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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY  
Circuit Court

Frank R. Addy, Jr., Circuit Court Judge

Case No.: 2021-001400

IOS, LLC.....Appellant-Respondent

v.

Lander University .....Respondent-Appellant

INITIAL BRIEF OF RESPONDENT-APPELLANT

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STATEMENT OF ISSUES ON CROSS-APPEAL

1. IS LANDER UNIVERSITY ENTITLED TO SUMMARY JUDGMENT AS TO IOS, LLC'S REMAINING CAUSE OF ACTION FOR BREACH OF LEASE ON THE GROUND THAT IOS, LLC LACKED STANDING TO SUE FOLLOWING ITS AFFIRMATION OF AN ABSOLUTE ASSIGNMENT OF LEASES AND RENTS AND TERMINATION OF ANY INTEREST IN THE REAL PROPERTY, FURNITURE, FIXTURES OR EQUIPMENT BY WAY OF FORECLOSURE

## STATEMENT OF THE CASE

On May 29, 2012, IOS, LLC brought suit against Lander University, The Lander Foundation (hereinafter “Lander”) and Lander College alleging causes of action for: 1) breach of an oral contract for the sale of real property 2) breach of contract and specific performance 3) promissory estoppel 4) negligent misrepresentation 5) negligence and 6) alleged breach of a commercial lease. Lander University, formerly known as Lander College until its name was changed effective July 1, 1992, answered admitting that it had leased the property from August 15, 2009 – July 14, 2011. It also held an option to purchase, which it did not exercise. Lander, a state university, denied that a final purchase agreement, oral or otherwise, was reached, citing the inability to unilaterally agree to a contract of sale without the required due diligence and S.C. Budget and Control Board approval. Additional defenses included: 1) the statute of frauds 2) standing 3) failure to state a cause of action 4) the doctrine of integration/merger 5) failure of the essential elements of a contract 6) statute of limitations and 7) frivolous lawsuit.

On December 28, 2017, the parties consented to the dismissal with prejudice of the Lander Foundation. During briefing and argument of Lander University’s Motion for Summary Judgment, IOS, LLC consented to abandon its first and second causes of action, which were predicated upon an alleged oral contract. On November 2, 2021, Judge Frank R. Addy granted summary judgment to Lander University as to IOS, LLC’s causes of action for promissory estoppel, negligent misrepresentation and negligence, finding the only issue of fact to be determined was whether IOS, LLC could recover for alleged damage to the property prior to the foreclosure of IOS, LLC’s interest in the property, which occurred prior to suit being filed. On November 12, 2021, IOS, LLC filed a S.C.R. Civ. P. 59 (e) Motion to Reconsider, as to all causes of action dismissed, even those it had abandoned. Said motion was denied on December 2, 2021.

IOS, LLC commenced this appeal on December 3, 2021. Lander University filed this cross-appeal on December 7, 2021.

#### STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. S.C.R.Civ.P. Rule 56. When reviewing summary judgment, appellate courts apply the same standard applied by the trial court. Bluestein v. Town of Sullivan’s Island, 429 S.C. 458, 839 S.E. 2d 879 (2020). When determining if any triable issues of fact exist, as would preclude summary judgment, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. S.C.R. Civ. P. 56(c).

Ordinarily, the denial of summary judgment is not appealable. Holloman v. McAllister, 289 S.C. 183, 345 S.E.2d 728 (1986). Courts have made a practice, however, of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable. Pitts v. Jackson Nat. Life Ins. Co., 352 SC 319, 574 S.E.2d 502 (Ct. App. 2002); cited by Southeastern Housing Foundation v. Smith, 670 S.E.2d 680, 688 (SC App. 2008). In Pitts, the Court of Appeals reviewed an interlocutory appeal of the trial court’s denial of an insured’s motion for summary judgment on an unjust enrichment claim, given that the claim was so closely connected to other issues and it constituted a basis for the grant of summary judgment in favor of the insurer on other claims. Id. Similarly, in Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002), this court stated in dicta that an appellate court may review an interlocutory order joined with an appealable issue. The court is entitled to review questions of law “de novo.” Ziegler v. Dorchester County, 426 S.C. 615, 828 S.E.2d 218 220 (2019).

