala Crane. So it would absolutely be premature to -- even if the lease were found to be valid, to let the insurance company out at this stage because there is damage to third parties that would not be subject to subrogation under the lease.

THE COURT: All right. Proposed orders in 10 days. How about that?

(No audible response.)

Proposed orders in 10 days.

MR. WILLIAMS: Yes, Your Honor.

MR. HUDSON: Thank you, Judge.

THE COURT: And you can file them, if you want to. But I'm going to be in Columbia, so I need a paper copy. All right. File the orders,

but send me a paper copy. Is that a problem?

MR. WILLIAMS: You saying you -- you don't have -- you don't have a law clerk; and e-mail you?

THE COURT: I have no law clerk.

MR. WILLIAMS: Okay.

THE COURT: It's me.

MR. WILLIAMS: Okay. Yes, sir.

MS. DAVIS: You want us to e-file and send you a mailed copy, correct, Your Honor?

THE COURT: Yes.

MS. DAVIS: And can I have a chance to rebut?

THE COURT: If you -- I think I understand it. But the record is open, if you need to.

MS. DAVIS: If you don't mind, Your Honor.

THE COURT: Go ahead. You're getting -- I assume you're getting paid to make that argument.

MS. DAVIS: Your Honor, at the end of the day, whether the lease is invalid (Indiscernible) or a subject oral contract, it's moot. The landlord unlawfully terminated this lease by forcible entry and detainer. No notice of default --

THE COURT: Well, I'm not a jury.

MS. DAVIS: But no notice of default with reference to the alleged smoke damages. The notice of default did not have anything to do with smoke damages. As well as the claim and delivery and forcible entry and detainer that I discussed, they support also the ultimate facts of conversion of personal property, of wrongful dispossession, as well as unjust enrichment. To that effect, there are some things that I have requested to be stricken from the complaint and I have detailed that extensively in my memorandum in response.

There are certain -- one particular defense, abandonment, I've already discussed should be stricken. But there's another counterclaim for conversion that I did want to note should also be stricken as a misapplication of conversion. Defendants are trying to allege that the fixtures on the premises are being converted. However, those fixtures are part of the infrastructure of the building prior to my client's entering and taking possession of the premises. And when you have fixtures of that nature or the

infrastructure has been fixed, it becomes, part and parcel, the realty. So again, any fixtures within the premises that may be attached to my client's trade fixtures or my client's fixtures that they haven't been able to take down or restore the premises or whatever, that is on them. That's their fault. They changed the locks.

THE COURT: Okay. Okay. Thank you.

MS. DAVIS: Thank you, Your Honor.

THE COURT: Next case.

MR. HUDSON: Thank you, Judge.

MR. WILLIAMS: Thank you, Judge.

(Proceedings conclude at approximately 12:26 p.m.)

CERTIFICATE

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville, South Carolina, on this 27th day of November, 2018.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

Teresa B. Johnson

Circuit Court Reporter



DICKSON DAVIS LAW FIRM

MOTION AND PETITION TO REINSTATE COVER LETTER

April 17, 2019

Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
P.O. Box 11629
Columbia, SC 29211

RECEIVED
APR 18 2019
SC Court of Appeals

VIA FEDEX 775000928873

Re	:	*Blackstone and Chase, LLC et al. v. Margaret H. Durham Living Trust et al.*
Case No.	:	2017-CP-23-07837
File Id.	:	2017-01-104

Dear Clerk of Court:

As you know, I represent Appellants Blackstone and Chase, LLC, et al. in this matter. Included is the Motion and Petition to Reinstate Appellants' appeal related to the South Carolina Appellate Court Order issued on April 4, 2019, dismissing the appeal on the basis that a motion for partial summary judgment is not immediately appealable. Included is the following:

(1) Appellants' Motion and Petition for Reinstatement with attendant proof of service;
(2) Order from the South Carolina Court of Appeals dismissing Appellants' appeal; and,
(3) A check for $50.00 payment to file Appellants' Motion for Reconsideration.

