

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2018-000906

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SC Court of Appeals

Sea Island Food Group, LLC, d/b/a Squeeze Plaintiff,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Hilton Smith,
East Bay Company, Ltd., Michael J. Quillen Family Limited Partnership Defendants,

Michael J. Quillen Family Limited Partnership Third-Party Plaintiff,

v.

Top of the Bay, LLC Third-Party Defendant

Top of the Bay, LLC d/b/a Club Light Fourth-Party Plaintiff, Respondent,

v.

Yaschik Development Company, Inc.,
d/b/a Yaschik Enterprises Fourth-Party Defendant, Appellant.

RECORD ON APPEAL VOL I OF II

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Sea Island Food Group, LLC d/b/a Squeeze,

Plaintiff,

v.

Yaschik Development Company, Inc., d/b/a
Yaschik Enterprises, Charleston Capital
Corporation, Thomas M. Ervin, and Michael
J. Quillen Family Limited Partnership,

Defendants.

Quillen Enterprises, LLC d/b/a The Brick,

Plaintiff-Intervenor,

v.

Yaschik Development Company, Inc., d/b/a
Yaschik Enterprises, Hilton Smith East Bay
Company, LTD., and Michael J. Quillen
Family Limited Partnership,

Defendants.

Michael J. Quillen Family Limited
Partnership,

Third-Party Plaintiff

v.

Top of the Bay, Inc. d/b/a Club Light,

Third-Party Defendant

Top of the Bay, Inc. d/b/a Club Light,

Fourth-Party Plaintiff

v.

Yaschik Development Company, Inc., d/b/a
Yaschik Enterprises,

Fourth-Party Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO. 2013-CP-10-7107

FILED
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CLERK OF COURT

ORDER ON POST-TRIAL MOTIONS

B

The trial of this case began on January 22, 2017 and ended on February 2, 2017 in Charleston County, resulting in the following verdict against Yaschik Development Company, Inc. ("Yaschik"): (1) Defendant Michael J. Quillen Family Limited Partnership ("FLP") on its Breach of Contract cause of action for \$1,112,857.10; (2) Plaintiff Sea Island Food Group, LLC d/b/a Squeeze ("Squeeze") on its Intentional Interference with Contractual Relations cause of action for \$738,371.64 actual damages and \$469,393.10 punitive damages; and (3) Fourth-Party Plaintiff Top of the Bay, Inc. d/b/a Club Light ("TOTB") on its Intentional Interference with Contractual Relations cause of action for \$1.00 nominal damages and \$133,333.33 punitive damages.

Following trial, several post-trial motions were made by Yaschik, Squeeze, and TOTB. On February 12, 2018, Yaschik filed a Motion for Judgment Notwithstanding the Verdict ("JNOV"), or, in the alternative, a New Trial, or, in the alternative, a New Trial *Nisi Remittitur*, and also a Motion for Setoff. Also on February 12, 2018, Squeeze filed a Motion for Written Court Ruling regarding this Court's granting Directed Verdict motions against Squeeze in favor of both Yaschik and FLP, or, in the alternative, a Motion to Reconsider said rulings. On February 20, 2018, TOTB filed a Motion for New Trial *Nisi Additur*, and also a Motion for a New Trial. Also on February 20, Yaschik filed a Motion for Stay of Execution of Judgment.

BACKGROUND

This dispute involved the building located at 213 East Bay Street ("213 East Bay"), in Charleston, South Carolina, which was burned by a fire on April 2, 2013. 213 East Bay is owned by Yaschik, and Yaschik's president is Thomas Ervin. 213 East Bay Street is subject to a Master Lease which was held by the FLP. Michael Quillen is the general partner of the FLP. Yaschik purchased the property in 2003 for approximately \$1,800,000.00. FLP purchased the Master Lease in March 2012 from Charleston T&T for \$500,000.00. 213 East Bay includes four

subdivided units held by three tenants (collectively, "subtenants"): (1) Squeeze, (2) The Brick (which is owned by the FLP), and (3) TOTB. At the time of FLP's purchase of the Master Lease, the subleases between the subtenants and Charleston T&T were assigned to FLP. The Master Lease and subleases were all triple-net leases, meaning the landlord under each lease passes down costs to the tenants. The tenant is required to pay - in addition to rent - the building's property taxes, maintenance, user fees, utilities, and insurance. This meant that Yaschik required the FLP to pay all of the expenses of the building, and the FLP required Squeeze, The Brick, and TOTB to pay the expenses. Ultimately, the subtenants paid for the building upkeep, maintenance, and insurance.

Importantly, Paragraph 20 of the Master Lease read: "If premises are totally destroyed by fire or other casualty, this lease shall terminate as of the date of such destruction and rental shall be accounted for as between Landlord and Tenant as of that date. If premises are damaged but not wholly destroyed by fire or other casualty, rent shall abate in such proportion as use of premises has been lost to the Tenant. Landlord shall restore premises to substantially the same condition as prior to damage as speedily as practicable, whereupon full rental shall commence." In conjunction with its purchase of the Master Lease, FLP acquired Charleston T&T's insurance policy, which had as well as \$1,000,000.00 in liability insurance as required by the Master Lease.

On the night of April 2, 2013, a fire originated on the second floor of 213 East Bay. Following the fire, FLP and Yaschik agreed that FLP would oversee the shoring and initial repair. FLP contracted with Belfor to secure the building and begin the clean-up process, and contracted with Applied Building Sciences, Inc. ("ABS") to perform architectural and engineering services for the repair of the building. FLP continued to update Yaschik and the subtenants on the repair efforts over the course of the next five months.

In late August 2013, ABS informed FLP and Yaschik that plans for repairs were nearly ready to be submitted to the City. On September 3, 2013, the FLP sent Yaschik a letter advising of several developments, including the insurance company's approval of payment of the policy limits and that structural plans were to be completed that day, and stating that Yaschik- as the building owner- would need to approve those plans. FLP followed up with email correspondence on September 5th and 6th, neither of which were responded to by Yaschik. On September 11, 2013, five months after the fire and after significant headway had been made by the FLP and subtenants towards repairing building, Yaschik sent FLP a letter purporting to terminate the Master Lease pursuant to the above-mentioned "Paragraph 20" on the basis the building was a total loss. The FLP advised Yaschik it did not believe the building had been "totally destroyed" by fire, and therefore, that it's purported termination was ineffective.

As early as May 2013, Yaschik had been negotiating with an entity known as East Bay Company, Ltd. ("EBCO") to purchase the building at 213 East Bay Street. EBCO owns all surrounding buildings on that particular block of East Bay and Cumberland Streets. These negotiations culminated in a December 30, 2013 agreement for the sale of 213 East Bay Street. Per the agreement, the completion of the sale is subject to the cancellation of the Master Lease with FLP and the cancellation of the assignment of rights under the subleases.

The present lawsuit followed. FLP's breach of contract and breach of contract accompanied by a fraudulent act claims against Yaschik were submitted to the jury, along with Squeeze and TOTB's intentional interference with contractual relations claims against Yaschik.

The reason the Court directed the verdicts at trial was the uncontroverted fact that Yaschik sent the letter terminating the lease on the grounds of total destruction due to the fire. Everything in this case flows from that uncontested fact, and no other cause of action by any of the parties against any other party could go forward with that action being taken by Yaschik. It

was either a justified act or an unjustified act, which was for the jury to decide, but there is no disputing it occurred. The lease provided that total destruction was retroactive to the date of the fire loss, which negated anything FLP did to begin repairs in the months between the fire and the declaration of total loss. Despite the fact that FLP may have had a duty to repair the premises so the subtenants could move back in if the fire did not cause a total loss, as a matter of law, FLP was relieved of any obligations it had to repair the property for the subtenants when Yaschik declared it a total loss. Indeed, FLP could not continue its repair efforts. That is why the Court dismissed the subtenants claims against FLP – Yaschik's action made it impossible for them to make any more repairs. The only factual question left for the jury to determine was whether Yaschik was justified in exercising its right to declare it a total loss. The jury found that Yaschik was not justified in doing so, and awarded FLP \$1,112,857.10 in compensatory damages. Similarly, the jury also found that Yaschik's actions unjustifiably interfered with the subtenant's leases with FLP. This is a perfectly understandable conclusion, and the verdicts are completely consistent in this regard. In fact, it would have been inconsistent to allow a verdict against FLP by the subtenants because the evidence was uncontroverted that Yaschik declared that the fire damage caused a total loss. At that moment in time, FLP could no longer make repairs. The only question was whether Yaschik's decision was justified or not.

If the jury had found Yaschik's decision to declare the property a total loss, they would have found the Master Lease was not breached. Necessarily, the jury would have had to find Yaschik did not intentionally interfered with the subtenants. Indeed, had they found Yaschik was justified in declaring the property a total loss, but also found that Yaschik intentionally interfered with the subleases, the Court would have had to overturn those verdicts as being inconsistent.

LEGAL STANDARDS



i. New Trial Absolute

When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice. *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). In other words, to warrant a new trial absolute, the verdict reached must be so "grossly excessive" as to clearly indicate the influence of an improper motive on the jury. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993). Alternatively, the trial court may grant a new trial absolute when, sitting as the thirteenth juror, it concludes the jury's verdict is not supported by the evidence." *Duncan v. Hampton Co. Sch. Dist. No. 2*, 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999). Finally, a new trial may be granted where verdicts are irreconcilably inconsistent. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010).

ii. Judgment Notwithstanding the Verdict

A motion for judgment notwithstanding the verdict, or JNOV, is a "renewal of the directed verdict motion." *Glover v. N. Carolina Mut. Life Ins. Co.*, 295 S.C. 251, 368 S.E.2d 68 (Ct. App. 1988). "In ruling on a motion for JNOV, the trial judge cannot disturb the factual findings of a jury unless a review of the record discloses no evidence which reasonably supports them." *Burns v. Universal Health Servs., Inc.*, 361 S.C. 221, 603 S.E.2d 605 (Ct. App. 2004). "The trial court must deny the motion when the evidence yields more than one inference or its inferences are in doubt." *Id.* at 232. The verdict should be upheld "if there is any evidence to sustain the factual findings implicit in the jury's verdict." *Id.*

iii. New Trial *Nisi Remittitur*

“Compelling reasons must be given to justify invading the jury’s province by granting a new trial *nisi remittitur*.” *Proctor v. Dep’t of Health and Envtl. Control*, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006). “The consideration for a motion for a new trial *nisi remittitur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented.” *Id.*

ANALYSIS

A. Yaschik

i. JNOV

Yaschik claims it is entitled to JNOV because the subtenants cannot establish their claims of intentional interference with a contract. To establish an action for intentional interference with a contract, the plaintiff must establish (1) the existence of a contract; (2) the wrongdoer’s knowledge of the contract; (3) the intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 336 S.E.2d 472 (1985). Yaschik contends that the third and fourth elements cannot be, and were not, established by the subtenants.

With regard to the third element, this Court did not rule that as a matter of law there was no breach of the sublease, but rather, it was found that there was a valid defense to the breach (namely, impossibility due to Yaschik’s conduct). Specifically, it was found that Yaschik’s conduct in sending a letter purporting to terminate the Master Lease made it impossible for FLP to perform its obligations to the subtenants. A finding of impossibility of performance is not a finding that the contract was not breached or that it was cancelled. Rather, the finding was that Yaschik interfered with the sublease and rendered FLP’s performance impossible – thereby justifying FLP’s breach. This finding inherently entails that the subleases were indeed breached,

and, therefore, the subtenants met this third element at trial. With regard to the fourth element, the question of whether Yaschik acted without justification was a factual determination to be made by the jury.

At trial, photographs of the building were shown to the jury showing portions of the premises largely intact. Also, evidence was presented showing that Thomas Ervin did not visit the building during the five months following the fire when FLP was making substantial efforts and rehabilitating the premises. Moreover, expert testimony at trial indicated that the building could have been restored to substantially the same condition. There was sufficient evidence presented at trial for a jury to reasonably conclude that Yaschik acted in bad faith by declaring the premises totally destroyed. The jury here could have reasonably, and based upon the evidence at trial, ultimately did find, that Yaschik knew of the valid and existing subleases, that Yaschik intentionally procured FLP's breach of the subleases by terminating the Master Lease on the basis of "total destruction," and that subtenants suffered damage as a result thereof. As such, Yaschik's Motion for JNOV is denied.

ii. New Trial Absolute

Yaschik also argues that it is entitled to a New Trial Absolute because the jury's verdict is irreconcilably inconsistent. Yaschik argues that the verdicts are "apparently based on different factual conclusions and legal standards despite arising from a common set of facts, agreements, or legal theories." In support of this position, Yaschik points out that the jury awarded FLP damages as if its sublease with Squeeze lasted through 2027, while awarding Squeeze damages only through 2017. However, these two positions are entirely consistent as Squeeze's sublease did indeed end in 2017 while FLP's Master Lease ran through 2027. It is well within the realm of reason to think that FLP would have had Squeeze, or another paying subtenant, in its property

through the end of its Master Lease. This was, after all, one of the most desirable retail locations on the Charleston peninsula.

Yaschik also points out in furtherance of its position the vast discrepancy between TOTB's damages and Squeeze's damages. However, as addressed below, Squeeze made a detailed showing at trial that it was profitable, and had the records to confirm that contention, while TOTB failed to make such a showing. Yaschik also points to the differing punitive damages awarded in this case, but that inconsistency is also addressed below.

Yaschik also contends that this Court erred in directing verdict in favor of FLP against Yaschik on Yaschik's breach of contract claim against FLP. Yaschik argues that the Court failed to consider all of the elements of estoppel when directing verdict in favor of FLP. Specifically, Yaschik points to the third element of estoppel- "knowledge, actual or constructive, of the real facts" as the element that was not considered. *Heritage Fed. Sav. & Loan Ass'n v. Eagle Lake & Golf Condo*, 318 S.C. 535, 458 S.E.2d 561. At trial, it was held that Thomas Ervin, as President of Yaschik, was estopped from alleging a breach of contract claim against FLP on the basis of "adequate insurance" because there was evidence that Mr. Ervin at least constructively knew of the amount of insurance on the building. While FLP was the party responsible for obtaining the insurance, Yaschik was, after all, the owner of the building itself. There was sufficient evidence presented that Mr. Ervin constructively knew the amount of insurance on the building.

Yaschik also contends that the Court erred in interpreting the contractual indemnification language of the Master Lease; specifically Paragraph 23 which states, "[FLP] shall indemnify and save [Yaschik] harmless from any and all claims, damages, costs expenses, including reasonable attorney's fees *arising from the management of the business* conducted by [FLP] at the leased premises." (Emphasis added). FLP argued at trial at this lease provision does not

apply because the "claims, damages, costs and expenses" suffered by Yaschik did not arise from the management of the business. At trial, this Court agreed with this contention by FLP, and no evidence has been presented which changes that position now.

Yaschik also moves for a new trial on the basis that an instruction given to the jury was improper. The instruction at issue is, "A lease is to be construed more strongly against the lessor, and in favor of the lessee." Yaschik argues that a clarifying instruction should have been added which states, "*particularly* where the lease was prepared by the lessor." (Emphasis added). Yaschik contends that it's "case was doomed the second this instruction was given to the jury." First, the challenged jury instruction is not erroneous, and is a correct statement of the applicable South Carolina law. Just because the law doesn't support Yaschik's position does not entail that the instruction is erroneous or prejudicial. Second, this jury instruction is not an outside-the-scope principle of law, and, rather, directly relates to the issues raised in the pleadings and at trial.

Finally, Yaschik's objection centers on the fact that the clarifying instruction of "particularly where the lease was prepared by the lessor" was not added. However, even if that clarifying phrase was added, the gist of the jury instruction remains the same. Yaschik argues that it did not draft the lease, and therefore, the charge is prejudicial. However, the Court of Appeals' use of the word "particularly" is important here because it signifies that a lease is to be more strongly construed against the lessor *especially when* it is prepared by the lessor. Whether the clarifying phrase is added or not does not change the essence of what the instruction conveys. In fact, it could be argued that the addition of the requested clarifying phrase would prejudice Yaschik to a greater degree, since Yaschik's complaint with the instruction is, after all, that it did not draft the lease agreement.

iii. New Trial *Nisi Remittitur*



Yaschik's Motion for a New Trial *Nisi Remittitur* is also denied. The jury verdict amounts are consistent, adequate, and reasonable based upon the evidence presented at trial. The jury awarded Squeeze \$738,371.64 in actual damages, an amount equal to 70% of the total damages alleged by Squeeze. This 30% reduction is evidence that the jury considered the proper extenuating factors related to Squeeze's lost earnings calculation, such as future rent escalations, future earnings growth rate percentages, owner salary, and restoration up-fit time.

The jury awarded FLP \$1,112,857.10 in actual damages. Yaschik contends that this award is invalid for being too speculative, as it is largely based on lost profits which would have accrued after the subtenants leases expired. This contention fails for two reasons. First, evidence presented at trial indicated that, even though the subtenants leases expired in 2017, they were planning on renewing their respective subleases if given the opportunity. Second, and as mentioned above, 213 East Bay Street is a prime retail location. It is not conjectural or speculative to conclude that even if Squeeze, TOTB, and The Brick all did not renew their subleases- FLP would have had no trouble finding new subtenants. It is uncontroverted that FLP's Master Lease ran through 2027, and the jury's award reflected that fact. FLP adequately established their lost profits with reasonable certainty at trial. No evidence has been presented which indicates that the jury awards to Squeeze or FLP place them in "a more advantageous position" than they were before the fire. Therefore, Yaschik's Motion for a New Trial *Nisi Remittitur* is denied.

iv. Yaschik Punitive Damages

Yaschik also contends that the punitive damages awarded to the subtenants - Squeeze and TOTB - were improper and contrary to law. Yaschik's first contention in this regard is that the subtenants failed to present clear and convincing evidence that Yaschik's conduct was willful, wanton, or in reckless disregard of their rights. The test used to make this determination is whether the tort was "committed in such a manner or under such circumstances that a person of ordinary

reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights." *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011). There was sufficient evidence presented at trial upon which the jury could have, and did indeed, determine that Mr. Ervin acted in such a way that he was conscious that his behavior would interfere with the subtenants rights under the contract. Indeed, the evidence showed that he conducted negotiations- unbeknownst to and to the detriment of the subtenants- with EBCO and Mr. Hilton Smith to buy 213 East Bay Street. This first factor is heavily in favor of allowing the punitive damages awarded to the subtenants to stand.

Yaschik's second contention is that the award of punitive damages violated Yaschik's due process rights. This is examined by looking at (1) the degree of reprehensibility of the conduct, (2) the disparity between the actual or potential harm and the amount awarded, and (3) the civil penalties authorized or imposed in comparable cases. *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011). We will examine these in turn.

First, the degree of reprehensibility is determined by weighing the following factors: (1) the harm caused being physical as opposed to economic, (2) the level of indifference for the health and safety of others, (3) the victim's financial vulnerability, (4) whether the conduct was isolated or repeated, and (5) whether the harm to the victim resulted from a malice or deceit, as opposed to a mere accident. The first two factors here clearly favor Yaschik's position. The tortious conduct did not put anyone's health or safety at risk, and the harm was purely economic. However, the next three factors all favor upholding the imposition of the punitive damages. The victims were small business bar owners whose livelihoods depended on the success of their bars. They were financially vulnerable, and the complained of conduct of Mr. Ervin directly impacted their financial vulnerability. Also, Yaschik was the building owner and the subtenants were merely subtenants- further evidencing the subtenant's vulnerability. The fourth element also favors

upholding the punitive damage award as Mr. Ervin's complained of conduct did not occur within one day, one week, or even one month, and, rather, the evidence indicated the negotiations with EBCO occurred over a period of months. Finally, the fifth element clearly supports the award of punitive damages, as the conduct involved was no mere accident, and the jury could properly infer a degree of deceit from the evidence presented.

The second guidepost in reviewing a punitive damage award takes a look at the disparity, if any, between actual or potential harm and the punitive damages award. To make this determination, a court may consider: (1) the likelihood the award will deter future like conduct; (2) whether the award is reasonably related to the harm likely to result from such conduct; and (3) the defendant's ability to pay. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). Examining the factors, it is reasonable to think that the award of punitive damages will deter Mr. Ervin from future like conduct, the award is directly related to the harm resulting from his conduct, and Yaschik easily has the ability to pay.

The third guidepost compares the punitive award to civil penalties authorized or imposed in comparable cases. Here, there are no civil penalties applicable to this situation. However, an examination of South Carolina case law shows that the highest ratio of actual damages to punitive damages ever upheld in this state was a ratio of 9.9:1. Thus, the award to Squeeze falls within well within this accepted ratio.

Yaschik also claims punitive damages awarded to TOTB are constitutionally excessive. The nominal damages awarded to TOTB were \$1.00, while the punitive damages awarded to TOTB were \$133,333, representing a 133,333:1 ratio. Courts are leery of upholding punitive damages awards that are "excessive" and South Carolina is no different. *See 2 Punitive Damages: Law and Prac.* 2d § 18:6 (2017). However, this case is novel in South Carolina, so far as case law seems to indicate, because the jury granted a large punitive damage award after only awarding a

nominal damage award of \$1.00. A punitive damage award of \$9.00 or \$10.00 would be absurd. There is no question the two subtenants were similarly situated and similarly impacted by Yaschik's actions. The difference in compensatory damage awards can be attributed to the fact that TOTB did not do a satisfactory job of presenting financial records to back its claim for economic losses, as discussed below. However, because the facts of the case are uniquely postured vis-à-vis two similarly situated subtenants, it seems proper to compare the punitive damage awards to them (which the jury seemed to do), and this Court finds the awards very much compare favorably to each other and in relation to Yaschik. Viewed in that light, the punitive damage award to TOTB is not excessive and, therefore, upheld as well.

v. Setoff

Yaschik seeks a setoff to account for various other payments received by FLP, TOTB, and Squeeze. Specifically, Yaschik seeks a setoff for any monies received by FLP and Squeeze in regards to claims they settled with EBCO, and Hilton Smith (EBCO's President), prior to trial. FLP alleged claims of tortious interference with contract, intentional interference with prospective contractual relations, violation of South Carolina unfair trade practices act, indemnity, and civil conspiracy, with Squeeze alleging intentional interference with a contract, against Mr. Smith and EBCO. All of these claims were settled pre-trial, and Yaschik now seeks a setoff for any monies paid as a result of those settlements.

There "can be only one satisfaction for an injury or wrong." *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012). Therefore, "the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury." *Id.* at 471-72. "When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." *Id.*

Yaschik is entitled to a reduction in the verdict amounts pertaining to FLP and Squeeze insofar as they received settlement funds relating to the breach of the Master Lease from EBCO and Mr. Hilton Smith. This amount has not yet been identified, so an exact calculation cannot yet be had. The parties have ten days to inform the Court of those amounts so the verdicts can be properly reduced to account for those prior settlements.

Yaschik also seeks a setoff for any funds paid by TOTB to FLP on FLP's causes of action for breach of contract, negligence, and indemnity relating to the fact that the fire started in TOTB's rental unit. However, these causes of actions arose from a separate injury- namely, the fire itself rather than anything relating to the lease agreements- so any settlement monies paid, if any, as a result of this pre-trial settlement will not be applied to the setoff. Therefore, its Motion for Setoff is denied with respect to TOTB.

Additionally, Yaschik's Motion for Setoff is granted insofar as it pertains to the business interruption insurance proceeds received by Squeeze and FLP. Both Squeeze and FLP received \$60,000.00 in business interruption insurance proceeds. At the beginning of trial, the parties stipulated on the record that any damages awarded to Squeeze and FLP would be reduced by the amount received from the business interruption proceeds. As such, the award to FLP and Squeeze are both reduced by the amount each received in business interruption insurance proceeds, which amounts to \$60,000.00 each. Therefore, Yaschik's Motion for Setoff is granted, in part, with respect to any pre-trial settlement monies paid by EBCO and Hilton Smith to FLP and Squeeze, and with respect to the business interruption insurance proceeds received by Squeeze and FLP. The remainder of Yaschik's Motion for Setoff is denied.

vi. Motion for Stay of Execution

Yaschik also filed a Motion for Stay of Execution of Judgment, pursuant to Rule 62(b), SCRCp, seeking to stay the executions of the judgments against it during the pendency of the

present post-trial motions. As this Order addresses the post-trial motions, the execution of this Order moots Yaschiks Motion for Stay of Execution.

B. Top of the Bay

i. New Trial *Nisi Additur*

TOTB made a Motion for New Trial *Nisi Additur* on the basis that the jury's award of \$1.00 in nominal damages to TOTB on its intentional interference with contractual relations claim was excessively inadequate, and that they are entitled to an award of actual damages. The South Carolina Supreme Court has previously stated that, in order for damages to be recoverable, the "evidence presented must be sufficient to enable the factfinder to make a determination with reasonable certainty or accuracy. Neither the existence, causation, nor amount of damages can be left to conjecture, guess, or speculations." *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 407 S.E.2d 630 (1991).

TOTB relied on its profit and loss statements from 2010 to 2013 in support of its damages. The documents are handwritten, uncertified, contradict other figures submitted to the City of Charleston, and provide no support or explanation for the numbers indicated on them. In support of its motion, TOTB argues that the other "almost identically situated" subtenant (Squeeze) received more than \$750,000 in actual damages, and, thus, the award of only \$1.00 was "clearly excessively inadequate." However, although Squeeze and TOTB were both subtenants, the evidence indicated they were in very different positions financially, and with respect to the manner in which their financial records were kept. Expert testimony from trial indicated that Squeeze's financial records were maintained in an exemplary fashion. Squeeze was also able to corroborate its records through electronic and other means.

Kelly Tant of TOTB stated the following with regard to the profit and loss statements: (1) her mother drafted them; (2) she is not capable of providing a breakdown of the numbers listed,

(3) she does not have reports from the cash registers, (4) she does not have, nor has she requested, copies of relevant checks from her bank, and (5) she does not know why there are discrepancies between the statements and tax returns. Ann Thode, Ms. Tant's mother, testified that: (1) the statements were drafted after the commencement of litigation and TOTB was served with discovery requests, (2) the statements were extrapolated from other handwritten, unsigned, uncertified, and unfiled copies of TOTB's tax returns, (3) she has no knowledge about the individual entries on the tax returns, and (4) she is not in possession of any receipts or financial records for TOTB. TOTB's damages figures were "not supported with corresponding figures" and were "wholly insufficient to provide the jury with a basis for calculating profits lost with reasonable certainty." *Drews Co. v. Ledwith-Wolfe Associates, Inc.*, 296 S.C. 207, 371 S.E.2d 532 (1988). Therefore, TOTB's Motion for *Nisi Additur* is denied.

ii. Motion for New Trial

TOTB also filed a Motion for a New Trial, and argues this Court erred in granting Directed Verdict against TOTB on its breach of contract claim against FLP. As explained above in relation to Squeeze, Yaschik's terminating the Master Lease terminated Squeeze's sublease agreement as a matter of law. Thus, FLP could not have breached a sublease that no longer existed. The breach of the sublease would have had to occur before Yaschik terminated FLP's Master Lease, but the evidence presented indicated no such breach. In fact, the evidence showed that FLP went above and beyond its contractual duties during the five months following the fire in regards to rehabilitating the premises. Once the Master Lease was terminated, it became impossible for FLP to further perform. Therefore, TOTB's Motion for a New Trial is denied.

C. Squeeze

Squeeze filed a Rule 59(e), SCRCF, Motion for Reconsideration with regard to this Court's granting of a Directed Verdict against Squeeze on its breach of contract claim against Yaschik,

and against Squeeze on its breach of contract claim against FLP. At trial, it was held that Squeeze could not pursue its breach of contract claims against Yaschik because Squeeze was not an intended third-party beneficiary of the lease between Yaschik and FLP. Squeeze argues that the language of the Master Lease evidences that it was indeed a third-party beneficiary. Specifically, they point to Paragraph 1 ("Tenant has the right to sublet"), and Paragraph 36 ("if this lease shall be assigned or sublet, shall include also tenant assignees or subleases, as to premises covered by such assignment or sublease"), and the fact that the Master Lease had language removing all restrictions on subletting. However, giving the tenant the right to sublet, or language which indicates a hypothetical subtenant, does not rise to the level of bestowing third-party beneficiary status on an after-the-fact subtenant. Nothing in the Master Lease indicates that the parties thereto intended to confer a direct benefit on Squeeze. In fact, when the Master Lease was executed in 1997, Squeeze would not be in existence for another 12 years. The possibility that a subtenant may come in down the road at some point was certainly contemplated, but no evidence exists which indicates the parties to the Master Lease intended to confer a direct benefit on Squeeze. Therefore, Squeeze lacked third-party beneficiary status, and, as such, lacked standing to bring its breach of contract action against Yaschik. In any event, the verdict against Yaschik on Squeeze's intentional interference cause of action was presumably for the same damages Squeeze suffered relating to its breach of contract claim. On top of that, Squeeze got an award of punitive damages, which would not have been allowed in a breach of contract claim.

At trial, Directed Verdict was also granted against Squeeze on its breach of contract claim against FLP. The basis of that ruling was that, due to Yaschik's terminating the Master Lease, it became impossible for FLP to continue its efforts in rehabilitating the premises. Squeeze argues that it had a separate contract with FLP which required FLP to "restore the premises to substantially the same condition as prior to damage as speedily as practicable" in the event there was a fire.

~~However, for five months following the fire, FLP undertook rather significant steps toward~~
fulfilling this obligations; including, but not limited to, contracting with Belfor and ABS in
furtherance of that goal. It was not until Yaschik terminated the Master Lease, rendering it an
impossibility, that FLP ceased its rehabilitation efforts. Therefore, Squeeze's Rule 59(e) Motion
to Reconsider is denied.

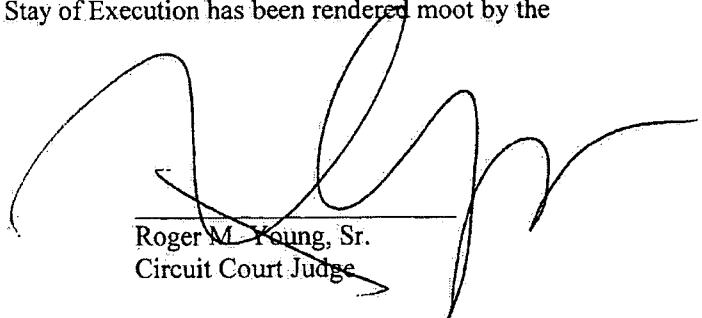
CONCLUSION

Having considered the arguments, supporting and opposing documents, and based on the
same, it is therefore ORDERED, ADJUDGED AND DECREED:

1. Yaschik's Motions for JNOV, New Trial Absolute, and for New Trial *Nisi Remittitur*
are denied; and
2. Squeeze's Motion to Reconsider is denied; and
3. TOTB's Motions for New Trial Absolute and New Trial *Nisi Additur* are denied; and
4. Yaschik's Motions for Setoff is granted, in part, and denied, in part. As discussed
above, Yaschik's Motion for Stay of Execution has been rendered moot by the
execution of this Order.

IT IS SO ORDERED!

5/7 2018



Roger M. Young, Sr.
Circuit Court Judge

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.

By 

DEPUTY CLERK

1 do is, like I said, we're going to stay here and work on
2 some things, and then based on what I make a decision on
3 some things here, we're going to have a little more work
4 in the morning, so I'm going to ask you -- you don't have
5 to come in until 10 o'clock. I think that will work out,
6 because if I bring them back in at 9:00, that should get
7 us through -- I don't want you to get here at 9:30
8 because you're going to have to wait.

9 I don't think we can do it in 30 minutes, but
10 I think we can do it in an hour. So let us depart with
11 you coming back at 10 o'clock tomorrow morning, rested
12 and ready and making the final push to get it to verdict.
13 Okay? Thank you so much for your patience, and, again,
14 don't begin any deliberations or discussions, and see you
15 tomorrow morning at 10 o'clock.

16 (Jury recessed for the day.)

17 THE COURT: Let's go through the final
18 directed verdict motions. Mr. Cooper, why don't you go
19 first.

20 MR. COOPER: I think with the evidence in the
21 case we're only going to make one motion at this point in
22 time, and that would be the breach of contract claim
23 against Quillen.

24 The evidence that we think proves the case as
25 a matter of law is when Mr. Quillen went up on the stand,

1 he acknowledged the sublease. He acknowledged it was an
2 independent contract. He acknowledged paragraph 20 that
3 he had a duty to restore, and he also acknowledged that
4 it wasn't restored and it still hasn't been restored, and
5 then, obviously, he didn't pay for that restoration, and
6 those are straight admissions by a party opponent on the
7 stand that prove every factor of the breach of contract,
8 and on those admissions, we think directed verdict is
9 appropriate.

10 MR. BROWN: Top of the Bay joins in that
11 motion.

12 THE COURT: Mr. Lay, are you arguing those?
13 He wants a directed verdict against you.

14 MR. LAY: I heard him. Well, obviously,
15 that's not the way, in my view, the law works at all. We
16 cannot grant possession of what we don't have. There was
17 a termination of the master lease. The subleases, the
18 possession comes from the owner, it goes to us, and then
19 we can provide what we've got. When they terminate, it
20 terminates their leases. They don't have a right to
21 pursue any of this, in my view. It is contingent on the
22 possession that we received from the owner. Once they
23 terminated, it was over.

24 The evidence, in addition to that, just shows
25 that Mr. Ervin says he did not terminate based on any

1 other issue, he terminated based on the -- he terminated
2 based on the total destruction issue. He said he was not
3 letting Mr. Quillen or FLP on the premises. There is
4 nothing that we can do about that, so as a matter of
5 law -- oh, and we performed our obligation up until that
6 point, which is also undisputed.

7 I mean, up until September 11, 2013, there is
8 no dispute that there was anything but movement going
9 forward at speedily as practicable. Even Clint Gaskins,
10 on a request to admit, acknowledged that on
11 cross-examination. During his cross-examination when
12 they were putting their case up, he acknowledged that
13 Mike was doing everything that he could do to move the
14 case forward. Kelley Tant acknowledged that. Tom Ervin
15 acknowledged that.

16 There's really no dispute that up to
17 September 11 on the date of termination everything was
18 being done as speedily as practical to restore the
19 premises in the condition they were in prior to the fire.

20 THE COURT: What if the jury finds that the
21 lease was not -- or the property was not totally
22 destroyed, then there was not a valid termination, and
23 then you still have a contractual obligation with them
24 to -- one, to restore and/or adequately insure would be a
25 breach of contract also.

1 MR. LAY: Right now we're talking about two
2 separate issues from adequate insurance and duty to
3 restore.

4 THE COURT: Well, they both fall under breach
5 of contract, and they were asking for breach of contract
6 against you. Granted, I threw in the last part
7 gratuitously, but breach of contract is breach of
8 contract. There are two avenues.

9 MR. LAY: Terminates is a matter of law.

10 THE COURT: If it was a valid termination.

11 MR. COOPER: I don't think he can argue that.
12 I mean, his whole position of the law of the case is --
13 and he testified there was not a valid termination. I
14 don't see how he can sit here and argue against the
15 evidence in the case, that there was not a termination.

16 MR. LAY: What happens at the moment of
17 termination, whether it's valid or invalid termination,
18 that is a breach of contract between FLP and Yaschik.
19 What it does, though, the effect of it, is that whether
20 it's right or wrong, it terminates those subleases, and
21 they can sue for tortious interference of a contract as a
22 result of that. That's what they're doing, but, for
23 example, the Am Jur articles you sent last night, that's
24 exactly what they say. One of the articles you pointed
25 to says that when there's a termination, it's over.

1 Now, it's not talking valid or invalid. It's
2 not like the lease continues forward and that's some sort
3 of issue of facts. That is a matter of law they
4 terminated. Our position ended at that moment. Our
5 ability to perform ends at that moment, and they have --
6 we can -- they can't pursue their claims as a result
7 against us.

8 THE COURT: Only if there's a valid
9 termination, though.

10 MR. LAY: I don't think that's right at all.
11 I think if it's valid or invalid, they terminate it.
12 They create damages if it's an invalid termination, but
13 it's still a termination.

14 MR. COOPER: That would be a complete
15 perversion to say his lease is effective and the
16 subleases aren't, particularly when his own client
17 lawyer, after the fact, sends the September 20th letter
18 saying we believe there was no termination, and he never
19 sent us a termination letter under our independent
20 sublease, and he said on the stand he thought and always
21 believed that that lease is still effective, so I don't
22 know how can you get up and argue a termination against
23 the law of the case.

24 MR. LAY: The individual does not determine
25 how the law applies. The law applies when there's

1 termination, there's termination.

2 THE COURT: There is such a thing is if --
3 you can argue it's not a valid termination.

4 MR. LAY: I think it's an invalid
5 termination, but the effect of that is it has terminated
6 our lease, and that was invalid and has created damages.
7 The effect of that is that it has terminated theirs as
8 well.

9 THE COURT: Maybe it's more correct, and I'm
10 thinking out loud here, to think of it as -- because it
11 was an invalid termination, it did not terminate your
12 leasehold, and therefore it did not terminate their
13 sublease; however, this is where your impossibility
14 defense may come in.

15 MR. LAY: Impossibility, proximate cause, all
16 those issues come in.

17 THE COURT: What about that? Because even if
18 Ervin and Yaschik improperly declared the lease to be
19 terminated, it was impossible for him to perform at that
20 point. He was told stay out. I'm taking over. You no
21 longer have a lease.

22 The property has been -- the second he
23 declared it totally destroyed, whether or not that was
24 correct, it became impossible for Quillen to perform any
25 longer under their lease and therefore under your

1 sublease.

2 MR. COOPER: So, I mean, I believe the quote
3 from the case law is cannot by any means be accomplished,
4 and Mr. Swope was correct. The case on that is if you
5 have the ability to go file a dec action or file an
6 affirmative injunction and you don't do that, that is a
7 complete bar, but on top of it, the evidence in the case
8 was, first of all, Mr. Ervin testified that he never
9 locked him out.

10 He never submitted a permit to him. He never
11 asked to do any more work. There was no effort
12 whatsoever for us to sit here and say by any means
13 possible, it could have never happened, because he didn't
14 try. The evidence is he didn't try, and Mr. Quillen sat
15 on the stand and said, I didn't give him a permit to
16 approve. It just stopped, because he voluntarily
17 stopped.

18 THE COURT: That's because Mr. Ervin sent him
19 a letter and said stop. You know, you no longer have a
20 lease. Give me the plans. You're out. I'm taking over.

21 MR. COOPER: But he wrote back and said no,
22 we believe there's a valid lease, but he still does
23 nothing. His lawyer wrote back in a September 20th
24 letter, I believe. He has still done nothing, but it has
25 to be by any means possible, and they're exactly right.

1 The case law is if you have some kind of judicial means
2 and you don't assert it, you're out.

3 On top of that, he voluntarily didn't try to
4 do anything, and, in fact, I believe Mr. Ervin testified
5 and said if he would have kept on going, he could have
6 kept on building. So I don't see how the impossibility
7 defense ever works. This was clearly a fight over money
8 and them not wanting to pay for it, and they voluntarily
9 threw up their hands.

10 MR. BROWN: Mr. Ervin testified if there had
11 been enough money, we would not be here today. That
12 building would have been restored. It is undisputed that
13 FLP had the money to do it. FLP entered into a lease and
14 obligated itself to restore the building in the event of
15 a fire if it wasn't wholly damaged.

16 It might not have been a cost effective deal,
17 but that was the deal that they entered into. To say it
18 was somehow contingent upon Yaschik's cooperation doesn't
19 make it contingent, but they didn't do that. The deal
20 they had was on the subleases. Again, Mr. Ervin
21 testified if he had enough money to fix the building, we
22 would have done it.

23 FLP had the obligation. They had the money,
24 but they didn't tender it. Mr. Ervin cancelled the lease
25 after FLP said, No, I think you have to pay the

1 shortfall, and at that point, it had been five-and-a-half
2 months. They didn't come up with the money yet and that
3 caused, I think, the breach, and I think those things are
4 undisputed.

5 MR. LAY: They're clearly disputed. There is
6 evidence all over the place. My point is, this is not
7 remotely -- this is an at law issue that their claim does
8 not stand. I'm not going to argue my DV yet, but this
9 notion that somehow they get a DV on this case, let's
10 look at it in terms of factual dispute.

11 Again, the caveat that we have a lot of at
12 law issues that we think prohibit this. They've offered
13 no evidence on impossibility. We put up evidence that it
14 was impossible, that the doors were locked, that we
15 couldn't perform. Mr. Ervin says the intent of his
16 termination had nothing to do with keeping this all open.
17 He said it repeatedly on cross-examination: Keep it open
18 for restoration by FLP.

19 He said no. It's because it was totally
20 destroyed. It had nothing to do with it. This idea that
21 there was -- there was repeated evidence put in that even
22 after the September 3rd letter, Mr. Quillen continued to
23 try to perform to put the premises back in.

24 He gets the September 11th letter. He still
25 continues to do what he can. He does not have

1 possession. No contractor can go on the premises. No
2 one can enter the premises without permission of the
3 owner. Possession has been taken. Rightfully or
4 wrongfully, it's been taken. There's nothing else that
5 he can do. If they've got some evidence of other things
6 that could be done, like an injunction, I didn't hear a
7 lawyer get up here and talk about some avenue that would
8 change the result from where we are right now, which is
9 five-and-a-half, four-and-a-half years after the event,
10 here we are. None of that evidence was proffered in this
11 case.

12 MR. COOPER: That's actually incorrect
13 because I asked him whether he -- because he thought
14 there was a valid contract, didn't he have a leasehold?
15 And I asked him about the trespass issue, and I said,
16 well, you had a lawyer and you sent a letter, and you
17 legally didn't try to do anything, and he said, No. We
18 were trying to do a business solution.

19 That was the testimony. He didn't do
20 anything. He didn't give a permit to Mr. Ervin. He
21 didn't demand anything of Yaschik. He didn't try. It
22 was because they were fighting over money, Your Honor,
23 but the problem with their case is he got on the stand
24 and admitted there's a contract. I had an obligation to
25 restore under the contract. I understand I had to do

1 that, and I am testifying I think the lease is still
2 valid.

3 That meets the definition of breach of
4 contract because he didn't restore it.

5 THE COURT: I got your point. All right.
6 Did you have any other --

7 MR. COOPER: One shot.

8 THE COURT: Anybody else have one they want
9 to make?

10 MR. SUMNER: Your Honor, Yaschik would like
11 to renew its direct the verdict motions.

12 THE COURT: All right. Which ones? I mean,
13 all of them, I know, but let's do this: You got Quillen
14 versus Yaschik on breach of contract. What's your --

15 MR. SUMNER: Well, the two we're moving for
16 with respect to Quillen is breach of contract accompanied
17 by fraudulent act as well as civil conspiracy, and as we
18 said yesterday, and I won't belabor the point because I
19 think we went through it pretty carefully, we believe
20 under the elements for breach of contract on fraudulent
21 act you have to prove a separate and independent
22 fraudulent act, that while it may be related to the
23 breach, cannot be the breach itself, and Mr. Lay said the
24 separate act is the breach. It's what he said yesterday,
25 and you not only have to meet that but you've got to meet

1 it by a clear and convincing evidence standard, and so --

2 THE COURT: Let me stop you just a second.
3 Mr. Lay, yesterday we were talking about you -- are you
4 still going forward with breach of contract accompanied
5 by fraudulent act and negligent misrepresentation?

6 MR. LAY: Not going forward with negligent
7 misrepresentation.

8 THE COURT: What's the fraudulent act?

9 MR. LAY: We have, I think, a series for
10 fraudulent acts, permitting FLP to continue with
11 restoration efforts for five months, expending its own
12 money when it had no intent to allow a restoration
13 because it was in the works, doing a better deal;
14 simultaneously pursuing the sale of a business. That
15 would be more profitable without FLP in the picture, and,
16 again, allowing FLP to continue to expend its money and
17 time on the restoration when it had no intent to go
18 forward with that.

19 Making the statement with the intent to
20 deceive or in reckless disregard of the truth that the
21 building was a total loss, which is not even a term under
22 the master lease, and also this idea that it's got to be
23 separate and apart from -- the termination is the breach.
24 The reason behind the termination is the fraud, the
25 intent behind it.

1 They're saying that this is terminated. The
2 reason that it is terminated is because it's totally and
3 wholly destroyed, which is a fundamentally wrong fact
4 which they knew was a wrong fact, and they were doing it
5 for bad reasons. That is a breach of contract with the
6 fraudulent act. They know that the wholly destroyed,
7 totally destroyed comments are not just inaccurate,
8 they're false.

9 They know they're not true and the evidence
10 is there for that. I mean, you go through the month of
11 August, we went through every inference on every
12 communication, all the way through to the communications
13 with Hilton Smith to the acknowledgement. He says that
14 he met with engineers and architects on August 20th.
15 After that, he acknowledges that the lease is still in
16 effect, not wholly destroyed.

17 He's already met with him, and a few days
18 later, he's acknowledging that it's in effect. He gets a
19 letter on September 3rd, and suddenly it's totally
20 destroyed, and there's absolutely -- we went through
21 this -- no new information that he had that would cause
22 him going from I believe the lease is in effect to this
23 wholly destroyed position, which was the first time it
24 had been brought up in five-and-a-half months.

25 So there are a series of fraudulent acts that

1 occur, but the culmination of it is the fraudulent
2 statement on wholly destroyed. The breach is the
3 termination. That's what the termination is.

4 MR. SUMNER: Your Honor, I would just point
5 out, it's breach of contract accompanied by fraudulent
6 act, and I think Mr. Lay is conflating that with the
7 fraudulent misrepresentation claim, which has been
8 abandoned. He's got to show a separate act, and he's
9 described a lot of motives that he is going to subscribe
10 to whatever Mr. Ervin was doing or not doing, but silence
11 or having an ill motive is not a fraudulent act.

12 He's got to show something more, and it can't
13 just be the breach. He keeps attaching and prescribing
14 the breach in a different way, but it's just getting back
15 to the breach. I think it's just a breach of contract
16 case. They said he's got bad motives, but having bad
17 motives doesn't make it breach of contract accompanied by
18 a fraudulent act. You've got to have more.

19 MR. COOPER: Your Honor, we have the same
20 claim as the derivatives of third-party beneficiary. I
21 mean, all of the backdoor stuff going on and being
22 defrauded, I don't disagree with it, but I look at it
23 just a little bit different on the breach.

24 THE COURT: Let me have you address the
25 concept of privity of contract and privity of the state

1 are two separate and distinct things. The law seems to
2 be pretty clear in this case that a sublessee does not
3 have privity of contract with the landlord, so you don't
4 get to sue on a breach of contract against Yaschik for
5 breach of contract or breach of contract accompanied by a
6 fraudulent act. I don't see that's the law.

7 MR. COOPER: No. The law you sent, we agree
8 with, but I believe, starting with -- it says ordinarily
9 a sublessee cannot sue under the master lease, but the
10 exception to that is if you can contract around it
11 because parties can contract around whatever --

12 THE COURT: The parties -- if there were a
13 party that was contemplated in existence at the time of
14 the contract being executed, perhaps you could make an
15 argument, but you're saying, well, they define subtenants
16 in there, and that gives us the rights as a tenant, but
17 you weren't a leaseholder at that time.

18 You weren't a leaseholder for some time after
19 that, so how could you be considered a third-party
20 beneficiary of a contract and have privity of contract
21 when it was signed months or years before your party ever
22 took possession?

23 MR. COOPER: Actually, that's correct, but
24 the contractual language says should tenant assign or
25 sublet. So it's not if tenant has a sublease now, it's

1 like should tenant assign or sublet, that is a future act
2 that was intended by the very drafting of that
3 definition, so it's in their contract.

4 They all reviewed it. They all signed it,
5 and that's what the contractual language says, so it
6 clearly was intended, if they were looking at sublessee
7 that should be an assignment or sublet in the future.
8 That's the four corners of the document, Your Honor, and
9 that's what it says, and the law you cite is correct,
10 ordinarily, but you can contract around the original
11 rules.

12 And we think that language is consistent with
13 the others, shall have the right to sublet. They cross
14 out the assignee. I just -- I don't know how you get --
15 and it's in the contract, you got to live with it.
16 Should this be assigned to a sublessee, that's a future
17 act we were contemplated in it, and it's right there in
18 the definition.

19 MR. BROWN: Top of the Bay has the same cause
20 of action, Your Honor. Chuck Eiserhardt testified this
21 morning that they had talked about the sublessees. They
22 Xed out the part of the master lease that required the
23 permission of the owner. They talked about it, and
24 obviously it was contemplated --

25 THE COURT: They were permitted sublessees,

1 and that's the point? There's a difference between
2 privity of state and privity of contract, and y'all have
3 got to get -- you got to get past the privity to the
4 state thing. You are not -- privity to contract is not
5 created by the landlord consenting to a sublease. That
6 seems to be black letter.

7 MR. BROWN: There's more than that. He
8 testified this morning that document set forth his
9 obligations to the tenants, and I asked him, under the
10 definition in that contract, did that obligation flow to
11 the sublessees, and he said yes. He is the party that
12 was there. He's the one that knew what the intent of the
13 parties was, and he said that that obligation flowed to
14 the subtenants.

15 THE COURT: Yes?

16 MR. GASKINS: Your Honor, on redirect, he
17 clarified his testimony and made it very clear that the
18 subtenants did not obtain the same rights, despite his
19 deposition. This is a form lease, and it was included in
20 there, but this form lease does not give the subtenants
21 the right to enforce the master lease. At best, it shows
22 that the original parties to the contract contemplated,
23 perhaps, an incidental benefit to some future subtenant,
24 but the law is clear, as you noted, that is not enough.

25 South Carolina law says that the parties have

1 to intend to confer a direct benefit, and the law that
2 you cited, we believe, is directly on point. There may
3 be times when there are exceptions to that. This is not
4 the case because the evidence is clear that none of the
5 original parties intended for it to apply to subtenants.
6 It was only going to be permitted.

7 In the subtenants -- the subleases did not
8 even come into existence until ten years after the master
9 lease was signed, and based on that, Your Honor, we think
10 the law is very clear that we are entitled to directed
11 verdict on those breach of contract based claims on the
12 subtenants.

13 MR. COOPER: Your Honor, we'd also like to
14 point out on Squeeze Exhibit 4, which was the assignment
15 of the master lease to Quillen in March of 2012, that
16 document that has the landlord's consent to assignment is
17 behind the assignment document that came out of Yaschik's
18 files, Exhibits A and B have the rent rolls with the
19 subtenants, so at that point in time, with that
20 definition, he would have known there were subtenants.
21 He would have known they were conferred a benefit under
22 that definition. We think there is sufficient evidence
23 to get over directed verdict.

24 THE COURT: All right. What's the difference
25 in your case -- your damages between your breach of

1 contract theory and your intentional interference with
2 contractual relations theory?

3 MR. COOPER: Well, the interference with the
4 contractual relationship is the sublease. He knew the
5 existence --

6 THE COURT: I know what it is. What's the
7 difference in your damages, is what I asked.

8 MR. COOPER: Oh, the damages? None, Your
9 Honor.

10 THE COURT: What?

11 MR. COOPER: None.

12 THE COURT: You don't have any damages on the
13 intentional interference?

14 MR. COOPER: No, they're -- the damages --

15 THE COURT: I'm asking what's the difference
16 in the damages.

17 MR. COOPER: The amount is the same.

18 THE COURT: So you're protected. If you
19 have -- if I allow you to go forward on your intentional
20 interference claim, your damages are exactly the same as
21 if you went forward on the breach of contract claim,
22 correct?

23 MR. COOPER: Yes, the actuals would be the
24 same, but, again, on election of remedies, you don't know
25 what that jury is focussed on at this point in time. I

1 think that's the risk, and I think that's why people
2 plead alternative claims, Your Honor.

3 THE COURT: I understand, but you have not
4 convinced me that you have standing to bring the breach
5 of contract case against the landlord in this case, so
6 I'm just throwing that out.

7 Go ahead.

8 MR. GASKINS: If I may, I think I can get you
9 over that hill and convince you that there is no breach
10 of contract case. At this point in time, before they go
11 and give closing arguments, they need to elect a remedy
12 between breach of contract based on a third-party
13 beneficiary or intentional interference because those are
14 inconsistent claims, and I'll tell you why.

15 The economic loss rule prevents a party which
16 is in a contract from seeking economic damages in tort,
17 and I'll pass up the case law. When they assert that
18 third party claim, third party beneficiary claim,
19 claiming some type of contract, at that point in time,
20 the economic loss rule applies, and it bars their tort
21 claim for intentional interference. Because they have
22 the same damages, they have to choose one, and they can't
23 recover on both. In fact, they are inconsistent, and I
24 would point you to the Harper v. Ethridge case, which is
25 290 S.C. 112.

1 I can hand it up. I don't have another copy,
2 and this talks about when it is appropriate to elect
3 remedies? And what the Court of Appeals said is when
4 there are inconsistent causes of action that will confuse
5 the jury, the plaintiff needs to elect the remedy prior
6 to submitting the case to the jury and making closing
7 arguments. So, Your Honor, we think because of that, it
8 makes your decision pretty easy, if you're already
9 leaning that way, as to kick the breach of contract
10 claims, because they are not third-party beneficiaries,
11 and if you don't, they're going to need to elect one of
12 the two anyways.

13 MR. COOPER: I believe we can elect when the
14 jury comes back, and I'm pretty confident that I can
15 explain the different actions and the different legal
16 basis on why both of them are not inconsistent.

17 THE COURT: Anybody else have any motions or
18 arguments they want to make?

19 MR. SUMNER: Your Honor, as to Yaschik's
20 claims, defending the claims against FLP, we renew our
21 motion on civil conspiracy. As we talked about
22 yesterday, there's no evidence of any special damages.
23 There's no rebuttal evidence that's been put up since we
24 had this conversation last, and I think everyone would
25 agree there's only one measure of damages that FLP is

1 striking, and that's the breach of contract damages, so
2 the civil conspiracy should go away.

3 THE COURT: What about that, Mr. Lay? You've
4 got to have special damages, and I haven't seen any
5 evidence of any damages that you would suffer, other than
6 the ones that claim to have suffered for breach of
7 contract.

8 MR. LAY: I think it's the way the damages
9 were played out. There were damages that were testified
10 to where Mr. Quillen spent his time, energy, for
11 five-and-a-half months trying to restore the premises
12 when there was no intent to restore the premises by the
13 owner. They were just drawing that along for the
14 insurance claim. They were trying to get that done to
15 get the thing cleaned up. They were trying to do it to
16 get an offer to use as a baseline with Hilton Smith.
17 Those damages are part of the civil conspiracy claim.

18 The breach of contract claim with fraudulent
19 intent, which is, you know, again, any unfair dealing
20 which would qualify as fraudulent intent. It's not the
21 nine elements of fraud. It's any unfair dealing, which
22 my client clearly testified to unfair dealing. Those
23 damages would emanate from the future lost profits from
24 the breach of the -- improper breach of the lease.

25 In addition, litigation costs, attorneys'

1 fees, which we -- he testified that he's having to defend
2 this case, would also be part of that. Now, we also
3 think with -- if there is a verdict against us -- I mean,
4 this is not like a tort claim on equitable indemnity.
5 This is a claim -- as part of our breach of contract
6 claim, if we have a -- if they breach -- if the
7 termination causes a problem with our lease where we
8 can't perform, we can't restore the premises as speedily
9 as practical because they have terminated, and whether it
10 is under an adequate insurance provision or whether it's
11 under article 20, none of that would have happened but
12 for the wrongful termination.

13 So those damages should flow through to
14 Yaschik, and we intend to argue that our damages should
15 flow through like that.

16 MR. SUMNER: As ironic as it is, the contract
17 provision has an indemnification provision that actually
18 runs the opposite way, so we would argue if we are hit
19 with damages, that we should be contractually indemnified
20 by Quillen FLP. And, in fact, there has been no evidence
21 to the contrary, and no one has disputed the
22 enforceability of that provision. In fact, Mr. Quillen
23 admitted it was in there. He acknowledged the purpose of
24 it and the intent, and he agreed all the provisions were
25 enforceable, so I don't know what would keep us from

1 moving right forward with a contractual indemnification
2 cause of action in the event that we are saddled with
3 damages as a result of the subtenant claims.

4 MR. LAY: Except he's leaving out a giant
5 piece. The indemnity says as a result of the management
6 by the tenant, which this has nothing to do with, it has
7 everything to do with the wrongful termination. There's
8 that big piece of the indemnity provision that he did not
9 bring up. It's got to be related to the management
10 tenants.

11 MR. SUMNER: I'd argue that getting the
12 proper insurance on the building that you're
13 contractually obligated to insure for both your benefit
14 and the benefit of your subtenants is management, and if
15 you squander that right and fail to comply with it,
16 that's management. I don't know what else you call it.

17 MR. LAY: He's committing a breach -- he's
18 alleging that that's inadequate insurance versus wholly
19 destroyed. He's welcome to admit that breach, and then
20 we can talk about what DV looks like at that point.

21 MR. SUMNER: I don't understand what that
22 means, so I'm going to disagree.

23 MR. LAY: His client stated that adequate or
24 inadequate insurance had nothing to do with the
25 termination to the lease, and he's very consistently held

1 on to that. At the end of the day, that's the only thing
2 that defines why the breach occurs. It incurred because
3 he decided to invoke article 20 of the lease. Article 20
4 has to do with total destruction.

5 We disagree with that, but that's what he
6 invoked. He said nothing about it being inadequately
7 insured. In fact, he denied it and said it had nothing
8 to do with his decision. That's the only evidence here.
9 Whether he was right or wrong is very much in dispute,
10 but the only evidence on proximate cause is the wholly
11 destroyed issue, and that's it. Nothing else has been
12 presented as to the reason why the termination occurred.
13 He's the only one that controls that, and he said it
14 unequivocally.

15 MR. SUMNER: Your Honor, we disagree, and
16 we've heard a lot of talk, but we haven't heard a single
17 mention of special damage, so for that reason, we renew
18 our motion on civil conspiracy.

19 MR. LAY: Special damages are the time and
20 effort and money expended during this effort.

21 MR. SUMNER: But he did not put up that
22 evidence. He put up that evidence in discovery, and I
23 was waiting for it, was ready to cross-examine Mike
24 Quillen, and I have it circled it in my outline and they
25 abandoned it.

1 MR. LAY: He testified, I spent the whole
2 summer coming down to Charleston. I went back and forth.
3 I spent my time doing that. That has value. I can put
4 that up in front of a jury.

5 THE COURT: He wasn't out of pocket anything.
6 The insurance that got paid out paid the bills, right?

7 MR. LAY: That is true. Well, not all of it,
8 but about 30,000 bucks but yeah. His out-of-pocket
9 expenses, the 106 that was fronted --

10 THE COURT: Well, I don't remember that
11 coming into evidence.

12 MR. SUMNER: It didn't. It came up in the
13 depositions, and I waited for it in evidence because I
14 would have gone into it, because I would have loved to
15 tell the jury that he was flying down on a private plane,
16 but I didn't get that chance because he didn't put it up.

17 MR. LAY: There are two different damages
18 that we're talking about, the damages that were fronted
19 from ABS have been reimbursed by insurance. There was no
20 testimony that suggested that the time and energy and all
21 of that, that he got reimbursed for all of that. In
22 fact, the evidence is that he did not, and he testified
23 that he was out of his time and he had to make these
24 trips down here. I'm not giving up or not providing an
25 economic number. I'm talking about the value of his

1 time, which is what the jury is going to have to decide.

2 THE COURT: Sounds a lot like pain and
3 suffering.

4 MR. LAY: Well, I think maybe two definitions
5 could be applied there. I think it's pain and suffering,
6 but it's also the value of his time, and the jury can
7 consider what the value of his time would be for
8 five-and-a-half months of working on this project when
9 there was no intent to restore.

10 MR. SUMNER: Too late to bring that up now.

11 THE COURT: Let me ask you this, because I'm
12 having a problem with getting to allowing a fraud claim
13 to go forward when -- you know, the testimony I heard was
14 uncontroverted, as far as he was open -- Mr. Ervin was
15 open about this Mr. Smith fellow was bugging him, but
16 there never was a deal with him. I don't remember
17 Mr. Smith testifying that they had a deal on this, and
18 when he got -- when your client, Mr. Quillen, got the
19 notification that he considered the property in -- he
20 considered the lease to be in default, that he again
21 said, well, I don't -- wouldn't want to use the word
22 fraud, I just thought it was a really tough negotiating
23 position, and then he took it as a negotiating, you know,
24 tactic.

25 MR. LAY: What he said was -- and let's talk

1 about what the law is first, because I think there is a
2 conflation of fraud with fraudulent act, and these are
3 terms of art. And the way fraud is described, the
4 fraudulent act under the law is any act characterized by
5 dishonesty, in fact, unfair dealing or the unlawful
6 appropriation by another's property by design. So it's
7 not --

8 THE COURT: Where is it other than your
9 theory that there's evidence that he was actually
10 conspiring to sell this property to Mr. Smith in reality?
11 Because they didn't have a deal prior to that.

12 MR. LAY: I can walk through that.

13 THE COURT: They didn't have a deal prior to
14 that, and it was many months later before, it sounded
15 like, they put a deal somewhat together, which I gather
16 has gone through.

17 MR. LAY: In a light most favorable to my
18 client -- and here's where it progressed. In August, he
19 is disclosing to Hilton Smith about my client, you know,
20 in discussions with my client and talking about he had to
21 have a meeting with my client.

22 My client was unaware of what was going on
23 with Hilton Smith. If you look at what goes on then, he
24 has a conversation with Tom Ervin about loaning him money
25 for the restoration of the building. He then has a

1 meeting with the engineers on August 19 --

2 THE COURT: He being who?

3 MR. LAY: I'm sorry. Tom Ervin has a
4 discussion with Mike Quillen about loaning him money for
5 the restoration, loaning money to Yaschik to complete the
6 restoration. There's no discussions that they talk about
7 now about, Oh, this is your responsibility.

8 None of that's going on. At the same time,
9 if you line up the e-mails with Hilton Smith,
10 communications are getting a lot more significant in
11 August, and Hilton Smith is communicating, I don't want
12 the building. He did that first in May. The building is
13 not something that I am interested in. I think it's a
14 problem in all of this.

15 So that idea was rooted very early on. Tom
16 Ervin is getting us to finish up with the insurance.
17 Then he comes in. He's getting us to do the cleanup, and
18 then he's getting us to negotiate without telling us that
19 he's dealing with Hilton Smith. He's talking to us about
20 making an offer on the property, and then he acknowledges
21 that the lease is in effect on August 27th, and there's
22 zero evidence of anything going on that is new that
23 caused him to take this new position on totally destroyed
24 or wholly destroyed.

25 THE COURT: Except for -- didn't it on

1 September, like, 3rd your client wrote him a letter, an
2 e-mail, and said, There's going to be \$1 million paid
3 out, and it's going to cost about 1.5, 1.8, and, you
4 know, I've done all I can. You need to get involved in
5 this thing, because you haven't been involved and that
6 was -- shortly thereafter, he got the letter saying, you
7 know what? I'm involved, and it's over.

8 MR. LAY: Well, he had been communicating the
9 1.5 to 1.8 figure for months. That's not the first time
10 he got that number. He had been communicating that the
11 insurance was going to be paying out, and it was a total
12 loss as defined by an insurance company for months.

13 He had gotten three different communications.
14 Tom Ervin had gotten three different communications
15 during the summer. None of that was new. He knew
16 exactly what the estimate was on the repair. He knew
17 exactly how much was being paid out on the insurance
18 policy, brand new, and you look at -- this idea that it's
19 all of a sudden his responsibility, that was acknowledged
20 for five-and-a-half months, that he knew it was his
21 responsibility. There were several communications where
22 the lease is in effect. The lease is in effect. There's
23 not a single communication from Tom Ervin where he's
24 putting into doubt article 20 where he is under the
25 obligation to restore the premises.

1 And the thing that seems to be the proximate
2 cause that is being pursued here is that Mike Quillen,
3 asserting his contractual rights under the master lease,
4 caused Tom Ervin to wrongfully breach. That can't be the
5 basis of a claim. A person has to have the right to
6 assert -- and I'm not just making that up. That's the
7 law. I can pull up the cases.

8 You have a right to pursue your contractual
9 rights. That's what he did. If you look at the
10 September 3rd letter, he says, I'm here still, but you've
11 got to take responsibility under article 20. If his
12 response to that is to wrongfully breach, that's not a
13 basis of a claim against us. That is their tortious
14 interference claim against Yaschik. That is not a basis
15 to sue us because we write a letter asserting our
16 contractual rights.

17 MR. SUMNER: And I don't know how we've got
18 to this point. I think to get back to your original
19 question, where is the fraudulent acts, the evidence has
20 been uncontroverted that Mr. Ervin told Mr. Quillen about
21 his discussions with Hilton Smith before the termination,
22 and there is evidence in the record, documents and
23 e-mails, where they were involved with the communications
24 post-termination, and, in fact, Mr. Quillen gave his
25 permission to Hilton Smith to talk to folks.

1 He never -- he said on the stand, I never
2 objected. I had never voiced an objection to them, and
3 so how can you have a fraudulent action when Tom Ervin's
4 been completely aboveboard and made him aware of it?

5 Now, the world according to John T. is John
6 T.'s theory. He's going to argue that, but, as you said,
7 where is the evidence of that? And I think the evidence
8 falls so far short of this heightened burden that does
9 apply when you have a breach of contract accompanied by a
10 fraudulent act.

11 Clear and convincing is the hurdle, and it's
12 not a scintilla of evidence standard like summary
13 judgment, so I think here, there is every reason to
14 direct verdict on that fraud claim, or breach of contract
15 accompanied by fraud because we still have not heard
16 articulated a fraudulent act.

17 MR. LAY: They're merging the timeline.
18 There was -- in August, up to the point of termination,
19 my client testified he didn't know a thing about the
20 negotiations that were going on. If there's a
21 termination that goes on on September 11, based on wholly
22 destroyed, totally destroyed, which the evidence is
23 unsupported by anything, it's the first time anyone, any
24 subtenant or us as the master leaseholder, heard anything
25 about it. It's the middle of these discussions that are

1 going on with Hilton Smith that we don't know about.

2 It's only after termination, when he has been
3 pulled out of the deal, that he is told by Hilton Smith
4 and he is given permission for ABS to talk with him
5 because he is still trying to get the premises restored.
6 That's what he is still trying to do, and that was the
7 testimony that he provided on the stand. He's acting
8 like the permission after the termination, or the
9 knowledge of Hilton Smith after the termination, was
10 somehow in the summer. It wasn't. That's not what he
11 testified to. He knew nothing about it.

12 It was only after the termination that it
13 comes out that Hilton Smith was making a claim on the
14 property, is not interested in the master lease. Tom
15 Ervin said, very early on, that Hilton Smith -- this is
16 in the summer. We can go back to Tom Ervin's testimony
17 that Hilton Smith is not interested in having a master
18 leaseholder in the equation, and then he gets terminated
19 for a reason that is unsupported anywhere in the records
20 before Tom Ervin on September 11, and it's -- any unfair
21 dealing is the standard for the fraudulent act, any
22 unfair dealing.

23 MR. COOPER: Your Honor, I was trying to do
24 that before you popped me with the other questions about
25 what that fraudulent act, I don't -- I'm not going to

1 belabor behind the scenes going on, but I view the letter
2 a little bit differently, the September 11th. I think
3 the breach is when he doesn't restore it.

4 Not restoring it is a contractual breach, but
5 that letter, I think, is the fraudulent act. I mean,
6 that letter is a complete pretext, if you ask me, that
7 there is no basis for it whatsoever with everything going
8 on behind the scenes.

9 MR. SUMNER: Just sounds like a breach to me.

10 THE COURT: Let me ask this: I'm thinking
11 about what a verdict form looks like, and if the jury
12 makes a preliminary finding that the property was totally
13 destroyed as contemplated under the lease, then that's
14 it. Everybody goes home.

15 Are we all in agreement on that? There is
16 nothing that survives a legitimate termination, based on
17 total destruction of the premises. If the jury says yes,
18 the property was, in fact, totally destroyed, then there
19 was no breach of contract by them against anybody. Your
20 lease is over with, and their subleases are over with.
21 There's no intentional interference. If the jury finds
22 that property was, in fact, totally destroyed, we all go
23 home.

24 MR. LAY: Let me tell you why that's not
25 exactly right, I don't think. We have an estoppel claim

1 as -- we've raised estoppel as to Yaschik. Part of the
2 estoppel claim is even if there was some sort of total
3 destruction, you drew us along five-and-a-half months
4 with an incredible amount of time, effort, energy, and
5 even fronting money, and you are estopped from asserting
6 total destruction now.

7 Secondly, we have a waiver as well, that you
8 have waived the right to assert total destruction because
9 of that same behavior, which would be a jury issue. I
10 think the estoppel issue is you. I think the waiver
11 issue is with the jury.

12 MR. COOPER: Your Honor -- and also from the
13 evidence in the case, I would disagree a little bit on
14 that adequate insurance claim because the evidence that
15 came out -- and we asked Mr. Ervin, that if there was
16 enough insurance to rebuild, would we be here today, and
17 I'm pretty sure he answered no, it would have been
18 rebuilt.

19 And, likewise, Mr. Quillen's testimony that
20 was put in, he also, from the deposition, said if there
21 was adequate insurance, whether it was \$2 million or \$3
22 million that came out in the deposition, that it would
23 have been rebuilt, and the leases would have gone back
24 into place.

25 So even if there was a total destruction, I

1 think everyone would agree if there was adequate
2 insurance, it would have been rebuilt, which is a
3 separate breach.

4 MR. LAY: I need to argue these one at a
5 time, and I'll come back to these, if we could. On the
6 equitable estoppel, you have to make a decision on that,
7 I think, and so you've got to decide whether their acts
8 were -- did they know about the condition of the
9 building, and if it was wholly destroyed, did their
10 attempts or their efforts during that summer, when we
11 spent five-and-a-half months putting the building back,
12 does that estop them from asserting total destruction?

13 And then the waiver issue is still part of
14 the jury -- something the jury would have to consider.
15 So I think we need to get an answer on that, and then it
16 would be if there is total destruction, there has to be
17 determination on whether there is waiver of that issue,
18 in my view. Basic premise, I think that would be
19 something you'd have on the verdict form, but we would
20 have to drop down to waive. It wouldn't be the end of
21 the day. They'd still have to decide whether they waive
22 the right to assert total destruction.

23 Does that make sense?

24 THE COURT: Did you want to respond to any of
25 that or --

1 MR. GASKINS: I'm not sure, Your Honor,
2 because I'm not sure I followed it, but if we want to
3 argue estoppel, I'm happy to do it.

4 MR. LAY: The question posed is what does the
5 verdict form look like? Is that the end of the day? And
6 the response is I don't think there is. I think there
7 would be have to be another part of the verdict form that
8 would have to deal with waiver, and then you're going to
9 have to deal with the estoppel issue that's sort of
10 related to the waiver. So that's what we would have to
11 decide, what you would have to decide.