## FACTS

This case arises out of a dispute between IOS, LLC and Lander University over a property known as the “Inn on the Square.” The parties entered into a commercial lease with option to purchase the property on April 12, 2009. The S.C. Budget and Control Board gave consent to the lease on August 17, 2009, but never approved a contract of sale.

Prior to this lease, the property known as “The Inn on the Square” operated as a small hotel with a restaurant and bar. The initial term of the lease was ten months, but was extended for an additional year by the agreement of the parties. During its possession of the property, Lander University utilized the property as honors housing.

Prior to IOS, LLC’s purchase of the property, the hotel was owned by Palmetto Inns, who bought it from a lender, Business Carolina, following a foreclosure. Exhibits submitted in favor of the Respondent-Appellant’s Motion for Summary Judgment show that Palmetto Inns was solely owned by S. Craig White, who is also a member of the Appellant-Respondent LLC. Palmetto Inns paid \$1,000,000.00 for the property on December 31, 2002. White personally guaranteed the purchase money Note and Mortgage. (See Ex. 3 (a. – g.) to Respondent-Appellant’s Reply Brief in Support of Summary Judgment, Articles of Organization and Operating Agreement of Palmetto Inns, LLC, Loan Agreement, Exhibit D to said Loan Agreement, “Certificate and Affidavit of Ownership of Palmetto Inns,” executed by S. Craig White, Promissory Note, Mortgage of Real Estate, Unconditional Guaranty, Assignment of Leases and Rents, and UCC-1, filed 2/13/2003 and UCC-3 continuation filed 2/12/2008.)

As part of the transaction, Business Carolina obtained from Palmetto Inns an **absolute** Assignment of Leases and Rents. (emphasis added) (Respondent-Appellant’s Reply Brief in Support of Summary Judgment, Ex.3 (f.) Assignment of Leases and Rents recorded on February

13, 2003 at Book 1453, Page 97, OCC for Greenwood.) A UCC filing further secured an interest in all furniture, fixtures and equipment as well as any tangible personal property, renewals or replacements thereof, including but not limited to, ranges, refrigerators, HVAC systems, telephones, televisions, and computers. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex.3 (g)., Business Carolina UCC Financing statements, 2/13/2003, continued in 2008, after IOS, LLC took ownership in 2005.)

Following Palmetto Inns' purchase of the hotel in 2002, upgrades to the property were financed through a series of loans by a separate entity of White's known as Emerald Inn. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 4, S.C. Secretary of State records regarding Emerald Inn, LLC.) According to loan documents, Emerald Inn and White purchased new carpet, furniture and equipment and pledged the associated personal property to Allegiant/a Division of Telerent, via a lease financing agreement. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 5 Allegiant/Telerent financing documents and UCCs executed by White as co-lessee). Sometime thereafter, Palmetto Inns went into default and in October 2004, Business Carolina filed foreclosure pleadings against Palmetto Inns. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 6, Greenwood County, Eighth Judicial Circuit, Public Index.)

Around this time, John Huffman visited the distressed hotel as a guest and became interested in purchasing it. Huffman and his wife, Misty, then partnered with one of their employees, Louis Smith, and formed IOS, LLC ,which tried to purchase of the Note from Business Carolina. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 7, Depo. of Smith, p. 19, 20.) Huffman testified that he had been involved with similar distressed properties, as a "turnaround artist" (Respondent-Appellant's Reply Brief in Support of Summary

Judgment, Ex. 8, Depo. of John Huffman, p. 282.) Smith testified that they also attempted to negotiate an agreement with Palmetto Inns guarantor, Craig White, which would allow White to “come back in at a certain percentage” if they were unable to refinance the existing indebtedness and remove his guarantee. (Id.)

Per Smith, he and Huffman were unable to purchase the Note and instead purchased the property subject to the existing Note and Mortgage. This required Craig White to remain pledged as personal guarantor. (Respondent-Appellant’s Reply Brief in Support of Summary Judgment, Ex. 7. and Ex. 9 a-c., IOS, Corporate Documents.) The deed from Palmetto Inns to IOS, LLC was recorded on March 7, 2005. According to the Operating Agreement, each member made an initial \$1.00 capital contribution and Louis Smith was named manager. (Id.) A subsequent amendment appointed John Huffman as manager, replacing Louis Smith. (Respondent-Appellant’s Reply Brief in Support of Summary Judgment, Ex. 9b., IOS, LLC Amended Operating Agreement) A second addendum in 2006, (a signed copy of which has not been provided to the Defendant) designated another entity of White’s, Chesterfield Express, a 75% owner of IOS, by virtue of a “purchase of ownership interest.” (Respondent-Appellant’s Reply Brief in Support of Summary Judgment, Ex. 9c. IOS, LLC First Addendum to Amended Operating Agreement.)

