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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Barry Clarke, Petitioner,

v.

Fine Housing, Inc. and RRJR, L.L.C., Defendants, of which Fine Housing, Inc. is the Respondent.

Appellate Case No. 2020-001371

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**ON WRIT OF CERTIORARI**
**TO THE COURT OF APPEALS**

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Appeal from Charleston County
J.C. Nicholson Jr., Circuit Court Judge

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Opinion No. 28126
Heard April 5, 2022 – Filed January 4, 2023

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**AFFIRMED**

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Thomas R. Goldstein, of Belk, Cobb, Infinger & Goldstein, P.A., of North Charleston, and Ashley G. Andrews, of LaFond Law Group, P.A., of Charleston, for Petitioner.

W. Cliff Moore III and Kirby D. Shealy III, both of Adams and Reese, LLP, of Columbia, for Respondent.

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**JUSTICE JAMES:** Barry Clarke brought this action for specific performance of a right of first refusal. The trial court ruled for Clarke and ordered Fine Housing, Inc. to convey certain real property to Clarke. The court of appeals reversed, holding the right of first refusal is unenforceable. *Clarke v. Fine Housing, Inc.*, Op. No. 2020-UP-238 (S.C. Ct. App. filed Aug. 12, 2020). We affirm.

## I.

Clarke owned a strip club at 2015 Pittsburgh Avenue in Charleston. Group Investment Company, Inc., whose shareholders were John Robinson and Robin Robinson, owned a strip club across the street at 2028 Pittsburgh Avenue (the Subject Property). The Subject Property includes buildings, a parking lot, and other land. In 1999, Clarke and Group Investment entered into a recorded lease (the Lease) that allowed Clarke to use half of the parking spaces located on the Subject Property.

Pertinent Lease provisions include Section 1.1, which states, "Lessee hereby leases from Lessor the property generally described in Exhibit 'A' attached hereto." Section 2.1 provides, "The premises is unimproved property to be used as a parking lot by both the Lessor and the Lessee." The parties agree the "unimproved property" is the parking spaces. Section 7.1 provides, "The Lessee and Lessor shall be entitled to use of one half (1/2) of the spaces contained in the parking lot [which encumbrances all of the property described

in Exhibit A]." Clarke agrees he was not entitled to use any portion of the Subject Property other than the parking spaces during the term of the Lease. Clarke argues Section 5.2 of the Lease provides him a right of first refusal (the Right) to buy the entire Subject Property; however, the entirety of Section 5.2 states, "Right of First Refusal: Lessor grants the Lessee the right of first refusal should it wish to sell." Section 5.2 does not state what property—the leased parking spaces or all of the Subject Property—is encumbered by the Right. Also, there are no provisions in Section 5.2 or elsewhere in the Lease stating either how the purchase price would be set when the time came for Clarke to exercise the Right or what procedures would govern Clarke's exercise of the Right.

In 2007, Group Investment conveyed the Subject Property to RRJR, LLC for the stated consideration of $5.00. John Robinson and Robin Robinson were members of RRJR. Clarke testified he "probably" knew Group Investment transferred the Subject Property to RRJR, but Clarke claimed he did not seek to exercise the Right at that time because Group Investment and RRJR were "the same people."

In 2013, RRJR conveyed the Subject Property to Fine Housing for $150,000.00.[1] Fine Housing's closing

[1] Clarke discusses the lead-up to the sale of the Subject Property to Fine Housing at length in his brief. Clarke argues Fine Housing employed "predatory" tactics to exploit RRJR and obtain title to the Subject Property. Because resolution of this appeal turns solely on the validity of the Right, Fine Housing's conduct is irrelevant.

attorney did not take note of the Lease or the Right prior to the closing, but Fine Housing concedes it had record notice of both the Lease and the Right. Neither Fine Housing nor RRJR notified Clarke of the sale of the Subject Property.

Clarke learned of the sale to Fine Housing in March 2014, and in May 2015, Clarke initiated this action for specific performance against Fine Housing and RRJR. RRJR did not answer and is in default. After a bench trial, the trial court ruled the Right is enforceable as to the entire Subject Property and ordered Fine Housing to convey title to the Subject Property to Clarke upon his payment of $350,000.00. The court of appeals reversed, holding the Right is an unreasonable restraint on alienation and is therefore unenforceable.

## II.

South Carolina law prohibits the enforcement of unreasonable restraints on alienation of real property. *Wise v. Poston*, 281 S.C. 574, 579, 316 S.E.2d 412, 415 (Ct. App. 1984) ("Under South Carolina common law, any unreasonable limitation upon the power of alienation is against public policy and must be construed as having no force and effect."). In general, a right of first refusal requires the property owner, when and if he decides to sell, to first offer the property to the holder of the right of first refusal. *See Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2d 384, 385 (Ct. App. 1997). Accordingly, a right of first refusal restrains an owner's power

of alienation to a degree by requiring the owner to offer the property first to the holder of the right. *See Cnty. of Jackson v. Nichols*, 623 S.E.2d 277, 280 (N.C. Ct. App. 2005).

The question of whether a right of first refusal is enforceable turns upon whether the right unreasonably restrains alienation. *See Wise*, 281 S.C. at 579, 316 S.E.2d at 415. The Restatement (Third) of Property provides, "A servitude that imposes a direct restraint on alienation of the burdened estate is invalid if the restraint is unreasonable. Reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint." Restatement (Third) of Property: Servitudes § 3.4 (Am. L. Inst. 2000). Comment *f* to section 3.4 of the Restatement addresses rights of first refusal: "Whether a right of first refusal is valid depends on the legitimacy of the purpose, the price at which the holder may purchase the land, and the procedures for exercising the right."

Many state courts apply the Restatement factors to determine—in a case-bycase fashion—whether a right of first refusal unreasonably restrains alienation. *See*, *e.g.*, *SKI, Ltd. v. Mountainside Props., Inc.*, 114 A.3d 1169, 1178 (Vt. 2015) (analyzing the purpose of the right, the price, and the clarity of the procedures for exercising the right to determine its impact on alienability); *MS Real Est. Holdings, LLC v. Donald P. Fox Fam. Tr.*, 864 N.W.2d 83, 91-93 (Wis. 2015) (same); *Low v. Spellman*, 629 A.2d 57, 59 (Me. 1993) (same); *Wildenstein & Co., Inc. v. Wallis*, 595 N.E.2d 828, 832 (N.Y. 1992) (same); *Hartnett v. Jones*, 629 P.2d 1357,

1363 (Wyo. 198 1) (same). We agree with the Restatement approach and hold the factors to be considered in assessing whether a right of first refusal unreasonably restrains alienation include (1) the legitimacy of the purpose of the right, (2) the price at which the right may be exercised, and (3) the procedures for exercising the right. These factors are not exclusive, and in this case, we will address another point raised by Fine Housing—the lack of clarity as to what real property the Right encumbers.[2]

## III.

Clarke argues the court of appeals erred in holding the Right is an unreasonable restraint on alienation and contends the Right contains clear provisions respecting the property encumbered by the Right and the price he would pay to acquire the Subject Property. He argues it was not necessary for the Right to spell out the procedures governing his exercise of the Right. Specifically, Clarke claims (1) the Lease provides the Right applies to all of the Subject Property, (2) the Right leaves the price to be determined by the seller, and (3) South Carolina law requires the Right to be exercised within a reasonable time.[3] Because Clarke's

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[2] Fine Housing does not challenge the legitimacy of the purpose of the Right.

[3] Clarke also argues the court of appeals "erred in drawing inferences from John and Robin Robinson's absence from trial." This argument was not in Clarke's petition for rehearing to the court of appeals or his petition for a writ of certiorari; therefore, it is unpreserved. Rule 242(d)(2), SCACR; *Sloan v. Dep't of Transp.*, 365 S.C. 299, 307-08, 618 S.E.2d 876, 880 (2005) (noting

action for specific performance is one in equity, we apply a de novo standard of review to the question whether the Right is an unreasonable restraint on alienation. *See Campbell v. Carr*, 361 S.C. 258, 262-63, 603 S.E.2d 625, 627 (Ct. App. 2004).

### A. What real property is encumbered by the Right?

Typically, the identity of the property encumbered by a right of first refusal is obvious from a plain reading of the instrument. Here, however, the Right is buried in a lease of parking spaces, and the Lease contains Exhibit A—the description of the Subject Property, which includes the buildings, the leased parking spaces, other parking spaces, and other land. The Restatement does not address whether a lack of clarity as to the real property encumbered by a right of first refusal is a factor to consider in determining whether a right of first refusal is an unreasonable restraint on alienation. We hold it is a valid consideration in this case.

Clarke relies on Section 1.1 of the Lease to support his argument that the Right unambiguously applies to all of the Subject Property. Section 1.1 states, "Lessee hereby leases from Lessor the property generally described in Exhibit 'A' attached hereto." Fine Housing argues Exhibit A "merely identified the location of the leased parking spaces" and "[t]he remaining language of the Lease does not provide the clarity needed to

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an issue not raised in a petition for rehearing and petition for writ of certiorari is unpreserved for review).

identify the property intended to be encumbered by the Right." Fine Housing argues the uncertainty about the property the Right encumbers supports the conclusion that the Right is an unreasonable restraint on alienation.

We agree with Fine Housing. The Lease is unclear as to whether the Right encumbers all of the Subject Property or only the leased parking spaces. Section 5.2 states in its entirety, "Right of First Refusal: Lessor grants the Lessee the right of first refusal should it wish to sell." This begs the obvious question, Sell what? Section 1.1 and Exhibit A do not support the conclusion that the Right applies to all of the Subject Property. Other provisions in the Lease strongly indicate the Right encumbers only the leased parking spaces. Section 2.1 provides, "The premises is unimproved property to be used as a parking lot by both the Lessor and the Lessee." Section 7.1 provides, "The Lessee and Lessor shall be entitled to use of one half (1/2) of the spaces contained in the parking lot [which encumbrances all of the property described in Exhibit A]." Section 7.1 establishes Exhibit A serves solely to identify the location of the parking lot and the parking spaces leased by Clarke.

As noted above, the Restatement does not address the effect on alienation when a right of first refusal is not clear as to the property it encumbers, and we have found no published decisions discussing this precise

issue.[4] Nevertheless, it is readily apparent that a right of first refusal that does not identify the property it encumbers can substantially restrain alienation of real property. We hold, under the facts of this case, the uncertainty as to what property is encumbered by the Right supports the conclusion that the Right is an unreasonable restraint on alienation.