12 MR. SUMNER: I think that we would argue that
13 waiver shouldn't go on the verdict form, that the jury
14 should be charged on waiver, but I don't know that that
15 necessarily needs to on the verdict form. We don't agree
16 it should presented as John T. has suggested.

17 MR. LAY: The verdict form says total
18 destruction, yes or no, stop, then that doesn't make any
19 sense, so the verdict form has got --

20 THE COURT: Well, it made sense to me when I
21 was thinking about it.

22 MR. LAY: No one reminded you of the waiver
23 provision.

24 THE COURT: All right. I got to think about
25 that a little bit.

1 MR. LAY: I think we've all been thinking
2 about this verdict form, and I think it could be a beast.
3 I understand.

4 THE COURT: Well, everybody can think about
5 that tonight and write one up as you see fit.

6 MR. LAY: We also have the claims -- the
7 claim by Yaschik against FLP on insurance, which here's
8 what the evidence showed: The master lease has
9 requirements for fire and extended coverage. We had fire
10 and extended coverage. There was no requirement for a
11 specific amount. \$1 million was purchased, and Yaschik
12 understood how much was there. They did the value of the
13 building and whatever their argument was, but 2012, we
14 knew that \$1 million would not cover the value or the
15 replacement cost. In 2013, they do that, and they never
16 did anything about it.

17 There's an estoppel certificate. The case
18 law is as strong as braided steel. Those certificates
19 mean something, and they didn't say we have no knowledge.
20 They said there are no defaults. We know you are relying
21 on this. This is in full force and effect.

22 Number one: We had what was required under
23 the claim in unambiguous terms of the lease. We had fire
24 and extended coverage. Number two: They had actual
25 knowledge of the amount of coverage. They haven't said

1 anything about it, and that has been the case for years
2 and years. Number three: They signed a consent to
3 assignment, which includes that exact estoppel
4 certificate language. That Atlanta case that we cited
5 points to estoppel certificates and the consent to
6 assignment, and if you say this is in full force and
7 effect and if there is no default, you've got to live
8 with it.

9 You're basically contracting away Mr. Ervin's
10 attempt -- there was an attempt yesterday to say, well, I
11 didn't really know the value of the building. Well, if
12 you recall on cross-examination, he abandoned that, said
13 he did know the value of the building. So there is zero
14 evidence of a breach here and the estoppel certificate --
15 the estoppel issue is yours. That's yours to decide.

16 So we've got that issue as well, so we've got
17 waiver and estoppel on -- and it's both estoppel by
18 silence as well as actual contractual estoppel via the
19 consent to assign, so there cannot be a claim for breach
20 of contract. We don't even know if it's repair versus
21 replacement at this point. What's the component of
22 damage? We don't even have that at this point.

23 We don't know what the damage component is.
24 We know that he asked for \$800 in his opening
25 statement -- \$800,000 in his opening statement, but

1 there's no competent evidence about what the terms should
2 be. If you're going to present something to the jury
3 about what it is, what's their basis for determining that
4 there's an ambiguity? And if there is an ambiguity, what
5 is their evidence on the intent of it? So this --
6 there's no evidence because this claim doesn't stand with
7 this estoppel certificate, in our view, and I invite you
8 again to review those cases.

9 As to the subtenant claims, again, on the
10 adequate insurance issue, I'm going to renew my claim
11 that they haven't offered a standard as to what adequate
12 means. There are a bunch of different definitions. You
13 had Clint Gaskins, who testified it was adequate
14 insurance for FLP with the contract with the landowner.
15 That was adequate insurance. Miss Kelley Tant said the
16 same thing. Ann Thode said the same thing.

17 People who are suing under the adequate
18 insurance and offered a definition agreed with me on
19 cross-examination that it was adequate in conjunction
20 with the master lease, which existed. There is -- if you
21 look at what the landowner did on cross-examination, you
22 don't know there's a breach until the event occurs. You
23 don't know. So that can't be an enforceable term under
24 South Carolina law, because South Carolina doesn't allow
25 that look-back. You can't retroactively look back and

1 say, Okay. We're in breach now.

2 You're either in breach at that moment, at
3 that moment of consummation of the agreement, or whenever
4 you're going to offer a deposition, and when is the
5 moment it becomes effective? It's not after the event
6 occurs then we evaluate whether there's a breach. That's
7 not the way South Carolina law, or black letter law
8 works. You can't enforce this thing, and even if you
9 can, they testified this was adequate, and Mike Quillen
10 testified it was adequate.

11 On top of that, how is that the proximate
12 cause of anything? Tyler very carefully stated that the
13 reason he did this was not because of insurance, it had
14 to do with the wholly destroyed issue. If the lease --
15 the lease shall terminate, is what it says. As of the
16 date of the fire, it shall terminate if it's wholly
17 destroyed. So he can't do this suggestion and say --
18 it's not a legitimate argue to say, Okay. It was wholly
19 destroyed, but I would have rebuilt it anyway.

20 Well, if it's wholly destroyed, my obligation
21 to the subtenants end. That lease is gone. The leases
22 are void, as a matter of law. It's not discretionary.
23 It is -- if the lease is gone, it gets terminated because
24 it's wholly destroyed -- and it's a "shall", not may, I
25 might, I could, it's shall.

1 If it is terminated, then any obligation
2 under it ceases, so there's no adequate insurance or any
3 other issue at that point, so it's totally defined by
4 what he did, wholly destroyed or not, totally destroyed
5 or not. It's if it's totally destroyed, okay. Other
6 than the waiver argument, it's over. If the jury says
7 they didn't waive it, that would end it.

8 If they say there is -- if there's not a
9 total destruction, then at that point, it's not a
10 proximate cause issue. It has to do with the wrongful
11 termination, and, again, the case law says that -- I
12 mean, what they're arguing is the adequate insurance
13 caused a wrongful breach. That's what they're arguing.
14 It caused a wrongful breach. That's not a valid basis on
15 the adequate insurance.

16 We were never allowed to perform. We never
17 got there. We had the assets to cover any obligation
18 that existed, but we were never allowed to perform
19 because everything shut down, so, again, on impossibility
20 and proximate cause as well. I think that's it for now,
21 but we renew all of our argument.

22 THE COURT: How do you argue that the amount
23 of insurance was inadequate when it was the amount you
24 told him to get?

25 MR. GASKINS: Well, I don't think the

1 evidence is it was the amount that Yaschik asked him to
2 get. That evidence was not presented. Ms. Thode did
3 testify that somebody at Yaschik told her to up it
4 several years before, but the evidence showed that,
5 actually, it was the insurance carrier, insurance agent
6 who bumped it up and got lower premiums, so I don't think
7 there's any evidence --

8 THE COURT: Y'all knew how much it was.

9 MR. GASKINS: He did know how much that was,
10 but did he know it was adequate? He didn't know the full
11 replacement value of the building, and on top of that, he
12 thought that -- he had a policy, but that Mr. Quillen was
13 self-insuring. In fact, before this case even started,
14 they put in their brief that Mr. Quillen, or Quillen FLP,
15 was self-insured.

16 THE COURT: How does a landowner get to, to
17 quote Oliver North's lawyer, sit there like a potted
18 plant? You know, he's got a building. It's his
19 building. He should be the most interested person on the
20 planet on knowing how much it's worth and how much
21 insurance is on there, and whatever he thought the value
22 of the property was, he knew it only had \$1 million of
23 insurance on it, because when they approved the
24 assignment of the lease to FLP, it was the same amount,
25 and when the bank required they added on to it, he knew

1 how much it was.

2 So how do you get to say, well, it was
3 inadequate when you're the most interested person in the
4 world in protecting your interest and you don't do
5 anything? One must think that you must have thought it
6 was adequately insured. How do you get to just sit there
7 and go, I guess we'll just see if it burns down and how
8 much it costs to repair it?

9 MR. GASKINS: That is a risk that you're
10 assuming, but this is a contract. In contracting parties
11 allocate risks.

12 THE COURT: I understand it's a contract, but
13 it's a contract you're trying to sue him for on that
14 basis, but then you say, Okay. I knew it was \$1 million.
15 When I had it with your predecessor, we knew it was \$1
16 million. You knew it when you got the \$1 million, but
17 now, in retrospect, it wasn't enough. That's called
18 estoppel or waiver.

19 MR. GASKINS: Well, Your Honor --

20 THE COURT: As a matter of law, how do I let
21 the jury even consider that argument?

22 MR. GASKINS: I think we have to look at the
23 elements and see what the facts are. On estoppel, there
24 has to be a false representation or concealment of
25 material facts. There was no false representation or

1 concealment of material facts. There needs to be an
2 intention, or at least an expectation, that such conduct
3 shall be acted upon by the other party.

4 There has to be knowledge of actual or real
5 facts, so you may argue that Mr. Ervin should have been
6 more involved and should have known what the value was
7 and insisted on it, but that doesn't mean he has --

8 THE COURT: The false statement was \$1
9 million was sufficient.

10 MR. GASKINS: I don't think he ever said
11 that. There's no evidence that he said that. There is
12 evidence that he presented, but let's remember the
13 context of how that information was presented.

14 So Quillen e-mailed him and says, Here's what
15 I found. You know what? I got to look at the lease and
16 see if I'm in compliance. I should have already done
17 this. Now, this is a month before the fire, so he's
18 telling Mr. Ervin, I got to go back and see if it's in
19 compliance, and then we may up it. So in addition to
20 that --

21 THE COURT: So a year later, he hasn't done
22 anything.

23 MR. GASKINS: No, Your Honor. This was a
24 month later. That was a February 7th, 2013 e-mail, so
25 almost two months later where they have fired her. So

1 that e-mail also goes to Mr. Quillen's reliance. He's
2 got to show he relied on what Tom said, and Tom's
3 silence, he didn't rely on it, because you know what?

4 He said, I'm going to go check it myself and
5 see if I'm compliant. So he did not establish that he
6 relied on anything that Tom did, just based on that
7 February 3rd -- or February 2013 e-mail. So I think you
8 have to look at all the elements, and certainly there's a
9 question of fact for the jury to decide, but also, as a
10 legal principal, we don't think they can meet it. The
11 evidence isn't there because they cannot show reliance,
12 and on top of that, I think we can't forget that this is
13 a contract that has a nonwaiver clause. We believe that
14 nonwaiver clause should be enforced and would permit any
15 assertion of estoppel or waiver.

16 Now, as to his other arguments about damages,
17 there's not been evidence in the record on which a jury
18 can rely to award Yaschik damages, the proof of loss that
19 Mr. Quillen submitted showing it was over for \$1.8
20 million or the replacement estimate report from Mr. Kelly
21 showing the damage was \$1.9 million.

22 So there's evidence to support damages. In
23 fact, the damages are much larger than that, because that
24 was not even going to be adequate because it didn't
25 consider the code upgrades, but that is certainly

1 evidence on which the jury can rely to award damages.

2 Now, going to causation I think he's
3 misrepresenting Mr. Ervin's testimony. He said the
4 insurance didn't drive my decision about whether the
5 building was totally destroyed, but I think the evidence
6 is crystal clear that the lack of insurance is the
7 proximate cause of all the damages here because if
8 there's adequate insurance, Mr. Quillen continues the
9 process of restoring the building, and he never writes
10 that September 3rd letter, and Yaschik and Mr. Ervin
11 never have to make that decision of whether the building
12 is totally destroyed.

13 So there are most definitely causation
14 issues, and that is, I think, very clear evidence that
15 the damages that they're claiming and they're claiming
16 were caused by his lack of insurance, and they currently
17 caused our damages.

18 MR. LAY: Let's look at what the actual
19 evidence is. There is a certificate -- landlord's
20 consent to assignment. Here's what Tom Ervin testified
21 to: I knew there was \$1 million in coverage. I knew the
22 building was worth more than that. In 2012, he enters
23 into a landlord's consent to assignment, so before that
24 date, he was aware that there was \$1 million of
25 insurance, and the building was worth more than that. He

1 signs an agreement that says the lease, including the
2 right of first refusal contained herein, is in full force
3 and effect, as without default, by either landlord or
4 tenant thereunder.

5 Furthermore, landlord is not aware of any
6 circumstance with which the passage of time and delivery
7 of any required notice, blah, blah, blah. That part is
8 not part of this.

9 Number five: Michael Quillen Family Limited
10 Partnership is relying on this consent and
11 acknowledgement to taking the assignment of rights and
12 responsibility as tenants under the master lease.
13 Yaschik Development Company, Tom Ervin, he has another
14 conversation with Mike Quillen where on
15 cross-examination, you knew that was not enough
16 insurance. You knew the value of the building. You knew
17 that wasn't going to be sufficient, and you could have asked
18 about it. I could have asked about it.

19 He didn't testify about, I thought I was
20 relying on Mike Quillen to go get more. That's made up.
21 That did not -- that testimony did not get presented in
22 this case, didn't happen, and if you look at the
23 correspondence that was presented that's not what
24 happened.

25 You don't need to go there. There's an

1 estoppel certificate with this consent to assignment. It
2 begins and it ends there, and it's not a jury issue, it's
3 a Judge Young issue. You are the fact finder, and you
4 are the person who applies the law on this estoppel
5 certificate. It's up to you. It either prevents them
6 from pursuing it, or you're saying, as a matter of law,
7 the estoppel certificate does not, if there is not an
8 estoppel with that document, and, with all due respect,
9 that case law is overwhelming.

10 It blocks them. If there's a default that
11 existed in 2012, which he admitted that his basis for
12 arguing default existed prior to that consent, that he's
13 blocked from any assertion from ever arguing, going
14 forward, that there was a breach as a result of that, and
15 that's what they're doing. It's the same exact thing.
16 \$1 million building is worth more than that, they're
17 saying they were entitled to more coverage than that.
18 They agreed they didn't have the requirement to do more
19 than that by agreeing to this consent of assignment.

20 MS. ALLIO: With respect to the estoppel
21 certificates, the case law is clear that a party who
22 executes an estoppel certificate should not be allowed to
23 raise claims which it knew or should have known, and the
24 party asserting the benefit of an estoppel certificate
25 must show that they reasonably relied thereon.

1 Generally speaking with estoppel, the two
2 parties had equal knowledge, equal meaning the exact same
3 knowledge. In order to show reasonable reliance with
4 respect to my client, plaintiff Squeeze, to show
5 reasonable reliance, the FLP would have had to show that
6 the FLP did show Squeeze the insurance policy that was in
7 place.

8 The testimony that has been submitted does
9 not show that, and, in fact, there was evidence that
10 showed that his lawyer advised him that he had to handle
11 his insurance before closing. That's the same e-mail
12 where his lawyer is asking him to get the estoppel
13 certificate signed. That's Squeeze Exhibit 11. I
14 believe it was actually entered as a Yaschik exhibit;
15 however, I don't think the FLP can show that they
16 reasonably relied on it, nor that my client actually had
17 actual knowledge or any means of knowledge of the
18 insurance policy that was in place at the time.

19 Furthermore, I do think it is a genuine issue
20 of material fact. It has to go to the jury because it's
21 subsequent to the estoppel certificate, and there was
22 testimony that the value of the building increased. I
23 don't think that was an issue.

24 There was also testimony that repair costs
25 increased after that time. That shows an altered course

1 in performance, and all the case law is clear that if
2 there is an altered course of performance after the
3 execution date, then it's a jury issue.

4 MR. LAY: I'll deal with their estoppel
5 certificate issue in just a second.

6 THE COURT: I'll tell you what: Let's hit
7 pause button and take this up at 9:00 in the morning.

8 (Recess taken.)

9 (February 1, 2018.)

10 (In open court, jury present.)

11 THE COURT: Let's see if we can sort this
12 out. I've been thinking and thinking and thinking about
13 this.

14 All right. As between Squeeze and Top of the
15 Bay and Yaschik, it seems to me that there is not a --
16 they are not a third-party beneficiary to the master
17 lease, so I'm directing verdicts on their causes of
18 action against Yaschik on breach of contract, breach of
19 contract accompanied by fraudulent act; however, they do,
20 both of those parties, Squeeze and Top of the Bay, have
21 presented enough evidence to go forward with intentional
22 interference with contractual relationship against
23 Yaschik. All right.

24 Then as to Squeeze versus FLP, they got
25 breach, both of them, Squeeze and Top of the Bay. And as

1 I understand their pleadings and their arguments, they
2 have alleged failure to make repairs, failure to restore
3 the property, carrying adequate insurance. FLP denies
4 they breached it as well as raised defenses of waiver,
5 estoppel, and impossibility of performance.

6 As I read both the master lease and the
7 subleases under paragraph 20, if there is a destruction
8 of the property -- and I think this mirrors the language
9 in the master lease, this is paragraph 20 of the
10 sublease -- it says -- obviously, I've got a fourth
11 generation copy.

12 It says if the premises are totally
13 destroyed, the lease terminates as of the date of the
14 destruction, and rental shall be accounted for as between
15 landlord and tenants, and if the premises are damaged but
16 not wholly destroyed by fire, rental shall abate --
17 rental shall abate in such proportion as use of premises
18 has been lost to the tenant. The landlord shall restore
19 the premises to substantially the same condition as prior
20 to damage as speedily as practical, whereupon, full
21 rental shall commence.

22 So under both the master lease and the
23 sublease, it's the owner of the property, the landlord,
24 who has the duty to repair the property in the event that
25 it is not totally destroyed. It's also -- as a matter of

1 both the contract and the law, it's the owner of the
2 property's responsibility to do anything with the
3 property in the event it's totally destroyed, put that
4 aside for a minute, but if the property is totally
5 destroyed, then the lease is terminated, both the master
6 lease and the sublease, and it's terminated as of the
7 date of the loss.

8 So despite the fact that the declaration by
9 Yaschik to declare it terminated because of total loss
10 did not take place until months later, the effect took
11 place the date of the fire. Whether or not that's
12 justified, that's actually between, I think, Yaschik and
13 FLP, but Yaschik's decision to declare it totally
14 destroyed terminated the leasehold and terminated the
15 sublease hold.

16 And, as a practical matter, not only did they
17 not then -- I don't think FLP had a duty to make repairs
18 under the contract. They didn't have a duty to restore
19 the property if it was destroyed. Carrying adequate
20 insurance is a separate issue. Again, following as to
21 whether or not it creates a shortfall, it doesn't create
22 a duty to make the repairs, it only affects who pays for
23 the repairs and whether or not they will be reimbursed by
24 insurance. Once the leasehold is terminated as of the
25 date of the fire, it made it impossible for FLP to

1 thereafter ever return possession to the property owner.

2 So as between Squeeze and Top of the Bay and
3 FLP, I don't see how their breach of contract action
4 survives, between Squeeze, Top of the Bay, and FLP.

5 Still, under kind of a big picture, whatever losses they
6 have would be if they say, well, it was not a justified
7 decision to declare it totally destroyed, then that would
8 mean that would be viewed and taken care of in your
9 intentional interference with a contractual relationship
10 cause of action.

11 Now, moving forward with -- that leaves us
12 with FLP versus Yaschik and Yaschik versus FLP. As to
13 FLP versus Yaschik, there's breach of contract, breach of
14 contract accompanied by fraud, both of which are denied,
15 and Yaschik in turn counterclaims for breach of contract
16 for failure to make repairs, as I see it, failure to
17 adequately insure.

18 Well, again, as I read the master lease
19 between Yaschik and FLP, I don't see where FLP has the
20 duty to make the repairs. It says the landlord makes the
21 repairs, and then it's just a question of whether or not
22 FLP has a duty to contract towards that by way of having
23 adequately insured it. So then you get to the question
24 of, well, what about the adequate insurance?

25 And there is no question that Yaschik knew

1 how much the property was worth, and there is no question
2 they knew how much insurance was on the property. The
3 only thing that I'm still wrestling with was when Ervin
4 was recalled, he admitted it was unusual to have the
5 tenant be responsible for obtaining the insurance.

6 He says he told Quillen that if the cost
7 exceeded \$1 million, that he considered FLP to be
8 self-insured, and he told Quillen he would be responsible
9 for any shortfall, if the insurance couldn't pay for all
10 of the repairs, but he admitted he knew the value of the
11 building in 2014 was more than \$1 million, and he knew
12 the insurance was only for \$1 million, so I would
13 normally say it's a slam dunk. It's an estoppel.

14 You can't claim you're inadequately insured
15 and know how much it was at the same time, but I'm
16 troubled by the fact that he said -- which I don't think
17 Quillen agrees, but he said there was a discussion
18 between he and Mike Quillen because they were having a
19 discussion about whether \$1 million was adequate that I
20 considered you to be self-insured.

21 So putting that aside for a second, let's
22 look at FLP versus Yaschik, breach of contract, breach of
23 contract accompanied by a fraudulent act, civil
24 conspiracy --

25 MR. LAY: We're bagging that, Your Honor.

1 We're not pursuing the civil conspiracy.

2 THE COURT: Just those two, fraud and civil
3 conspiracy?

4 MR. LAY: It will be breach of contract and
5 breach of contract accompanied by fraudulent intent.

6 THE COURT: And those are simply -- at that
7 point, you say Yaschik breached the contract by declaring
8 it to be totally destroyed when, in fact, it wasn't
9 totally destroyed?

10 MR. LAY: Correct.

11 THE COURT: That's the basis for the breach
12 of contract?

13 MR. LAY: And not doing the restoration, but
14 yes.

15 THE COURT: Instead of doing repairs, they
16 declared it to be destroyed and rebuilt, or in the
17 process of rebuilding, I guess, so that's the breach of
18 contract. And then your theory of breach of contract
19 accompanied by fraudulent act, which they denied, is to
20 say that there was a course of conduct going behind
21 during that five-month period in which he was using
22 Quillen to kind of act as almost like a general
23 contractor, to line up the work with the engineers and
24 all of that, all along knowing that he was going to sell
25 it at some point down the road to Mr. Smith, and then

1 once it got to the point where it did, in September, and
2 Quillen said, Look, this is your project. You got to get
3 involved, and it's going to clearly cost more than \$1
4 million and you've got decisions to make, at that point,
5 Yaschik, or Ervin, said it's terminated.

6 So that's your theory on what the fraud is,
7 right?

8 MR. LAY: Yes, sir.

9 THE COURT: So they denied that. I think you
10 got enough evidence to go forward with on that as well.
11 So I'm really at this point only stuck with the legal
12 effect of the estoppel argument on failure to carry this
13 adequate insurance, and I guess there's also an
14 impossibility defense.

15 MR. LAY: Yes, sir.

16 THE COURT: So why don't you address that
17 first.

18 MR. LAY: Let me deal with the testimony from
19 Tom Ervin as it pertains to the self-insurance issue, and
20 to make sure you understand the time frame here, because
21 there are two different time frames we're dealing with in
22 reference to his testimony. On the self-in insurance, he
23 testified -- when he was put up originally, he testified,
24 I thought he was insured, and then on cross-examination,
25 he said, I never had a specific conversation with Mike

1 Quillen about self-insurance.

2 That was not something that was an
3 articulated agreement of meeting of the minds. That's
4 not what we had, and, in fact, the testimony, I can read
5 it to you, he was to provide insurance coverage --

6 Question: He never said anything about
7 self-insurance that you seem to be interjecting into
8 this? And he says: We never had a specific conversation
9 about it.

10 Now, the conversation that you're talking
11 about occurred after the fire, and what he was
12 suggesting -- and this is all part of our theory on the
13 pretextual nature of kind of changing reasons for
14 termination, is that he was saying it was in dispute.
15 After the fire when I had a conversation with Mr. Quillen
16 when we talked, I raised the insurance issue with him.

17 That's all after the fact. He's not saying
18 that he raised the issue on insurance and FLP having an
19 obligation to provide more insurance than was available
20 prior to the fire. There's no testimony to that, and I
21 think he actually denied that, and he knew the value of
22 the building, he knew the amount of insurance. It's only
23 after the fire that it's brought up.

24 THE COURT: All right.

25 MR. LAY: And just a small thing, the master

1 lease, there's a tendency in this, because we're talking
2 about the adequate insurance terms --

3 THE COURT: Adequate insurance does not
4 appear in the master lease.

5 MR. LAY: That's what I wanted to say. So
6 then when you get to -- the issue that becomes
7 extraordinarily problematic for them is the estoppel
8 certificate, and it's not -- it's estoppel, but it's also
9 what we call written estoppel. It is an agreement where
10 they are specifically contracting the reliance part of
11 it, and the Fundus case is almost directly on point.
12 It's a unique document, signed statement by a party, such
13 as a tenant or mortgagee. There's a duty to investigate
14 before signing.

15 You can't just acknowledge it and then claim
16 ignorance. You've actually got a duty to ask questions
17 before you are saying, I agree to this, and it's in full
18 force and effect, and there's no default. That's the
19 obligation under all of these cases.

20 So he said in his testimony, In 2012 when I
21 signed the consent to assignment, I knew how much the
22 building was worth, and I knew it was underinsured, and I
23 proclaimed to you that the agreement was in full force
24 and effect and there were no details.

25 He cannot go back now with the estoppel

1 certificate in place, according to the case law, and then
2 say something that was -- that he claims was in default
3 prior to, you know, 2012. It's either in default, or
4 it's not, with \$1 million under -- being under the value
5 of the business, if you're in default then, or it's not.

6 If he looks back now and says, well, I'm
7 going to declare it in breach now, in 2013. He's
8 prohibited from doing that. That's the whole purpose of
9 the estoppel certificate. He has already declared that
10 that is not a default situation, and I know you're
11 relying on it and I'm writing it down, and this is
12 something we have agreed to, we've contracted to, so
13 that's the problem we have.

14 This idea that there was a discussion about
15 self-insurance prior to that, even he says that's not the
16 case. It's only an assumption that he made, and he
17 articulated, apparently -- according to him, in the light
18 most favorable, he articulates that after the fire.

19 THE COURT: Okay. How about your -- one
20 other thing as long as I've got Mr. Lay up. So where
21 does that leave you with their breach of contract claim
22 against your client, Yaschik versus FLP? You had failure
23 to repair and failure to adequately insure, as I
24 understood the basis of your claim, so say I rule in your
25 favor on insurance, not being available. What about the

1 failure to repair?

2 MR. LAY: Well, the failure to repair, if you
3 recall from -- and I know it's hard to recall after two
4 weeks, but even Mr. Ervin said if the obligation to
5 restore under article 20 resides with Yaschik, so there's
6 no evidence of that being anything other than the case,
7 is that FLP did not have that obligation under the master
8 lease. They cannot sue us under the master lease for an
9 obligation that resides with them.

10 THE COURT: Okay.

11 MR. LAY: And they also --

12 THE COURT: I wanted to make sure that was
13 your position.

14 MR. LAY: Excuse me, sir?

15 THE COURT: I just wanted to make sure that
16 was your position.

17 MR. LAY: You recall they have an indemnity
18 claim, according to Mr. Sumner, and we also were moving
19 for DV on this indemnity claim because they haven't pled
20 it. It's been posited as a defense. It's not been
21 posited as a counterclaim against us.

22 THE COURT: That would be contractual?

23 MR. LAY: Contractual, and if you look at the
24 indemnity provision --

25 THE COURT: That applies to maintenance, it

1 says, things that the FLP did, as I read it.

2 MR. LAY: It's about the management acts, and
3 it's not indemnity for their own breach.

4 THE COURT: Correct. Okay. Mr. Sumner?

5 MR. SUMNER: I'll respond to Mr. Lay two
6 points that he made with respect to this waiver and
7 estoppel. The first being the self-insurance idea, I do
8 think that it's accurate that there's been no testimony
9 that there was a specific conversation between Tom Ervin
10 and Mike Quillen before the fire about this concept of
11 insurance, but I think the evidence is also quite clear
12 that this master lease, being a pure net lease, shifted
13 all the responsibilities onto the tenant, and it shifted
14 the risk of loss onto the tenant.

15 THE COURT: Let me ask you, it shifted -- the
16 responsibility of getting fire and casualty insurance,
17 the question is, how much did he need to get? And this
18 is when we keep getting back to estoppel, and that is
19 Ervin knew exactly how much insurance was on that piece
20 of property. There's no getting around that.

21 MR. SUMNER: He did, but I think we need to
22 get back to the elements of estoppel, and if you look at
23 the elements, Quillen FLP has to prove that as it relates
24 to the party claiming the estoppel that his client had a
25 lack of knowledge and that he had a lack of means of

1 obtaining the truth of the facts.

2 In other words, he has to blindly rely on
3 Yaschik, and there was some prejudicial change in
4 position, and I know we keep going to this estoppel
5 certificate, and there is good case law on estoppel
6 certificate, but that was signed in 2012. We're not
7 suing on a breach that predated the estoppel certificate.
8 This is a breach that occurred and became apparent in
9 April 2014, after Quillen had renewed insurance for a new
10 policy term. He could have gotten more insurance. He
11 had the means to determine whether he had enough or not.

12 So I don't think that estoppel certificate
13 signed in the past is some kind of get-out-of-jail-free
14 card from now into the future. I don't think that's what
15 the case law says. It's really good about breaches that
16 predate the estoppel certificate. That's not why we're
17 suing them. We're suing them because he had the
18 obligation to have the insurance, and under that master
19 lease, only the master tenant had the obligation to have
20 insurance.

21 Tom Ervin testified about he knew the value
22 of the building, and there was a conflation between what
23 is the value of the building and what is the value of the
24 total piece of real estate, and when you do that
25 approach, you're factoring in the future income that this

1 entire parcel of real estate, with dirt and bricks and
2 everything on it, can obtain, but I don't think it was
3 ever established that Tom Ervin knew exactly what it
4 would take to put that building back together.

5 THE COURT: Well, I go back to -- at least I
6 wrote this note down, Mr. Lay, on cross-examination of
7 Mr. Ervin, when you recalled him, he admitted that he
8 knew the value of the building in 2012 to '13 was more
9 than \$1 million and, he knew that the insurance was only
10 for \$1 million.

11 MR. SUMNER: And I thought I cleared that up
12 on redirect, when I went up there and used the income
13 approach on the board and showed the jury that this
14 income approach --

15 THE COURT: But the income approach goes into
16 valuing what the property is worth.

17 MR. SUMNER: The property, exactly, but not
18 the cost of replacement of the building, and I don't
19 think they ever established that. I guess that's where
20 I'm trying to draw the distinction.

21 THE COURT: We know it's going to cost
22 somewhere between \$1.5 million and .8, .9, or over \$2
23 million, and that went into his determination to
24 terminate it.

25 MR. SUMNER: Absolutely we know that now.

1 THE COURT: So he can't say -- how does he
2 get to say it was for that reason that I terminated the
3 lease because it was totally destroyed? It retroactively
4 goes back to the date of it, and suddenly you're
5 justifying a decision made five months later.

6 MR. SUMNER: And I think Tom Ervin testified
7 pretty clearly that his decision to declare this totally
8 destroyed and terminate the lease was not based on the
9 lack of insurance. He also said if Quillen had
10 sufficient insurance, he would have let him rebuild the
11 building, but I think those are two separate things,
12 Judge, and I think when you look at the elements of
13 estoppel, we're not talking about in 2012, we're talking
14 about 2013, and at that point, Quillen tells Tom, Here's
15 what I got on the insurance. I've got to go back on the
16 lease and figure out if I'm in compliance. I should have
17 done that already.

18 So in that communication that they're relying
19 on the estoppel in February, he's saying, Let me go back
20 and make sure I'm protected. This is what I have.
21 Hopefully it's good enough for the bank, but let me go
22 back and make sure and check that I'm in compliance. I
23 should have done that when I signed this thing, but, you
24 know, I'll be in touch.

25 How did he rely on anything from Tom at that

1 point? I mean, he had the ability to look at the lease,
2 and, just like anybody, he could have determined what
3 would be replacement value, and he told Tom he was going
4 to go and investigate it and try to figure out if he was
5 in compliance, so at that point he does give him \$1
6 million. Thanks for the million. Tom hands it to
7 Wells-Fargo, and we're good.

8 How did Quillen rely on that? I don't think
9 he did, and I don't think the evidence establishes that.
10 I think what the evidence establishes is that Quillen
11 realized he needed to take a second look at the
12 insurance, and apparently he didn't, so I don't think
13 that they meet the elements of estoppel, particularly as
14 it relates to the party making the estoppel claim. They
15 don't have the reliance, and they surely had every
16 opportunity to go and investigate it like he said he was
17 going to do.

18 THE COURT: All right.

19 MR. LAY: The condition in 2012 and 2013 is
20 exactly the same. There was a February 2013 discussion
21 about the insurance, in which all of the policies were
22 sent to Mr. Ervin whose bank was taking a look at it.
23 Chuck Eiserhardt testified that the bank was the one that
24 established the amount of coverage that was supposed to
25 be on the building.

1 There was absolutely zero discussion or
2 evidence from Tom Ervin that there was some sort of
3 reliance that he was going to check and make sure
4 everything was okay. In fact, the evidence shows to the
5 contrary. There are a series of communications that
6 occurred in that February-March time frame where the only
7 thing requested by Mr. Ervin -- Mr. Ervin comes back and
8 says, I need some flood insurance, and then flood
9 insurance was added to the policy.

10 This idea that he is relying on and there was
11 a suggestion of you going back and I'm making sure
12 everything is okay, that's not the course of discussion
13 that took place in February of 2013 at all. The
14 condition is exactly the same as it was in 2012. Was it
15 \$1 million? He knew that the building was worth a lot
16 more. It was underinsured for this particular event, and
17 he never said a word about it.

18 In fact, he signed a document that said this
19 is in full force and effect, and I know you're relying on
20 my representation that this is in full force and effect
21 and that there are no defaults and that is the end, the
22 beginning and the end of the discussion. That's all that
23 should be looked at, and, Your Honor, you've got the
24 ability -- it's not just a law issue, it's a fact issue,
25 and you, sitting as the presiding judge, have to make

1 that determination under the law and under the facts.

2 MR. SUMNER: And, Judge, the last thing I
3 would point out is this contract does have a nonwaiver
4 clause, and, you know, whether --

5 THE COURT: Waiver and estoppel are two
6 distinct concepts.

7 MR. SUMNER: I understand.

8 THE COURT: They're often said in the same
9 sentence and the same breath.

10 MR. SUMNER: Understood, and I thought we
11 were addressing both in concept. I just want to make
12 sure it's clear, particularly as it relates to the
13 waiver, that they agreed in the contract that there is a
14 nonwaiver provision, so I would ask the Court consider
15 that when you're weighing the legal side in conjunction
16 with the equitable side on estoppel.

17 THE COURT: Well, it seems to me Mr. Lay has
18 cleared it up. The discussion I made note of took place
19 after the fire, not before the fire, so there's no reason
20 to not direct the verdict on the grounds of estoppel.

21 He had knowledge of how much the -- Ervin had
22 knowledge of how much the policy was worth. There had
23 been discussions as to -- about the amounts. It's not
24 like he didn't know, it's -- I don't think he's claiming
25 he didn't know it was worth \$1 million, but there was the

1 estoppel certificates and the transfer of the lease in
2 which anybody could have said at that time, Hey, that's
3 not enough, or, Maybe we need to look at this, but it's
4 just, to me, completely inequitable to allow the action,
5 to come in and say, you know, I'm going to sue you for
6 not having enough insurance on this property when they
7 knew exactly how much and all they had to do was say you
8 get more and you got to pay for it.

9 It's that simple. So I'm going to direct a
10 verdict -- and, also, on the grounds of failure to
11 repair, once he terminated that property -- or once he
12 declared the lease totally destroyed, or the property
13 totally destroyed, that terminated the lease,
14 retroactively back to the date of the fire, and Ervin
15 never did have any obligation to repair -- excuse me,
16 Quillen never had any duty to repair the property or
17 restore the property in the event it was totally
18 destroyed.

19 The only thing he had an obligation to do was
20 to pay for the insurance and get the insurance and pay
21 for it, and it is clear Yaschik knew exactly how much
22 insurance was on there and also seems that he probably
23 had a fair idea it was inadequate. So as to Yaschik's
24 breach of contract against FLP, that is dismissed, as
25 well as is the indemnity claim, because the written

1 indemnity claim contained in the lease was for any acts
2 of Quillen to do demands of the property, and that has
3 nothing to do with the fire.

4 So let me see. That leaves us then back with
5 Squeeze and Top of the Bay versus Yaschik, intentional
6 interference; FLP versus Yaschik with breach of contract,
7 breach of contract accompanied by fraud; and Squeeze and
8 FLP, again, they don't have any basis for suing FLP for
9 breach of contract because FLP didn't have the duty to
10 make repairs and restore the property, and it was
11 impossible for them to perform, in any event, if they did
12 have such a duty because of the declaration of it being
13 totally destroyed.

14 MR. COOPER: Your Honor, if I may ask on the
15 ruling on the breach of contract, just because the notice
16 went out, if that is incorrect and the jury finds there
17 wasn't a total destruction, the legal effect of our
18 subcontract is it's still effective, and I don't quite
19 understand why simply the notice immediately -- because
20 we all agree it's wrong. That position that it was
21 totally destroyed is wrong. If that is wrong, we have an
22 effective contract. There is an obligation to restore.

23 THE COURT: By the landlord.

24 MR. COOPER: No, that's under our paragraph
25 20. If that -- he never sent us a notice of termination.

1 If that termination to the landlord is incorrect, the
2 landlord still has a binding contract, and we, likewise,
3 still have a binding contract.

4 So I don't understand how he can go forward
5 with a breach of contract claim on the basis of I did
6 have an effective contract because your termination was
7 wrong and we can't, under the same exact language, go
8 forward with our breach of contract claim.

9 THE COURT: Because it was not -- after
10 Yaschik, whether rightly or wrongly, declared the
11 property to be totally destroyed, he told Quillen, Stay
12 off the property. Turn over the plans, and it was
13 impossible for Quillen to perform under your contract
14 with him, even if I interpret it to shift a burden to
15 Yaschik -- or to Quillen to restore or rebuild, which I
16 don't believe that lease is construed that way.

17 But giving you the benefit of the doubt on
18 it, it was not possible for Quillen to perform, because
19 they had declared it to be over, and the master
20 leaseholder declared it to be over and told Quillen to
21 stay off. Under your theory, they would have the
22 obligation to then go in, trespass on the property, take
23 over the project, dispossess the owner of the property,
24 and make plans, make repairs, hire these people to do it,
25 all the while the landlord is saying, Get off my

1 property? I don't think that's possible.

2 MR. COOPER: Okay. But the evidence that
3 came in is that he didn't try to do anything. All he
4 tried to do was sell a master lease, which I think is the
5 inference of the evidence that the lease is still in
6 effect. I mean, Mr. Lay has argued the same to Your
7 Honor, impossible means impossible, and you can't do it
8 voluntarily. The evidence was, when he sent the
9 September 3rd letter, he said, I'm not going to restore.

10 That's what Quillen said in the September --
11 I'm going to turn it over to the landlord. He ignored
12 our contractual obligations at that point. He was
13 obligated to continue to restore, under our contractual
14 obligations, when he turned it over. He created that
15 impossibility, and then he didn't try to do anything else
16 after that.

17 THE COURT: I guess your position. Did you
18 want to say something?

19 MR. SWOPE: I did, Your Honor, just, if
20 nothing else, to make sure the record is clear. Top of
21 the Bay's position is, number one, Mr. Ervin testified
22 that if there had been adequate insurance that he would
23 have allowed the rebuilding to go forward. That, I
24 believe, Your Honor, takes the breach of contract on
25 inadequate insurance, and the Court should allow that to

1 go forward to the jury.

2 Number two: As I stated earlier, on behalf
3 of Top of the Bay both in the motion in limine and the
4 directed verdict stage, they have to do -- under the
5 impossibility defense, they had to go to court. They had
6 to file an injunction. If they lost that, they had to
7 take that up on appeal in order for impossibility to be a
8 legitimate defense.

9 They didn't do either of those things, and,
10 Your Honor, I think the case law on impossibility is
11 quite clear, that they had to take legal steps that they
12 didn't take.

13 THE COURT: All right.

14 MR. SWOPE: Thank you, Your Honor.

15 MR. COOPER: And I think the adequate
16 insurance provision is a separate insurance, that it was
17 not adequate regardless of the time of the breach because
18 it wasn't enough to repair, restore, and everyone
19 testified that there was enough insurance. Even
20 Mr. Quillen, when his deposition was put in front of him
21 said, If there was enough insurance, it would have been
22 rebuilt, and the sublessees would be back in their space,
23 and that is a separate contractual provision in his
24 breach.

25 THE COURT: Well, I think the record's clear

1 for appeal, but I got to rule on something, and I just
2 did, so that's where we're going.

3 So I'm going to work on the jury charges to
4 get you something, but I did send out last night this
5 total destruction of premises proposed charge, and I'm
6 willing to accept input on that now. Do you have -- I'll
7 start with you, Mr. Cooper.

8 MR. COOPER: I mean, Your Honor, it obviously
9 wouldn't affect us --

10 THE COURT: What's that?

11 MR. SWOPE: I think we're in the same boat,
12 Your Honor.

13 THE COURT: What's that?

14 MR. SWOPE: I think we're in the same boat.

15 THE COURT: Well, I disagree that you don't
16 have a dog in the fight. I'm very happy to hear that you
17 don't want to argue about it.

18 You have a case against Yaschik for
19 intentional interference with your contract with the
20 master lease, all right? Your argument, as I understand
21 it, would be this property was not really totally
22 destroyed; therefore, that was a ruse to claim it was
23 totally destroyed, and that interfered with my lease and
24 I couldn't go there, and you got to pay for that.

25 I don't know what your theory is for

1 intentional interference, if it's not that, but it's your
2 case, not mine, but I think you still have a dog in the
3 fight about the argument of whether or not Yaschik was
4 justified in declaring the property to be totally
5 destroyed.

6 I think the first question that I would get
7 back from the jury, if I don't put in some kind of
8 definition, is what does totally destroyed mean? So I
9 thought I would go ahead and come up with something
10 because I would -- if I didn't put it in the general
11 charge, that would be their first question, what is
12 totally destroyed? And I would like to answer the
13 question a little bit better than you guys did with
14 totally destroyed means totally destroyed.

15 MR. COOPER: Your Honor, excuse my
16 frustration.

17 THE COURT: I understand.

18 MR. COOPER: The comments we made is we
19 thought that in the first paragraph, on the second line
20 of the insured property, we would ask you take out
21 insured. We don't think that matters.

22 THE COURT: Okay. I did take that from one
23 case in which they were adopting language from a policy,
24 so --

25 MR. COOPER: Going down to the second

1 paragraph, where it is the fifth line from the bottom, it
2 starts, The interest of both parties, and I think there's
3 more than one. It should be all parties. It is the
4 second to last sentence in the second paragraph.

5 THE COURT: Okay.

6 MR. COOPER: And then in the last sentence,
7 starting with the dependent clause in determining
8 whether, we would take everything out after that.

9 THE COURT: Starting where?

10 MR. COOPER: The last sentence, Your Honor.

11 THE COURT: The situation of the party who
12 took this lease is part of the consideration --

13 MR. COOPER: And the interest in the
14 leasehold must be taken into account full stop, we would
15 delete from there.

16 THE COURT: You don't want that in there,
17 that last sentence? I mean, basically, I would think you
18 would want it in there, but I'm just thinking out loud,
19 that I anticipate the objection to come from Yaschik, and
20 they're like, look, totally destroyed is totally on my
21 decision. This says it's not quite that simple. You got
22 to look at it not only from the owner's perspective, but
23 you have to consider whether or not the tenants or
24 subtenants have an interest in it being totally
25 destroyed.

1 MR. COOPER: That being the case, we would
2 just like repair in the language instead of repair and
3 restore.

4 MR. BROWN: We would agree with that, Your
5 Honor. We like the last sentence, and we're okay with
6 that staying in there, but we would just ask that a
7 period appear after the word account in that last part of
8 the last sentence be taken out.

9 THE COURT: Okay. I see what you're saying.

10 MR. COOPER: Your Honor -- and I'm sorry. I
11 know we have the language in here about repairing and
12 rebuilding. I didn't know if you just wanted to keep it
13 consistent with the contractual language, which is
14 restore, restoration throughout the charge so we're not
15 confusing terms because I will be arguing to the jury
16 that it's not a repair/rebuild. The contractual language
17 says restore, so we would like that jury charge
18 throughout to be consistent with the language in
19 paragraph 20.

20 THE COURT: I'm a little bit confused on what
21 you said.

22 MR. COOPER: For example, second paragraph,
23 the second to last word, It says undertake to rebuilding
24 it, we would change that to restoring it, because that's
25 the word used in paragraph 20 of the leases, and then in

1 the next sentence, it says, In making the decision
2 whether it was totally destroyed, you can consider
3 whether it was readily restorable, whether it was
4 practically so from a mechanical or construction
5 standpoint, and while you may consider whether or not it
6 may have been reasonably financially impractical from the
7 owner's standpoint, the cost of the restoration, instead
8 of repairs, as related to the value of the building
9 before the fire is only one of the permitted measures in
10 valuation. I think that's the last one I saw that hasn't
11 been addressed.

12 MR. LAY: Agree with those suggestions
13 because it is tracking the language that's in the lease,
14 and one step further, and it doesn't really say the
15 building in the lease, it says premises, so substitute --
16 I think premises should be substituted for building, to
17 comply with the actual lease language, but other than
18 that, it's fine.

19 MR. SUMNER: Your Honor, a couple things: I
20 don't understand how the second sentence implying or
21 imposing the obligation to restore if it's not totally
22 destroyed, how that comes into play on the charge on
23 total destruction.

24 I think that's sort of a semantic issue that
25 certainly can be argued, but I don't agree we should

1 change it throughout and make it consistent, because on
2 the first sentence of paragraph 20, the question is, Is
3 it totally destroyed? And so the restoration piece is
4 really not applicable, and so for that reason, I don't
5 agree that we should go through and change rebuild,
6 repair, everything in there to restore.

7 With respect to the last sentence, I found it
8 a little bit confusing, and so for that reason, you know,
9 I'd like to have it taken out in total. I think what you
10 said from the bench a minute ago was very clear, and I
11 don't think we have an objection to it, that the jury
12 should consider the interest of the owner, the tenant,
13 and subtenants in arriving at a decision.

14 I feel like the way this sentence is written,
15 I get confused where it's talking about the building
16 owner paid for it or -- you know, to me, it caused me to
17 scratch my head and wonder where we're going, so I think
18 there's a better way. If you were to use your own words
19 like you did a moment ago, I think it would give a clear
20 picture to the jury that they are not to consider only
21 one party's interest, but everybody's.

22 I think that's fair, and I think that's what
23 the witnesses have said, but if we're going to leave in
24 the last sentence, I think we got to leave it in in
25 total. I think trying to cut out that last half of the

1 sentence would be unfair and would then sort of leave us
2 hanging, so I would -- on behalf of Yaschik, we would
3 argue that the last sentence could be better written, but
4 if we're going to leave it in, let's leave the entire
5 thing in.

6 And with that, Your Honor, I think we are --
7 we find the rest to be acceptable. Yeah, and I would say
8 changing building to premises is going to be weird on
9 some of these as well. When you're talking about the
10 character as a building, I don't think we can say
11 character as the premises. I think it starts to get kind
12 of esoteric and strange. I know why John T.'s arguing
13 that, but I don't think we can set it out like that. I
14 don't think, the way this is written, that would work.

15 THE COURT: All right. On the second full
16 paragraph, I'm going to change reasonably prudent man to
17 reasonably prudent person, and taking out that part about
18 insured completely, here's how it will read: You may
19 consider such things as whether the remnant of the
20 building was sufficiently strong to warrant rebuilding
21 upon it, or was the building so utterly destroyed that no
22 reasonably prudent person would, under the circumstances,
23 undertake rebuilding it.

24 In making your decision whether the building
25 was totally destroyed, you may consider whether it was

1 readily repairable, including whether it was practically
2 so from a mechanical or construction standpoint, and
3 while you may consider whether this may not have been
4 reasonably financially practical from the owner's
5 viewpoint, the cost of repairs as related to the value of
6 the building before the fire is only one of many
7 permitted measures and valuations.

8 The matter may not be said to turn solely on
9 the wishes of the owner and his apparent financial
10 interest. The interest of all parties are to be
11 considered, including the interest of the owner, the
12 tenant, and subtenants. All right?

13 So let me do this: I'm going to run back,
14 finish up the charges based on the rulings that I made,
15 see what I can do about a verdict form. In the meantime,
16 y'all get ready for your closing arguments. Make sure
17 all the exhibits are in place, and I will send you out
18 something here very shortly, give you a little bit of
19 time to digest it.

20 MR. SWOPE: Your Honor?

21 THE COURT: Yes.

22 MR. SWOPE: Squeeze Exhibit 57 has some
23 information that needs to be redacted --

24 THE COURT: Okay.

25 MR. SWOPE: -- about liability insurance

1 against my client, and in our motion in limine, we ask
2 that be removed.

3 THE COURT: You got something to substitute
4 it.

5 MR. SWOPE: We'll need to redact it, but I
6 didn't want to redact it.

7 THE COURT: Does everybody agree with Will,
8 that it needs to be?

9 MR. COOPER: Yes, Your Honor.

10 MR. LAY: Yes, Your Honor.

11 THE COURT: Then he's got the big black
12 marker.

13 MR. SUMNER: Thank you, Judge.

14 THE COURT: Okay. I'll send something out in
15 a few minutes.

16 (Recess taken.)

17 (In open court, jury not present.)

18 THE COURT: Any issue with the jury charges?

19 MR. COOPER: There is one request that we
20 would make; that is, simply instead of putting the
21 punitive damages charge in the middle is charge the
22 breach of contract, breach of contract with fraudulent
23 intent and their damages, the tortious interference, and
24 then just put the punitives at the end. It's just more
25 natural.

1 THE COURT: All right. Top of the Bay?

2 MR. BROWN: Other than what Mr. Cooper just
3 said, we have nothing further.

4 THE COURT: FLP?

5 MS. MONTAGUE: Yes, Your Honor. Only one
6 thing that we would ask to be added. On your section on
7 rules of instruction, which starts on page seven at the
8 bottom, one of our proposed charges included a line
9 saying forfeiture provisions must be stricken to construe
10 termination of the lease, and forfeiture will be allowed
11 only when intent is clear and no other reasonable
12 construct is possible.

13 THE COURT: Hand that up to me.

14 MS. MONTAGUE: Yes, sir.

15 THE COURT: So the sentence that says
16 forfeiture provisions must be construed?

17 MS. MONTAGUE: Yes, sir.

18 THE COURT: Because the first sentence is in
19 there.

20 MS. MONTAGUE: Correct.

21 THE COURT: Does that cause anybody any
22 angst?

23 MR. SUMNER: Yes, Your Honor. Yaschik would
24 object to adding that. I think this whole paragraph of
25 construction against the lessor or the construction

1 against the drafter, you know, is a matter of last
2 resort. You know, this is a commercial lease of
3 sophisticated contracting parties.

4 We would argue that this notion of
5 construction against Yaschik, or whoever drafted this
6 lease to begin with, should not apply in a commercial
7 setting, and certainly this notion of a forfeiture
8 provision, if they want to argue to the Court a
9 forfeiture provision, they can do that, but I think
10 that -- you know, the way this works, termination of
11 contract is based on total destruction.

12 I don't think that this is classic forfeiture
13 provision in that if you don't pay your rent, we're going
14 to do away with the contract. I think it unfairly put a
15 very, very high burden on us, and, for that reason we
16 would ask that the Court, at the very least, not
17 include --

18 THE COURT: Is there a forfeiture provision
19 in the lease? Where?

20 MR. LAY: We think article 20 is the
21 forfeiture provision, and that's where the lease
22 terminates, so this termination on the wholly destroyed,
23 so that would be the forfeiture.

24 MR. SUMNER: Your Honor, we could live with
25 what's in your proposed instruction, but, again, I think

1 the forfeiture provision -- calling it a forfeiture
2 provision, it implies some negative connotation. This is
3 simply to exercise the contractual right to terminate
4 premised on a condition of -- you know, I think this
5 paints a pretty bleak picture, and I think it unfairly
6 prejudices us. The jury can look at that provision and
7 decide for themselves what it means.

8 THE COURT: I don't know anything about not
9 having a forfeiture provision apply in a commercial lease
10 setting. It otherwise seems like an accurate statement
11 of the law, so I'll add that.

12 MR. SUMNER: Okay. We just renew our
13 objection for the record.

14 THE COURT: What else do you have, anything?

15 MR. SUMNER: Yes, sir. On page 14, this is
16 within the context of the breach of contract accompanied
17 by fraudulent act. On the third line down, the sentence
18 begins, The breach and the fraud do not have to be the
19 same act, though they may be.

20 And I think this directly contradicts the
21 Minter case which we've cited in our briefing, and I've
22 got a copy for Your Honor. This case actually held on
23 this point, that there has to be evidence of an
24 independent fraudulent act. For that reason, the Court
25 of Appeals upheld the trial Court, finding that, sure,

1 there's a breach, and there may be ill intent, but you've
2 got to show a separate act.

3 And so I think we have to follow Minter here,
4 and I would argue that instead of the sentence that I
5 just read that we state in there that there needs to be a
6 finding of a separate fraudulent act.

7 THE COURT: Do you want to be heard on that?

8 MR. LAY: That charge came right out of Judge
9 Ralph King Anderson's charge book on breach of contract
10 with fraudulent act. I've got a suggestion, is just
11 remove that sentence, and that would meet both our
12 objectives, it seems to me.

13 MR. SUMNER: It would not meet mine. I don't
14 think that's a good middle ground. I think we got to
15 follow Minter. Judge Anderson did a good job on his
16 charges, but the Court of Appeals is the law.

17 THE COURT: Got to go with the case over
18 Judge Anderson.

19 MR. SUMNER: Thank you, Judge.

20 THE COURT: All right. So I'll take out the
21 sentence that reads, The breach and fraud do not have to
22 be the same act, though they may be. Then I'll start the
23 next sentence with, The fraudulent act and change must be
24 independent of the acts that caused the breach.

25 Does that satisfy you, Mr. Sumner?

1 MR. SUMNER: It's a whole lot better than how
2 it read, so I think we can accept that, Your Honor.

3 THE COURT: All right.

4 MR. SUMNER: The final point I will raise
5 falls on page 17, the last element, and this is within
6 the context of intentional interference with contractual
7 relationship. I think the Court accurately has captured
8 the law on this point, that regardless of the defendant's
9 behavior, there must actually be a breach of the
10 underlying contract before there can be an interference
11 with existing contractual relationship.

12 Now, I raise that, and it kind of ties in a
13 little going next to the verdict forms. How are we going
14 to deal with this, given that we directed verdict on the
15 subtenants's breach of contract claims against Quillen if
16 there's no breach of their subcontract, of their
17 sublease? There is no interference. I mean, it
18 presupposes that there's a breach, but we kind of find
19 ourselves on a tightrope.

20 At the very least, I think on the verdict
21 form, the jury is going to have to make a determination
22 of whether there was a breach of the sublease by Quillen
23 in order for this intentional interference claim to go
24 forward.

25 THE COURT: That's why I asked yesterday if

1 we all agreed that if the property were totally
2 destroyed, then everything else goes away, because if the
3 property was totally destroyed, there wasn't a breach.
4 There wasn't a breach of the contract accompanied by a
5 fraudulent act, and there wasn't an intentional
6 interference with another act, if he was justified in
7 terminating that lease. That's the way I saw it.

8 MR. SUMNER: Well, I agree with you. I don't
9 challenge that at all, but I think that there's a minor
10 point, that in order to recover on intentional
11 interference the jury has to determine, the subs have to
12 prove, that Quillen breached the sublease.

13 In order for there to be an interference with
14 that contract, there necessarily has to be a breach of
15 that contract, and as I understand it, what Mr. Lay has
16 argued was --

17 THE COURT: I don't know if I agree with
18 that, because if he unjustifiably declared it void, or
19 totally destroyed, it wouldn't have voided those
20 contracts, which otherwise would remain in effect. The
21 property would be restored, and when it got restored,
22 then they would step back in to their place. So there
23 doesn't necessarily have to have been any wrongdoing by
24 Quillen.

25 MR. COOPER: And on top of, Your Honor, the

1 way I read -- or when I heard how we were debating it, is
2 you also said, well, it was impossible for him to perform
3 because he kicked them out. He threw them out. So that
4 would be causing Quillen, because of the impossibility to
5 perform, to, in effect, be breaching our contract. I
6 think that's definitely an alternative way to look at it
7 from what you described as well.

8 MR. SUMNER: I understand the argument, but
9 we're left with the elements and have to establish it by
10 some way. So, you know, it would be our position that we
11 need to -- that needs to be on the verdict form, in order
12 to establish the necessary elements for interference, if
13 they find there was some unjustifiable breach of the
14 contract that was interfered with.

15 THE COURT: Well, it seems to me if the jury
16 came back with a verdict in Yaschik's favor on breach of
17 contract and breach of contract by fraudulent act, it
18 would be an inconsistent verdict to say that they could
19 find for intentional interference, and then we just deal
20 with it at that point on the verdict.

21 MR. SUMNER: On the form, could we just say
22 if you find that and give some instruction that you don't
23 get to intentional interference?

24 THE COURT: Do you agree?

25 MR. COOPER: If you know the total --

1 THE COURT: In other words, reverse the
2 order, put Yaschik's claims -- or Quillen's claims for
3 breach of contract, breach of contract accompanied by
4 fraud first, and then when we get to Squeeze's and
5 Yaschik's, that if you found that the contract was
6 breached, then you can consider the intentional
7 interference claims.

8 MR. SUMNER: If you have to have that.

9 THE COURT: I would think you have to,
10 because if you found that he was justified in terminating
11 because it was totally destroyed, then he's not
12 intentionally interfering with their contract.

13 MR. COOPER: I would agree with that, yes,
14 because if there was not a total destruction, the way the
15 posture is, the case, it would go ahead.

16 MR. BROWN: We would agree with that.

17 THE COURT: Okay. All right.

18 MR. SUMNER: I have concerns about the form,
19 but I can wait and raise those or raise those now.

20 THE COURT: The form, you mean --

21 MR. SUMNER: The verdict form.

22 THE COURT: Let me deal with those one at a
23 time.

24 MR. COOPER: Do you think it would be cleaner
25 to put at the top of the verdict form just an initial

1 question saying, Do you find total destruction? Yes or
2 no.

3 THE COURT: That's why I brought it up.

4 MR. COOPER: I think that's cleaner than
5 putting it inside of the actual verdict form. The
6 posture of the case, now I would agree with you.
7 Yesterday, you hadn't granted your DVs and whatnot.

8 THE COURT: Everybody seemed to be a little
9 upset with, I thought, that rather brilliant observation,
10 but clearly, upon reflection, it's often what it takes
11 for somebody to think I'm right.

12 MR. SUMNER: With all due respect, I think
13 that places undue importance on the question of total
14 destruction.

15 THE COURT: That's what it all boils down to.

16 MR. SUMNER: Well, it is, but you got to put
17 it into the context of burden of proof, what they have to
18 show. I think the way you've got it in your verdict form
19 makes the most sense. I mean, I feel like putting that
20 on top of the page, as if it's some separate, overarching
21 issue, it places -- for me, it places an unfair focus on
22 that when we should just be considering it within the
23 elements of the case, that they have to prove by a
24 preponderance of evidence, and so I would argue -- I
25 don't care for just putting that -- isolating it on its

1 own. I think it's better formulated just walking through
2 the various causes of action as you have it.

3 MR. BROWN: Top of the Bay would agree to put
4 that line at the top. I don't think that -- I think if
5 we put the charge, if you will, in the verdict form, that
6 will have the result of just further confusing this jury.

7 So I think if you start off with if you find
8 the building is totally destroyed, if they do, that's the
9 end of it, and I think that's appropriate. I think it's
10 the simplest and easiest way for them to understand.

11 MR. SUMNER: But on a breach of contract
12 case, they still have to prove their interference, so,
13 again, I feel like that's --

14 THE COURT: If it was totally destroyed, you
15 win.

16 MR. SUMNER: Right. But if it's not totally
17 destroyed, I don't necessarily lose on the interference
18 claim, and so what I don't want to do it give the
19 impression to the jury that total destruction, Yaschik
20 wins; not total destruction, Yaschik loses, period, on
21 all counts. I think it gives that impression if it did
22 that with respect to the breach of contract, but with
23 respect to the interference, they still have to prove the
24 elements of the interference.

25 THE COURT: Yeah. But they don't have to

1 prove anything if you prove that the property was totally
2 destroyed.

3 MR. SUMNER: I don't disagree with that, but
4 if it's not totally destroyed, I don't want the jury to
5 say, Okay. It's not totally destroyed. Let's go to the
6 damages line on interference. You still got --

7 MR. BROWN: I think you can say if it's not
8 totally destroyed, go to the next part, and then you get
9 into the different causes of action. There's nothing in
10 there that says if you find the building is totally
11 destroyed you go straight to the damages section.

12 MR. SUMNER: I think the way the verdict form
13 was proposed by the Court this morning is the best way,
14 with a couple tweaks I do want to raise when it's
15 appropriate, but I think reformatting it, we believe,
16 would be prejudicial to us because it would give the
17 impression that total destruction would have an automatic
18 direct, you know, result. If there was not total
19 destruction, then the jury is going to say, Okay. That
20 means there was interference. Get out the pen.

21 THE COURT: Okay. Did you have something
22 else?

23 MR. SUMNER: Yes, Your Honor. With respect
24 to the verdict form, a couple things.

25 Number one: I think because there's some

1 different burdens of proof, I think we should, include
2 with each cause of action, the burden of proof, and I
3 think you can simply be -- with respect to breach of
4 contract, preponderance of evidence, intentional
5 interference, preponderance of evidence, and then as to
6 the breach accompanied by fraud, that they have the
7 burden of proving it by clear and convincing evidence.

8 THE COURT: Well, that's just implied with
9 the words "if appropriate".

10 MR. SUMNER: Yes, but if there was just one
11 burden in the case, I would agree that that's easy to
12 follow, but there's two. It's hard for me to follow with
13 all these different causes of action. I just feel like
14 it would clarify to the jury, did the plaintiff prove by
15 a preponderance or did the plaintiff prove by clear and
16 convincing and so on and so forth.

17 MR. COOPER: Your Honor, I would just say
18 that the verdict form is simple, and your jury
19 instructions are not very long where the burden of proofs
20 are laid out, and, obviously, in closing, he can waive
21 the jury instructions and show them the burden of proofs
22 to the different causes of action, so I don't think it's
23 confusing, particularly the way the case states, four
24 causes of action.

25 THE COURT: Here's what I'm going to do: I'm

1 going to move Quillen's up so it says breach of contract.
2 I'm going to leave the language, and I don't think it's
3 necessary --

4 MR. SUMNER: Before you print, I just don't
5 want to fail to raise something.

6 THE COURT: What?

7 MR. SUMNER: There is, I think, a very
8 appropriate proximate cause element under the FLP cause
9 of action, which now sounds like in order to be first, we
10 would like to see that in each cause of action because we
11 think it is an essential element, and at least the one
12 party, we don't think they've satisfied it. So with the
13 way it's written, the proposed verdict form, Did the
14 breach proximately cause damage to the FLP, we would just
15 like to have that applied to each of the causes so it's
16 fairly determined by the jury as to each separate party.

17 THE COURT: All right.

18 MR. SUMNER: Thank you.

19 MR. COOPER: If you're inclined to make that
20 change, it seems like -- I'm looking at our verdict form.
21 We have cause and damage to Squeeze. You could just say
22 the proximate cause of damage to Squeeze. It just seems
23 like -- just reword it in that single sentence instead of
24 putting a bunch of lines in there.

25 THE COURT: I'm missing what you just said.

1 MR. COOPER: May I approach? It might be
2 easier to show.

3 MR. BROWN: Your Honor, the charge says
4 causing damage to, so I think it's already in there.

5 THE COURT: Made a couple changes. I don't
6 think we need to change the punitive damages area where
7 it's at. It makes sense the way it's at right there, but
8 other than that, I made the changes. You'll get that in
9 a second and we'll go from there.

10 All right. Look at those things. He's going
11 to run some new jury charges and see where that leaves
12 us.

13 MR. COOPER: Can I raise something before we
14 close? Based on your rulings today, in arguing to the
15 jury that -- talking about the September 11th letter,
16 which is the termination letter, when that was sent that
17 it, as you ruled, voided our contract as of the date of
18 the fire, April 2nd.

19 THE COURT: Correct.

20 MR. COOPER: And if you find a breach of the
21 master lease, subsequently, there's a breach to perform,
22 and then there's a breach of our lease, it's just whether
23 or not it was intentionally procured, and that also the
24 effect of the September 11th is Quillen could not perform
25 his obligations under the sublease.

1 THE COURT: What are you asking me?

2 MR. COOPER: I just don't want to run afoul
3 of your ruling, because I want to make sure that what I
4 say is accurate, because I don't want to misstate that to
5 the jury.

6 THE COURT: So if the jury finds that it was
7 totally destroyed, it's retroactive, and it was gone
8 away, all right, but you're really only arguing if it was
9 not justified in finding it was totally destroyed.

10 MR. COOPER: That's exactly right.

11 THE COURT: Then you would be arguing you're
12 entitled to damages because that was not a justifiable
13 breach, and had that not caused the breach between
14 Quillen and Yaschik, your lease would have remained in
15 effect, but I think what maybe you're getting at -- and
16 my point was, because they said it was breached, even if
17 the jury finds it wasn't -- that it was breached, it was
18 not possible for Quillen to perform because when Yaschik
19 declared it to be terminated, it made it impossible for
20 Quillen to perform in their agreement with you, and that
21 was interfering with your contract with Quillen.

22 MR. COOPER: 100 percent. That's exactly
23 what I want to say. I want to say when that September
24 11th was sent, the legal effect of it, what the judge
25 ruled, is Quillen could not perform under our sublease

1 because of the interference, which is the breach. So if
2 there's not a total destruction of the master lease,
3 there's a breach there. There's a breach under our
4 agreement, and that's what procured the breach.

5 THE COURT: That was the interference. That
6 was the interference, okay? Does that answer your
7 question?

8 MR. COOPER: Yes. I just don't want to run
9 afoul when I'm using the word impossible to perform. I
10 just want to make sure that that's clear about what I'm
11 going to tell them about, because I think it's going to
12 be confusing because I did ask a lot of questions about
13 could you do this? Could you do that?

14 I want to tell them that the Court has ruled
15 that it was impossible for him to perform after the
16 September 11th letter was sent.

17 THE COURT: Correct.

18 MR. COOPER: Thank you.

19 THE COURT: All right.

20 MR. COOPER: May I make a suggestion to the
21 verdict form? Where you have your text in bold, if we're
22 going to put -- shouldn't we put it under the first time
23 they answer yes or no and then just stop them right
24 there? Because there can't be a breach of contract with
25 fraudulent act.

1 MR. SUMNER: We renew our objections that we
2 raised on the record, but with that being said, we have
3 no problem with sending them back.

4 THE COURT: Okay. All right. While he
5 prints those out, take a look, make sure it says what I
6 said, and take five minutes to go to the restroom, and
7 maybe we'll get this show on the road.

8 A F T E R N O O N S E S S I O N

9 (In open court, jury present.)

10 THE COURT: Welcome back, folks. Thank you
11 so much. This has been an usually long trial. We
12 usually don't get them this long or this complicated, but
13 when we do, we just have to slow down and do it right.

14 We worked yesterday afternoon. We worked
15 this morning, but we have finally gotten to the part
16 where we're ready to get it to you for closing arguments,
17 and then I'll charge you on the law, and you will retire
18 to consider what your verdict will be.

19 So the process is because the plaintiffs have
20 the burden of proof, they will go first, and then you'll
21 hear from the defendants, and then we'll give the
22 plaintiffs the opportunity to make a brief reply under
23 our rules since they have the burden of proof. The
24 plaintiffs, remember, are the people that brought the
25 lawsuit, and I have aligned the parties so that the two

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2013-CP-10-7107

Sea Island Food Group, LLC d/b/a
Squeeze; et al.

Yaschik Development Company, Inc.
d/b/a/ Yaschik Enterprises; et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: **We, the jury, find for the Plaintiff Michael J. Quillen Family Limited Partnership against Yaschik Development Company Inc., d/b/a Yaschik Enterprises. We, the jury, find for the Plaintiff, Sea Island Food Group, LLC d/b/a Squeeze against Yaschik Development Company Inc., d/b/a Yaschik Enterprises. We, the jury, find for the Plaintiff, Top of the Bay, Inc. d/b/a Club Light against Yaschik Development Company Inc., d/b/a Yaschik Enterprises.**

This order ☒ ends ☐ does not end the case.
Additional Information
for the Clerk :

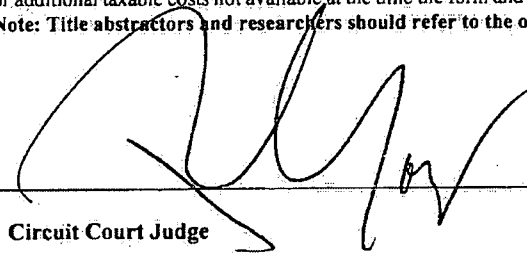
INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Michael J. Quillen Family Limited Partnership	Yaschik Development Company Inc., d/b/a Yaschik Enterprises	\$1,112,857.10 Actual Damages

Sea Island Food Group, LLC d/b/a Squeeze	Yaschik Development Company Inc., d/b/a Yaschik Enterprises	\$738,371.64 Actual Damages \$469,393.10 Punitive Damages
Top of the Bay, Inc. d/b/a Club Light	Yaschik Development Company Inc., d/b/a Yaschik Enterprises	\$1.00 Nominal Damages \$133,333.33 Punitive Damages
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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


Circuit Court Judge

2134
Judge Code

2/5/18
Date

For Clerk of Court Office Use Only

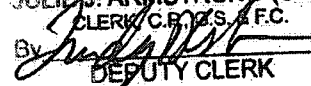
This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Amanda Haffenden

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK/C.E.O. U.S. & F.C.
By 
DEPUTY CLERK

) IN THE COURT OF COMMON PLEAS
) FOR THE
) NINTH JUDICIAL CIRCUIT

) CASE NO.: 2013-CP-10-7107

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VERDICT FORM

Please answer each of the below questions in order. Your decisions must be unanimous.

MICHAEL J. QUILLEN FAMILY LIMITED PARTNERSHIP (FLP)

Breach of Contract Against Yaschik

Did Yaschik breach the Master Lease by improperly terminating the lease on the basis that the premises were totally destroyed?

Yes ☒ No ☐

If yes, did the breach proximately cause damage to the FLP?

Yes ☒ No ☐

If yes, award appropriate damages to FLP:

\$ 1,112,857.10

If you find for FLP on its Breach of Contract Claim then you may consider the following claims of FLP, Squeeze and TOB. If you find Yaschik did not breach its contract with FLP, stop deliberating.

FLP Breach of Contract Accompanied by a Fraudulent Act Against Yaschik

If yes in FLP's Breach of Contract claim against Yashick and damages awarded:

Was Yaschik's breach of the Master Lease accompanied by a fraudulent act?