At the time IOS, LLC purchased the property in 2005, Business Carolina agreed to a dismissal without prejudice of the 2004 Foreclosure. (Respondent-Appellant’s Reply Brief in Support of Summary Judgment, Ex. 10, Dismissal of Business Carolina Foreclosure of Palmetto Inns, without Prejudice.) Business Carolina further entered into a Forbearance and Loan Modification with Palmetto Inn and White, which acknowledged IOS, LLC as the titleholder of the property. The agreement allowed interest only payments for a certain period and extended the maturity date of the Note to March 29, 2011. (Respondent-Appellant’s Reply Brief in Support of

Summary Judgment, Ex. 11, Forbearance executed between Palmetto Inns and Business Carolina, Inc. on 3/29/2005, and Loan Modification Agreement, recorded at Book 1833, Page 136 in the Office of the Clerk of Court for Greenwood County.) The Addendum to the Forbearance Agreement, executed by Smith on behalf of IOS, LLC, affirmed the debt and stipulated that while IOS, LLC had not assumed the Note, it took title subject to Business Carolina, Inc.'s security interest. (Id.) In these documents IOS, LLC acknowledged it had no right of recoupment or set off of any kind with respect to the indebtedness, loan or loan documents, and further waived appraisal, stay, valuation, extension or redemption. (Id.)

Based upon the testimony of both Louis Smith and John Huffman, there was controversy with White immediately after the purchase of the property. Huffman claims when he initially met him, White threatened to kill him and Huffman reciprocated. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex.12, p. 316, Depo. of Huffman.) Neither Smith nor Huffman elaborated on the dispute, stating only that the two never got along. (Id.) At his deposition, Huffman indicated the property was purchased in the name of IOS, LLC so he could "walk in debt free" without assuming Palmetto Inns' liabilities, which he estimated totaled at least \$200,000.00 over the mortgage debt. Exhibits submitted in support of Respondent-Appellant's Motion for Summary Judgment, reflect that during IOS, LLC's ownership, creditor's claims and liens threatened to affect the property and equipment, including a complaint for claim and delivery filed by Allegiant/Telerent against White/Emerald Inn shortly before Palmetto Inns' transfer to IOS, LLC. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 13, Greenwood County Public Index.) The suit sought a money judgment against White and Emerald Inn for non-payment, as well as the return of the hotel's furniture and fixtures. (Respondent-Appellant's Reply Brief in

Support of Summary Judgment, Ex. 14, Telerent Complaint.) Evidence shows Huffman paid Allegiant/Telerent \$5,000.00 for the collateral and a release. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 15, Telerent hand written agreement, check and itemization and Ex. 16, Huffman, Day 2, p. 17, l. 21-24.) Huffman claims he subsequently sold most of these furnishings, along with a Karaoke machine used in the hotel bar, to Lander University when the lease at issue commenced. (Respondent-Appellant's Reply Brief in Support of Summary Judgment Ex. 17, Handwritten Bill of Sale from IOS, LLC to Diane Newton on behalf of Lander University and Exhibit to Plaintiff's federal tax return indicating mass sale of assets on 12/31/2009.) A review of the Greenwood County Public Index reflects additional claims filed against Palmetto Inns and IOS, LLC, during the first year of Huffman's operation of the hotel which may have also soured the relationship. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 18, Greenwood County Public Index, IOS, LLC the Inn on the Square.)

The Greenwood County Public Index indicates that IOS, LLC also incurred debt with respect to the hotel. A junior mortgage from IOS, LLC to Misty Huffman, individually, in the amount of \$200,000.00 was filed with the Greenwood County Clerk of Court. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 19, 7/18/05 IOS, LLC mortgage to Misty Huffman, Book 1883, Page 269, OCC Greenwood County.) According to Huffman, this Mortgage represented a personal loan from the Huffmans' to IOS, LLC funded by personal credit cards or lines of credit. No accounting has been produced which itemizes this total. Respondent-Appellant has surmised that it also likely served to secure the Huffmans' management fee and/or anticipated profit from 'flip' of the property.