## B. Price

In general, provisions governing the price at which a right of first refusal may be exercised are important in assessing the impact on alienation. For example, a right of first refusal that may be exercised at a fixed price can substantially restrain alienation. *See Selig v. State Highway Admin.*, 861 A.2d 710, 719 (Md. 2004) (explaining that a right of first refusal allowing the holder to purchase the property at a fixed price inhibits alienability because with the passage of time, the fixed price may bear no relationship to market value). However, where the holder of the right may match the offer of a third party, the restraint on alienation may be lessened. *See Shiver v. Benton*, 304 S.E.2d 903, 905 (Ga. 1983) ("If the holder of the preemption right is merely entitled to meet the offer of an open market purchaser, there is little clog on alienability.").

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[4] The Iowa Court of Appeals issued an unpublished decision in which the court partially based its holding that a right was unenforceable on the lack of clarity regarding the property subject to the right. *See Franklin v. Johnston*, 899 N.W.2d 741, at *8 (Iowa Ct. App. 2017) (unpublished table decision).

Clarke emphasizes that the Right does not provide a fixed price at which he could purchase the Subject Property. Clarke first contends the Right left the sales price to be determined entirely by RRJR and simply required him to "match whatever offer [RRJR] received" from a third party. Clarke alternatively contends the exercise of the Right would have, to the benefit of RRJR, "touched off a bidding competition for the property." Fine Housing argues the Right's failure to provide any method for determining the price at which Clarke could exercise the Right creates an unreasonable restraint on alienation.

We agree with Fine Housing. The Right contains no price provisions at all. Although a right of first refusal that is silent as to price might not restrain alienation to the same degree as a right of first refusal containing a fixed price, a right of first refusal should contain some method for determining the price at which it may be exercised. If the Right provided that Clarke could acquire the Subject Property by matching the terms of a third-party offer, the restraint on RRJR's power of alienation would perhaps have been minimal. *See Bortolotti v. Hayden*, 866 N.E.2d 882, 890 (Mass. 2007) (explaining a right of first refusal that allows the holder to match any bona fide offer made by a third party "works a de minimis restraint on the alienation of property"). Of course, in this case, the Right does not include such a provision.

Where a right of first refusal provides no price terms, a dispute may arise as to whether the holder of the right may purchase the property by matching a

third-party offer or only after participating in a bidding war with other prospective buyers. That prospect hardly weighs in Clarke's favor. Under the facts of this case, the complete absence of any method for determining price weighs in favor of a finding that the Right is an unreasonable restraint on alienation.

### C. Procedures governing the exercise of the Right

Clarke contends the Right provides satisfactory procedures governing the exercise of the Right. We disagree because the Right contains no such procedures whatsoever. Comment *f* to section 3.4 of the Restatement states:

> The provisions governing exercise of the right of first refusal are important in determining its impact on alienability. Lack of clarity may cause substantial harm by making it difficult to obtain financing and exposing potential buyers to threats of litigation. Lengthy periods for exercise of rights of first refusal will also substantially affect alienability of the property.

When applying this factor, courts often examine the time period within which the right can be exercised after the owner decides to sell. *See Hare v. McClellan*, 662 A.2d 1242, 1249 (Conn. 1995). Alienation can be substantially restrained when the holder of the right has an extended time to decide whether he will purchase the property. *MS Real Est. Holdings*, 864 N.W.2d at 91. However, when the time allowed for the exercise

of the right is reasonable, the right will generally be enforced. *Lorentzen v. Smith*, 5 P.3d 1082, 1086 (N.M. Ct. App. 2000).

Clarke contends, contrary to the Restatement, that "a right of first refusal does not require detailed instructions on how to exercise it to be valid." Clarke argues the seller must only notify the holder of the right of his intent to sell to trigger the right of first refusal. As for the time period in which the holder must exercise the right, Clarke cites *Hobgood v. Pennington* for the proposition that "[w]hen the contract does not include a provision that time is of the essence, the law implies that it is to be done within a reasonable time[.]" 300 S.C. 309, 314, 387 S.E.2d 690, 693 (Ct. App. 1989).

Clarke does not dispute that the Right prescribes no limitation on the time within which he could exercise the Right after being notified of RRJR's desire to sell. Again, there are no provisions at all delineating the procedural requirements Clarke must follow to exercise the Right. This deficiency supports the conclusion that the Right is an unreasonable restraint on alienation. *See Girard v. Myers*, 694 P.2d 678, 683 (Wash. Ct. App. 1985) ("The preemptive right in this case states no time limit within which the holder must act and sets forth no procedural requirements that the holder must follow to exercise the right. Such a preemptive right permits the holder to frustrate a sale to a third party simply by stalling and then threatening litigation when a controversy develops."); *MS Real Est. Holdings*, 864 N.W.2d at 91-92 ("[W]here the . . . procedure for exercising the right is clear, and the time

for exercising the right when it arises is reasonably short, its practical effect on alienation is de minimis.").

Clarke's reliance on *Hobgood* and his suggestion that the law implies a "reasonable time" within which he could exercise the Right are without merit. In *Hobgood*, the court of appeals addressed the issue of whether a real estate purchase and sale agreement expired after the closing date contained in the agreement. 300 S.C. at 313-14, 387 S.E.2d at 692-93. The *Hobgood* court held that because the contract did not include a provision stating time was of the essence, the contract had not expired: "When the contract does not include a provision that time is of the essence, the law implies that it is to be done within a reasonable time; and the failure to incorporate in the memorandum such a statement does not render it insufficient." *Id.* at 314, 387 S.E.2d at 693.

*Hobgood* lends Clarke no support for two reasons. First, *Hobgood* is factually distinguishable because it had nothing to do with a right of first refusal. Second, Clarke misses the point of the Restatement approach by arguing a court can simply imply a reasonable time requirement in which a right of first refusal must be exercised. The whole point of the Restatement is to predetermine a limited time within which a right of first refusal must be exercised to protect the owner's power of alienation. A judicially implied "reasonable time" requirement would do little to protect the owner's power of alienation. Lengthy litigation over what is or is not a reasonable time under the facts of any given case will necessarily restrain alienation.

## Conclusion

The Right does not identify the property it encumbers, contain price provisions, or contain procedures governing the exercise of the Right. We conclude the Right is an unreasonable restraint on alienation. We therefore affirm the court of appeals' holding that the Right is unenforceable.

**AFFIRMED.**

**BEATTY, C.J., KITTREDGE and HEARN, JJ., concur. FEW, J., concurring in result only in a separate opinion.**

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**JUSTICE FEW:** I concur in result. In my opinion, the instrument Clarke contends grants him a right to purchase the property does not grant him any rights at all. The phrase "first right of refusal" is a descriptive term used to summarize an instrument that sets forth in detail the right of one person to purchase property the seller may otherwise choose to sell to a third person. In this case, the instrument simply recites the descriptive term as though the term means anything independent of the detailed rights set forth in a legitimate first right of refusal. An instrument that simply recites the descriptive term without the underlying detailed explanation of the rights conveyed is meaningless. This instrument is meaningless; it is not, therefore, a "first right of refusal." I do not disagree with the Restatement section the majority adopts. However, I would not reach the question whether the

instrument is an unreasonable restraint on alienation because I would find the instrument at issue in this case is not a restraint on alienation. The instrument says nothing, does nothing, restrains nothing. I concur in result.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Barry Clarke, Respondent/Appellant,

v.

Fine Housing, Inc. and RRJR, L.L.C., Defendants,

Of which Fine Housing, Inc. is the Appellant/Respondent.

Appellate Case No. 2017-002285

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Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

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Opinion No. 2020-UP-238
Submitted May 1, 2020 – Filed August 12, 2020

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**REVERSED**

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W. Cliff Moore, III, and Kirby D. Shealy, III, both of Adams and Reese, LLP, of Columbia, for Appellant/Respondent.

Ashley G. Andrews, of Lafonde Law Group, P.A., of Charleston, and Thomas R. Goldstein, of Belk, Cobb, Infinger & Goldstein, P.A., of North Charleston, for Respondent/Appellant.

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**PER CURIAM:** Fine Housing, Inc., appeals from the trial court's order finding a right of first refusal (Right of First Refusal) to be enforceable against it and requiring it to deliver title to a property (Property) to Barry Clarke upon his payment of $350,000. Fine Housing argues the trial court erred in (1) finding Clarke had an enforceable Right of First Refusal, (2) not finding Clarke waived the right to enforce the Right of First Refusal, (3) not finding Clarke is barred by the doctrine of laches; (4) not finding Clarke is equitably estopped from asserting the Right of First Refusal, and (5) calculating the price at which to exercise the Right of First Refusal. Clarke cross appeals, arguing the trial court erred in (1) setting the acquisition price of the Property at $350,000 when Fine Housing paid $150,000 for the Property, and (2) not allowing him to introduce cancelled checks related to Fine Housing's payments to itself and others. We reverse.

## FACTS

Clarke filed an action to enforce the Right of First Refusal to purchase Property located in Charleston, South Carolina. Clarke asserted that, as successor to

Group Investment Company, Inc. and RRJR, LLC, Fine Housing had refused to allow Clarke to acquire the Property in conformity with a lease (Lease). Clarke's complaint asked only for specific performance of a provision in the Lease for the Property and relief from the owner of the Property, Fine Housing, and Fine Housing's grantor, RRJR.[1] Fine Housing answered, asserting, among other defenses, that Clarke (1) waived the ability to enforce the Right of First Refusal; (2) was estopped from exercising the Right of First Refusal; and (3) was barred by the doctrine of laches from enforcing the Right of First Refusal.[2] Both parties moved for summary judgment, and the court denied both motions.

After a non jury trial, the trial court held the Right of First Refusal was enforceable and ordered Fine Housing to deliver title of the Property to Clarke upon his payment of $350,000. Fine Housing filed a motion to alter or amend, which was denied by the trial court. Fine Housing appeals, and Clarke cross-appeals.

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[1] Group Investment deeded the Property to RRJR for $5. John and Robin Robinson were shareholders of Group Investment and members of RRJR. John Robinson died in 2008, and in December 2013, Robin Robinson transferred the Property, along with her home, to Fine Housing. RRJR defaulted and is not a party to this appeal.

[2] At trial, Fine Housing abandoned the other defenses.

## STANDARD OF REVIEW

An action for specific performance of a real estate contract is in equity. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 290 (2000). "In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence." *Wachovia Bank, Nat. Ass'n. v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014) (citing *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)). "However, this [c]ourt is not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." *Ingram*, 340 S.C. at 105, 531 S.E.2d at 291.

## LAW/ANALYSIS

### A. Fine Housing's Appeal

Fine Housing argues the trial court erred in enforcing the Right of First Refusal. We agree.