Yes ☐ No ☒

If yes, did the breach proximately cause damage to the FLP?

Yes ☐ No ☒

If yes and proven by clear and convincing evidence, award punitive damages to FLP:

\$ 0

Sea Island Food Group, LLC, d/b/a Squeeze

Intentional Interference with Contract Against Yaschik

Did Yaschik intentionally interfere with Squeeze's sublease without justification by terminating the Master Lease?

Yes ☒ No ☐

If yes, did the interference proximately cause damage to Squeeze? Yes ☒ No ☐

If yes, award appropriate damages to Squeeze:

\$ 738,371.⁶⁴

If proven by clear and convincing evidence, award punitive damages to Squeeze:

\$ 469,393.¹⁰

Top of the Bay, Inc., d/b/a Club Light

Intentional Interference with Contract Against Yaschik

Did Yaschik intentionally interfere with Top of the Bay's sublease without justification
by terminating the Master Lease?

Yes ☒ No ☐

If yes, did the breach proximately cause damage to TOB?

Yes ☒ No ☐

If yes, award appropriate damages to Top of Bay:

\$ \$1.00

If proven by clear and convincing evidence, award punitive damages to Top of the Bay:

\$ 133,333.³³

Tousheer Myer 2/2/18
Foreman/Date

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) COURT OF COMMON PLEAS
) THE NINTH JUDICIAL CIRCUIT
) CASE No.: 2013-CP-10- 7107

SEA ISLAND FOOD GROUP, LLC
doing business as SQUEEZE,

Plaintiff,

v.

YASCHIK DEVELOPMENT
COMPANY, INC. doing business as
YASCHIK ENTERPRISES,
CHARLESTON CAPITAL
CORPORATION, THOMAS M.
ERVIN, and MICHAEL J. QUILLEN
FAMILY LIMITED PARTNERSHIP,

Defendants.

COMPLAINT

(Breach of Contract, Breach of
Contract Accompanied by
Fraudulent Act, Interference with
Contractual Relationship, Piercing
the Corporate Veil)

(Jury Trial Demanded)

FILED
2013 DEC -5 PM 4:50
JULIE J. ARMSTRONG
CLERK OF COURT

Plaintiff Sea Island Food Group, LLC doing business as Squeeze brings
this action against Defendants Yaschik Enterprises, Charleston Capital
Corporation, Thomas M. Ervin, and Michael J. Quillen Family Limited
Partnership based on the allegations set forth below.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Sea Island Food Group, LLC is a South Carolina limited
liability company with its principal place of business located in Charleston
County, South Carolina.

2. Upon information and belief, Defendant Yaschik Development Company, Inc. is a South Carolina Corporation with its principal place of business located in Charleston County, South Carolina

3. Upon information and belief, Defendant Charleston Capital Corporation is a South Carolina Corporation with its principal place of business in Charleston County, South Carolina.

4. Upon information and belief, Defendant Michael J. Quillen Limited Family Partnership is a Virginia Limited Partnership with its principal place of business located in Gate City, Virginia.

5. Upon information and belief, Thomas M. Ervin resides in Charleston County, South Carolina.

6. This Court has jurisdiction over the parties to and the subject matter of this action, and venue in Charleston County is proper under § 15-7-30 of the Code of Laws of South Carolina in that all the alleged acts or omissions giving rise to the cause of action occurred in Charleston County.

FACTS

7. Plaintiff incorporates the allegations of paragraphs 1 through 6 above as if fully set forth herein.

8. On or about March 14, 1997 a Master Lease ("Master Lease") was entered into between the now-dissolved 213 East Bay Associates, Inc. and

Charleston T&T, Inc. A true and correct copy of the lease is attached as **Exhibit 1** and incorporated by reference.

9. The Master Lease began on April 1, 1997 and was for a period of five years with five five-year options to renew.

10. On or before April 1, 2002, Charleston T&T, Inc. elected to exercise its option to renew the Master Lease for another five years.

11. On or about April 15, 2003, Defendant Yaschik Development Company, Inc. purchased 213 East Bay Street from 213 East Bay Associates, Inc. for approximately \$1,800,000.00 and continued leasing the space under the same Master Lease.

12. At all relevant times, Defendant Thomas M. Ervin has served as President of Yaschik Development Company, Inc.

13. On or about March 15, 2006, Charleston T&T, Inc. sublet the space at 213 A East Bay Street to R&R Entertainment, who operated the bar Squeeze. A true and correct copy of the lease (the "Sublease") is attached as **Exhibit 2** and incorporated by reference.

14. The Sublease term was for a period of one year beginning on April 1, 2006 with two five-year options to renew.

15. On or about January 12, 2011, Sea Island Food Group, LLC purchased Squeeze from R&R Entertainment and assumed the Sublease.

16. As a result of Plaintiff's assumption of the Sublease, Plaintiff became an intended beneficiary of the Master Lease.

17. On or about March 30, 2012, the tenants of 213 East Bay Street were informed by letter (the "Assumption Letter") that Defendant Michael J. Quillen Family Limited Partnership had assumed the Master Lease from Charleston T&T, Inc. and that future correspondence and rent should be directed to the attention of Defendant Michael J. Quillen Family Limited Partnership. A true and correct copy of the Assumption Letter is attached as **Exhibit 3** and incorporated by reference.

18. On or about April 2, 2013, there was a fire at 213 East Bay Street.

19. Defendants Thomas Ervin, Yaschik Development Company, Inc., and Charleston Capital Company carried only \$1,000,000.00 of fire insurance on a building that was purchased for \$1,800,000.00 and has a tax assessment value of \$2,219,000.00.

20. The fire caused damage to the property occupied by other tenants, but 213 A East Bay Street had limited smoke damage and some water damage.

21. Defendant Michael J. Quillen Family Limited Partnership initiated the cleanup and restoration of 213 East Bay Street.

22. On or about September 11, 2013, Yaschik Development Company, Inc. doing business as Yaschik Enterprises and Defendant Charleston Capital Corporation sent master leaseholder Defendant Michael J. Quillen Family

Limited Partnership a letter (the "Termination Letter") informing them that, "Since the fire at the leased property has led to a total loss of the subject premises, the Master Lease has been automatically terminated pursuant to the terms of the first sentence of Paragraph 20 of the Master Lease." A true and correct copy of the Termination Letter is attached as **Exhibit 4** and incorporated by reference.

23. The fire did not, in fact, result in a total loss of the premises.

24. And to date, the reconstruction of 213 East Bay Street has reached a stalemate and ceased.

FIRST CAUSE OF ACTION
(Breach of Contract)

*(Against Defendants Yaschik Development Company, Inc.
and Charleston Capital Company)*

25. Plaintiff incorporates the allegations of paragraphs 1 through 24 above as if fully set forth herein.

26. A valid contract exists between Defendants Yaschik Development Company and Defendant Michael J. Quillen Family Limited Partnership in the form of the Master Lease.

27. Plaintiff is a Third-Party Beneficiary of the Master Lease.

28. Defendants Yaschik Development Company and Charleston Capital Company breached the contract in that they failed to speedily make repairs and return the building to substantially the same condition as prior to the fire.

29. Plaintiff suffered damages as a direct and proximate result of Defendant Yaschik Development Company and Defendant Charleston Capital Company's breach.

30. Plaintiff is entitled to actual and consequential damages, plus any court costs, and attorney's fees.

SECOND CAUSE OF ACTION
(Breach of Contract Accompanied by a Fraudulent Act)
(Against Defendants Yaschik Development Company, Inc.
and Charleston Capital Company)

31. Plaintiff incorporates the allegations of paragraphs 1 through 30 above as if fully set forth herein.

32. A valid contract exists between Defendants Yaschik Development Company and Defendant Michael J. Quillen Family Limited Partnership in the form of the Master Lease.

33. Plaintiff is a Third Party Beneficiary of the Master Lease.

34. Defendants Yaschik Development Company and Charleston Capital Company breached the contract in that they failed to speedily make repairs and return the building to substantially the same condition as prior to the fire.

35. Defendants Yaschik Development Company and Charleston Capital Company's breach of contract was accompanied by a fraudulent act not in the making of the contract but in the breaching of its obligation

accompanied by dishonesty, unfair dealing, and unlawfully appropriating property in which Plaintiff had a legal interest.

36. Defendants Yaschik Development Company and Charleston Capital Company sent a Termination Letter that lacked a legal or factual basis with fraudulent and ulterior motives.

37. Plaintiff suffered damages as a direct and proximate result of Defendants Yaschik Development Company and Charleston Capital Company's breach.

38. Plaintiff is entitled to actual, consequential, and punitive damages, plus any court costs, and attorney's fees.

THIRD CAUSE OF ACTION
(Breach of Contract)

(Against Defendant Michael J. Quillen Family Limited Partnership)

39. Plaintiff incorporates the allegations of paragraphs 1 through 38 above as if fully set forth herein.

40. A valid contract exists between Plaintiff and Defendant Michael J. Quillen Family Limited Partnership in the form of the Sublease.

41. Defendant Michael J. Quillen Family Limited Partnership breached the contract in that it failed to speedily make repairs and return the building to substantially the same condition as prior to the fire.

42. Plaintiff suffered damages as a direct and proximate result of Defendant's breach.

43. Plaintiff is entitled to actual and consequential damages, plus any court costs, and attorney's fees.

FOURTH CAUSE OF ACTION
(Intentional Interference with a Contractual Relationship)
*(Against Defendants Yaschik Development Company, Inc.
and Charleston Capital Company)*

44. Plaintiff incorporates the allegations of paragraphs 1 through 43 above as if fully set forth herein.

45. A valid contract exists between Plaintiff and Michael J. Quillen Family Limited Partnership in the form of the Sublease.

46. Defendants Yaschik Development Company, Inc. and Charleston Capital Company were aware of the contract between Plaintiff and Michael J. Quillen Family Limited Partnership.

47. Defendants Yaschik Development Company, Inc. and Charleston Capital Company intentionally procured the breach of this contract in that they sent a Termination Letter that lacks a legal or factual basis with fraudulent and ulterior motives, they failed to speedily make repairs and return the building to substantially the same condition as prior to the fire, and they stalled reconstruction of the building.

48. Plaintiff suffered damages as a direct and proximate result of Defendant's breach.

49. Plaintiff is entitled to actual and consequential damages, plus any court costs, and attorneys' fees.

FIFTH CAUSE OF ACTION
(Piercing the Corporate Veil)
(Against Defendants Yaschik Development Company, Inc.
and Thomas M. Ervin)

50. Plaintiff incorporates the allegations of paragraphs 1 through 49 above as if fully set forth herein.

51. Upon information and belief, Defendant Thomas M. Ervin does business under the name Yaschik Development Company, Inc. and Charleston Capital Company.

52. Defendant Thomas M. Ervin operates these companies as an alter ego, façade, or mere instrumentality of himself.

53. Upon information and belief, Defendant Thomas M. Ervin ignored corporate formalities of Defendants Yaschik Development Company and Charleston Capital Company by failing to (1) adequately insure 213 East Bay Street or (2) require the master leaseholder to adequately insure 213 East Bay Street.

54. It would be unjust and fundamentally unfair to Plaintiff Sea Island Food Group, LLC if Defendant Thomas M. Ervin was not held personally responsible for the damages suffered by Plaintiff.

55. The corporate form of each should be disregarded to hold Defendant Thomas M. Ervin personally responsible for the actual, consequential, punitive and other applicable damages.

JURY DEMAND

56. Pursuant to Rule 38 of the South Carolina Rules of Civil Procedure, Plaintiff respectfully requests a trial by jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment against Defendants on all causes of action and that Plaintiff be awarded:

- A. Actual damages;
- B. Consequential damages;
- C. Pre and post judgment interest;
- D. Reasonable attorneys' fees and costs; and
- E. Such other and further relief as this Court deems just and appropriate.

Law Office of M. Brooks Derrick, LLC



M. Brooks Derrick (SC Bar No.: 76330)
36 Broad Street
Charleston, South Carolina 29401
Office: (843) 410-2545
Fax: (843) 410-5664
bderrick@derricklawoffice.com

*Attorney and Counselor for
Sea Island Food Group, Inc.*

Charleston, South Carolina
December 5, 2013

EXHIBIT 1

Master Lease dated March 14, 1997

EXHIBIT 1

tenant: <u>Charleston T & T</u>	Term: <u>Five (5) Years</u>
Date Signed: <u>March 14, 1997</u>	Initial Monthly Base Rental \$ <u>8750.00</u>
Effective Date: <u>April 1, 1997</u>	Renewal Date: <u>December 31, 2001*</u>

*90 day notice to renew

MOVED FROM Charleston T & T

hereinafter referred to as Tenant,

sum of \$8750.00 (Eight Thousand Seven Hundred Fifty DOLLARS)
 received by check as a deposit which shall be applied as follows:

	RECEIVED	PAYABLE PRIOR TO OCCUPANCY
for the period from <u>July 1, 1997</u> to <u>July 31, 1997</u> : <u>\$8750.00</u>	\$	\$
Month's Rental	\$	\$
Security Deposit	\$	\$ <u>8750.00</u> due prior
Deposit	\$	\$ <u>to March 25, 1997</u>
moving charge	\$	\$
R	\$	\$
M	\$ <u>8750.00</u>	\$ <u>8750.00</u> due prior
		\$ <u>to March 25, 1997</u>

STATE OF SOUTH CAROLINA, COUNTY OF Charleston

THIS AGREEMENT entered into this 14th day of March, 1997

between Charleston T & T hereinafter referred to as Tenant,
213 East Bay Associates Inc. Landlord or Agent for the Landlord,
 hereinafter referred to as Landlord.

WITNESSETH:

PREMISES. That Landlord, in consideration of rents, covenants and conditions mentioned herein, to be paid, kept, performed and observed by Tenant does hereby demise, lease and let unto Tenant, and Tenant does hereby hire and take from Landlord the premises known as:

213 East Bay Street to include entire premises and parking area in the garage behind the building that is included in the title to this property.

TERM. To have and to hold said leased premises for the term of Five (5) Years
 beginning April 1, 1997
 and ending March 31, 2002

Tenant shall have five (5) options to renew of Five (5) years each.

Landlord agrees to give tenant three (3) months rent abatement beginning April 1, 1997.

Landlord agrees to give tenant \$7500.00 at delivery of premises for heat and air system for unfinished space in rear and to include the installation of firewalls to meet codes for restaurant and bar. Tenant shall pay any amount over the \$7500.00.

Tenant has the right to sublet.

Landlord agree to give tenant first right of refusal to buy property should landlord elect to sell. Tenant shall have 30 days from notice to enter into a contract agreeable to both parties.

The rental amount shall increase by 4% per year during term and any renewal

RENT. Tenant shall pay to the Landlord, a Monthly Base Rental and Additional Rent as follows:

(A) MONTHLY BASE RENTAL. Tenant shall pay a Monthly Base Rental to Landlord for each calendar month during the term of this lease or any renewal thereof, in advance on or before the first day of each succeeding month. The amount of the Monthly Base Rental for the first year of this lease shall be

Eight Thousand Seven Hundred Fifty Dollars (\$ 8750.00)

The rental for the first month of the term of this lease shall be paid at the date of the execution hereof. If such date be other than the first day of the calendar month, such first rental payment shall be prorated for the period between the effective date of this lease and the first day of the following month.

(B) MONTHLY BASE RENTAL ADJUSTMENTS. The Monthly Base Rental shall be subject to an annual accumulative adjustment upward on each

(B) **ADDITIONAL RENT.** In addition to the Monthly Base Rental and its annual accumulative adjustments, Tenant shall pay Additional Rent as indicated hereto below in subparagraphs:

(1) **TAX INCREASE.** Tenant shall pay annually a sum equal to any increase in real estate taxes (ad valorem, special assessments, or any other governmental charges) over those assessed for 19____ on a pro rata basis. Presentation of copies of tax bills shall constitute sufficient evidence of additional rent due and shall be payable within fifteen (15) days after receipt thereof. Tenant shall be charged additional rent only for that portion of the calendar year during which this lease was in effect.

(2) **PERCENTAGE OF GROSS SALES.** Tenant shall pay annually a sum equal to _____ percent (____%) of gross sales, as herein defined, in excess of _____ Dollars (\$____) in any lease year. Gross sales as used herein shall be the amount of the gross sales as indicated on the Tenant's South Carolina State Tax Report (Form ST-3). Tenant shall deliver to Landlord a certified copy of each monthly report within ten (10) days after report is due to the South Carolina Tax Commission. Lease year as used herein shall be the period of one year's duration commencing on the effective day of the lease and each successive period of one full year commencing on the anniversary of said effective date. Tenant shall deliver to Landlord within _____ days following the end of each lease year written statement signed and certified by Tenant to be a true and correct statement of the amount of gross sales during the preceding lease year. Tenant shall at the same time pay the amount of Additional Rent due (if any) as a percentage of the excess over the amount herein stated.

(3) **COMMON AREA MAINTENANCE.** Tenant shall pay on the first day of each month, in advance, a fee equal to the Tenant's pro rata share of the cost of maintaining common areas. Tenant's common area maintenance fee for the remaining portion of the calendar year in which this lease became effective shall be Dollars (\$____) per month. Said fee shall be adjusted at the end of each calendar year to reflect any increase in cost during said year. Common areas include all areas used in common with the other Tenants of the property of which the leased premises is a part for the convenience or welfare of all tenants' customers collectively. Common area maintenance shall include (if applicable) the cleaning, stripping and repairing of parking areas (surfacing not included) and the managing, cleaning and repairing of all common areas, including but not limited to the following:

(C) **PRORATION OF CHARGES.** If the leased premises described herein are less than the entire property, the increases in Monthly Base Rental adjustments, Additional Rent and all other charges required by this lease shall be determined by proration on the same ratio that the rentable floor area of the leased premises bears to the rentable floor area of the entire property. It is agreed that the leased premises contains _____ square feet of rentable area of the entire property is _____ square feet, resulting in a percentage ratio factor of _____ percent.

(D) **ADDITIONAL CHARGES.** Any charges due Landlord by Tenant, including but not limited to, damage to premises, legal fees, cost of tenant remedies, and past due charges for utilities, insurance, cleaning, maintenance and repairs, etc., or for work done on the premises by order of Tenant, shall be considered as Additional Rent due in addition to all other rent payable and shall be included in any lien for rent. In the event any documentary stamp tax or tax based on rental or leasing of the premises is required the cost shall be paid by tenant upon demand. The cost of a credit report on the Tenant, which may be requested in the Landlord's option shall be paid by the Tenant.

4. **SECURITY DEPOSIT.** Any security deposit required by Landlord and paid by Tenant shall be retained as security (interest free) for the faithful performance by Tenant of all terms, covenants and conditions herein. Landlord may at any time apply said deposit or any part thereof against any default by Tenant of any of the terms, covenants and conditions of this lease. In such event, Tenant shall upon demand deposit with Landlord the amount so applied. Landlord shall have the full amount of the deposit on hand at all times during the term of this lease. Upon the expiration of this lease the Tenant shall surrender possession of the leased premises as required in paragraph 25 herein. Landlord is given permission to deduct from said security deposit the cost of any unusual cleaning or repairs to the property, upon written notice of Tenant. Security deposit is not a part of the rental and subsequently cannot be deducted from the rent of the last month of this tenancy. Security deposit in any remaining portion will be returned within 15 days after the termination of this tenancy or completion of the repairs necessitated by Tenant's misuse of the premises. In the event the security deposit is not sufficient to pay all charges due, Tenant shall pay said charges within three days after receiving written notice from the Landlord or Agent.

5. **TENANTS UTILITIES.** Tenant shall pay all charges or bills for all utility and scavenger services used by the Tenant, EXCEPT:

No exceptions

6. **USE OF PREMISES.** Tenant agrees to use entire leased premises for : **any use permitted as per zoning**

7. **EXAMINATION OF PREMISES.** Tenant has examined the leased premises and is familiar with their present condition. Tenant, relying solely on said examination, agrees to accept premises in their present condition except for the specific items listed herein or itemized on an attached check-in list.

8. **DELAY OF POSSESSION.** If Landlord is unable to deliver possession of leased premises on the effective date of this lease, by reason of the building over of a prior Tenant or for any other reason, this lease shall not be affected or impaired in any way and Landlord shall not be liable to Tenant for any loss or damage resulting therefrom. The effective date of this lease however, shall not begin until the delivery of possession. If Landlord, however, is unable to deliver possession of the premises to Tenant by **April 1, 1997**, 19____, Tenant shall have the right to cancel this lease upon written notice delivered to Landlord and upon such cancellation Landlord and Tenant shall each be released and discharged from all liability under this lease. In such case any deposit or prepay rent shall be promptly returned to Tenant. **Should Landlord be unable to deliver possession of the premises by the above date, the lease shall be terminated and the deposit shall be returned to the Tenant.**

9. **TENANT'S PARKING.** Parking of vehicles owned or operated by Tenant or Tenant's employees is hereby limited, restricted or prohibited, as follows:

all available space in rear of building as part of the title to this property.

10. **LIABILITY INSURANCE.** Tenant shall not carry any stock of goods or do anything in or about the leased premises which will in any way restrict or invalidate any insurance coverage of the leased premises. Tenant agrees to pay upon demand an additional rent any increase in premiums of insurance carried by the Landlord on the leased premises resulting from the Tenant's use or occupancy. Tenant shall keep in full force and effect, at Tenant's expense, insurance for plate glass, personal property, trade fixtures and property damages, as well as a public liability policy in which both Tenant and Landlord shall be named as the insured with the following minimum coverage:

\$1,000,000 liability shall be maintained by tenant

11. **MAINTENANCE AND REPAIRS.** Landlord shall repair and maintain the foundation, roof, outer walls and structural members of the leased premises and all other ordinary and extraordinary

(C) **PRORATION OF CHARGES.** If the leased premises described herein are less than the entire property, the following is: Monthly Base Rental adjustments. Additional Rent and all other charges required by this lease shall be determined by proration on the same ratio that the rentable floor area of the leased premises bears to the rentable floor areas of the entire property. It is agreed that the leased premises contains _____ square feet of rentable area of the entire property is _____ square feet, resulting in a percentage ratio factor of _____ percent.

SECURITY DEPOSIT. Any security deposit required by Landlord and paid by Tenant shall be retained as security (interest free) for the faithful performance by Tenant of all terms, covenants and conditions herein; Landlord may at any time apply said deposit or any part thereof against any default by Tenant of any of the terms, covenants and conditions of this lease. In such event, Tenant shall upon demand deposit with Landlord the amount so applied and Landlord shall have the full amount of the deposit on hand at all times during the term of this lease. Upon the expiration of this lease the Tenant shall surrender possession of the leased premises as required in paragraph 26 herein. Landlord is given permission to deduct from said security deposit the cost of any unusual cleaning or repairs to the property, upon valuation of Tenant. Security deposit is not a part of the rental and subsequently cannot be deducted from the rent of the last month of this tenancy. Security deposit or any remaining portion will be returned within 15 days after the termination of this tenancy or completion of the repairs necessitated by Tenant's misuse of the premises. In the event the security deposit is not sufficient to pay all charges due, Tenant shall pay said charges within three days after receiving written notice from the Landlord or Agent.

No exceptions

7. **EXAMINATION OF PREMISES:** Tenant has examined the leased premises and is familiar with their present condition. Tenant, relying solely on said examination, agrees to accept premises in their present condition except for the specific items listed herein or itemized on attached check-in list.

9. TENANT'S PARKING. Parking of vehicles owned or operated by Tenant or Tenant's employees is hereby limited, restricted or prohibited as follows:

all available space in rear of building as part of the title
to this property.

10. **LIABILITY INSURANCE.** Tenant shall not carry any stock of goods or do anything in or about the leased premises which will in any way restrict or invalidate any insurance coverage of the leased premises. Tenant agrees to pay upon demand as additional rent any increase in premiums of insurance carried by the Landlord on the leased premises resulting from the Tenant's use or occupancy. Tenant shall keep in full force and effect, at Tenant's expense, insurance for plate glass, personal property, trade fixtures, and property damages, as well as a public liability policy in which both Tenant and Landlord shall be named as the insured with the following minimum coverage:

\$1,000,000 liability shall be maintained by tenant

11. **MAINTENANCE AND REPAIRS.** Landlord shall repair and maintain the foundation, roof, outer walls and structural members of the leased premises. Tenant shall, at Tenant's sole expense make all other repairs necessary to maintain the leased premises, both interior and exterior, ordinary and extraordinary including window glass, plate glass, storefronts, doors, windows, screens, awnings, locks, keys, weather stripping and thresholds, as well as all interior walls, floors, ceilings, and floor coverings. Tenant's responsibility to maintain the premises shall also include the servicing, repair, maintenance, and if caused by Tenant's neglect, replacement of the plumbing, electrical, ventilating, heating and air conditioning systems, including all pipes, wiring, fixtures, filters, equipment, machinery, boilers, furnaces, water heaters and appliances. Tenant shall also repair and be responsible for any damage caused by stoppage, breakage, leakage, overflow, discharge or freezing of plumbing pipes, soil lines, or fixtures. If any part of the leased premises is damaged by the Tenant, or Tenant's employees, agents or invitees or by any breaking and entering of said premises, or by any attempt to break and enter leased premises, Tenant shall provide Landlord with immediate written notification of all damages to the premises. After notification and approval of the Landlord, repairs shall be made promptly at Tenant's expense as to restore said premises to its previous condition. If Tenant refuses or neglects to commence necessary repairs within ten (10) days after written demand, or does not complete such repairs within a reasonable time thereafter, Landlord may make said repairs without liability to Tenant for any loss or damage that may accrue to Tenant's stock, business or fixtures by reason thereof, and if Landlord makes such repairs, Tenant shall pay to Landlord, on demand, an Additional Rent for the cost thereof. Tenant's failure to pay shall constitute a default of this lease. Repairs that are the Landlord's responsibility shall be made within a reasonable time after written notice from the Tenant. Tenant's failure to give or unreasonable delay in giving notice of needed repairs or defects shall make Tenant liable for any loss or damage resulting from delay of needed repairs.

12. **REGULATIONS AND SANITATION.** Tenant shall keep the leased premises clean, safe, sanitary and in compliance with laws, ordinances and requirements of any legally constituted public authority. Tenant shall keep broom clean all areas in and around lease premises that are not included in Common Area Maintenance, such as front sidewalks and area behind building. Cleaning includes removing of any trash or refuse deposited on the leased premises or adjacent public area by Tenant, Tenant's customers or anyone else. In the event of non-compliance by Tenant, Landlord shall have the right to have said areas cleaned, trash and refuse removed and charge the expense to Tenant as Additional Rent which shall be due and payable upon demand. Nonpayment of which shall constitute default of the lease. Tenant shall employ if Landlord determines it is necessary, a reputable pest extermination company at regular intervals.

13. **ALTERATIONS.** Tenant shall make no alterations, additions, improvements, or rewiring in or to the leased premises without the consent of Landlord. All additions or improvements to the building including carpeting, tile, other floor covering, wall covering, ceiling tile, etc., made with or without Landlord's written consent shall become part of the premises and the property of Landlord upon installation. Trade fixtures and office furniture shall be installed on as

- from with or without written permission of Landlord, it will not fulfill Tenant's obligations under the terms of this lease, and if sublet, assigned or occupied without the Landlord's permission, this lease may, at the option of the Landlord, be terminated by a written notice. In the event Tenant shall sublease the leased premises in accordance herewith for rental purposes, the monthly rent shall be payable hereunder. Tenant shall pay to Landlord monthly in advance an Additional Rent hereunder, one half of all such excess rent. Any proposed assignee that proposes to assume Tenant's obligations hereunder shall execute a satisfactory assumption agreement before consent shall be given.
15. **SIGNS OR AWNINGS.** Tenant shall place no signs, notices, pictures, or advertising matter upon the exterior of the leased premises except with the written consent of the Landlord. Any and all signs placed on the leased premises by Tenant shall be maintained in compliance with rules and regulations governing such signs. The Tenant shall be responsible to Landlord for any damages by installation, use, maintenance or removal of said signs. Any electrical service needed for signs shall be installed at the Tenant's expense.
 16. **WAIVER OF RIGHTS.** No failure of Landlord to exercise any power given Landlord hereunder, or to insist upon Tenant's strict compliance with Tenant's obligation hereunder and no custom or practice of the parties at variance with the terms hereof shall constitute a waiver of Landlord's right to demand exact compliance with the terms of this lease at a future time. The rights and remedies created by this lease are cumulative and the use of one remedy shall not be taken to exclude the right to the use of another.
 17. **RULES AND REGULATIONS.** Landlord reserves the right at any time to make further rules and regulations as in Landlord's judgment may be necessary for the safety, care, appearance, and cleanliness of the premises and the preservation of good order therein, and such other rules and regulations shall be binding upon the parties hereto with the same force and effect as if they had been contained herein at the time of execution hereof.
 18. **RIGHT OF ENTRY.** Landlord without being liable for trespass or damages, shall have the right to enter leased premises during reasonable hours to examine same or to make repairs, additions, or alterations as Landlord may deem necessary for the safety, comfort, appearance, or preservation thereof, or to exhibit said premises. Entry shall also be allowed to post "FOR RENT" notice, during the thirty days before the expiration of this lease. Said right of entry shall likewise exist for the purpose of removing placards, signs, fixtures, alterations or additions which do not conform to this agreement. In accordance with this right, Tenant shall give Landlord a key to any and all locks, security systems and burglar alarms. Tenant shall not change or install new locks or security systems without the written consent of Landlord.
 19. **LIENS.** Tenant shall not create any liens for labor or materials against Landlord's interest in the leased premises. All persons contracting with the Tenant for the erection, installation, alteration, repair or demolition of any building or other improvements on the leased premises, and all material suppliers, contractors, mechanics, and laborers are hereby charged with notice that they must look to the Tenant and to the Tenant's interests only in the leased premises to secure the payment of any bill for work done or material furnished during the rental period created by this lease. In the event that liens are placed on record against the leased premises by contractors, mechanics, laborers, material suppliers, etc. because of action by Tenant it will constitute a default of this lease.
 20. **DAMAGE OR DESTRUCTION OF PREMISES.** If premises are totally destroyed by fire or other casualty, this lease shall terminate as of the date of such destruction and rental shall be accounted for as between Landlord and Tenant as of that date. If premises are damaged but not wholly destroyed by fire or other casualty, rental shall abate in such proportion as use of premises has been lost to the Tenant. Landlord shall restore premises to substantially the same condition as prior to damage as speedily as practicable, whereupon full rental shall commence.
 21. **DAMAGE TO PERSONAL PROPERTY.** All personal property, merchandise, fixtures and equipment placed or moved into the leased premises shall be at the risk of Tenant or the owners thereof, and Landlord shall not be liable for any damages, loss of theft of said personal property, merchandise, fixtures, or equipment, from any cause whatsoever.
 22. **CONDEMNATION.** If the whole of the leased premises, or such portion thereof as will make said premises unusable for the purpose herein leased, be condemned by any legally constituted authority, this lease shall terminate on the date when possession thereof is taken by public authorities, and rental shall be accounted for as between Landlord and Tenant as of that date. Such termination, however, shall be without prejudice to the rights of either Landlord or Tenant to recover from the public authority compensation for damage caused by condemnation. Neither the Tenant nor Landlord shall have any rights in any award made to the other by any condemnation authority. In the event only such portion of the leased premises is acquired by condemnation as will leave the remaining premises, after alteration and repairs, in condition suitable for use by Tenant, the monthly rental payments from the day of such acquisition to the end of the original or any extended term of this lease shall be reduced in proportion to the resulting loss of use of leased premises by Tenant. In the event of such partial acquisition and reduction in rent, Landlord shall make promptly at Landlord's expense, all necessary alterations and repairs which shall be required, to restore the premises to a safe and usable condition.
 23. **INDEMNITY AND LIABILITY.** Tenant shall indemnify and save Landlord harmless from any and all claims, damages, costs and expenses, including reasonable attorney's fees, arising from the management of the business conducted by Tenant on the leased premises. Landlord shall not be liable, and Tenant waives all claims for damage to person or property sustained by Tenant, its employees or agents, resulting from the condition of, the leased premises, or any equipment or such as may result from any accident in or about the leased premises or which may result directly or indirectly from any act of neglect of any other Tenant of the property, of which the leased premises is a part.
 24. **REVERSION.** Tenant shall surrender to Landlord, at the end of the term of this lease or upon cancellation of this lease, said leased premises broom clean and in as good condition as the leased premises were at the beginning of the term of this lease, ordinary wear and tear and damage by fire and windstorm or other acts of God excepted, or Tenant will pay to Landlord all damages that Landlord may suffer because of Tenant's failure to do so. Tenant will indemnify and save Landlord harmless from and against all claims made by any succeeding Tenant of said premises against Landlord because of delay in delivering possession of leased premises, so far as such delay is occasioned by failure of Tenant to so surrender leased premises. Security deposit may be withheld as payment or partial payment of repairs or unusual cleaning needed after Tenant vacates.
 25. **EFFECTIVE DATE OF LEASE.** This lease shall become effective as a binding agreement only upon the execution and delivery thereof by both Landlord and Tenant. If this lease is signed by one party and submitted to the other party, then it shall constitute an offer to lease which is subject to revocation at any time prior to execution by the other party and delivery of a fully executed copy to the submitting party.
 26. **NOTICES.** Tenant hereby appoints as Tenant's agent to receive service of all notices required under this lease as well as all dispossessionary distress notices, the person in charge of leased premises or occupying said premises, at the time notice is delivered. If no person is in charge of, or occupying said premises, the service of such notice may be made by attaching the same in the main entrance to said premises. A copy of all notices under this lease shall also be sent to Tenant's last known address, if different from said premises.
 27. **BANKRUPTCY.** If Tenant shall be adjudicated bankrupt or as insolvent or take the benefit of any Federal reorganization or make a general assignment or take the benefit of any insolvent law, or if a Trustee in bankruptcy or a receiver be appointed or elected for Tenant, under Federal or State law, this lease at the option of the Landlord shall expire and end seven (7) days after Landlord gives Tenant written notice, UNLESS the Tenant's Trustee immediately cures any default of Tenant hereunder and provides (in compliance with Federal and State laws) adequate assurance of future performance of Tenant's obligations hereunder.
 28. **BEYOND LANDLORD'S CONTROL.** None of the acts, promises, covenants, or obligations on the part of the Tenant to be kept, performed or not performed as this lease may be, nor the obligation of the Tenant to pay rent, Additional Rent or other charges or payments shall be in anywise waived, excused or affected by reason of the Landlord being unable at any time during the term of this lease, to supply, or to delay in supplying heat, light, elevator service or any other service expressed or implied on the part of the Landlord to be supplied, or by reason of the Landlord being unable to make any alterations, repairs, or decorations, or to supply any equipment or fixtures, or any other promise, covenant, or obligations on the part of the Landlord to be performed, if the Landlord's inability or delay is caused by circumstances or events beyond the Landlord's control.
 29. **KEYS.** Landlord shall provide Tenant with one key per lock, and the Tenant is responsible for accounting for all keys provided or duplicated and shall return all keys of leased premises to the Landlord upon termination or cancellation of this lease and/or Tenant's vacating said premises. Landlord shall have the right, if in the Landlord's sole judgment it is necessary, to require the Tenant at Tenant's expense to replace locks, and to supply Landlord with one key to the new lock. The Landlord shall also have the right to require the Tenant to provide a key to the Landlord for the purpose of entering the premises at any time.

- Access must for the purpose of removing pictures, signs, literature, even access to electronic media by the Tenant or the Tenant's right. Tenant shall give Landlord a key to any and all locks, security systems and burglar alarms. Tenant shall not change or install new locks or security systems without the written consent of Landlord.
9. **LIENS.** Tenant shall not create any liens for labor or materials against Landlord's interest in the leased premises. All persons contracting with the Tenant for the correction, installation, alteration, repair or demolition of any building or other improvements on the leased premises, and all material suppliers, contractors, mechanics, and laborers are hereby charged with notice that they must look to the Tenant and to the Tenant's interests only in the leased premises to secure the payment of any bill for work done or material furnished during the rental period created by this lease. In the event that liens are placed on record against the leased premises by contractors, mechanics, laborers, material suppliers, etc. because of action by Tenant it will constitute a default of this lease.
20. **DAMAGE OR DESTRUCTION OF PREMISES.** If premises are totally destroyed by fire or other casualty, this lease shall terminate as of the date of such destruction and rental shall be accounted for as between Landlord and Tenant as of that date. If premises are damaged but not wholly destroyed by fire or other casualty, rental shall abate in such proportion as the portion of premises has been lost to the Tenant. Landlord shall restore premises to substantially the same condition as prior to damage as speedily as practicable, whereupon full rental shall commence.
21. **DAMAGE TO PERSONAL PROPERTY.** All personal property, merchandise, fixtures and equipment placed or moved into the leased premises shall be at the risk of Tenant or the owners thereof, and Landlord shall not be liable for any damages, loss of theft of said personal property, merchandise, fixtures, or equipment, from any cause whatsoever.
22. **CONDEMNATION.** If the whole of the leased premises or such portion thereof as will make said premises unusable for the purpose herein leased, be condemned by any legally constituted authority, this lease shall terminate on the date when possession thereof is taken by public authorities, and rental shall be accounted for as between Landlord and Tenant as of that date. Such termination, however, shall be without prejudice to the rights of either Landlord or Tenant to recover from the public authority compensation for damage caused by condemnation. Neither the Tenant nor Landlord shall have any rights in any award made to the other by any condemnation authority. In the event only such portion of the leased premises is acquired by condemnation as will leave the remaining premises, after alteration and repairs, in condition suitable for use by Tenant, the monthly rental payments from the day of such acquisition to the end of the original or any extended term of this lease shall be reduced in proportion to the resulting loss of use of leased premises by Tenant. In the event of such partial acquisition and reduction in rent Landlord shall make promptly at Landlord's expense, all necessary alterations and repairs which shall be required, to restore the premises to a safe and usable condition.
23. **INDEMNITY AND LIABILITY.** Tenant shall indemnify and save Landlord harmless from any and all claims, damages, costs and expenses, including reasonable attorney's fees, arising from the management of the business conducted by Tenant on the leased premises. Landlord shall not be liable, and Tenant waives all claims for damage to person or property sustained by Tenant, its employees or agents, resulting from the condition of the leased premises, or any equipment or such as may result from any accident in or about the leased premises or which may result directly or indirectly from any act of neglect of any other Tenant of the property of which the leased premises is a part.
24. **REVERSION.** Tenant shall surrender to Landlord, at the end of the term of this lease or upon cancellation of this lease, said leased premises broom clean and in as good condition as the leased premises were at the beginning of the term of this lease, ordinary wear and tear and damage by fire and whatsover or other acts of God excepted, or Tenant will pay to Landlord all damages that Landlord may suffer because of Tenant's failure to do so. Tenant will indemnify and save Landlord harmless from and against all claims made by any succeeding Tenant of said premises against Landlord because of delay in delivering possession of leased premises, so far as such delay is occasioned by failure of Tenant to so surrender leased premises. Security deposit may be withheld as payment or partial payment of repairs or unusual cleaning needed after Tenant vacates.
25. **EFFECTIVE DATE OF LEASE.** This lease shall become effective as a binding agreement only upon the execution and delivery thereof by both Landlord and Tenant. If this lease is signed by one party and submitted to the other party, then it shall constitute an offer to lease which is subject to revocation at any time prior to execution by the other party and delivery of a fully executed copy to the submitting party.
26. **NOTICES.** Tenant hereby appoints as Tenant's agent to receive service of all notices required under this lease as well as all dispossessory distraint notices, the person in charge of leased premises or occupying said premises, at the time notice is delivered. If no person is in charge of, or occupying said premises, the service of such notice may be made by attaching the same to the main entrance to said premises. A copy of all notices under this lease shall also be sent to Tenant's last known address, if different from said premises.
27. **BANKRUPTCY.** If Tenant shall be adjudicated bankrupt or as insolvent or take the benefit of any Federal reorganization or make a general assignment or take the benefit of any insolvent law, or if a Trustee in bankruptcy or a receiver be appointed or elected for Tenant, under Federal or State law, this lease at the option of the Landlord shall expire and end seven (7) days after Landlord gives Tenant written notice. UNLESS the Tenant's Trustee immediately cures any default of Tenant hereunder and provides (in compliance with Federal and State laws) adequate assurance of future performance of Tenant's obligations hereunder.
28. **BEYOND LANDLORD'S CONTROL.** None of the acts, promises, covenants, or obligations on the part of the Tenant to be kept, performed or not performed as the case may be, nor the obligation of the Tenant to pay rent, Additional Rent or other charges or payments shall be in anywise waived, excused or affected by reason of the Landlord being unable at any time during the term of this lease, to supply, or to delay in supplying heat, light, elevator service or any other service expressed or implied on the part of the Landlord to be supplied; or by reason of the Landlord being unable to make any alterations, repairs, or decorations, or to supply any equipment or fixtures, or any other promise, covenant, or obligations on the part of the Landlord to be performed, if the Landlord's inability or delay is caused by circumstances or events beyond the Landlord's control.
29. **KEYS.** Landlord shall provide Tenant with one key per lock, and the Tenant is responsible for accounting for all keys provided or duplicated and shall return all keys of leased premises to the Landlord upon termination or cancellation of this lease and/or Tenant's vacating said premises. Landlord shall have the right, if in the Landlord's sole judgment it is necessary, to require the Tenant at Tenant's expense to replace locks, and to supply Landlord with one key to the new locks. The Landlord shall replace a master key or pass key to the premises, including all security locks and systems. Tenant shall not change or install new locks or security systems without written approval from Landlord.
30. **ESTOPPEL CERTIFICATES.** Tenant shall from time to time, within ten days following written notice from Landlord, execute, acknowledge and deliver to the Landlord a written statement certifying that this lease is in full force and effect. This statement should also state whether or not the Landlord is in default in performance of any covenant or condition of this lease. The failure of the Tenant to execute, acknowledge and deliver to the Landlord a statement in accordance with this covenant shall constitute an acknowledgment by the Tenant that this lease is unmodified and in full force and effect, and shall constitute a waiver of any defaults by the Landlord which may have existed prior to the date of such notice.
31. **PEACEFUL POSSESSION.** Subject to the terms, covenants and conditions of this lease, the Tenant shall have, hold and enjoy possession of the leased premises, subject to the rights of the holders of any mortgage which now covers said premises or which may hereafter be placed on leased premises by Landlord. Tenant's rights are also subject to any underlying lease now or later covering the entire property of which the leased property is a part. Tenant shall execute any necessary lease subordination agreement at the Landlord's request.
32. **DEFAULT.** If Tenant fails to pay rent, including Additional Rent on or before the due dates as herein stated (TIME IS OF THE ESSENCE) this lease shall be in default. If Tenant fails to cure such default within five (5) days after written notice from Landlord; or if Tenant shall be in default in performing any of the terms, covenants and conditions of this lease other than the provision requiring the payment of rent, and fails to cure such default within thirty (30) days after the receipt of written notice of default from Landlord; or if leased premises shall be abandoned or deserted for fifteen (15) days; or if this lease is assigned to any other person, firm, office or corporation, without the permission of Landlord as required in paragraph 15 herein, this lease at the Landlord's option shall expire and terminate seven (7) days after Landlord delivers written notice to Tenant of such condition of default and Tenant shall immediately quit and surrender said premises to Landlord. In the event of any such default or breach of performance, the Landlord without any further notice or demand of any kind to the Tenant, may terminate this lease and re-enter and forthwith repossess the entire premises and without being liable for trespass or damage shall re-let, lease or demise the premises to another Tenant without any hindrance or prejudice to Landlord's right to distrain for any past due rent, Additional Rent, and rent from the time of such default or termination until the premises were leased or rented to another Tenant. The collection by Landlord of rent for the unexpired term shall entitle Tenant to all Tenant's rights of this lease during the period for which the rent may have been collected.

Landlord and Tenant agree that the leased premises are security for the payment of said rent, and Tenant agrees that said lien may be enforced by distraint or foreclosure, at the election of Landlord. It is understood and agreed that any merchandise, fixtures, furniture, or equipment left in the premises when Tenant vacates shall be deemed to have been abandoned by Tenant and by such abandonment, Tenant relinquishes any right or interest therein and Landlord is authorized to sell, dispose of or destroy same.

ATTORNEY'S FEE. In the event Landlord successfully defends any action by the Tenant, or if it is necessary for Landlord to employ an attorney for the collection of rent or any other sum due hereunder, or to enforce any covenant of this lease, or the termination of this lease, or for the possession of the leased premises or any part thereof, the Tenant shall pay all costs, including reasonable attorney's fees.

AGENT. Tenant acknowledges that the aforementioned N/A is the managing agent for the owner(s) of the leased premises. Tenant shall pay all rent payable under this lease to said agent. The right to collect said rentals shall be governed by the written agreement between Landlord and agent for the management of the leased premises and shall terminate with the expiration of said management agreement or any renewal thereof.

DEFINITIONS. "Landlord" as used in this lease shall include the owner or owners of the property and/or the aforementioned managing agent as well as the Landlord's heirs, representatives, assigns and successors in title to premises. "Tenant" shall include Tenant, Tenant's heirs and representatives, and if this lease shall be assigned or sublet, shall include also Tenant assignees or subtenants, as to premises covered by such assignment or sublease. "Agent" shall include agent, agent's successors, assigns, heirs and representatives. "Landlord," "Tenant," and "Agent," including male and female, singular and plural, corporation, partnership or individual, as may fit the particular parties.

SPECIAL STIPULATIONS. Insofar as the following stipulations conflict with any of the provisions herein, the following stipulations shall control:

Tenant shall be responsible for the following in addition to base rent:

1. real estate taxes
2. user fees
3. fire and extended coverage insurance
4. liability insurance
5. all maintenance to include roof, exterior of building, electrical, heat and air systems, plumbing

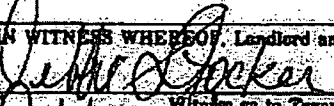
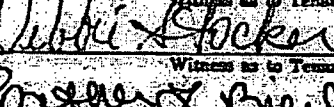
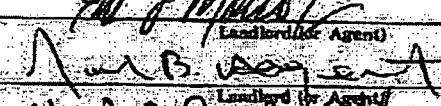
It is understood that this is a net lease and all expenses/assessments associated with this property shall be paid by tenant.

Landlord understands that the tenant is going to renovate the property to accommodate a restaurant/bar and hereby approves said renovations.

ENTIRE AGREEMENT. This lease contains the entire agreement between the parties hereto and all previous negotiations leading thereto, and it may be modified only by a dated written agreement signed by both Landlord and Tenant. No surrender of the leased premises or of the remainder of the term of this lease shall be valid unless accepted by Landlord in writing. **TIME IS OF THE ESSENCE IN THIS AGREEMENT.**

IS IS A LEGALLY BINDING CONTRACT. TENANT IS ADVISED TO SEEK FURTHER ASSISTANCE IF THE CONTENTS ARE NOT UNDERSTOOD. TENANT ACKNOWLEDGES THE RECEIPT OF A COPY OF THIS AGREEMENT.

IN WITNESS WHEREOF, Landlord and Tenant have executed these premises, the day and year first above written.

 Witness as to Tenant	 Tenant
 Witness as to Tenant	 Landlord
 Witness as to Landlord (or Agent)	 Landlord (or Agent)
 Witness as to Landlord (or Agent)	 Landlord (or Agent)

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<u>[Signature]</u> Witness as to Tenant	<u>[Signature]</u> Tenant
<u>[Signature]</u> Witness as to Tenant	<u>[Signature]</u> Tenant
<u>[Signature]</u> Witness as to Landlord (or Agent)	<u>[Signature]</u> Landlord (or Agent)
<u>[Signature]</u> Witness as to Landlord (or Agent)	<u>[Signature]</u> Landlord (or Agent)
<u>[Signature]</u>	<u>[Signature]</u> agent

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The printed matter in this form approved by the CHARLESTON TRIDENT ASSOCIATION OF REALTORS®

201 (Revised 1993)

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Lease

Lease

Property

19

EXHIBIT 2

Sublease dated March 15, 2006

EXHIBIT 2

COMMERCIAL LEASE AND DEPOSIT RECEIPT

Tenant: R & R Entertainment dba Squeez Term: 1 year (with two 5 year options)
 Date Signed: March 15, 2006 Initial Monthly Base Rental: \$2300
 Effective Date: April 1, 2006 Renewal Date: March 31, 2007

RECEIVED FROM R & R Entertainment

the sum of \$ 2300 Twenty Three Hundred 00 DOLLARS,
 evidenced by Rent due 1st of month later after 5th 4% late charge
 RECEIVED PAYABLE PRIOR TO OCCUPANCY

Rent for the period from	to	\$	\$
1st Month's Rental		\$	\$
Security Deposit	<u>2300</u>	\$	<u>2300</u>
Key Deposit		\$	\$
Cleaning charge		\$	\$
Other		\$	\$
TOTAL		\$	<u>2300</u>

STATE OF SOUTH CAROLINA, COUNTY OF Charleston

THIS AGREEMENT entered into this 15 day of March 2006, between R & R Entertainment dba Squeez hereinafter referred to as Tenant,
 and Charleston 1st hereinafter referred to as Landlord,
 do hereby certify that the above is a true and correct copy of the original.

WITNESSETH

1. PREMISES: That Landlord, in consideration of rents, covenants and conditions mentioned herein, to be paid, kept, performed and observed by Tenant, does hereby demise, lease and let unto Tenant, and Tenant does hereby hire and take from Landlord the premises known as:

213 A East Bay Street
approximately 1100 square feet

2. TERM: To have and to hold such leased premises for the term of 1 year
 beginning April 1, 2006
 And ending March 31, 2007

Base Rent to start June 1st 2006 -
 Base Rent for year 1 is \$2300 Twenty Three Hundred 00 Months
 Base Rent for year 2 is \$2700 Twenty Seven Hundred 00 Months
 Tenant responsible for 12% (twelve) % of gross building
 Tax and Insurance Triple Net Lease includes building
 maintenance

3. RENT: Tenant shall pay to the Landlord, a Monthly Base Rental and Additional Rent as follows:

(A) MONTHLY BASE RENTAL: Tenant shall pay a Monthly Base Rental to Landlord by each calendar month during the term of this lease or any renewal thereof, in advance on or before the first day of each succeeding month. The amount of the Monthly Base Rental for the first year of this lease shall be Twenty Three Hundred Dollars (\$ 2300).
 The rent for the first month of the term of this lease shall be paid at the date of execution hereof. If such date be other than the first day of the calendar month, said first rental payment shall be prorated for the period between the effective date of this lease and the first day of the following month.

(1) MONTHLY BASE RENTAL ADJUSTMENTS: The Monthly Base Rental shall be subject to an annual accumulative adjustment upward on each anniversary date of this lease for the succeeding twelve months. Said annual rental adjustment shall be determined by increasing the Monthly Base Rental an amount equal to the sum of subparagraphs 4% annually be applied to the previous 12 months of this lease, or any renewal thereof.

(a) STEP UP: The Monthly Base Rental shall be increased annually as follows:

4% annually starting April 1, 2007

(b) COST OF LIVING INCREASE: The Monthly Base Rental shall be increased annually by an amount equal to any percentage increase during the previous twelve (12) months in the Consumer Price Index for all Urban Consumers (22-84-101), as shown by the most recent published CPI preceding each anniversary date of this lease.

(c) INSURANCE: The Monthly Base Rental shall be increased annually by an amount equal to one twelfth of any increase during the previous twelve (12) months in the annual cost of fire and extended coverage insurance for the leased premises, whether by reason of increased coverage or by increase in rate. Landlord shall keep the premises adequately insured at a reasonable rate.

(d) UTILITIES: The Monthly Base Rental shall be increased annually by the amount of any increase during the previous twelve (12) months in the average monthly cost of utility and sewerage services paid or payable by Landlord, whether by reason of increase in rate or by increase in service or consumption. Said cost of services includes cost of all such services not paid by tenants for such items as electricity, gas, water, sewer, garbage collection, etc.

- (8) **ADDITIONAL RENT.** In addition to the Monthly Base Rental and its annual accumulative adjustments, Tenant shall pay Additional Rent as indicated herein below in subparagraphs:
- (1) **TAX INCREASE.** Tenant shall pay annually a sum equal to any increase in real estate taxes (ad valorem, special assessment, or any other government charges) over those assessed for 19____ on a per acre basis. Presentation of copies of tax bills shall constitute sufficient evidence of additional rent due and shall be payable within fifteen (15) days after receipt thereof. Tenant shall be charged additional rent only for that portion of the calendar year during which this lease was in effect.
 - (2) **PERCENTAGE OF GROSS SALES.** Tenant shall pay annually a sum equal to _____ percent of _____ % of gross sales as herein defined, in excess of _____ sales as used herein shall be the amount of the gross sales as indicated on the Tenant's South Carolina State Tax Report (Form ST-3). Tenant shall deliver to Landlord a certified copy of each monthly report within ten (10) days after report is due to the South Carolina Tax Commission. Lease year as used herein shall be the period of one year's duration commencing on the effective day of the lease and each successive period of one year commencing on the anniversary of said effective date. Tenant shall deliver to Landlord within _____ days following the end of each lease year written statement signed and certified by Tenant to be true and correct statement of the amount of gross sales during the preceding lease year. Tenant shall at the same time pay the amount of Additional Rent due (if any) as a percentage of the excess over the amount herein stated.
 - (3) **COMMON AREA MAINTENANCE.** Tenant shall pay on the first day of each month in advance, a fee equal to the Tenant's pro rata share of the cost of maintaining common areas. Tenant's common area maintenance fee for the remaining portion of the calendar year in which this lease becomes effective shall be \$_____ per month. Said fee shall be adjusted at the end of each calendar year to reflect any increase in cost during said year. Common areas include all areas used in common with the other Tenant of the property of which the leased premises is a part, for the convenience or welfare of all Tenant's customers collectively. Common area maintenance shall include (if applicable) the cleaning, mowing and repaving of parking areas (parking not included) and the mowing, cleaning, and repaving of all common areas, including but not limited to the following:
- (C) **PROPORTION OF CHARGES.** If the leased premises described herein are less than the entire property, the increase in Monthly Base Rental adjustments, Additional Rent and all other charges required by this lease shall be determined by proration on the basis of the rentable floor area of the leased premises bears to the rentable floor area of the entire property. It is agreed that the leased premises is _____ square feet of rentable area of the entire property is _____ square feet, resulting in a percentage ratio factor of _____ percent.
- (D) **ADDITIONAL CHARGES.** Any charges due Landlord by Tenant, including but not limited to, damages to premises, and fees, cost of default remedies, and past due charges for utilities, insurance, cleaning, maintenance and repairs, etc. or for work done on the premises by order of Tenant, shall be considered as Additional Rent due (in addition to all other rent payable), and shall be included in any later rental. In the event any documentary stamp tax or tax levied on rental or leasing of the premises is required the cost shall be paid by Tenant upon demand. The cost of a credit report on the Tenant, which may be requested at the Landlord's option shall be paid by the Tenant.
4. **SECURITY DEPOSIT.** Any security deposit required by Landlord and paid by Tenant shall be retained as security (interest free) for the faithful performance by Tenant of all terms, covenants and conditions herein. Landlord may at any time apply said deposit or any part thereof against any default by Tenant of any of the terms, covenants and conditions of this lease. In such event, Tenant shall upon demand deposit with Landlord the amount to apply that Landlord shall have the full amount of this deposit on hand at all times during the term of this lease. Upon the expiration of this lease the Tenant shall surrender possession of the leased premises as required in paragraph 25 herein. Landlord if given permission to deduct from said security deposit the cost of any unused cleaning or repairs to the property, upon vacating of Tenant. Security deposit is not a part of the rental and subleasing cannot be deducted from the rent of the last month of this tenancy. Security deposit or any remaining portion will be returned within 15 days after the termination of this tenancy or completion of the repairs necessitated by Tenant's misuse of the premises. In the event the security deposit is not sufficient to pay all charges due, Tenant shall pay said charge within three days after receiving written notice from the Landlord or Agent.
5. **TENANT'S UTILITIES.** Tenant shall pay all charges or bills for all utility and services: service is used by the Tenant. *EXCEPT:*
Landlord pays all utilities
6. **USE OF PREMISES.** Tenant agrees to use entire leased premises for *Bank*
(and for no other purpose). Pets, animals or birds may not be kept on the premises without the Landlord's permission. These premises may not be used for sleeping quarters or apartments, for games of chance or any form of gambling, immoral conduct or any other illegal activity.
7. **EXAMINATION OF PREMISES.** Tenant has examined the leased premises or a portion of with their present condition. Tenant, relying solely on said examination, agrees to accept premises in their present condition except for the specific items listed herein or itemized in attached check-list.
8. **DELAY OF POSSESSION.** If Landlord is unable to deliver possession of leased premises on the effective date of this lease by reason of the holding over of a prior tenant or for any other reason, this lease shall not be affected or imposed in any way and Landlord shall not be liable to Tenant for any loss or damage resulting therefrom. The effective date of this lease however shall be the date of the delivery of possession. If Landlord, however, is unable to deliver possession of the premises to Tenant by _____, 20____, Tenant shall have the right to cancel this lease upon written notice delivered to Landlord and upon such cancellation Landlord and Tenant shall each be released and discharged from all liability under this lease. In such case any deposit or prepaid rent shall be promptly returned to Tenant.
9. **TENANT'S PARKING.** Parking of vehicles owned or operated by Tenant or Tenant's employees is hereby limited, restricted or prohibited, as follows:
N/A (None available)
10. **LIABILITY INSURANCE.** Tenant shall not carry any stock of goods or do anything in or about the leased premises which will in any way in fact or in law, or by any insurance coverage of the leased premises. Tenant agrees to pay upon demand of additional rent any increase in premiums of insurance carried by the Landlord on the leased premises resulting from the Tenant's use or occupancy. Tenant shall keep in full force and effect, at Tenant's expense, insurance for plate glass, personal property, trade fixtures, and property damages, as well as a public liability policy, in which both Tenant and Landlord shall be named as the insured with the following minimum coverages:
11. **MAINTENANCE AND REPAIRS.** Landlord shall repair and maintain the foundation, roof, exterior walls and structural members of the leased premises. Tenant shall, at Tenant's sole expense make all other repairs necessary to maintain the leased premises, both interior and exterior, ordinary and extraordinary, including window glass, plate glass, store fronts, doors, windows, screens, awnings, roofs, eave weather stripping and thresholds, as well as all interior walls, floors, ceilings and floor coverings. Tenant's responsibility to maintain the premises shall also include the servicing, repair, maintenance, and if caused by Tenant's neglect, replacement of the following: plumbing, electrical, ventilating, heating and air conditioning systems, including all pipes, wiring, fixtures, filters, equipment, machinery, boilers, furnaces, compressors and appliances. Tenant shall also repair and be responsible for any damage caused by stoppage, breakage, leakage, overflow, discharge or freezing of plumbing pipes, soil lines, or fixtures. If any part of the leased premises is damaged by the Tenant, or Tenant's employees, agents or invitees (or by any breaking and entering of said premises) or by any attempt to break and enter leased premises, Tenant shall provide Landlord with immediate written notification of all damages to the property. After notification and approval of the Landlord, repairs shall be made promptly at Tenant's expense so as to restore said premises to its previous condition. If Tenant refuses or neglects to commence necessary repairs within ten (10) days after written demand or does not complete such repairs within a reasonable time thereafter, Landlord may make said repairs without liability to Tenant for any loss or damage that may occur to Tenant's stock, business or fixtures by reason thereof, and if Landlord makes such repairs, Tenant shall pay to Landlord, on demand, all Additional Rent, the cost thereof. Tenant's failure to pay shall constitute a default of this lease. Repairs that are the Landlord's responsibility shall be made within a reasonable time after written notice from the Tenant. Tenant's duty to give or unreasonable delay in giving notice of needed repairs or defaults shall make Tenant liable for any loss or damage resulting from delay of needed repairs.

12. **REGULATIONS AND SANITATION.** Tenant shall keep the leased premises clean, safe, sanitary and in compliance with law, ordinances and requirements of any legally constituted public authority. Tenant shall keep broom clean at all times in and around leased premises for area not included in Common Area or maintenance, such as front sidewalk and area behind building. Cleaning is to be removing of any trash or refuse deposited on the leased premises or adjacent public area by Tenant, Tenant's customers, or anyone else. In the event of non-compliance by Tenant, Landlord shall have the right to have said areas cleaned, trash and refuse removed and charge the expense to Tenant as Additional Rent which shall be due and payable upon demand. Employment of which shall constitute default of the lease. Tenant shall employ if Landlord determines it is necessary, a reputable pest extermination company at regular intervals.
13. **ALTERATIONS.** Tenant shall make no alterations, additions, improvements, or remodeling to the leased premises without the consent of Landlord. All additions, or improvements to the building including carpentry, tile, other floor coverings, wall covering, ceiling tile, etc., made with or without Landlord's consent shall be the property of Landlord upon expiration, termination or termination of the lease. Trade fixtures and office furniture that are not attached to the building shall be removed from the premises and any injury caused by said removal shall be repaired (within 10 days) by Tenant's expense. Said trade fixtures shall be removed from the premises before the end of the lease or shall become part of the premises and the property of Landlord. Tenant shall not install or maintain any equipment, partitions, furniture, etc., which the weight or operation thereof would tend to injure or be detrimental to the leased premises or would unreasonably annoy or disturb other tenants.
14. **ASSIGNMENT OR SUBLEASE.** Tenant shall not, without written consent of Landlord, in each case, assign, transfer, mortgage, pledge or otherwise encumber or dispose of this lease, or sublet the leased premises or any part thereof or permit the premises to be occupied by other persons. Such consent shall not be unreasonably withheld. If the lease is assigned, or if the leased premises or any part thereof be sublet or occupied by any other person, firm, office or corporation with or without written permission of Landlord, it will not relieve Tenant of any obligations under the terms of this lease, and it is further agreed that Tenant shall sublease the leased premises in accordance herewith for rentals in excess of those rentals payable hereunder. Tenant shall pay to Landlord monthly in advance as Additional Rent hereunder, one half of all such excess rent. Any proposed assignee shall prepare to assume Tenant's obligations hereunder shall execute a satisfactory assignment agreement before consent shall be given.
15. **SIGNS OR AWNINGS.** Tenant shall place no signs, notices, pictures, or advertising matter upon the exterior of the leased premises except with the written consent of the Landlord. Any and all signs placed on the leased premises by Tenant shall be maintained in compliance with rules and regulations governing such signs. The Tenant shall be responsible to Landlord for any damage by installation, use, maintenance or removal of said signs. Any electrical service needed for signs shall be installed at the Tenant's expense.
16. **WAIVER OF RIGHTS.** No failure of Landlord to exercise any power given Landlord hereunder, or to bring upon Tenant's strict compliance with Tenant's obligation hereunder and no custom or practice of the parties at variance with the terms hereof shall constitute a waiver of Landlord's right to demand strict compliance with the terms of this lease of a future time. The rights and remedies created by this lease are cumulative and the use of one remedy shall not be taken to exclude the right to the use of another.
17. **RULES AND REGULATIONS.** Landlord reserves the right at any time to make further rules and regulations as in Landlord's judgment may be necessary for the safety, care, appearance, and cleanliness of the premises and the preservation of good order herein, and such other rules and regulations shall be binding upon the parties hereto with the same force and effect as if they had been contained herein at the time of execution hereof.
18. **RIGHT OF ENTRY.** Landlord, without being liable for trespass or damages, shall have the right to enter leased premises during reasonable hours to examine same or to make repairs, alterations or additions as Landlord may deem necessary for the safety, comfort, appearance, or preservation thereof, or to exhibit said premises. Entry shall also be allowed to post "FOR RENT" notices during the thirty days before the expiration of this lease. Said right of entry shall be exercised for the purpose of removing placards, signs, fixtures, alterations or additions which do not conform to this agreement. In accordance with this agreement, Tenant shall give Landlord a key to any and all locks, security systems and burglar alarms. Tenant shall not change or install new locks or security systems without the written consent of Landlord.
19. **LIENS.** Tenant shall not create any lien for labor or materials against Landlord's interest in the leased premises. All persons contracting with the Tenant for the erection, installation, alteration, repair or demolition of any building or other improvements on the leased premises, and all material suppliers, contractors, mechanics, and laborers are hereby charged with notice that they must look to the Tenant and to the Tenant's interest only in the leased premises to secure the payment of any bill for work done or material furnished during the rental period created by this lease. In the event that liens are placed on record against the leased premises by contractors, mechanics, laborers, material suppliers, etc., because of failure by Tenant to pay, it will constitute a default of this lease.
20. **DAMAGE OR DESTRUCTION OF PREMISES.** If premises are totally destroyed by fire or other casualty, this lease shall terminate as of the date of such destruction and no rent shall be accounted for as between Landlord and Tenant as of that date. If premises are damaged but not wholly destroyed by fire or other casualty, Tenant shall be liable to Landlord for the cost of repairs in such proportion as use of premises has been lost to the Tenant. Landlord shall restore premises to substantially the same condition as prior to damage as readily as practicable, whereupon full rental shall commence.
21. **DAMAGE TO PERSONAL PROPERTY.** All personal property, merchandise, fixtures and equipment placed or moved into the leased premises shall be at the risk of Tenant or the owner thereof, and Landlord shall not be liable for any damage, loss of theft of said personal property, merchandise, fixtures, or equipment from any cause whatsoever.
22. **CONDEMNATION.** If the whole of the leased premises, or such portion thereof as will make said premises unusable for the purpose herein leased, be condemned by any legally constituted authority, this lease shall terminate on the date when possession thereof is taken by public authorities, and rental shall be accounted for as between Landlord and Tenant as of that date. Such termination, however, shall be without prejudice to the rights of either Landlord or Tenant to recover from the public authority compensation for damage caused by condemnation. Notwithstanding the Tenant nor Landlord shall have any claim in any award made to the other by any condemnation authority. In the event only such portion of the leased premises is acquired by condemnation as will leave the remaining premises, after alteration and repair, in condition suitable for use by Tenant, the monthly rental payments from the day of such acquisition to the end of the original or any extended term of this lease shall be reduced in proportion to the resulting loss of use of leased premises by Tenant. In the event of such partial acquisition and reduction in rent, Landlord shall make promptly of Landlord's expense, all necessary alterations and repairs which shall be required, to restore the premises to a safe and usable condition.
23. **INDEMNITY AND LIABILITY.** Tenant shall indemnify and save Landlord harmless from any and all claims, damages, costs and expenses, including reasonable attorney's fees, arising from the manner of use of the business conducted by Tenant on the leased premises. Landlord shall not be liable, and Tenant waives all claims for damage to person or property sustained by Tenant, its employees or agents, resulting from the condition of the leased premises, or any equipment or such as may result from any accident in or about the leased premises or which may result directly or indirectly from any act of neglect of any other Tenant of the property of which the leased premises is a part.
24. **REVERSION.** Tenant shall surrender to Landlord, at the end of the term of this lease or upon cancellation of it, said leased premises broom clean and in as good condition as the leased premises were at the beginning of the term of this lease, ordinary wear and tear and damage by fire and windstorm, or other acts of God excepted, or Tenant will pay to Landlord all damages that Landlord may suffer because of Tenant's failure to do so. Tenant will indemnify and save Landlord harmless from and against all claims made by any succeeding Tenant of said premises against Landlord because of delay in delivering possession of leased premises, so far as such delay is occasioned by failure of Tenant to so surrender leased premises. Security deposit may be withheld as payment or partial payment of repairs or unusual cleaning needed after Tenant vacates.
25. **EFFECTIVE DATE OF LEASE.** This lease shall become effective as a binding agreement only upon the execution and delivery thereof by both Landlord and Tenant. If this lease is signed by one party and submitted to the other party, then it shall constitute an offer to lease which is subject to revocation at any time prior to execution by the other party and delivery of a duly executed copy to the accepting party.
26. **NOTICES.** Tenant hereby appoints as Tenant's agent to receive service of all notices required under this lease as well as all dispossession, default notices, the person in charge of leased premises or occupying said premises, at the time notice is delivered. If no person is in charge of, or occupying said premises, the service of such notice may be made by attaching the same in the mail, addressed to said premises. A copy of all notices under this lease shall also be sent to Tenant's last known address, if different from said premises.
27. **BANKRUPTCY.** If Tenant shall be adjudicated bankrupt or as insolvent or take the benefit of any Federal reorganization or make a general assignment or take the benefit of any insolvency law, or if a trustee in bankruptcy or a receiver be appointed or elected for Tenant, under Federal or State law, this lease at the option of the Landlord shall expire, and within seven (7) days after Landlord gives Tenant written notice, UNLESS if a Tenant's trustee immediately cures any default of Tenant hereunder and provides (in compliance with Federal and State laws) adequate assurance of future performance of Tenant's obligation hereunder.
28. **BEYOND LANDLORD'S CONTROL.** None of the acts, promises, covenants, or obligations on the part of the Tenant to be kept, performed or not performed as the case may be, nor the obligation of the Tenant to pay rent, Additional Rent or other charges or payments shall be in anywise waived, excused or affected by reason of the Landlord being unable at any time during the term of this lease, to supply, or to duty in supplying heat, light, elevator service or any other service expressed or implied on the part of the Landlord to be supplied, or by reason of the Landlord being unable to make any alterations.