Respectfully submitted this 17 day of April, 2019.

Deborah D. Davis, Esq.
SC Bar No.: 102942
Attorney for Appellants

cc: Robert K. Merting, Joshua Hudson

/ddd

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APR 18 2019
SC Court of Appeals

FAX COVER SHEET

TO	Shelby
COMPANY	S.C. Appellate Clerk of Court
FAX NUMBER	18037341839
FROM	Deborah Davis
DATE	2019-04-18 02:33:57 GMT
RE	Case No. 2017-CP-23-07837

COVER MESSAGE

Shelby,

See attached petition to reinstate the appeal for case no. 2017-CP-23-07837 via FedEx Tracking No. 775000928873. Exhibits to follow.

Best Regards,

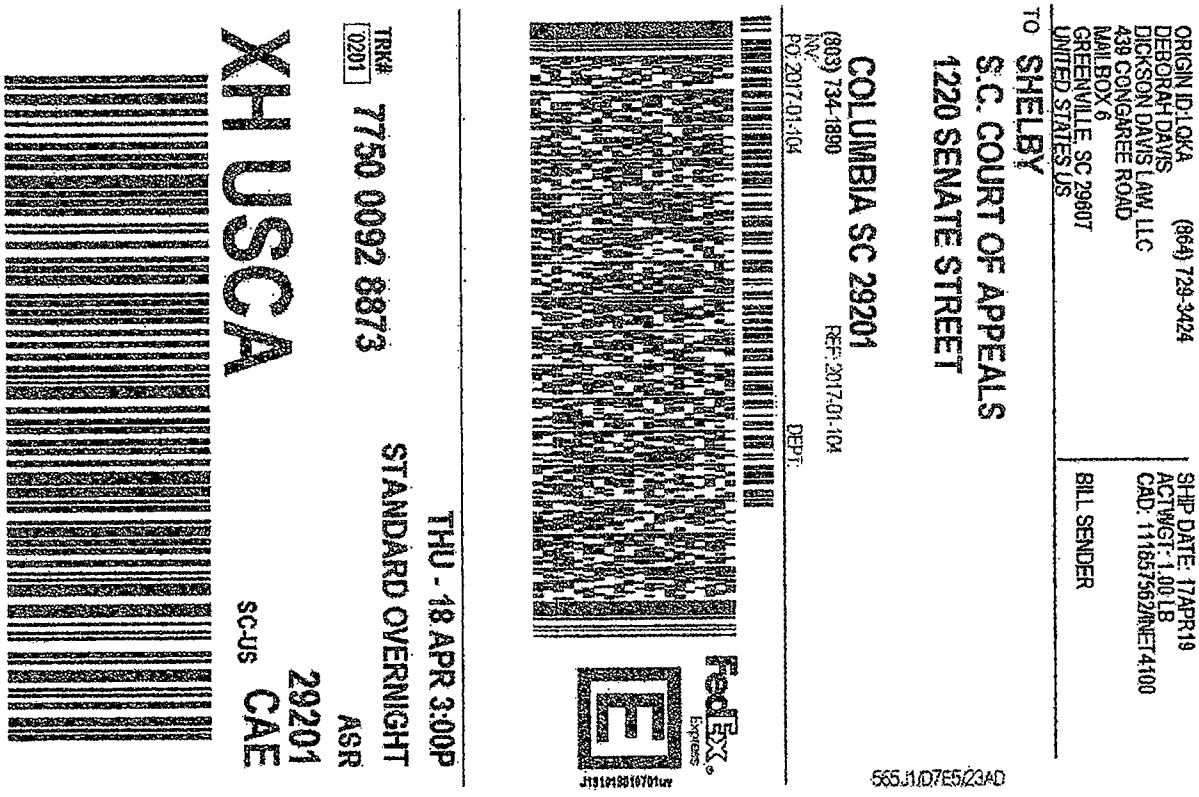
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