A right of first refusal is a pre-emptive right. *Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2d 384, 385 (Ct. App. 1997). A right of first refusal "is a contingent, nonvested interest in that the grantee . . . might never choose to sell the property." *Id.* It is an interest predicated on an event that is not certain to occur. *Id.* Preemptive rights are subject to the rule against restraint of alienation of interest in land. 61 Am. Jur.

2d *Perpetuities and Restraints on Alienation* § 110 (2002).

Under some circumstances, a right of first refusal may not be an unreasonable restriction on alienation. *Id.* A right of first refusal is not a restraint on alienation as long as both the price the designated person must pay and the time allowed for the exercise of the right of first refusal are reasonable. *Id.* When assessing the reasonableness of a restraint on alienation in the form of a right of first refusal, consideration should be given to several factors, including: "(1) the purpose or purposes for which the restraint is imposed; (2) the duration of the restraint; and (3) the method of determining the price to be paid." *See* 61 Am. Jur. 2d *Perpetuities, Etc.* § 109 (2002). "Whether a right of first refusal is valid depends on the legitimacy of the purpose, the price at which the holder may purchase the land, and the procedures for exercising the right." Restatement (Third) of Property (Servitudes) § 3.4 cmt. f (2000).

The Lease, dated January 8, 1999, provided Clarke the use of one-half of the parking spaces on the Property. The description of the Property attached to the Lease references a plat recorded in the Office of the Register of Deeds for Charleston County; however, Clarke does not claim he leased the other one-half of the parking spaces or the buildings located on the Property. The Lease for the Property provides in article V, section 5.2, "Right of First Refusal: [Group

Investment] grants [Clarke] the right of first refusal should it wish to sell."

The trial court first found Clarke had an enforceable Right of First Refusal of which Fine Housing had record notice. The court wrote, "Every purchaser or mortgagee is regarded as having notice of documents properly recorded. Any properly recorded interest is valid as to subsequent purchasers without notice." The court noted Fine Housing did not contest the applicability of the recording statute or dispute that the parties' lease, containing the contested right of first refusal, was on file in the Office of the Register of Deeds for Charleston County and constituted notice to Fine Housing of its existence. The court also noted Fine Housing's closing attorney, William Sloan, was candid about missing the recorded Lease due to the time constraints on the quick transaction.

The trial court then addressed Fine Housing's argument that the Right of First Refusal was invalid for vagueness. The court noted a right of first refusal is the opposite of a restraint on alienation because nothing in the Lease prevents the owner from selling and it guarantees the seller will always have at least two bidders for his property in the event he wishes to sell. As to the time for performance, the court stated every contract in South Carolina contains within it implied terms of good faith and reasonableness. Further, as for the price, the trial court was "persuaded not only by the [L]ease itself, but also by the testimony of [Clarke] that the price is controlled by the property owner and

set by the owner's acceptance of any price from any purchaser whose offer is acceptable to the owner, after which the plaintiff, as the holder of the right, can either match the price or waive the right to exercise it." Therefore, the trial court held the Right of First Refusal was definite, and the intention of the parties was clear and unmistakable. *See Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC.*, 374 S.C. 483, 499, 649 S.E.2d 494, 502 (Ct. App. 2007) ("Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it.") (quoting *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)).

Fine Housing argues the trial court erred in finding the Right of First Refusal to be enforceable because it does not (1) specify the property encumbered by the right, (2) describe the method for determining the price at which the right can be exercised, or (3) provide procedures for exercising the right. Therefore, Fine Housing argues the Right of First Refusal in the Lease lacks the specificity required to be an enforceable interest in real estate. While it is recorded, it asserts the Lease does not contain the necessary details for notice and understanding by a third party of the operation of the Right of First Refusal and the nature and extent of Clarke's interest. Thus, the Right of First Refusal is unenforceable because it constituted an unreasonable restraint

on alienation that violates the public policy of the State of South Carolina.

As to the specificity of property encumbered, the language in the Lease does not specifically state whether the Right of First Refusal encumbers the entire tract or just the leased parking spaces. Fine Housing argues the Lease solely provides for Clarke's lease of parking spaces on the Property. Clarke asserts he has a Right of First Refusal on the entire tract, including improvements on the Property.

As to the method for determining the price, Fine Housing asserts the Right of First Refusal pursued by Clarke is not only uncertain on the issue of price, it is completely devoid of any language addressing price. Clarke claimed he was entitled to exercise the Right of First Refusal by paying Fine Housing one dollar more than Fine Housing paid RRJR for the Property. No evidence was offered at trial as to what Group Investment intended for determining the price, and Clarke's attempts to testify about his understanding of what John Robinson intended were denied by the trial court under the Dead Man's Statute. *See* S.C. Code Ann. § 19-11-20 (2014).

As to the procedures for exercising the Right of First Refusal, Fine Housing argues the Lease has no provision that identifies when or how Clarke should be notified of events that would trigger the Right of First Refusal and, once triggered, the time period during which Clarke must respond and how he must respond.

Clarke argues the Right of First Refusal was not triggered by the transfer to RRJR; whereas, Fine Housing asserts the Lease does not state whether the Right of First Refusal is or is not triggered by a transfer of the Property from one entity to another entity if the entities share common ownership. Fine Housing asserts Clarke waited until April 13, 2015, more than a year after he learned of the transfer to Fine Housing on March 21, 2014, to formally invoke the Right of First Refusal.

Based on our review of the evidence, we find the Lease did not specifically set forth whether the Right of First Refusal applied to the leased parking spaces or the entire property; the Lease did not specify how the price of the Property would be determined for the Right of First Refusal; and the Lease did not state a time for exercising the Right of First Refusal. Further, John Robinson was unavailable to testify as to his intent of the Right of First Refusal, and Robin Robinson defaulted and was not a party to the action. We, therefore, find the lack of specificity in the language of the Right of First Refusal creates an unreasonable restraint on alienation. Thus, the trial court erred in determining the Right of First Refusal was enforceable.

Fine Housing also argues the trial court erred in (1) not finding Clarke waived the right to enforce the Right of First Refusal; (2) not finding Clarke's attempt to exercise the Right of First Refusal is barred by the doctrine of laches; (3) not finding Clarke is equitably estopped from asserting the Right of First Refusal;

and (4) calculating the price at which to exercise the Right of First Refusal. We need not address these issues because our determination that Clarke's Right of First Refusal was not enforceable is dispositive of the appeal. *See Hagood v. Sommerville*, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (declining to address an issue when the resolution of a prior issue is dispositive); *Whiteside v. Cherokee Cnty. Sch. Dist. No. One*, 311 S.C. 335, 340-41, 428 S.E.2d 886, 889 (1993) (holding the appellate court need not address remaining issues when the resolution of a prior issue is dispositive).

**B. Clarke's Appeal**

Clarke argues the trial court erred in (1) setting the acquisition price of the property at $350,000 when Fine Housing paid $150,000 for the property; and (2) not allowing him to introduce cancelled checks related to Fine Housing's payments to itself and others.

We need not address these issues because our determination that Clarke's Right of First Refusal was not enforceable is dispositive of the appeal. *See Hagood*, 362 S.C. at 199, 607 S.E.2d at 711 (declining to address an issue when the resolution of a prior issue is dispositive); *Whiteside*, 311 S.C. at 340-41, 428 S.E.2d at 889 (holding the appellate court need not address remaining issues when the resolution of a prior issue is dispositive).

**CONCLUSION**

Accordingly, the decision of the trial court is **REVERSED**.

HUFF, THOMAS, and MCDONALD, JJ., concur.[3]

[3] We decide this case without oral argument pursuant to Rule 215, SCACR.

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| STATE OF SOUTH CAROLINA<br>COUNTY OF CHARLESTON<br>Barry Clarke,<br>Plaintiff,<br>vs.<br>Fine Housing, Inc. and RRJR, L.L.C.,<br>Defendants. | ) | IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT<br>CASE NO.: ~~2016~~ [2015]-CP-10-03038<br>ORDER OF JUDGMENT<br>(Filed Sep. 28, 2017) |

Date of trial: July 26, 2017

Plaintiff's attorneys: Ashley Andrews, Thomas R. Goldstein

Defendant's attorneys: Cliff Moore, Charles Altman (Mr. Altman was not counsel of record)

Court Reporter: M. Rebecca Hill

**Procedural Background**

This interesting real estate case came before the Court for trial on the merits on July 26, 2015. The plaintiff filed a complaint seeking specific performance on May 28, 2015, alleging that the defendant, RRJR, L.L.C., conveyed a parcel of real estate without notifying the plaintiff of his opportunity to purchase the property under a recorded right of first refusal. The plaintiff alleged that the defendant, Fine Housing, Inc., took title to the parcel subject to the plaintiff's right of first refusal and should be compelled to deed it to the

plaintiff upon receipt of the purchase amount. The defendant, R.R.J.R., never answered the complaint, and the plaintiff filed an affidavit of default on August 3, 2015. The defendant, Fine Housing, answered the complaint on September 2, 2015, setting up the following defenses (the Court disregards the defense of statute of limitations, which defendant did not pursue):

General denial.

Denial based on vagueness of the right of first refusal.

Waiver.

Laches.

Estoppel.

Prior to trial, the parties filed cross motions for summary judgment, which, after considering the parties' memorandums, affidavits, and argument of counsel, the Court denied. Thereafter, the plaintiff moved for an Order of the Court appointing a receiver to collect the rents on the disputed parcel until the Court ruled. However, prior to issuing a ruling, the parties announced that they resolved that motion by consent and will submit a separate Consent Order disposing of that issue.

At the trial on the merits, the plaintiff called three witnesses, Vincent DeStaso, the principal of Fine Housing, Inc., William Sloan, the closing attorney who handled the transaction from RRJR to Fine Housing, Inc., and the plaintiff, Barry Clarke. The plaintiff also

subpoenaed a fourth witness, William Swope, attorney for RRJR, who the Court excused due to a death in the family. In the face of Mr. Swope's absence, and to avoid re-calling him to the stand, the parties stipulated as to the purpose for calling him; to wit, that John and Robin Robinson were the shareholders of Group Investment Co. and the members of RRJR, L.L.C., which stipulation obviated to leave the record open.

After the plaintiff's case, both sides made the appropriate motions under Rules 41(b) and 50 of the *South Carolina Rules of Civil Procedure.* (Plaintiff called the defendant's principal, Vincent DeStaso, sole member of Fine Housing, Inc., in his case in chief. After the plaintiff rested, the defendant called no additional witnesses, thereby making the plaintiff's and the defendant's motions timely at the close of the plaintiff's case.) After the Court denied the competing motions, the defendant chose not to call additional witnesses, which made the case ripe for disposition on the merits.