Over the next two years, the following mortgages were additionally recorded against the property: Bridge Financial, LLC for \$115,475.00 (recorded 9/12/06), Cornerstone Capital Funding

for \$230,000.00 (recorded 1/8/07), Upper Savannah Council of Governments for \$250,000.00 (recorded 1/25/07), Uptown Development Corporation for \$50,000.00 (recorded 1/25/07) and Upper Savannah Council of Governments for \$50,000.00 (recorded 1/9/09) (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 20 Mortgage and Lien record, and mortgages filed in the OCC Greenwood County.) An additional Assignment of Leases and Rents was recorded on behalf of Upper Savannah Council of Governments. UCC filings securing the furniture, fixtures and equipment were additionally filed on behalf of both Uptown Greenwood Development Corporation and Upper Savannah Council of Governments. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 21, Uptown Greenwood Development Corporation and Upper Savannah Council of Governments UCC's.)

Lonestar Ventures, LLC (an entity solely owned by Huffman's wife, Misty) recorded an additional mortgage in the amount of \$200,000.00 on 4/2/07. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 22, Mortgage from IOS, LLC to Lonestar Ventures, LLC, Bk. 2158, p. 228, Subordinated to Bridge Financial, Bk., 2158, p. 232.) It is uncertain whether this is the original mortgage to Misty Huffman being refiled after her 7/18/05 mortgage was subordinated to subsequent lenders. As with the prior mortgage, no accounting for this amount has been produced in discovery.

Despite this substantial influx of capital from third party lenders over a three year period (2006-2009) IOS, LLC was delinquent in many of its obligations, including the mortgage payment to Business Carolina, and taxes owed to Greenwood County, the IRS, the S.C. Department of Revenue, and the S.C. Employment Security Commission. The Business Carolina loan file, provided during discovery, also reflects extensive documentation regarding late or missing payments. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 24,

Business Carolina Palmetto Inns, Loan Transcript.). In October and November of 2007, Business Carolina threatened foreclosure and filed a Lis Pendens against both Palmetto Inns and IOS, LLC (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 25, Greenwood County Public Index for IOS, LLC). A letter from Business Carolina indicates that foreclosure would only be deferred if IOS, LLC escrowed funds totaling \$26,156.25, to be applied monthly to interest until March 1, 2008. In its November 2007 letter, Business Carolina indicated that if IOS, LLC successfully refinanced on or before March 1, 2008, the amount escrowed would be applied to reduce principal. After that date, the payment would revert to principal and interest in the amount of \$7,071.39 per month. According to correspondence from the credit file, Business Carolina also wrote demanding that IOS, LLC and Mr. Huffman attempt to refinance the property or face foreclosure. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 26, Letters of Todd Lucas to John Huffman, August 16, 2007 and November 8, 2007.) From the payment summary provided by Business Carolina, Inc., however, it appears this never occurred and Palmetto Inns/IOS, LLC remained largely in arrears. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 24, Loan Transcript.)

After approximately four years, Business Carolina made arrangements to sell the Note to a third party, Banc Capital and Financial Services, pursuant to an agreement dated June 29, 2009. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Exhibit 27, Banc Capital contract). Closing was initially to take place on or before June 29, 2009, which was extended due to the buyer's need to first "settle out a 1031 exchange." (Id.)

According to notes from Todd Lucas, loan officer for Business Carolina, Huffman contacted him when he learned of the pending agreement with Banc Capital to discuss "performance of the hotel" indicating for the first time that he could no longer fund it.

(Respondent-Appellant’s Reply Brief in Support of Summary Judgment Exhibit 28, Business Carolina Credit Notes.) On August 3rd, 2009, representatives of the bank met with Huffman and his attorney, Leonard Jordan, during which Huffman stated the hotel was suffering and he could no longer subsidize it every month. (Id.)