- mirrors, or decorations, or to supply any equipment or fixtures, or any other premises, including of security locks and systems. Tenant shall not change or install new locks or security systems without written approval from Landlord.
29. **KEYS.** Landlord shall provide Tenant with one key per lock, and the Tenant is responsible for accounting for all key provided or duplicated and shall return all keys of leased premises to the Landlord upon termination or cancellation of this lease and/or Tenant's vacating said premises. Landlord shall have the right, in its sole discretion, to require the Tenant at Tenant's expense to replace locks, and to supply Landlord with one key to the new locks. The Landlord shall retain a master key or pass key to the premises, including of security locks and systems. Tenant shall not change or install new locks or security systems without written approval from Landlord.
30. **ESTOPPEL CERTIFICATE.** Tenant shall from time to time, within ten days following written notice from Landlord, execute, acknowledge and deliver to the Landlord a written statement certifying that this lease is in full force and effect. This statement shall also state whether or not the Landlord is in default in performance of any covenant or condition of this lease. The failure of the Tenant to execute, acknowledge and deliver to the Landlord a statement in accordance with this covenant shall constitute an acknowledgment by the Tenant that this lease is unmodified and in full force and effect, and shall constitute a waiver of any claims by the Landlord which may have existed prior to the date of such notice.
31. **BACKUP POSSESSION.** Subject to the terms, covenants and conditions of this lease, the Tenant shall have, hold or enjoy possession of the leased premises, subject to the rights of the holders of any mortgage which now covers said premises or which may hereafter be placed on leased property is a part. Tenant shall execute any necessary lease subordination agreement at the Landlord's request.
32. **DEFAULT.** If Tenant fails to pay rent, including additional rent, on or before the due dates as herein stated (TIME IS OF THE ESSENCE) this lease shall be in default. If Tenant fails to cure such default within five (5) days after written notice from Landlord, or if leased premises shall be abandoned or deserted for fifteen (15) days, or if this lease is assigned to any other person, firm, office or corporation, without the permission of Landlord as is stated in paragraph 15 herein, this lease of the Landlord's option shall expire and terminate seven (7) days after Landlord delivers written notice to Tenant of such condition or default and Tenant shall immediately quit and surrender said premises to Landlord. In the event of any such default or breach of performance, the Landlord without any further notice or demand of any kind to the Tenant, may terminate this lease and re-enter and forthwith repossess the entire premises and without being liable for the loss or damage shall re-let, lease or demise the premises to another Tenant without any hindrance or prejudice to Landlord's right to collect for any past due rent, additional rent, and rent from the time of such default or termination until the premises were leased or rented to another Tenant. The collection by Landlord of rent for the unexpired term shall entitle Tenant to all Tenant's rights of this lease during the period for which the rent may have been collected.
33. **ASSIGNMENT OF CHATTELS.** Tenant hereby pledges and assigns to Landlord of the furniture, fixtures, goods, equipment and chattels of Tenant which shall or may be brought or put on said premises as security for the payment of said rent, and Tenant agrees that said lien may be enforced by distasteful or foreclosure, at the election of Landlord. It is understood and agreed that any merchandise, fixtures, furniture, or equipment left in the premises when Tenant vacated shall be deemed to have been abandoned by Tenant and by such abandonment, Tenant relinquishes any right or interest therein and Landlord is authorized to sell, dispose of or destroy same.
34. **ATTORNEY'S FEE.** In the event Landlord successfully defends any action by the Tenant, or if it is necessary for Landlord to employ an attorney for the collection of rent or any other sum due hereunder, or to enforce any covenant of this lease, or the termination of this lease, or for the possession of the leased premises or any part thereof, the Tenant shall pay all costs, including reasonable attorney's fees.
35. **AGENT.** Tenant acknowledges that the aforementioned Agent is the managing agent for the owner of the leased premises. Tenant shall pay all rent payable under this lease to said agent. The right to collect said rents shall be governed by the written agreement between Landlord and agent for the management of the leased premises and shall terminate with the expiration of said management agreement or any renewal thereof.
36. **DEFINITIONS.** "Landlord" as used in this lease shall include the owner or owners of the property and/or the aforementioned managing agent as well as the Landlord's heirs, representatives, assigns and successors in title to premises. "Tenant" shall include Tenant, Tenant's heirs and representatives, and if this lease shall be assigned or sublet, shall include also Tenant assignees or sublessees, or to premises covered by such assignment or sublease. "Agent" shall include agent, agent's successors, assigns, heirs and representatives. "Landlord," "Tenant," and "Agent," including a sole and female, singular and plural, corporation, partnership or individual, or any of the particular parties.
37. **SPECIAL stipulations:** Insofar as the following stipulations conflict with any of the provisions herein, the following stipulations shall control:

35. ENTIRE AGREEMENT. This lease contains the entire agreement between the parties hereto and all previous negotiations leading thereto, and it may be modified only by a dated written agreement signed by both Landlord and Tenant. No surrender of the leased premises or of the remainder of the term of this lease shall be valid unless accepted by Landlord in writing. TIME IS OF THE ESSENCE IN THIS AGREEMENT.



IN WRITTEN WHEREOF, Landlord and Tenant have executed these premises, this day and year first above written.

Witness as to Tenant

Witness as to Tenant

Witness as to Landlord (or Agent)

Witness as to Landlord (or Agent)

Tenant

Tenant

Landlord (or Agent)

Landlord (or Agent)

THIS IS A LEGALLY BINDING CONTRACT. TENANT IS ADVISED TO SEEK FURTHER ASSISTANCE IF THE CONTENTS ARE NOT UNDERSTOOD. TENANT ACKNOWLEDGES THE RECEIPT OF A COPY OF A COPY OF THIS AGREEMENT.

The printed matter in this form approved by the CHARLESTON TRIDENT ASSOCIATION OF REALTORS

Form 301 / Revised 10/91
R-141 PENDING

COPY

EXHIBIT 3

Assumption Letter dated March 30, 2012

EXHIBIT 3

March 30, 2012

NOTICE TO TENANTS OF 213 EAST BAY STREET, CHARLESTON, SC

Dear Tenants:

We are happy to announce that as of the above stated date, CHARLESTON T&T, INC. has assigned all of its rights as landlord under your lease to the MICHAEL J. QUILLEN FAMILY LIMITED PARTNERSHIP. This assignment is effective immediately, so from this date forward, please send all communications, correspondence, rents other sums payable under your lease to the MICHAEL J. QUILLEN FAMILY LIMITED PARTNERSHIP at the address stated below. Furthermore, any security deposits previously held by CHARLESTON T&T, INC. have been assigned and transferred to the MICHAEL J. QUILLEN FAMILY LIMITED PARTNERSHIP.

Sincerely,

CHARLESTON T&T, INC.

By: _____
Ann Thode, Its President

MICHAEL J. QUILLEN
FAMILY LIMITED PARTNERSHIP

By: _____
Michael J. Quillen, General Partner

* * * * *

Until further notice, the mailing address for all future communications, correspondence, rent, and other payments shall be:

**MICHAEL J. QUILLEN FAMILY LIMITED PARTNERSHIP
15121 Washington Way
Bristol, VA 24202**

EXHIBIT 4

Termination Letter dated September 11, 2013

EXHIBIT 4

YASCHIK ENTERPRISES

Complete Real Estate and Investment Service

Yaschik Development Co., Inc. • Charleston Capital Corporation.

56 Queen Street • Post Office Box 328 (29402)
Charleston, South Carolina 29401

Phone (843) 723-6464 • FAX (843) 723-1228 • E-mail: yaschik@bellsouth.net

September 11, 2013

EXPRESS MAIL - OVERNIGHT DELIVERY

Mike J. Quillen, General Partner
Michael J. Quillen Family Limited Partnership
15121 Washington Way
Bristol, VA 24202

Re: Michael J. Quillen Family Limited Partnership / Yaschik Development Co., Inc. -
Lease Matter (213 East Bay)

Dear Mike:

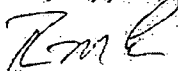
This letter is in response to your correspondence dated September 3, 2013 regarding the insurance proceeds and Master Lease related to 213 East Bay Street. Since the fire at the leased property has led to a total loss of the subject premises, the Master Lease has been automatically terminated pursuant to the terms of the first sentence of Paragraph 20 of the Master Lease. As such, please discontinue using any insurance proceeds for the design, remediation or rebuilding of the premises until and unless I provide you with such authorization.

Please find enclosed our check for \$7,787.36 as payment in full of prepaid rent from April 2 to April 30, 2013. I have deducted the costs of property tax and user fee on a prorata basis to the date of the fire.

	Before proration	Pro-rata
Rent	15,758.26	(525.28)
Property tax	29,368.25	(7,423.78)
User fee	86.00	(21.84)
		(7,970.90) deduction

Please do not hesitate to contact me if you have any questions.

Very truly yours,


Thomas M. Ervin
President

Cc: Greg Pearce

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

SEA ISLAND FOOD GROUP, LLC
doing business as SQUEEZE,

Plaintiff,

v.

YASCHIK DEVELOPMENT
COMPANY, INC. doing business as
YASCHIK ENTERPRISES, HILTON
SMITH, EAST BAY COMPANY,
LTD., and MICHAEL J. QUILLEN
FAMILY LIMITED PARTNERSHIP,

Defendants.

QUILLEN ENTERPRISES, LLC
doing business as THE BRICK,

Plaintiff-Intervenor,

v.

YASCHIK DEVELOPMENT
COMPANY, INC. doing business as
YASCHIK ENTERPRISES, HILTON
SMITH, EAST BAY COMPANY,
LTD., and MICHAEL J. QUILLEN
FAMILY LIMITED PARTNERSHIP,

Defendants.

) COURT OF COMMON PLEAS
) THE NINTH JUDICIAL CIRCUIT
) CASE No.: 2013-CP-10-7107

2015 MAY 13 PM 2:39
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

FIRST AMENDED COMPLAINT

(Breach of Contract, Breach of
Contract Accompanied by a
Fraudulent Act, and Tortious
Interference with Contractual
Relationship)

(Jury Trial Demanded)

Plaintiff Sea Island Food Group, LLC doing business as Squeeze and Plaintiff-Intervenor Quillen Enterprises, LLC doing business as The Brick ("Plaintiffs") bring this action against Defendants Yaschik Development Company, Inc. doing business as Yaschik Enterprises, Michael J. Quillen Family Limited Partnership, Hilton Smith, and East Bay Company, LTD ("East Bay Company") based on the allegations set forth below.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiffs are South Carolina limited liability companies with their principal places of business located in Charleston County, South Carolina.
2. Upon information and belief, Defendant Yaschik Development Company, Inc. is a South Carolina Corporation with its principal place of business located in Charleston County, South Carolina.
3. Upon information and belief, Defendant Michael J. Quillen Limited Family Partnership is a Virginia Limited Partnership with its principal place of business located in Gate City, Virginia.
4. Upon information and belief, Defendant East Bay Company, LTD is a South Carolina Corporation with its principal place of business located in Charleston County, South Carolina.
5. Upon information and belief, Defendant Hilton Smith resides in Charleston County, South Carolina.

6. This Court has jurisdiction over the parties to and the subject matter of this action, and venue in Charleston County is proper under § 15-7-30 of the Code of Laws of South Carolina in that all of the alleged acts or omissions giving rise to the cause of action occurred in Charleston County.

FACTS

7. Plaintiffs incorporate the allegations of paragraphs 1 through 6 above as if fully set forth herein.

8. On or about March 14, 1997 a Master Lease ("Master Lease") was entered into between the now-dissolved 213 East Bay Associates, Inc. and Charleston T&T, Inc. A true and correct copy of the lease is attached as **Exhibit 1** and incorporated by reference.

9. The Master Lease began on April 1, 1997 and was for a period of five years with five five-year options to renew.

10. On or before April 1, 2002, Charleston T&T, Inc. elected to exercise its option to renew the Master Lease for another five years.

11. On or about April 15, 2003, Defendant Yaschik Development Company, Inc. purchased 213 East Bay Street from 213 East Bay Associates, Inc. for approximately \$1,800,000.00.

12. At the time of the purchase, Defendant Yaschik Development Company, Inc. was aware of the landlord-tenant relationship between Charleston T&T and the tenants and operated under the Master Lease with

the knowledge and intent that Charleston T&T would continue leasing the space in 213 East Bay Street.

13. On or about March 15, 2006, Charleston T&T, Inc. sublet the space at 213 A East Bay Street to R&R Entertainment, who operated the bar Squeeze. A true and correct copy of the lease (the "Squeeze Sublease") is attached as **Exhibit 2** and incorporated by reference.

14. The Squeeze Sublease term was for a period of one year beginning on April 1, 2006 with two five-year options to renew.

15. On or about January 12, 2011, Sea Island Food Group, LLC purchased Squeeze from R&R Entertainment and assumed the Squeeze Sublease.

16. On or about August 2, 2010, Charleston T&T, Inc. sublet space at 213 East Bay Street to The Brick. A true and correct copy of the lease (the "Brick Sublease") is attached as **Exhibit 3** and incorporated by reference.

17. The Brick Sublease term was to begin on August 2, 2010 and end on March 31, 2011 with one six-year option to renew.

18. On or about March 30, 2012, the tenants of 213 East Bay Street were informed by letter (the "Assumption Letter") that Defendant Michael J. Quillen Family Limited Partnership had assumed the Master Lease from Charleston T&T, Inc. and that future correspondence and rent should be directed to the attention of Defendant Michael J. Quillen Family Limited

Partnership. A true and correct copy of the Assumption Letter is attached as **Exhibit 4** and incorporated by reference.

19. Defendant Hilton Smith is the president and CEO of East Bay Company.

20. Defendant East Bay Company's real estate holdings include the Maritime Building at 215 East Bay Street and 207 East Bay Street.

21. On or about April 2, 2013, there was a fire at 213 East Bay Street.

22. Defendants Hilton Smith and East Bay Company were aware of the fire that occurred at 213 East Bay Street on or about April 2, 2013.

23. Defendant Yaschik Development Company, Inc., and Charleston Capital Company carried only \$1,000,000.00 of fire insurance on a building that was purchased for \$1,800,000.00.

24. The fire caused damage to the property occupied by other tenants, but the properties occupied by Plaintiffs had limited smoke damage and some water damage.

25. Defendant Michael J. Quillen Family Limited Partnership initiated the cleanup, investigation, and restoration of 213 East Bay Street with the approval of Tom Ervin of Yaschik Enterprises.

26. Defendants Hilton Smith and East Bay Company were aware of the extensive investigation and restoration efforts made by Michael J. Quillen Family Limited Partnership with the approval of Tom Ervin.

27. Defendants Hilton Smith and East Bay Company were aware of Plaintiffs' tenancy and the fact that restorations were made for the benefit of Plaintiffs, as tenants.

28. On or about May 30, 2013, Thomas Ervin, on behalf of Yaschik Development Company, and Hilton Smith, on behalf of East Bay Company, discussed East Bay Company's purchase of 213 East Bay Street. This discussion and a subsequent proposal to sell 213 East Bay are memorialized in correspondence from Thomas Ervin to Hilton Smith dated May 31, 2013.

29. The proposal from Yaschik Development Company makes mention of the following facts incident to the sale:

- i. The property was subject to the Master Lease;
- ii. The Master Lease expires on March 31, 2017, but contains renewal options through March 31, 2027; and
- iii. Defendant Michael J. Quillen Family Limited Partnership has a right of first refusal on any sale offer.

30. Towards the end of 2013, Defendant Hilton Smith and East Bay Company agreed to enter into a purchase agreement with Yaschik Development Company for the purchase of 213 East Bay.

31. After several revisions to the purchase agreement, Thomas Ervin, on behalf of Yaschik Development Company, and Hilton Smith, on behalf of East Bay Company, entered into a Real Estate Sales Agreement on December 30, 2013 for the purchase of 213 East Bay for \$3,673,736.00.

32. The Real Estate Sales Agreement required the cancellation or termination of the Master Lease, and therefore it required the cancellation or termination of the Squeeze Sublease and the Brick Sublease.

33. On or about September 11, 2013, Yaschik Development Company, Inc. sent master leaseholder Defendant Michael J. Quillen Family Limited Partnership a letter (the "Termination Letter") informing them that, "Since the fire at the leased property has led to a total loss of the subject premises, the Master Lease has been automatically terminated pursuant to the terms of the first sentence of Paragraph 20 of the Master Lease." A true and correct copy of the Termination Letter is attached as **Exhibit 5** and incorporated by reference.

34. Michael J. Quillen Family Limited Partnership, Tom Ervin, Yaschik Development, Hilton Smith, and EBC were all aware that investigation revealed that the fire did not, in fact, result in a total loss of the premises.

35. And to date, the reconstruction of 213 East Bay Street has reached a stalemate and ceased.

FIRST CAUSE OF ACTION

(Breach of Contract)

(Against Defendant Yaschik Development Company, Inc.)

36. Plaintiffs incorporate the allegations of paragraphs 1 through 35 above as if fully set forth herein.

37. A valid contract exists between Defendant Yaschik Development Company and Defendant Michael J. Quillen Family Limited Partnership in the form of the Master Lease.

38. Plaintiffs are Third-Party Beneficiaries of the Master Lease because the Master Lease was made with the intent that the tenants of 213 East Bay would benefit from the performance of the obligations within the contract.

39. Defendant Yaschik Development Company breached the contract in that they failed to speedily make repairs and return the building to substantially the same condition as prior to the fire.

40. Plaintiffs suffered damages as a direct and proximate result of Defendant Yaschik Development Company and Defendant Charleston Capital Company's breach.

41. Plaintiffs are entitled to actual and consequential damages, plus any court costs, and attorney's fees.

SECOND CAUSE OF ACTION
(Breach of Contract Accompanied by a Fraudulent Act)
(Against Defendant Yaschik Development Company, Inc.)

42. Plaintiffs incorporate the allegations of paragraphs 1 through 41 above as if fully set forth herein.

43. A valid contract exists between Defendants Yaschik Development Company and Defendant Michael J. Quillen Family Limited Partnership in the form of the Master Lease.

44. Plaintiffs are Third-Party Beneficiaries of the Master Lease.

45. Defendant Yaschik Development Company breached the contract in that they failed to speedily make repairs and return the building to substantially the same condition as prior to the fire.

46. Defendant Yaschik Development Company's breach of contract was accompanied by a fraudulent act not in the making of the contract but in the breaching of its obligation accompanied by dishonesty, unfair dealing, and unlawfully appropriating property in which Plaintiff had a legal interest.

47. Defendant Yaschik Development Company sent a Termination Letter that lacked a legal or factual basis with fraudulent and ulterior motives.

48. Plaintiffs suffered damages as a direct and proximate result of Defendants Yaschik Development Company and Charleston Capital Company's breach.

49. Plaintiffs are entitled to actual, consequential, and punitive damages, plus any court costs, and attorney's fees.

THIRD CAUSE OF ACTION

(Breach of Contract)

(Against Defendant Michael J. Quillen Family Limited Partnership)

50. Plaintiffs incorporate the allegations of paragraphs 1 through 49 above as if fully set forth herein.

51. A valid contract exists between Plaintiffs and Defendant Michael J. Quillen Family Limited Partnership in the form of the Sublease.

52. Defendant Michael J. Quillen Family Limited Partnership breached the contract in that it failed to speedily make repairs and return the building to substantially the same condition as prior to the fire.

53. Plaintiffs suffered damages as a direct and proximate result of Defendant's breach.

54. Plaintiffs are entitled to actual and consequential damages, plus any court costs, and attorney's fees.

FOURTH CAUSE OF ACTION

(Intentional Interference with a Contractual Relationship)

(Against Defendant Yaschik Development Company, Inc.)

55. Plaintiffs incorporate the allegations of paragraphs 1 through 54 above as if fully set forth herein.

56. The Squeeze Sublease is a valid contract between Plaintiff and the Michael J. Quillen Family Limited Partnership.

57. The Brick Sublease is a valid contract between Plaintiff-Intervenor and the Michael J. Quillen Family Limited Partnership.

58. Defendant Yaschik Development Company, Inc. was aware of the contract between Plaintiff and Michael J. Quillen Family Limited Partnership.

59. Defendant Yaschik Development Company, Inc. intentionally procured the breach of this contract in that they sent a Termination Letter that lacks a legal or factual basis with fraudulent and ulterior motives, they failed to speedily make repairs and return the building to substantially the same condition as prior to the fire, and they stalled reconstruction of the building.

60. Plaintiffs suffered damages as a direct and proximate result of Defendant Yaschik Development Company's willful, wanton, and intentional conduct.

61. Plaintiffs are entitled to actual, punitive, and consequential damages, plus any court costs, and attorneys' fees.

FIFTH CAUSE OF ACTION

(Intentional Interference with a Contractual Relationship)
(Against Defendants Hilton Smith and East Bay Company, Ltd.)

62. Plaintiffs incorporate the allegations of paragraphs 1 through 61 above as if fully set forth herein.

63. The Squeeze Sublease is a valid contract between Plaintiff and the Michael J. Quillen Family Limited Partnership.

64. The Brick Sublease is a valid contract between Plaintiff-Intervenor and the Michael J. Quillen Family Limited Partnership.

65. Defendants Hilton Smith and East Bay Company were aware of the contracts between Plaintiffs and Michael J. Quillen Family Limited Partnership.

66. Defendants Hilton Smith and East Bay Company intentionally procured the breach of these contracts by, among other things, ultimately conditioning the purchase of 213 East Bay on the termination or cancellation of the Master Lease.

67. Plaintiffs suffered damages as a direct and proximate result of Defendants Hilton Smith and East Bay Company's willful, wanton, and intentional conduct.

68. Plaintiffs are entitled to actual, punitive, and consequential damages, plus any court costs, and attorneys' fees.

JURY DEMAND

69. Pursuant to Rule 38 of the South Carolina Rules of Civil Procedure, Plaintiff respectfully requests a trial by jury.

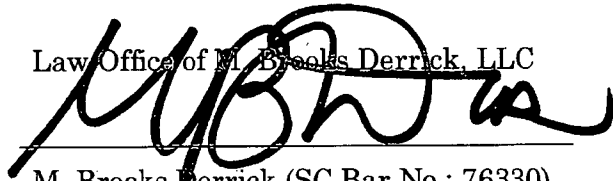
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against Defendants on all causes of action and that Plaintiffs be awarded:

- A. Actual damages;
- B. Punitive damages;
- C. Consequential damages;
- D. Pre and post judgment interest;
- E. Reasonable attorneys' fees and costs; and
- F. Such other and further relief as this Court deems just and

appropriate.

Law Office of M. Brooks Derrick, LLC



M. Brooks Derrick (SC Bar No.: 76330)
36 Broad Street
Charleston, South Carolina 29401
Office: (843) 410-2545
Fax: (843) 410-5664
bderrick@derricklawoffice.com

*Attorneys and Counselors for
Plaintiff Sea Island Food Group, LLC
and Plaintiff-Intervenor Quillen
Enterprises, LLC*

Charleston, South Carolina
May 13, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Sea Island Food Group, LLC d/b/a Squeeze,

Plaintiff,

v.

Yaschik Development Company, Inc. d/b/a
Yaschik Enterprises, Hilton Smith, East Bay
Company, LTD., and Michael J. Quillen
Family Limited Partnership,

Defendants.

Quillen Enterprises, LLC
d/b/a The Brick,

Plaintiff-Intervenor,

v.

Yaschik Development d/b/a Yaschik
Enterprises, Hilton Smith, East Bay Company,
LTD., and Michael J. Quillen Family Limited
Partnership,

Defendants.

Michael J. Quillen Family Limited Partnership,

Third-Party Plaintiff,

v.

Top of the Bay, Inc. d/b/a Club Light

Third-Party Defendant.

Civil Action No.: 2013-CP-10-7107

**ANSWER TO FIRST AMENDED
COMPLAINT, CROSS CLAIMS AND
THIRD-PARTY COMPLAINT
(Jury Trial Demanded)**

FILED
2015 JUN -3 PM 4:08
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

DEFENDANT MICHAEL J. QUILLEN FAMILY LIMITED PARTNERSHIP ("FLP" or "Defendant"), by and through its undersigned attorneys, comes now to answer the First Amended Complaint of Plaintiffs, to assert Defenses and Cross-Claims against Defendants Yaschik Development Company, Inc., Hilton Smith, and East Bay Company, LTD., and hereby complains of the Third-Party Defendant above-named. FLP would allege and show as follows:

FOR A FIRST DEFENSE
(General Denial)

1. Each and every paragraph of Plaintiffs' First Amended Complaint not herein specifically admitted, qualified or explained is denied.

2. Paragraph 1 is admitted upon information and belief.

3. Paragraph 2 is admitted upon information and belief.

4. Denied as stated. FLP states it is a Virginia Limited Partnership with its principal place of business located in Washington County, Virginia.

5. Paragraph 4 is admitted upon information and belief.

6. Paragraph 5 is admitted upon information and belief.

7. Paragraph 6 is a legal conclusion which requires no response from FLP. To the extent a response is required, Paragraph 6 is admitted upon information and belief.

8. Paragraph 7 is a paragraph of incorporation which requires no response from FLP. To the extent a response is required, FLP reiterates all of the allegations set forth hereinabove as fully as if repeated herein.

9. Paragraphs 8 through 35 are admitted.

10. Paragraph 36 is a paragraph of incorporation which requires no response from FLP. To the extent a response is required, FLP reiterates all of the allegations set forth herein above as fully as if repeated herein.

11. Paragraph 37 is admitted.
12. Paragraph 38 is a legal conclusion which requires no response from FLP. To the extent a response is required, Paragraph 38 is denied and strict proof demanded thereof.
13. Paragraph 39 is not directed to FLP and therefore no response is required. To the extent a response is required, Paragraph 39 is admitted.
14. Paragraphs 40 and 41 are not directed to FLP and therefore no response is required. To the extent a response is required, Paragraphs 40 and 41 are denied.
15. Paragraph 42 is a paragraph of incorporation which requires no response from FLP. To the extent a response is required, FLP reiterates all of the allegations set forth herein above as fully as if repeated herein.
16. Paragraph 43 is admitted.
17. Paragraph 44 is a legal conclusion which requires no response from FLP. To the extent a response is required, Paragraph 44 is denied and strict proof demanded thereof.
18. Paragraphs 45 through 47 are not directed to FLP and therefore no response is required. To the extent a response is required, Paragraphs 45 through 47 are admitted.
19. Paragraphs 48 and 49 are not directed to FLP and therefore no response is required. To the extent a response is required, Paragraphs 48 and 49 are denied.
20. Paragraph 50 is a paragraph of incorporation which requires no response from FLP. To the extent a response is required, FLP reiterates all of the allegations set forth herein above as fully as if repeated herein.
21. Paragraph 51 is admitted.
22. Paragraphs 52 through 54 are denied.

23. Paragraph 55 is a paragraph of incorporation which requires no response from FLP. To the extent a response is required, FLP reiterates all of the allegations set forth herein above as fully as if repeated herein.

24. Paragraphs 56 and 57 are admitted.

25. Paragraphs 58 and 59 are not directed to FLP and therefore no response is required. To the extent a response is required, Paragraphs 58 and 59 are admitted.

26. Paragraphs 60 and 61 are not directed to FLP and therefore no response is required. To the extent a response is required, Paragraphs 60 and 61 are denied.

27. Paragraph 62 is a paragraph of incorporation which requires no response from FLP. To the extent a response is required, FLP reiterates all of the allegations set forth herein above as fully as if repeated herein.

28. Paragraphs 63 and 64 are admitted.

29. Paragraphs 65 and 66 are not directed to FLP and therefore no response is required. To the extent a response is required, Paragraphs 65 and 66 are admitted.

30. Paragraphs 67 and 68 are not directed to FLP and therefore no response is required. To the extent a response is required, Paragraphs 67 and 68 are denied.

31. Paragraph 69 requires no response from FLP.

32. Paragraph beginning "WHEREFORE," including all subparts, is denied.

FOR A SECOND DEFENSE

(12(b)(6))

33. FLP reiterates all of the allegations set forth herein above as fully as if repeated herein.

34. FLP would show that Plaintiffs have failed to allege facts sufficient to constitute a valid cause of action against FLP, and therefore, Plaintiffs' First Amended Complaint should be dismissed against FLP pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE
(Waiver/Estoppel/Laches)

35. FLP reiterates all of the allegations set forth herein above as fully as if repeated herein.

36. FLP would show that Plaintiffs' claims are barred by the doctrine of waiver and/or estoppel, as well as the equitable doctrine of laches.

FOR A FOURTH DEFENSE
(Prevention of Condition)

37. FLP reiterates all of the allegations set forth herein above as fully as if repeated herein.

38. FLP would show that Plaintiffs' claims are barred by the prevention of one or more material conditions to the contracts.

**FOR A FIFTH DEFENSE AND BY WAY OF CROSS CLAIMS AGAINST CO-
DEFENDANT YASCHIK DEVELOPMENT COMPANY, INC. d/b/a YASCHIK
ENTERPRISES, HILTON SMITH AND EAST BAY COMPANY, LTD**

39. FLP reiterates all of the allegations set forth herein above as fully as if repeated herein.

40. On March 29, 2012, FLP purchased the Master Lease from Charleston T&T, Inc., with the approval of Yaschik Development Company, Inc. d/b/a Yaschik Enterprises ("Yaschik").

41. As a result of FLP's purchase of the Master Lease, Charleston T&T assigned its rights to FLP under both the Master Lease, and the three subleases held by Plaintiff Sea Island

Food Group, LLC d/b/a Squeeze, Plaintiff Quillen Enterprises, LLC d/b/a The Brick, and Top of the Bay, Inc. d/b/a Club Light, respectively.

42. Hilton Smith, Jr., at all times relevant to this action, was and remains the President and CEO of East Bay Company, Ltd. ("EBC").

43. EBC currently owns The Maritime Building located at 215 East Bay Street, directly next to 213 East Bay Street. EBC also owns 207 East Bay Street, located on the same block and only several buildings down from 213 East Bay Street.

44. A fire occurred at 213 East Bay Street in the early morning hours of April 2, 2013.

45. Thereafter, over the next several months, extensive investigations were conducted and restoration efforts were undertaken. Throughout this process, it was determined that the fire did not result in a total loss, and that the building was not totally destroyed.

46. Hilton Smith and EBC were aware that a fire occurred at 213 East Bay Street in the early morning hours of April 2, 2013. Over the next several months, Hilton Smith and EBC were aware of the extensive investigations conducted and restoration efforts undertaken as to the property.

47. In May 2013, Yaschik began entertaining proposals for purchase of the property from Hilton Smith on behalf of EBC. Yaschik presumably entertained purchase offers from other persons or entities not named in this lawsuit as well.

48. On or about May 30, 2013, Thomas Ervin, on behalf of Yaschik, and Hilton Smith, on behalf of EBC, discussed EBC's purchase of the 213 East Bay Street property. This discussion and subsequent proposal from Yaschik was memorialized in correspondence to Hilton Smith dated May 31, 2013.

49. The proposal from Yaschik outlined pertinent facts, including that the property was subject to the master lease on a pure net basis, the master lease expires March 31, 2017, renewal options for the lease are available through March 31, 2027, and the current tenant, FLP, has a right of first refusal on any sale offer. Shortly thereafter in September 2013, Yaschik, through Ervin, informed FLP of its position that the lease was void because the building was totally destroyed.

50. After months of coordination between Yaschik and FLP regarding the restoration efforts, including an understanding that FLP would take the lead in procuring the restoration efforts, FLP informed Yaschik of its obligation under the Master Lease to restore the premises to substantially the same condition as speedily as practicable.

51. Shortly thereafter in September 2013, Yaschik, through Ervin, informed FLP of its position that the lease was void because the building was totally destroyed.

52. Yaschik instructed all involved to cease all work on the building and restoration plans.

53. However, on October 25, 2013, Yaschik took the position that FLP is the tenant under the lease for the 213 East Bay Street property, as evidenced by an Escrow Agreement between FLP, Yaschik, Wells Fargo, and Smith Cox & Associates, LLP.

54. Based upon the Master Lease's grant to FLP of first right of refusal to buy property and at the request of Ervin on behalf of Yaschik, FLP submitted a proposal to Yaschik and Ervin to sell the Master Lease back to Yaschik. Neither Yaschik nor Ervin ever responded to this proposal.

55. By November 2013, Smith and EBC agreed to enter into a purchase agreement with Yaschik for the purchase of 213 East Bay.

56. After several versions of a purchase agreement were amended and edited, Smith and Ervin, on behalf of their respective companies, entered into a Real Estate Sales Agreement on December 30, 2013 for the purchase of 213 East Bay Street for \$3,673,736.

57. The Real Estate Sales Agreement required cancellation and /or termination of the Master Lease and provides that if Yaschik is unable to receive a termination of the Master Lease prior to the expiration of the initial inspection period, the agreement may be terminated by either party. Furthermore, the Agreement provided that at closing, Yaschik shall deliver to EBC various documents, *inter alia*, a termination of the Master Lease.

58. The purchase price included the annual net income EBC would receive from the two leases of Plaintiffs, plus income from a second floor tenant that would execute a lease at the time of closing of the property.

59. FLP was never granted its right of first refusal pursuant to the Master Lease.

FIRST CROSS CLAIM AGAINST YASCHIK
(Breach of Contract)

60. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

61. Yaschik was party to the contract, the Master Lease, whereby it agreed to restore the premises to substantially the same condition as speedily as practicable in the event the building was not wholly destroyed.

62. Furthermore, the Master Lease provided that Yaschik agreed to give FLP, as the tenant, first right of refusal to buy the property should Yaschik elect to sell.

63. Yaschik has breached the Master Lease with FLP in:

- a. Failing to restore the premises located at 213 East Bay to substantially the same condition as speedily as practicable; and

b. Failing to honor FLP's first right of refusal to purchase 213 East Bay.

64. As a direct and proximate cause of the breach of Yaschik, FLP has incurred significant restoration expenses that have gone unpaid, has become involved in litigation in which it faces liability due to the breaches of Yaschik described above, has incurred costs and expenses in order to protect its interests, and has past and future loss of business income.

65. As a result of this breach of contract, FLP is entitled to both actual and punitive damages, as well as reasonable attorney's fees and costs of defending this action. Further, FLP is informed and believes it is entitled to recover damages from Yaschik for any amount FLP may be required to pay any party herein as a result of the breach of Yaschik.

SECOND CROSS CLAIM AGAINST YASCHIK
(Breach of Contract Accompanied by a Fraudulent Act)

66. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

67. Yaschik's above-mentioned conduct in breaching the Master Lease was infused with fraudulent intent in that it knew, based upon the extensive investigative and restoration information, that the property was not wholly destroyed, and that the Master Lease remained in full effect and force, including its obligations to restore the property and give FLP first right of refusal to purchase the property.

68. The breach of contract was accompanied by a fraudulent act in that, without a valid reason to do so, Yaschik, through Ervin, returned FLP's April 2013 rent, declared the Master Lease void and entertained offers and in fact, entered into a Real Estate Agreement, to sell the property to Smith and EBC.

69. As a result of this breach of contract accompanied by a fraudulent act, FLP is entitled to both actual and punitive damages, as well as reasonable attorney's fees and costs of

defending this action. Further, FLP is informed and believes it is entitled to recover damages from Yaschik for any amount FLP may be required to pay any party herein as a result of the breach of Yaschik.

THIRD CROSS CLAIM AGAINST YASCHIK
(Fraud and/or Fraudulent Concealment)

70. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

71. Through its actions, omissions, deliberate concealment, nondisclosure and silence, Yaschik, through Ervin, represented that it would not cancel the Master Lease and agreed to be bound to the terms thereunder, to include but not limited to, its obligation to speedily restore the premises to its pre-fire condition.

72. Yaschik's representation was false and dishonest.

73. Yaschik's representation was material.

74. Yaschik knew that its representation was false, or Yaschik at least had a reckless disregard for its truth or falsity.

75. Yaschik intended that FLP act upon its representations so that FLP would pay the restoration costs and expenses and Yaschik could avoid these payments or repayment thereof, despite its obligation under the Master Lease.

76. Additionally, through its representations and actions related thereto, Yaschik intended to achieve the future benefit of selling to Smith and EBC or other outside entities the subject property unencumbered, i.e., free from the Master Lease and subleases that remain valid and in effect. This benefit would be achieved by Yaschik at the expense of FLP, which derives significant business income from these valid lease agreements.

77. FLP did not know of the falsity of Yaschik's representations.

78. FLP relied upon the truth of the representations.

79. As a direct and proximate result of Yaschik's fraud and fraudulent concealment, FLP suffered damages, including the restoration expenses, lost income, past and future loss of business income, and costs of defending this action.

80. Yaschik's conduct was reckless and in conscious disregard of FLP's rights, thus entitling FLP to an award of punitive damages.

81. Further, FLP is informed and believes it is entitled to recover damages from Yaschik for any amount FLP may be required to pay any party herein as a result of the breach of Yaschik.

FOURTH CROSS CLAIM AGAINST YASCHIK
(Negligent Misrepresentation)

82. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

83. Yaschik, by and through Ervin, made false representations to FLP that they had no intention of cancelling the Master Lease after the April 2, 2013 fire.

84. Yaschik had a pecuniary interest in making these false statements, as it permitted FLP to incur the significant costs of the restoration efforts.

85. Additionally, through its misrepresentations and actions related thereto, Yaschik intended to achieve the future benefit of selling to Smith or EBC or other outside persons and/or entities the subject property unencumbered, i.e., free from the Master Lease and subleases that remain valid and in effect. This benefit would be achieved by Yaschik at the expense of FLP, which derives significant business income from these valid lease agreements.

86. As the Landlord and owner of the building and pursuant to the Master Lease, Yaschik owed a duty of care to FLP to see that it communicated truthful and accurate information to FLP.

87. In misrepresenting its intentions, Yaschik breached that duty by failing to exercise the due care owed to FLP.

88. FLP justifiably relied on Ervin's representations on behalf of Yaschik.

89. FLP has suffered a pecuniary loss as the proximate result of its reliance on these misrepresentations, as FLP incurred significant expenses in the restoration process, has suffered loss of past and future business income, and has had to defend this action.

90. As a result of this negligent misrepresentation, FLP is entitled to both actual and punitive damages, as well as reasonable attorney's fees and costs of defending this action. Further, FLP is informed and believes it is entitled to recover damages from Yaschik for any amount FLP may be required to pay any party herein as a result of the negligent misrepresentation of Yaschik.

FIFTH CROSS CLAIM AGAINST YASCHIK
(Quantum Meruit)

91. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

92. The costs and expenses incurred by FLP in the restoration process constitutes a financial benefit conferred upon Yaschik by FLP.

93. Because it was Yaschik's obligation under the express terms of the Master Lease, Yaschik realized that benefit by wrongfully and deceptively permitting FLP to incur these expenses.

94. Additionally, Yaschik intended to achieve the future benefit of selling to Smith and EBC or other outside persons and/or entities the subject property unencumbered, i.e., free from the Master Lease and subleases that remain valid and in effect. This benefit would be achieved by Yaschik at the expense of FLP, which derives significant business income from these valid lease agreements.

95. Because of Yaschik's untruthful, deceitful, unlawful and inexcusable conduct, it would be unfair and unjust to allow Yaschik to retain the benefit of the restoration efforts without repaying FLP.

96. Similarly, because of Yaschik's untruthful, deceitful, unlawful and inexcusable conduct, it would be unfair and unjust to allow Yaschik to seek the future benefit of the sale of the property unencumbered at the expense of FLP, who has and would suffer loss of business income.

97. FLP is entitled to the amount of expenses it incurred plus prejudgment interest under the theory of *quantum meruit* based on Yaschik's wrongful conduct that result in its unjust enrichment at FLP's expense.

SIXTH CROSS CLAIM AGAINST YASCHIK
(Indemnity)

98. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

99. FLP has denied Plaintiffs' allegations against it, but in the event FLP is found liable to Plaintiffs for damages based upon the allegations in the Complaint, FLP alleges it is without fault in regard thereto and is entitled to judgment against Yaschik for full and complete equitable indemnity and/or contractual indemnity against any such liability, plus costs, expenses, and attorney's fees in defending this action.

FIRST CROSS CLAIM AGAINST HILTON SMITH AND EBC
(Tortious Interference with Contract)

100. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

101. The Master Lease is a valid contract between FLP and Yaschik.

102. The Sublease between Squeeze and FLP is a valid contract.

103. The Sublease between The Brick and FLP is a valid contract.

104. The Sublease between Top of the Bay and FLP is a valid contract.

105. Hilton Smith and EBC were aware of the Master Lease that existed between FLP and Yaschik.

106. Hilton Smith and EBC were aware of the Subleases that existed between FLP and the sub-tenants, Squeeze, the Brick, and Top of the Bay, respectively.

107. Hilton Smith and EBC intentionally procured a breach these contracts by, among other things, conditioning EBC's purchase of the property on termination and cancellation of the Master Lease between FLP and Yaschik.

108. Hilton Smith and EBC's actions were willful, wanton, and intentional, and without justification.

109. As a direct and proximate cause of the tortious interference of Hilton Smith and EBC, FLP has suffered loss of past and future business income, incurred significant restoration expenses that have gone unpaid, has become involved in litigation in which it faces liability due to the interferences described above, has incurred costs and expenses in order to protect its interests.

110. As a result of this tortious interference with the Master Lease, FLP is entitled to both actual and punitive damages, as well as reasonable attorney's fees and costs of defending

this action. Further, FLP is informed and believes it is entitled to recover damages from Smith and EBC for any amount FLP may be required to pay any party herein as a result of the interference of Smith and EBC.

SECOND CROSS CLAIM AGAINST HILTON SMITH AND EBC
(Intentional Interference with Prospective Contractual Relations)

111. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

112. The Master Lease between FLP and Yaschik was renewable for periods of five years through 2027.

113. Hilton Smith and EBC intentionally interfered with FLP's potential contractual relations by, among other things, conditioning EBC's purchase of the property on termination and cancellation of the Master Lease between FLP and Yaschik. Such condition necessarily interfered with any prospective contractual relations of renewal of the Master Lease, and precluding any future Subleases thereunder.

114. Hilton Smith and EBC's actions were willful, wanton, and intentional and done for an improper purpose and by improper methods, i.e., tortiously interfering with the Master Lease for its own financial gain.

115. As a direct and proximate cause of the intentional interference of Hilton Smith and EBC, FLP has suffered loss of future business income, incurred significant restoration expenses that have gone unpaid, has become involved in litigation in which it faces liability due to the interferences described above, has incurred costs and expenses in order to protect its interests.

116. As a result of this intentional interference with the renewable Master Lease, FLP is entitled to both actual and punitive damages, as well as reasonable attorney's fees and costs of

defending this action. Further, FLP is informed and believes it is entitled to recover damages from Smith and EBC for any amount FLP may be required to pay any party herein as a result of the interference of Smith and EBC.

THIRD CROSS CLAIM AGAINST HILTON SMITH AND EBC
(Violation of South Carolina Unfair Trade Practices Act)

117. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

118. The actions of Hilton Smith and EBC described herein related to these contracts constitute a willful, unfair and deceptive act in commerce which impacts the public interest in the State of South Carolina.

119. Upon information and belief, Hilton Smith and EBC have attempted, through contact with Yaschik, contractors, engineers, and vendors, to have the property at 213 East Bay declared totally destroyed in order to terminate the Master Lease.

120. In the alternative, Hilton Smith and EBC have attempted to have FLP removed from the Master Lease or otherwise terminate the Master Lease without cause or justification in order to effectuate their Real Estate Agreement with Yaschik.

121. These actions and others constitute willful, unfair and deceptive acts in commerce which impact the public interest in the State of South Carolina.

122. The acts and practices of Hilton Smith and EBC impact the public interest of the State of South Carolina, as these acts and practices have the potential for being repeated.

123. The acts and practices of Hilton Smith and EBC represent unfair trade practices in that Hilton Smith and EBC used and continue to use unfair and deceptive methods and practices which are prohibited by the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, et seq.

124. The acts and practices were and are a willful and knowing violation of the South Carolina Unfair Trade Practices Act, and therefore, FLP is entitled to all remedies allowed under the South Carolina Unfair Trade Practices Act, including actual damages, treble damages, and attorneys' fees, and such other and further relief as this Court deems just and proper.

FOURTH CROSS CLAIM AGAINST HILTON SMITH AND EBC
(Indemnity)

125. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

126. FLP has denied Plaintiffs' allegations against it, but in the event FLP is found liable to Plaintiffs for damages based upon the allegations in the Amended Complaint, FLP alleges it is without fault in regard thereto and is entitled to judgment against Smith and EBC for full and complete equitable indemnity and/or contractual indemnity against any such liability, plus costs, expenses, and attorney's fees in defending this action.

FIRST CROSS CLAIM AGAINST YASCHIK, HILTON SMITH AND EBC
(Civil Conspiracy)

127. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

128. Ervin, Yaschik, Hilton Smith and EBC joined together, working for their own purposes, and conspired to injure FLP by permitting or inducing FLP to lead restoration efforts, then subsequently terminating or causing to be terminated the Master Lease and denying or causing to be denied FLP's right of first refusal under the Master Lease.

129. FLP has been injured as a result of Smith and EBC's these actions.

130. As a direct and proximate cause of the conspiracy of Ervin, Yaschik, Hilton Smith and EBC, FLP has suffered loss of future business income, incurred significant restoration

expenses that have gone unpaid, has become involved in litigation in which it faces liability due to the interferences described above, has incurred costs and expenses in order to protect its interests, and has past and future loss of business income.

131. Additionally, FLP has suffered special damages, including damage to its business reputation in Charleston, South Carolina, and incurred significant time and business expenses in combating the actions of Ervin, Yaschik, Hilton Smith, and EBC in attempting to terminate the Master Lease and/or remove FLP from the Master Lease.

132. As a result of this civil conspiracy, FLP is entitled to both actual and punitive damages, as well as reasonable attorney's fees and costs of defending this action. Further, FLP is informed and believes it is entitled to recover damages from Yaschik, Smith and EBC for any amount FLP may be required to pay any party herein as a result of the conspiracy of Yaschik, Smith and EBC.

FURTHER ANSWERING AND BY WAY OF A THIRD-PARTY COMPLAINT

133. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

134. Third-Party Defendant Top of the Bay, Inc. d/b/a Club Light ("Club Light") is a limited liability company with its principal place of business located in Charleston County, South Carolina.

135. On or about April 1, 2012, Charleston T&T, Inc. sublet the space at 213C to Club Light. The Sublease term was for a period of five years.

136. Unit C housed two bars, Club Light and Speak Easy.

137. On March 29, 2012, FLP purchased the Master Lease from Charleston T&T, Inc., with the approval of "Yaschik" and with subsequent notification to the tenants, including Club Light.

138. The Club Light Sublease remained a valid and enforceable contract between Club Light and FLP after the assignment of the Master Lease and FLP's assumption of the various subleases related to 213 East Bay.

139. Pursuant to the Sublease between Club Light and FLP, Club Light was responsible for the maintenance of the premises, both interior and exterior, ordinary and extraordinary, including all interior walls, floors ceilings and floor coverings. Club Light was also responsible for the servicing, repair and maintenance of various systems, including but not limited to plumbing, electrical, heating, ventilating, and air conditioning, including all pipes, wiring, fixtures, filters, equipment, machinery, boilers, furnaces, compressors, and appliances.

140. On or about April 2, 2013, there was a fire at 213 East Bay Street.

141. Subsequent investigation revealed the fire originated at or near the storage room, office area, and kitchen of Club Light on the second floor of 213 East Bay.

142. Since its assumption of the Master Lease and Subleases, FLP has not received notification of electrical problems from any of the tenants, including Club Light.

FOR A FIRST CAUSE OF ACTION AGAINST TOP OF THE BAY, INC.
d/b/a CLUB LIGHT
(Breach of Contract)

143. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

144. Club Light was party to the contract, the Club Light Sublease, whereby it agreed to maintain the interior and interior systems of the second floor it rented.

145. Club Light has breached the Club Light Sublease with FLP in failing to maintain the interior and interior systems as outlined above, with such failures being the cause and/or contributing cause to the April 2, 2013 fire.

146. As a direct and proximate cause of the breach of Club Light, FLP has incurred significant restoration expenses that have gone unpaid, has become involved in litigation in which it faces liability due to the breaches of Club Light described above, has incurred costs and expenses in order to protect its interests, and has past and future loss of business income.

147. As a result of this breach of contract, FLP is entitled to both actual and punitive damages, as well as reasonable attorney's fees and costs of defending this action. Further, FLP is informed and believes it is entitled to recover damages from Club Light or any amount FLP may be required to pay any party herein as a result of the breach of Club Light.

FOR A SECOND CAUSE OF ACTION AGAINST TOP OF THE BAY, INC.
d/b/a CLUB LIGHT
(Negligence)

148. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

149. Club Light had a duty to maintain the interior premises and to service, repair, and maintain interior systems of 213 East Bay Unit C.

150. Club Light breached that duty in failing to maintain the interior premises and to service, repair, and maintain interior systems of 213 East Bay Unit C.

151. Such breach caused and/or contributed to the April 2, 2013 fire.

152. As a direct and proximate cause of the negligence, recklessness, and gross negligence of Club Light, FLP has incurred significant restoration expenses that have gone unpaid, has become involved in litigation in which it faces liability due to the breaches of Club

Light described above, has incurred costs and expenses in order to protect its interests, and has past and future loss of business income.

153. As a result of Club Light's negligence, FLP is entitled to both actual and punitive damages, as well as reasonable attorney's fees and costs of defending this action. Further, FLP is informed and believes it is entitled to recover damages from Club Light or any amount FLP may be required to pay any party herein as a result of the breach of Club Light.

FOR A THIRD CAUSE OF ACTION AGAINST TOP OF THE BAY, INC.
d/b/a CLUB LIGHT
(Indemnity)

154. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

155. FLP has denied Plaintiffs' allegations against it, but in the event FLP is found liable to Plaintiffs for damages based upon the allegations in the Amended Complaint, FLP alleges it is without fault in regard thereto and is entitled to judgment against Club Light for full and complete equitable indemnity and/or contractual indemnity against any such liability, plus costs, expenses, and attorney's fees in defending this action.

Prayer for Relief

WHEREFORE, FLP requests judgment from this Court as follows:

1. That Plaintiffs' First Amended Complaint be dismissed against FLP;
2. For damages, attorney's fees, and costs; and
3. For such other and further relief as this court deems just and proper.

WHEREFORE, FLP respectfully prays for judgment against Yaschik, Smith and EBC as follows:

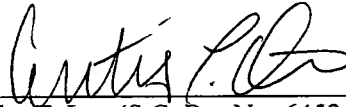
1. Actual damages in the appropriate amount;

2. Punitive damages in the appropriate amount;
3. Indemnity damages if FLP is found liable to Plaintiffs;
4. Prejudgment interest;
5. Attorney's fees;
6. The costs of this action; and
7. Such other and further relief as this Court deems necessary and just.

WHEREFORE, FLP respectfully prays for judgment against Club Light as follows:

1. Actual damages in the appropriate amount;
2. Punitive damages in the appropriate amount;
3. Indemnity damages if FLP is found liable to Plaintiffs;
4. Prejudgment interest;
5. Attorney's fees;
6. The costs of this action; and
7. Such other and further relief as this Court deems necessary and just.

GALLIVAN, WHITE & BOYD, P.A.



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Attorneys for Defendant
Michael J. Quillen Family Limited Partnership

Columbia, South Carolina
June 7, 2015

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) THE NINTH JUDICIAL CIRCUIT

Sea Island Food Group d/b/a Squeeze,

)
) Plaintiff,
)

v.

)
) Yaschik Development Company, Inc.
) d/b/a Yaschik Enterprises, Hilton Smith,
) East Bay Company, LTD., and Michael J.
) Quillen Family Limited Partnership,
)

)
) Defendants.
)

)
) Quillen Enterprises, LLC d/b/a The
) Brick,

)
) Plaintiff-Intervenor,
)

v.

)
) Yaschik Development Company, Inc.
) d/b/a Yaschik Enterprises, Hilton Smith,
) East Bay Company, LTD., and Michael J.
) Quillen Family Limited Partnership,
)

)
) Defendants.
)

)
) Michael J. Quillen Family Limited
) Partnership,

)
) Third-Party Plaintiff,
)

v.

)
) Top of the Bay, Inc. d/b/a Club Light,
)

)
) Third-Party Defendant.
)

)
) Top of the Bay, Inc. d/b/a Club Light,
)

)
) Fourth-Party Plaintiff,
)

v.

)
) Yaschik Development Company, Inc.
) d/b/a Yaschik Enterprises,
)

)
) Fourth-Party Defendant.
)

Civil Action No.: 2013-CP-10-7107

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT
BY

THIRD-PARTY DEFENDANT
TOP OF THE BAY d/b/a
CLUB LIGHT'S ANSWER TO
THIRD PARTY PLAINTIFF'S
COMPLAINT AND
COUNTERCLAIM AGAINST
THIRD-PARTY PLAINTIFF
MICHAEL J. QUILLEN
FAMILY LIMITED PARTNERSHIP AND
FOURTH-PARTY COMPLAINT
AGAINST YASCHIK DEVELOPMENT
COMPANY, INC. d/b/a YASCHIK
ENTERPRISES

COMES NOW, Third-Party Defendant, Top of the Bay, Inc. d/b/a Club Light, by and through its undersigned attorneys, answering the Third-Party Complaint of the Third-Party Plaintiff, counter claiming against Third-Party Plaintiff Michael J. Quillen Family Limited Partnership, and making a Fourth-Party Complaint against Yaschik Development Company, Inc. d/b/a Yaschik Enterprises would allege and show unto the Court:

FOR A FIRST DEFENSE

1. Each and every allegation of the Plaintiff's Complaint not specifically admitted herein is denied.

2. Paragraphs 1 through 38 constitute the Third Party Plaintiff's Answer to the Complaint against it and do not require a response from this Third Party Defendant. To the extent a response is required, all allegations contained therein are denied.

3. Paragraphs 39 through 132 constitute the Third Party Plaintiff's Cross-claims against other parties and do not require a response from this Third Party Defendant. To the extent a response is required, all allegations contained therein are denied.

4. Paragraph 133 is a pleading paragraph and does not require a response. To the extent a response is required, all allegations contained there in are denied.

5. Paragraph 134 is admitted.

6. Paragraph 135 is admitted insofar as it is consistent with the Sublease, which speaks for itself.

7. Paragraph 136 is admitted.

8. Third Party Defendant admits that it was notified that the Master Lease had been purchased from Charleston T&T. Third Party Defendant lacks information sufficient to form a belief as to the remaining allegations of Paragraph 137 and therefore denies the same.

9. Paragraph 138 amounts to a legal conclusion and therefore requires no response from Third Party Defendant. To the extent a response is required, Paragraph 138 is denied and strict proof is demanded thereof.

10. Paragraph 139 is a recitation of the Sublease, which speaks for itself and requires no response from Third Party Defendant. To the extent a response is required, Paragraph 138 is denied and strict proof is demanded thereof.

11. Paragraph 140 is admitted.

12. Third Party Defendant lacks information to form a belief as to the allegations of Paragraphs 141 and 142 and therefore denies the same.

13. Paragraph 143 is a pleading paragraph and does not require a response. To the extent a response is required, all allegations contained there in are denied.

14. Paragraph 144 is a recitation of the Sublease, which speaks for itself and requires no response from Third Party Defendant. To the extent a response is required, Paragraph 144 is denied and strict proof is demanded thereof.

15. Paragraphs 145 through 147 are denied.

16. Paragraph 148 is a pleading paragraph and does not require a response. To the extent a response is required, all allegations contained there in are denied.

17. Paragraph 149 is a recitation of the Sublease, which speaks for itself, as well as a legal conclusion and requires no response from Third Party Defendant. To the extent a response is required, Paragraph 149 is denied and strict proof is demanded thereof.

18. Paragraphs 150 through 155 are denied.

19. To the extent the "Wherefore" paragraphs contain any allegations, those allegations are denied.

FOR A SECOND DEFENSE
(Failure to State a Claim)

20. The allegations contained in the preceding paragraphs, not inconsistent herewith, are hereby realleged as if set forth herein verbatim.

21. The Defendant would show that the Plaintiff's Complaint fails to state a claim upon which relief can be granted, and, therefore should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE
(Comparative Negligence)

22. The allegations contained in the preceding paragraphs, not inconsistent herewith, are hereby realleged as if set forth herein verbatim.

23. The Defendant would show that such injuries or losses that Plaintiff sustained, if any, was due to and caused by the sole negligence, gross negligence, willfulness, wantonness, carelessness and recklessness of the Plaintiff, combining, concurring and contributing with the negligence, if any, on the part of this Defendant, to such a degree that Plaintiff's recovery is barred by the doctrine of comparative negligence in South Carolina.

FOR A FOURTH DEFENSE
(Intervening and Superseding Negligence)

24. The allegations contained in the preceding paragraphs, not inconsistent herewith, are hereby realleged as if set forth herein verbatim.

25. The Defendant would show that such injuries or losses that Plaintiff sustained, if any, as alleged in Plaintiff's Complaint, was not due to or caused by any negligence on the part

of the Defendant, but was rather due to and caused by the contributing, concurring, intervening or superseding fault, breach of warranty or act or omission of a third party, over which this Defendant had no control.

FOR A FIFTH DEFENSE
(Waiver and Estoppel)

26. The allegations contained in the preceding paragraphs, not inconsistent herewith, are hereby realleged as if set forth herein verbatim.

27. The Defendant would show that Plaintiff's Complaint is barred by the doctrine of waiver and estoppel.

FOR A SIXTH DEFENSE
(Spoliation)

28. The allegations contained in the preceding paragraphs, not inconsistent herewith, are hereby realleged as if set forth herein verbatim.

29. The Defendants would show that Plaintiff's Complaint is barred by the doctrine of spoliation.

FOR A SEVENTH DEFENSE
(*Res Ipsa Loquitur*)

30. The allegations contained in the preceding paragraphs, not inconsistent herewith, are hereby realleged as if set forth herein verbatim.

31. Third Party Defendant pleads as a defense the non-applicability of the doctrine of *Res Ipsa Loquitur*, which is not part of the law of this State.

32. Third Party Plaintiff's claims should be dismissed as they rely solely on the doctrine of *Res Ipsa Loquitur*.

FOR AN EIGHTH DEFENSE
(Punitive Damages)

33. The allegations contained in the preceding paragraphs, not inconsistent herewith, are hereby realleged as if set forth herein verbatim.

34. The Defendant alleges that the Plaintiff's claim for punitive damages violates both the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of any meaningful standard and is inconsistent with due process guarantees.

35. The Defendant alleges that the Plaintiff's claim for punitive damages violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the South Carolina Constitution because, even if it could be argued the standard governing the imposition of punitive damages exists, the standard would be void due to vagueness.

36. The Defendant alleges that the Plaintiff's claim for punitive damages violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the Defendant.

37. The Defendant alleges that the Plaintiff's claim of punitive damages violates the doctrine of separation of powers and Article I, Section 3 of the South Carolina Constitution because punitive damages are a creation of the Judicial Branch of government which invades the province of the Legislative Branch of government.

38. Defendant would show, upon information and belief, that the Plaintiff's claim for punitive Damages violates the Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause in that

Defendant could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause is being violated because Defendant can be compelled to give testimony against itself in a penalty situation such as punitive damages; the assessment of punitive damages by a burden of proof less than beyond a reasonable doubt is violative of the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; Plaintiff's claim for punitive damages violates Defendant's right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills this Defendants' exercise of that right; the Plaintiff's claim for punitive damages violates the Eighth Amendment's guarantee that excessive fines shall not be imposed; the Plaintiff's claim for punitive damages violates both the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding either punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, the Plaintiff's claim for punitive damages should be dismissed.

FOR A COUNTERCLAIM AGAINST
MICHAEL J. QUILLEN FAMILY LIMITED PARTNERSHIP
(Breach of Contract)

39. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

40. Third Party Defendant Top of the Bay, Inc. d/b/a Club Light ("Club Light") is a domestic corporation with its principle of business located in Charleston County, South Carolina.

41. This Court has jurisdiction to hear the counterclaim.

42. Charleston T&T, Inc. held a master lease for the property located at 213 East Bay Street, Charleston, South Carolina.

43. On or about April 1, 2012, Charleston T&T, Inc. sublet certain space at 213 East Bay Street to Club Light.

44. On or about March 29, 2012, the Michael J. Quillen Family Limited Partnership ("FLP") purchased the master lease for 213 East Bay Street from Charleston T&T, Inc.

45. The Club Light sublease remained a valid and enforceable contract between Club Light and FLP after the assignment of the master lease and FLP's assumption of the various subleases related to 213 East Bay Street.

46. On or about April 2, 2013, there was a fire at 213 East Bay Street.

47. Pursuant to Section 18 of the sublease between Club Light and FLP, FLP was required to restore 213 East Bay Street to substantially the same condition as it was prior to damage as speedily as practicable.

48. FLP has failed to adhere to Section 18 of the sublease and in doing so has breached the sublease by failing to restore 213 East Bay Street to substantially the same condition as it was prior to the fire of April 2, 2013.

49. As a direct and proximate result of the breach by FLP, Club Light has incurred significant business losses, loss of future income, loss of chattel and other costs and expenses.

50. Paragraph 4 of the sublease between T&T and Club Light, which was assigned to FLP, required FLP as the assignee to maintain adequate insurance on the premises and present to Club Light the insurance bill for payment of its 37% share.

51. FLP failed to procure adequate insurance and the premises were left underinsured. This failure amounts to a breach of the sublease.

52. The underinsurance of the premises has resulted in a delay in its restoration and therefore a loss of use for Club Light and a reduction in business income.

BY WAY OF A FOURTH PARTY COMPLAINT
AND FIRST CAUSE OF ACTION AGAINST
YASCHIK DEVELOPMENT COMPANY, INC.
(Breach of Contract)

53. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

54. A valid contract existed between Defendant Yaschik Development Company and Defendant FLP in the form of the Master Lease.

55. Club Light is a Third-Party Beneficiary of the Master Lease.

56. Defendant Yaschik Development Company breached the contract in that it failed to speedily make repairs and return the building to substantially the same condition as prior to the fire.

57. Club Light suffered damages as a direct and proximate result of Defendant Yaschik Development Company's breach. Said damages included, but were not limited to, significant business losses, loss of future income, loss of chattel and other costs and expenses.

BY WAY OF A FOURTH PARTY COMPLAINT
AND SECOND CAUSE OF ACTION AGAINST
YASCHIK DEVELOPMENT COMPANY, INC..
(Breach of Contract Accompanied by a Fraudulent Act)

58. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

59. A valid contract existed between Defendant Yaschik Development Company and FLP in the form of the Master Lease.

60. Club Light is a Third-Party Beneficiary of the Master Lease.

61. Defendant Yaschik Development Company breached the contract in that it failed to speedily make repairs and return the building to substantially the same condition as prior to the fire.

62. Defendant Yaschik Development Company's breach of contract was accompanied by a fraudulent act not in the making of the contract but in the breaching of its obligation accompanied by dishonesty, unfair dealing, and unlawfully appropriating property in which Club Light had a legal interest.

63. Defendant Yaschik Development Company's termination of the sublease lacked a legal or factual basis and was grounded upon fraudulent and ulterior motives.

64. As a direct and proximate result, Club Light suffered damages including, but not limited to, significant business losses, loss of future income, loss of chattel and other costs and expenses.

65. Club Light is entitled to actual, consequential and punitive damages, as well as costs and attorney's fees relating to the within action.

BY WAY OF A FOURTH PARTY COMPLAINT
AND THIRD CAUSE OF ACTION AGAINST
YASCHIK DEVELOPMENT COMPANY, INC.
(Intentional Interference with a Contractual Relationship)

66. Each and every allegation set forth in the foregoing paragraphs is realleged as if repeated verbatim herein.

67. A valid contract existed between Defendant Yaschik Development Company and FLP in the form of the Master Lease.

68. Club Light is a Third-Party Beneficiary of the Master Lease.

69. Defendant Yaschik Development Company was aware of the contract between Club Light and Michael J. Quillen Family Limited Partnership.

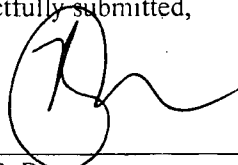
70. Defendant Yaschik Development company intentionally procured the breach of that contract in that they sent a Termination Letter that lacks a legal or factual basis with fraudulent and ulterior motives, they failed to speedily make repairs and return the building to substantially the same condition as prior to the fire, and they stalled reconstruction of the building.

71. Club Light suffered damages as a direct and proximate result of Defendant Yaschik Development Company's breach. Said damages included, but were not limited to, significant business losses, loss of future income, loss of chattel and other costs and expenses.

WHEREFORE, having fully answered, the Third-Party Defendant prays that the Third-Party Plaintiff's Complaint be dismissed with actual damages in the appropriate amount, punitive damages in the appropriate amount, judgment interest, attorneys fees and costs of this action and such other and further relief as this Court deems just and proper on its Counterclaim and Fourth-Party Complaint.

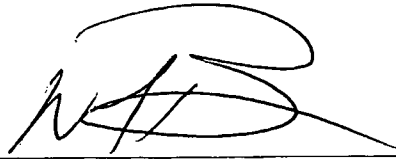
The Third-Party Defendant/Fourth-Party Plaintiff demands a jury trial.

Respectfully submitted,



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*Attorneys for Top of the Bay d/b/a Club Light as
Third-Party Defendant*



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Light as Counter-claimant and Fourth-Party
Plaintiff*

Columbia, South Carolina
August 17, 2015

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2013-CP-10-7107

Sea Island Food Group, LLC d/b/a Squeeze,
Plaintiff,

v.

Yaschik Developent Company, Inc., d/b/a
Yaschik Enterprises, Charleston Capital
Corporation, Thomas M. Ervin, and Michael
J. Quillen Family Limited Partnership,

Defendants.

Quillen Enterprises, LLC d/b/a The Brick,
Plaintiff-Intervenor,

v.

Yaschik Developent Company, Inc., d/b/a
Yaschik Enterprises, Hilton Smith East Bay
Company, LTD., and Michael J. Quillen
Family Limited Partnership,

Defendants.

Michael J. Quillen Family Limited
Partnership

Third-Party Plaintiff

v.

Top of the Bay, Inc. d/b/a Club Light,

Third-Party Defendant

Top of the Bay, Inc. d/b/a Club Light,

Fourth-Party Plaintiff

v.

Yaschik Developent Company, Inc., d/b/a
Yaschik Enterprises,

Fourth-Party Defendant

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2015 SEP 17 PM 2:19
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BY

**FOURTH-PARTY DEFENDANT
YASCHIK DEVELOPMENT
COMPANY, INC. d/b/a YASCHIK
ENTERPRISES' ANSWER TO
FOURTH-PARTY PLAINTIFF TOP OF
THE BAY, INC., d/b/a CLUB LIGHT'S
FOURTH-PARTY COMPLAINT**

CHARLESTON\616760v1

RECORD 000199

Yaschik Development Company, Inc., doing business as Yaschik Enterprises ("Yaschik Development"), by and through counsel, hereby answers Fourth-Party Plaintiff Top of the Bay, Inc., d/b/a Club Light's ("Plaintiff Club Light") Fourth-Party Complaint of as follows:

Paragraphs 1 through 38 represent Plaintiff Club Light's Answer to Third-Party Plaintiff's Complaint and Paragraphs 39 through 52 represent Plaintiff Club Light's Counterclaims against Michael J. Quillen Family Limited Partnership. As such, Paragraphs 1-52 do not necessitate a response. To the extent any response is required, the allegations are hereby denied.

ANSWER TO FOURTH-PARTY COMPLAINT

ANSWERING FIRST CAUSE OF ACTION AGAINST YASCHIK
(Breach of Contract)

1. Responding to Paragraph 53, Yaschik Development incorporates by reference its responses set forth in the preceding paragraphs of this answer as fully as if repeated verbatim herein.

2. Responding to Paragraph 54, Yaschik Development admits that a valid contract existed between Yaschik Development and FLP in the form of the Master Lease before it was automatically terminated on account of the total destruction of the premises at 213 East Bay Street. Yaschik Development craves reference to said Master Lease and denies any allegations inconsistent therewith.

3. The allegations of Paragraph 55 are denied.

4. The allegations of Paragraph 56 are denied.

5. The allegations of Paragraph 57 are denied.

ANSWERING SECOND CAUSE OF ACTION AGAINST YASCHIK
(Breach of Contract Accompanied by Fraudulent Act)

6. Responding to Paragraph 58, Yaschik Development incorporates by reference its responses set forth in the preceding paragraphs of this answer as fully as if repeated verbatim herein.

7. Responding to Paragraph 59, Yaschik Development admits that a valid contract existed between Yaschik Development and FLP in the form of the Master Lease before it was automatically terminated on account of the total destruction of the premises at 213 East Bay Street. Yaschik Development craves reference to said Master Lease and denies any allegations inconsistent therewith.

8. The allegations of Paragraph 60 are denied.

9. The allegations of Paragraph 61 are denied.

10. The allegations of Paragraph 62 are denied.

11. The allegations of Paragraph 63 are denied.

12. The allegations of Paragraph 64 are denied.

13. The allegations of Paragraph 65 are denied.

ANSWERING THIRD CAUSE OF ACTION AGAINST YASCHIK
(Intentional Interference with a Contractual Relationship)

14. Responding to Paragraph 66, Yaschik Development incorporates by reference its responses set forth in the preceding paragraphs of this answer as fully as if repeated verbatim herein.

15. Responding to Paragraph 67, Yaschik Development admits that a valid contract existed between Yaschik Development and FLP in the form of the Master Lease before it was automatically terminated on account of the total destruction of the premises at 213 East Bay

Street. Yaschik Development craves reference to said Master Lease and denies any allegations inconsistent therewith.

16. The allegations of Paragraph 68 are denied.

17. Responding to Paragraph 69, Yaschik Development admits that it was aware that the Master Tenant had sublet the premises to one or more subtenants. Yaschik Development did not learn the details of the sub-leases, including the sub-lease for Club Light, however, until after the fire. The remaining allegations of Paragraph 69 are denied.

18. The allegations of Paragraph 70 are denied.

19. The allegations of Paragraph 71 are denied.

BY WAY OF AFFIRMATIVE DEFENSES

FOR A FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)

20. Plaintiff Club Light has failed to state a claim upon which relief can be granted, and some or all of the claims in 20. Plaintiff Club Light's Amended Complaint should, therefore, be dismissed pursuant to SCRCP 12(b)(6).

FOR A SECOND AFFIRMATIVE DEFENSE
(Waiver and Estoppel)

21. Plaintiff Club Light's claims are barred by the doctrines of waiver and/or estoppel.

FOR A THIRD AFFIRMATIVE DEFENSE
(Laches)

22. Plaintiff Club Light's claims are barred by the doctrine of Laches.

FOR A FOURTH AFFIRMATIVE DEFENSE
(Good Faith and Reasonable Procedures)

23. Any actions taken by and/or any procedures followed by Yaschik Development were taken in good faith, in a reasonable manner, and were authorized by statutes, reasonable in

time and manner, and in compliance with any laws and contracts, and therefore Plaintiff Club Light is precluded from recovery against Yaschik Development.

FOR A FIFTH AFFIRMATIVE DEFENSE
(Intervening Actions of Third Party)

24. Any injury or damage suffered by Plaintiff Club Light, if any, was due to or caused by or occasioned by the intervening actions or omissions of a third party or parties for whom Yaschik Development is not responsible and, therefore, Plaintiff Club Light's claims should be barred or reduced accordingly.

FOR A SIXTH AFFIRMATIVE DEFENSE
(Failure to Mitigate)

25. The damages recoverable by Plaintiff Club Light, if any, must be reduced by any amount of damages caused by Plaintiff Club Light's failure to mitigate such damages in whole or in part.

FOR A SEVENTH AFFIRMATIVE DEFENSE
(Unclean Hands and In Pari Delicto)

26. Plaintiff Club Light's claims are barred by the Doctrines of Unclean Hands and/or In Pari Delicto.

FOR AN EIGHTH AFFIRMATIVE DEFENSE
(Failure to Allege Fraud with Particularity)

27. Plaintiff Club Light has failed to allege fraud with the particularity required under SCRC 9(b).

FOR A NINTH AFFIRMATIVE DEFENSE
(Lack of Standing)

28. Plaintiff Club Light lacks the capacity, authority, and/or standing to assert some or all of the Claims asserted in the Fourth Party Complaint.

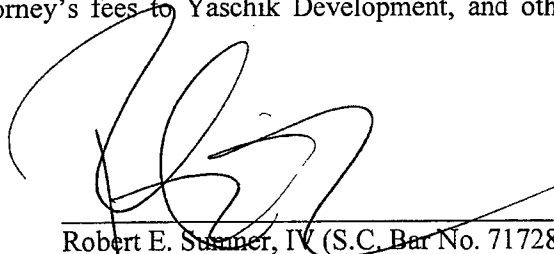
FOR A TENTH AFFIRMATIVE DEFENSE
(Third Party Beneficiary)

29. Plaintiff Club Light's claims are barred in whole or in part based on the fact that the terms of the Lease fail to include any third-party beneficiaries.