**Factual Background**

The dispute in this case involves a parcel of real estate commonly referred to as 2028 Pittsburgh Avenue. 2028 Pittsburgh Avenue is unusual in that the center of the Pittsburgh Avenue is the boundary line between the City of Charleston and Charleston County. On the south side of the street is a properly licensed adult business, 2015 Pittsburgh Avenue, currently owned and operated by the plaintiff. On the north side of the street, 2028 Pittsburgh Avenue, is the

parcel at issue in this case. It also houses an adult business currently owned and operated by the defendant's, Fine Housing, Inc.'s, tenant. (It is the collection of rents from Fine Housing's tenant that are the subject matter of the plaintiff's motion for appointment of receiver that the parties resolved and which will be addressed in a separate Consent Order.) Both parties agree that the greatest share of the value of the 2028 Pittsburgh Avenue property is its availability as lawfully licensed sexually oriented business because both the City of Charleston and Charleston County have adult use zoning and licensing ordinances that restrict the location and licensing requirements for such businesses. These ordinances limit the number of available parcels that can support an adult business.

Clarke's adult business at 2015 Pittsburgh Avenue opened first, having been started by the plaintiff and later operated for many years by John Robinson, whose lease with the plaintiff Clarke is the subject of this action. The plaintiff testified that many years ago, his friend, John Robinson, approached him and solicited his advice about getting into the "club" business. Even though the plaintiff advised Robinson against it, Robinson did enter the "club" business and ultimately opened and operated a well-known and successful adult business known as "Diamonds" out of Barry Clarke's property at 2015 Pittsburgh Avenue. This is the property in the City of Charleston. Clarke testified that one of his main purposes of the parties' 1999 lease was to allow customers of either establishment to park at either site.

Years later, John Robinson moved across the street to 2028 Pittsburgh Avenue, the parcel in the County of Charleston, and Robinson and Clarke became competitors, each running an adult business on the north and south sides of the same street. By all accounts, both were successful. In 2009, John Robinson died, and his surviving spouse, Robin Robinson, assumed responsibility for running the business. (John Robinson is the "JR" of the defaulting defendant "RRJR." His surviving spouse, Robin Robinson, is the "RR," hence "RRJR, L.L.C.") Barry Clarke testified that he started an adult business at 2015 Pittsburgh Avenue many years ago, and testified he helped his deceased friend, John Robinson, get his start in the "club" business both against the advice and under the tutelage of the plaintiff, Barry Clarke. Over the years, John Robinson was both Barry Clarke's tenant at 2015 Pittsburgh Avenue operating an adult business known as "Diamonds," and also his competitor when he moved "Diamonds" from 2015 Pittsburgh Avenue to 2028 Pittsburgh Avenue. The evidence reveals that the two men enjoyed not only a close relationship but also a competitive one.

The friendly competition between the two gave rise to a lease (Plaintiff's Exhibit 1) between Barry Clarke and Group Investment Company, Inc. dated January 8, 1999, and recorded in the R.M.C. Office for Charleston County on January 8, 1999 at Book C319 at Page 791. Group Investment Company, Inc. was the forerunner of RRJR, L.L.C.—see plaintiff's Exhibits 31, Secretary of State Report for Group Investment Company, 32 Secretary of State Report for RRJR, and

33, Deed from Group Investment Company to RRJR dated April 25, 2007, for the consideration of $5.00, and stipulation of William Swope.

This lease is the central issue in this case.

According to plaintiff's testimony, Robinson and Clarke jointly met with a local lawyer, who drafted and recorded the lease (Plaintiff's Exhibit **1).** Plaintiff testified there were negotiations between the two, and that the recorded lease represented the terms to which Plaintiff agreed—including the right of first refusal in Article V, as maybe seen by their signatures on the lease. (Robin Robinson signed the lease for RRJR, L.L.C.—see Plaintiff's Exhibit 1, page 10.) After Clarke and Robinson signed the lease, the lawyer who drafted it sent it to the Register of Mesne Conveyance for Charleston County where the R.M.C. recorded it on January 17, 1999, at Book C 319 at Page 791. The lease contains Article V, which is the heart of the dispute now before the Court. Article V reads as follows:

**Article V**

> Section 5.1: Option to renew: There are no options to renew.
>
> Section 5.2: Right of first refusal: Lessor grant Lessee the right of first refusal should it wish to sell.

After recording the lease in 1999, Robinson and Clarke continued their relationship that varied between friendly and competitive. Barry Clarke testified that his motivation for the lease was to allow each

man's customers the right to park on one another's property, the idea being that it benefitted both to allow patrons to visit both clubs without having to move a car. According to the plaintiff, when they signed the lease, adult business located on both 2015 Pittsburgh Avenue and 2029 Pittsburgh Avenue, and because there was an adult business across the street from one another, it made sense to allow parking for either business on either lot. Plaintiff also testified that his purpose of the right of first refusal was to secure adequate parking for his property and to ensure that Robinson always had at least two purchasers in the event he decided to sell his parcel.

After John Robinson died in 2009, his surviving spouse, Robin, assumed the duties of running the business. As the run-up to the transaction with Fine Housing demonstrates, she found herself in financial trouble, facing imminent foreclosure on her home, unsatisfied judgments, and tax liens. (See Plaintiff's Exhibit 4, December 2, 2013 Settlement Statement.) As the settlement statement shows, her financial troubles required her to secure financing from non-traditional sources, first through a mortgage on her residence and later through Fine Housing. Through financial missteps—as delineated on the settlement statement and the testimony of William Sloan—she ultimately found herself facing the loss of her waterfront home located on Sol Legare Road on James Island. Because of her financial missteps over the years, conventional lending institutions were unavailable to Ms. Robinson and relief through bankruptcy was unavailable, and thus,

when faced with the loss of her home, she searched for additional nontraditional sources of financing, which led her to Fine Housing. The testimony of the witnesses at trial revealed that Ms. Robinson's lawyer, William Swope, reached out to financial brokers to find a source of financing for Mrs. Robinson. Mr. DeStaso testified that he was unwilling to loan Ms. Robinson money, but his lawyer testified until shortly before the closing, he thought he was preparing a closing for a refinance. (As discussed more fully below, whether the transaction started out as a loan and matured into a sale, or whether it was a sale from the beginning does not change the legal analysis.) Mr. DeStaso testified he flew to Charleston shortly before Thanksgiving, 2013, inspected Mrs. Robinson's home and the business, and literally on the eve of the foreclosure sale scheduled for 11:00 a.m. on Tuesday, December 3, 2013, he "purchased," through his corporation, Fine Housing, Inc., the two properties from her for the sum of $850,000.00. (The closing statement, Plaintiff's Exhibit 4, and Mr. DeStaso's testimony reveals that he wired $815,000.00 to close the transaction. As discussed more fully below, whether the transaction was a straight purchase or a hybrid transaction as suggested by the lease-back and buy-back provisions does not change the legal analysis.)

The testimony and evidence is uncontracted that Fine Housing Inc, through its principal, Vincent DeStaso, traveled to Charleston shortly before Thanksgiving, 2013, interviewed Mrs. Robinson and toured the Sol Legare property and the club on Pittsburgh

Avenue. This visit occurred a short time prior to her home being offered for sale on the courthouse steps to satisfy an unpaid mortgage to another lender. Ultimately, a few days before Thanksgiving 2013, DeStaso committed either to loaning to Mrs. Robinson the sum of $850,000.00 in exchange for deeds to both the Sol Legare property and the Pittsburgh Avenue property or committed to purchasing the properties with a lease-back and buy-back provisions so that Mrs. Robinson could avoid the foreclosure sale of her home scheduled for Tuesday, December 3, 2013, at 11:00 a.m. on the courthouse steps. (In 2013, Thanksgiving fell on November 28th.) Both the settlement statement and Mr. DeStaso's testimony reveal that Fine Housing actually transferred $815,000.00 because he retained the sum of $35,000.00, and as Plaintiff's Exhibit 4 demonstrates, he sent other sums to entities affiliated with Vincent DeStaso. (See Plaintiff's Exhibit 4, testimony of Vincent DeStaso.) There was considerable testimony—none of which is contradicted—about the rush imposed on Fine Housing's closing attorney, who closed the transaction. Thanksgiving fell on the 28th; the Master's Office scheduled the sale for Tuesday, December 3rd. The closing attorney, William Sloan, testified he originally thought DeStaso's instructions were to prepare a closing for a refinance, and he learned only shortly before the closing to prepare the documents for a "sale." (Plaintiff argues forcefully that the lease-back and buy-back provisions demonstrate it was a hybrid loan/sale, not a pure sale, and Defendant argues just as forcefully that it was a pure sale. As stated throughout, this Court concludes that the law requires the

same outcome regardless of whether the transaction was a hybrid or a pure sale.) As discussed more fully below, Mr. Sloan testified he initially thought he was preparing a refinance closing, and only days before the date for closing, discovered it was a "sale." It was this last-minute rush that contributed to his failure to examine thoroughly the chain of title that, in turn, gives rise to this dispute. (The defendant, Fine Housing, Inc. currently has a claim pending against his closing attorney, alleging negligence for failing to discover the Clarke lease.)

As the testimony of Vincent DeStaso and the exhibits (Plaintiff's Exhibits 4, December 2, 2013 settlement statement and Exhibits 10 and 11, leases and option to repurchase) establish—Mrs. Robinson agreed to deed both properties, her Sol Legare home and the 2028 Pittsburgh Avenue property, to Fine Housing, and in exchange, Fine Housing agreed to lease both properties back to Mrs. Robinson and gave her a written option to repurchase both properties for the agreed upon repayment sum of 1.15 million dollars. In short, under the terms of the agreement, Mrs. Robinson signed deeds, agreed to pay monthly rent for 24 months and then repay principal and interest to Mr. DeStaso. Had Mrs. Robinson conformed to the payment schedule, she had the right to reclaim both properties at a fixed price. However, Mrs. Robinson did not make the payments. She did, however, file a lawsuit against Fine Housing Inc. on February 19, 2014, two months after the closing, at Case Number 2014-CP-10-01035, in which she alleged Fine Housing defrauded

her. In essence, she alleged that the transaction was a loan, not a sale. However, that case ended in favor of Fine Housing Inc. on January 9, 2015, when the parties entered a stipulation of dismissal with prejudice. (See plaintiff's Exhibits 14 and 15.)

At no time before, during, or after the December 3, 2013, closing did anyone provide notice to the plaintiff of the proposed sale of the property. (See Plaintiff's Exhibit 13, November 19, 2016 Request To Admit.) The parties stipulated that neither Robin Robinson nor Fine Housing (or anyone acting on their behalf) gave notice to the plaintiff of the defendant's intention to purchase the property.