During the meeting with bank representatives, Huffman indicated that he was negotiating with Lander University to lease the hotel. Notes indicate that the bank reportedly objected, stating that they had already sold the Note and the buyer did not want “the Lander deal or for the hotel to be shut down.” (Id.) On August 5, 2009, Business Carolina Vice President Todd Lucas documented a conversation with Huffman, who stated that he would be forced to begin shutting the hotel down on August 8<sup>th</sup>, 2009 and would be completely closed by August 15, 2009, if Business Carolina did not agree to the lease. Though the prospective purchaser objected, Huffman refused to keep the hotel open. The sale then apparently fell through leaving Business Carolina with the lease to Lander University, which it subsequently approved.

As an integral part of the transaction, however, a Forbearance Agreement from IOS, LLC, who was not the original borrower, was required. This new Forbearance Agreement reaffirmed the debt and reiterated IOS, LLC’s previous waiver of defenses in the event of a future foreclosure. (Respondent-Appellant’s Reply Brief in Support of Summary Judgment, Ex. 29, Forbearance Agreement, IOS, LLC 2009.) It also required IOS, LLC to attest that its interest was subordinate all of the prior loan documents, including the assignment of leases and rents to Business Carolina. The original Assignment provided (in pertinent part) that:

**“for good and valuable consideration, Assignor absolutely assigns and transfers to assignee”** the following:

- (a). The income, rents, receivables, security or other similar deposits, revenues, issues, royalties, profits, earnings, products and

proceeds from any and all of the Property (collectively, the “rents, issue and profits”) together with the right, power and authority to collect same;

(b.) All leases, **written or oral, now in existence or hereafter arising** (emphasis added) all other agreements for the use and occupancy of all or any portion of the Property, and any and all extensions or renewals of any thereof (individually collectively, the “Lease” or “Leases” together with the right, power and authority of the Assignor to alter, modify, or change the terms thereof, or surrender, cancel or terminate same; and

(c.) Any and all guarantees of any obligations of any Lessee (the “lessee”) under each of the leases.

Assignor **irrevocably** (emphasis added) appoints Assignee its true and lawful attorney-in-fact, at any time and from time to time, at the option of the Assignee to demand, receive and enforce payment of rents, to give receipts, releases and satisfactions, and to sue, in the name of the Assignor or the Assignee, for all the rents, issues and profits and to apply the same to the indebtedness secured; provided however, that Assignor shall have the right and license to collect the rents, issues and profits prior to or at any time there is no continuing default hereunder or under any of the other loan documents evidencing and securing the Note (as defined herein) (“Loan Documents”). The assignment of rents, issues and profits is an **absolute assignment** (emphasis added) from Assignor to Assignee and not merely the passing of a security interest.

“Upon payment in full of the indebtedness, this Assignment shall become and be void and of no effect, but the affidavit, certificate, letter or statement of any officer, agent, or attorney of the Assignee showing any part of the Indebtedness to remain unpaid or unperformed shall be and constitute conclusive evidence of the validity, effectiveness and continuing force of this Assignment and **any person may, and is hereby authorized to, rely thereon.** The Assignor, as the lessor under any Lease, hereby authorizes and directs the lessee named in any such Lease or any other or future lessee or occupant of the premises described therein upon receipt from the Assignee is then the holder of the Note to pay over to the Assignee all rents, and profits or accruing under such Leases or from the premises described therein and to continue to do until otherwise notified by the Assignee.”

The new Forbearance Agreement also included an acknowledgement of default. IOS, LLC was again required to affirm (see paragraph 6) that Business Carolina had an “absolute assignment” in and to the Lander Lease, as set forth in the Assignment of Leases and Rents executed by Palmetto Inns. Acceptance of the Forbearance Agreement by IOS, LLC specifically excluded acceptance of rent pursuant to the lease as a waiver of default.

A new Subordination/Non Disturbance agreement further provided in paragraph 9 that the **Lender would be entitled, but not obligated, to exercise the claims, rights, power, privileges and remedies of the landlord under the Lease, and shall be entitled to the benefits of, and to receive and enforce performance of, all of the covenants to be performed by the Tenant under the lease as though the lender were named therein as the Landlord** (emphasis added).

As both Palmetto and IOS, LLC acknowledged the default, Business Carolina required collection of the rent through an escrow agent, who applied Lander’s payment pursuant to a schedule devised by Palmetto Inn and IOS, LLC’s creditors.

After assuming possession, Lander performed due diligence as required by the S.C. Budget and Control Board and determined it was not feasible to purchase the property under the option. At the end of the renewal term, Business Carolina refiled its foreclosure proceeding on July 22, 2011.