ELEVENTH AFFIRMATIVE DEFENSE
(Reservation of Rights to Assert Additional Defenses)

30. Yaschik Development specifically reserves any additional affirmative defenses as may be available to it as are revealed during the course of its investigation and/or discovery in the case, as are consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered Plaintiff Club Light's Answer to Third-Party Plaintiff's Complaint and Counterclaim Against Third-Party Plaintiff Michael J. Quillen Family Limited Partnership and Fourth-Party Complaint Against Yaschik Development Company, Inc., Yaschik Development prays that Plaintiff Club Light's Fourth-Party Complaint be dismissed, with prejudice, and that the Court award attorney's fees to Yaschik Development, and other relief as the Court may deem just and proper.



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Charleston, SC
September 17, 2015

*Attorneys for Yaschik Development
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Enterprises, Charleston Capital
Corporation and Thomas M. Ervin*

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Sea Island Food Group, LLC d/b/a Squeeze,

Plaintiff,

v.

Yaschik Development Company, Inc., d/b/a
Yaschik Enterprises, Charleston Capital
Corporation, Thomas M. Ervin, and Michael
J. Quillen Family Limited Partnership,

Defendants.

Quillen Enterprises, LLC d/b/a The Brick,

Plaintiff-Intervenor,

v.

Yaschik Development Company, Inc., d/b/a
Yaschik Enterprises, Hilton Smith East Bay
Company, LTD., and Michael J. Quillen
Family Limited Partnership,

Defendants.

Michael J. Quillen Family Limited
Partnership

Third-Party Plaintiff,

v.

Top of the Bay, Inc. d/b/a Club Light,

Third-Party Defendant

Top of the Bay, Inc. d/b/a Club Light,

Fourth-Party Plaintiff

v.

Yaschik Development Company, Inc., d/b/a
Yaschik Enterprises,

Fourth-Party Defendant

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO. 2013-CP-10-7107

FILED
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JULIE J. ARNOLD, CLERK
CLERK OF COURT

**YASCHIK DEVELOPMENT
COMPANY, INC.'S MOTION AND
MEMORANDUM IN SUPPORT FOR
JUDGMENT NOTWITHSTANDING
THE VERDICT, OR, IN THE
ALTERNATIVE, A NEW TRIAL
ABSOLUTE, OR, IN THE
ALTERNATIVE, A NEW TRIAL NISI
REMITTITUR**

Pursuant to Rules 50 and 59 of the South Carolina Rules of Civil Procedure, Defendant Yaschik Development Company, Inc., d/b/a Yaschik Enterprises (“Yaschik”) moves for judgment notwithstanding the verdict (“JNOV”), or, in the alternative, a new trial absolute, or, in the alternative, a new trial nisi remittitur. This matter was tried before a jury in Charleston County from January 22 – February 2, 2018, resulting in the following verdict against Yaschik: (1) Defendant Michael J. Quillen Family Limited Partnership (“FLP”) for \$1,112,857.10; (2) Plaintiff Sea Island Food Group, LLC d/b/a Squeeze (“Squeeze”) for \$738,371.64 actual damages and \$469,393.10 punitive damages; and (3) Fourth-Party Plaintiff Top of the Bay, Inc. d/b/a Club Light (“TOTB”) for \$1.00 nominal damages and \$133,333.33 punitive damages. The verdict amount must be reduced by any setoff to be determined by the Court.¹

The Court granted the parties ten (10) days leave to file any post-trial motions. Yaschik moves for relief on the grounds set for below. Yaschik further incorporates all evidence and arguments made during the trial and in its pre-trial motions and memoranda. Yaschik requests a hearing and reserves the right to submit portions of the trial transcript when they are received.

LEGAL STANDARD

I. Judgment Notwithstanding the Verdict.

“In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt.” *Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005) (citations omitted). “When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has

¹ Yaschik hereby adopts the arguments in its Motion for Setoff by reference, pursuant to Rule 10(c), SCRCP.

authority to decide credibility issues or to resolve conflicts in the testimony or evidence.” *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000). A “motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.” *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016).

II. New Trial Absolute.

“The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.” *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 88-89, 610 S.E.2d 852, 856 (Ct. App. 2005) (citing *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). Furthermore,:

The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives . . . The failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal this Court will grant a new trial absolute.

Id. “Alternatively, the trial court may grant a new trial absolute when, sitting as the thirteenth juror, it concludes the jury’s verdict is not supported by the evidence.” *Id.* “Unlike a motion for directed verdict, the trial judge weighs the evidence under the thirteenth juror doctrine and need not view it in the light most favorable to the opposing party. *McEntire v. Mooregard Exterminating Servs.*, 353 S.C. 629, 633, 578 S.E.2d 746, 748 (Ct. App. 2003).

III. New Trial Nisi Remittitur.

“If the trial court determines that the verdict is merely excessive, the court has the power to reduce the verdict by granting a new trial nisi remittitur. A motion for a new trial nisi remittitur asks the trial court to reduce the verdict because the verdict is merely excessive.” *Burke v. AnMed Health*, 393 S.C. 48, 56, 710 S.E.2d 84, 88 (Ct. App. 2011) (citation and internal quotation marks

omitted). “A motion for new trial nisi remittitur asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice.” *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000).

ARGUMENT

I. The Court should grant JNOV in favor of Yaschik.

A. *The Subtenants’ intentional interference with contractual relationship causes of action fail because the Court ruled as a matter of law that there was no breach of the subleases.*

Under South Carolina law, “[t]he elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer’s knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages.” *Vortex Sports & Entm’t, Inc. v. Ware*, 378 S.C. 197, 205, 662 S.E.2d 444, 449 (Ct. App. 2008) (citing *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993)). “[W]ithout a breach of the underlying contract, there can be no recovery.” *First Union Mortg. Corp. v. Thomas*, 317 S.C. 63, 73, 451 S.E.2d 907, 913 (Ct. App. 1994); *see also Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007) (“An essential element to the cause of action for tortious interference with contractual relations requires the intentional procurement of the contract’s breach . . . Where there is no breach of the contract, there can be no recovery.”) (citations omitted.)

In this case, Yaschik is entitled to JNOV on Squeeze and TOTB’s (collectively the “Subtenants”) intentional interference with contractual relationship claims because they cannot establish the third element – procurement of a breach – as a result of the Court’s ruling that there was no breach of the underlying subleases. Because the Court ruled as a matter of law that FLP

did not breach its subleases with Squeeze and TOTB, the Subtenants' causes of action for intentional interference with contractual relations fail.

The Subtenants' claims against Yaschik for intentional interference with contractual relations are based on allegations that Yaschik improperly procured FLP's breach of its subleases with Squeeze and TOTB. Specifically, the Subtenants claim that FLP breached the subleases by failing to speedily make repairs and return the building to substantially the same condition as prior to the fire and that such breach was procured by Yaschik. (*See Squeeze 2nd Am. Compl.*, ¶ 70 and *TOTB 3rd Prty. Ans. & Cntr.-Cln.*, ¶ 47.) The Subtenants also maintained causes of action directly against FLP for breach of contract based, in part, on its failure to restore the premises to substantially the same condition as prior to the fire. (*See Squeeze 2nd Am. Compl.*, ¶ 41 and *TOTB 3rd Prty. Ans. & Cntr.-Cln.*, ¶¶ 48 & 51.) Thus, the Subtentants' claims against Yaschik for intentional interference with contractual relationship derive from the same allegations that form the basis of their claims for breach of contract against FLP.

At the close of evidence, the Court granted directed verdict against the Subtenants' claims against FLP for breach of contract and ruled, as a matter of law, that there was no breach of the subleases. As stated above, "without a breach of the underlying contract, there can be no recovery." *First Union Mortg. Corp.*, 317 S.C. at 73, 451 S.E.2d at 913. Here, because the Court ruled as a matter of law that there was no breach of the subleases, there can be no recovery for intentional interference by the Subtenants. Therefore, Yaschik is entitled to JNOV on the Subtenants' claims. *See id.* (reversing trial court's denial of directed verdict on interference claim because plaintiff did not prove a breach of the underlying contract); *Eldeco*, 372 S.C. at 482, 642 S.E.2d at 732 (affirming directed verdict against plaintiff's interference claim because plaintiff did not prove that third party breached the underlying contract).

B. Yaschik is entitled to JNOV on Squeeze and TOTB's claims for intentional interference with contractual relations because Yaschik was justified in its actions by exercising its contractual rights under the Master Lease.

Yaschik is also entitled to JNOV on the Subtenants' intentional interference with contractual relations claims because there is no evidence to establish the fourth element of those claims, which is that Yaschik's actions lacked justification. As to this fourth element, "[i]nterference with a contract is justified when it is motivated by legitimate business purposes." *Gailliard v. Fleet Mortgage Corp.*, 880 F. Supp. 1085 (D.S.C. 1995). Similarly, "there can be no finding of intentional interference with . . . contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party." *Eldeco*, 372 S.C. at 482, 642 S.E.2d at 732. Where the defendant is acting pursuant to an absolute contractual right, equal or superior to the right of the plaintiff, there is no factual issue as to a claim for intentional interference with contractual relations. *S. Contracting, Inc. v. H.C. Brown Constr. Co.*, 317 S.C. 95, 100, 450 S.E.2d 602, 605 (Ct. App. 1994).

According to the Subtenants, Yaschik lacked a legal or factual basis to terminate the Master Lease, which led to FLP automatically terminating the Subtenants' subleases. As explained below, however, Yaschik's exercise of its contractual rights, regardless of its motive or means, cannot form the basis of a claim of intentional interference with contractual relations, and the Subtenants' causes of action fail as a result.

The analysis in *Webb v. Elrod*, 308 S.C. 445, 418 S.E.2d 559 (Ct. App. 1992), is helpful in illustrating why the Court should grant JNOV in favor of Yaschik. In *Webb*, the Webbs sued the Elrods for intentional interference with the Webbs's contractual relations with third parties. *Id.* at 446, 418 S.E.2d at 560. Specifically, the Webbs purchased land from the Elrods via the execution of two notes and mortgages and eventually became delinquent in their payments. *Id.* To assist in

making payments, the Webbs sold portions of the land to third party purchasers and told them to make their payments directly to the Elrods. *Id.* The third party purchasers did not make their expected payments, and the Elrods informed them that their payments would no longer be accepted and that the Elrods intended to foreclose on the Webbs's mortgages. *Id.* at 447, 418 S.E.2d at 561. The third party purchasers subsequently ceased making all payments, and the Webbs sued the Elrods for intentional interference with contract. *Id.* The Webbs asserted that the Elrods interfered with the Webbs's contracts with the third party purchasers by informing the purchasers that payment would no longer be accepted and of the intention to foreclose. *Id.* At trial, the court granted a directed verdict in favor of the Elrods based on the fact that the Elrods were justified in their actions and "chose to exercise their legal right to foreclose." *Id.* at 448, 418 S.E.2d at 561. In affirming the trial court's decision to grant a directed verdict, the Court of Appeals cited the legal principle that the exercise in good faith of a legal right by a party to a contract affords no basis for an action for intentional interference with a contract. *Id.*

In this case, the Subtenants cannot establish a claim against Yaschik for intentional interference with their subleases with FLP because Yaschik was pursuing its own rights under the Master Lease with FLP and was, therefore, justified in its actions. Under Section 20 of the Master Lease, the Master Lease terminated automatically if the premises were totally destroyed by fire or other casualty. (Trial Ex. S001, Master Lease, ¶ 20.) Thus, termination was an absolute right under the Master Lease, and Yaschik's exercise of that right was superior to any rights that the Subtenants possessed under their subleases with FLP because the subleases were subservient to the Master Lease. 52 C.J.S. *Landlord & Tenant* § 61 ("A sublessee is charged with notice of the terms of the lease and is bound by its conditions."). As such, Yaschik's pursuit of its own contractual rights under the Master Lease cannot give rise to liability for intentional interference

of the Subtenants' rights under their subleases, which were inferior to Yaschik's rights under the Master Lease.

The case of *S. Contracting* is also instructive on this point. In that case, SoCon, a subcontractor on a construction project, sued Great American, a bonding company, for intentional interference with contractual relations after Great American directed the termination of SoCon's subcontract with the prime contractor, Brown Construction. 317 S.C. at 96-97, 450 S.E.2d at 603. Great American had a separate contract with Brown Construction that required Brown Construction to obtain performance and payment bonds from its major subcontractors on the project. *Id.* After SoCon failed to obtain the required bond, Great American allegedly directed Brown Construction to terminate its subcontract with SoCon. *Id.*

In *S. Contracting*, the trial court granted Great American summary judgment on SoCon's claims for intentional interference with contractual relations, finding that Great American's insistence on its contractual rights with Brown Construction was legally justified even if it resulted in the termination of SoCon's subcontract. *Id.* at 98, 450 S.E.2d at 603. On appeal, the Court of Appeals affirmed summary judgment and held that a claim against a defendant for intentional interference with contractual relations cannot be maintained when the defendant is exercising an absolute right, equal or superior to the plaintiff's right. *Id.* at 100-01, 450 S.E.2d at 605. In so doing, the Court rejected SoCon's argument that summary judgment was improper because there was a factual issue based on the purported improper means by which Great American chose to act in enforcing its rights under its contract with Brown Construction. *Id.* at 101, 450 S.E.2d at 605. According to the Court, that argument failed because "SoCon was not a party to that contract and had no contractual right to require good faith and fair dealing by Great American. Therefore, any

inquiry into the manner or uniformity with which Great American chose to enforce its contract with Brown is irrelevant.” *Id.*

S. Contracting dictates that Yaschik be granted JNOV on the Subtenants’ claims for intentional interference with contractual relations. Yaschik’s alleged interference with contractual relations arises from its exercise of its own rights under a separate contract to which the Subtenants were not a party; just as Great American’s alleged interference arose from its insistence of its rights under a contract to which SoCon was not a party. Also, just as Great American’s contract with the prime contractor for the entire construction project was superior to the prime contractor’s subcontract with SoCon, the Master Lease governing the lease of the entire Property is similarly superior to the subleases for a portion of the Premises held by the Subtenants. And similar to the arguments made by SoCon, the argument advanced by the Subtenants in this case attacks the alleged manner of Yaschik’s enforcement of its rights under the Master Lease, which is irrelevant under *S. Contracting*. Therefore, the Court should reject the Subtenants’ intentional interference with contractual relations claims against Yaschik just as the Court of Appeals rejected SoCon’s claim in *S. Contracting*.

Furthermore, the evidence and testimony at trial only buttresses the fact that Yaschik was justified in its actions and was pursuing its rights under the Master Lease. Tom Ervin, president of Yaschik, testified that he terminated the Master Lease pursuant to paragraph 20 because the building was totally destroyed by fire. He further explained that he did not intend to cause harm to the Subtenants. Clint Gaskins agreed on cross-examination that if the premises were totally destroyed by fire, Yaschik had a contractual right to terminate the Master Lease. As such, the evidence at trial only supports the conclusion that Yaschik was justifiably pursuing its rights under the Master Lease and is not liable for intentional interference with contract.

The fact that the jury ultimately concluded that the Property was not totally destroyed by fire does not alter this conclusion. On this point, the case of *Toys "R" Us v. NBD Trust Co.*, 904 F.2d 1172 (7th Cir. 1990) is instructive. In that case, the lease between the landlord and the tenant provided that the tenant could sublease the premises, subject to the landlord's consent, which could not be unreasonably withheld. The landlord refused the tenant's request to sublease the premises, and the tenant sued for breach of contract and interference with its contract to sublease the premises. The court ruled that the trial court properly granted summary judgment on the tenant's interference claim because the landlord was legally justified in refusing to consent to the sublease because it was acting to protect its interest as the owner of the premises. *Id.* at 1178. Significantly, though, the court ruled that the issue of whether the landlord breached the contract by unreasonably withholding consent was a jury issue. *Id.* at 1177-78. Thus, according to the court, the landlord's reliance on debatable language in the lease to withhold consent was reasonable and could not form the basis of an interference claim even if such reliance could constitute a breach of contract. *Id.* at 1178.

Like the landlord in *Toys "R" Us*, Yaschik merely invoked a provision of the master lease that resulted in alleged interference with a sublease agreement. The Court's ruling that the provision in question – Section 20 – was ambiguous and that there was a jury issue of whether that provision was breached dictates that Yaschik's termination of the lease under the lease was not *per se* unreasonable. Even if Yaschik mistakenly concluded the building was "totally destroyed," it was legally justified in doing so. Therefore, the Subtenants cannot prove the necessary element that Yaschik lacked justification in terminating the Master Lease.

To avoid this result, the Subtenants presented evidence which they claim shows that Yaschik was motivated by a prospective deal to sell the premises to East Bay Company in an

attempt to show an improper purpose by Yaschik. According to the Subtenants, the premises were more valuable free and clear of the Master Lease and the subleases, and Yaschik took actions to terminate those leases to maximize its profits from the sale of the building to East Bay Company. Yaschik disputes these arguments. But even when this evidence is construed in a light most favorable to the Subtenants, Yaschik's actions would be justified based on its economic interest in the building and leases in question.

Judicial decisions from across the country recognize that a landlord has a sufficient interest to interfere with a sublease or a prospective or actual lease assignment. *Ran Corp. v. Hudesman*, 823 P.2d 646, 649 (Alaska 1991). These cases hold that "where there is a direct financial interest in a contract, the essential question in determining if interference is justified is whether the person's conduct is motivated by a desire to protect his economic interest, or whether it is motivated by spite, malice, or some other improper objective." *Bendix Corp. v. Adams*, 610 P.2d 24, 31 (Alaska 1980). Thus, even where a landlord interferes with a sublease or potential sublease or assignment for his own economic gain, such interference is justified based on the landlord's desire to protect his economic interest. See, e.g., *Bergfeld v. Stork*, 7 Ill. App. 3d 486, 288 N.E.2d 15 (Ill. Ct. App. 1972) (landlord's interference with lease assignment to obtain higher rent from another tenant "was not inconsistent with a good faith purpose, since he was the owner of the property"); *Ran Corp.*, 823 P.2d at 649-650 (stating that landlord's termination of lease based on knowledge of a more profitable use of property justified landlord's interference with tenant's separate contract to assign the lease). Therefore, even if Yaschik terminated the Master Lease to maximize its return on the sale of the premises, its termination was legally justified, and no claim for intentional interference can be maintained as a result.

Ultimately, the Subtenants improperly used the intentional interference claim as an alternative way to recover for Yaschik's alleged breach of the Master Lease. However, it is Yaschik's direct interest in the Master Lease and the property itself which demonstrate that its termination of the Master Lease was legally justified, regardless of the ultimate effect that such termination had on the subleases. As the cases discussed above establish, a landlord acting pursuant to a contractual right or in furtherance of a legitimate business purpose is justified in interfering with a sublease. Thus, Yaschik is entitled to JNOV on the Subtenants' claims of intentional interference with contractual relations, which are based solely on Yaschik's termination of the Master Lease.

C. *Yaschik is entitled to JNOV on TOTB's claim for intentional interference with contractual relations because TOTB's damages evidence was unreliable and speculative.*

The South Carolina Supreme Court has previously stated that, in order for damages to be recoverable, the "evidence presented must be sufficient to enable the factfinder to make a determination with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculations." *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991) (internal quotation marks omitted). TOTB failed to produce reliable evidence on the damages element for its intentional interference with contractual relations cause of action against Yaschik. Specifically, TOTB identified its profit and loss statements from 2010 to 2013 as the documents it relied on to support its damages. The documents are handwritten, uncertified, contradict other figures submitted to the City of Charleston, and provide no support or explanation for the numbers indicated on them. Furthermore, the testimony attempting to explain the documents clearly demonstrated that they are unreliable. As explained below, and given the

unreliability of the documents produced by TOTB, the jury's award of damages to TOTB was based on improper speculation or guessing and Yaschik is entitled to JNOV.

The analysis in *Drews Co. v. Ledwith-Wolfe Associates, Inc.*, 296 S.C. 207, 371 S.E.2d 532 (1988), is helpful in illustrating how TOTB's evidence as to lost profits failed to clear the "reasonable certainty hurdle." *Id.* at 214, 371 S.E.2d at 536. In *Drews*, the contractor contracted with the owner of a building to convert the building into a restaurant. *Id.* at 208, 371 S.E.2d at 533. The project was eventually delayed, and the owner sued the contractor for breach of contract and alleged that the delays caused the owner to lose profits from the restaurant. *Id.* In support of its claim for lost profits, the owner produced "a sheet of paper reflecting the gross profits the restaurant made in the first 11 months of operation after construction was completed." *Id.* at 214, 371 S.E.2d at 536. The Court explained that "[t]hese figures were not supported with corresponding figures for overhead or operating expenditures, but only with [o]wner's testimony" as to his expectations of profits. *Id.* Ultimately, the Court ruled that the "owner's proof was insufficient to merit submission to the jury." *Id.* The Court further stated that "[o]wner's expectations, unsupported by any particular standard or fixed method for establishing net profits, were wholly insufficient to provide the jury with a basis for calculating profits lost with reasonable certainty." *Id.*

In striking similarity to the owner's damages documentation in *Drews*, TOTB relied on four handwritten sheets of paper attempting to calculate the "Net Profit/Loss" for the company in years 2010 to 2013. The profit and loss statements were not drafted by a TOTB owner or employee and lacked support from any receipts, bills, or other reliable information. The profit and loss statements also contradicted numbers TOTB submitted to the City of Charleston for the same years. Kelly Tant stated the following with regard to the profit and loss statements: (1) her mother

drafted them; (2) she does not know when her mother drafted them; (3) she is not capable of providing a further breakdown of the numbers listed; (4) she does not have nightly reports from the cash registers; (5) she does not have, nor has she requested from her bank, copies of relevant checks; (6) she does not know why there are discrepancies between the statements and tax returns; and (7) she does not know if the statements were created for the litigation. Similarly, Ann Thode, Ms. Tant's mother, testified as follows with regard to the profit and loss statements: (1) the 2010 and 2013 statements were drafted after the litigation commenced and TOTB was served with discovery requests; (2) the 2010 and 2013 statement numbers were extrapolated from handwritten, unsigned, uncertified, and unfiled copies of TOTB's tax returns; (3) she has no personal knowledge about the individual entries on the tax returns; and (4) she is not in possession of any receipts or financial records for TOTB. In other words, just like in *Drews*, the damages here were "not supported with corresponding figures" and were "wholly insufficient to provide the jury with a basis for calculating profits lost with reasonable certainty." *Drews*, 296 S.C. at 214, 371 S.E.2d at 536.

Ultimately, TOTB's proof as to lost profits "must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn." *Id.* at 213, 371 S.E.2d at 536. TOTB's profit and loss statements did not meet this burden, and therefore, Yaschik should be granted JNOV as to TOTB's cause of action for intentional interference with contractual relations.

II. In the alternative, the Court should require a new trial absolute in this matter.²

A. *The jury's verdict is irreconcilably inconsistent.*

“Verdicts which are irreconcilably inconsistent should not stand, and a new trial should be granted, because the parties and the judge ‘should not be required to guess as to what a jury sought to render.’” *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 49, 691 S.E.2d 135 (2010).

1. *Inconsistencies as to breach of the subleases.*

The Court’s directed verdict against the Subtenants’ claims for breach of contract against FLP and the jury’s verdict against Yaschik on the Subtenants’ claims for intentional interference with contractual relations are irreconcilably inconsistent. As explained in Section I.A, above, the tort of intentional interference with contractual relations require the procurement of the breach of the underlying contract. Because the Court ruled that FLP did not breach the underlying subleases, the jury’s finding that Yaschik procured a breach of those subleases is inconsistent with the Court’s decisions. Therefore, a new trial should be granted on the Subtenants’ claims against FLP for breach of contract and against Yaschik for intentional interference with contractual relations.

2. *Inconsistencies as to damages.*

Yaschik is entitled to a new trial on damages because the jury awards on each of the three claims are irreconcilably inconsistent because they are apparently based on different factual conclusions and legal standards despite arising from a common set of facts; agreements, and legal theories.

In this case, FLP’s and the Subtenants’ claims all arise from Yaschik’s termination of the Master Lease, and each party separately sought lost profits arising from the termination. In rebuttal

² Yaschik reasserts the arguments made for JNOV and requests, in the alternative, the Court require a new trial for the reasons set forth in those arguments previously raised.

to the claims for lost profits, Yaschik argued that each party's lost profits should be reduced for a certain period because lost profits would not have been earned during the period of reconstruction. The only competent testimony offered at trial showed that the reconstruction period would have ranged from 24-33 months from the time of fire. In addition, Yaschik argued that the damages period should not extend beyond the expiration of FLP's subleases on March 31, 2017, because any rent beyond that period was speculative and subject to conjecture.

Despite these arguments, it appears that the jury awarded FLP lost profits for a period of approximately fourteen years after the fire, including ten years after the expiration of the subleases, and only included a period of twelve months for reconstruction. Presumably, this award was based on the testimony of Michael Quillen, who testified that FLP's damages calculation was based on the continuation of the Squeeze and TOTB subleases through 2027. The jury awarded no punitive damages to FLP, finding that Yaschik had not acted fraudulently in breaching the Master Lease.

Contrary to its award of lost profits to FLP, the jury seems to have concluded that Squeeze was not entitled to damages beyond the expiration of its sublease on March 31, 2017. It is not clear what reconstruction period, if any, the jury used to reduce Squeeze's alleged damages. The jury also awarded Squeeze \$469,393.10 in punitive damages.

The jury awarded to TOTB only \$1 in actual damages and an additional \$133,333.33 in punitive damages. Therefore, it is impossible to determine the amount of lost profits the jury concluded TOTB suffered, the period when such profits would have been lost, whether they were discounted by a reconstruction period, and, if so, the duration of that period.

The inconsistencies in these awards cannot be reconciled. First, the jury apparently concluded for the purpose of determining FLP's damages that the Squeeze sublease would have continued until 2027, while simultaneously concluding for the purpose of determining Squeeze's

damages that the Squeeze sublease would have terminated in 2017. These two conclusions cannot both be true.

Second, the jury also concluded for the purpose of determining FLP's damages that the TOTB sublease would have continued until 2027. However, the jury also concluded that TOTB suffered only \$1 in lost profits as a result of the Master Lease termination. It is completely unreasonable for the jury to conclude that TOTB would have renewed the lease under the same terms and conditions, including rent, for an additional ten years when it was not profitable. The unreasonableness of this conclusion is further supported by testimony in the record that TOTB was looking to sell Club Light prior to the fire and had bounced a check after the fire. Nevertheless, the jury appears to have adopted that conclusion that TOTB would have renewed the sublease for ten additional years for the purpose of determining FLP's damages.

Third, the jury's awards of punitive damages to Squeeze and TOTB are inconsistent because the jury awarded Squeeze more than three times the amount of punitive damages that it awarded TOTB. This discrepancy is unreasonable and cannot be reconciled with the purposes of punitive damages. Punitive damages are primarily intended to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future – not to compensate the plaintiff. *Clark v. Cantrell*, 339 S.C. 369, 378-79, 529 S.E.2d 528 (2000). By awarding vastly different amounts of punitive damages, the jury apparently viewed punitive damages as a form of compensation rather than as a means of punishment or deterrence.

Fourth, the jury's award of punitive damages to Squeeze and TOTB are inconsistent with its refusal to award punitive damages on FLP's breach of contract accompanied by a fraudulent act. This inconsistency again suggests that the jury awarded punitive damages as a type of compensatory damage rather than as a punishment or deterrent. At the very least, the

inconsistencies in punitive damages shows that the jury applied no evident standard and leaves all parties and the Court guessing at its rationale.

Based on the above inconsistencies, Yaschik is entitled to a new trial on damages. Or, in the alternative, the Court should apply a standard reconstruction time for the purpose of discounting the parties' lost profits, limit the damages period to the expiration of the subleases in March 31, 2017, and eliminate punitive damages pursuant to Yaschik's motion for new trial, as argued below.

B. *The Court failed to consider the elements of estoppel in granting FLP's motion for directed verdict.*

At the close of evidence, FLP moved for a directed verdict on Yaschik's breach of contract cause of action based on the theory that Yaschik was estopped from making the claim. Yaschik's cause of action alleged that "FLP breached the Master Lease in failing to maintain adequate fire and extended coverage for the Property and in failing to maintain the Property" (Am. Ans., ¶ 96.) FLP argued that Yaschik was estopped as a matter of law from contending FLP failed to fulfill its insurance obligations under the Master Lease because Yaschik was aware of the amount of insurance FLP had before the fire. The Court ultimately granted FLP's motion for directed verdict on the grounds that Yaschik was estopped from making the breach of contract claim. In doing so, however, the Court failed to properly consider all the elements of estoppel, and, therefore, directed verdict was improper and Yaschik is entitled to a new trial.

Under South Carolina law, the elements of equitable estoppel as to the party to be estopped are:

- (1) conduct that amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that facts are otherwise than and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall

be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts.

Heritage Fed. Sav. & Loan Ass'n v. Eagle Lake & Golf Condo., 318 S.C. 535, 544, 458 S.E.2d 561, 566-67. “Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other.” *Id.* at 544, 458 S.E.2d at 567.

FLP failed to produce evidence at trial, and the Court failed to properly consider, whether Yaschik, as the party being estopped, had “knowledge, actual or constructive, of the real facts” as it pertains to sufficient insurance for the Property. *Id.* Specifically, Mr. Ervin testified that he did not know how much it would cost to repair or replace the building if it was destroyed in a fire. It is not enough that Yaschik have knowledge of how much insurance FLP had on the building because Yaschik’s cause of action asserted that FLP did not “maintain adequate fire and extended coverage for the Property” (Am. Ans., ¶ 96) (emphasis added.) In other words, Yaschik needed to have knowledge of both the amount of insurance FLP maintained and the amount of insurance needed to repair or replace the building in order to have “knowledge, actual or constructive, of the real facts.”³ Further, the Court was “required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing” directed verdict. *Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005) (citations omitted). Because the evidence, when viewed in the light most favorable to Yaschik, yields to the inference that Yaschik did not have knowledge of the amount of insurance required, the Court improperly granted directed verdict and Yaschik is entitled to a new trial.

³ Yaschik does not concede that it had knowledge of how much insurance was on the building at the time of the fire. The evidence at trial revealed that Mr. Quillen sent Mr. Ervin an e-mail on February 7, 2013, stating that “I will pull the lease and make sure we are in compliance with insurance requirements (I should have already done that).” (Trial Ex. Y157.) Based on this e-mail, it was reasonable for Yaschik to believe that FLP was in the process of adjusting the amount of insurance on the building at the time of the fire.

The Court also failed to properly consider the elements related “to the party claiming estoppel.” *Heritage Fed. Sav. & Loan Ass’n*, 318 S.C. at 544, 458 S.E.2d at 566-67. Those elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts; (2) reliance upon the misleading conduct of the party estopped; and (3) prejudicial change in position. *Id.*

As to the knowledge element, “[o]ne with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been misled.” *Regions Bank v. Schmauch*, 354 S.C. 648, 675, 582 S.E.2d 432, 446 (Ct. App. 2003). The February 7, 2013, email from Mr. Quillen to Mr. Ervin demonstrates that FLP had the means to acquire the knowledge of adequate insurance for the Property. Mr. Quillen specifically states in the February 7 e-mail that he “will pull the lease and make sure we are in compliance with insurance requirements.” (Trial Ex. Y157.) Mr. Quillen could have easily reviewed the terms of the lease and conferred with Yaschik as he said he was going to do, but, instead, he failed to do this and should not be allowed to claim estoppel.

The February 7 e-mail is equally problematic for FLP with regard to the reliance element of estoppel. The e-mail demonstrates that FLP was not relying on Yaschik to make a decision on adequate insurance. Rather, Mr. Quillen clearly states that he is going to “pull the lease and make sure we are in compliance with insurance requirements.” (*Id.*) Put simply, FLP took it upon itself to confirm adequate insurance, it was not relying on Yaschik.

In addition, evidence was produced at trial showing that FLP’s own attorney informed FLP that insurance was FLP’s responsibility and made no mention of reliance on approval from Yaschik. Specifically, the January 22, 2012, email from attorney Jamison Cox to Mr. Quillen states, in relevant part, that “I will chase down information for the other numbers, but need you to

consider how you want to handle insurance (fire and extended coverage) and general liability. Under the Master Lease the tenant is responsible for both and they need to be in place at closing.” (Trial Ex. Y050.) The e-mail clarifies that insurance was FLP’s responsibility and FLP undertook to insure the building without reliance on Yaschik. Further, under the Master Lease, FLP was free to purchase insurance coverage from any insurance company and Yaschik was not required to approve this selection. (Trial Ex. S001, Master Lease, ¶¶ 10, 37.) In short, Yaschik retained no rights or involvement, whatsoever, regarding the insurance on the Property and was relying on the tenant to insure the full value of the building. Because the Court failed to properly consider all the elements of estoppel, directed verdict was improper and Yaschik is entitled to a new trial.

C. *The Court misinterpreted the contractual indemnification language of the Master Lease in granting FLP’s motion for directed verdict.*

FLP moved for a directed verdict on Yaschik’s claim for contractual indemnification based on the theory that the “Indemnity and Liability” provision of the Master Lease was inapplicable to the factual situation in this matter.⁴ The “Indemnity and Liability” provision is Paragraph 23 of the Master Lease, and states, in relevant part, that “[FLP] shall indemnify and save [Yaschik] harmless from any and all claims, damages, costs and expenses, including reasonable attorney’s fees arising from the management of the business conducted by [FLP] at the leased premises.” (Trial Ex. S001, Master Lease, ¶ 23.) FLP argued, and the Court ultimately ruled, that the provision did not apply because the “claims, damages, costs and expenses” suffered by Yaschik in this matter did not arise “from the management of the business conducted by [FLP] at the leased premises.” (*Id.*) This ruling was improper because Yaschik’s damages are a direct result of FLP’s management and Yaschik is therefore entitled to a new trial.

⁴ Yaschik mistakenly designated its indemnification counter-cross claim as an affirmative defense. Pursuant to Rule 8(c), SCRCP, “[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleadings as if there had been a proper designation.” Rule 8(c), SCRCP (emphasis added.)

Multiple witnesses testified during the trial that if FLP had obtained sufficient insurance for the Property, then the building would have been repaired and the lawsuit avoided. For example, Mr. Ervin testified that he would have let Mr. Quillen continue to repair the building and would not have terminated the Master Lease had there been sufficient insurance. Logic therefore dictates that: (1) if FLP had sufficient insurance for the Property, it would have been repaired; (2) if the building was repaired, Yaschik would have never terminated the Master Lease; and (3) if the Master Lease was never terminated, the lawsuit would have been avoided and Yaschik would not have suffered any damages. In other words, Yaschik's damages are a direct result of FLP's failure to properly insure the Property.

Furthermore, FLP's obligation to insure the Property is necessarily included in its "management of the business" it conducted at the Property. FLP did not function as a restaurant or bar at the Property; rather, the only "business" FLP conducted at the Property was that of being a landlord to the Subtenants. Under the subleases, and part of FLP's obligations as landlord, FLP was required to "keep the Premises adequately insured at a reasonable rate" As such, any damages suffered as a result of FLP failing to perform its obligations as a landlord, i.e., failing to adequately insure the building, would also be the result of FLP's "management of the business" it conducted at the Property.

In ruling on a motion for a directed verdict, "the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005) (citations omitted). Further, "[t]he trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Id.* Here, Yaschik was the party opposing FLP's motion for a directed verdict and the Court was required to view the

inferences from the evidence in its favor. In addition, the Court was required to deny FLP's motion if the evidence yielded more than one inference or the inference was in doubt. Because the evidence, viewed in the light most favorable to Yaschik, yields to the inference that FLP's insurance obligations were included in "management of the business," the Court improperly granted directed verdict and Yaschik is entitled to a new trial.

D. *The jury's punitive damages awards were improper and contrary to law.*

The jury awarded punitive damages in this matter to both Squeeze and TOTB. As to Squeeze, the jury awarded \$738,371.64 in actual damages and \$469,393.10 in punitive damages. The jury awarded TOTB \$1.00 in nominal damages and \$133,333.33 in punitive damages. As explained below, the punitive damages awards were not proven by clear and convincing evidence and they are grossly excessive, contrary to law, and violated Yaschik's due process rights. Yaschik is entitled to a new trial, or, in the alternative, a reduction of the award of punitive damages.

1. *The Subtenants failed to present clear and convincing evidence that Yaschik's conduct was willful, wanton, or in reckless disregard of their rights.*

The award of punitive damages was improper because there was no evidence that Yaschik's actions were willful, intentional, or with reckless disregard of the Subtenants' rights. "In order to recover punitive damages, the plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011); see S.C. Code Ann. § 15-33-135 ("In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence"); *Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004) ("On the issue of punitive damages, the highest burden of proof known to the civil law is applicable."). Further, "[t]he test by which a tort is to be characterized as reckless, wil[l]ful or wanton is whether it has been

committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights." *Id.* (citation omitted). In sum, "[i]t is this present consciousness of wrongdoing that justifies the assessment of punitive damages against the tort-feasor" *Id.* (citation omitted).

The evidence at trial showed that Mr. Ervin did not have a present consciousness of wrongdoing when he declared the building totally destroyed. Rather, Mr. Ervin was acting pursuant to a contractual right and on the recommendation of various engineers, contractors, and insurance professionals. Mr. Ervin believed the building to be totally destroyed and that it was impossible to repair what was left of the structure. Furthermore, all parties testified that they did not believe that Mr. Ervin was trying to defraud or harm anyone. The Subtenants failed to meet the clear and convincing burden of proof and the award of punitive damages was improper.

2. The Subtenants' award of punitive damages violates Yaschik's due process rights.

When a party challenges the constitutionality of the amount of punitive damages, the Court is "required to determine whether the award of punitive damages . . . is consistent with due process." *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 396, 714 S.E.2d 904, 911 (Ct. App. 2011). Such a determination requires the Court to determine whether the award was reasonable in light of the following guideposts:

(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id. Applying the facts of this case to these factors demonstrates that the jury's award was unreasonable and not consistent with due process.

i. Reprehensibility.

In order to evaluate the reasonableness of the amount of the award, the Court must first “determine the degree of reprehensibility.” *Id.* at 397, 714 S.E.2d at 911. In making this evaluation, the Court is required to analyze whether:

(i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Id. Notably, “[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” *Duncan v. Ford Motor Co.*, 385 S.C. 119, 143, 682 S.E.2d 877, 889 (Ct. App. 2009) (citation omitted).

As to the first factor, any harm caused to either Squeeze or TOTB was purely economic as neither party alleged any physical harm from Yaschik’s actions. *See Duncan v. Ford Motor Co.*, 385 S.C. 119, 143, 682 S.E.2d 877, 889 (Ct. App. 2009) (stating that a fire destroying a home and personal possessions resulted in purely economic harm). Further, a finding of only economic harm “typically weigh[s] against the reprehensibility.” *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 589, 686 S.E.2d 176, 186 (2009).

Second, it was neither alleged nor proven at trial that Yaschik’s conduct evinced an indifference to or a reckless disregard for the health or safety of others. In fact, Yaschik declaring a building built on a four foot void as totally destroyed ultimately enhanced the health and safety of others. Further, South Carolina law states that “when evaluating the degree of a defendant’s reprehensibility in a post-trial review of the award, the defendant’s reprehensibility is not enhanced pursuant to this second consideration unless it involves the reckless disregard for the health or

safety of people.” *Hollis*, 394 S.C. at 398, 714 S.E.2d at 912. Yaschik’s conduct was not indifferent or reckless to the health or safety of people, and, therefore, this factor favors a lesser degree of reprehensibility.

Third, the Subtenants were not financially vulnerable parties as South Carolina case law typically only finds financial vulnerability for poor or ill individuals. *See Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 629, 720 S.E.2d 473, 483 (Ct. App. 2011) (holding that a fatherless special needs child was financially vulnerable); *Mitchell*, 385 S.C. at 589, 686 S.E.2d at 186 (finding that an HIV positive teenager was financially vulnerable). Squeeze and TOTB are both business entities claiming to be making hundreds of thousands of dollars per year. Further, Squeeze also owned a successful catering company that supplemented any income the company earned from the bar. Kelly Tant also just passed her test to become a real estate appraiser, is about to finish her apprenticeship, and will soon be able to work as a fully-licensed real estate appraiser.

The fourth and fifth considerations also indicate a lower degree of reprehensibility on behalf of Yaschik. As to the fourth consideration, the Subtenants allege only an isolated incident of intentional interference with their subleases. Yaschik’s termination of the Master Lease was a one-time occurrence that happened as the result of the September 11, 2013, letter from Mr. Ervin. No evidence was presented as to whether Yaschik engaged in similar contractual interference with subtenants for other properties. Finally, as to the fifth consideration, any harm suffered by the Subtenants was not the result of intentional malice, trickery, or deceit. Representatives from both Squeeze and TOTB testified that they never had any communications with Yaschik making it impossible for Yaschik to have ever tricked or deceived them. Further, no evidence was produced at trial that Yaschik intended malice towards the Subtenants or ever attempted to harm them. In fact, the evidence was actually to the contrary in that Mr. Ervin testified that he demanded the

Subtenants be provided for in any potential deal with Hilton Smith. The jury also declined to rule that Yaschik committed a fraudulent act when they ruled in favor of Yaschik on FLP's breach of contract accompanied by a fraudulent act claim.

Reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185 (internal quotation marks omitted). Here, the reprehensibility factors are lacking, and their absence "renders any award suspect." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 143, 682 S.E.2d 877, 889 (Ct. App. 2009) (citation omitted). Accordingly, Yaschik's conduct was not sufficiently reprehensible to support the punitive damages awarded.

ii. **Disparity between actual or potential harm and the punitive damages award.**

The second guidepost the Court must examine in determining whether the punitive damages award violates due process is the disparity between the actual or potential harm and the punitive damages award. *Hollis*, 394 S.C. at 396, 714 S.E.2d at 911. The South Carolina Supreme Court has previously stated that, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, a court may consider: "the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185 (2009). It should be noted, however, that "a court may not rely upon these considerations to justify an otherwise excessive punitive damages award." *Id.*

As to the first consideration, deterrence, Yaschik was the biggest loser financially from the fire out of all the parties involved in this lawsuit. Yaschik lost five to six years of income from the building, must pay the damages awards and legal expenses from the lawsuit, and also is responsible for paying to reconstruct the building after it was demolished. This multi-million

dollar loss more than suffices as punishment without additional punitive damages being added. In addition, to the extent punitive damages are intended to punish Yaschik, Yaschik is owned by a charitable foundation and no one at Yaschik gains personally from any profits it makes. Damages in excess of any actual damages suffered by Squeeze and TOTB only function to reduce the money going to charities.

Furthermore, “[t]he deterrent effect [that] the imposition of punitive damages may have on others cannot be used as a significant basis for upholding an award of punitive damages.” *Hollis*, 394 S.C. at 400, 714 S.E.2d at 913. As such, to the extent punitive damages are intended to deter other building owners, the South Carolina Supreme Court “significantly discount[s] the importance of this consideration in evaluating the constitutionality of the award.” *Id.*

The second consideration is “whether the award is reasonably related to the harm likely to result from such conduct.” *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185. Notably, the United States Supreme Court “has consistently pointed out that a reasonable relationship between punitive and actual damages must exist.” *Duncan v. Ford Motor Co.*, 385 S.C. 119, 145, 682 S.E.2d 877, 890 (Ct. App. 2009). Further, the Court has stated “in practice few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process.” *Duncan v. Ford Motor Co.*, 385 S.C. 119, 145, 682 S.E.2d 877, 890 (Ct. App. 2009) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 1524 (2003)). “In the end, a general concern of reasonableness drives [the] inquiry.” *Id.* at 146, 682 S.E.2d at 891.

As to TOTB, a ratio of 133,333.33 to 1 far exceeds a single-digit ratio and it is difficult to imagine how such a ratio represents a reasonable relationship between the punitive and actual damages. By way of comparison, in a case involving a ratio of 127 to 1, the South Carolina Supreme Court stated that “such a sizable disparity between punitive and compensatory damages

establishes a presumption that the punitive damages award is an unconstitutional deprivation of property.” *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 170, 604 S.E.2d 385, 392 (2004). Here, the evidence at trial showed that TOTB was actually losing money in some years and that its profit and loss numbers were inconsistent with filings TOTB made with the City of Charleston. As such, to the extent the Court seeks to compare the punitive damages award to the potential harm TOTB could have suffered, such a comparison is impossible given how unreliable TOTB’s numbers are in this case.

With regard to Squeeze, although the ratio does not exceed a single-digit ratio, the \$469,393.10 in punitive damages does not represent a reasonable relationship between the punitive and actual damages. Specifically, in the context of analyzing FLP’s breach of contract accompanied by a fraudulent act claim, the jury was asked to decide if Yaschik had a fraudulent intent when it terminated the Master Lease. The jury ruled in favor of Yaschik on FLP’s breach of contract accompanied by a fraudulent act claim, and, therefore, necessarily ruled that Yaschik did not have a fraudulent intent. Given this determination by the jury as to the nature of Yaschik’s conduct, a punitive damages award of almost 65% percent of Squeeze’s actual damages is excessive.

Finally, with regard to the third consideration, although Yaschik has the ability to pay the punitive damages, it is important to note “that trial courts must be careful about considering the net worth of the defendant.” *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185 n. 8 (2009). Specifically, “[w]ealth cannot justify an otherwise unconstitutional punitive damages award. While the ability to pay remains relevant to the post-judgment due process review, a punitive damages award should never be based solely on a percentage of the defendant’s net worth.” *Id.* Further, although Yaschik is a high-value entity, it is owned by a charitable foundation with all profits going to the foundation

for distribution to charity. Thus, the only entities being punished by the award of punitive damages are the charities and non-profits of this state.

iii. Comparative penalty awards.

The third guidepost is “the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 402, 714 S.E.2d 904, 914 (Ct. App. 2011). There are no authorized civil penalties applicable to this situation, however, there are four reported opinions in South Carolina in which punitive damages were upheld for tortious interference with contractual relations. See *Vortex Sports & Entm’t, Inc. v. Ware*, 378 S.C. 197, 203, 662 S.E.2d 444, 448 (Ct. App. 2008) (finding a 4.4 to 1 ratio was proper); *Collins Entm’t Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 144, 584 S.E.2d 120, 130 (Ct. App. 2003) (finding a 9.9 to 1 ratio was proper); *Kinard v. Crosby*, 315 S.C. 237, 433 S.E.2d 835 (1993) (finding a 4.8 to 1 ratio was proper); *Collins v. Terry*, 303 S.C. 358, 400 S.E.2d 783 (Ct. App. 1991) (finding a 6 to 1 ratio was proper). Notably, the highest ratio found not to be excessive for a comparable cause of action in South Carolina is 9.9 to 1. TOTB’s ratio far exceeds the previous high at 133,333.33 to 1 and is an obvious outlier with comparable cases.

In sum, Yaschik’s conduct was not sufficiently reprehensible for punitive damages to be awarded. There is also a significant level of disparity between the actual and potential harm suffered by the Subtenants and the amount of the punitive damages awarded by the jury. Further, with regard to the punitive damages awarded to TOTB, the jury’s award of punitive damages is not in accord with punitive damages awarded in comparable cases. As such, the punitive damages awarded by the jury were unconstitutional and Yaschik is entitled to a new trial, or, in the alternative, a reduction of the award of punitive damages.

E. *The Court's charge to the jury failed to give the jury the correct law applicable to its determinations.*

Over objection from Yaschik, the Court instructed the jury as follows with regard to construing the Master Lease: "A lease is to be construed more strongly against the lessor, and in favor of the lessee." (Jury Instructions, p. 7.) Notably, this instruction was the first given to the jury under the heading "Rules of Construction." (*Id.*) As explained below, this instruction was improper and prejudicial to Yaschik, and Yaschik is entitled to a new trial as a result.

"When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues." *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). Furthermore, "[a] trial court must charge the current and correct law." *Welch v. Epstein*, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000). "An erroneous jury instruction will not result in reversal unless it causes prejudice to the appealing party." *Berberich v. Jack*, 392 S.C. 278, 285, 709 S.E.2d 607, 611 (2011). "A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial." *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008).

The crux of this lawsuit was whether the Property was "totally destroyed" pursuant to Paragraph 20 of the Master Lease. Paragraph 20 states that:

If premises are totally destroyed by fire or other casualty, this lease shall terminate as of the date of such destruction and rental shall be accounted for as between Landlord and Tenant as of that date. If premises are damaged but not wholly destroyed by fire or other casualty, rental shall abate in such proportion as use of premises has been lost to the Tenant. Landlord shall restore premises to substantially the same condition as prior to damage as speedily as practicable, whereupon full rental shall commence.

(Trial Ex. S001, Master Lease, ¶ 20.) Throughout the trial, FLP advocated that "totally destroyed" is a purely physical determination and that a person can tell if a building is "totally destroyed"

simply by looking at it. In contrast, Yaschik argued that a determination of “totally destroyed” requires an analysis of the economics, building codes, and feasibility of repair. As such, the outcome of the case was dependent on whichever party’s interpretation of the Master Lease the jury elected to use.

The instruction at issue is an excerpt from *Skull Creek Club P’ship v. Cook & Book*, 313 S.C. 283, 437 S.E.2d 163 (Ct. App. 1993), in which the Court of Appeals construes a provision in a lease against the landlord because the landlord was the drafting party. *Id.* at 286-87, 437 S.E.2d at 165-66. The precise language from the opinion states, “a lease is to be construed more strongly against the lessor, and in favor of the lessee, particularly where the lease was prepared by the lessor.” *Id.* at 286, 437 S.E.2d at 165 (emphasis added). It is important to note that the underlined language clarifies that this rule is intended to be used in situations in which the lessor prepared the lease. That is not the case here, however, as the Master Lease was a form lease that neither party drafted. Further, the additional clarifying language was not included in the instructions given to the jury and the jury was left to assume that the Master Lease was to be construed against Yaschik, regardless of the fact that Yaschik did not draft the Master Lease.

Courts in other jurisdictions have repeatedly held that rules “calling for construction of a contract against the drafter is a rule of last resort.” *Eastgate I-90 Office Bldg. P’ship v. Woodley*, No. 61924-1-I, 2009 Wash. App. LEXIS 935, at *6 (Ct. App. Apr. 27, 2009) (refusing to construe a renewal provision in a lease against the landlord simply because the tenants alleged that the landlord was the drafter); *see also Roberts, Jackson & Assocs. v. Pier 66 Corp.*, 41 Wn. App. 64, 69, 702 P.2d 137 (1985) (stating that the rule that ambiguity be resolved against the drafter applies only where intent of parties cannot be otherwise determined); *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs.*, 896 N.W.2d 115, 131 (Minn. Ct. App. 2017) (“[t]he instruction on contract meaning

was a material misstatement of law because the clause instructing the jury to construe ambiguous terms against the drafter was set on an equal footing with the clause instructing the jury to determine the intent of the parties when faced with ambiguous terms”); *Econ. Premier Assurance Co. v. W. Nat’l Mut. Ins. Co.*, 839 N.W.2d 749, 754 (Minn. Ct. App. 2013) (“[i]n the general context of contract law, *contra proferentem* has historically been regarded as a last resort, used only when other interpretive methods have failed to reveal the parties’ intent.”). The instruction to construe the Master Lease against the landlord should not have been given in this case as the Master Lease was a form lease that neither Yaschik nor FLP drafted. Further, even if the Court determined that the original owner of the Property did draft the Master Lease, which Yaschik denies, it was improper to instruct the jury to construe the Master Lease against Yaschik on equal footing with an instruction that the intent of the parties controls.

Finally, the instruction was inherently prejudicial against Yaschik given that the case turned on the jury choosing between the lessor and lessee’s construction of a key term. The instruction effectively required the jury to utilize FLP’s construction of “totally destroyed” simply because they were the lessee. Yaschik’s case was doomed the second this instruction was given to the jury and Yaschik is entitled to a new trial.

III. In the alternative, the Court should require a new trial nisi remittitur.

As stated above, “[a] motion for new trial nisi remittitur asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice.” *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). Further, “[t]he consideration for a motion for a new trial nisi remittitur requires the trial judge to consider the adequacy of the verdict in light of the evidence presented.” *Proctor v.*

Dep't of Health & Envtl. Control, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006). As explained below, the damages awarded in this case are excessive in light of the evidence presented.

“Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible.” *Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 311, 594 S.E.2d 867, 874 (Ct. App. 2004). In addition, the South Carolina Supreme Court has previously stated that, in order for damages to be recoverable, the “evidence presented must be sufficient to enable the factfinder to make a determination with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculations.” *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991) (internal quotation marks omitted). The actual damages awarded to both Squeeze and FLP exceed the damages suffered by the two parties and places them in a more advantageous position than they were prior to the damage. Further, the evidence as to their future lost profits was speculative and not sufficient to enable the jury to make a determination with reasonable certainty or accuracy.

Squeeze based its lost profits analysis on an annualized annual profit for 2012 in the amount of \$230,198.61. Squeeze applied a growth rate of 5% and calculated lost earnings for the four year period from April 1, 2013, through April 1, 2017, in the amount of \$1,054,816.45. However, as pointed out by Yaschik’s expert in accounting and business valuation, Chris O’Neal, this calculation was inaccurate. First, the analysis improperly added back the owner’s salary despite testimony from Clint Gaskins that he was paid a salary in return for work performed at the Squeeze bar. Second, Mr. O’Neal explained that it was improper to remove the Squeeze on Site operation from the damages calculation because Squeeze on Site was a part of the Sea Island Food Group company at the time of the fire. Third, Mr. O’Neal demonstrated that Squeeze failed to

include the 4% annual rent escalator in the profits calculation, despite language in the sub-lease mandating an annual 4% increase in rents. Fourth, Mr. O'Neal demonstrated that a 5% growth rate was improper based on accepted growth rates for the restaurant and bar industry, and finally that Squeeze did not account for any time for construction and tenant up-fit. Squeeze did not present any testimony to refute the accounting errors contained in its damages calculation. Therefore, Mr. O'Neal's expert opinions went unopposed.

The jury awarded Squeeze \$738,371.64 in actual damages, an amount equal to 70% of the total damages alleged by Squeeze. However, it is evident that the jury did not properly account for the discrepancies in Squeeze's damages calculation. The only competent testimony at trial given on a reasonable amount of time required for construction and tenant up-fit came from expert Eddie Porcher. Mr. Porcher testified that it would take at least 20 months for construction and 4 months for tenant up-fit in order for any tenants to be returned to operation. As such, at a minimum, the damages award for Squeeze should have been reduced by 24 months, which represents 50% of the claimed damages. Furthermore, Squeeze's damages should have been reduced to account for the erroneous handling of the owner salary, Squeeze on Site profits/losses, 4% rent escalator, and growth rate. This was clearly not accounted for. There was simply no basis for the jury to award damages in the amount of \$738,371.64. This amount should be reduced in light of the evidence presented at trial.

The jury awarded FLP \$1,112,857.10 in actual damages. A considerable portion of this award is comprised of lost profits FLP speculates it would earn after the current subleases expire. This is improper as "[t]he crucial requirement in lost profits determinations is that they be established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative." *Drews Co. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 213, 371 S.E.2d 532, 535-

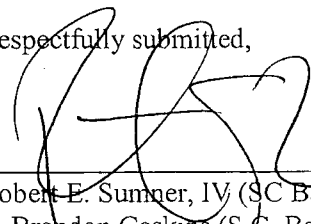
36 (1988) (internal quotation marks omitted.) It is impossible to know if FLP would be able to re-lease the various units of the building, the rate of the future leases, and the amount of time the units would be vacant before being re-leased. FLP's damages award should be reduced to the amount of money FLP would have earned under the subleases in place at the time of the fire.

The evidence in this case demonstrates that the damages awarded to Squeeze and FLP are excessive. The damages fail to account for construction time and the speculative nature of the future lost profits. The damages result in a windfall to Squeeze and FLP as they put them in a more advantageous position than they were before the fire. The Court should decrease the damages awarded to Squeeze and FLP.

CONCLUSION

For the foregoing reasons and those presented at trial, JNOV is appropriate in this case as the result is not supported by the law or the evidence. In the alternative, Yaschik is entitled to a new trial absolute, or, in the alternative, a new trial nisi remittitur.⁵

Respectfully submitted,



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⁵ Yaschik also moves, in the alternative, for relief on all grounds argued above pursuant to Rule 59(e), SCRCP.

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February 12, 2018
CHARLESTON, SC

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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MAY 15 2018

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Roger M. Young, Sr., Circuit Court Judge

SC Court of Appeals

Case No. 2013-CP-10-7107

Sea Island Food Group, LLC d/b/a Squeeze.....Respondent,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Charleston Capital
Corporation, Thomas M. Ervin, Hilton Smith, East Bay Company, LTD., and Michael J.
Quillen Family
Limited Partnership..... Defendants,

Of whom Yaschik Development Company, Inc., d/b/a Yaschik Enterprises
is the.....Appellant,

Of whom Hilton Smith and East Bay Company, LTD.
are the.....Respondent.

Michael J. Quillen Family Limited Partnership.....Respondent,

v.

Top of the Bay, Inc. d/b/a Club Light, Yaschik Development Company, Inc., d/b/a
Yaschik Enterprises, Hilton Smith, East Bay Company, LTD., and Michael J. Quillen
Family Limited Partnership..... Defendants,

Of whom Yaschik Development Company, Inc., d/b/a Yaschik Enterprises
is the.....Appellant.

Michael J. Quillen Family Limited Partnership.....Third-Party Plaintiff,

v.

Top of the Bay, Inc. d/b/a Club Light..... Third-Party Defendant.

Top of the Bay, Inc. d/b/a Club Light.....Respondent,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises Appellant.

NOTICE OF APPEAL

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises (“Appellant”) appeals the following:

(1) Order of the Honorable R. Markley Dennis, Jr. dated November 6, 2017, and filed November 8, 2017, vacating Previous Order Filed July 14, 2015;

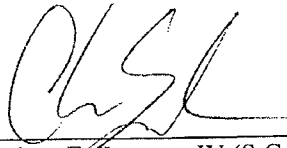
(2) Jury Verdict dated February 2, 2018, and filed on February 5, 2018;

(3) Order of the Honorable Roger M. Young, Sr., dated and filed May 7, 2018, (the “Post-trial Order”) denying Appellant’s Motion for JNOV, Motion for New Trial Absolute, Motion for New Trial *Nisi Remittitur* and granting, in part, and denying, in part, Appellant’s Motion for Setoff; and

(4) Rulings of the Honorable Roger M. Young, Sr. on matters of the admissibility of evidence and jury instructions made during the trial, which began on January 22, 2018, and ended on February 2, 2017.¹

On February 12, 2018, Appellant timely filed the Motion for JNOV, Motion for New Trial Absolute, Motion for New Trial *Nisi Remittitur*, and Motion for Setoff. Appellant received written notice of the entry of the Post-Trial Order on May 8, 2018.

¹ Copies of the Order Vacating Previous Order, Jury Verdict Form, and Post-Trial Order, are attached hereto, as required by South Carolina Appellate Court Rule 203(d)(1)(B).



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*Attorneys for Appellant Yaschik Development
Company, Inc., d/b/a Yaschik Enterprises*

May 11, 2018
Charleston, SC

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ORDER VACATING PREVIOUS ORDER

RECORD 000246

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

Case No. 2013-CP-10-7107

SEA ISLAND FOOD GROUP, LLC)
doing business as SQUEEZE,)

Plaintiff,)

v.)

ORDER VACATING PREVIOUS ORDER
FILED JULY 14, 2015

YASCHIK DEVELOPMENT)
COMPANY, INC. doing business as)
YASCHIK ENTERPRISES, HILTON)
SMITH, EAST BAY COMPANY,)
LTD., and MICHAEL J. QUILLEN)
FAMILY LIMITED PARTNERSHIP,)

Defendants.)

MICHAEL J. QUILLEN FAMILY)
LIMITED PARTNERSHIP,)

Third-Party Plaintiff,)

v.)

TOP OF THE BAY, LLC)

Third-Party Defendant.)

TOP OF THE BAY, LLC,)
d/b/a CLUB LIGHT)

Fourth-Party Plaintiff,)

v.)

YASCHIK DEVELOPMENT)
COMPANY, INC. doing business as)
YASCHIK ENTERPRISES,)

Fourth-Party Defendant.)

FILED
2017 NOV -8 AM 10:00
JULIE J. ARMSTRONG
CLERK OF COURT

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SC Court of Appeals

CHARLESTON\695072v2

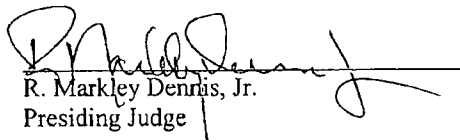
This matter is before the Court on the joint motion of the Plaintiff, Sea Island Food Group, LLC ("Squeeze"), and Defendants East Bay Company Ltd. ("EBCO") and Hilton Smith ("Smith") to vacate the Court's previous Order Granting Motion to Dismiss First Amended Complaint filed July 14, 2015 and to dismiss Squeeze's claims against EBCO and Smith, with prejudice. A hearing was held on October 30, 2017, with the following attorneys appearing: Lindsey W. Cooper, Jr. for Squeeze; Charles J. Baker III for EBCO and Smith; and Robert E. Sumner IV and E. Brandon Gaskins for Yaschik Development Company.

Rule 60(b)(5) of the South Carolina Rules of Civil Procedure allows the Court to grant relief from a judgment or order on the grounds that it is no longer equitable for it to have prospective application. Such a motion is addressed to the sound discretion of the trial court.

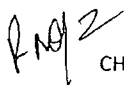
Now, therefore, it is

ORDERED that the Court's previous Order Granting Motion to Dismiss First Amended Complaint filed July 14, 2015, is hereby vacated *nunc pro tunc* and that Squeeze's, EBCO's and Smith's motion to dismiss Squeeze's claims against EBCO and Smith is denied.

AND IT IS SO ORDERED.


R. Markley Dennis, Jr.
Presiding Judge

CHARLESTON, SC
November 6, 2017



CHARLESTON\695072v2

JURY VERDICT FORM

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2013-CP-10-7107

Sea Island Food Group, LLC d/b/a
Squeeze; et al.

Yaschik Development Company, Inc.
d/b/a/ Yaschik Enterprises; et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: **We, the jury, find for the Plaintiff Michael J. Quillen Family Limited Partnership against Yaschik Development Company Inc., d/b/a Yaschik Enterprises. We, the jury, find for the Plaintiff, Sea Island Food Group, LLC d/b/a Squeeze against Yaschik Development Company Inc., d/b/a Yaschik Enterprises. We, the jury, find for the Plaintiff, Top of the Bay, Inc. d/b/a Club Light against Yaschik Development Company Inc., d/b/a Yaschik Enterprises.**

This order ☒ ends ☐ does not end the case.
Additional Information
for the Clerk: _____

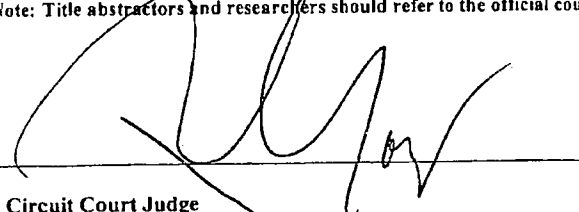
INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Michael J. Quillen Family Limited Partnership	Yaschik Development Company Inc., d/b/a Yaschik Enterprises	\$1,112,857.10 Actual Damages

Sea Island Food Group, LLC d/b/a Squeeze	Yaschik Development Company Inc., d/b/a Yaschik Enterprises	\$738,371.64 Actual Damages \$469,393.10 Punitive Damages
Top of the Bay, Inc. d/b/a Club Light	Yaschik Development Company Inc., d/b/a Yaschik Enterprises	\$1.00 Nominal Damages \$133,333.33 Punitive Damages
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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


 Circuit Court Judge

Judge Code 2134 Date 2/5/18

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

 ATTORNEY(S) FOR THE PLAINTIFF(S)

 ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Amanda Haffenden

) IN THE COURT OF COMMON PLEAS
) FOR THE
) NINTH JUDICIAL CIRCUIT

) CASE NO.: 2013-CP-10-7107

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MAY 15 2018
SC Court of Appeals

MAY 15 2018

SC Court of Appeals

Please answer each of the below questions in order. Your decisions must be unanimous.

MICHAEL J. QUILLEN FAMILY LIMITED PARTNERSHIP (FLP)

Breach of Contract Against Yaschik

Did Yaschik breach the Master Lease by improperly terminating the lease on the basis that the premises were totally destroyed?

Yes ☒ No ☐

If yes, did the breach proximately cause damage to the FLP?

Yes ☒ No ☐

If yes, award appropriate damages to FLP:

\$ 1,112,857.10

If you find for FLP on its Breach of Contract Claim then you may consider the following claims of FLP, Squeeze and TOB. If you find Yaschik did not breach its contract with FLP, stop deliberating.

FLP Breach of Contract Accompanied by a Fraudulent Act Against Yaschik

If yes in FLP's Breach of Contract claim against Yashick and damages awarded:

Was Yaschik's breach of the Master Lease accompanied by a fraudulent act?

Yes ☐ No ☒

If yes, did the breach proximately cause damage to the FLP?

Yes ☐ No ☒

If yes and proven by clear and convincing evidence, award punitive damages to FLP:

\$ 0

Sea Island Food Group, LLC, d/b/a Squeeze

Intentional Interference with Contract Against Yaschik

Did Yaschik intentionally interfere with Squeeze's sublease without justification by terminating the Master Lease?

Yes ☒ No ☐

If yes, did the interference proximately cause damage to Squeeze? Yes ☒ No ☐

If yes, award appropriate damages to Squeeze:

\$ 738,371.⁶⁴

If proven by clear and convincing evidence, award punitive damages to Squeeze:

\$ 469,393.¹⁰

Top of the Bay, Inc., d/b/a Club Light

Intentional Interference with Contract Against Yaschik

Did Yaschik intentionally interfere with Top of the Bay's sublease without justification
by terminating the Master Lease?

Yes ☒ No ☐

If yes, did the breach proximately cause damage to TOB?

Yes ☒ No ☐

If yes, award appropriate damages to Top of Bay:

\$ \$1.00

If proven by clear and convincing evidence, award punitive damages to Top of the Bay:

\$ 133,333.³³

Tashers Myer 2/2/18
Foreman/Date

POST-TRIAL ORDER

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Sea Island Food Group, LLC d/b/a Squeeze,

Plaintiff,

v.

Yaschik Development Company, Inc., d/b/a
Yaschik Enterprises, Charleston Capital
Corporation, Thomas M. Ervin, and Michael
J. Quillen Family Limited Partnership,

Defendants.

Quillen Enterprises, LLC d/b/a The Brick,

Plaintiff-Intervenor,

v.

Yaschik Development Company, Inc., d/b/a
Yaschik Enterprises, Hilton Smith East Bay
Company, LTD., and Michael J. Quillen
Family Limited Partnership,

Defendants.

Michael J. Quillen Family Limited
Partnership,

Third-Party Plaintiff

v.

Top of the Bay, Inc. d/b/a Club Light,

Third-Party Defendant

Top of the Bay, Inc. d/b/a Club Light,

Fourth-Party Plaintiff

v.

Yaschik Development Company, Inc., d/b/a
Yaschik Enterprises,

Fourth-Party Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO. 2013-CP-10-7107

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JULIE J. HARRISON
CLERK OF COURT

ORDER ON POST-TRIAL MOTIONS

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SC Court of Appeals

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The trial of this case began on January 22, 2017 and ended on February 2, 2017 in Charleston County, resulting in the following verdict against Yaschik Development Company, Inc. ("Yaschik"): (1) Defendant Michael J. Quillen Family Limited Partnership ("FLP") on its Breach of Contract cause of action for \$1,112,857.10; (2) Plaintiff Sea Island Food Group, LLC d/b/a Squeeze ("Squeeze") on its Intentional Interference with Contractual Relations cause of action for \$738,371.64 actual damages and \$469,393.10 punitive damages; and (3) Fourth-Party Plaintiff Top of the Bay, Inc. d/b/a Club Light ("TOTB") on its Intentional Interference with Contractual Relations cause of action for \$1.00 nominal damages and \$133,333.33 punitive damages.

Following trial, several post-trial motions were made by Yaschik, Squeeze, and TOTB. On February 12, 2018, Yaschik filed a Motion for Judgment Notwithstanding the Verdict ("JNOV"), or, in the alternative, a New Trial, or, in the alternative, a New Trial *Nisi Remittitur*, and also a Motion for Setoff. Also on February 12, 2018, Squeeze filed a Motion for Written Court Ruling regarding this Court's granting Directed Verdict motions against Squeeze in favor of both Yaschik and FLP, or, in the alternative, a Motion to Reconsider said rulings. On February 20, 2018, TOTB filed a Motion for New Trial *Nisi Additur*, and also a Motion for a New Trial. Also on February 20, Yaschik filed a Motion for Stay of Execution of Judgment.

BACKGROUND

This dispute involved the building located at 213 East Bay Street ("213 East Bay"), in Charleston, South Carolina, which was burned by a fire on April 2, 2013. 213 East Bay is owned by Yaschik, and Yaschik's president is Thomas Ervin. 213 East Bay Street is subject to a Master Lease which was held by the FLP. Michael Quillen is the general partner of the FLP. Yaschik purchased the property in 2003 for approximately \$1,800,000.00. FLP purchased the Master Lease in March 2012 from Charleston T&T for \$500,000.00. 213 East Bay includes four

subdivided units held by three tenants (collectively, "subtenants"): (1) Squeeze, (2) The Brick (which is owned by the FLP), and (3) TOTB. At the time of FLP's purchase of the Master Lease, the subleases between the subtenants and Charleston T&T were assigned to FLP. The Master Lease and subleases were all triple-net leases, meaning the landlord under each lease passes down costs to the tenants. The tenant is required to pay - in addition to rent - the building's property taxes, maintenance, user fees, utilities, and insurance. This meant that Yaschik required the FLP to pay all of the expenses of the building, and the FLP required Squeeze, The Brick, and TOTB to pay the expenses. Ultimately, the subtenants paid for the building upkeep, maintenance, and insurance.

Importantly, Paragraph 20 of the Master Lease read: "If premises are totally destroyed by fire or other casualty, this lease shall terminate as of the date of such destruction and rental shall be accounted for as between Landlord and Tenant as of that date. If premises are damaged but not wholly destroyed by fire or other casualty, rent shall abate in such proportion as use of premises has been lost to the Tenant. Landlord shall restore premises to substantially the same condition as prior to damage as speedily as practicable, whereupon full rental shall commence." In conjunction with its purchase of the Master Lease, FLP acquired Charleston T&T's insurance policy, which had as well as \$1,000,000.00 in liability insurance as required by the Master Lease.