## Discussion of the issues

### A. South Carolina Recording Statute

The plaintiff's complaint sounds in specific performance. The defendant's defenses are both legal and equitable. Neither party requested a jury trial. The Court evaluates this case as a case brought in equity. "An action for specific performance is one in equity." *Fesmire v. Digh*, 385 S.C. 296, 303, 683 S.E.2d 803, 807 (Ct. App. 2009),

There are two broad principles of law invoked in this case. (The defendant's affirmative defenses are separately analyzed below.) The first is the application of the South Carolina Recording Statute, § 30-7-10, S. C. Code, Ann. "Validity of conveyances, liens, and other transactions as to subsequent purchasers and

creditors." Every purchaser or mortgagee is regarded as having notice of documents properly recorded. Any properly recorded interest is valid as to subsequent purchasers without notice. *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 662 S.E.2d 452 (S. C. App. 2008); *In Re Davis*, 490 Bkrtcy. Rpts. 221 (D.S.C. 2013).

Here, the defendant does not contest the applicability of the recording statute or dispute that the parties' lease, containing the contested right of first refusal, is on file in the R.M.C. Office and constitutes notice to the defendant of its existence. On the stand, Fine Housing's closing attorney, William Sloan, was candid about missing it (see plaintiff's Exhibit 12), although his testimony makes clear that he was not originally clear about Fine Housing's intentions—whether the transaction was a loan or a sale, and by the time Sloan knew what Fine Housing's intentions were, it provided Sloan only a couple of days in order to review the title and prepare the closing documents for a December 3rd closing in time to avoid the foreclosure sale of Mrs. Robinson's Sol Legare home. Also contributing to the confusion and undue pressure was the fact that the foreclosing creditor refused to grant additional time, and, in fact, made Mr. Sloan's job even more difficult by refusing to accept his trust account check, thereby placing additional pressure on him to leave his office, obtain certified funds, and transmit those by hand delivery to the foreclosing creditor. Such pressure in combination with a failure to provide an adequate period to investigate the status of title created a recipe for disaster with the closing attorney. Sloan testified

that he understood from Swope that he was charged with preparing a sales transaction on the Tuesday before Thanksgiving to prevent a December 3rd foreclosure sale. In 2013, Thanksgiving fell on November 28th. The Master's Office scheduled the foreclosure sale for Tuesday, December 3rd. The evidence demonstrates that the short period of time afforded to Sloan to get the transaction ready for closing accounts for the misstep. Mr. Sloan testified that because time was so short, he had no choice but to rely on background title provided by Mrs. Robinson's attorney, William Swope, which contained no mention of the Clarke Lease that is the subject of this action. (See Plaintiff's Exhibit 12.) In fact, Mr. Sloan testified that he found the Clarke lease almost immediately after closing, when he had time to examine the chain of title more closely. Sloan was not so much negligent as prevented from having a reasonable opportunity to examine title because of the time constraints placed on him.

At trial, the defendant concedes that it is on notice of the Clarke Lease, but argues that the right of first refusal is invalid for vagueness and for waiver, estoppel, and laches. Thus, it is not disputed that the South Carolina Recording Statute gave notice to the defendant of the plaintiff's lease, containing a right of first refusal, and neither Robin Robinson nor Fine Housing, Inc., placed the plaintiff on notice of their intent to close prior to the closing on December 3, 2013.

### B. Vagueness or Ambiguity

The heart of defendant's defense is that the right of first refusal is not enforceable because it is too vague or ambiguous to be enforced. Through cogent, well-researched, well-written and forcibly argued legal presentations, the defendant argues that the right of first refusal is not enforceable because it constitutes a "restraint on alienation" and the Court must, therefore, apply it narrowly. The defendant also urges the Court to ignore Article V because it does not contain a mechanism for its operation, including a time for performance, set price, or method of determining price. To support its position, the defense handed up an unpublished opinion called *Page v. Page*, issued by the Court of Appeals on February 24, 2004, at Opinion No. 2004-UP110.

At the outset, when the Court of Appeals issues an unpublished opinion, it releases it with all capital, boldface disclaimer at the top saying: "**THIS OPINION HAS NO PRECEDENT1AL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR**." See Appellate Court Rule 268(d)(2): "Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." This rule must mean something.

However, in an abundance of caution, and to avoid overlooking controlling principles of law, the Court

thoroughly reviewed *Page v. Page*, including the cases cited therein, and finds that it is not applicable in this case for the very reason asserted by the defendant who is relying on it: the right of first refusal in *Page* was a deed restriction inserted in the granting clause of a deed in an effort to cut down on a fee simple conveyance:

> M.K. Page and Maude Page conveyed a parcel of real estate to S. M. Page, in fee simple absolute, reserving a life estate unto themselves. In the deed, M. K. and Maud placed a restriction on S. M. Page's right to dispose of the property. The restriction created a right of first refusal as follows:
>
> In the event S. M. Page decides to sell all or any portion of this property, it shall first be offered to Betsy Page Flinn, Carolyn Page Eaton, and Samuel D. Page under the same terms and conditions as the proposed sale. This restriction, on transfer, shall also apply to any heirs of S. M. Page.

As the Court of Appeals explained in *Page*, it found the right of first refusal invalid because it represented an effort "to cut down a fee simple estate contained in the granting clause." *Page* at page 3. The reason the Court of Appeals' opinion is unpublished is because it is relying entirely on the published *Stylecraft, Inc. v. Thomas*, 250 S.C. 495, 498, 159 S.E.2d 46, 47 (1968). *Stylecraft* has caused more than a few real estate lawyers sleepless nights. Only a few cases in South Carolina law have: (1) generated as much comment or (2)

caused as much anguish for real estate lawyers as *Stylecraft*. There, the Supreme Court held that any efforts to impose restrictions in a deed that are contained in granting clauses of deeds are ineffective to prevent the conveyance of an unrestricted fee simple transfer. Thus, the defendant is correct: when a granting clause in a deed attempts to impose a reversion of title in a deed, it is, under *Stylecraft*, ineffectual to cut down the grant of a fee simple estate for the very reason defendant advocates: it represents a restraint on alienation. As the Court of Appeals notes in *Page*, such a limitation "runs counter to the commonly acknowledged concept in this state that one of the attributes of fee simple ownership is the ability to freely convey it with few if any restrictions." Thus, under *Page—and* more importantly under *Stylecraft—this* Court would not hesitate to invalidate a right of first refusal if it were ineffectively expressed in the granting clause of a deed of conveyance. *Stylecraft* requires it.

However, unlike *Page*, but more importantly, unlike *Stylecraft*, this case does **not** present a *Stylecraft* issue of whether a restriction in the granting clause of a deed of conveyance is or is not effective. There is no question that Group Investment Company and/or RRJR, L.L.C. had fee simple title and the right to sell the property to any person in the world for the highest obtainable price. The Clarke lease in no way attempts to cut down the fee simple ownership. Here, the issue is whether a recorded lease—which the parties agree is: (1) of record, and (2) in full force and effect—-does or does not contain a valid right of first refusal. Thus,

the present case is more akin to a case of a missed mortgage or a missed judgment or a missed mechanic's lien. A properly recorded mechanic's lien is a "restraint on alienation" in one sense because whoever purchases the property, purchases it subject to the lien. This Court is not called upon to decide if a limiting reversion in the granting clause in a deed does or does not effectively cut down the fee simple ownership of the grantee—especially because *Stylecraft* laid that issue to rest. Rather, the issue here is whether the defendant took title to the property subject to the plaintiff's lease. Since the defendant concedes he took title subject to the plaintiff's lease, the question distills down to whether the right of first refusal is or is not valid. Contrary to the defendant's argument, had RRJR, L.L.C. notified Clarke of its intent to sell, then it could have maximized its return instead of accepting what Fine Housing was willing to pay. Not to put too fine a point on it, but RRJR's haste deprived it of an opportunity to drive up the bidding. This is the opposite of a restraint on alienation.

The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract. If the language is clear and unambiguous, the language alone determines the contract's force and effect. *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992). *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 438 S.E.2d 275 (1993). On the issue of whether the right of first refusal is or is not too

ambiguous to enforce is an issue analyzed by the Court of Appeals in 1996 in the so-called "Grease Monkey" case, *Minter v. GOCT, Inc.*, 322 S. C. 525, 473 S.E.2d 67 (1996). There the plaintiff brought a breach of contract action, alleging that the defendant had failed to live up to its contractual obligation to allow the plaintiff the right of first refusal to own and operate any "Grease Monkey" franchise in Richland or Lexington counties. The plaintiff alleged the agreement contained a provision giving Carolina Properties a "first right of refusal on any other Grease Monkey sites developed by GOCT [322 S.C. 527] in Richland or Lexington County South Carolina." The plaintiff sued when the defendant built another facility on Rabon Road in Richland County without offering it first to the plaintiff. The trial court granted a directed verdict for the defendant on the breach of contract claim, and the Court of Appeals reversed. In sending the case back for trial on damages, the Court of Appeals quoted the plaintiffs testimony as follows: "According to William S. Minter, ill., the right of first refusal was a negotiated part of the agreement because he was in the real estate development business and the parties contemplated a chain of oil change facilities."

The testimony of William S. Minter in the *Grease Monkey* case and the testimony of the plaintiff here is almost identical. Here the plaintiff testified at length about his friendship with John Robinson, the negotiations leading up the lease, and the fact of its recording, and the purpose for the right of first refusal. As the plaintiff testified, the right of first refusal is the

opposite of a restraint of alienation because it guarantees the seller will always have at least two bidders for his property in the event he wishes to sell. Nothing in the lease prevents the owner from selling; in fact, it guarantees there will always be two bidders.

In construing a similar right of first refusal contract between two equal parties, the Court of Appeals said:

> "In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." *Southern Ad. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 80-81, 562 S.E.2d 482, 484-85 (Ct. App.2002); *accord D.A. Davis Constr. Co., Inc. v. Palmetto Props., Inc.*, 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984); *Williams v. Teran, Inc.*, 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976); *RentCo., a Div. of Fruehauf Corp. v. Tamway Corp.*, 283 S.C. 265, 267, 321 S.E.2d 199, 201 (Ct.App.1984). "Contracts should be liberally construed so as to give them effect and carry out the intention of the parties." *Mishoe v. Gen. Motors Acceptance Corp.*, 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958).
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> The parties' intention must, in the first instance, be derived from the language of the contract. *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); *C.A.N. Enters., Inc. v. S.C. Health & Human Services Fin. Comm'n.*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) ("In construing terms in contracts, this Court must first look at the language of the contract to

determine the intentions of the parties."); *Jacobs v. Service Merch. Co.*, 297 S.C. 123, 375 S.E.2d 1 (Ct.App.1988). To discover the intention of a contract, the court must first look to its language-if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect. *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973). "Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." *Blakeley v. Rabon*, 266 S.C. 68, 73, 221 [649 S.E.2d 502] S.E.2d 767, 769 (1976); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93-94, 594 S.E.2d 485, 493-94 (Ct.App.2004); *accord Kable v. Simmons*, 217 S.C. 161, 166, 60 S.E.2d 79, 81 (1950).