Huffman submitted a demand for payment of damages to IOS, LLC in the amount of \$339,262.00, which he claimed was necessary to place the property back in the “serviceable and operational condition” necessary to reopen as a hotel. (Plaintiff’s Memo in Opposition to Summary Judgment, filed March 16, 2018, Exhibit 3.) His demand requested large even sums for the repair or replacement of equipment without justification, such as: \$60,000.00 for a telephone system, \$70,000.00 for HVAC and refrigeration repairs, \$23,000.00 for a security system and

\$12,000.00 for a commercial dryer. When compared to IOS, LLC tax returns obtained during discovery these assets, which were on a depreciation schedule, were worth far less. (E.g. \$1,500.00 for the dryer, \$3,780.00 for the security system and \$19,300 for the HVAC, which was put into service in 2006 and remained in service.) **No bills, estimates purchase orders, or invoices were provided in discovery which supported these damages.**

Contrary to Huffman's assertion, there was evidence that many of the items were either sold to Lander at the beginning of the lease, or in storage on the property when it was foreclosed and sold to the subsequent purchaser. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 31, Bill of Sale from Business Carolina, Inc. to 104 East Court, LLP). As a result, Lander denied that damages were owed to IOS, LLC under the lease.

Ultimately, the property was sold at foreclosure and a deficiency judgment in the amount of \$425,218.84 was entered on May 2, 2012. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 30 Foreclosure Order and Judgment.) This action was not filed until May 29, 2012.

Curiously, after the foreclosure was complete, Louis Smith executed two confessions of judgment on behalf of IOS, LLC to Lonestar Ventures, one in the amount of \$632,419.82, (Civil Action No.: 2014-CP-24-1429) and a second in the amount of \$277,154.22 (Civil Action No.: 2014-CP-24-1430. (Respondent-Appellant's Reply Brief in Support of Summary Judgment, Ex. 23, Confessions of Judgment by IOS, LLC.) These amounts far exceed the total of either mortgage to Misty Huffman or Lonestar Ventures, LLC. There are no corresponding complaints in the Circuit Court file setting forth proof of either debt, only entry of the confessions of judgment.

## ARGUMENT

- I. THE TRIAL COURT SHOULD HAVE GRANTED RESPONDENT-APPELLANT'S MOTION FOR SUMMARY JUDGMENT AS TO IOS, LLC'S CAUSE OF ACTION FOR BREACH OF LEASE AS IOS, LLC CONSENTED TO THE ASSIGNMENT OF ITS INTEREST IN THE LEASE TO BUSINESS CAROLINA, INC. AND THEREFORE LACKED STANDING TO ENFORCE IT.

Ordinarily, the denial of summary judgment is not appealable. Holloman v. McAllister, 289 S.C. 183, 345 S.E.2d 728 (1986). Courts have made a practice, however, of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable. Pitts v. Jackson Nat. Life Ins. Co., 352 SC 319, 574 S.E.2d 502 (Ct. App. 2002); cited by Southeastern Housing Foundation v. Smith, 670 S.E.2d 680, 688 (SC App. 2008). In Pitts, the Court of Appeals reviewed an interlocutory appeal of the trial court's denial of an insured's motion for summary judgment on an unjust enrichment claim, given that the claim was so closely connected to other issues and it constituted a basis for the grant of summary judgment on other claims. Id. In addition, the court is entitled to review questions of law "de novo." Ziegler v. Dorchester County, 426 S.C. 615, 828 S.E.2d 218 220 (2019)

Lander University would argue that the circuit court should have granted Respondent-Appellant's Motion for Summary Judgment as to IOS, LLC's cause of action for breach of the lease, as IOS, LLC lacked standing to enforce it by virtue of an irrevocable assignment in favor of the Lender, Business Carolina.

Before any action can be maintained, there must exist a justiciable controversy. Byrd v. Irmo High School, 321 S.C. 426, 430, 468 S.E. 2d 861, 864 (1996). Justiciability encompasses several doctrines, including ripeness, mootness and standing. Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013). In the case at bar, the Appellant-Respondent acknowledged multiple times that

its ownership interest was subject the prior loan documents, including the absolute Assignment of Leases and Rents to Business Carolina. Further, by the time the Appellant-Respondent filed this suit in 2012, it had already been divested of any interest in the real or personal property by Business Carolina's foreclosure and sale. As a result, the Appellant-Respondent lacks standing to enforce any of the terms of the lease, including recovery of damages in a separate lawsuit against the tenant, Lander, following the conclusion of the foreclosure.