On the night of April 2, 2013, a fire originated on the second floor of 213 East Bay. Following the fire, FLP and Yaschik agreed that FLP would oversee the shoring and initial repair. FLP contracted with Belfor to secure the building and begin the clean-up process, and contracted with Applied Building Sciences, Inc. ("ABS") to perform architectural and engineering services for the repair of the building. FLP continued to update Yaschik and the subtenants on the repair efforts over the course of the next five months.

In late August 2013, ABS informed FLP and Yaschik that plans for repairs were nearly ready to be submitted to the City. On September 3, 2013, the FLP sent Yaschik a letter advising of several developments, including the insurance company's approval of payment of the policy limits and that structural plans were to be completed that day, and stating that Yaschik- as the building owner- would need to approve those plans. FLP followed up with email correspondence on September 5th and 6th, neither of which were responded to by Yaschik. On September 11, 2013, five months after the fire and after significant headway had been made by the FLP and subtenants towards repairing building, Yaschik sent FLP a letter purporting to terminate the Master Lease pursuant to the above-mentioned "Paragraph 20" on the basis the building was a total loss. The FLP advised Yaschik it did not believe the building had been "totally destroyed" by fire, and therefore, that it's purported termination was ineffective.

As early as May 2013, Yaschik had been negotiating with an entity known as East Bay Company, Ltd. ("EBCO") to purchase the building at 213 East Bay Street. EBCO owns all surrounding buildings on that particular block of East Bay and Cumberland Streets. These negotiations culminated in a December 30, 2013 agreement for the sale of 213 East Bay Street. Per the agreement, the completion of the sale is subject to the cancellation of the Master Lease with FLP and the cancellation of the assignment of rights under the subleases.

The present lawsuit followed. FLP's breach of contract and breach of contract accompanied by a fraudulent act claims against Yaschik were submitted to the jury, along with Squeeze and TOTB's intentional interference with contractual relations claims against Yaschik.

The reason the Court directed the verdicts at trial was the uncontroverted fact that Yaschik sent the letter terminating the lease on the grounds of total destruction due to the fire. Everything in this case flows from that uncontested fact, and no other cause of action by any of the parties against any other party could go forward with that action being taken by Yaschik. It

was either a justified act or an unjustified act, which was for the jury to decide, but there is no disputing it occurred. The lease provided that total destruction was retroactive to the date of the fire loss, which negated anything FLP did to begin repairs in the months between the fire and the declaration of total loss. Despite the fact that FLP may have had a duty to repair the premises so the subtenants could move back in if the fire did not cause a total loss, as a matter of law, FLP was relieved of any obligations it had to repair the property for the subtenants when Yaschik declared it a total loss. Indeed, FLP could not continue its repair efforts. That is why the Court dismissed the subtenants claims against FLP – Yaschik's action made it impossible for them to make any more repairs. The only factual question left for the jury to determine was whether Yaschik was justified in exercising its right to declare it a total loss. The jury found that Yaschik was not justified in doing so, and awarded FLP \$1,112,857.10 in compensatory damages. Similarly, the jury also found that Yaschik's actions unjustifiably interfered with the subtenant's leases with FLP. This is a perfectly understandable conclusion, and the verdicts are completely consistent in this regard. In fact, it would have been inconsistent to allow a verdict against FLP by the subtenants because the evidence was uncontroverted that Yaschik declared that the fire damage caused a total loss. At that moment in time, FLP could no longer make repairs. The only question was whether Yaschik's decision was justified or not.

If the jury had found Yaschik's decision to declare the property a total loss, they would have found the Master Lease was not breached. Necessarily, the jury would have had to find Yaschik did not intentionally interfere with the subtenants. Indeed, had they found Yaschik was justified in declaring the property a total loss, but also found that Yaschik intentionally interfered with the subleases, the Court would have had to overturn those verdicts as being inconsistent.

LEGAL STANDARDS



i. New Trial Absolute

When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice. *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). In other words, to warrant a new trial absolute, the verdict reached must be so "grossly excessive" as to clearly indicate the influence of an improper motive on the jury. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993). Alternatively, the trial court may grant a new trial absolute when, sitting as the thirteenth juror, it concludes the jury's verdict is not supported by the evidence." *Duncan v. Hampton Co. Sch. Dist. No. 2*, 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999). Finally, a new trial may be granted where verdicts are irreconcilably inconsistent. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010).

ii. Judgment Notwithstanding the Verdict

A motion for judgment notwithstanding the verdict, or JNOV, is a "renewal of the directed verdict motion." *Glover v. N. Carolina Mut. Life Ins. Co.*, 295 S.C. 251, 368 S.E.2d 68 (Ct. App. 1988). "In ruling on a motion for JNOV, the trial judge cannot disturb the factual findings of a jury unless a review of the record discloses no evidence which reasonably supports them." *Burns v. Universal Health Servs., Inc.*, 361 S.C. 221, 603 S.E.2d 605 (Ct. App. 2004). "The trial court must deny the motion when the evidence yields more than one inference or its inferences are in doubt." *Id.* at 232. The verdict should be upheld "if there is any evidence to sustain the factual findings implicit in the jury's verdict." *Id.*



iii. New Trial *Nisi Remittitur*

“Compelling reasons must be given to justify invading the jury’s province by granting a new trial *nisi remittitur*.” *Proctor v. Dep’t of Health and Envtl. Control*, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006). “The consideration for a motion for a new trial *nisi remittitur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented.” *Id.*

ANALYSIS

A. Yaschik

i. JNOV

Yaschik claims it is entitled to JNOV because the subtenants cannot establish their claims of intentional interference with a contract. To establish an action for intentional interference with a contract, the plaintiff must establish (1) the existence of a contract; (2) the wrongdoer’s knowledge of the contract; (3) the intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 336 S.E.2d 472 (1985). Yaschik contends that the third and fourth elements cannot be, and were not, established by the subtenants.

With regard to the third element, this Court did not rule that as a matter of law there was no breach of the sublease, but rather, it was found that there was a valid defense to the breach (namely, impossibility due to Yaschik’s conduct). Specifically, it was found that Yaschik’s conduct in sending a letter purporting to terminate the Master Lease made it impossible for FLP to perform its obligations to the subtenants. A finding of impossibility of performance is not a finding that the contract was not breached or that it was cancelled. Rather, the finding was that Yaschik interfered with the sublease and rendered FLP’s performance impossible – thereby justifying FLP’s breach. This finding inherently entails that the subleases were indeed breached,

and, therefore, the subtenants met this third element at trial. With regard to the fourth element, the question of whether Yaschik acted without justification was a factual determination to be made by the jury.

At trial, photographs of the building were shown to the jury showing portions of the premises largely intact. Also, evidence was presented showing that Thomas Ervin did not visit the building during the five months following the fire when FLP was making substantial efforts and rehabilitating the premises. Moreover, expert testimony at trial indicated that the building could have been restored to substantially the same condition. There was sufficient evidence presented at trial for a jury to reasonably conclude that Yaschik acted in bad faith by declaring the premises totally destroyed. The jury here could have reasonably, and based upon the evidence at trial, ultimately did find, that Yaschik knew of the valid and existing subleases, that Yaschik intentionally procured FLP's breach of the subleases by terminating the Master Lease on the basis of "total destruction," and that subtenants suffered damage as a result thereof. As such, Yaschik's Motion for JNOV is denied.

ii. New Trial Absolute

Yaschik also argues that it is entitled to a New Trial Absolute because the jury's verdict is irreconcilably inconsistent. Yaschik argues that the verdicts are "apparently based on different factual conclusions and legal standards despite arising from a common set of facts, agreements, or legal theories." In support of this position, Yaschik points out that the jury awarded FLP damages as if its sublease with Squeeze lasted through 2027, while awarding Squeeze damages only through 2017. However, these two positions are entirely consistent as Squeeze's sublease did indeed end in 2017 while FLP's Master Lease ran through 2027. It is well within the realm of reason to think that FLP would have had Squeeze, or another paying subtenant, in its property

through the end of its Master Lease. This was, after all, one of the most desirable retail locations on the Charleston peninsula.

Yaschik also points out in furtherance of its position the vast discrepancy between TOTB's damages and Squeeze's damages. However, as addressed below, Squeeze made a detailed showing at trial that it was profitable, and had the records to confirm that contention, while TOTB failed to make such a showing. Yaschik also points to the differing punitive damages awarded in this case, but that inconsistency is also addressed below.

Yaschik also contends that this Court erred in directing verdict in favor of FLP against Yaschik on Yaschik's breach of contract claim against FLP. Yaschik argues that the Court failed to consider all of the elements of estoppel when directing verdict in favor of FLP. Specifically, Yaschik points to the third element of estoppel- "knowledge, actual or constructive, of the real facts" as the element that was not considered. *Heritage Fed. Sav. & Loan Ass'n v. Eagle Lake & Golf Condo*, 318 S.C. 535, 458 S.E.2d 561. At trial, it was held that Thomas Ervin, as President of Yaschik, was estopped from alleging a breach of contract claim against FLP on the basis of "adequate insurance" because there was evidence that Mr. Ervin at least constructively knew of the amount of insurance on the building. While FLP was the party responsible for obtaining the insurance, Yaschik was, after all, the owner of the building itself. There was sufficient evidence presented that Mr. Ervin constructively knew the amount of insurance on the building.

Yaschik also contends that the Court erred in interpreting the contractual indemnification language of the Master Lease; specifically Paragraph 23 which states, "[FLP] shall indemnify and save [Yaschik] harmless from any and all claims, damages, costs expenses, including reasonable attorney's fees *arising from the management of the business* conducted by [FLP] at the leased premises." (Emphasis added). FLP argued at trial at this lease provision does not

apply because the “claims, damages, costs and expenses” suffered by Yaschik did not arise from the management of the business. At trial, this Court agreed with this contention by FLP, and no evidence has been presented which changes that position now.

Yaschik also moves for a new trial on the basis that an instruction given to the jury was improper. The instruction at issue is, “A lease is to be construed more strongly against the lessor, and in favor of the lessee.” Yaschik argues that a clarifying instruction should have been added which states, “*particularly* where the lease was prepared by the lessor.” (Emphasis added). Yaschik contends that it’s “case was doomed the second this instruction was given to the jury.” First, the challenged jury instruction is not erroneous, and is a correct statement of the applicable South Carolina law. Just because the law doesn’t support Yaschik’s position does not entail that the instruction is erroneous or prejudicial. Second, this jury instruction is not an outside-the-scope principle of law, and, rather, directly relates to the issues raised in the pleadings and at trial.

Finally, Yaschik’s objection centers on the fact that the clarifying instruction of “particularly where the lease was prepared by the lessor” was not added. However, even if that clarifying phrase was added, the gist of the jury instruction remains the same. Yaschik argues that it did not draft the lease, and therefore, the charge is prejudicial. However, the Court of Appeals’ use of the word “particularly” is important here because it signifies that a lease is to be more strongly construed against the lessor *especially when* it is prepared by the lessor. Whether the clarifying phrase is added or not does not change the essence of what the instruction conveys. In fact, it could be argued that the addition of the requested clarifying phrase would prejudice Yaschik to a greater degree, since Yaschik’s complaint with the instruction is, after all, that it did not draft the lease agreement.

iii. New Trial *Nisi Remittitur*



Yaschik's Motion for a New Trial *Nisi Remittitur* is also denied. The jury verdict amounts are consistent, adequate, and reasonable based upon the evidence presented at trial. The jury awarded Squeeze \$738,371.64 in actual damages, an amount equal to 70% of the total damages alleged by Squeeze. This 30% reduction is evidence that the jury considered the proper extenuating factors related to Squeeze's lost earnings calculation, such as future rent escalations, future earnings growth rate percentages, owner salary, and restoration up-fit time.

The jury awarded FLP \$1,112,857.10 in actual damages. Yaschik contends that this award is invalid for being too speculative, as it is largely based on lost profits which would have accrued after the subtenants leases expired. This contention fails for two reasons. First, evidence presented at trial indicated that, even though the subtenants leases expired in 2017, they were planning on renewing their respective subleases if given the opportunity. Second, and as mentioned above, 213 East Bay Street is a prime retail location. It is not conjectural or speculative to conclude that even if Squeeze, TOTB, and The Brick all did not renew their subleases- FLP would have had no trouble finding new subtenants. It is uncontroverted that FLP's Master Lease ran through 2027, and the jury's award reflected that fact. FLP adequately established their lost profits with reasonable certainty at trial. No evidence has been presented which indicates that the jury awards to Squeeze or FLP place them in "a more advantageous position" than they were before the fire. Therefore, Yaschik's Motion for a New Trial *Nisi Remittitur* is denied.

iv. Yaschik Punitive Damages

Yaschik also contends that the punitive damages awarded to the subtenants - Squeeze and TOTB - were improper and contrary to law. Yaschik's first contention in this regard is that the subtenants failed to present clear and convincing evidence that Yaschik's conduct was willful, wanton, or in reckless disregard of their rights. The test used to make this determination is whether the tort was "committed in such a manner or under such circumstances that a person of ordinary

reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights." *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011). There was sufficient evidence presented at trial upon which the jury could have, and did indeed, determine that Mr. Ervin acted in such a way that he was conscious that his behavior would interfere with the subtenants rights under the contract. Indeed, the evidence showed that he conducted negotiations- unbeknownst to and to the detriment of the subtenants- with EBCO and Mr. Hilton Smith to buy 213 East Bay Street. This first factor is heavily in favor of allowing the punitive damages awarded to the subtenants to stand.

Yaschik's second contention is that the award of punitive damages violated Yaschik's due process rights. This is examined by looking at (1) the degree of reprehensibility of the conduct, (2) the disparity between the actual or potential harm and the amount awarded, and (3) the civil penalties authorized or imposed in comparable cases. *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011). We will examine these in turn.

First, the degree of reprehensibility is determined by weighing the following factors: (1) the harm caused being physical as opposed to economic, (2) the level of indifference for the health and safety of others, (3) the victim's financial vulnerability, (4) whether the conduct was isolated or repeated, and (5) whether the harm to the victim resulted from a malice or deceit, as opposed to a mere accident. The first two factors here clearly favor Yaschik's position. The tortious conduct did not put anyone's health or safety at risk, and the harm was purely economic. However, the next three factors all favor upholding the imposition of the punitive damages. The victims were small business bar owners whose livelihoods depended on the success of their bars. They were financially vulnerable, and the complained of conduct of Mr. Ervin directly impacted their financial vulnerability. Also, Yaschik was the building owner and the subtenants were merely subtenants- further evidencing the subtenant's vulnerability. The fourth element also favors

upholding the punitive damage award as Mr. Ervin's complained of conduct did not occur within one day, one week, or even one month, and, rather, the evidence indicated the negotiations with EBCO occurred over a period of months. Finally, the fifth element clearly supports the award of punitive damages, as the conduct involved was no mere accident, and the jury could properly infer a degree of deceit from the evidence presented.

The second guidepost in reviewing a punitive damage award takes a look at the disparity, if any, between actual or potential harm and the punitive damages award. To make this determination, a court may consider: (1) the likelihood the award will deter future like conduct; (2) whether the award is reasonably related to the harm likely to result from such conduct; and (3) the defendant's ability to pay. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). Examining the factors, it is reasonable to think that the award of punitive damages will deter Mr. Ervin from future like conduct, the award is directly related to the harm resulting from his conduct, and Yaschik easily has the ability to pay.

The third guidepost compares the punitive award to civil penalties authorized or imposed in comparable cases. Here, there are no civil penalties applicable to this situation. However, an examination of South Carolina case law shows that the highest ratio of actual damages to punitive damages ever upheld in this state was a ratio of 9.9:1. Thus, the award to Squeeze falls within well within this accepted ratio.

Yaschik also claims punitive damages awarded to TOTB are constitutionally excessive. The nominal damages awarded to TOTB were \$1.00, while the punitive damages awarded to TOTB were \$133,333, representing a 133,333:1 ratio. Courts are leery of upholding punitive damages awards that are "excessive" and South Carolina is no different. *See 2 Punitive Damages: Law and Prac. 2d § 18:6* (2017). However, this case is novel in South Carolina, so far as case law seems to indicate, because the jury granted a large punitive damage award after only awarding a

nominal damage award of \$1.00. A punitive damage award of \$9.00 or \$10.00 would be absurd. There is no question the two subtenants were similarly situated and similarly impacted by Yaschik's actions. The difference in compensatory damage awards can be attributed to the fact that TOTB did not do a satisfactory job of presenting financial records to back its claim for economic losses, as discussed below. However, because the facts of the case are uniquely postured vis-à-vis two similarly situated subtenants, it seems proper to compare the punitive damage awards to them (which the jury seemed to do), and this Court finds the awards very much compare favorably to each other and in relation to Yaschik. Viewed in that light, the punitive damage award to TOTB is not excessive and, therefore, upheld as well.

v. Setoff

Yaschik seeks a setoff to account for various other payments received by FLP, TOTB, and Squeeze. Specifically, Yaschik seeks a setoff for any monies received by FLP and Squeeze in regards to claims they settled with EBCO, and Hilton Smith (EBCO's President), prior to trial. FLP alleged claims of tortious interference with contract, intentional interference with prospective contractual relations, violation of South Carolina unfair trade practices act, indemnity, and civil conspiracy, with Squeeze alleging intentional interference with a contract, against Mr. Smith and EBCO. All of these claims were settled pre-trial, and Yaschik now seeks a setoff for any monies paid as a result of those settlements.

There "can be only one satisfaction for an injury or wrong." *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012). Therefore, "the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury." *Id.* at 471-72. "When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." *Id.*

Yaschik is entitled to a reduction in the verdict amounts pertaining to FLP and Squeeze insofar as they received settlement funds relating to the breach of the Master Lease from EBCO and Mr. Hilton Smith. This amount has not yet been identified, so an exact calculation cannot yet be had. The parties have ten days to inform the Court of those amounts so the verdicts can be properly reduced to account for those prior settlements.

Yaschik also seeks a setoff for any funds paid by TOTB to FLP on FLP's causes of action for breach of contract, negligence, and indemnity relating to the fact that the fire started in TOTB's rental unit. However, these causes of actions arose from a separate injury- namely, the fire itself rather than anything relating to the lease agreements- so any settlement monies paid, if any, as a result of this pre-trial settlement will not be applied to the setoff. Therefore, its Motion for Setoff is denied with respect to TOTB.

Additionally, Yaschik's Motion for Setoff is granted insofar as it pertains to the business interruption insurance proceeds received by Squeeze and FLP. Both Squeeze and FLP received \$60,000.00 in business interruption insurance proceeds. At the beginning of trial, the parties stipulated on the record that any damages awarded to Squeeze and FLP would be reduced by the amount received from the business interruption proceeds. As such, the award to FLP and Squeeze are both reduced by the amount each received in business interruption insurance proceeds, which amounts to \$60,000.00 each. Therefore, Yaschik's Motion for Setoff is granted, in part, with respect to any pre-trial settlement monies paid by EBCO and Hilton Smith to FLP and Squeeze, and with respect to the business interruption insurance proceeds received by Squeeze and FLP. The remainder of Yaschik's Motion for Setoff is denied.

vi. Motion for Stay of Execution

Yaschik also filed a Motion for Stay of Execution of Judgment, pursuant to Rule 62(b), SCRCP, seeking to stay the executions of the judgments against it during the pendency of the

present post-trial motions. As this Order addresses the post-trial motions, the execution of this Order moots Yaschiks Motion for Stay of Execution.

B. Top of the Bay

i. New Trial *Nisi Additur*

TOTB made a Motion for New Trial *Nisi Additur* on the basis that the jury's award of \$1.00 in nominal damages to TOTB on its intentional interference with contractual relations claim was excessively inadequate, and that they are entitled to an award of actual damages. The South Carolina Supreme Court has previously stated that, in order for damages to be recoverable, the "evidence presented must be sufficient to enable the factfinder to make a determination with reasonable certainty or accuracy. Neither the existence, causation, nor amount of damages can be left to conjecture, guess, or speculations." *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 407 S.E.2d 630 (1991).

TOTB relied on its profit and loss statements from 2010 to 2013 in support of its damages. The documents are handwritten, uncertified, contradict other figures submitted to the City of Charleston, and provide no support or explanation for the numbers indicated on them. In support of its motion, TOTB argues that the other "almost identically situated" subtenant (Squeeze) received more than \$750,000 in actual damages, and, thus, the award of only \$1.00 was "clearly excessively inadequate." However, although Squeeze and TOTB were both subtenants, the evidence indicated they were in very different positions financially, and with respect to the manner in which their financial records were kept. Expert testimony from trial indicated that Squeeze's financial records were maintained in an exemplary fashion. Squeeze was also able to corroborate its records through electronic and other means.

Kelly Tant of TOTB stated the following with regard to the profit and loss statements: (1) her mother drafted them; (2) she is not capable of providing a breakdown of the numbers listed,

(3) she does not have reports from the cash registers, (4) she does not have, nor has she requested, copies of relevant checks from her bank, and (5) she does not know why there are discrepancies between the statements and tax returns. Ann Thode, Ms. Tant's mother, testified that: (1) the statements were drafted after the commencement of litigation and TOTB was served with discovery requests, (2) the statements were extrapolated from other handwritten, unsigned, uncertified, and unfiled copies of TOTB's tax returns, (3) she has no knowledge about the individual entries on the tax returns, and (4) she is not in possession of any receipts or financial records for TOTB. TOTB's damages figures were "not supported with corresponding figures" and were "wholly insufficient to provide the jury with a basis for calculating profits lost with reasonable certainty." *Drews Co. v. Ledwith-Wolfe Associates, Inc.*, 296 S.C. 207, 371 S.E.2d 532 (1988). Therefore, TOTB's Motion for *Nisi Additur* is denied.

ii. Motion for New Trial

TOTB also filed a Motion for a New Trial, and argues this Court erred in granting Directed Verdict against TOTB on its breach of contract claim against FLP. As explained above in relation to Squeeze, Yaschik's terminating the Master Lease terminated Squeeze's sublease agreement as a matter of law. Thus, FLP could not have breached a sublease that no longer existed. The breach of the sublease would have had to occur before Yaschik terminated FLP's Master Lease, but the evidence presented indicated no such breach. In fact, the evidence showed that FLP went above and beyond its contractual duties during the five months following the fire in regards to rehabilitating the premises. Once the Master Lease was terminated, it became impossible for FLP to further perform. Therefore, TOTB's Motion for a New Trial is denied.

C. Squeeze

Squeeze filed a Rule 59(e), SCRCp, Motion for Reconsideration with regard to this Court's granting of a Directed Verdict against Squeeze on its breach of contract claim against Yaschik,

and against Squeeze on its breach of contract claim against FLP. At trial, it was held that Squeeze could not pursue its breach of contract claims against Yaschik because Squeeze was not an intended third-party beneficiary of the lease between Yaschik and FLP. Squeeze argues that the language of the Master Lease evidences that it was indeed a third-party beneficiary. Specifically, they point to Paragraph 1 ("Tenant has the right to sublet"), and Paragraph 36 ("if this lease shall be assigned or sublet, shall include also tenant assignees or subleases, as to premises covered by such assignment or sublease"), and the fact that the Master Lease had language removing all restrictions on subletting. However, giving the tenant the right to sublet, or language which indicates a hypothetical subtenant, does not rise to the level of bestowing third-party beneficiary status on an after-the-fact subtenant. Nothing in the Master Lease indicates that the parties thereto intended to confer a direct benefit on Squeeze. In fact, when the Master Lease was executed in 1997, Squeeze would not be in existence for another 12 years. The possibility that a subtenant may come in down the road at some point was certainly contemplated, but no evidence exists which indicates the parties to the Master Lease intended to confer a direct benefit on Squeeze. Therefore, Squeeze lacked third-party beneficiary status, and, as such, lacked standing to bring its breach of contract action against Yaschik. In any event, the verdict against Yaschik on Squeeze's intentional interference cause of action was presumably for the same damages Squeeze suffered relating to its breach of contract claim. On top of that, Squeeze got an award of punitive damages, which would not have been allowed in a breach of contract claim.

At trial, Directed Verdict was also granted against Squeeze on its breach of contract claim against FLP. The basis of that ruling was that, due to Yaschik's terminating the Master Lease, it became impossible for FLP to continue its efforts in rehabilitating the premises. Squeeze argues that it had a separate contract with FLP which required FLP to "restore the premises to substantially the same condition as prior to damage as speedily as practicable" in the event there was a fire.

However, for five months following the fire, FLP undertook rather significant steps toward fulfilling this obligations; including, but not limited to, contracting with Belfor and ABS in furtherance of that goal. It was not until Yaschik terminated the Master Lease, rendering it an impossibility, that FLP ceased its rehabilitation efforts. Therefore, Squeeze's Rule 59(e) Motion to Reconsider is denied.

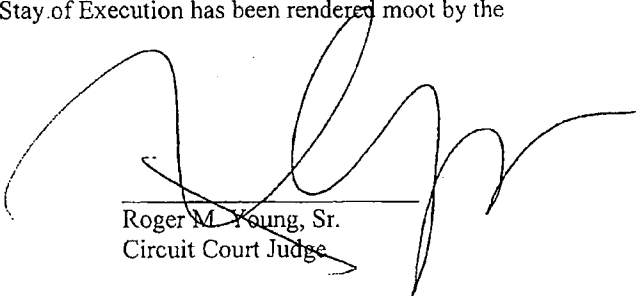
CONCLUSION

Having considered the arguments, supporting and opposing documents, and based on the same, it is therefore ORDERED, ADJUDGED AND DECREED:

1. Yaschik's Motions for JNOV, New Trial Absolute, and for New Trial *Nisi Remittitur* are denied; and
2. Squeeze's Motion to Reconsider is denied; and
3. TOTB's Motions for New Trial Absolute and New Trial *Nisi Additur* are denied; and
4. Yaschik's Motions for Setoff is granted, in part, and denied, in part. As discussed above, Yaschik's Motion for Stay of Execution has been rendered moot by the execution of this Order.

IT IS SO ORDERED!

5/7 2018



Roger M. Young, Sr.
Circuit Court Judge

COPY

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Roger M. Young, Sr., Circuit Court Judge

RECEIVED
MAY 15 2018
SC Court of Appeals

Case No. 2013-CP-10-7107

Sea Island Food Group, LLC d/b/a Squeeze.....Respondent,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Charleston Capital Corporation, Thomas M. Ervin, Hilton Smith, East Bay Company, LTD., and Michael J. Quillen Family Limited Partnership..... Defendants,

Of whom Yaschik Development Company, Inc., d/b/a Yaschik Enterprises is the..... Appellant,

Of whom Hilton Smith and East Bay Company, LTD. are the..... Respondent.

Michael J. Quillen Family Limited Partnership..... Respondent,

v.

Top of the Bay, Inc. d/b/a Club Light, Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Hilton Smith, East Bay Company, LTD., and Michael J. Quillen Family Limited Partnership..... Defendants,

Of whom Yaschik Development Company, Inc., d/b/a Yaschik Enterprises is the..... Appellant.

Michael J. Quillen Family Limited Partnership..... Third-Party Plaintiff

v.

Top of the Bay, Inc. d/b/a Club Light..... Third-Party Defendant.

Top of the Bay, Inc. d/b/a Club Light..... Respondent,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises Appellant.

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Respondents in the foregoing matter with a copy of the foregoing *Notice of Appeal* by depositing the same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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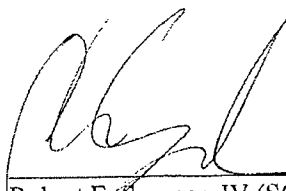
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May 11, 2018
CHARLESTON, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Roger M. Young, Sr., Circuit Court Judge

Case No. 2013-CP-10-7107

RECEIVED
JUN 04 2018
SC Court of Appeals

Sea Island Food Group, LLC d/b/a Squeeze.....Respondent,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Hilton Smith, East Bay Company, LTD., and Michael J. Quillen Family Limited Partnership..... Defendants,

Of whom Yaschik Development Company, Inc., d/b/a Yaschik Enterprises
is the.....Appellant,

Of whom Hilton Smith and East Bay Company, LTD.
are..... Respondents,

Of whom Michael J. Quillen Family Limited Partnership is a.....Respondent.

Michael J. Quillen Family Limited Partnership..... Third-Party Plaintiff,

v.

Top of the Bay, Inc. d/b/a Club Light..... Third-Party Defendant.

Top of the Bay, Inc. d/b/a Club Light.....Respondent,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises Appellant.

AMENDED NOTICE OF APPEAL

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises ("Appellant")
appeals the following:

(1) Order of the Honorable R. Markley Dennis, Jr. dated November 6, 2017, and
filed November 8, 2017, Vacating Previous Order Filed July 14, 2015;

(2) Jury Verdict dated February 2, 2018, and filed on February 5, 2018;

(3) Order of the Honorable Roger M. Young, Sr., dated and filed May 7, 2018,
(the "Post-trial Order") denying Appellant's Motion for JNOV, Motion for New Trial
Absolute, Motion for New Trial *Nisi Remittitur* and granting, in part, and denying, in part,
Appellant's Motion for Setoff;

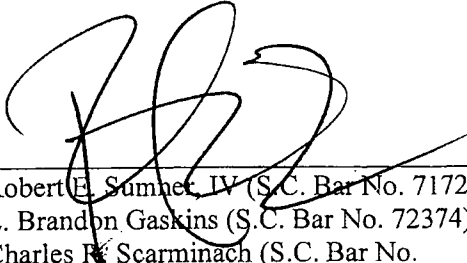
(4) Rulings of the Honorable Roger M. Young, Sr. on matters of the admissibility
of evidence and jury instructions made during the trial, which began on January 22, 2018,
and ended on February 2, 2018;

(5) Order of the Honorable Roger M. Young, Sr., granting, in part, and denying,
in part, the directed verdict motions made by Appellant and Respondents during the trial
which began on January 22, 2018 and ended on February 2, 2018.¹

On February 12, 2018, Appellant timely filed the Motion for JNOV, Motion for
New Trial Absolute, Motion for New Trial *Nisi Remittitur*, and Motion for Setoff.
Appellant received written notice of the entry of the Post-Trial Order on May 8, 2018.

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¹ Copies of the Order Vacating Previous Order, Jury Verdict Form, and Post-Trial Order, are attached
hereto, as required by South Carolina Appellate Court Rule 203(d)(1)(B). All other rulings at issue were
not reduced to writing but were made orally from the bench.



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June 1, 2018
Charleston, SC

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

Case No. 2013-CP-10-7107

SEA ISLAND FOOD GROUP, LLC)
doing business as SQUEEZE,)

Plaintiff,)

v.)

**ORDER VACATING PREVIOUS ORDER
FILED JULY 14, 2015**

YASCHIK DEVELOPMENT)
COMPANY, INC. doing business as)
YASCHIK ENTERPRISES, HILTON)
SMITH, EAST BAY COMPANY,)
LTD., and MICHAEL J. QUILLEN)
FAMILY LIMITED PARTNERSHIP,)

Defendants.)

MICHAEL J. QUILLEN FAMILY)
LIMITED PARTNERSHIP,)

Third-Party Plaintiff,)

v.)

TOP OF THE BAY, LLC)

Third-Party Defendant.)

TOP OF THE BAY, LLC,)
d/b/a CLUB LIGHT)

Fourth-Party Plaintiff,)

v.)

YASCHIK DEVELOPMENT)
COMPANY, INC. doing business as)
YASCHIK ENTERPRISES,)

Fourth-Party Defendant.)

FILED
2017 NOV - 8 AM 10:00
JULIE J. ANASTAS RONG
CLERK OF COURT

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JUN 04 2018

SC Court of Appeals

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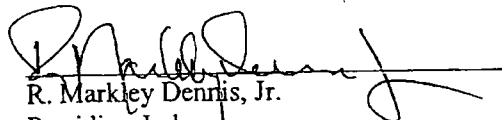
This matter is before the Court on the joint motion of the Plaintiff, Sea Island Food Group, LLC ("Squeeze"), and Defendants East Bay Company Ltd. ("EBCO") and Hilton Smith ("Smith") to vacate the Court's previous Order Granting Motion to Dismiss First Amended Complaint filed July 14, 2015 and to dismiss Squeeze's claims against EBCO and Smith, with prejudice. A hearing was held on October 30, 2017, with the following attorneys appearing: Lindsey W. Cooper, Jr. for Squeeze; Charles J. Baker III for EBCO and Smith; and Robert E. Sumner IV and E. Brandon Gaskins for Yaschik Development Company.

Rule 60(b)(5) of the South Carolina Rules of Civil Procedure allows the Court to grant relief from a judgment or order on the grounds that it is no longer equitable for it to have prospective application. Such a motion is addressed to the sound discretion of the trial court.

Now, therefore, it is

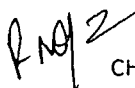
ORDERED that the Court's previous Order Granting Motion to Dismiss First Amended Complaint filed July 14, 2015, is hereby vacated *nunc pro tunc* and that Squeeze's, EBCO's and Smith's motion to dismiss Squeeze's claims against EBCO and Smith is denied.

AND IT IS SO ORDERED.


R. Markley Dennis, Jr.
Presiding Judge

CHARLESTON, SC
November 6, 2017

ATTEST: A TRUE COPY
JULIE Y. ARMSTRONG (SEAL)
CLERK, C.P. & S.C.
By  DEPUTY CLERK



CHARLESTON\695072v2

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2013-CP-10-7107

Sea Island Food Group, LLC d/b/a
Squeeze; et al.

Yaschik Development Company, Inc.
d/b/a/ Yaschik Enterprises; et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: **We, the jury, find for the Plaintiff Michael J. Quillen Family Limited Partnership against Yaschik Development Company Inc., d/b/a Yaschik Enterprises. We, the jury, find for the Plaintiff, Sea Island Food Group, LLC d/b/a Squeeze against Yaschik Development Company Inc., d/b/a Yaschik Enterprises. We, the jury, find for the Plaintiff, Top of the Bay, Inc. d/b/a Club Light against Yaschik Development Company Inc., d/b/a Yaschik Enterprises.**

This order ☒ ends ☐ does not end the case.

Additional Information
for the Clerk :

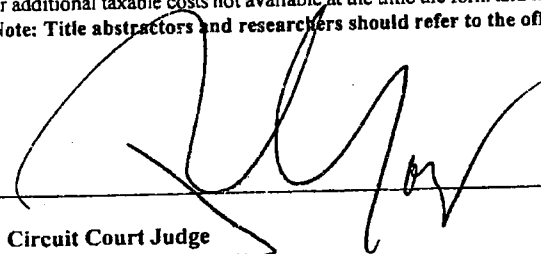
INFORMATION FOR THE PUBLIC INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Michael J. Quillen Family Limited Partnership	Yaschik Development Company Inc., d/b/a Yaschik Enterprises	\$1,112,857.10 Actual Damages

Sea Island Food Group, LLC d/b/a Squeeze	Yaschik Development Company Inc., d/b/a Yaschik Enterprises	\$738,371.64 Actual Damages \$469,393.10 Punitive Damages
Top of the Bay, Inc. d/b/a Club Light	Yaschik Development Company Inc., d/b/a Yaschik Enterprises	\$1.00 Nominal Damages \$133,333.33 Punitive Damages
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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



Circuit Court Judge

2134
Judge Code

2/5/18
Date

For Clerk of Court Office Use Only

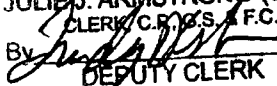
This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Amanda Haffenden

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK C.R. & S. & F.C.
By 
DEPUTY CLERK

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE
) NINTH JUDICIAL CIRCUIT

SEA ISLAND FOOD GROUP, LLC,
D/B/A SQUEEZE,

Plaintiff,

v.

YASCHIK DEVELOPMENT
COMPANY, INC., D/B/A YASCHIK
ENTERPRISES and MICHAEL J.
QUILLEN FAMILY LIMITED
PARTNERSHIP

Defendants.

MICHAEL J. QUILLEN FAMILY
LIMITED PARTNERSHIP,

Third-Party Plaintiff,

v.

TOP OF THE BAY, INC., D/B/A
CLUB LIGHT,

Third-Party Defendant.

TOP OF THE BAY, INC., D/B/A
CLUB LIGHT,

Fourth-Party Plaintiff,

v.

YASCHIK DEVELOPMENT
COMPANY, INC. D/B/A YASCHIK
ENTERPRISES

Fourth-Party Defendant.

CASE NO.: 2013-CP-10-7107

VERDICT FORM

RECEIVED

JUN 04 2018

SC Court of Appeals

Please answer each of the below questions in order. Your decisions must be unanimous.

MICHAEL J. QUILLEN FAMILY LIMITED PARTNERSHIP (FLP)

Breach of Contract Against Yaschik

Did Yaschik breach the Master Lease by improperly terminating the lease on the basis that the premises were totally destroyed?

Yes ☒ No ☐

If yes, did the breach proximately cause damage to the FLP?

Yes ☒ No ☐

If yes, award appropriate damages to FLP:

\$ 1,112,857.10

If you find for FLP on its Breach of Contract Claim then you may consider the following claims of FLP, Squeeze and TOB. If you find Yaschik did not breach its contract with FLP, stop deliberating.

FLP Breach of Contract Accompanied by a Fraudulent Act Against Yaschik

If yes in FLP's Breach of Contract claim against Yashick and damages awarded:

Was Yaschik's breach of the Master Lease accompanied by a fraudulent act?

Yes ☐ No ☒

If yes, did the breach proximately cause damage to the FLP?

Yes ☐ No ☒

If yes and proven by clear and convincing evidence, award punitive damages to FLP:

\$ 0

Sea Island Food Group, LLC, d/b/a Squeeze

Intentional Interference with Contract Against Yaschik

Did Yaschik intentionally interfere with Squeeze's sublease without justification by terminating the Master Lease?

Yes ☒ No ☐

If yes, did the interference proximately cause damage to Squeeze? Yes ☒ No ☐

If yes, award appropriate damages to Squeeze: \$ 738,371.⁶⁴

If proven by clear and convincing evidence, award punitive damages to Squeeze:

\$ 469,393.¹⁰

Top of the Bay, Inc., d/b/a Club Light

Intentional Interference with Contract Against Yaschik

Did Yaschik intentionally interfere with Top of the Bay's sublease without justification

by terminating the Master Lease?

Yes ☒ No ☐ ~~Yes~~ ~~No~~ 2/2/18

If yes, did the breach proximately cause damage to TOB?

Yes ☒ No ☐ ~~Yes~~ ~~No~~ 2/2/18

If yes, award appropriate damages to Top of Bay:

\$ \$1.00

If proven by clear and convincing evidence, award punitive damages to Top of the Bay:

\$ 133,333.³³

Toushees Myer 2/2/18
Foreman/Date

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO. 2013-CP-10-7107

Sea Island Food Group, LLC d/b/a Squeeze,

Plaintiff,

v.

Yaschik Development Company, Inc., d/b/a
Yaschik Enterprises, Charleston Capital
Corporation, Thomas M. Ervin, and Michael
J. Quillen Family Limited Partnership,

Defendants.

Quillen Enterprises, LLC d/b/a The Brick,

Plaintiff-Intervenor,

v.

Yaschik Development Company, Inc., d/b/a
Yaschik Enterprises, Hilton Smith East Bay
Company, LTD., and Michael J. Quillen
Family Limited Partnership,

Defendants.

Michael J. Quillen Family Limited
Partnership,

Third-Party Plaintiff

v.

Top of the Bay, Inc. d/b/a Club Light,

Third-Party Defendant

Top of the Bay, Inc. d/b/a Club Light,

Fourth-Party Plaintiff

v.

Yaschik Development Company, Inc., d/b/a
Yaschik Enterprises,

Fourth-Party Defendant.

FILED
2018 MAY -7 PM 2:38
JULIE J. SHERIDAN
CLERK OF COURT

ORDER ON POST-TRIAL MOTIONS

RECEIVED
JUN 04 2018
SC Court of Appeals

B

The trial of this case began on January 22, 2017 and ended on February 2, 2017 in Charleston County, resulting in the following verdict against Yaschik Development Company, Inc. ("Yaschik"): (1) Defendant Michael J. Quillen Family Limited Partnership ("FLP") on its Breach of Contract cause of action for \$1,112,857.10; (2) Plaintiff Sea Island Food Group, LLC d/b/a Squeeze ("Squeeze") on its Intentional Interference with Contractual Relations cause of action for \$738,371.64 actual damages and \$469,393.10 punitive damages; and (3) Fourth-Party Plaintiff Top of the Bay, Inc. d/b/a Club Light ("TOTB") on its Intentional Interference with Contractual Relations cause of action for \$1.00 nominal damages and \$133,333.33 punitive damages.

Following trial, several post-trial motions were made by Yaschik, Squeeze, and TOTB. On February 12, 2018, Yaschik filed a Motion for Judgment Notwithstanding the Verdict ("JNOV"), or, in the alternative, a New Trial, or, in the alternative, a New Trial *Nisi Remittitur*, and also a Motion for Setoff. Also on February 12, 2018, Squeeze filed a Motion for Written Court Ruling regarding this Court's granting Directed Verdict motions against Squeeze in favor of both Yaschik and FLP, or, in the alternative, a Motion to Reconsider said rulings. On February 20, 2018, TOTB filed a Motion for New Trial *Nisi Additur*, and also a Motion for a New Trial. Also on February 20, Yaschik filed a Motion for Stay of Execution of Judgment.

BACKGROUND

This dispute involved the building located at 213 East Bay Street ("213 East Bay"), in Charleston, South Carolina, which was burned by a fire on April 2, 2013. 213 East Bay is owned by Yaschik, and Yaschik's president is Thomas Ervin. 213 East Bay Street is subject to a Master Lease which was held by the FLP. Michael Quillen is the general partner of the FLP. Yaschik purchased the property in 2003 for approximately \$1,800,000.00. FLP purchased the Master Lease in March 2012 from Charleston T&T for \$500,000.00. 213 East Bay includes four

subdivided units held by three tenants (collectively, "subtenants"): (1) Squeeze, (2) The Brick (which is owned by the FLP), and (3) TOTB. At the time of FLP's purchase of the Master Lease, the subleases between the subtenants and Charleston T&T were assigned to FLP. The Master Lease and subleases were all triple-net leases, meaning the landlord under each lease passes down costs to the tenants. The tenant is required to pay - in addition to rent - the building's property taxes, maintenance, user fees, utilities, and insurance. This meant that Yaschik required the FLP to pay all of the expenses of the building, and the FLP required Squeeze, The Brick, and TOTB to pay the expenses. Ultimately, the subtenants paid for the building upkeep, maintenance, and insurance.

Importantly, Paragraph 20 of the Master Lease read: "If premises are totally destroyed by fire or other casualty, this lease shall terminate as of the date of such destruction and rental shall be accounted for as between Landlord and Tenant as of that date. If premises are damaged but not wholly destroyed by fire or other casualty, rent shall abate in such proportion as use of premises has been lost to the Tenant. Landlord shall restore premises to substantially the same condition as prior to damage as speedily as practicable, whereupon full rental shall commence." In conjunction with its purchase of the Master Lease, FLP acquired Charleston T&T's insurance policy, which had as well as \$1,000,000.00 in liability insurance as required by the Master Lease.

On the night of April 2, 2013, a fire originated on the second floor of 213 East Bay. Following the fire, FLP and Yaschik agreed that FLP would oversee the shoring and initial repair. FLP contracted with Belfor to secure the building and begin the clean-up process, and contracted with Applied Building Sciences, Inc. ("ABS") to perform architectural and engineering services for the repair of the building. FLP continued to update Yaschik and the subtenants on the repair efforts over the course of the next five months.

In late August 2013, ABS informed FLP and Yaschik that plans for repairs were nearly ready to be submitted to the City. On September 3, 2013, the FLP sent Yaschik a letter advising of several developments, including the insurance company's approval of payment of the policy limits and that structural plans were to be completed that day, and stating that Yaschik- as the building owner- would need to approve those plans. FLP followed up with email correspondence on September 5th and 6th, neither of which were responded to by Yaschik. On September 11, 2013, five months after the fire and after significant headway had been made by the FLP and subtenants towards repairing building, Yaschik sent FLP a letter purporting to terminate the Master Lease pursuant to the above-mentioned "Paragraph 20" on the basis the building was a total loss. The FLP advised Yaschik it did not believe the building had been "totally destroyed" by fire, and therefore, that it's purported termination was ineffective.

As early as May 2013, Yaschik had been negotiating with an entity known as East Bay Company, Ltd. ("EBCO") to purchase the building at 213 East Bay Street. EBCO owns all surrounding buildings on that particular block of East Bay and Cumberland Streets. These negotiations culminated in a December 30, 2013 agreement for the sale of 213 East Bay Street. Per the agreement, the completion of the sale is subject to the cancellation of the Master Lease with FLP and the cancellation of the assignment of rights under the subleases.

The present lawsuit followed. FLP's breach of contract and breach of contract accompanied by a fraudulent act claims against Yaschik were submitted to the jury, along with Squeeze and TOTB's intentional interference with contractual relations claims against Yaschik.

The reason the Court directed the verdicts at trial was the uncontroverted fact that Yaschik sent the letter terminating the lease on the grounds of total destruction due to the fire. Everything in this case flows from that uncontested fact, and no other cause of action by any of the parties against any other party could go forward with that action being taken by Yaschik. It

was either a justified act or an unjustified act, which was for the jury to decide, but there is no disputing it occurred. The lease provided that total destruction was retroactive to the date of the fire loss, which negated anything FLP did to begin repairs in the months between the fire and the declaration of total loss. Despite the fact that FLP may have had a duty to repair the premises so the subtenants could move back in if the fire did not cause a total loss, as a matter of law, FLP was relieved of any obligations it had to repair the property for the subtenants when Yaschik declared it a total loss. Indeed, FLP could not continue its repair efforts. That is why the Court dismissed the subtenants claims against FLP – Yaschik's action made it impossible for them to make any more repairs. The only factual question left for the jury to determine was whether Yaschik was justified in exercising its right to declare it a total loss. The jury found that Yaschik was not justified in doing so, and awarded FLP \$1,112,857.10 in compensatory damages. Similarly, the jury also found that Yaschik's actions unjustifiably interfered with the subtenant's leases with FLP. This is a perfectly understandable conclusion, and the verdicts are completely consistent in this regard. In fact, it would have been inconsistent to allow a verdict against FLP by the subtenants because the evidence was uncontroverted that Yaschik declared that the fire damage caused a total loss. At that moment in time, FLP could no longer make repairs. The only question was whether Yaschik's decision was justified or not.

If the jury had found Yaschik's decision to declare the property a total loss, they would have found the Master Lease was not breached. Necessarily, the jury would have had to find Yaschik did not intentionally interfered with the subtenants. Indeed, had they found Yaschik was justified in declaring the property a total loss, but also found that Yaschik intentionally interfered with the subleases, the Court would have had to overturn those verdicts as being inconsistent.

LEGAL STANDARDS

i. New Trial Absolute

When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice. *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). In other words, to warrant a new trial absolute, the verdict reached must be so "grossly excessive" as to clearly indicate the influence of an improper motive on the jury. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993). Alternatively, the trial court may grant a new trial absolute when, sitting as the thirteenth juror, it concludes the jury's verdict is not supported by the evidence." *Duncan v. Hampton Co. Sch. Dist. No. 2*, 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999). Finally, a new trial may be granted where verdicts are irreconcilably inconsistent. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010).

ii. Judgment Notwithstanding the Verdict

A motion for judgment notwithstanding the verdict, or JNOV, is a "renewal of the directed verdict motion." *Glover v. N. Carolina Mut. Life Ins. Co.*, 295 S.C. 251, 368 S.E.2d 68 (Ct. App. 1988). "In ruling on a motion for JNOV, the trial judge cannot disturb the factual findings of a jury unless a review of the record discloses no evidence which reasonably supports them." *Burns v. Universal Health Servs., Inc.*, 361 S.C. 221, 603 S.E.2d 605 (Ct. App. 2004). "The trial court must deny the motion when the evidence yields more than one inference or its inferences are in doubt." *Id.* at 232. The verdict should be upheld "if there is any evidence to sustain the factual findings implicit in the jury's verdict." *Id.*



iii. New Trial *Nisi Remittitur*

"Compelling reasons must be given to justify invading the jury's province by granting a new trial *nisi remittitur*." *Proctor v. Dep't of Health and Envtl. Control*, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006). "The consideration for a motion for a new trial *nisi remittitur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented." *Id.*

ANALYSIS

A. Yaschik

i. JNOV

Yaschik claims it is entitled to JNOV because the subtenants cannot establish their claims of intentional interference with a contract. To establish an action for intentional interference with a contract, the plaintiff must establish (1) the existence of a contract; (2) the wrongdoer's knowledge of the contract; (3) the intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 336 S.E.2d 472 (1985). Yaschik contends that the third and fourth elements cannot be, and were not, established by the subtenants.

With regard to the third element, this Court did not rule that as a matter of law there was no breach of the sublease, but rather, it was found that there was a valid defense to the breach (namely, impossibility due to Yaschik's conduct). Specifically, it was found that Yaschik's conduct in sending a letter purporting to terminate the Master Lease made it impossible for FLP to perform its obligations to the subtenants. A finding of impossibility of performance is not a finding that the contract was not breached or that it was cancelled. Rather, the finding was that Yaschik interfered with the sublease and rendered FLP's performance impossible – thereby justifying FLP's breach. This finding inherently entails that the subleases were indeed breached,

and, therefore, the subtenants met this third element at trial. With regard to the fourth element, the question of whether Yaschik acted without justification was a factual determination to be made by the jury.

At trial, photographs of the building were shown to the jury showing portions of the premises largely intact. Also, evidence was presented showing that Thomas Ervin did not visit the building during the five months following the fire when FLP was making substantial efforts and rehabilitating the premises. Moreover, expert testimony at trial indicated that the building ~~could have been restored to substantially the same condition.~~ There was sufficient evidence presented at trial for a jury to reasonably conclude that Yaschik acted in bad faith by declaring the premises totally destroyed. The jury here could have reasonably, and based upon the evidence at trial, ultimately did find, that Yaschik knew of the valid and existing subleases, that Yaschik intentionally procured FLP's breach of the subleases by terminating the Master Lease on the basis of "total destruction," and that subtenants suffered damage as a result thereof. As such, Yaschik's Motion for JNOV is denied.

ii. New Trial Absolute

Yaschik also argues that it is entitled to a New Trial Absolute because the jury's verdict is irreconcilably inconsistent. Yaschik argues that the verdicts are "apparently based on different factual conclusions and legal standards despite arising from a common set of facts, agreements, or legal theories." In support of this position, Yaschik points out that the jury awarded FLP damages as if its sublease with Squeeze lasted through 2027, while awarding Squeeze damages only through 2017. However, these two positions are entirely consistent as Squeeze's sublease did indeed end in 2017 while FLP's Master Lease ran through 2027. It is well within the realm of reason to think that FLP would have had Squeeze, or another paying subtenant, in its property

through the end of its Master Lease. This was, after all, one of the most desirable retail locations on the Charleston peninsula.

Yaschik also points out in furtherance of its position the vast discrepancy between TOTB's damages and Squeeze's damages. However, as addressed below, Squeeze made a detailed showing at trial that it was profitable, and had the records to confirm that contention, while TOTB failed to make such a showing. Yaschik also points to the differing punitive damages awarded in this case, but that inconsistency is also addressed below.

~~Yaschik also contends that this Court erred in directing verdict in favor of FLP against~~

Yaschik on Yaschik's breach of contract claim against FLP. Yaschik argues that the Court failed to consider all of the elements of estoppel when directing verdict in favor of FLP. Specifically, Yaschik points to the third element of estoppel- "knowledge, actual or constructive, of the real facts" as the element that was not considered. *Heritage Fed. Sav. & Loan Ass'n v. Eagle Lake & Golf Condo*, 318 S.C. 535, 458 S.E.2d 561. At trial, it was held that Thomas Ervin, as President of Yaschik, was estopped from alleging a breach of contract claim against FLP on the basis of "adequate insurance" because there was evidence that Mr. Ervin at least constructively knew of the amount of insurance on the building. While FLP was the party responsible for obtaining the insurance, Yaschik was, after all, the owner of the building itself. There was sufficient evidence presented that Mr. Ervin constructively knew the amount of insurance on the building.

Yaschik also contends that the Court erred in interpreting the contractual indemnification language of the Master Lease; specifically Paragraph 23 which states, "[FLP] shall indemnify and save [Yaschik] harmless from any and all claims, damages, costs expenses, including reasonable attorney's fees *arising from the management of the business* conducted by [FLP] at the leased premises." (Emphasis added). FLP argued at trial at this lease provision does not

apply because the “claims, damages, costs and expenses” suffered by Yaschik did not arise from the management of the business. At trial, this Court agreed with this contention by FLP, and no evidence has been presented which changes that position now.

Yaschik also moves for a new trial on the basis that an instruction given to the jury was improper. The instruction at issue is, “A lease is to be construed more strongly against the lessor, and in favor of the lessee.” Yaschik argues that a clarifying instruction should have been added which states, “*particularly* where the lease was prepared by the lessor.” (Emphasis added). Yaschik contends that it’s “~~case was doomed the second this instruction was given to~~ the jury.” First, the challenged jury instruction is not erroneous, and is a correct statement of the applicable South Carolina law. Just because the law doesn’t support Yaschik’s position does not entail that the instruction is erroneous or prejudicial. Second, this jury instruction is not an outside-the-scope principle of law, and, rather, directly relates to the issues raised in the pleadings and at trial.

Finally, Yaschik’s objection centers on the fact that the clarifying instruction of “particularly where the lease was prepared by the lessor” was not added. However, even if that clarifying phrase was added, the gist of the jury instruction remains the same. Yaschik argues that it did not draft the lease, and therefore, the charge is prejudicial. However, the Court of Appeals’ use of the word “particularly” is important here because it signifies that a lease is to be more strongly construed against the lessor *especially when* it is prepared by the lessor. Whether the clarifying phrase is added or not does not change the essence of what the instruction conveys. In fact, it could be argued that the addition of the requested clarifying phrase would prejudice Yaschik to a greater degree, since Yaschik’s complaint with the instruction is, after all, that it did not draft the lease agreement.

iii. New Trial *Nisi Remittitur*



Yaschik's Motion for a New Trial *Nisi Remittitur* is also denied. The jury verdict amounts are consistent, adequate, and reasonable based upon the evidence presented at trial. The jury awarded Squeeze \$738,371.64 in actual damages, an amount equal to 70% of the total damages alleged by Squeeze. This 30% reduction is evidence that the jury considered the proper extenuating factors related to Squeeze's lost earnings calculation, such as future rent escalations, future earnings growth rate percentages, owner salary, and restoration up-fit time.

The jury awarded FLP \$1,112,857.10 in actual damages. Yaschik contends that this award is invalid for being too speculative, as it is largely based on lost profits which would have accrued after the subtenants leases expired. This contention fails for two reasons. First, evidence presented at trial indicated that, even though the subtenants leases expired in 2017, they were planning on renewing their respective subleases if given the opportunity. Second, and as mentioned above, 213 East Bay Street is a prime retail location. It is not conjectural or speculative to conclude that even if Squeeze, TOTB, and The Brick all did not renew their subleases- FLP would have had no trouble finding new subtenants. It is uncontroverted that FLP's Master Lease ran through 2027, and the jury's award reflected that fact. FLP adequately established their lost profits with reasonable certainty at trial. No evidence has been presented which indicates that the jury awards to Squeeze or FLP place them in "a more advantageous position" than they were before the fire. Therefore, Yaschik's Motion for a New Trial *Nisi Remittitur* is denied.

iv. Yaschik Punitive Damages

Yaschik also contends that the punitive damages awarded to the subtenants - Squeeze and TOTB - were improper and contrary to law. Yaschik's first contention in this regard is that the subtenants failed to present clear and convincing evidence that Yaschik's conduct was willful, wanton, or in reckless disregard of their rights. The test used to make this determination is whether the tort was "committed in such a manner or under such circumstances that a person of ordinary

reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights." *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011). There was sufficient evidence presented at trial upon which the jury could have, and did indeed, determine that Mr. Ervin acted in such a way that he was conscious that his behavior would interfere with the subtenants rights under the contract. Indeed, the evidence showed that he conducted negotiations- unbeknownst to and to the detriment of the subtenants- with EBCO and Mr. Hilton Smith to buy 213 East Bay Street. This first factor is heavily in favor of allowing the punitive damages awarded to the subtenants to stand.

Yaschik's second contention is that the award of punitive damages violated Yaschik's due process rights. This is examined by looking at (1) the degree of reprehensibility of the conduct, (2) the disparity between the actual or potential harm and the amount awarded, and (3) the civil penalties authorized or imposed in comparable cases. *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011). We will examine these in turn.

First, the degree of reprehensibility is determined by weighing the following factors: (1) the harm caused being physical as opposed to economic, (2) the level of indifference for the health and safety of others, (3) the victim's financial vulnerability, (4) whether the conduct was isolated or repeated, and (5) whether the harm to the victim resulted from a malice or deceit, as opposed to a mere accident. The first two factors here clearly favor Yaschik's position. The tortious conduct did not put anyone's health or safety at risk, and the harm was purely economic. However, the next three factors all favor upholding the imposition of the punitive damages. The victims were small business bar owners whose livelihoods depended on the success of their bars. They were financially vulnerable, and the complained of conduct of Mr. Ervin directly impacted their financial vulnerability. Also, Yaschik was the building owner and the subtenants were merely subtenants- further evidencing the subtenant's vulnerability. The fourth element also favors

upholding the punitive damage award as Mr. Ervin's complained of conduct did not occur within one day, one week, or even one month, and, rather, the evidence indicated the negotiations with EBCO occurred over a period of months. Finally, the fifth element clearly supports the award of punitive damages, as the conduct involved was no mere accident, and the jury could properly infer a degree of deceit from the evidence presented.

The second guidepost in reviewing a punitive damage award takes a look at the disparity, if any, between actual or potential harm and the punitive damages award. To make this determination, a court may consider: ~~(1) the likelihood the award will deter future like conduct;~~ (2) whether the award is reasonably related to the harm likely to result from such conduct; and (3) the defendant's ability to pay. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). Examining the factors, it is reasonable to think that the award of punitive damages will deter Mr. Ervin from future like conduct, the award is directly related to the harm resulting from his conduct, and Yaschik easily has the ability to pay.

The third guidepost compares the punitive award to civil penalties authorized or imposed in comparable cases. Here, there are no civil penalties applicable to this situation. However, an examination of South Carolina case law shows that the highest ratio of actual damages to punitive damages ever upheld in this state was a ratio of 9.9:1. Thus, the award to Squeeze falls within well within this accepted ratio.

Yaschik also claims punitive damages awarded to TOTB are constitutionally excessive. The nominal damages awarded to TOTB were \$1.00, while the punitive damages awarded to TOTB were \$133,333, representing a 133,333:1 ratio. Courts are leery of upholding punitive damages awards that are "excessive" and South Carolina is no different. See 2 Punitive Damages: Law and Prac. 2d § 18:6 (2017). However, this case is novel in South Carolina, so far as case law seems to indicate, because the jury granted a large punitive damage award after only awarding a

nominal damage award of \$1.00. A punitive damage award of \$9.00 or \$10.00 would be absurd. There is no question the two subtenants were similarly situated and similarly impacted by Yaschik's actions. The difference in compensatory damage awards can be attributed to the fact that TOTB did not do a satisfactory job of presenting financial records to back its claim for economic losses, as discussed below. However, because the facts of the case are uniquely postured vis-à-vis two similarly situated subtenants, it seems proper to compare the punitive damage awards to them (which the jury seemed to do), and this Court finds the awards very much compare favorably to each other and in relation to Yaschik. Viewed in that light, the punitive damage award to TOTB is not excessive and, therefore, upheld as well.

v. Setoff

Yaschik seeks a setoff to account for various other payments received by FLP, TOTB, and Squeeze. Specifically, Yaschik seeks a setoff for any monies received by FLP and Squeeze in regards to claims they settled with EBCO, and Hilton Smith (EBCO's President), prior to trial. FLP alleged claims of tortious interference with contract, intentional interference with prospective contractual relations, violation of South Carolina unfair trade practices act, indemnity, and civil conspiracy, with Squeeze alleging intentional interference with a contract, against Mr. Smith and EBCO. All of these claims were settled pre-trial, and Yaschik now seeks a setoff for any monies paid as a result of those settlements.

There "can be only one satisfaction for an injury or wrong." *Smith v. Widener*, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012). Therefore, "the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury." *Id.* at 471-72. "When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." *Id.*

Yaschik is entitled to a reduction in the verdict amounts pertaining to FLP and Squeeze insofar as they received settlement funds relating to the breach of the Master Lease from EBCO and Mr. Hilton Smith. This amount has not yet been identified, so an exact calculation cannot yet be had. The parties have ten days to inform the Court of those amounts so the verdicts can be properly reduced to account for those prior settlements.

Yaschik also seeks a setoff for any funds paid by TOTB to FLP on FLP's causes of action for breach of contract, negligence, and indemnity relating to the fact that the fire started in TOTB's rental unit. ~~However, these causes of actions arose from a separate injury- namely, the fire itself~~ rather than anything relating to the lease agreements- so any settlement monies paid, if any, as a result of this pre-trial settlement will not be applied to the setoff. Therefore, its Motion for Setoff is denied with respect to TOTB.

Additionally, Yaschik's Motion for Setoff is granted insofar as it pertains to the business interruption insurance proceeds received by Squeeze and FLP. Both Squeeze and FLP received \$60,000.00 in business interruption insurance proceeds. At the beginning of trial, the parties stipulated on the record that any damages awarded to Squeeze and FLP would be reduced by the amount received from the business interruption proceeds. As such, the award to FLP and Squeeze are both reduced by the amount each received in business interruption insurance proceeds, which amounts to \$60,000.00 each. Therefore, Yaschik's Motion for Setoff is granted, in part, with respect to any pre-trial settlement monies paid by EBCO and Hilton Smith to FLP and Squeeze, and with respect to the business interruption insurance proceeds received by Squeeze and FLP. The remainder of Yaschik's Motion for Setoff is denied.

vi. Motion for Stay of Execution

Yaschik also filed a Motion for Stay of Execution of Judgment, pursuant to Rule 62(b), SCRCF, seeking to stay the executions of the judgments against it during the pendency of the

present post-trial motions. As this Order addresses the post-trial motions, the execution of this Order moots Yaschiks Motion for Stay of Execution.

B. Top of the Bay

i. New Trial *Nisi Additur*

TOTB made a Motion for New Trial *Nisi Additur* on the basis that the jury's award of \$1.00 in nominal damages to TOTB on its intentional interference with contractual relations claim was excessively inadequate, and that they are entitled to an award of actual damages. The South Carolina Supreme Court has previously stated that, in order for damages to be recoverable, the "evidence presented must be sufficient to enable the factfinder to make a determination with reasonable certainty or accuracy. Neither the existence, causation, nor amount of damages can be left to conjecture, guess, or speculations." *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 407 S.E.2d 630 (1991).

TOTB relied on its profit and loss statements from 2010 to 2013 in support of its damages. The documents are handwritten, uncertified, contradict other figures submitted to the City of Charleston, and provide no support or explanation for the numbers indicated on them. In support of its motion, TOTB argues that the other "almost identically situated" subtenant (Squeeze) received more than \$750,000 in actual damages, and, thus, the award of only \$1.00 was "clearly excessively inadequate." However, although Squeeze and TOTB were both subtenants, the evidence indicated they were in very different positions financially, and with respect to the manner in which their financial records were kept. Expert testimony from trial indicated that Squeeze's financial records were maintained in an exemplary fashion. Squeeze was also able to corroborate its records through electronic and other means.

Kelly Tant of TOTB stated the following with regard to the profit and loss statements: (1) her mother drafted them; (2) she is not capable of providing a breakdown of the numbers listed,

(3) she does not have reports from the cash registers, (4) she does not have, nor has she requested, copies of relevant checks from her bank, and (5) she does not know why there are discrepancies between the statements and tax returns. Ann Thode, Ms. Tant's mother, testified that: (1) the statements were drafted after the commencement of litigation and TOTB was served with discovery requests, (2) the statements were extrapolated from other handwritten, unsigned, uncertified, and unfiled copies of TOTB's tax returns, (3) she has no knowledge about the individual entries on the tax returns, and (4) she is not in possession of any receipts or financial records for TOTB. ~~TOTB's damages figures were "not supported with corresponding figures"~~

and were "wholly insufficient to provide the jury with a basis for calculating profits lost with reasonable certainty." *Drews Co. v. Ledwith-Wolfe Associates, Inc.*, 296 S.C. 207, 371 S.E.2d 532 (1988). Therefore, TOTB's Motion for *Nisi Additur* is denied.

ii. Motion for New Trial

TOTB also filed a Motion for a New Trial, and argues this Court erred in granting Directed Verdict against TOTB on its breach of contract claim against FLP. As explained above in relation to Squeeze, Yaschik's terminating the Master Lease terminated Squeeze's sublease agreement as a matter of law. Thus, FLP could not have breached a sublease that no longer existed. The breach of the sublease would have had to occur before Yaschik terminated FLP's Master Lease, but the evidence presented indicated no such breach. In fact, the evidence showed that FLP went above and beyond its contractual duties during the five months following the fire in regards to rehabilitating the premises. Once the Master Lease was terminated, it became impossible for FLP to further perform. Therefore, TOTB's Motion for a New Trial is denied.

C. Squeeze

Squeeze filed a Rule 59(e), SCRCF, Motion for Reconsideration with regard to this Court's granting of a Directed Verdict against Squeeze on its breach of contract claim against Yaschik,

and against Squeeze on its breach of contract claim against FLP. At trial, it was held that Squeeze could not pursue its breach of contract claims against Yaschik because Squeeze was not an intended third-party beneficiary of the lease between Yaschik and FLP. Squeeze argues that the language of the Master Lease evidences that it was indeed a third-party beneficiary. Specifically, they point to Paragraph 1 ("Tenant has the right to sublet"), and Paragraph 36 ("if this lease shall be assigned or sublet, shall include also tenant assignees or subleases, as to premises covered by such assignment or sublease"), and the fact that the Master Lease had language removing all ~~restrictions on subletting. However, giving the tenant the right to sublet, or language which~~ indicates a hypothetical subtenant, does not rise to the level of bestowing third-party beneficiary status on an after-the-fact subtenant. Nothing in the Master Lease indicates that the parties thereto intended to confer a direct benefit on Squeeze. In fact, when the Master Lease was executed in 1997, Squeeze would not be in existence for another 12 years. The possibility that a subtenant may come in down the road at some point was certainly contemplated, but no evidence exists which indicates the parties to the Master Lease intended to confer a direct benefit on Squeeze. Therefore, Squeeze lacked third-party beneficiary status, and, as such, lacked standing to bring its breach of contract action against Yaschik. In any event, the verdict against Yaschik on Squeeze's intentional interference cause of action was presumably for the same damages Squeeze suffered relating to its breach of contract claim. On top of that, Squeeze got an award of punitive damages, which would not have been allowed in a breach of contract claim.

At trial, Directed Verdict was also granted against Squeeze on its breach of contract claim against FLP. The basis of that ruling was that, due to Yaschiks terminating the Master Lease, it became impossible for FLP to continue its efforts in rehabilitating the premises. Squeeze argues that it had a separate contract with FLP which required FLP to "restore the premises to substantially the same condition as prior to damage as speedily as practicable" in the event there was a fire.

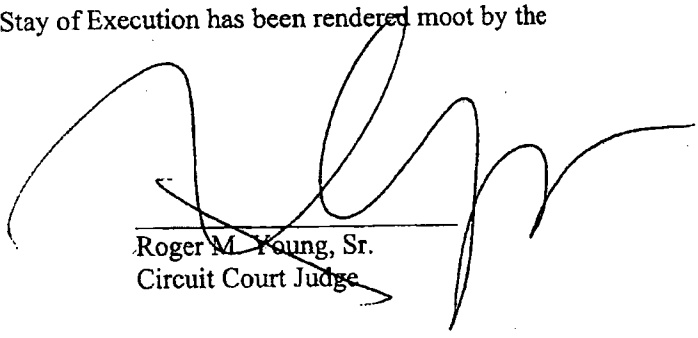
However, for five months following the fire, FLP undertook rather significant steps toward fulfilling this obligations; including, but not limited to, contracting with Belfor and ABS in furtherance of that goal. It was not until Yaschik terminated the Master Lease, rendering it an impossibility, that FLP ceased its rehabilitation efforts. Therefore, Squeeze's Rule 59(e) Motion to Reconsider is denied.

CONCLUSION

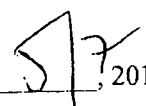
Having considered the arguments, supporting and opposing documents, and based on the same, it is therefore ORDERED, ADJUDGED AND DECREED:

1. Yaschik's Motions for JNOV, New Trial Absolute, and for New Trial *Nisi Remittitur* are denied; and
2. Squeeze's Motion to Reconsider is denied; and
3. TOTB's Motions for New Trial Absolute and New Trial *Nisi Additur* are denied; and
4. Yaschik's Motions for Setoff is granted, in part, and denied, in part. As discussed above, Yaschik's Motion for Stay of Execution has been rendered moot by the execution of this Order.

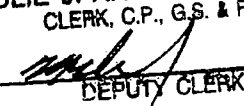
IT IS SO ORDERED!



Roger M. Young, Sr.
Circuit Court Judge


_____, 2018

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.

By 

DEPUTY CLERK

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Roger M. Young, Sr., Circuit Court Judge

Case No. 2013-CP-10-7107

RECEIVED
JUN 04 2018
SC Court of Appeals

Sea Island Food Group, LLC d/b/a Squeeze.....Respondent,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Hilton Smith, East Bay
Company, LTD., and Michael J. Quillen Family Limited Partnership..... Defendants,

Of whom Yaschik Development Company, Inc., d/b/a Yaschik Enterprises
is the.....Appellant,

Of whom Hilton Smith and East Bay Company, LTD.
are..... Respondents,

Of whom Michael J. Quillen Family Limited Partnership is a.....Respondent.

Michael J. Quillen Family Limited Partnership..... Third-Party Plaintiff,

v.

Top of the Bay, Inc. d/b/a Club Light..... Third-Party Defendant.

Top of the Bay, Inc. d/b/a Club Light.....Respondent,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises Appellant.

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Respondents in the foregoing matter with a copy of the foregoing *Amended Notice of Appeal* by depositing the same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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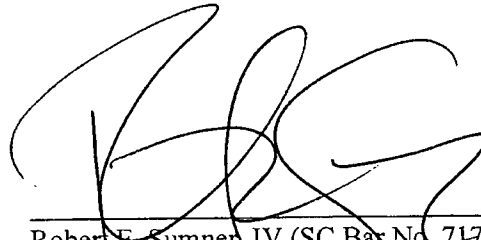
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June 1, 2018
CHARLESTON, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS
2013-CP-10-07107

SEA ISLAND FOOD GROUP, LLC,
d/b/a SQUEEZE,

Plaintiff,

vs.