The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof. *Thomas-McCain, Inc. v. Siter*, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977); *see also Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct.App.2000) ("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."). "Documents will be interpreted so as to give effect to all of their provisions, if practical." *Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct.App.1997) (citing 17A Am.Jur.2d *Contracts §* 385 (1991)). In ascertaining intent, the court will strive to

> discover the situation of the parties, along with their purposes at the time the contract was entered. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977); *Bruce v. Blalock*, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962); *Mattox v. Cassady*, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct.App.1986).

In *Brady v. Brady*, 222 S.C. 242, 72 S.E.2d 193 (1952) the South Carolina Supreme Court asseverated:

> It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning.
>
> Agreements should be liberally construed so as to give them effect and carry out the intention of the parties. In arriving at the intention of the parties to a lease, the subject matter, the surrounding circumstances, the situation of the parties, and the object in view and intended to be accomplished by the parties at the time, are to be regarded, and the lease construed as a whole. Different provisions dealing with the same subject matter are to be read together.
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> *Id.* at 246-47, 72 S.E.2d at 195.
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> If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's

> force and effect. *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993); *Blakeley* at 72, 221 S.E.2d at 769. "Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Ellie* at 93, 594 S.E.2d at 493 (quoting *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)). However, where an agreement is ambiguous, the court should seek to determine the parties' intent. *Smith-Cooper v. Cooper*, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct.App.2001); *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 390, 503 S.E.2d 184, 187 (Ct.App.1998).
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> *Ecclesiastes Production Ministries v. Outparcel Associates, LLC.*, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007) (Court of Appeals reversed grant of directed verdict when plaintiff sought to enforce lease with right of first refusal.)

Finally, the defendant contends the right of first refusal is too ambiguous and indefinite to be enforced because it does not contain a time for performance or a method of determining price. As to the time for performance, every contract in South Carolina contains within it implied terms of good faith and reasonableness. In a contract for the sale of land, where a contract does not contain a "time is of the essence" clause, the Court supplies the time for performance as being "reasonable":

> It is well established in this state that time is not of the essence of a contract to convey land unless made so by its terms expressly or by implication from the nature of the subject matter, the object of the contract or the situation or conduct of the parties. When the contract does not include a provision that time is of the essence, the law implies that it is to be done within a reasonable time; and the failure to incorporate in the memorandum such a statement does not render it insufficient. *Speed v. Speed*, 213 S.C. 401, 49 S.E.2d 588 (1948).
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> *Hobgood v. Pennington*, 300 S.C. 309, 387 S.E.2d 690 (Ct. App. 1989)

As for defendant's suggestion that the right of first refusal fails to set the price, the Court is persuaded not only by the lease itself, but also by the testimony of the plaintiff, Clarke, that the price is controlled by the property owner and set by the owner's acceptance of any price from any purchaser whose offer is acceptable to the owner, after which the plaintiff, as the holder of the right, can either match the price or waive the right to exercise it. Such a process is the opposite of a "restraint" on alienation. Instead of being a "restraint," it is a facilitator. However, (as discussed below) a holder of a right of first refusal cannot waive the right to exercise it when the seller and the purchaser—who are on notice of the right—keep the holder of the right of first refusal in the dark and deprive him of an opportunity to exercise it. Such conduct is inequitable. Therefore, under well-established principles of South

Carolina jurisprudence, the right of first refusal here is at least as definite as the right enforced by the Court of Appeals in the *Grease Monkey* case, and the intention of the parties is clear and unmistakable under the holding of *Ecclesiastes Production Ministries:* "Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it."

### C. **Waiver, Estoppel and Laches**

The final defenses asserted by the defendant are both legal and equitable. "By waiver is meant the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such a right. Therefore, to establish waiver, the person against whom the waiver is claimed must have full knowledge of his rights and of facts which will enable him to take effectual action for the enforcement of such right." *Sims v. Ham*, 275 S.C. 369, 271 S.E.2d 316 (1980). "Where an implied waiver is involved, the distinction between waiver and estoppel' is close, and sometimes the doctrines merge into each other with almost imperceptible gradations, so that it is difficult to determine the exact point where one doctrine ends. and the other begins." *Id.* Whether a party is barred by estoppel or waiver can only be determined in light of the circumstances of each case. *Janasik v. Fairways Oaks Villas*, 307 S.C. 339, 415 S.E.2d 384 (1992) Likewise, "Laches is 'neglect for an unreasonable and unexplained length of time, under circumstances

affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to he determined in light of the facts of each case: taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party." *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002), citing *Hallums v. Hallums*, 296 S.C. 195, 198-1.99, 37.1 S.E.2d 525, 527 (1988). *Bray v. State*, 366 S.C. 137, 620 S.E.2d 743 (2005)

The evidence in this case does not support either theory. The defendant contends that the plaintiff "waived" his right to first refusal in 2007, (Plaintiff's Exhibit 33, June 13, 2007, Deed from Group Investment Co. to RRJR, L.L.C.) when Group Investment Company, Inc. transferred its interest in the 2028 Pittsburgh Avenue property to RR.JR, and the plaintiff failed to exercise his right at the time of that conveyance. The evidence does not support such a theory. First, the record shows that the transfer was a name change only, going from a corporation owned and operated by John Robinson and Robin Robinson to a limited liability company owned and operated by John Robinson and Robin Robinson for the consideration of five (55.00) dollars. (See plaintiff's Exhibits 31, 32, and 33, Stipulation of William Swope, and testimony.) Second, the consideration for the 2007 transfer is five dollars ($5.00), and the affidavit of true consideration demonstrates that it is a name change only. Third, the plaintiff testified he was aware. of the name change and knew it. was not a sale to a third party. The defendant failed to produce evidence otherwise. Estoppel and

waiver are protective only, and are to be invoked as shields, and not as offensive weapons. Their operation in all cases should be limited to saving harmless or making whole the party in whose favor they arise and should not, in any case, he made the instruments of gain or profit. See *Herrring v. Volume Merchandise, Inc.*, 252 N.C. 450, 113 S.E.2d 814 (1960); *28 Am.Jur.2d Estoppel and Waiver § 33 (1966).* See also *Ott v. Ott*, 1.82 S.C. 135, 188 S.E. 789 (1936). While the doctrine of waiver or equitable estoppel may be invoked as affirmative defenses to counterclaims, they may not be asserted in a complaint as offensive weapons. *Janasik v. Fairway Oaks Villas*, 307 S.C. 339, 415 S.E.2d 384 (2002)

Likewise, the defendant asserts that the plaintiff waived his right to enforce his right of first refusal because of his inaction upon the transfer to Fine Housing, Inc. There is no evidence in this record to support any theory based on plaintiff's alleged inaction. Fine Housing, Inc. acquired title on December 3, 2013. Two months later Robin Robinson filed suit against Fine Housing, seeking to unwind the transaction. Fine Housing admits it never gave notice of the transfer to Clarke. RRJR, L.L.C. is in default and has walked away from the entire dispute. Mr. Clarke testified he received a late-night visit from "Terry and Terry" sometime in March 2014, telling him that "something was up with the club." Mr. Clarke then testified he contacted Mr. DeStaso, informed him of his right to purchase the property, and Mr. DeStaso promised to call him back within two weeks. When DeStaso failed to

call Clarke back. Clarke testified he called him a second time, and DeStaso told Clarke "he forgot." It was at that point, Clarke testified, that he turned the matter over to his lawyers, and on April 10, 2014, Clarke's lawyer sent to DeStaso a proposed purchase agreement. (Plaintiff's Exhibit 16.) When DeStaso failed to respond, Clarke's lawyer sent to DeStaso a second letter, Plaintiff's Exhibit 17, dated April 21, 2014, reminding him that Clarke was "ready, willing, and able" to purchase: "Barry wanted me to convey to you that he is ready, willing, and able to purchase the property without owner financing and only mentioned that as an option if you were interested in it." In fact, it was not—until January 9, 2015, there was certainty as to who held title. (See order of dismissal in *RRJR vs. Fine Noosing, Inc.*. plaintiffs Exhibit 15.) Under these facts, the defendant has failed to establish by a preponderance of the evidence that. the plaintiff failed to act in a timely manner or took such action as would equitably esstop him from claiming the right to enforce his lease.

In summary, there is no evidence in this record to support a theory of either waiver or estoppel.

As to the affirmative defense of laches, the record is likewise devoid of evidence supporting defendant's affirmative defense. The defendant stipulated it never notified the plaintiff of his acquisition, and the defendant, RRJR, never notified anyone of anything. The plaintiff testified that he heard a "rumor" that a third party had "taken over the club" after he received a late-night visit in March, 20.14, at his home from "Terry and Terry." The plaintiff testified that when he heard

rumors about the putative sale of the club, he immediately contacted Ashley Andrews and undertook an investigation to, as he put it, find out what was going on. This led to a telephone call to Vincent. DeStaso. Plaintiff testified he offered DeStaso a sum of money to exercise his right to the club, and DeStaso promised to call him hack. Plaintiff testified he heard nothing back and therefore placed a second call to DeStaso a month later, who informed plaintiff that "he forgot." Plaintiff testified that he knew then he could not rely on DeStaso's representations and turned the matter entirely over to his attorneys.

The documentary evidentiary record corroborates the plaintiff's testimony. The evidentiary record demonstrates that the transfer of the property occurred on December 3. 2013. (Plaintiff's Exhibit 4) The evidentiary record demonstrates that no one gave notice of this transfer to plaintiff. (Plaintiff's Exhibit 13) The evidentiary record demonstrates that less than two months after closing, on February 19, 20.14, Robin Robinson filed a lawsuit at case number 2014-CP-10-01.035, seeking to rescind the closing. (Plaintiff's Exhibit 14) The evidentiary record demonstrates that th.is action terminated in Fine Housing's favor on January 9, 2015. (Plaintiff's Exhibit 15) The evidentiary record demonstrates that the plaintiff's first written expression of his attempt to exercise his right of first refusal occurred on April 10, 2014. (Plaintiff's Exhibit 16) On April 17, 2014, plaintiff renewed his effort to exercise his right of first refusal, emphasizing, that he was "ready, willing, and able" to complete the

transaction. Under these sequences of events, it is impossible to find evidence to support a defense of 'aches. (The defendant abandoned the defense of statute of limitations.)