In its most basic sense, "standing" refers to a party's right to make legal claim or seek judicial enforcement of a duty or right. Preservation Society of Charleston v. South Carolina Department of Health and Environmental Control, 430 S.C. 220, 845 S.E. 2d 481 (2020) and Bank of America v. Draper, 405 S.C. 214, 746 S.E.2d 478 (2013). Standing to sue is a fundamental requirement in instituting an action. *Id.* The party seeking to establish standing has the burden of proof. Sea Pines Ass'n for the Protection of Wildlife, Inc. v. S.C. Dept. of Natural Resources, 345 S.C. 594, 601, 550 S.E. 2d 287, 291 (2001).

When an assignor retains no rights to assigned property, an assignor lacks standing to enforce any agreements regarding that property. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S.E. 2d 826 (1997)

An assignment of leases and rents made upon good consideration is valid. S. C. Ann. 29-3-100 (1976, as amended). A recording of a written document containing an assignment of leases and rents, issue or profits is valid from the time of recording, and is perfected from the time of recording against subsequent assignees, lien creditors and purchasers for valuable consideration from the assignor. S. C. Ann. 29-3-100(B) (1976, as amended) (emphasis added). The assignment of a lease or the subletting of leased premises conveys an interest in the land. An assignment is a conveyance of the lessee's entire interest in the demised premises without retaining any

reversionary interest in the leasehold. Neal v. Craig Brown, Inc., 356 S.E.2d 912 (1987). The Assignment at issue in this case transferred the following, in pertinent part:

“Assignor irrevocably appoints Assignee as its true and lawful attorney-in-fact, at any time and from time to time, at the option of the Assignee, to demand, receive and enforcement payment of rent, to give receipts, releases and satisfactions, and to sue in the name of the Assignor or Assignee, for all the rents, issues and profits and to apply the same to the indebtedness secured; provided, however, that Assignor shall have the right and license to collect the rents, issues and profits prior to or at any time there is no continuing default hereunder or under any of the other loan documents evidencing and securing the Note (as defined herein) (Loan Documents). The assignment of rents, issues and profits in this Assignment is an absolute assignment from Assignor to Assignee and not merely the passing of a security interest.” (Respondent-Appellant’s Reply Brief in Support of Summary Judgment, Ex.3(f))

It is clear from the language of this document that the right, power and authority to sue for any monies owed under the lease in the event of a default by Palmetto Inns was transferred to Business Carolina. This is more than a security interest in the rent paid pursuant to a lease agreement. By operation of law, therefore, the Assignment of Leases and Rents executed by Palmetto Inns as well as its subsequent affirmation by representatives of IOS, LLC that this assignment applied specifically to the Lease with Lander, conveyed both Palmetto Inns’ and IOS, LLC’s entire interest in the demised real and personal property including the right to assert claims under the Lease.

II. THE TRIAL COURT SHOULD HAVE GRANTED SUMMARY JUDGMENT TO RESPONDENT-APPELLANT AS TO IOS, LLC’S CAUSE OF ACTION FOR BREACH OF LEASE AS IOS, LLC WAIVED ANY RIGHT TO ENFORCE THE LEASE WHEN IT FAILED TO BRING A COMPULSORY COUNTERCLAIM DURING THE FORECLOSURE TO CONSTRUE OR SET ASIDE THE ASSIGNMENT.

By virtue of the loan documents, as well as the Forbearance, Subordination/Non-Disturbance, any cause of action for monies due under the lease was assigned to Business Carolina

for the reduction of the debt. Respondent-Appellant would also argue that IOS, LLC was further deprived of standing when it failed to answer the foreclosure and assert claims under the Assignment, Forbearance or Subordination/Non-Disturbance Agreements against the assignee, Business Carolina. Lander argues that it is clear from these documents that any funds arising out of the lease were pledged to the reduction of the debt and therefore part of the same transaction or occurrence which was tried during the foreclosure. Had IOS, LLC believed that any damages were owed due to breach of the lease, the proper remedy was a compulsory counterclaim against the assignee, Business Carolina, seeking to construe, enforce or invalidate the assignment.