YASCHIK DEVELOPMENT COMPANY,
INC., d/b/a YASCHIK ENTERPRISES,
et al.,

Defendants.

MICHAEL J. QUILLEN FAMILY
LIMITED PARTNERSHIP,

Third-Party Plaintiff,

vs.

TOP OF THE BAY, INC., d/b/a
CLUB LIGHT,

Third-Party Defendant.

TOP OF THE BAY, INC., d/b/a
CLUB LIGHT,

Fourth-Party Plaintiff,

vs.

YASCHIK DEVELOPMENT COMPANY,
INC., d/b/a YASCHIK ENTERPRISES,

Fourth-Party Defendant.

TRANSCRIPT OF PROCEEDINGS

January 22-26, 2018
Charleston, South Carolina

VOLUME I

STEPHEN CLINT GASKINS - DIRECT EXAMINATION

1 but what floor was Squeeze on at 213 East Bay Street?

2 A. So standing from street side, Squeeze would have
3 been the first floor, bottom left-hand portion, to the
4 left of the Brick.

5 Q. And what portion of the second floor did Squeeze
6 occupy?

7 A. None, zero.

8 Q. Just on the first floor?

9 A. Just first floor.

10 Q. Okay. And then walking through this lease, at the
11 top, what is the term expiration of this lease, if you
12 could explain it.

13 A. So the expiration date of the lease through all of
14 the options would have been March 31, 2017.

15 Q. Okay. And can you circle that for the jury.

16 A. It's a one year and five-year option, and you can
17 see the start date of April 1, 2006.

18 Q. So when did this lease expire?

19 A. The lease expired on March 31, 2017.

20 Q. And then going down, farther down into provision
21 number one, section number one, what does section number
22 one describe?

23 A. This describes the premises of our sublease at
24 213-A East Bay Street to be 1,100 square feet.

25 Q. Again, what portion of this building is this?

1 were wholly destroyed?

2 A. To date, we have not been informed of that.

3 Q. What about Yaschik communicating directly to you
4 about the Squeeze premises?

5 A. He has not communicated directly with us either.

6 Q. And from Clint Gaskins's perspective, how much
7 time did you spend with the Squeeze business?

8 A. The Squeeze business was roughly 25 percent of my
9 time.

10 Q. And explain why it took up that much time for the
11 jury.

12 A. So I approached, Sea Island Food Group, approached
13 it as an investment for us, but also a management
14 opportunity. So in total, of all the days that we were
15 open in that location, I think that I was actually
16 working that bar less than a couple of handfults' worth of
17 time, ten times or less. From the get-go, we hired staff
18 and placed staff and managed that staff so that the
19 operation could perform on its own.

20 We always approached Sea Island Food Group as well
21 from a standpoint to be able to go out there in the
22 field. It was never a job for me, per se. I was never
23 buying a job where I was going to be a bartender. It was
24 an opportunity for me to get into what I considered a
25 higher level of business and being able to grow that

STEPHEN CLINT GASKINS - REDIRECT EXAMINATION

1 A. Sure.

2 Q. First, I want to talk to you about provision 20 in
3 the sublease, if you'll go ahead and pull that up.

4 All right. In the provision 20 of the sublease,
5 it has a particular provision here that we've already
6 talked about a lot, which if the premises are totally
7 destroyed by fire or other casualty, this lease shall
8 terminate, and it goes on to say if the premises are
9 damaged but not wholly destroyed by fire or other
10 casualty, rent shall abate in such proportion as the use
11 of premises as -- I can't read this one. I'm sorry --
12 has been left to the tenant.

13 I want to talk to you about some of the words in
14 provision number 20, totally and wholly destroyed. After
15 the fire, you went to your premises, and you were able to
16 see it, correct?

17 A. Yes.

18 Q. You were able to walk through it; is that correct?

19 A. That's right.

20 Q. You were also able to go into Brick?

21 A. That's right.

22 Q. And you were able to see what was going on in
23 there?

24 A. That's correct.

25 Q. And you had -- actually, in your premises you had

1 A. I believe it was October.

2 Q. You believe it was October?

3 A. Correct.

4 Q. In fact, you had conversations with Hilton Smith
5 in October 2013, correct?

6 A. We sent an e-mail to his office.

7 Q. Communicated with him?

8 A. That's right.

9 Q. All right. Hilton Smith approached Squeeze, Sea
10 Island Food Group, in December 2013, correct?

11 A. December, yes.

12 Q. And he told you that Yaschik instructed him to do
13 his best to keep the tenants in place in the building,
14 correct?

15 A. That's what we were discussing yesterday, the
16 meeting I took with him.

17 Q. And that's what you understood. That's what he
18 told you, and that's what you understood from the
19 meeting, correct?

20 A. Correct. That's what we understood was his
21 intent.

22 Q. From Hilton Smith. That's what Hilton told you?

23 A. Correct.

24 Q. Fair enough. Let's look at Squeeze Exhibit No. 7
25 that your lawyer put up on the board yesterday, and this

1 is the purchase and sale agreement between Tom Ervin and
2 Hilton Smith to sell the building. They signed it on
3 what date, Mr. Gaskins?

4 A. The 30th of December.

5 Q. So if you would please look on the fourth page,
6 section 3(b), let's look at exactly what this document
7 said as it relates to subtenants. It says, just in the
8 top part of B, if purchaser and seller have been unable
9 to agree upon new leases with the sublessees on terms
10 acceptable to the purchaser and the seller, it goes on to
11 say that the purchaser or the seller may terminate this
12 agreement.

13 Do you agree with that? And we're on 3(b)
14 right now.

15 A. I believe that's what's written there, yes.

16 Q. And what 3(b) says is that the seller being
17 Yaschik and the purchaser being Hilton Smith and East Bay
18 Company are going to agree upon new lease terms with the
19 sublessees, correct? That's what they said in their
20 document, correct?

21 A. Correct.

22 Q. All right. Now, let's turn to page five, and I
23 want to direct you to section 5(e). Prior to the
24 expiration of the initial inspection period, seller and
25 purchaser shall agree upon the terms of new leases with

1 the existing sublessees that are acceptable to both
2 parties and which do not change the business terms of the
3 sublessees.

4 Did I say that correctly?

5 A. We're looking at (e)?

6 Q. (E) slipped off the page. It's on the bottom
7 there, Matt. There we go. Shall agree upon the terms of
8 new leases with the sublessees that are acceptable to
9 both parties and do not change the business terms of the
10 sublessees.

11 Did I read that correctly?

12 A. Correct. Can you define business terms?

13 Q. We'll let Mr. Ervin explain this document, but
14 that's what it says, correct?

15 A. That's correct, yes.

16 Q. And, in fact, if you look at the very last page,
17 page 18 of the document --

18 A. And the seller here would have been Yaschik.

19 Q. Right.

20 A. So if he was working with the purchaser, why would
21 he have never reached out to us?

22 Q. Well, what he was telling --

23 A. At this point, when this agreement was signed, we
24 still have never heard from him, so how was he working in
25 unison to secure new leases from us when we haven't

1 received any correspondence?

2 Q. You did have communications with Hilton, correct?

3 A. Yeah, and I was not allowed to speak on it
4 yesterday.

5 Q. Okay. Look on Exhibit 3 and, in particular, item
6 number 10, which makes up the better part of the second
7 half of that page. Now, this is part of the purchaser's
8 obligations, but what section 10 says is that if required
9 as part of obtaining subleases acceptable to the
10 purchaser, the following shall also be provided by the
11 purchaser as landlord, and these items will be included
12 in the cost of construction, and he goes on and accounts
13 for different upfit items that would apply to the
14 sublessees who they're trying to reassign with leases to
15 the building after Hilton buys it, correct?

16 A. What page are you on again? I'm sorry.

17 Q. It's page 18. It's Exhibit C to the document, and
18 if you look, this is what it looks like in full page.
19 Landlord's work is the title.

20 A. I was looking at the wrong section.

21 Q. My point is, Exhibit C makes specific conditions
22 to the purchase that involve upfits for the subtenants,
23 the sublessees, correct?

24 A. That's correct.

25 Q. And if you flip back to the first page, sublessees

1 is defined in paragraph (d), 1(d), and that definition
2 includes Squeeze, doesn't it?

3 A. Yes, that's correct.

4 Q. And this document was December 30, 2013, correct,
5 first page?

6 A. Yes. That's the date on the document.

7 Q. And that was after you had filed a lawsuit suing
8 Yaschik Development, correct?

9 A. Correct. I mean, at this point he's still
10 acknowledging us as sublessees.

11 Q. He's looking out for you?

12 A. He wanted to terminate, recognizing us as
13 sublessees.

14 Q. Let's let him explain to the jury when he takes
15 the stand. Getting back to September 11, 2013, that's
16 when Tom Ervin sent the letter to Mike Quillen with whom
17 he had a lease, and he told him the lease was terminated
18 because the building had been totally destroyed, correct?

19 A. Correct.

20 Q. Now, you understand under the terms of the master
21 lease, if the premises are, in fact, totally destroyed,
22 Yaschik does have the contractual right to terminate the
23 lease?

24 A. Correct.

25 Q. Correct? So in this case, if this jury finds that

STEPHEN CLINT GASKINS - ~~REDIRECT~~ EXAMINATION

1 213 East Bay Street was totally destroyed by the fire,
2 Yaschik would have the right to terminate that master
3 lease?

4 A. That is correct, yes.

5 Q. Mr. Gaskins, you don't think Tom Ervin or anybody
6 associated with Yaschik Development ever deceived Sea
7 Island Food Group, do you?

8 A. To my knowledge, prior to that letter, no.

9 Q. You don't think you were misled by Tom Ervin prior
10 to September 11, 2013, do you?

11 A. It would be kind of hard to be misled when we
12 haven't had any conversations to that point.

13 MR. SUMNER: That's all the questions I have.
14 Thank you.

15 THE COURT: All right. Why don't we take a
16 15-minute break to use the rest room, and we'll come back
17 with redirect, recross. All right? Don't begin
18 deliberations or discussions. We'll be back in 15
19 minutes.

20 (Recess taken.)

21 (In open court, jury present.)

22 THE COURT: You can begin your redirect.

23 REDIRECT EXAMINATION

24 BY MR. COOPER:

25 Q. Mr. Gaskins, I'm going to turn your attention to

THOMAS M. ERVIN - DIRECT EXAMINATION

1 A. I am.

2 Q. And, likewise, one of the properties that's near
3 is 213 East Bay Street, correct?

4 A. Correct.

5 Q. And how many blocks is that from your office?

6 A. Probably three, three-and-a-half.

7 Q. So it's a little bit longer than the walk here,
8 isn't it?

9 A. A little bit.

10 Q. How often do you walk by 213 East Bay Street on a
11 weekly basis?

12 A. It depends if I go to lunch there, but probably
13 two or three times.

14 Q. But we could agree it's a short walk?

15 A. Relatively short, yes.

16 Q. And I know there's been a lot of talk about this,
17 but from when the fire happened -- you understand it
18 happened on April 2nd, correct?

19 A. I do.

20 Q. Isn't the first time you actually went inside of
21 213 to look at the structure was in September of 2013?

22 A. That's correct.

23 Q. So your office, for five-and-a-half months, is
24 three-and-a-half blocks away, and the first time you
25 tried to enter it was September 2013, correct?

1 A. I'm glad you brought that up. The truth is, I
2 drive by that building every day on my way into work. I
3 walk by there during the five to six months that you're
4 talking about probably four or five times a week.

5 I looked in the building on a regular basis. I
6 did not go in the building. Most of the time it was
7 boarded up. I'm not a contractor. I'm not an engineer.
8 I would have been in the way going inside the building,
9 but the presumption that I was distant and not aware of
10 what was going on there is wrong.

11 Q. But my question was, you didn't go into the
12 building --

13 A. I did not physically walk inside the doors,
14 correct.

15 Q. And you brought it up as well. You're not a
16 contractor, correct?

17 A. That's correct.

18 Q. You're not an engineer?

19 A. I am not.

20 Q. And you're not an architect?

21 A. I am not.

22 Q. When did you purchase 213 East Bay Street?

23 A. I believe it was 2003.

24 Q. And I believe you paid \$1.8 million for it; is
25 that correct?

THOMAS M. ERVIN - DIRECT EXAMINATION

1 A. I believe that's correct.

2 Q. And as part of the purchase, you assumed the
3 master lease that was held by Charleston T&T at the time,
4 correct?

5 A. No. I received an assignment of that lease as an
6 obligation of the building.

7 Q. Right. So the master lease was used as the
8 landowner's income stream from 213 East Bay Street,
9 correct?

10 A. Correct.

11 Q. If you would, Exhibit 1, please.

12 MR. SUMNER: Squeeze 1?

13 MR. COOPER: Yes, thank you. Squeeze
14 Exhibit No. 1, and may I admit this as a master lease?

15 MR. SUMNER: No objection.

16 (Squeeze Exhibit 1 was marked for
17 identification and admitted into evidence.)

18 BY MR. COOPER:

19 Q. Is this a copy of the master lease that you would
20 have assumed when you purchased the building in 2003?

21 A. I believe -- it looks to be, yes.

22 Q. And Charleston T&T was the master leaseholder at
23 the time you purchased, correct?

24 A. They were the tenant, yes.

25 Q. And, ultimately, that master lease was assigned

THOMAS M. ERVIN - DIRECT EXAMINATION

1 period, I think you just said, We went in there. Do you
2 recall that you went and walked into the building after
3 you got Mr. Quillen's September 3rd letter?

4 A. I believe so.

5 Q. Okay. So in the chronology of events, you
6 received the September 3rd letter from Mr. Quillen that
7 says -- and wouldn't you agree he says, I'm turning over
8 the project to you?

9 A. That's correct.

10 Q. And you understood that to be the financial
11 obligations as well, didn't you?

12 A. That was in dispute.

13 Q. But Mr. Quillen's position is, as you understood
14 it, was Yaschik needed to pay for the restoration.

15 A. I believe that that was in dispute, but yes, that
16 was his position.

17 Q. Right. And your position was, I'm not paying for
18 it?

19 A. And my position was there was an obligation on his
20 part.

21 Q. Right, but I'm not paying for it, right? He's
22 paying for it, not me.

23 A. That is what I was hoping the outcome would be.

24 Q. Yes. So in the chronology of events, Mr. Quillen
25 sends the September 3rd letter. Either that day or soon

THOMAS M. ERVIN - DIRECT EXAMINATION

1 thereafter, you walked down and actually walked into the
2 property at 213 East Bay Street, correct?

3 A. That's correct.

4 Q. And then about a week later, you sent the letter
5 on September 11th saying that the property was a total
6 loss. Do you know why you didn't use the words totally
7 destroyed?

8 A. No, sir.

9 Q. Okay. But you didn't say the property was totally
10 destroyed, you said it was a total loss, didn't you, in
11 the letter?

12 A. That's what I wrote, yes.

13 Q. Which brings up -- and did you make that total
14 loss determination after you walked into the building? I
15 believe that's what you said during your deposition.

16 A. It took me that full week to come to that
17 conclusion. I met with the engineers that were working
18 on the project. I talked with the construction people
19 that were on the project. I talked to a number of people
20 to come to that conclusion. It was not an easily made
21 decision.

22 Q. But it was one made five-and-a-half months after
23 the fire?

24 A. It was one made once I was given the point on
25 running the project.

1 time; is that correct?

2 A. No. That was not the intent.

3 Q. That was not the intent?

4 A. No, sir.

5 Q. When you talked about there being a total loss of
6 the building, was that -- the structure of 213, it was
7 just a complete loss?

8 A. It was destroyed beyond the ability to reuse what
9 was there.

10 Q. So, in your mind, did it have any value?

11 A. Actually, the part that was left was a negative.
12 It had to be removed.

13 Q. Okay.

14 MR. COOPER: I've got premarked what is
15 Squeeze Exhibits 82 through 84. It's Yaschik balance
16 sheets.

17 MR. SUMNER: All right. No objection.

18 MR. LAY: No objection.

19 MR. SWOPE: None.

20 (Squeeze Exhibits 82, 83, and 84 were marked
21 for identification and admitted into evidence.)

22 BY MR. COOPER:

23 Q. And we'll start with the 2012 balance sheet, and I
24 also show you 2013. Yaschik is a little bit strange. I
25 can see you have your financial tax year on a June 30th

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1 with that?

2 A. We hadn't gotten there yet, but it was beginning
3 to come to that.

4 Q. And this is just a time frame. To me, it seems
5 like the beginning of August is really when things start
6 percolating to the surface in the discussions between you
7 and Mr. Quillen; is that correct?

8 A. I think we had discussions all along, but it
9 became more evident that the problems were more severe as
10 more information became available from the engineers.

11 Q. Likewise, Exhibit Number 29, Squeeze Exhibit No.
12 29, which is an August 12th e-mail from Mike Quillen to
13 Mr. Ervin.

14 MR. COOPER: Objection?

15 MR. LAY: None.

16 MR. SUMNER: No objection.

17 (Squeeze Exhibit 29 was marked for
18 identification and admitted into evidence.)

19 BY MR. COOPER:

20 Q. So this e-mail is a couple days later. The first
21 one was August 8, August 12th, Mr. Quillen again is
22 writing to you about money, correct?

23 A. Well, he's telling me what expenses have been
24 incurred and what he's been able to negotiate and how
25 much we've spent on engineering and architecture, yes.

1 Q. Sorry. When I say money, I just see numbers and I
2 think money, but you're right, he's telling you that
3 BELFOR today is approximately 393,000 for their bills,
4 correct?

5 A. Correct.

6 Q. But they haven't been paid yet, correct?

7 A. Correct.

8 Q. But they haven't been paid yet, right?

9 A. That's right.

10 Q. And you spent 76,000 on engineering in 2000, on
11 small construction consultants, correct?

12 A. That's correct.

13 Q. And he's saying going forward, he thinks the cost
14 is going to be another 1.5 to \$1.8 million; is that
15 correct?

16 A. He's guessing, but yes.

17 Q. And, again, just with the \$1 million of insurance,
18 it's apparent at this point that there's an
19 underinsurance issue; is that correct?

20 A. Absolutely.

21 Q. Did you think the \$1 million was adequate
22 insurance?

23 A. It obviously was not.

24 Q. If there was adequate insurance, there should have
25 been enough to restore the property back to a

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1 substantially similar position as required by paragraph
2 20, correct?

3 A. If there were adequate insurance available, we
4 wouldn't be here today.

5 Q. That's right. Because there would have been
6 enough to restore the property back to a substantially
7 similar condition before the fire, correct?

8 A. It would have been restored. I don't think it
9 would have been substantially the same because of the
10 code requirements, but it would have been restored, yes.

11 Q. But the code is in the wall. The layout could
12 have been substantially similar, correct?

13 A. It could have been, yes.

14 Q. Where the bars were located would have been
15 substantially similar?

16 A. Absolutely.

17 Q. I believe on the same e-mail, second to last
18 sentence references BELFOR estimate, and I'm going to
19 hand to you what is a July 20th --

20 MR. COOPER: It's Squeeze Exhibit 23.

21 (Squeeze Exhibit 23 was marked for
22 identification and admitted into evidence.)

23 BY MR. COOPER:

24 Q. Do you recall if this is the BELFOR estimate he
25 left on your desk?

THOMAS M. ERVIN - DIRECT EXAMINATION

1 A. It would have an effect on everyone.

2 Q. Including the sublessees, correct?

3 A. Yes, sir.

4 Q. And then you did bring up an interesting point
5 that I'll skip forward to. You talked about -- I believe
6 it was you were working on offers with Quillen to buy out
7 the lease. Didn't you just say that?

8 A. Mike and I worked on a number of things.

9 Q. I'm going to hand you what is Exhibit 54. This is
10 a November 20th letter between Mike Quillen and Tom
11 Ervin, correct?

12 A. Yes, sir.

13 MR. COOPER: Squeeze Exhibit 54.

14 MR. SUMNER: No objection.

15 (Squeeze Exhibit 54 was marked for
16 identification and admitted into evidence.)

17 BY MR. COOPER:

18 Q. And I just want to confirm this November 20th
19 e-mail. It says, Also, I need to know the number that
20 they're thinking about to release the master lease and be
21 indemnified.

22 A. Yes, sir.

23 Q. So you're asking how much money can Yaschik pay
24 Quillen for a release of the master lease agreement,
25 right?

THOMAS M. ERVIN - DIRECT EXAMINATION

1 A. I'm asking him to give the equivalent, and I'll
2 put it in my terms, of a quitclaim deed. The legal
3 rights that he had under that lease had been extinguished
4 by the destruction of the building, but I knew that there
5 was a dispute as to that, and I knew that Mike Quillen
6 wanted to be paid or he was going to litigate.

7 I knew that he had subtenants because he had told
8 me that his subtenants wanted to return to the space or
9 they were going to litigate. I was trying to avoid
10 litigation by getting a contract with Hilton Smith that
11 would pay everyone and allow the subtenants to return to
12 their original spaces under the same terms that they had
13 before.

14 Q. So you're saying that number was also a number
15 that was to be paid to the subtenants?

16 A. No. There was nothing to be paid to the
17 subtenants. The subtenants would be restored to their
18 spaces.

19 Q. And this is part of the PSA that you entered into
20 with Hilton, correct?

21 A. PSA?

22 Q. Purchase sale agreement.

23 A. Yes, sir.

24 Q. But at this point you're asking for a release.
25 Why would you have to pay him for something that you

1 thought you rightfully terminated?

2 A. Because I didn't want to be here. I wanted to
3 avoid the litigation.

4 Q. And did he ever give you a number?

5 A. Probably.

6 Q. I want to show you Exhibit 57. This is a November
7 29th letter from Mike Quillen to Tom Ervin, it's Squeeze
8 Exhibit 57.

9 MR. SUMNER: No objection.

10 (Squeeze Exhibit 57 was marked for
11 identification and admitted into evidence.)

12 BY MR. COOPER:

13 Q. So he's telling you now he will take a half \$1
14 million; is that correct?

15 A. That's correct.

16 Q. Did you agree to that amount?

17 A. I agreed to move forward with negotiation with
18 Hilton Smith in an effort to get into a position to pay
19 him that money. I was going to try to get it a little
20 less than that, but we moved forward. I never said, I
21 will give you that.

22 Q. You never -- so you didn't agree to pay the
23 \$500,000?

24 A. I did agree?

25 Q. Did not.

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1 THE COURT: Okay. Let's take about a
2 15-minute break, and I remind you not to talk about the
3 case. See you back in 15.

4 (Recess taken.)

5 (In open court, jury present.)

6 THE COURT: Good afternoon, folks. Welcome
7 back. We're going to resume now with the
8 cross-examination of the witness by Mr. Swope.

9 MR. SWOPE: May it please the Court, Your
10 Honor, may I approach the witness?

11 CROSS-EXAMINATION

12 BY MR. SWOPE:

13 Q. Mr. Ervin, I'm handing you a document that's
14 previously been marked as real estate sales agreement,
15 and it's Exhibit 7. Are you familiar with that document?

16 A. Yes, sir.

17 Q. And did you execute that document on the 30th day
18 of December 2013?

19 A. I did.

20 Q. Okay. And that is the purchase agreement between
21 Yaschik Development Company and East Bay Company,
22 Limited, correct?

23 A. That's correct.

24 Q. And before you entered into this agreement, you
25 reviewed its terms very carefully, did you not?

1 A. I believe so, yes, sir.

2 Q. Did you do it with counsel?

3 A. Yes, sir.

4 Q. Okay. And with the advice of counsel, or against
5 the advice of counsel, you chose to execute this
6 agreement, correct?

7 A. Yes, sir.

8 Q. Okay. And you understood its terms.

9 A. I believe so, yes, sir.

10 Q. Okay. All right. Now, on page one, under
11 paragraph one, where it says purchase and sale of
12 property, do you see that?

13 A. Yes, sir.

14 Q. Okay. I'm going to focus your attention on
15 paragraphs C and D. Okay?

16 A. Yes, sir.

17 Q. All right. Paragraph C says, Together with the
18 cancellation of the master lease -- this is a requirement
19 of the sale -- together with the cancellation of the
20 master lease with Charleston T&T, Inc. dated March 19,
21 1997 and assignment by Charleston T&T, Inc. to Quillen
22 Family Limited Partnership in December 2012, the master
23 lease, are you familiar with that document?

24 A. Yes, sir.

25 Q. And that's the document that went from Ann Thode

THOMAS M. ERVIN - CROSS-EXAMINATION

1 of Charleston T&T to Mr. Quillen and made him the master
2 tenant, correct?

3 A. That's correct.

4 Q. Okay. And you have obligations back and forth to
5 him, based on your master lease that you assumed from 213
6 East Bay Street, East Bay Associates.

7 A. We have a contract.

8 Q. And you stepped into 213 East Bay Associates'
9 shoes?

10 A. Yes, sir.

11 Q. All right. And you didn't renegotiate that
12 contract?

13 A. Did not.

14 Q. Didn't try to renegotiate that contract?

15 A. No, sir.

16 Q. Okay. And when you came up with a purchase price
17 for buying that building, you knew that contract was in
18 existence and what its terms were, did you not?

19 A. Are you talking about when we drew this agreement?

20 Q. No, when you purchased 213 East Bay Street, back
21 in 2003?

22 A. Yes, sir.

23 Q. You knew what the terms of that master lease were,
24 that you were stepping into the shoes of 213 East Bay
25 Associates to perform, correct?

1 A. That's correct.

2 Q. And you knew what Charleston T&T was supposed to
3 do?

4 A. Yes, sir.

5 Q. When Charleston T&T sold their interest to
6 Quillen, you knew what Quillen's responsibilities were,
7 correct?

8 A. He assumed the responsibilities that existed with
9 Charleston T&T from 1997.

10 Q. Okay. Now, Charleston T&T put in place the
11 subleases with the Brick, Squeeze, and Top of the Bay; is
12 that correct?

13 A. I had no direct knowledge of that, but I
14 understand that now, yes, sir.

15 Q. And so when Quillen buys that master lease, he
16 assumes the obligation is between him and those
17 sublessees, correct?

18 A. I would believe that to be true, yes, sir.

19 Q. Do you have any obligations, any legal
20 obligations, between Yaschik and the subtenants?

21 A. I do not believe so.

22 Q. Okay. I want to direct your attention to
23 paragraph B of this document, which goes on to say:
24 Together with at the option of the purchaser an
25 assignment of rights of seller -- seller is Yaschik,

THOMAS M. ERVIN - CROSS-EXAMINATION

1 that's you -- in the subleases with Quillen Enterprises,
2 Inc., d/b/a the Brick, and Sea Island Food Group, LLC,
3 d/b/a Squeeze, together the sublessees, upon terms
4 acceptable to the purchaser.

5 A. Yes, sir.

6 Q. Now, if you don't have any direct obligations to
7 the sublessees, why are you agreeing to convey those
8 rights --

9 A. What I'm trying to do --

10 Q. -- to the buyer?

11 A. -- as I explained before, I was trying to protect
12 the rights -- not rights, protect the subtenants as to
13 their space requirements. I was trying to give them the
14 opportunity to retain the space that they were in on the
15 same terms that they had under the agreement that they
16 had with Mr. Quillen.

17 Q. But right here --

18 A. I didn't draft this document.

19 Q. We read it with counsel. We read through that.

20 A. And any rights that I might have with that that
21 might be assigned. If I didn't have any, they wouldn't
22 be assigned.

23 Q. I understand that. My question is, in this, you
24 agree to convey your rights to them. I understand you
25 may take the position that you didn't have any rights.

1 A. Correct.

2 Q. This is an outward manifestation, that there is
3 some connection between Yaschik and the subtenants. It
4 now becomes an issue for someone else to decide whether
5 that's true or not, but you have established in this
6 document that there is some link between Yaschik and
7 these subtenants?

8 A. There is some link. I don't believe it's a
9 contractual link, but I do believe there is some link.

10 Q. Okay. All right. Did you send a termination
11 letter advising the subtenants that their subleases were
12 terminated?

13 A. I did not.

14 Q. Okay. Exhibit B. All right. And at the top of
15 that, it says value based on annual net income for two
16 leases of Brick and Squeeze versus income from a second
17 floor tenant, and it has an assumed net rental income of
18 81,120.

19 A. For the second floor tenant, yes.

20 Q. Okay. And he's willing to pay at a 5 percent cap,
21 correct?

22 A. That's correct.

23 Q. Okay. And the proper way to calculate that is
24 take those 3 annual rents, divide it by .05, which is the
25 5 percent cap rate, and that sets you your price,

1 correct?

2 A. After you subtract out the construction costs.

3 Q. I understand that. I'm talking about just for the
4 calculation on where he is starting.

5 A. Yes, sir.

6 Q. Okay. So the morning of the fire, if those are
7 the exact rents that are being paid --

8 A. I don't believe they were. I don't know what Top
9 of the Bay was paying.

10 Q. Okay. If I told you that's the exact number that
11 Top of the Bay was paying, would you disagree with me?

12 A. I would disagree, but I don't know.

13 Q. But assuming it is the morning of the fire, the
14 building was worth \$5.44 million from an income
15 generation standpoint.

16 A. If it were not subject to that master lease, that
17 would be correct.

18 Q. Okay. And so I'm not going to belabor what Mr.
19 Cooper's gone over with you about the difference in
20 value, or difference in income that would be generated
21 from this building, absent the master lease.

22 A. Yes, sir.

23 Q. All right. Since there is a lack of insurance to
24 cover the rebuilding cost, how is that going to get paid?

25 A. I guess these determinations here will be a

THOMAS M. ERVIN - CROSS-EXAMINATION

1 not in a lease. You're not supposed to do that; is that
2 right?

3 A. That's true.

4 Q. And on this termination letter, this letter is in
5 response to your correspondence dated September 3rd
6 regarding the insurance proceeds and the master lease.
7 Since the fire at the leased property has led to total
8 loss of the subject premises, the master lease has been
9 automatically terminated.

10 Did I read that correctly?

11 A. You read that correctly.

12 Q. So you're referencing paragraph 20; is that right?

13 A. Yes, sir.

14 Q. And you're saying, I'm not responsible because the
15 building is totally destroyed.

16 A. No, that's not what that says.

17 Q. Was a total loss.

18 A. It says the building is a total loss and the lease
19 is terminated. That's what it says.

20 Q. Under paragraph 20?

21 A. Yes, sir.

22 Q. Let's be real. Paragraph 20 says it's terminated
23 if it's wholly or totally destroyed, correct?

24 A. Yes, sir.

25 Q. But you're referencing total loss here, correct?

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1 A. I don't understand the difference.

2 Q. This is the first time you have taken the position
3 that the building was totally or wholly destroyed; is
4 that correct?

5 A. Over the period of five months, he said it was
6 becoming apparent to all of us that that was the fact.

7 Q. All right. Again, I'm going to say it slowly:
8 You never told anyone that this building was a total loss
9 or totally destroyed or wholly destroyed before sending
10 this letter?

11 A. That's correct, and the reason for that is I had
12 constant communication with Mike Quillen, had some
13 communication with ABS, and I was being led to believe
14 that plans were being drawn and we were going to be able
15 to rebuild that building.

16 Q. While you were sitting in your office
17 three-and-a-half blocks away?

18 A. And going by the property at least once a day,
19 usually twice.

20 Q. Okay. However, apparently you didn't bother to
21 walk into the building; is that correct?

22 A. Until September, that's correct.

23 Q. Until after the September 3rd communication, you
24 didn't bother to walk into it, even though you were going
25 by it every day; is that correct?

1 A. That's correct.

2 Q. And that's what convinced you that it was a --
3 totally destroyed, from walking by?

4 A. No, sir. I testified yesterday that accumulation
5 from knowledge from the reports from ABS, my physical
6 inspection of the property, and my knowledge of what had
7 to be done, the estimate that we had been given by
8 BELFOR, and the knowledge that that BELFOR estimate was
9 going to be significantly less than what the real cost to
10 rebuild was going to be, the fact that the walls were not
11 going to be structurally sound, we could not use any of
12 those masonry walls for reconstruction, those were the
13 things that convinced me that it was a total loss, the
14 fact that there was no soil study done to determine
15 whether or not pilings were going to be necessary, and
16 those were going to be necessary.

17 Q. Well, we'll go to your deposition. If you go to
18 page 45 of your deposition. I'm asking you the
19 question -- well, let me start:

20 Okay. And to be completely clear, you didn't
21 have the information available, talking about information
22 on estimates and things, there's no way for you to say
23 that in September of 2013 that the property was totally
24 destroyed, that the repair was going to be more than the
25 value of that property, correct?

THOMAS M. ERVIN - CROSS-EXAMINATION

1 MR. SUMNER: The letter?

2 MR. LAY: Yes.

3 BY MR. LAY:

4 Q. Mike sends you a letter on September 3rd and tells
5 you: This is to advise of two significant events; one
6 that they've paid the policy of \$1 million; is that
7 right?

8 A. That's correct.

9 Q. All right. You knew that was coming. That's not
10 new. It's just completed; is that correct?

11 A. Yes, sir.

12 Q. And then, in addition, the structure plans will be
13 complete today and available for submittal to the city as
14 well as BELFOR for their estimate. You were familiar
15 with the plans, generally, but will need to review and
16 approve them in a specific sense, and then it goes on.

17 Did I read that correctly?

18 A. You did.

19 Q. So he's telling you, You got plans. You open it.
20 For goodness sakes, you're going to have to make
21 decisions about this building, and then in the last part
22 he's saying, All parties have been working diligently,
23 but you got to do what you contracted to do, what you
24 promised to do, which is follow provision 20 and restore
25 these premises, and you pulled the plug and raise an

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1 thought, was minimally low, only added to the concerns
2 that it was going to be impossible to rebuild what was
3 there. There would be nothing left to rebuild on.

4 MR. LAY: If you go to FLP 80, which is the
5 October 2, 2013 e-mail. Any objections?

6 MR. SUMNER: No objection.

7 MR. LAY: Move to admit.

8 (FLP Exhibit 80 was marked for identification
9 and admitted into evidence.)

10 BY MR. LAY:

11 Q. Pull it up, please.

12 So this is a communication between Mike Quillen to
13 you -- excuse me, from you to Mike Quillen, October 2,
14 2013?

15 A. That's correct.

16 Q. And at that time you had already terminated the
17 lease affecting both FLP and also affecting the
18 subtenants; is that correct?

19 A. That's correct.

20 Q. And you're asking: Mike, I need information
21 regarding the lease obligations to the current
22 subtenants; is that right?

23 A. Yes, sir.

24 Q. And you're referencing an investor; is that
25 correct?

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1 Q. Thank you, Matt. And now can you look at the term
2 section of this lease and describe for the jury the
3 terms, or the length of the term for this lease.

4 A. It began in April of '97, ended five years later.
5 The tenant had the option to renew for five different
6 times at five years for each renewal.

7 Q. And so what's the longest possible term under this
8 master lease?

9 A. Thirty years.

10 Q. That would take us through which date?

11 A. March 31, 2027.

12 Q. Okay. Thank you, Matt. How would you describe
13 the overall structure of the master lease in a real
14 estate format?

15 A. As I stated earlier in response to some question,
16 this is further than a triple-net lease. The tenant here
17 is responsible for the normal expenses of taxes,
18 insurance, and daily maintenance of the common areas,
19 but, in addition to that, they're also responsible for
20 the roof and the walls and the foundation, the plumbing,
21 the mechanical, the things that might, in a commercial
22 lease, be normally sourced by the landlord.

23 Q. Is this an unusual setup in a commercial leasing?

24 A. It's not extraordinarily rare, but it's not the
25 most common.

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1 A. It does not.

2 Q. Thank you. Let's switch gears again, and I want
3 to ask you about the fire that took place on April 2nd,
4 2013.

5 How did you first learn about this fire?

6 A. On the morning news. I woke up that morning,
7 turned on the morning news, and it was the lead story on
8 all the stations.

9 Q. Had anyone called you prior to you seeing it on
10 the television?

11 A. I had not gotten a call, no.

12 Q. Mr. Ervin, would you tell the jury, what was your
13 reaction once you realized the building that was owned by
14 Yaschik Development had caught fire?

15 A. It was like a punch in the stomach. It was, you
16 know, this is not good. During my time at Yaschik, we
17 have never experienced a calamity of this nature, so I
18 had gotten up that morning. It happens to be my youngest
19 daughter's birthday, and I was looking forward -- we have
20 a family dinner with her and all the kids every year on
21 their birthdays. I was looking forward to that, and all
22 of a sudden, it was, Let's go deal with this thing.

23 Q. Were you concerned?

24 A. First, I was concerned. When you see a fire, you
25 naturally think is anybody hurt, damaged, killed?

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1 Q. Okay. Following your work on April the 2nd, did
2 you have a meeting with Mike Quillen when he came to town
3 on April the 3rd?

4 A. We did.

5 Q. And could you just explain to the ladies and
6 gentlemen of the jury that conversation, what was the
7 takeaway after you had spoken to Mr. Quillen?

8 A. Mike was going to take point on handling the
9 reconstruction of the building.

10 Q. And how did that conversation even come about,
11 that he decided to take point on the reconstruction?

12 A. Mike offered to do so. I think he was -- I know
13 he's qualified. Mike is a professional engineer, and he
14 had an equity stake in the deal, and he offered to be in
15 charge and to both work with the insurance company and
16 with the contractors and the engineers, and I was happy
17 to have him do so.

18 Q. You're the building owner, right?

19 A. Yes, sir.

20 Q. And what was your level of comfort in knowing that
21 you had a tenant handling the reconstruction of the
22 building?

23 A. That might have been unusual in most
24 circumstances, but I think he was a very capable person
25 in this instance.

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1 want to spend your lunch.

2 See you all at 2:00.

3 (Recess taken.)

4 A F T E R N O O N S E S S I O N

5 (In open court, jury present.)

6 THE COURT: Okay. Welcome back, folks. We
7 will resume now with the questioning by Mr. Sumner of
8 Mr. Ervin.

9 MR. SUMNER: Thank you, Your Honor. May it
10 please the Court:

11 BY MR. SUMNER:

12 Q. Mr. Ervin, I'm going to start off by asking you a
13 question I meant to ask you early on when we were talking
14 about your salary and the financial performance of
15 Yaschik Development.

16 Now, you told this jury what you make in salary
17 and what you make in annual bonus, but those numbers are
18 not reflected on the Yaschik Development P&L and, a
19 salary number is not reflected on a Yaschik Development
20 tax return; is that correct?

21 A. It's shown as an administrative expense.

22 Q. Will you explain to the jury how you pull your
23 paycheck and why it is that it's accounted for in such an
24 unusual fashion.

25 A. The payroll is actually generated through the

1 sister corporation, Charleston Capital Corporation, the
2 second corporation, Charleston Capital, and Yaschik
3 Development reimburses Charleston Capital for the portion
4 that Yaschik pays.

5 Q. Okay. And who is the shareholder of Charleston
6 Capital?

7 A. Henry and Sylvia Yaschik Charitable Foundation.

8 Q. How does that fit into the equation of Yaschik
9 Development as it relates to the Henry and Sylvia Yaschik
10 Charitable Foundation? As far as when Charleston Capital
11 earns income, what is it doing?

12 A. Well, both Charleston Capital and Yaschik
13 Development pay dividends to the charitable foundation
14 for distributions for charity.

15 Q. Okay. Thanks. Appreciate you clearing that up.
16 When we left off, we were looking at this timeline, and
17 we looked at a May 24th letter. I want to move you
18 forward to June 2, and if you'll follow along, there's a
19 couple entries on June 2 where you received several
20 e-mails, actually three of them, that related to a
21 meeting you were going to have with Mike Quillen on June
22 6 of 2013. Did you have a meeting with Mike Quillen on
23 June 6, 2013?

24 A. Off the top of my head, I don't remember, but if
25 they indicated we were going to schedule one, I'm sure we

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1 event, June 28th, which comes -- if we could pull that
2 out, please. This is Exhibit 78, Yaschik. I think it's
3 already previously been referred to, June 28 e-mail from
4 Mike Quillen and Tom Ervin.

5 MR. COOPER: No objection.

6 MR. LAY: None.

7 MR. SWOPE: None.

8 (Yaschik Exhibit 78 was marked for
9 identification and admitted into evidence.)

10 BY MR. SUMNER:

11 Q. This is the end of June, to put it into context,
12 almost two full months after the fire, over two full
13 months after the fire, almost three, and Quillen writes
14 to you and says: I want to provide you an update on
15 where we are with reconstruction, and first he identifies
16 some challenges that have been encountered with respect
17 to the reconstruction; is that correct?

18 A. That's correct.

19 Q. Without reading the document, what challenges did
20 Mr. Quillen encounter in late June that he related to
21 you.

22 A. The problem with structural stability was becoming
23 clearer, that the masonry structure itself was not going
24 to up to the recent international building codes
25 regarding earthquake.

1 Q. Was this a departure from the information that
2 both you and Mr. Quillen had been getting up-to-date?

3 A. It was a departure, yes.

4 Q. A development?

5 A. Yes.

6 Q. Would this have an effect on the cost to repair or
7 the ability to repair the building?

8 A. Certainly.

9 Q. And he says further on down, as you can see, We
10 are still a few weeks away from a final design that we
11 can present to the city for permits.

12 My question to you is, he says in late June, We're
13 a few weeks away from a design that we can submit for
14 permits. Did you ever get a final design from
15 Mr. Quillen that could be submitted for permits to the
16 city?

17 A. We did not.

18 Q. He makes reference in this e-mail that he's going
19 to be back down in Charleston the second half of July.
20 Did you meet with Mr. Quillen in late July?

21 A. I believe we did.

22 Q. If we go back to the timeline, in particular, did
23 you meet with Mr. Quillen on July the 25th, 2013?

24 A. I believe I did.

25 Q. And this is now moving forward yet another month.

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1 12th of 2013, and, in particular, it's an e-mail, and
2 this is Exhibit 79?

3 MR. COOPER: No objection.

4 MR. LAY: No objection.

5 MR. BROWN: None.

6 MR. SUMNER: Yaschik 79.

7 (Yaschik Exhibit 79 was marked for
8 identification and admitted into evidence.)

9 BY MR. SUMNER:

10 Q. On August 12, 2013, you receive another e-mail
11 from Mike Quillen, correct?

12 A. Yes, sir.

13 Q. And he's referencing the need to give you a call
14 at your office, and he also references the fact that he
15 believes that the insurance company now is going to pay
16 out the full \$1 million on the policy, correct?

17 A. He says he thinks so, but he still has some
18 doubts.

19 Q. And he actually goes on and says, I am not as
20 confident based on the time this has taken; is that
21 correct?

22 A. Correct.

23 Q. So he still has some doubts on it. We don't have
24 a full payment on the policy as of August the 12th?

25 A. That's correct.

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1 Q. He goes on and references, I also left you a copy
2 of BELFOR's estimate. Do you see that reference?

3 A. Yes.

4 Q. What's he talking about there?

5 A. BELFOR had created an estimate of costs for
6 reconstruction of the building.

7 Q. And who was BELFOR exactly?

8 A. BELFOR is a restoration contractor. Their primary
9 business is repairing damaged structures, or cleaning up
10 damaged structures. In fact, this was an industry that I
11 was unaware of up until the day of the fire. At the
12 fire, there were several construction companies that came
13 up to give me their business card to do this kind of
14 work. I was really amazed that there was an industry
15 that went out and chased business like that, but BELFOR
16 is one of those contractors.

17 Q. And this is a document I'm going to show you next.
18 This is Squeeze Exhibit 24 that was previously marked and
19 referenced in Squeeze's case. While we wait for
20 technology, I'm going to show you the first page of this
21 exhibit, and would you describe what this is.

22 A. This is the cover page for the statement for
23 restoration that BELFOR prepared.

24 Q. Is this the same one that Mr. Quillen was
25 referencing in his e-mail we just looked at?

1 A. Yes, sir.

2 Q. What was the total amount, estimated amount, it
3 was going to take to put the building back together
4 again?

5 A. \$2,154,812.63.

6 Q. So, Mr. Ervin, prior to receiving this estimate
7 that was done by BELFOR, who was the contractor on the
8 scene, had you received any written estimate of the cost
9 to repair or replace this building at this point in time?

10 A. I had not.

11 Q. Let's look, if we could, on to August the 14th,
12 and this is Yaschik Exhibit 159. This has already been
13 previously marked by someone else. This is an e-mail
14 from Mike Quillen on August 14th, 2013. Again, this is
15 Mike Quillen reaching out to you referencing,
16 conversations on the phone, second paragraph.

17 He says, I've spoken to the architects, and the
18 structural plans are basically done. Ready to submit to
19 the city and place the steel on order.

20 Did I read that correctly?

21 A. You did.

22 Q. Did you get the plans that week?

23 A. We did not.

24 Q. Did you ever get the plans from Mr. Quillen?

25 A. We never got a set of final plans.

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1 A. Pretty much so, yes.

2 Q. Then fast forwarding a week later, you had sent
3 him a letter on September 11th informing him that the
4 master lease was terminated because the building had been
5 totally destroyed by fire?

6 A. I did.

7 Q. Now, Mr. Ervin, I want you to look at this jury,
8 and I want you to explain to them the exact process you
9 went through from September 3rd until September the 11th
10 and how you came to arrive at this conclusion that this
11 building was totally destroyed by the fire.

12 A. I reviewed the plans that were drawn, the draft
13 plans that were drawn. I saw how significantly different
14 they were from the original reconstruction that we had in
15 mind, how it meant eliminating every structural element
16 that was there, removing the floor that was underneath
17 the building, putting in pilings that would support a new
18 steel structure, and completely rebuilding a building.

19 There was no option to do anything other than that
20 and still comply with the building codes. We couldn't
21 get a structural building there with masonry walls that
22 was going to meet the existing earthquake codes. We
23 couldn't put a building there and not meet all the
24 ABA requirements, not meet the fire requirements of the
25 town without taking out everything that was there and

1 completely rebuilding it. That was the first thing that
2 I knew from the plans.

3 Then I had an estimate from BELFOR, which I really
4 thought was a little high because they were estimating
5 without a set of plans to go from. I thought maybe it
6 would be a little less, but they were assuming they could
7 use the existing foundation.

8 Once we knew they had to go back and take out the
9 entire slab, do soil analysis and put new piling in to go
10 down to support the new building, I knew the cost was
11 going to be significantly more than anything we had
12 dreamed of. It meant that from a code perspective there
13 was no way to build exactly what was there, and from a
14 financial perspective, there was no way to repair what
15 was there and have anything resembling an occupiable
16 building. It just couldn't be done from a code
17 perspective, regardless, but, economically, it couldn't
18 be done either, and based on that information, based on
19 everything that I analyzed, I knew that the building was
20 destroyed.

21 There wasn't any way we were going to be able to
22 repair what was still there. There might be an area that
23 was mildly damaged. Everything was damaged. You can't
24 run as much water through a building as was there and not
25 damage everything, but there was no way to repair that

1 building and comply with the building codes. It simply
2 couldn't be done, and I was aware of that, and that's
3 when I wrote the letter.

4 The letter was to state the facts as well as to --
5 and I know they won't appreciate this, but that severance
6 clause exists for the benefit of the tenant as well. You
7 don't want the tenant hanging around thinking something
8 is going to happen that's not going to happen. You need
9 to tell them the truth, and that's what I was doing.

10 Q. So, Mr. Ervin, was your decision to declare it a
11 total loss based on the information that was provided to
12 you by Mike Quillen?

13 A. In part, yes.

14 Q. Did you base that decision on the information you
15 learned from ABS, both through your meetings in person
16 and through e-mails?

17 A. That's correct.

18 Q. Did you base it on your -- you told these folks
19 before that you went there the week of September the 3rd
20 and actually walked around and physically observed the
21 building. Did you base that decision on your physical
22 observations?

23 A. In part, yes.

24 Q. Mr. Ervin -- and it sounds like you based that
25 decision on part on what you believed it was going to

1 cost to repair or reconstruct this building, correct?

2 A. Correct.

3 Q. Did you compare the cost of repair to what you
4 believed to be the cost of the building, or the value of
5 the building?

6 A. No. There was no way to compare a cost of repair
7 because it could not be done and comply with the code.

8 Q. At this point in time, what did you think it was
9 going to cost to repair this building?

10 A. Actually, I was thinking probably somewhere in the
11 2.5 million range. I knew it was going to be expensive
12 to demolish everything there. It's a unique building
13 inside. The fact that we had to retain the facade was --
14 again, in Charleston, you're not supposed to say this,
15 but it was a real hindrance because it inhibits the
16 ability to get materials in and out of the building site,
17 but it was a fact, and I estimated that it was going to
18 be a minimum of \$2.5 million.

19 Q. Now, as an employee of Yaschik Development, did
20 you stand to personally gain from declaring this building
21 to be totally destroyed by fire?

22 A. Absolutely not.

23 Q. Have you recognized some additional income or
24 profit or gain on account of making that decision on
25 September the 11th, 2013?

1 A. Absolutely not.

2 Q. I want to just briefly touch on your
3 communications with Hilton Smith. They've been brought
4 up in this lawsuit a number of times.

5 I think you told this jury you saw Mr. Smith at
6 the scene of the fire, and we've gone through two letters
7 you received from Mr. Smith's lawyer indicating that he
8 was upset because of damage to his building that occurred
9 on account of the fire, correct?

10 A. That's correct.

11 Q. If we could refer to Exhibit 164, this is an
12 e-mail that has been previously marked and shown to this
13 jury. If we could zoom in to the body of this, Matt, and
14 this letter states, Pursuant to our telephone
15 conversation yesterday, please review the pertinent facts
16 and proposal as follows.

17 So my first question to you is, can you please
18 explain to the jury what happened on that telephone call?
19 Who called who and how did this come about?

20 A. Hilton called me and asked me about the
21 possibility of buying that site.

22 Q. What specifically did Hilton say that you can
23 recall?

24 A. He said he was a logical purchaser if he were
25 interesting in selling. His Bay company owned the

1 property on all three sides. He indicated that he had
2 plans for his property that would be more convenient for
3 him if he happened to own that site.

4 Q. And what was your position on selling the property
5 at that point?

6 A. I told him we were in the process of
7 reconstructing the building, that if he bought it, it was
8 going to be with a tenant in place, and these were the
9 numbers that were in place, and if he was willing to live
10 with that, then he could deal with it.

11 Q. So if we look down here in this memorandum -- and
12 if we could zoom in a little more on that, Matt, just on
13 the numbered paragraphs, please, the first thing you
14 state in paragraph one is what?

15 A. 213 East Bay is subject to a master lease on a
16 pure net basis.

17 Q. And then you give him the terms and the renewal
18 options, and you make him, in essence, an offer. Did you
19 state you would accept an offer based on a 5 percent cap
20 rate evaluation, correct?

21 A. That's correct.

22 Q. And if you apply the net rents of 189,000 to a 5
23 percent cap rate, you get this \$3.781 million, correct?

24 A. Correct.

25 Q. Do you recall when you next heard back from Hilton

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1 BY MR. SUMNER:

2 Q. This is an e-mail from Hilton Smith to you? This
3 starts the chain?

4 A. Yes.

5 Q. Good morning. Anxious to review the lease, plans,
6 and cost estimates for the property. Best regards.

7 And then you respond to him, Hilton, I'm not
8 ignoring you. Issues have arisen with the tenant that
9 prevent me from disclosing info at this point. Once
10 those are resolved, I will be in touch.

11 Now, to put this in context, this is before
12 Mr. Quillen has dropped the reconstruction back in your
13 lap, correct?

14 A. That's correct.

15 Q. And this is where there's been a termination of
16 the master lease, correct?

17 A. Correct.

18 Q. So what are you referring to on August 28? And if
19 you could, just explain that to the jury.

20 A. Well, the issues included both the shortfall money
21 and who was going to pay what that shortfall was and the
22 issues with not having any plans. We were trying to
23 reach a conclusion as to what it was going to cost to
24 rebuild, and ABS simply did not deliver.

25 Q. And so at this point, did you cut off

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1 communications with Hilton Smith for a period of time?

2 A. I basically told him I couldn't provide any
3 information right now, and once those were resolved, I
4 called him.

5 Q. Okay. Well, once Mr. Quillen handed the
6 reconstruction back off to you and once you had declared
7 this master lease to be terminated, did you have
8 communications with Hilton Smith?

9 A. I had communications with him after that.

10 Q. And were those communications in secret?

11 A. No.

12 Q. Okay. Who did you inform that you were having
13 conversations with Hilton Smith?

14 A. Mike Quillen.

15 Q. So you actually specifically and directly informed
16 Mike Quillen that you were talking to Hilton Smith about
17 selling the building?

18 A. I did.

19 Q. And what was the context of those conversations?

20 A. I told him that he was -- if there was going to be
21 a purchaser, he was the natural purchaser. He would
22 probably pay more than anyone else, and I knew that
23 Hilton was going to have to deal with Michael and
24 Michael's tenants.

25 Q. And had you previously had conversations with

1 Mr. Quillen about Mr. Quillen buying the building?

2 A. We had.

3 Q. Tell me about those.

4 A. I just remember we never reached a number that was
5 in the best interest of Yaschik and something we could
6 accept.

7 Q. Did Mike Quillen ever offer a number in the 3.6,
8 \$3.7 million?

9 A. Oh, no.

10 Q. And if I could direct you to Exhibit No. 46, and
11 this was an e-mail that was previously shown to the jury
12 by Mr. Lay. This is an e-mail, if that's the right
13 one -- Squeeze 46, this is an October 22, 2013 e-mail to
14 Mike Quillen and his lawyer, Jameson Cox, and if you
15 could zoom in at the top there, Matt, this is an e-mail
16 from you, right?

17 A. Yes, sir.

18 Q. Okay. And you're mailing Mike Quillen and copying
19 Mike Quillen's lawyer; is that correct?

20 A. That's correct.

21 Q. And you're talking to them specifically about your
22 dealings with Hilton Smith, correct?

23 A. I am.

24 Q. And, in fact, as Mr. Lay pointed out earlier in
25 the context of this conversation, you asked Mr. Quillen

1 and his lawyer to help you get information, documents,
2 that Hilton Smith wanted to review, correct?

3 A. Correct.

4 Q. After this e-mail and going into the fall months,
5 did you continue keep Mr. Quillen in the loop about your
6 progress with Mr. Smith?

7 A. Sure, I did.

8 Q. And in November of 2013, Mr. Smith sent you a
9 proposed contract, didn't he?

10 A. I don't remember if it was in November. We
11 executed one in December.

12 Q. Okay. All right. Well, so these communications
13 continue, and they culminate into an agreement that you
14 signed in December?

15 A. That's correct.

16 Q. And let's look at Squeeze No. 7, and this is a
17 document this jury has seen before, so I don't want to
18 drag this out too long, but what I want to ask you is --
19 I think the jury has seen a couple of provisions of this
20 real estate sales agreement, but can you describe for
21 them, what was the concept? What was the idea of this
22 deal that you reached with Hilton Smith and then executed
23 on December the 30th of 2013?

24 A. The structure of the deal was that we were going
25 to establish a price that would be the market price for

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1 that property if the owner of the building were
2 collecting rents directly from the tenants, had to
3 provide the information about the sublease tenants to
4 Mr. Smith in order for him to come up with that number.

5 Those were provided by Mike. I asked him to do
6 so. I had to get Mike to sign a release that he was
7 abandoning any rights that he may claim. I believe they
8 were extinguished already, but I believed he was going to
9 make a claim he was going to have to extinguish his
10 claims.

11 I would have to pay him a number that would make
12 him happy to relinquish any claims in the master lease,
13 and I put a provision in there that the subtenants on the
14 first floor, Brick and Squeeze, had to be returned to
15 their spaces on as close of business terms as could be
16 done so they would be paying effectively the same rent.
17 They would have effectively the same space.

18 There were probably going to be design issues
19 because the fire code wouldn't allow an 11-foot wide
20 building to be built if it didn't have proper fire exits,
21 but we were going to have to address those, but if Hilton
22 couldn't come to terms with Squeeze and Brick and pay
23 enough money that I was going to be able to pay Mike
24 Quillen a return on his investment, the deal was off.
25 There wasn't going to be a deal.

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1 And as I testified before, the only reason I
2 didn't include Kelley Tant in that agreement is because
3 Mr. Quillen had told me she did not express an interest
4 in returning to that building. I believe if I had
5 included that as well, it wouldn't have changed the deal
6 because I think everybody in that building was paying
7 market rent at the time. They weren't there on some kind
8 of a preferential lease, but that was the structure of
9 the deal. That's exactly what the contract says.

10 Q. And up until this point, December 30th, 2013, had
11 you ever received an e-mail or a phone call or an
12 in-person meeting from either Kelley Tant or Clint
13 Gaskins or Matt Quillen, any of the subtenants in this
14 case?

15 A. I never had any communication with any one of
16 those other than Matt Quillen. I think Matt may have
17 attended one or two of the meetings I had with Mike
18 because I believe Matt was serving as Mike's eyes and
19 feet on the ground in Charleston.

20 Q. Understood. Now, if you look on the first page of
21 this document, if we can just scroll down here, Matt, to
22 these provisions, provision C says, Together with
23 cancellation of the master lease with Charleston
24 T&T dated March 19, 1977, and so on and so forth.

25 Now, you've told the jury that on September 11th

1 you declared this lease terminated?

2 A. That's correct.

3 Q. Why did you use this terminology in this document?

4 A. Because I wanted to get Mike Quillen to confirm,
5 like I testified once before, like a quitclaim deed. You
6 may have already sold the property. You may have already
7 relinquished your rights in it, but you're confirming
8 that whoever wants assurance that you don't have any
9 interest in it, and, more importantly, you're not going
10 to sue anybody.

11 Q. And then here in subparagraph D, this is where you
12 mention the subleases, correct?

13 A. If there are any rights with the subleases,
14 they're going to be assigned or they're going to be taken
15 care of. They basically meant the same thing. They were
16 either going to occupy the space or release their claim
17 to occupy the space.

18 Q. Did you have any specific contract with any of the
19 sublessees?

20 A. Absolutely not.

21 Q. Did you have any specific contractual relationship
22 with the sublessees?

23 A. I did not.

24 Q. And let's turn to page four of this document, and,
25 in particular, I would like to look at section 3(b), if

1 we can just pull that up, Matt. Now, section 3(b) says,
2 If seller is unable to receive a termination of the
3 master lease prior to the expiration of the inspection
4 period and/or purchaser and seller have been unable to
5 agree upon new leases with the sublessees on terms
6 acceptable, and then it goes on and says, the purchaser
7 and the seller, as applicable, may terminate this
8 agreement; is that right?

9 A. That's correct.

10 Q. Okay. So under this provision, you had to agree
11 to the new terms of the sublessees's arrangement,
12 correct?

13 A. That's correct.

14 Q. And I guess part and parcel with that would be the
15 subtenants had to agree with that as well?

16 A. Absolutely.

17 Q. Let's look at page five, and 5(e) in particular,
18 if you could pull that out. Thank you, and, again, it
19 says it with more specificity, that prior to the
20 expiration of the initial inspection period, seller and
21 purchaser shall agree upon the terms of new leases with
22 the existing sublessees that are acceptable to both
23 parties and do not change the business terms of the
24 sublessee; is that right?

25 A. That's correct.

1 Q. Okay. Now, when you say do not change the
2 business terms of the sublessees, does that mean that all
3 the -- everything under the existing leases is going to
4 stay the same?

5 A. It may not stay exactly the same, but you can't
6 raise the rate rent, you can't shorten the lease. You
7 can't do anything to the detriment of the tenant.

8 Q. And, in fact, if you look at the last page, page
9 18, Exhibit C -- and if we focus in on paragraph ten,
10 please, Matt, as further recompense for the lessees and
11 sublessees, you have it concluded here that if required
12 as part of obtaining the subleases acceptable to the
13 purchaser, the following shall also be provided by the
14 purchaser as landlord, and these items will be included,
15 and it goes on and lists a number of upfit items that
16 would apply to each of the sublessees, correct?

17 A. That's correct.

18 Q. Mr. Ervin, how did things end up with Hilton
19 Smith? Did you sell him the building?

20 A. Did not.

21 Q. Why did that deal fall through?

22 A. He eventually came to the conclusion that it
23 wasn't a good investment for him.

24 Q. Now, Mr. Smith worked on this building and his
25 designs in trying to come up with a way to make this work

THOMAS M. ERVIN - CROSS-EXAMINATION

1 made this deal with Hilton Smith, were you going to be
2 putting more money in your pocket or less?

3 A. Less, and I knew it was going to be less.

4 Q. And, in fact, you said that you believed it was
5 going to cost another \$1 million to reconstruct that
6 building, correct?

7 A. I did.

8 Q. So if that, in fact, was the case, this price
9 under the sales agreement with Hilton Smith would be
10 reduced to 2.6 million, correct?

11 A. If he agreed to it, yes, then that was the cost.

12 Q. Thank you, Matt. So, in conclusion, can you just
13 describe to the jury what happened? You did not end up
14 selling the building to Hilton Smith. You did not go
15 through with this December 30th sales contract. What's
16 to happen to the building at 213 East Bay Street?

17 A. We moved forward with rebuilding it.

18 Q. And are you going to repair it or are you going to
19 knock it down and rebuild it?

20 A. Knock it down and rebuild it, the only option that
21 was available.

22 Q. And where are you in that process right now,
23 Mr. Ervin?

24 A. We're in about the fourth or fifth month of the
25 process. Demolition was the first 90 days. We have --

THOMAS M. ERVIN - CROSS-EXAMINATION

1 we're done installing micropiling. We have re-shored the
2 front facade again, and that's basically where we stand
3 right now.

4 Q. And all in, what's it going to cost Yaschik
5 Development to tear down and rebuild this building at 213
6 East Bay Street?

7 MR. COOPER: Objection, Your Honor.
8 Subsequent remedial efforts.

9 MR. SUMNER: I'm just asking him what he's
10 going to pay, Judge.

11 THE COURT: Overruled.

12 MR. COOPER: Same objection.

13 THE COURT: Overruled.

14 BY MR. SUMNER:

15 Q. You can answer.

16 A. Construction contract was \$3.9 million.

17 Q. Has Yaschik Development gained financially at all
18 from the termination of this master lease?

19 A. No, sir. We have not had a gain through this
20 entire process.

21 MR. SUMNER: No further questions. Thank
22 you.

23 Actually, if I may, can I just confer with my
24 co-counsel for one quick second, Judge?

25 THE COURT: Sure.

ANN THODE - DIRECT EXAMINATION

1 Q. Did you create -- I'm sorry. Did you create
2 Charleston T&T for that purpose?

3 A. That purpose only.

4 Q. So in 1997, you had the master lease for 213 East
5 Bay Street?

6 A. Yes.

7 Q. And you and your two children worked to start up a
8 bar/restaurant?

9 A. We did.

10 Q. What was the name of that bar/restaurant?

11 A. Jack the Ripper.

12 Q. I think you said the bar came from England?

13 A. It did.

14 Q. Was it an English pub kind of place?

15 A. No. Kensington Park was -- in England at the,
16 time if you got a divorce, you could not ever get married
17 in the church again. You had to get married in a public
18 house, and there are boroughs -- I don't know how exactly
19 to describe it, but they're divided in small boroughs
20 throughout London and the London area. Kensington Park
21 is one of those, and each one of them had sort of a town
22 hall, but they also had in that town hall a bar, every
23 one of them did, because they also knew it would be used
24 for events. Since they had the church rules of not being
25 allowed to marry the second time in a church, it had to

ANN THODE - DIRECT EXAMINATION

1 we had, that's what that was. Cost of goods would have
2 been what she spent at liquor stores, Sam's, Costco.
3 There were a few people she used around town, Burris
4 Liquors -- there were several places she bought these
5 cost of goods for that year; her salaries and wages, her
6 rent, which in parentheses I've got there now includes
7 Speakeasy, and the reason I did that, because there was a
8 big jump between 2010 and 2011, and that was because now
9 she was paying the square footage rent for what I call
10 the apartment, but it is what became Speakeasy; taxes and
11 fees and then other, she had borrowed some money from her
12 dad, so she was paying that back, and then what it cost
13 to outfit Speakeasy. That gave her a net profit of
14 \$28,107.79. And then --

15 Q. Under that --

16 A. Then I added back in -- I said, well, had you not
17 had to pay your dad, you would actually have made \$68,000
18 that year.

19 Q. So you added the \$40,000 that Kelley took out to
20 pay her personal loan? You added that back in?

21 A. Yes, yes.

22 Q. Is it fair to say -- was Kelley the sole
23 shareholder of Top of the Bay?

24 A. Yeah, and it wasn't a personal loan for her to go
25 on vacation, it was a personal loan for business.

1 Q. That she got from her dad?

2 A. Yes.

3 Q. When you add the 40,000 back in, you got the
4 68,102, correct?

5 A. Yes, yes.

6 Q. Now, did Kelley get paid any other way?

7 A. She did. She was paid \$50,000 a year. That was
8 her salary.

9 Q. The numbers year to year vary. Did Kelley pay
10 herself \$50,000 every one of these years?

11 A. Yes.

12 Q. So net profit and loss of 40,000, plus the 28,000?

13 A. Yes.

14 Q. And then, in addition to that, Kelley paid herself
15 \$50,000?

16 A. Yes.

17 Q. Okay. Now, you prepared you said, this particular
18 profit and loss statement, prior to the litigation. What
19 about 2012? Did you make a profit and loss statement for
20 2012?

21 A. I did, just because I made one for 2011. I
22 thought, well, since I've got the form now, I'll just go
23 ahead and continue to make them.

24 Q. And that was made contemporaneous? That was
25 before the fire?

ANN THODE - DIRECT EXAMINATION

1 the Bay and what entity?

2 A. Charleston T&T. It's Top of the Bay doing
3 business as Club Light and Speakeasy with -- as a tenant
4 and Charleston T&T as the landlord, and that's me.

5 Q. Charleston T&T was still the master leaseholder,
6 correct?

7 A. Yes.

8 Q. Okay. When did you sell the master lease to FLP?
9 Was it later in 2012?

10 A. No. It was in -- yes, it was.

11 Q. When is this sublease dated?

12 A. April 1, 2012.

13 Q. That's when the period begins. Can you look on
14 the back page and tell me when the signatures were.

15 A. 2/21, so February 21.

16 Q. So February 21, 2012?

17 A. Right.

18 Q. Your company, Charleston T&T, entered into a lease
19 agreement with your daughter's company, Top of the Bay,
20 for the second floor of 213 East Bay Street?

21 A. Yes.

22 Q. Is that correct?

23 A. Yes.

24 Q. Okay. Now, I want to bring your attention to a
25 couple of paragraphs in this, and I want to point out,

ANN THODE - DIRECT EXAMINATION

1 first, you've heard a lot and we've heard a lot about
2 paragraph 20 and so forth. This sublease appears to be a
3 little bit different than these, doesn't it? And --

4 A. Oh, sorry.

5 Q. Let me call your attention first to paragraph
6 four.

7 A. Yeah, 20 is condemnation.

8 Q. Let me call your attention first to paragraph
9 four. Do you see that, on page two?

10 A. Yes. Use of premises, that one?

11 Q. Paragraph four on page two deals with insurance.

12 A. No, my four is use --

13 Q. I think there's a couple of duplicative numbers in
14 there. Right there.

15 A. Okay. Insurance, yes.

16 Q. Can you read -- that's paragraph four, right?

17 A. Right.

18 Q. Read that first part of that first sentence in
19 paragraph four.

20 A. Landlord shall keep the premises adequately
21 insured at a reasonable rate as indicated below. Choose
22 one.

23 Q. That's the same language we've been hearing about
24 for the last four days, correct?

25 A. Yes, it is.

ANN THODE - DIRECT EXAMINATION

1 A. Yes.

2 Q. Okay. Was it your intent at that time that you
3 understood that obligation?

4 A. Yes, it was.

5 Q. Okay. And you understood that obligation.

6 A. I did.

7 Q. Now, let me direct your attention to now paragraph
8 18.

9 A. Damage or destruction of premises.

10 Q. Now, this is the paragraph we've been talking
11 about for the last four days that basically says if the
12 building is totally destroyed, then the lease is
13 terminated.

14 A. Right.

15 Q. However, if the building is damaged but not wholly
16 destroyed, they have to fix the building.

17 A. Correct.

18 Q. Rents will abate, and they will fix the building;
19 is that right?

20 A. Correct.

21 Q. Now, did you understand your obligation under
22 paragraph 18 at the time you entered into this sublease?

23 A. Yes, that I had to have adequate insurance.

24 Q. That was paragraph four. Paragraph four says you
25 have to have adequate insurance. Paragraph 18 --

1 A. I'm sorry. I'm just really tired. Long day for
2 me.

3 Okay. 18, damage or destruction. If
4 premises are totally destroyed by fire this lease shall
5 terminate -- okay. Yes, I understood that, that if the
6 building was declared totally destroyed, the lease could
7 be terminated.

8 Q. Okay. What was your obligation if the building
9 was damaged by fire but not wholly destroyed?

10 A. I had to carry the insurance. I had to --

11 Q. Read paragraph 18 and tell me if you understood.

12 A. Premises damaged but not wholly destroyed by fire
13 or other casualty, rental shall abate in such proportion
14 as to use the premises has been lost to the tenant.
15 Landlord shall restore the premises to substantially the
16 same condition as prior to damage and as speedily as
17 predictable.

18 Q. Okay. So if the building is totally damaged, the
19 lease is terminated, correct?

20 A. Yes.

21 Q. It's damaged but not wholly destroyed, you had to
22 restore it to --

23 A. Had to restore it.

24 Q. To the condition it was in prior?

25 A. Yes.

ANN THODE - CROSS-EXAMINATION

1 Q. He had the opportunity to pull the master lease
2 and review it carefully with his lawyer, correct?

3 A. Correct.

4 Q. He had the opportunity pull all three of the
5 subleases and review those carefully with his lawyer,
6 correct?

7 A. That's correct.

8 Q. And he had the opportunity to ask you for any
9 documentation that you had so he could satisfy himself
10 that this \$500,000 investment was worth his time, right?

11 A. Yes.

12 Q. And that was up to Mike Quillen to do the due
13 diligence, right?

14 A. Yes, it was.

15 Q. It wasn't your job to make sure he did everything
16 he was supposed to do, correct?

17 A. That's correct.

18 Q. Do you have any idea what kind of due diligence he
19 did on the insurance obligation?

20 A. I do not.

21 Q. Do you know if he had the building appraised?

22 A. I do not.

23 Q. Do you know if he brought in a contractor or an
24 engineer that gave him an idea of the cost of the bricks
25 and mortar of the building structure itself?

ANN THODE - CROSS-EXAMINATION

1 Q. Okay. So in '97, this building was owned by the
2 company 213 East Bay Street, and then in 2003, the
3 building was sold to Yaschik Development, correct?

4 A. Correct.

5 Q. And from 2003 until you sold the master lease to
6 Mike Quillen, the owner of the building was Yaschik
7 Development, correct?