Therefore, based on the totality of the evidence, which includes evaluating the witnessess' testimony for credibility and believability, the documentary evidence, and the arguments of counsel and their written memoranda, the Court makes the following

## FINDINGS OF FACT

1. The plaintiff recorded a lease allowing shared parking of the property commonly referred to as 2028 Pittsburgh Avenue.

2. The defendant, Fine Housing, Inc., had notice of the lease by virtue of it being recorded and properly indexed upon the rolls of the Register of Mesne Conveyance for Charleston County.

3. The lease contains Article V, which grants to the plaintiff the right of first refusal in the event the owner offers the property for sale.

4. The lease contains an exact legal description of the property so encumbered by the lease and the right of first refusal.

5. Neither seller nor purchaser provided the plaintiff with notice or with an opportunity to exercise his right of first refusal prior to the sale or afterwards.

6. Fine Housing Inc. acquired title to the property on December 3, 2013, for the stated consideration of $150,000.00.

7. Robin Robinson challenged the sale on February 19, 2014, by filing a summons and complaint at Case Number 2014-CP-10-01035. This lawsuit ended in Fine Housing's favor on January 9, 2015.

8. The first notice of any kind to the plaintiff occurred on or about March 21, 2014 when he received a late-night visit from "the two Terry's" telling him the club was in the hands of a new person.

9. The plaintiff first attempted to exercise his right of first refusal on April 10, 2014, when his lawyer conveyed an offer to purchase to the defendant.

10. The right of first refusal contained in Article V of the lease between Group Housing, Inc. and Barry Clarke contains sufficient terms to be enforceable.

11. The right of first refusal contains an exact legal description of the property encumbered.

12. The lease containing the right of first refusal is properly indexed in the Register of Mesne Conveyance for Charleston County.

13. The defendant failed to produce sufficient evidence to establish by a preponderance of the evidence the defenses of waiver, laches, or estoppel. (The defendant abandoned the other defenses.)

14. The right of first refusal is sufficiently articulated to be enforceable.

Based on these facts, the Court makes the following

## CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction and jurisdiction over the parties.

2. The plaintiff personally served the defendant, RRJR, L.L.C., who failed to appear and is adjudged to be in default.

3. The plaintiff has established by a preponderance of the evidence that he has a valid right of first refusal that identifies the property with sufficient particularity to be enforced.

4. The defendants failed to give the plaintiff notice of the purported sale to Fine Housing.

5. The plaintiff acted timely after receiving notice of the transfer on or about March 21, 2014.

6. Fine Housing's Agreement was to purchase both properties (Sol Legare property and the 2028 Pittsburgh Avenue property) for $850,000.00.

7. Fine Housing allocated $700,000.00 of the purchase price for the acquisition of the Sol Legare property and $150,000.00 of the purchase price for the acquisition of the 2028 Pittsburgh Avenue property.

8. Fine Housing sold the Sol Leagare property for $500,000.00 on December 5, 2016.

9. Fine Housing is entitled to receive $200,000.00 + $150,000.00 for a total of $350,000.00 in order to be made whole on the right of first refusal.

10. The right of first refusal contains an implied condition of timeliness, and sixty (60) days is a reasonable time for performance.

It is therefore **ORDERED:**

That the plaintiff has proven by a preponderance of the evidence that he is entitled to specific performance of his right of first refusal, and it is further

**ORDERED** that the sum of $350,000.00 is an equitable sum to be paid to Fine Housing, Inc. in satisfaction of the plaintiff's right of first refusal, and it is further

**ORDERED** that the plaintiff shall have sixty (60) days from the date of receipt of a copy of this signed and filed Order (or such Final Order as may be entered by the Court of final appellate authority) to consummate his acquisition of the property defined by the legal description contained in the right of first refusal, and it is further

**ORDERED** that if the plaintiff does not perform under the terms of this Order within sixty (60) days from the date of receipt of this signed and filed Order (unless the date for performance be postponed by judicial review of this Order), the plaintiff shall immediately file a release of the right of first refusal in recordable form with the Register of Mesne Conveyance. In such case, the remainder of the lease will remain in full force and effect. It is further

**ORDERED** that upon receipt of the amount of $350,000.00 within sixty (60) days from receipt of this

signed and filed Order—unless postponed by timely petition for judicial review—the defendant shall execute a limited warranty deed in favor of the plaintiff for the consideration set forth here. In the event the defendant refuses to execute such deed, then the plaintiff will notify the Court of the defendant's refusal, and the Court will issue such supplemental Order as is necessary in order to put into effect the intent of this Order to convey title to the plaintiff upon payment of the consideration required here.

**AND IT IS SO ORDERED**!

~~August~~ [Sept.] 28, 2017
Charleston, S. C.

/s/ J. C. Nicholson, Jr.
J. C. Nicholson, Jr., Presiding Judge
Ninth Judicial Circuit

**The Supreme Court of South Carolina**

Barry Clarke, Petitioner,

v.

Fine Housing, Inc. and RRJR, L.L.C., Defendants,

Of which Fine Housing, Inc. is the Respondent.

Appellate Case No. 2020-001371

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ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

| | | |
|---|---|---|
| /s/ | D.W. Beatty | C.J. |
| /s/ | John Kittredge | J. |
| /s/ | Kaye G. Hearn | J. |
| /s/ | John Cannon Few | J. |
| /s/ | George James, Jr. | J. |

Columbia, South Carolina
February 10, 2023

cc: Thomas R. Goldstein, Esquire
Ashley G. Andrews, Esquire
W. Cliff Moore, III, Esquire
Kirby Darr Shealy, III, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM
CHARLESTON COUNTY
Court of Common Pleas
J. C. Nicholson., Circuit Court Judge

RECEIVED
**Jan 17 2023**
S.C. SUPREME
COURT

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Opinion No.: 28126
Case No. 2015-CP-10-03038
Appellate Tracking No.: 2020-001371

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Barry Clarke ..... Petitioner;

vs.

Fine Housing, Inc. and RRJR, L.L.C. .....Defendants,
of which Fine Housing, Inc. is the ..... Respondent.

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PETITION FOR REHEARING

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As permitted by the *South Carolina Appellate Court Rules*, Rule 221(a), the Petitioner, Barry Clarke, submits that the Court's January 4, 2023, Opinion overlooks five material principles of fact and law, which requires that the Opinion under review be amended to be consistent with South Carolina law. Therefore, Petitioner prays for rehearing and reconsideration on the following grounds:

1. The Court misapplies well-settled principles governing the Court's review of contracts freely entered into by willing parties, and Opinion No. 28126 impairs the ability of parties to enter into contracts freely and voluntarily.

2. The Court overlooks that the recorded lease contains an exact description of the property carefully identified in ¶ 1.1 Demised Premises of the Lease (Appendix page 355) Article 7.1 defines the use permitted under the lease, and Article 5.1 provides that there are no options to renew, but Article 5.2 provides: "Lessor grants the Lessee the right of first refusal should it wish to sell."

3. The Court applies an immaterial distinction between "improper inferences," (which the Opinion says were not raised) with the standard of review governing appeals in equity cases on appeal from a non-jury trial. The standard of review permits the reviewing Court to view the evidence and draw its own conclusions: "In an action in equity, tried by the judge alone, without a reference, on appeal the appellate court has jurisdiction to find facts in accordance with

its view of the preponderance of the evidence." *Townes Assocs., LTD v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). This broad standard does not permit a reviewing court (or a trial court) to draw conclusions (or inferences) from matters not contained in the record. If reviewing courts employed a limitless standard unbounded by the record, then the entire trial edifice collapses. Such a boundless standard implicates the logical impossibility of proving a negative, a logical impossibility made famous by Bertrand Russell's observation that no one can disprove his assertion that a teapot orbits the sun. (Warren Moise, one of South Carolina's excellent legal writers, adapts this illogical principle to numerous legal contexts, changing Russell's teapot to: "as likely as flying to Neptune in a bathtub.") Thus, when the Court of Appeals based its decision, in part, on the Robinson's absence at trial, it violated its own standard of review, a standard which governs all appeals. Moreover, the Petitioner put this issue before the Court in his Petition for *Certiorari* and stated on pages 9-10 of his Brief:

> Even though there is nothing ambiguous or complicated about the right of first refusal in the recorded lease, if it were ambiguous, then such ambiguity is subject to clarification by parol testimony. Fine Housing offered nothing, nor could it, that provides the Court with evidence to shed light on a [putative] ambiguity. On the other hand, Clarke testified in depth about the negotiations leading up to the right of first refusal, the reason for it, and in particular how it was bargained for at arm's

length and beneficial for both parties, facts ignored by the Court of Appeals. (Brief at pages 9-10)

4. The Court misapplies the law of restraint on alienation because there is no evidence in the record that the Right-of-First-Refusal restrained the seller in any way.

5. After correctly concluding that the case is a case brought in equity and applying the correct standard of review governing appeals in equitable matters, the Court overlooks the conclusion that a Respondent with unclean hands obtains an unjustified windfall by his own negligence thus rewarding the guilty party and punishing the innocent party.

## Introduction

At the outset, Petitioner acknowledges that the Court's well-crafted Opinion 28126 demonstrates a proficiency of legal research, and Petitioner has no quarrel with the Court adopting the three Restatement factors: "We agree with the Restatement approach and hold the factors to be considered in assessing whether a right of first refusal unreasonably restrains alienation include (1) the legitimacy of the purpose of the right, (2) the price at which the right may be exercised, and (3) the procedures for exercising the right." (Opinion at page 4, discussed in detail below). In identifying 5 areas that the Opinion 28126 overlooks, Petitioner accepts the Court's endorsement of the Restatement 3d's statement of the factors

necessary to draft an enforceable right of first refusal. Both the Restatement and the Court's footnote 4, citing an unpublished Iowa Court of Appeals opinion, *Franklin v. Johnston*, 899 N.W.2d 741 (Iowa Ct. App. 2017), set forth essentially the same factors courts apply in analyzing whether a Right-of-First-Refusal "**unreasonably"** restrains a seller. However, what the Court overlooks is that while the Iowa Court of Appeals' decision and the Restatement identify the pertinent factors (the Iowa factors are more restrictive), Opinion 28126 ignores the facts developed in the record. By not applying the facts of this case to the factors—and allowing the Court of Appeals to draw a negative inference from outside the record, the Court presents an ineffable Goldilocks zone for enforceability—not too restrictive and not too uncluttered—that no lawyer can meet because the Opinion does not set out the minimum factual requirements for an enforceable Right-of-First-Refusal. The lawyer who drafted the Agreement in this case carefully limited the duration of the agreement, provided that it could not be renewed, attached a precise legal description, left the selling price and the timing and mechanism of sale solely in the hands of the Robison's, and properly recorded it.[1] It is impossible to discern how this document "unreasonably" restrained the Robinson's. (The parties in the *Franklin*