In a foreclosure action, a compulsory counterclaim arises out of the same transaction or occurrence when there is a logical relationship between the counterclaim and the enforceability of the agreement. N.C. Fed Sav. & Loan Ass'n v. DAV Corp., 298 SC 514, 381 S.E.2d 903 (1989). In South Carolina Community Bank v. Salon Proz, LLC this court found a claim was compulsory in a foreclosure action when, if the allegation were true, "it could affect the loan's enforceability." 420 S.C. 89, 97-98, 800 S.E. 2d 488, 492 (Ct. App. 2017).

Although IOS, LLC was a named Defendant in the foreclosure action taken by Business Carolina against Palmetto Inns, LLC, it filed no answer and was in default when the judgment of foreclosure was entered. By waiving any defense to the foreclosure and failing to bring a compulsory counterclaim against Business Carolina, IOS, LLC waived any damages for alleged violations of the Lease, as they were part of the same transaction or occurrence and were assigned to Business Carolina to reduce the debt.

Pursuant to the language of the Assignment (see above), any amounts found due and owing under the lease contract would have operated to offset the amounts found due and owing under the Note and Mortgage at the time of foreclosure. Because the Assignment was executed as part and

parcel of the loan package, it is part of the same occurrence or transaction. S.C.R. Civ. P. 13(a) and N.C. Fed. Sav. & Loan Ass'n v. DAV, Corp. 298 SC 514, 381 S.E.2d 903 (1989). If IOS, LLC believed it was aggrieved by the Assignment, or corresponding Forbearance and Subordination/Non-Disturbance Agreements, as well as Business Carolina's failure to assert a claim under the Assignment against Lander for breach of the lease, it should have filed compulsory counterclaim against Business Carolina.

Further, once the Bank obtained title to the property at the foreclosure sale, any interest IOS, LLC held in the property or the lease terminated. An action for foreclosure adjudicates and cuts off any interest in real property. It is a proceeding *in personam*, as well as *in rem*. Bartles v. Livingston, 282 S.C. 448, 319 S.E.2d 707, Perpetual Building and Loan Association v. Braun, 270 S.C. 338, 242 S.E.2d 407 (1978). Anderson v. Pilgram, 30 S.C.499, 9 S.E. 587 (1889).

In this case, Business Carolina chose to foreclose the mortgage, and resold the real property to 104 East Court LLP. Furthermore, on September 20, 2013, Business Carolina executed an "as is" Bill of Sale for any and all tangible personal property obtained via the foreclosure associated with the Inn on the Square to 104 East Court LLP. (Ex. 27) As stated above, the loan documents assigned to Business Carolina a security interest in both the lease, as well as all furniture, fixtures or equipment. Claims for damage, loss or impairment of that interest were likewise assigned to Business Carolina and before any funds could be recovered by IOS, LLC, and the loan documents required that they be applied to the indebtedness. In failing to bring a compulsory counterclaim under the security agreements, IOS, LLC waived any right to litigate the validity of the assignment or its entitlement to funds outside of the foreclosure.

CONCLUSION

For the reasons stated above, this Court should reverse the circuit court's denial of summary judgment on IOS, LLC's cause of action for breach of lease.

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**Apr 20 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY  
Circuit Court

Frank R. Addy, Jr., Circuit Court Judge

Case No.: 2021-001400

IOS, LLC.....Appellant-Respondent

v.

Lander University .....Respondent-Appellant

PROOF OF SERVICE

I certify that I have served the Initial Brief of the Respondent-Appellant and Designation of Matter to be Included in the Record on Appeal by email and U.S. Mail postage prepaid, on April 20, 2022, addressed to Appellant-Respondent’s attorney of record:

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April 20, 2022

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**Apr 20 2022**

**SC Court of Appeals**

April 20, 2022

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
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Re: IOS, LLC v. Lander University  
Appellate Case No.: 2021-001400

Dear Madam Clerk:

Enclosed please find the Respondent-Appellant's Initial Brief and Designation of Matter with Proof of Service in the above-referenced matter. I would appreciate your assistance with filing the attached and returning clocked copies.

Sincerely,

*s/Lena Y. Meredith*

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