8 A. That's correct.

9 Q. And so for that period of time, those nine years,
10 you had a business relationship with Yaschik, correct?

11 A. Yes.

12 Q. And that was a good business relationship with
13 Yaschik?

14 A. It was.

15 Q. You interacted with Tom Ervin?

16 A. Yes.

17 Q. And you found him to be honest and professional
18 and fair, correct?

19 A. He was fair.

20 Q. In fact, once you even actually asked him to give
21 you a break on the rent and he did?

22 A. Yes, but he also came back later and asked for the
23 break that he gave me to be paid, which I did.

24 Q. But he gave you what you wanted?

25 A. Yes, yes. The kids were struggling in the late

KELLEY TANT - DIRECT EXAMINATION

1 that your understanding?

2 A. Yes, sir.

3 Q. And, if you would, explain to me how you got to
4 the number that you think you made in 2010 as a profit?

5 MR. SUMNER: Your Honor, objection. I think
6 the testimony was that her mother made the calculations,
7 so I don't know that it's appropriate for this witness to
8 be explaining her mother's calculations.

9 MR. SWOPE: Your Honor, it's her business.
10 It's her profit and loss statement. She said she went
11 over the 2010 tax return with her mother and verified the
12 numbers. This is drawn directly from that.

13 THE COURT: I'll allow it. Go ahead.

14 BY MR. SWOPE:

15 Q. All right. Now, you start up there, the gross, I
16 assume that's your total receipts?

17 A. Yes, sir.

18 Q. Okay. And then the next line says cost of goods.
19 What's that?

20 A. That would be liquor, cups, fruit that you needed
21 to run the business.

22 Q. Okay. The next line says salaries and wages.
23 What is that?

24 A. That would be the salaries for the year, my
25 salary, plus the salary for employees.

1 Q. Okay. And how much was your salary?

2 A. \$50,000.

3 Q. So 50,000 of that 67,998.46 was yours?

4 A. Yes, sir.

5 Q. And the then rent. That's what you paid for your
6 space?

7 A. Yes, sir.

8 Q. And you paid that to Charleston T&T in 2010?

9 A. Yes, sir.

10 Q. And then it says taxes and fees. What would that
11 be?

12 A. That would be insurance and then the taxes on the
13 building.

14 Q. Okay. And then the other, it says \$30,000, first
15 payment of -- what is that?

16 A. Personal business loan.

17 Q. Personal loan from father?

18 A. Yes, sir.

19 Q. Tell me about that.

20 A. I had gotten -- in about 2008, I borrowed 100,000
21 from my dad, so I am now in the process of paying him
22 back.

23 Q. And that was the first installment?

24 A. Yes, sir.

25 Q. So you took 30,000 of your profits and you used

KELLEY TANT - DIRECT EXAMINATION

1 that to repay the loan?

2 A. (Nods head.)

3 Q. And that would have been income to you on your tax
4 return, correct?

5 A. Yes.

6 Q. All right. And then there's another figure right
7 below that, 8,792. It says repairs. What would that
8 have been?

9 A. I would have probably had to repair the air
10 conditioning unit, so it could have been a unit or --

11 Q. Okay. All right. And then it says net profit
12 loss. What is that number?

13 A. That's -- after taking everything out that we just
14 went over from the gross, that's what I would have left.

15 Q. So your net profit for the year would have been
16 \$53,979.73?

17 A. Yes, sir.

18 Q. And you added 3,000 back in?

19 A. 30,000.

20 Q. I'm sorry, 30,000 back in for the loan, and you
21 also had your \$50,000 salary?

22 A. Yes, sir.

23 Q. And all that totalled together is what your profit
24 for the year was?

25 A. Yes, sir.

KELLEY TANT - DIRECT EXAMINATION

1 Q. And do you know what that number totals up to?

2 A. It was \$133,979.73.

3 Q. \$133,979.73?

4 A. Yes, sir.

5 Q. All right. If we could pull up the P&L for 2011,
6 okay. Let me back up. Could we pull up the tax return
7 for 2011? And can you scroll down to the bottom of the
8 first page.

9 Now, Ms. Tant, at the bottom of the first page of
10 that 2011 tax return, it doesn't say copy. It also
11 doesn't have your signature. Have you had a chance to
12 review that document?

13 A. Yes, sir.

14 Q. Okay. Is that a fair and accurate reflection of
15 what you submitted to the IRS?

16 A. Yes, sir.

17 Q. And you would have signed and dated that?

18 A. Yes, sir.

19 Q. And that would have been the basis for drawing the
20 2011 profit and loss statement?

21 A. Yes, sir.

22 Q. Tracy, if you put the 2011 P&L -- all right. Bump
23 it up just one more. There you go.

24 So on the 2011 P&L, I don't want to belabor it for
25 the jury, the gross is what the number appears?

KELLEY TANT - DIRECT EXAMINATION

1 A. Yes, sir.

2 Q. And then you have a higher cost of goods sold
3 because you had a better year?

4 A. Yes, sir.

5 Q. Okay. And salaries and wages, that was 62,196.50?

6 A. Yes, sir.

7 Q. And \$50,000 of that was yours?

8 A. Yes, sir.

9 Q. And then your rent went up to \$78,000?

10 A. Yes, sir.

11 Q. And why did that happen?

12 A. Because, as my mom said, it's the apartment.

13 Q. That's when you opened the Speakeasy?

14 A. Yes, sir.

15 Q. Okay. And so --

16 A. Actually, no. I opened Speakeasy in 2010, but my
17 rent included Speakeasy in 2011.

18 Q. Your mom cut you a little slack in 2010?

19 A. Yes.

20 Q. And the taxes and fees, we went over that in last
21 year's.

22 A. Uh-huh.

23 Q. That's just what you paid in 2011?

24 A. I'm sorry. 38,684.85.

25 Q. And then explain the other section to me.

1 A. So I then paid back my father, 40,000, and the
2 cost to establish Speakeasy, I had gone in -- since
3 Speakeasy started picking up and I was getting busier and
4 busier, I was able to go back in and put nicer furniture
5 in and things like that.

6 Q. So you took your profits and reinvested in your
7 business, and you put in \$28,792?

8 A. Yes, sir.

9 Q. Okay. And then your net profit for that year was
10 how much?

11 A. \$20,107.79.

12 Q. And you added back in the 40,000 of income where
13 you paid the loan?

14 A. Uh-huh.

15 Q. And your \$50,000 salary?

16 A. Yes, sir.

17 Q. Did you add back in the cost of the profits you
18 saved back in Speakeasy?

19 A. Yes, sir.

20 Q. What number did you come up with?

21 A. \$146,215.58.

22 Q. Thank you. All right. And do you know how much
23 of a net increase that was from 2010 to 2011 on that
24 profit?

25 A. Yes. It was 9.6 percent.

KELLEY TANT - DIRECT EXAMINATION

1 Q. All right. And then if you could pull up the 2012
2 tax return, scroll down the first page, and, Ms. Tant,
3 that says copy down at the signature spot. Have you had
4 an opportunity to review that document?

5 A. Yes, sir.

6 Q. And is that a fair and accurate reflection of what
7 you supplied to the IRS when you filed the tax returns
8 for 2012?

9 A. Yes, sir.

10 Q. Okay. All right. And if we could then put up the
11 2012 P&L. All right. And, again, I don't want to bore
12 the jury too much. I feel like I'm doing enough of that
13 already, but your gross was 496,202?

14 A. Yes, sir.

15 Q. And you had costs of goods of 155,110.98?

16 A. Yes, sir.

17 Q. And you had salaries and wages of 66,041.96?

18 A. Yes, sir.

19 Q. And out of that, 50,000 of that number was your
20 salary?

21 A. Yes, sir.

22 Q. And you paid your rent and your taxes and fees?

23 A. Yes, sir.

24 Q. Now, explain to me the other.

25 A. The money that I put into advertisement.

1 Q. And how much was that?

2 A. \$12,344.

3 Q. Okay. And then --

4 A. The balance of the loan to my father, 30,000.

5 Q. So you paid off your father.

6 A. Yes, sir.

7 Q. And you got repairs.

8 A. Yes, sir.

9 Q. What was your net profit and loss with all those
10 deductions?

11 A. \$116,771.86.

12 Q. And then you claimed \$30,000 of income for paying
13 off the loan?

14 A. Yes, sir.

15 Q. And your \$50,000 salary?

16 A. Yes, sir.

17 Q. Okay. And what did you come up with for your net
18 profit for 2010?

19 A. \$196,771.86.

20 Q. Okay. And do you know what the percentage
21 increase from 2011 to 2012 was?

22 A. It was 33.9 percent.

23 Q. Okay. Now, 33.9 is a lot bigger than 9.6. What
24 do you attribute that to?

25 A. The Speakeasy.

1 Q. When did the fire happen?

2 A. April 2nd, 2013.

3 Q. So you got a quarter of the year in 2013?

4 A. Yes, sir.

5 Q. Okay. Is that the best quarter, worst quarter,
6 average quarter of the year?

7 A. It's hard to say. We just started, so --

8 Q. So you had a 9.6 percent increase and a 33 percent
9 increase across those three years.

10 A. Yes, sir.

11 Q. Do you know what that averages out to?

12 A. No, sir.

13 Q. Okay. All right. Now, when you were trying to
14 calculate what your damages were after the fire, how did
15 you go about doing that?

16 A. Took the 2010 -- the percentage 9.6 and 33.9 and
17 then averaged it out to 21.75.

18 Q. So 21.75 is the average of those two?

19 A. Yes, sir.

20 Q. So you took that figure and assumed constant
21 growth?

22 A. Yes, sir.

23 Q. And so what did you come up with for your 2014
24 figure?

25 A. Originally 1.4.

1 Q. You mean for all the years?

2 A. For all '13, '14, '15, '16 to 2017, yes.

3 Q. And you came up with what number?

4 A. \$1,429,071.26.

5 Q. Okay. And that was taking whatever you made in
6 2012 and adding -- multiplying that by 1.2175 each
7 successive year?

8 A. Yes, sir.

9 Q. Now, there was a lot of talk when Mr. Gaskins was
10 on the stand about how it was going to take a while for
11 the building to be reinstated, or restored.

12 A. Yes, sir.

13 Q. Did you take into account any of that?

14 A. I did now, yes, sir.

15 Q. Okay. And what number did you come up with,
16 taking that into account?

17 A. I was going with we would be back in business in
18 December, late December, of 2013 so I took out 2013, and
19 it was \$1,210,750.83.

20 Q. Okay. And do you believe that's how much money
21 you've lost as a result of this fire and the building not
22 being put back in condition in a timely fashion?

23 A. Yes, sir.

24 Q. Okay. Now, since you haven't been able to engage
25 in this business, what have you had to do to support your

KELLEY TANT - CROSS-EXAMINATION

1 Q. He's communicating with Clint. He's communicating
2 with architects. He's communicating with contractors.
3 You know all that sort of chaos is being moved forward by
4 Mike Quillen; is that right?

5 A. Yes, sir.

6 Q. And he is -- during that time period, you never
7 had any sort of interaction with Tom Ervin when it came
8 to the rehabilitation or restoration of that building; is
9 that right?

10 A. That's correct.

11 Q. You never heard Tom Ervin or anyone else on behalf
12 of Yaschik say, you know, We need to talk about this and
13 see if there is some sort of economic analysis that we
14 need to apply to the destruction of the building before
15 we determine whether or not we're going to go forward
16 with restoration. No one ever said anything like that to
17 you?

18 A. No, sir.

19 Q. In fact, it's not in the lease agreement, is it?

20 A. No, sir.

21 Q. It's very simple language, totally and wholly; is
22 that right?

23 A. Yes, sir.

24 Q. And we now know from Google that it means totally
25 and wholly; is that right? And you never -- the first

KELLEY TANT - CROSS-EXAMINATION

1 Q. And if you would turn to the next page, page 77,
2 you actually -- in response to getting a copy of this
3 order of suspension, you filled out an affidavit, and you
4 signed it and notarized it and you explained what
5 happened, correct?

6 A. Yes, sir.

7 Q. And, in fact, is that your signature on the
8 bottom?

9 A. Yes, sir.

10 Q. And then the date is September the 26th, 2013; is
11 that right?

12 A. Yes, sir, right after we got the letter from
13 Yaschik saying he terminated the lease, yes, sir.

14 Q. And in this affidavit that you signed that you
15 certified, you write, We no longer need a BL license as
16 on April 2nd, 2013, there was a fire that totally
17 destroyed the building at 213 East Bay.

18 A. Yes, sir.

19 Q. The owner of the building has decided to void the
20 leases. We will not be reopening, correct?

21 A. That is correct.

22 Q. Okay. And that's what you wrote on your
23 affidavit. That's your handwriting, correct?

24 A. Yes, sir.

25 Q. And you swore that was the truth, correct?

KELLEY TANT - REDIRECT EXAMINATION

1 your witness. You can't lead her.

2 THE WITNESS: Did I know the building was
3 totally destroyed? I did not.

4 BY MR. SWOPE:

5 Q. All right. If you could, Mr. Brown, would you put
6 up the commercial sublease, and if you would look at
7 paragraph -- what is that, 30? I got old eyes. Special
8 stipulations, 38.

9 A. 38, okay. Yes, sir.

10 Q. All right. And so, if you would, you don't have
11 to read aloud, but if you would read that paragraph very
12 quickly for me.

13 A. Yes, sir.

14 Q. Okay. Now, that paragraph, what does that mean
15 you pay?

16 A. I pay 30 percent of all taxes, insurance taxes,
17 insurance associated with repairs, including the roof and
18 exterior.

19 Q. And you paid 37 percent?

20 A. 37 percent, yes, sir.

21 Q. And that includes the insurance?

22 A. Yes, sir, insurance and taxes, yes, sir.

23 Q. And so what insurance would that be you would be
24 paying 37 percent of?

25 A. The insurance to cover the building.

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

2013-CP-10-07107

SEA ISLAND FOOD GROUP, LLC,
d/b/a SQUEEZE,

Plaintiff,

vs.

YASCHIK DEVELOPMENT COMPANY,
INC., d/b/a YASCHIK ENTERPRISES,
et al.,

Defendants.

MICHAEL J. QUILLEN FAMILY
LIMITED PARTNERSHIP,

Third-Party Plaintiff,

vs.

TOP OF THE BAY, INC., d/b/a
CLUB LIGHT,

Third-Party Defendant.

TOP OF THE BAY, INC., d/b/a
CLUB LIGHT,

Fourth-Party Plaintiff,

vs.

YASCHIK DEVELOPMENT COMPANY,
INC., d/b/a YASCHIK ENTERPRISES,

Fourth-Party Defendant.

TRANSCRIPT OF PROCEEDINGS

January 29 - February 2, 2018
Charleston, South Carolina

VOLUME II

MICHAEL QUILLEN - DIRECT EXAMINATION

1 Exhibit 105.

2 MR. LAY: Do you have any objection to that?

3 MR. SUMNER: You're using our exhibit, no
4 objection.

5 MR. COOPER: None.

6 MR. SUMNER: None.

7 MR. LAY: That's Yaschik 105.

8 (Yaschik Exhibit 105 was marked for
9 identification and admitted into evidence.)

10 BY MR. LAY:

11 Q. And this is an e-mail from you on April 16th when
12 you are communicating with ABS; is that correct?

13 A. Yes.

14 Q. And what are you trying to accomplish here, what
15 you're communicating? Why are you communicating with ABS
16 at this point on April the 16th?

17 A. Again, you know, the FLP was obligated to the
18 subtenants to do what it could to restore the building as
19 speedily as practical, so we're in the process of doing
20 the stabilization of safety and security, which is
21 priority number one, but second priority is to get to
22 work on restoring the building, so I was talking about
23 ABS about them doing that work.

24 Q. And are you acknowledging to them this
25 responsibility you have to the tenants to get this thing

1 restored as quickly as you could?

2 A. Yes. I say, I feel as though it's the FLP's
3 responsibility to put the spaces back to acceptable
4 condition. My reference is to the obligation to the
5 sublessees.

6 Q. Okay.

7 A. The other point that I'm making at the bottom of
8 that, because it had already come up is the obligation of
9 the subtenants which passed on to the landlord was to put
10 the building back as it existed prior, which, basically,
11 HVAC, electrical, plumbing. The upfit, or putting back
12 the booze to the bars or the mirrors or whatever, that
13 was the responsibility of the subtenants, so I wasn't
14 asking ABS to do that type of design.

15 Q. And if you could go to FLP 13 --

16 MR. LAY: Any objection to 13, which is an
17 April 25, 2013 e-mail from Clint responding to -- from
18 Clint and then Mike's response? Any objection?

19 MR. SUMNER: No objection.

20 MR. COOPER: None.

21 (FLP Exhibit 13 was marked for identification
22 and admitted into evidence.)

23 BY MR. LAY:

24 Q. I want to talk about this. Did you get an e-mail
25 from Clint telling you that he was going to do a

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1 very fortunate, and the best part of this story is no one
2 was injured during this fire, but somebody could have
3 been, and had -- I call it Top of the Bay, but had Club
4 Light been totally packed with people on a Saturday night
5 and busy and the fire occurred, it might not have been
6 the same outcome as when nobody was in Club Light when
7 the fire occurred.

8 So I basically said and the city was very
9 appreciative of that the FLP will restore the sprinkler
10 system in the building even though it's not required.
11 Also, as mentioned here, this is when we were told, well,
12 you are going to have -- the building is going to have to
13 meet the -- I think it's 2012 earthquake codes, which
14 really didn't have anything particularly do with the
15 fire. It just had to do with the position that the city
16 had taken on earthquake codes going forward.

17 Q. How did you have to deal with the earthquake
18 codes?

19 A. Primary impact would be on the front facade, that
20 the front facade had to be secured. Had we remained with
21 using the other masonry brick structure on the side
22 walls, you know, they would have had to also, so it was
23 another reason to not use that to come up with an
24 alternative design to meet the earthquake code for a
25 steel structure.

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1 Q. Are you also communicating with them about the
2 total repair of costs?

3 A. Yes.

4 Q. Tell me what you're communicating there.

5 A. In addition, until we get some more analysis,
6 we're not able to get a good estimate of the total repair
7 costs, although, as expressed earlier, it would certainly
8 exceed the insurance policy, possibly by a significant
9 amount.

10 Q. After you sent this e-mail to Tom Ervin, did you
11 ever say, hey, you're responsible for the restoration?

12 A. No.

13 Q. Did he ever say to you to stop doing the
14 restoration because the building was totally and wholly
15 destroyed?

16 A. No.

17 Q. Let's skip to August, if we could. There was a
18 lot of activity in August. You've seen some of these
19 communications in August. Tell me, from your
20 perspective, as you enter August, what's going on.

21 A. As evidenced by the ABS invoices, we were getting
22 very close to finishing the plans. We were meeting with
23 Tom, meeting with the sublessees. Actually, I was
24 excited and impressed with where we were, and we had a
25 resolution for how we were going to do the structural

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1 did you think was going on? What was your concern when
2 you received this e-mail on August 27th?

3 A. I did not know what was going on, but I was very
4 confused about what was going on. I mean, we had worked
5 diligently for five-and-a-half months. We were certainly
6 in the red zone to get the structural plans committed to
7 the city.

8 This oddball e-mail of the 27th I didn't
9 understand, so I mean, that's just maybe a red flag was
10 going up, or the hair on the back of my neck was going
11 up, but something wasn't right here. You know, I didn't
12 know what it was on this date, August the 3rd, but
13 something wasn't right.

14 Q. All right. Now, in the second part of this --
15 this part where you're indicating to him -- you're
16 acknowledging that you're getting a \$750,000 check from
17 insurance, that wasn't a surprise to Tom, was it?

18 A. No. He expected to recover the full value of the
19 \$1 million the entire time. We never thought we would
20 not recover \$1 million.

21 Q. Had you kept him informed of that?

22 A. Yes.

23 Q. Okay. Second paragraph.

24 A. Same thing. We had said throughout August that,
25 you know, structural plans will be complete today and

1 available for submittal to the city as well as BELFOR for
2 their estimate. You are familiar with the plans --
3 again, you got to approve them. I know you're a member
4 of ABS, but this is your building. This is your asset.
5 You got to approve them.

6 Q. And are you indicating to him that, you know,
7 steel has to be ordered, things have to be moving?

8 A. Yeah. I'm basically saying -- again, I worked,
9 you know, from day one with BELFOR. Tom, I assume, had
10 some exposure to BELFOR, but I had worked with them, and
11 I said, look, if you don't want to use BELFOR, who do you
12 want to use?

13 These plans aren't specific to BELFOR. If you
14 don't want to use BELFOR, who do you want to use? Let's
15 get them involved. It still needs to get ordered. The
16 roof needs to get on the building.

17 Q. Okay. And then, if you could, go to the last
18 paragraph --

19 A. Before you leave that one, I think I should point
20 out that, again, I am not saying that all the plans were
21 done on September the 3rd. Structural plans were done,
22 which we had said many times. The final architectural
23 plans are -- would be ready in two weeks, and, again,
24 that was waiting on some input from the subtenants and
25 from Tom.

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1 A. Yes, sir.

2 Q. Irrespective of those two parties, one of the
3 parties was the FLP, correct?

4 A. Yes, sir.

5 Q. And let me get back to our favorite topic,
6 insurance. Our subtenants had to pay for the insurance
7 under the subleases?

8 A. They were responsible for the expenses and the
9 insurance, yes.

10 Q. Regardless of the amount of insurance that you
11 would have gotten, you could have passed that on legally
12 to the subtenants, correct?

13 A. Yes, sir.

14 Q. And this was FLP 116. It's also Squeeze 13, which
15 is, I believe -- you said I believe you were mistaken
16 that actually the insurance renewal was in October of
17 2012, I believe?

18 A. Originally, I incorrectly assumed that because the
19 lease term was April through March that that would be the
20 same insurance.

21 Q. And when there's a renewal -- you had already
22 purchased the master lease, I believe, on March 30, 2012?

23 A. Yes, sir.

24 Q. So this was after the fact, correct?

25 A. Yes, sir.

1 Q. So --

2 A. In October.

3 Q. After the renewal, in that intervening seven
4 months, you could have had the opportunity to increase
5 the insurance limits for this renewal, correct?

6 A. Yes, sir.

7 Q. But you kept it at the \$1 million?

8 A. Kept it at the same thing we assumed from the
9 assignment.

10 Q. And under the master lease too, did you really
11 have an expectation that Yaschik had insurance?

12 A. I had -- I mean, you know, we all know what the
13 subs mean, but I assumed Yaschik was a established real
14 estate developer in Charleston, and I think we heard he
15 had as many as 24, 25 buildings. I did think it was
16 strange when we found out he didn't have other insurance
17 on the building, so, you know, I did think that he did
18 have other insurance in addition to what the FLP had, and
19 the FLP -- had he had any, he could have passed that cost
20 on to the FLP.

21 Q. But you were just speculating, right?

22 A. I don't think it was speculation. I think it was
23 just common sense, that if a building -- the owner of a
24 building and the owner of 25 buildings, had, you know,
25 owned those buildings that he would make sure that the

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1 31, 2012, correct?

2 A. Yes, sir.

3 Q. Okay. And you became the tenant under the master
4 lease. We're looking here at our chart. You're the
5 tenant under the master lease between Quillen FLP and
6 Yaschik, correct?

7 A. Yes.

8 Q. And FLP is actually the landlord of the subleases
9 with Squeeze, Brick, and Club Light, correct?

10 A. That's correct.

11 Q. Now, when you purchased that master lease, you
12 signed an assignment or assumption of leases with Ann
13 Thode, correct?

14 A. Yes.

15 Q. And if we could pull up Quillen Exhibit 16, which
16 has been previously marked, this is the document you
17 signed whereby you agree that you would accept all the
18 terms of the master lease and the subleases and all the
19 duties and the obligations, and in return you would pay
20 Ann Thode \$500,000, correct?

21 A. Yes. We both signed this document, I believe.

22 Q. And if you look down on page two, section 3(h), it
23 says T&T agrees to indemnify, protect, hold harmless, and
24 defend Quillen against any claims, costs, judgments, or
25 liabilities including attorney fees arising out of or

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1 BY MR. SUMNER:

2 Q. When we left off, I think you had agreed with me
3 that following the fire you agreed you would take point
4 on the restoration efforts, and you would be the one who
5 would relay information to Yaschik and keep Tom Ervin
6 abreast of your progress?

7 A. Correct, what FLP was doing.

8 Q. And FLP was taking on the responsibility for
9 getting the insurance claim filed and restoring the
10 building, correct?

11 A. Working on the restoration of the building, yes.

12 Q. In fact, you believed it was FLP's responsibility
13 to do that, correct?

14 A. Restore the building?

15 Q. To take the point -- to take the responsibility to
16 put the building back together again.

17 A. I think that's two questions. I felt that -- I
18 agreed the FLP would take the point at the time for the
19 insurance work, with the architect's work, with the fire
20 investigator that chose to do that. The second part of
21 your question, I think, said did the FLP feel like it was
22 obligated to restore the building.

23 Q. Let me ask it a different way. Would you agree it
24 was the FLP's responsibility to put the space back to an
25 acceptable condition?

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1 A. To the subtenants, yes. We also would pass on
2 that obligation to Yaschik.

3 Q. And you understood and you agree you had that
4 obligation to the subtenants?

5 A. I did.

6 Q. Now, you took over, you started running point on
7 this, in April. I think you told this jury it was three
8 or four weeks before you were permitted to get into the
9 building and to allow the architects and the contractors
10 and the engineers to begin their work on the building; is
11 that true?

12 A. Yes. We obviously looked in the building,
13 particularly the first floor, on the day of the fire, and
14 within another day or so, the subjects, you know, Squeeze
15 and Brick particularly -- you know, they vacated with the
16 smoke, so they left car keys, cash, these other things
17 inside their premises. They were allowed to go in under
18 the supervision of the fire marshal and get the cash and
19 keys, so they got in on the first floor very temporarily.
20 Don't know what went on upstairs, as far as meeting, and
21 then it was about three weeks when they finished the fire
22 investigation and they allowed everybody to go in the
23 building, yes.

24 Q. And after working on this for a little while, it
25 was in June or the end of June, when ABS realized that

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1 This is an e-mail you sent to Tom Ervin on
2 August 8, 2013, correct?

3 A. Yes.

4 Q. You said you've spoken to ABS and they expect to
5 have the structural plans ready by Wednesday next week,
6 correct?

7 A. That's correct.

8 Q. And you go on and you continue walking through
9 this discussion about the plans, and then you say, I
10 still have not had a final answer on payment by the
11 insurance company, but they have the information they
12 requested; is that right?

13 A. Yes.

14 Q. So as of August 8, 2013, the insurance company has
15 not given you a final decision on whether they would pay
16 the full claim, correct?

17 A. That's correct.

18 Q. Okay. But it was your understanding that the cost
19 of reconstruction was going to far exceed the policy,
20 correct?

21 A. My term wouldn't have been far, but it would
22 exceed it.

23 Q. And you go on and say, Thus, we need to discuss
24 how we might proceed. And in the next sentence, as
25 mentioned, to start back with reconstruction will require

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1 a commitment on one's part for the job which will exceed
2 the insurance premiums, correct?

3 A. Yes.

4 Q. And you start that paragraph with the phrase "as
5 mentioned," and you would agree with me, would you not,
6 at this point, on August 8, 2013, you have had numerous
7 conversations with Tom Ervin about the insurance
8 shortfall?

9 A. We have had numerous conversations about the
10 insurance the FLP had and what the estimated
11 reconstruction costs were going to be. Again, I don't
12 know how many times, but insurance wasn't the issue. The
13 issue was there was a delta between the amount of
14 insurance the FLP had and the cost of reconstruction.
15 That was a dollar figure of approximately a round number
16 of \$1 million.

17 Q. And Tom had consistently made it clear to you that
18 he believed that the FLP should pay for that delta,
19 correct?

20 A. No, that's not at all my understanding.

21 Q. And did you make it clear to Tom that it was your
22 opinion that Yaschik would have to pay for that?

23 A. I believe I did.

24 Q. Now, we mentioned earlier this e-mail from ABS,
25 providing plans, was previously marked as Quillen Exhibit

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1 Q. You could have obtained additional insurance on
2 the building in October of 2013, but you chose not to.
3 You let the building owner handle the insurance from that
4 point going forward; correct?

5 A. I looked into doing it, and Tom ended up doing it.
6 If my understanding is -- I said, One of us has got to do
7 it. If you do it, get us. He did it, and he didn't
8 include us.

9 Q. The FLP didn't maintain insurance on 213 East Bay
10 following the termination letter, did it?

11 A. Not -- well, it was following the termination
12 letter, but it was caused by the insurance company in
13 October, saying they weren't going to renew the policy.

14 Q. Now, on August the 29th, you submitted a proof of
15 loss that was signed and submitted to the insurance
16 company, correct?

17 A. Yes, sir.

18 Q. And you swore that -- let's just actually go to
19 this document. It's Yaschik Exhibit 84, and what a proof
20 of loss is you -- actually, in order to get paid on an
21 insurance policy, you have to sign your name and have the
22 document notarized, and you swear that you represent to
23 the insurance company the accurate cost of replacement of
24 the structure, correct? Okay.

25 And so let's look at what's in front of you,

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1 Exhibit 84, and let's start at the top, and we can pan
2 down. This is a sworn statement of loss, to Canopus
3 Insurance, correct?

4 A. Yes.

5 Q. Regarding the fire on April 2nd, 2013?

6 A. Yes.

7 Q. 213 East Bay Street?

8 A. Yes.

9 Q. And then going down a little further, please,
10 Matt, and I'm just going to focus on section 6, insurance
11 and loss. On the left-hand side, it says item involved,
12 building, correct?

13 A. Yes.

14 Q. And then it goes through. It gives total loss or
15 damage, and it's got repair or replacement cost \$1.861
16 million, correct?

17 A. Correct. Yes, sir.

18 Q. And it's got the actual cash value of \$1.462
19 million, correct?

20 A. That's what it says, yes.

21 Q. And at the bottom of that page, if you could zoom
22 in on the bottom third, please, Matt, that's your
23 signature, correct?

24 A. Yes, sir.

25 Q. And by signing that, you verified that the numbers

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1 contained in this proof of loss were true and accurate to
2 the best of your knowledge, correct?

3 A. Yes, sir.

4 Q. Thank you.

5 A. May I expand on that a little? I would like to
6 note -- I did not fill this form out. The insurance
7 company filled this form out, sent it to me.
8 \$1,861,815.34 was the number that the insurance adjuster
9 calculated using the known computer program that
10 insurance agents -- that was their number.

11 I didn't dispute that number. We've used that
12 number in other testimony. That number did include the
13 \$660,000, but that was the number the insurance company
14 did. That was a number they were familiar with. Had I
15 wanted to use another number, I guess I could have gone
16 in there and said, well, I recognize whose number that is
17 and I recognize that's an acceptable number to you all
18 and I don't have a major dispute, except we may not go
19 that exact route.

20 I could have gotten a formal estimate submitted to
21 them for approval because it says at the very top pending
22 company's approval, but it would have delayed it. The
23 purpose here -- and maybe the implication is we did
24 something. That 1.861 significantly, by \$861,000,
25 exceeded \$1 million. Where something may have been even

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1 Q. Okay. And at no point in time did you object to
2 Hilton Smith's involvement and tell Tom to stop, correct?

3 A. No. Again, I said, I'm a businessperson. Their
4 motive was very simple as documented. Our motive was to
5 get the building reconstructed and get the subtenants
6 back, start generating lease income. If it took and we
7 found out subsequent to all this that taking the master
8 lessee out was worth \$1.5 million more, I was happy to
9 leave and get out of there as long as the subtenants were
10 taken care of.

11 Q. And just like the summer, in the fall, you were
12 involved in communications with Tom Ervin and his lawyer
13 and your lawyer as you guys tried to work out a deal to
14 see how you could try to salvage this situation that
15 obviously, at its very core, was a big dispute, correct?

16 A. What I did not know -- I did not know the
17 economics of the conversation with Hilton Smith. I knew
18 there was a conversation going on, and I very clearly
19 said we won't be an impediment to whatever gets this
20 building reconstructed. We're not going to stand in
21 anybody's way. If Hilton Smith can do it, I have no
22 problem with that.

23 Q. And you don't think Tom Ervin was trying to
24 defraud you when he was talking to Hilton Smith about
25 selling the building, do you?

1 A. I wouldn't use the word defraud. I think the
2 strategy that Tom Ervin took purposely, starting by
3 contacting Hilton Smith in May, were to see what other
4 options were out there. They didn't disclose that to us.
5 He didn't bring us in. As I testified earlier, what Tom
6 chose to do -- and it was a business decision. Instead
7 of sitting down and talking about that, he punched us in
8 the nose and said, The lease is terminated. Now let's
9 sit down and talk about what the lease is worth.

10 Q. In all fairness, we've looked at e-mails where you
11 and Tom discussed that before September 11, 2013, though?

12 A. Not in any detail, though.

13 Q. You did discuss it. Do we need to go back and run
14 through all these e-mails from June, July, and August?
15 You had discussions with Tom about the master lease, the
16 value of the master lease, whether or not you were going
17 to purchase the building. You had those communications
18 with him months before the contract was terminated.

19 A. We did. All that didn't have anything to do with
20 what Hilton Smith was going to do. I mean, I had no
21 knowledge of the Hilton Smith \$5.4 million at that time.
22 So, yeah, I mean, we've obviously already been through
23 that for seven or eight hours today.

24 Q. With respect to Kelley Tant and Top of the Bay, at
25 the time of the fire, or shortly after the fire, you did

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1 Q. You said before with the exposure to the elements,
2 does the building suffer deterioration because of that?

3 A. It does.

4 Q. So moving into April --

5 MS. MONTAGUE: This is Yaschik Exhibit 174,
6 4/15. Any objection?

7 MR. COOPER: None.

8 MR. GASKINS: No objection.

9 (FLP Exhibit 174 marked for identification
10 and admitted into evidence.)

11 BY MS. MONTAGUE:

12 Q. Pull up the date first. So this is in April,
13 2014?

14 A. That's correct.

15 Q. By April of 2014, the building has still been left
16 exposed?

17 A. Yes.

18 Q. Has there been any clear communication to you
19 about what exactly is wanted with proceeding with this
20 project?

21 A. No.

22 Q. All right. Jesse, if you would, starting with
23 given the damage --

24 A. Okay. If I can add one thing, possibly, prior to
25 this in February, we had began to notice the beginnings

1 of the deterioration of the wood framing. We had -- we
2 were mostly concerned with the front wall, making sure
3 that that was going to be salvaged, because that was the
4 primary -- that's the thing that really had to be
5 salvaged.

6 Again, based upon the e-mails and work, it was
7 pretty clear that the work of that second story was off
8 the table and they were looking at something that was
9 three or four stories, so we weren't as concerned with
10 the remainder of the structure at this point in time. We
11 were mostly concerned with the front wall. I had sent an
12 e-mail and a request and basically substantial repair
13 bracing drawings to Mr. Ervin to install on the front
14 wall.

15 By this point in time, during the original
16 process, the front wall was supposed to have been braced
17 with a permanent steel frame and the roof was supposed to
18 have been on, and that's what we were hoping for. That
19 never took place, so we have no permanent steel frame,
20 just a temporary bracing that had been in place for nine,
21 ten months, and it was beginning to be clear that that
22 was deteriorating.

23 The original timbers were beginning to
24 deteriorate, and the front wall was beginning to
25 deteriorate as well. It had not been repaired as of now,

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1 so we wanted to put a permanent steel frame in, but there
2 was no decision on what they wanted to do with the
3 building.

4 That steel frame in the front was going to depend
5 almost entirely on what structure they wanted behind it,
6 two-story original repair that we had already come up
7 with, the three story, or even a four story. All four of
8 those options were going to require a different steel
9 frame. So in lieu of the fact that there was no decision
10 in sight to put a permanent frame in place, we designed a
11 temporary wood framing system. I think -- concurrent
12 with this period of time, I think the city, if I call --
13 of course, it's been several years, but the city was
14 ready to get rid of the scaffolding in front of the
15 building and wanted that gone, and I think that's what
16 predicated the need for this because the scaffolding was
17 acting as a form of bracing.

18 So once that was removed, I needed to replace that
19 with something, and so that's when I came up with the
20 temporary timber design that's still in place right now,
21 actually, but this e-mail was sent on Tuesday, April 15th
22 after several months of kind of trying to figure out
23 where the owners wanted to go with the building.

24 We were becoming very frustrated with the process,
25 and this is our, if you will, Dear John letter to the

1 owner saying we're kind of done with this.

2 But it says, Tom, based on my observations of
3 various building components while on site yesterday, our
4 recommendations for the repair of the building have
5 changed. Given the damage the building has sustained,
6 both initially due to the fire and ongoing and the
7 required repairs to bring the building into compliance
8 with the 2012 IBC, it is recommended to demolish the
9 building, except for the front facade wall.

10 Deterioration of building components caused by exposure
11 over the past few months include the accelerated
12 degradation of the lime mortar joint in the masonry walls
13 and accelerated deterioration of the wood floor framing
14 components. Many of the existing components that were
15 originally considered to be salvageable are now required
16 to be replaced new elements that are required to meet the
17 detailing requirements for new construction.

18 Due to the accelerated degradation, the
19 amount of new components required to bring the building
20 into compliance cannot be adequately integrated with the
21 existing salvageable components without rebuilding the
22 entire building and requiring the entire building to meet
23 the requirements for new construction; therefore, it is
24 not practical to repair the building in its current
25 condition, and it should be demolished and rebuilt with

1 new materials in accordance with the 2012 IBC for new
2 construction.

3 Any elements to remain for historical
4 purposes, including the front wall, should be repaired
5 and will be required to be laterally supported by new
6 structural frame members of the new building.

7 Q. Okay. I won't make you read the whole thing.

8 So your recommendation here, as you say in your
9 e-mail, is because of the damage the building has
10 sustained, so if you would, is that the same damage we
11 were talking about because of the exposure the building
12 had?

13 A. That's exactly correct. It was the exposure.
14 Again, in February, we were already concerned with the
15 degradation of the original timber framing, but
16 particularly we were concerned with the front wall
17 because we know we needed to, at a minimum, support and
18 figure that out.

19 Now it's been a couple more months, no direction.
20 The site is just sitting there, wall, so to speak. We
21 figured that, you know, at this point in time a lot of
22 the original timbers were beginning to decay. They were
23 going to have to be replaced to complete a repair. That
24 was going to cause all kinds of cost increases. It was
25 going to cause all kinds of delays, which we already were

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1 that needed some journey help assistance with. His own
2 personal residence had a problem that I helped him with.
3 Currently starting a project on 215 East Bay Street, the
4 front wall.

5 Q. A point that I meant to ask you earlier on, make
6 sure it was clear, this building, prior to the fire, did
7 not meet current codes, did it?

8 A. No, not at all. It was built in the 1800s.

9 Q. So if any casualty had happened, another Hurricane
10 Hugo, I'm not saying that should happen, and we had to do
11 some repairs, would that have had to have been brought up
12 to current code?

13 A. Any repair to the structure -- you follow through
14 the process directed by the building code, but yes, any
15 new components will need to be brought up to the new
16 code.

17 Q. During the process, during the summer before you
18 got the e-mail from Mr. Quillen saying stop work, was
19 there ever a delay in the process of getting these
20 repairs done because of Mr. Quillen?

21 A. No.

22 Q. Was he cooperative during this entire process?

23 A. I would agree with that statement. He was kind
24 of, you know, pushing, leading, pushing.

25 Q. You can say pushing. It's okay. He won't be

MICHAEL JOSEPH SHAHID - CROSS-EXAMINATION

1 had my paralegal print out some documents that we might
2 need. She's doing it now. It should only be a couple
3 minutes.

4 (In open court, jury present.)

5 THE COURT: We will resume with the
6 cross-examination of Yaschik.

7 CROSS-EXAMINATION

8 BY MR. GASKINS:

9 Q. Good afternoon, Mr. Shahid. My name is Brandon
10 Gaskins, and I represent Yaschik Development Company, and
11 I want to start at the beginning of your involvement in
12 this project, and Mike Quillen engaged you. You all
13 signed an engagement letter, correct?

14 A. Yes.

15 Q. And pursuant to that engagement letter, he agreed
16 to pay you for your services, correct?

17 A. Yes.

18 Q. And you bill for your services based on an hourly
19 basis, correct?

20 A. Yes.

21 Q. And that applies to everybody that works in your
22 office?

23 A. That's correct.

24 Q. And so if you're working on a project and you work
25 for half an hour, you're going to put in an entry for .5,

MICHAEL JOSEPH SHAHID - CROSS-EXAMINATION

1 he?

2 A. He was an EIT.

3 Q. Can you answer my question? Was Mr. Grennan a
4 licensed professional engineer at the time he was working
5 on this project?

6 A. No, he was not.

7 Q. Okay. Now, in June, or maybe May, ABS realized
8 that the repair, to some extent, was going to have to
9 comply with the seismic codes; is that correct?

10 A. Yes.

11 Q. Okay. And you informed Mr. Quillen of that,
12 right?

13 A. I believe so, yes.

14 Q. And at the end of June, you told him about the
15 difficulties of complying with the seismic codes, right?

16 A. Yes.

17 Q. Okay. And at the end of June you also told him
18 that ABS would have structural drawings ready in two
19 weeks; isn't that correct?

20 A. Yes.

21 Q. Okay. And you also told him that ABS would have
22 full drawings ready in a month; is that right?

23 A. I can't recall exactly, but we were pushing hard
24 to get it done.

25 Q. And ABS didn't have those structural drawings

MICHAEL JOSEPH SHAHID - CROSS-EXAMINATION

1 ready within two weeks of the end of June, did it?

2 A. No.

3 Q. And I think it's been established that the
4 preliminary structural drawings were not even produced to
5 Mr. Quillen or Mr. Ervin until August 30, 2013; is that
6 correct?

7 A. Yes.

8 Q. And at that time, you hadn't provided any other
9 drawings to Mr. Quillen or Mr. Ervin, had you?

10 A. Not that I'm aware of.

11 Q. And also at this time I think it's been
12 established that ABS had not finalized any architectural
13 drawings. Would you agree with me?

14 A. Yes.

15 Q. And they also didn't have any mechanical drawings?

16 A. No. We don't do mechanical drawings.

17 Q. You farmed that. You subcontract with a
18 mechanical engineer to provide that, correct?

19 A. Yes.

20 Q. So you didn't have any mechanical drawings from a
21 subcontractor, right?

22 A. No.

23 Q. You didn't have any electrical plans, did you?

24 A. No.

25 Q. And you didn't have any plumbing drawings either,

THOMAS MARION ERVIN - ~~XXXX~~-EXAMINATION

1 point it was not a rebuild -- it was not a repair, it was
2 a rebuild.

3 Q. Was it a personal decision to declare this
4 building totally destroyed or was it a business decision?

5 A. It was a business decision.

6 Q. Will you please tell this jury exactly what you
7 based that business decision on when you sent the letter
8 on September the 11, 2013.

9 A. Well, I considered it a total loss. We lost
10 complete use of the building, and for an economic
11 reconstruction to occur, there had to be a total rebuild,
12 and that's where I thought we were.

13 MR. SUMNER: Your Honor, one moment. May I
14 confer with my co-counsel?

15 Mr. Ervin, I have no questions. Please
16 direct your attention to these other lawyers, as I'm sure
17 they do. Thank you.

18 THE COURT: Mr. Cooper?

19 MR. COOPER: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. COOPER:

22 Q. Hello, Mr. Mr. Ervin.

23 A. Good day.

24 Q. You were in the courtroom all day when Mr. Quillen
25 was testifying, weren't you?

EDWARD PORCHER - DIRECT EXAMINATION

1 is not supported in any way on the existing building, you
2 don't have to upgrade the existing building, you just
3 have to be sure the addition meets code; however, if you
4 put an addition on to that existing building and that
5 existing building supports that addition and provides
6 lateral stability for that addition, then you have to
7 run -- then that addition and the supporting elements for
8 lateral stability have to meet the seismic requirements
9 of the code.

10 Q. All right. And did you prepare a scope of work to
11 determine what type of repairs were being needed to 213
12 East Bay Street to bring it to compliance with those code
13 requirements?

14 A. I started to prepare a scope to repair the
15 building, but when I started going through the code and
16 realized that this repair or addition would have to meet
17 seismic requirements, I realized that it started to be an
18 absurd task. In other words, to try to bring this old,
19 unreinforced masonry building up to current code to meet
20 seismic, I didn't feel it was cost effective or feasible.

21 Q. All right. Now, it's my recollection that you did
22 prepare a scope of work with certain repairs that would
23 be needed.

24 A. Yeah.

25 Q. Do you recall that?

EDWARD PORCHER - CROSS-EXAMINATION

1 Q. It's going to be better -- it's going to be better
2 able to withstand n earthquake?

3 A. Yes, sir.

4 Q. And, by the way, I want to make sure we all agree
5 we have had pictures of the 1886 earthquake up here?

6 A. Yes, sir.

7 Q. We've talked about earthquake, the potential for
8 earthquakes here in the area?

9 A. Yes, sir.

10 Q. Seen pictures of the United States. We talked
11 about all of that.

12 A. Yes, sir.

13 Q. This was not an earthquake. This was a fire,
14 correct?

15 A. That's correct.

16 Q. So part of what you're doing -- because I think
17 you said your primary job is to protect the public?

18 A. That's correct.

19 Q. Is to improve this building to the point where it
20 is safer for the public?

21 A. That is correct.

22 MR. BROWN: I don't have anything further.

23 THE WITNESS: Thank you.

24 THE COURT: Mr. Lay? Sorry.

25 CROSS-EXAMINATION

1 was the real intention of the parties.

2 In determining the intent, you may not
3 consider the undisclosed or secret intentions of the
4 parties, but, rather, you must be guided only by the
5 parties' outward expressions. Where the contract has
6 been put in writing, you should gravitate to the meaning
7 of the parties, primarily from the contents of the
8 written document itself. Words cannot be read into a
9 contract which in turn import an intent wholly expressed
10 when the contract was executed. An agreement capable of
11 interpretation, which will make it valid, will be given
12 such an interpretation if the agreement is ambiguous.

13 Now, the phrase totally destroyed within the
14 meaning of the lease means the complete destruction of
15 the property by fire so that nothing of value remains of
16 it, as distinguished from a partial loss, where the
17 party -- where the property is damaged, but not entirely
18 destroyed. This does not mean that the materials of
19 which the building was composed were all utterly
20 destroyed or obliterated, but that the building, though
21 some part of it may be left standing, has lost its
22 character as a building.

23 A total loss does not mean an absolute
24 extinction. It is not necessary that all the parts and
25 materials composing the building are absolutely and

1 physically destroyed, but the inquiry always is whether,
2 after the fire, the thing still exists as a building.
3 You may consider such things as whether the remnants of
4 the building were sufficiently strong to warrant
5 rebuilding a plan or was the building so utterly
6 destroyed that no reasonably prudent person would, under
7 the circumstances, undertake rebuilding it.

8 In making your decision whether the building
9 was totally destroyed, you may consider whether it was
10 readily repairable, including whether it was practically
11 so from a mechanical or construction standpoint, and
12 while you may consider whether this may not have been a
13 reasonably, financially practical -- let me restate that.

14 And while you may consider whether this may
15 not have been reasonably financially practical from the
16 owner's viewpoint, the cost of repairs as related to the
17 value of the building before the fire is only one of many
18 permitted measures in valuation. The matter may not be
19 set to turn solely upon the wishes of the owner and his
20 apparent financial interest. The interest of all parties
21 is to be considered, including the interest of the owner,
22 the tenants, and the subtenants.

23 Now, even if you find that a breach of
24 contract has occurred, it is not actionable unless it
25 proximately caused the plaintiff's damages. Proximate

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CASE NO. 2013-CP-10-7107

Sea Island Food Group, LLC d/b/a Squeeze,
Plaintiff,

v.

Yaschik Development Company, Inc., d/b/a
Yaschik Enterprises, Charleston Capital
Corporation, Thomas M. Ervin, and Michael
J. Quillen Family Limited Partnership,

Defendants.

Quillen Enterprises, LLC d/b/a The Brick,
Plaintiff-Intervenor,

v.

Yaschik Development Company, Inc., d/b/a
Yaschik Enterprises, Hilton Smith East Bay
Company, LTD., and Michael J. Quillen
Family Limited Partnership,

Defendants.

Michael J. Quillen Family Limited
Partnership

Third-Party Plaintiff

v.

Top of the Bay, Inc. d/b/a Club Light,

Third-Party Defendant

Top of the Bay, Inc. d/b/a Club Light,

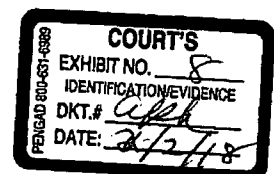
Fourth-Party Plaintiff

v.

Yaschik Development Company, Inc., d/b/a
Yaschik Enterprises,

Fourth-Party Defendant

JURY CHARGES



Duty of Judge

- I remind you that, during this trial, you and I have certain duties to perform.
- As the trial judge, it is my responsibility to preside over the trial of this case, and I also have the duty to rule on the admissibility of the evidence offered during this trial.
- You are to consider only the evidence before you. You are to consider only the testimony which has been presented from this witness stand, any exhibits which have been made a part of the record in this case, and any stipulations of counsel.
- I have the additional duty to charge you the law applicable to this case. It is your duty as jurors to accept and apply the law as I now state it to you. If you think you have any idea as to what the law is or what the law ought to be and it does not agree with what I tell you the law is, you must forget that idea because you are sworn to accept the law and apply the law exactly as I state it to you.

Judges of the Facts

- Jurors are the sole judges of the facts.
- A trial judge cannot state, comment on, or make any statement to a trial jury about the facts in a case.
- The law does not allow me to have an opinion about the facts in this case.
- This is a matter solely for you, the jury, to determine.
- As jurors, it is your duty to determine the effect, value, weight, and truth of the evidence presented during this trial.

Credibility of Witnesses

- You must determine the credibility of witnesses who have testified in this case.

- Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth.
- In determining the believability of witnesses who have testified in this case, you may believe one witness over several witnesses or several witnesses over one witness. You may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. If you reject part, you may still accept the remainder of a witness' testimony.
- You may consider whether any witness has exhibited to you any interest, bias, prejudice, or other motive in this case. You may consider the appearance and demeanor of a witness while on the witness stand.
- You are not bound to decide the case based on the number of witnesses a side produces.
- The fact that testimony is not contradicted directly does not necessarily render it undisputed. You may consider the inherent probability of the testimony and the credibility of witnesses.
- Un-contradicted testimony is not binding upon you. You have the right to consider it in light of all the circumstances and give it such weight, if any, that you think it deserves.

Burden of Proof

- In a civil case, the Plaintiff has the burden of proof.
- The burden of proof is proof by a preponderance of the evidence.
- A preponderance of the evidence simply means the greater weight of the evidence.
- It is evidence, which, when viewed as a whole, shows that the fact sought to be proved is more likely true than not true.

- The preponderance of the evidence is not determined by the number of witnesses. Instead, it must be determined by the greater weight of all of the evidence.

Direct and Circumstantial Evidence

- There are two types of evidence that are generally presented during a trial - direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Deposition Testimony

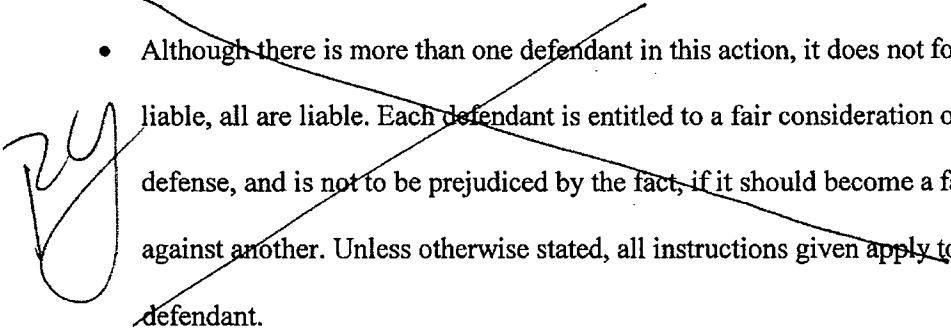
- Certain testimony has been presented into evidence by deposition.
- A deposition is testimony taken under oath before the trial and preserved in writing or by mechanical or electronic means, such as video or audio tape recording. You are to consider that testimony as if the witness had given it in court.

Expert Witness

- Ordinarily people cannot testify as to their opinion about something in Court.
- An exception is made for expert witnesses.
- They are experts because of experience of education or specialized training in some area.
- They may give their opinion and state their reasons for their opinion.
- You can give an expert's testimony as much or as little weight as you think it deserves.
- If you don't think it's based upon sufficient education or experience, or you conclude the expert's opinions are not sound or outweighed by other evidence, you may disregard the opinion entirely.
- You are not compelled to blindly accept an expert's opinion.

- You have the right to consider the testimony in light of all the circumstances and give it such weight (if any) as you think it is entitled to.

Separate Consideration of Each Defendant

- 
- Although there is more than one defendant in this action, it does not follow that if one is liable, all are liable. Each defendant is entitled to a fair consideration of that defendant's own defense, and is not to be prejudiced by the fact, if it should become a fact, that you find against another. Unless otherwise stated, all instructions given apply to the case against each defendant.

Liability of Corporations

- The fact that a plaintiff or defendant is a corporation should not affect your decision. All persons are equal before the law, and corporations, whether large or small, are entitled to the same fair and conscientious consideration by you as any other person. A corporation under the law is a person, but it can only act through its employees, agents, directors, or officers. The law therefore holds a corporation responsible for the acts of its employees, agents, directors, and officers, if but only if those acts are authorized. An act is authorized if it is a part of the ordinary course of employment of the person doing it. Whether a particular act was authorized is a question you must decide on the evidence. The fact that a plaintiff or defendant is a corporation should not affect your decision. All persons are equal before the law, and corporations, whether large or small, are entitled to the same fair and conscientious consideration by you as any other person.

Breach of contract

- A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. A contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act.

Stated another way, there must be an offer and an acceptance accompanied by valuable consideration.

- The parties must manifest their mutual assent to all essential terms of the contract in order for an enforceable obligation to exist. If one of the parties has not agreed, then a prerequisite to formation of the contract is lacking. To constitute a valid and binding contract, it is essential that both parties assent to the same thing in the same sense.
- In this case, Quillen Family Limited Partnership (FLP) has asserted a breach of contract claims against Yaschik Development Company (Yaschik) arising out of the Master Lease, alleging that Yaschik breached the Master Lease when it declared the building located at 213 East Bay Street was totally destroyed by the fire on April 2, 2013, instead of undertaking an obligation to repair and restore the building so that the lease and subleases could continue after it was repaired.
- When discussing contracts, the word "breach" is defined as a failure without legal excuse to perform any promise which forms a whole or a part of a contract, including the refusal of a party to recognize the existence of the contract or the doing of something inconsistent with its existence. When performance of a duty under a contract is due, any nonperformance is a breach. Putting it another way, a party breaches a contract when he does not perform as he agreed to perform under the contract. A party's contractual duty is found in the obligation assumed by the party to the contract. A party's failure to comply with the contractual duty constitutes the breach.
- Therefore, a breach of contract is any unjustified failure to perform any promise that is a part of the contract; or a violation or nonfulfillment of the obligations, agreements or duties imposed by the contract; or the commission or omission of some act that violates the express or implied undertakings contained in the contract. This would include knowingly preventing,

hindering or making more costly the other party's performance, or in advance of the due date of his performance, repudiating his promise to perform-that is, repudiating or renouncing the contract.

- The plaintiff is entitled to recover only if you find that it has proved by the preponderance of the evidence that the defendant did, in fact, breach the contract between the two parties.

Therefore, the plaintiff must establish three elements: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate result of the breach. FLP must prove each element of the contract alleged to be breached.

- In this case the parties do not contest the Master Lease was a binding contract between Yaschik and FLP. However, they do dispute whether there was a breach or unjustifiable failure to perform and whether FLP suffered any damages as a result, and again FLP bears the burden of proving both by a preponderance of the evidence.

Duty of Good Faith and Fair Dealing

- In every contract there exists an unspoken, but legally enforceable, promise of good faith and fair dealing. This unspoken promise is an implied covenant of good faith and fair dealing and it ensures that neither party will do anything to impair the other's rights to receive benefits under the contract. If a party to a contract does not perform as the contract gives it the right to do, it is a breach of the implied covenant of good faith and fair dealing.

Rules of Construction

- A lease is to be construed more strongly against the lessor, and in favor of the lessee.

- Forfeiture provisions must be strictly construed to avoid termination of the lease, and forfeiture will be allowed only when intent is clear and no other reasonable construction is possible.
- When a provision is ambiguous, the intent of the parties controls. The intent of the parties is a question of fact to be resolved by you, the jury, when the contract is ambiguous. In attempting to ascertain the parties' intention, the situation of the parties, as well as their purposes at the time the contract was entered, must be determined.
- Parties to a contract are not expected to exercise clairvoyance in spotting hidden ambiguities in the contract and they are protected if they innocently construe in their own favor an ambiguity susceptible of another interpretation.
- In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. The parties' intention must, in the first instance, be derived from the language of the contract. The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used. The intent and purport of a written contract must be gathered from the contents of the entire agreement and not from any particular clause or provision therein. Every term contained in a contract must be considered and given effect if possible.
- Where the language of the contract is ambiguous, that is, it has more than one meaning, you are permitted to consider the circumstances that surround the making of the contract to help you determine the real intention of the parties. You may not, however, use such circumstances to give the contract a meaning that is not apparent on its face.
- The paramount rule in interpreting contracts is to ascertain the intention of the parties and then to put these intentions into effect. To arrive at a correct conclusion as to the intention of

the parties, it is proper that the contract be considered in the light of surrounding circumstances. The parties' intention must, in the first instance, be derived from the language of the contract. If its language is plain, unambiguous and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect.

- The rights of the parties to a contract must be measured by the contract which the parties themselves made. The court is not in the business of making a contract for a party. The intention of a contract is to be determined from the language. Language which is perfectly clear determines the full force and effect of the document. Words which admit of a more extensive or more restrictive signification must be taken in that sense which will best effectuate what is reasonable to suppose was the real intention of the parties. In determining the intent of the parties, you may not consider the undisclosed or secret intentions of the parties but rather you must be guided only by the parties' outward expressions.
- Where the contract has been put into writing, you should gather the intention and meaning of the parties primarily from the contents of the written document itself. Words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. An agreement capable of an interpretation which will make it valid will be given such an interpretation if the agreement is ambiguous.

Total Destruction of Premises

- "Totally destroyed", within the meaning of the lease, means the complete destruction of the property by fire, so that nothing of value remains of it as distinguished from a partial loss, where the property is damaged, but not entirely destroyed. This does not mean that the materials of which the building was composed were all utterly destroyed or obliterated, but that the building, though some part of it may be left standing, has lost its character as a

building. A total loss does not mean an absolute extinction. It is not necessary that all the parts and material composing the building are absolutely and physically destroyed, but the inquiry always is whether, after the fire, the thing still exists as a building.

- You may consider such things as whether the remnants of the building were sufficiently strong to warrant rebuilding upon it, or was the building so utterly destroyed that no reasonably prudent person would, under the circumstances, undertake rebuilding it. In making your decision whether the building was totally destroyed you may consider whether it readily repairable, including whether it was practically so from a mechanical or construction standpoint. And, while you may consider whether this may not have been reasonably financially practical from the owner's viewpoint, the cost of the repairs as related to the value of the building before the fire is only one of many permitted measures in valuation. The matter may not be said to turn solely upon the wishes of the owner and his apparent financial interest. The interests of all parties are to be considered, including the interests of the owner, the tenant and subtenants.

Proximate Cause

- Even if you find that a breach of contract has occurred, it is not actionable unless it proximately causes the plaintiff's damages. Proximate cause is the efficient or direct cause of damage.
- The law defines proximate cause to be something that produces a natural chain of events which, in the end, brings about the damage. In other words, proximate cause is the direct cause, without which the damage would not have occurred. If the damage would have happened as a natural and probable consequence, even in the absence of the alleged breach, then the plaintiff has failed to demonstrate proximate cause.

- Proximate cause requires proof of both causation in fact and legal cause. Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence. Legal cause is proved by establishing foreseeability. The touchstone of proximate cause is foreseeability which is determined by looking to the natural and probable consequences of the defendant's conduct. Foreseeability of the damage from the breach is a prerequisite to the breach being a proximate cause of the damage for which recovery is sought. The law requires only reasonable foresight. When the damage complained of is not reasonably foreseeable in the exercise of due care, there is no liability. Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach.
- Further, where the cause of the damage may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has failed to carry the burden of establishing that his damages were the proximate result of the defendant's breach of contract.

Actual Damages or Compensatory Damages

- Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put it in the same position it was in prior to the damages received insofar as this is monetarily possible. In other words, actual or compensatory damages include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant.
- Actual damages, if any, may be assessed where a wrongful act has caused a loss or injury which can be assessed in money, the universal and cardinal principle being that the party injured shall receive compensation commensurate with its loss or injury, and no more. Actual damages are such as will compensate the party for damage suffered or losses sustained. The

goal is to restore the damaged party, as nearly as possible through the payment of money, to the same position it was in before the wrongful act occurred.

- The basic measure of actual damages is the amount needed to compensate the plaintiff for the losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position it would have been in if there had been no wrongful injury. Actual damages include compensation for all damages which are naturally the proximate result of the alleged wrongful conduct of the defendant.

Breach of Contract Damages

- The damages recoverable for a breach of contract are those which follow as a natural consequence of the breach or those damages which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was entered into. Generally, the damages to which one is entitled for breach of contract are those which arise naturally from the breach or those which reasonably may be supposed to have been within the contemplation of the parties at the time the contract was entered into.
- One who seeks to recover damages for a breach of contract to which it was a party must show that the contract has been performed on its part, or at least that it was, at the appropriate time, able, ready, and willing to perform it.
- A party who has been injured by the breach of a contract is entitled to recover the amount of the loss. That is to say, it is entitled, insofar as this can be done by a monetary award, to be placed in the same position it would have occupied if the contract had been performed.
- Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered to arise naturally according to the usual course of things

from the breach of contract itself, or such damages as may reasonably be supposed to have been within the contemplation of the parties at the time they made it as the probable result of the breach.

Lost Profits

- "Profits" have been defined as the net pecuniary gain from a transaction, the gross pecuniary gains diminished by the cost of obtaining them. "Profits" are the net of income over expenditures during a given period. "Profits" refers to the gross proceeds of a business transaction less the costs of the transaction.
- Lost profits are recoverable in an action for breach of contract. First, the profits must have been prevented or lost as a natural consequence of the breach of contract. Second, lost profits must reasonably be supposed to have been within the contemplation of the parties at the time the contract was made as a probable result of a breach of the contract.
- When lost profits are contemplated as a measure of damages for breach of contract, they should be established with reasonable certainty since recovery cannot be had for profits which are conjectural or speculative. While proof with mathematical certainty is not required, the amount of damages cannot be left to conjecture, guess, or speculation. There must be a certain standard or fixed method by which the loss may be estimated with a fair degree of accuracy.

Breach of contract accompanied by a fraudulent act

- If you have found by a preponderance of the evidence that Yaschik breached the respective contracts, you may also consider whether that breach was accompanied by a fraudulent act. A statement, or claim, or document is "fraudulent" if it was falsely made, or caused to be made, with the intent to deceive. A fraudulent act is of like character to a fraudulent intention but imports some definite act looking to the perpetration of the fraud.

- A misrepresentation made in reckless disregard of the truth will support an action for breach of contract accompanied by a fraudulent act. A fraudulent act is one characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design. The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character. The fraudulent act must be independent of the act that caused the breach. What is required is that they be logically connected, the one being attendant upon the other.
- A party may recover punitive damages for breach of contract accompanied by a fraudulent act. However, mere breach of a contract, even if willful or with fraudulent purpose, is not sufficient to entitle a plaintiff to a punitive damages award. It is the accompanying fraudulent act that allows recovery for punitive damages. Absent a fraudulent act accompanying the breach, there can be no recovery for punitive damages.
- To recover punitive damages for breach of contract accompanied by a fraudulent act, the plaintiff must prove three elements by clear and convincing evidence:
 - (1) A breach of contract;
 - (2) Fraudulent intent relating to the breaching of the contract and not merely to its making; such proof may or may not involve false representations; fraudulent intent is normally proved by circumstances surrounding the breach; and
 - (3) A fraudulent act accompanying the breach; a fraudulent act is one characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design; the fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character.

- In an action for breach of contract accompanied by a fraudulent act, there must be proof of actual damages, or at least nominal damages, to support a verdict awarding punitive damages.

Punitive Damages Generally

- If you award actual damages, you may also consider an award of punitive damages. Punitive damages are intended to punish the defendant for extraordinary and outrageous misconduct and to prevent the defendant and others from committing similar acts in the future. Punitive damages can only be awarded when conduct of the defendant has been something more than mere negligence. The evidence must establish the defendant's acts were reckless, willful and wanton, meaning there was a conscious failure to exercise due care or a conscious indifference to the rights and safety of others or a reckless disregard thereof.
- If you find that the defendant's conduct was willful, wanton, or reckless, you may award the plaintiff punitive damages. To support an award of punitive damages, the plaintiff must prove by clear and convincing evidence that the conduct complained of included a consciousness of wrongdoing at the time of the conduct.
- Clear and convincing is more than just a preponderance, or greater weight, of the evidence, which requires only proof which persuades you that a party's claim is more likely true than not true. On the other hand, clear and convincing proof is not as high a standard as the burden of proof in criminal cases, which is proof beyond a reasonable doubt. Clear and convincing proof leaves no substantial doubt in your mind. It means that the evidence is not ambiguous, doubtful, equivocal or contradictory. Convincing means persuading by proof or argument, causing one to believe in the truth of what is asserted. Clear and convincing proof establishes in your mind, not only that the fact is probable, but that it is highly probable.

- Before awarding punitive damages, you must consider and weigh four elements which may be pertinent to the facts of this case:
- You must first consider the relationship between any punitive damage award and the harm caused. Any penalty imposed should take into account the reprehensibility of the conduct, the harm caused, the defendant's awareness of the conduct's wrongfulness, the duration of the conduct, and any concealment. Thus, any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused, including the compensatory damage award made by you.
- Secondly, any penalty imposed should take into account, as a mitigating factor, any other penalty that may have been imposed or which may be imposed for the conduct involved, including any criminal or civil penalty or any other punitive damages award arising out of the same conduct.
- Next, you should consider whether the award of and the amount of any punitive damages award may deprive the defendant of any profits derived from the improper conduct and whether the ill-gotten profits should be properly awarded to the plaintiff.
- Finally, any award of punitive damages must be limited to punishment and, thus, may not affect economic bankruptcy. To this end, the defendant's ability to pay any punitive damage award should be considered. However, the economic bankruptcy factor is not an absolute bar to an award of punitive damages.

Intentional interference with contractual relationships

- In this case, Top of the Bay and Squeeze are suing Yaschik for intentional interference with a contractual relationship. Yaschik denies this claim and therefore Top of the Bay and Squeeze have the burden of proving their claims.

- One who intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.
- To establish an action for intentional interference with an existing contractual relationship, sometimes referred to as tortious interference with an existing contractual relationship, the plaintiff must prove:
 - (1) the existence of the contract;
 - (2) the wrongdoer's knowledge of the contract;
 - (3) the intentional procurement of the contract's breach;
 - (4) the absence of justification; and
 - (5) resulting damages.
- The rule presupposes the existence of a valid contract. That is, there must be a valid and enforceable contract for a cause of action for tortious interference with an existing contractual relationship to exist. The particular agreement must be in force and effect at the time of the breach that the defendant has caused. If for any reason it is entirely void, there is no liability for causing its breach.
- For a cause of action to arise, a breach must be intentionally procured. The plaintiff must prove that the outsider intentionally induced or caused the third person not to perform his contract with the plaintiff. The essential element is the intent to cause the result. If the defendant does not have this intent, his conduct does not subject him to liability.
- Regardless of the defendant's behavior, there must actually be a breach of the underlying contract before there can be an interference with an existing contractual relationship.

- Interference with a contract is justified when it is motivated by a legitimate business purpose.

The exercise in good faith of a legal right by a party to a contract affords no basis for an action by the second party for intentional interference with a contract even though the consequence of the legal right by the first party is to cause a third party not to perform another contract with the second party.

- An essential element of the tort of interference with a contractual relationship is that damages resulted from the breach. In an action for interference with a contract, the plaintiff may recover such damages sustained by him as are a natural and proximate consequence of the interference.

The measure of damages includes:

- (1) unforeseen expenses;
- (2) damage to reputation;
- (3) damage for loss of employees;
- (4) damage for loss of customers;
- (5) damage for loss of goodwill.

- Where the damages alleged are lost profits, the plaintiff must prove:
 - (1) that it is reasonably certain that profits would have been realized but for the tort; and
 - (2) that such lost profits can be ascertained and measured from the evidence produced with reasonable certainty.
- Where the result of the interference is to put the plaintiff out of business, his damages are the difference between the value of his business in the absence of the interference and the amount realized by liquidation. Aggravated, unjustified interference with contractual rights, in reckless disregard of the rights of the contracting parties, justifies the award of punitive damages. The same charge I gave you for punitive damages above applies for this cause of

action as well, with Top of the Bay and Squeeze needing to prove their claim for punitive damages by clear and convincing evidence.

Damages generally

No Speculation

- I charge you that the plaintiffs have the burden of presenting such evidence so as to enable you to determine the amount of their damages, if any, with reasonable certainty and accuracy. While proof of the amount of loss with absolute or mathematical certainty is not required, the existence, causation, or amount of damages cannot be left to conjecture, guesswork or speculation. The evidence presented by the plaintiffs must enable you, the jury, to determine what amount is fair, just and reasonable. The plaintiffs bear the burden of proving by the preponderance of the evidence that they are entitled to compensatory damages.

Nominal

- Yaschik denies the plaintiffs sustained any real injuries as a result of the alleged breaches. If you find that Yaschik caused the plaintiffs some damage, but the evidence does not convince you the plaintiffs sustained any real or substantial damages as a proximate result of that Yaschik's breach, you could find nominal damages in favor of the plaintiffs.
- A small sum, known as nominal damages, may be awarded when a plaintiff has proved no substantial loss or damage but when the law recognizes the violation or invasion of a legal right or the breach of a duty, or when a plaintiff's evidence shows the existence but not the amount of actual damage. Nominal damages are a trivial or trifling sum awarded to a plaintiff in an action where there is not substantial loss or damage to be compensated, but still the law recognizes a technical invasion of the plaintiff's rights or a breach of the defendant's duty.

Nominal damages are awarded for the vindication of a right where no real loss or damage can be proved.

- If no actual damages capable of pecuniary estimation have been sustained, but legal right of a plaintiff has been thereby violated through a defendant's breach, you can award only nominal damages - such as one dollar, one cent, or other inconsiderable amount-to vindicate a plaintiff's legal right.

Verdict

- A verdict in this case cannot be based upon sympathy, passion, prejudice, or emotion, or on some other consideration not found in the evidence.
- Your verdict must be unanimous.