[1] At oral argument, Justice Few asked if the Robinson's received an offer to purchase in 15 days whether Clarke would have to meet the 15-day deadline. Counsel replied in the affirmative. The point is that the Robinson's controlled everything, including the time for performance, which should insulate the Agreement from allegations of "unreasonable" restraint on alienation.

case missed the Goldilocks zone in the other direction—too restrictive—because the Agreement in that case was a complex Easement/Maintenance Agreement that restrained, among other things, who could fish in a lake being created and impeded future "commercialization." The Iowa decision required the courts to resolve a property line/easement dispute between the 2nd and 3rd generation of quarreling families whose ancestors, in 1962, created a 14-acre lake that submerged both parties' property—including 4 acres of the defendants' property. The two families entered into a lengthy and detailed "Easement and Agreement" that the Court found too restrictive!) The Iowa Court of Appeals' decision turned partly on an application of Iowa statutory law—not implicated here—but in evaluating the right of first refusal, the Court identified six factors[2] in reaching its decision, but if the analysis of the Iowa court were applied here, then the trial court reached the correct decision. The six factors are:

> 1. The one imposing the restraint has some interest in land which he is seeking to protect;

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[2] Opinion No. 28126 adopts the Restatement's conclusion that a Right-of-First-Refusal is unenforceable if, and only if, it **unreasonably** restrains alienation. The Restatement's factors adopted by the Court are: 1. The legitimacy of the purpose of the right, 2. The price at which the right is exercised, and 3. The procedures for exercising the right. (Opinion at page 4) The Restatement's three factors are easier to meet than the six factors the *Franklin* Court identified, so Petitioner organizes his Petition around the six *Franklin* factors to provide a more thorough analysis than provided by examining the fewer Restatement factors.

> 2. The restraint is limited in duration;
>
> 3. The enforcement of the restraint accomplishes a worthwhile purpose;
>
> 4. The type of conveyances prohibited are ones not likely to be employed to any substantial degree by the one restrained;
>
> 5. The number of persons to whom alienation is prohibited is small; and finally
>
> 6. The one upon whom the restraint is imposed is a charity.

The lawyer who drafted the recorded lease in this record was in perfect synch with the first five factors, and the sixth is not applicable. (And, as discussed in more detail below, the document leaves the sales price and the timing and mechanics of sale entirely in the hands of the Seller, the opposite of a "restraint" on "alienation." Were the Court to decide this case based on the first five factors, the Petitioner easily prevails. Moreover, as discussed more fully below, many of the cases cited by the Court in concluding the Right of First Refusal is unenforceable support Petitioner's claim that it is enforceable: "If the holder of the preemption right is merely entitled to meet the offer of an open market purchaser, there is little clog on alienability." Opinion at page 6 citing *Shiver v. Benton*, 251 Ga. 284, 304 S.E.2d 903, 905 (Ga. 1983). If Petitioner's case were distilled down to a single sentence, it would be that one. The lawyer drafting the document here carefully drafted it not to offend the Rule Against Perpetuities and included an exact legal description and left the

sales price, the timing, and the mechanics of execution entirely in the hands of the Robinson's and recorded the document to provide notice to the world. Thus, the purpose of the Right-of-First-Refusal is designed to insure that the Robinson's received top dollar for their property—the opposite of a restraint on alienation. As discussed below, Opinion No. 28126 parses the document into separate sections and fails to construe the document as a whole, thereby departing from its own precedent on this issue:

> A contract must be read as a whole document so that one party may not create ambiguity by pointing out a single sentence or clause. *S. Atl. Fin. Servs., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003). "Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it." *Laser Supply & Servs., Inc. v. Orchard Park Assoc.*, 382 S.C. 326, 334, 676 S.E.2d 139, 143-144 (Ct.App.2009).
>
> *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 769 S.E.2d 237 (S.C. 2015) (Court reversed Court of Appeals and found termination agreement unambiguous—after granting rehearing)

**1. The Court misapplies well-settled principles governing the Court's review of contracts freely entered into by willing parties and impairs the ability of parties to enter into contracts freely and voluntarily.**

The Court's Opinion overlooks the foundational principle of contract law that restricts a Court from substituting its view of the benefits of a voluntary agreement for that of the parties who freely entered into it. "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Jordan v. Security Group, Inc.*, 311 S.C. 227, 428 S.E.2d 705 (1993). The concurring Opinion in this case highlights the Court's failure to adhere to its long-established precedent. The concurrence states: "The instrument says nothing,[3] does nothing, restrains nothing." (Opinion at page 10) See also *Ecclesiastes Production Ministries v. Outparcel Associates, L.L.C.*, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007), a frequently cited case:

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[3] George Berkeley constructed a logical argument that nothing exists unless perceived. *Esse est percipi*, he said. Here, the application of the recording statute provides notice to the world of its existence, and the Court cannot declare the instrument is "nothing" because it is succinct, especially where the usual attack on a right of first refusal is that it is too restrictive. Here, the Robinson's were not restrained in the least, but that does not mean the Agreement they entered into is "nothing," especially since the recording of it made sure the whole world perceived it. Its concision means only the terms favored the Robinson's, not that they do not exist.

> Whether a contract's language is ambiguous is a question of law. Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. ("[W]hen the written contract is ambiguous in its terms, . . . parol and other extrinsic evidence will be admitted to determine the intent of the parties.") The determination of the parties' intent is then a question of fact for the jury to determine. (numerous citations omitted)

Here, there is an unresolved question of whether this Court uses the terms "ambiguous" and "vague" synonymously—the two terms are interchangeable. Assuming the two terms are identical, the conclusions reached by the Opinion under review are refuted by the undisputed record. The record shows that willing parties voluntarily entered into an Agreement, had it reduced to writing, carefully tailoring it to avoid the Rule Against Perpetuities, included an exact legal description, and took the final, important step of recording it at the Register of Mesne Conveyances (now the "Register of Deeds") to give notice to the world of the Lease and the respective rights and obligations spelled out therein. It is likewise undisputed that the South Carolina recording statute places Fine Housing in the same legal position as the original lessee by acquiring the property from the Robinsons subject to the terms of the Lease. § 30-7-10, S. C. Code, ann. Therefore the Right of First Refusal is something; it is impossible for it to be "nothing."

**2. The Court overlooks that the recorded lease contains an exact description of the property carefully identified in ¶ 1.1 Demised Premises of the Lease (Appendix page 355)**

Opinion 28126 acknowledges that the description of the property is precisely defined—Exhibit A—and the Petitioner does not quarrel with the obvious conclusion that the Right of First Refusal might have been better drafted. However, a criticism that a document might have been better drafted is a universal criticism applicable to every written document in the world. Even Moses would take another crack at the *Pentateuch* if provided the opportunity, but the question before the Court is not whether the Right could have been better drafted but whether it is or is not ambiguous ("vague"), a purely binary analysis. If the document is not ambiguous, then the inquiry ends and the Court enforces it as written. "Where an agreement is clear and capable of legal interpretation, he courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Ecclesiastes Ministries, op. cit*., citing *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004). If it is ambiguous, then the Court looks to extrinsic evidence in order to determine if the contract being examined can be enforced, and this record contains sufficient evidence to support the trial court's findings on this issue. (The trial court also required Petitioner to pay Fine Housing $350,000.00 to match Fine Housing's $150,000.00 purchase price and allow for a generous return for Fine Housing's satisfaction of

encumbrances even though the record demonstrates Fine Housing paid itself substantial improper fees out of the closing. See Appendix pages 141-142 for the fees Fine Housing paid itself on the closing statement and pages 207-210 of the testimony: "Q. You told her you would pay 850 to acquire title to the property, correct? A. Correct. Q. But you didn't wire 850, did you? A. No. Q. You wired $815? A. Correct. Q. You kept $35,000 back, isn't that correct? A. Yes. Fine Housing also paid itself, its lawyer, its inspection company, *etc*., and the trial court, which was in a better position to listen to the testimony and observe the manner in which it was delivered, devised an equitable result.)

In concluding that the attachment of Exhibit A is not specific enough: "The Lease is unclear as to whether the Right encumber all of the Subject Property or only the leased parking spaces" (Opinion at page 5), the Court can reach this conclusion if, and only if, it makes no effort to read the document as a whole. Speculation about whether the Robinson's intended to sell the entire parcel or just the parking spaces not only tortures the clear intent of the parties, but also reduces the entire Lease to an absurdity by imposing a strained interpretation of a clear agreement without a *scienter* of evidence to support such a strained reading.

Here, Petitioner should prevail even if the agreement is ambiguous because Petitioner offered uncontracted testimony about the parties' intent, the purpose of the agreement, and the Respondent cannot be heard to complain about putative ambiguity

(vagueness) in a document he ignored. The recorded Right-of-First-Refusal contains an **exact legal description** of the property encumbered. On page 5 of the Opinion as quoted above, the Court holds: "The Lease is unclear as to whether the Right encumbers all of the Subject Property or only the leased parking spaces." This is an absurd conclusion that is possible if, and only if, each section is read in isolation and not as part of a whole. Section 5.2 states in its entirety. 'Right of First Refusal: Lessor grants the Lessee the right of first refusal should it wish to sell.'" (Opinion under review at page 5) Here, the Court deviates from its own long established precedents that (1) courts enforce contracts as written without inquiring into the wisdom or folly of specific agreements. *Jordan v. Security Group, Inc., op. cit*., and (2) that in construing contracts, the Court is required to examine the entire document and not provisions in isolation:

> The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof. *Thomas-McCain, Inc. v. Siter*, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977); see also *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000) ("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."). "Documents will be interpreted so as to give effect to all of their provisions, if practical." *Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 329 S.C. 206, 212, 494 S.E.2d 465, 468

(Ct. App. 1997) (citing *17A Am. Jur. 2d* Contracts § 385 (1991)).

*Ecclesiastes Production Ministries v. Outparcel Associates, L.L.C.*, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007)

It is a forced absurdity unsupported by the record to speculate the Robinson's were selling the parking lot and not the entire parcel, and if there were an ambiguity about what property is covered, then the Court is required to evaluate the evidence in the record to enforce the agreement of the parties. The trial court did this and found: "There is no question that Group Investment Company and/or RRJR, L.L.C. had fee simple title and the right to sell the property to any person in the world for the highest obtainable price. The Clarke lease in no way attempts to cut down the fee simple ownership." Instead, the Opinion under review takes the opposite view and vacates a contract between willing parties because it imposes a strained interpretation of the document and substitutes its wisdom for that of the parties without any supporting evidence that the parties intended, or even contemplated, selling the parking places but not the entire parcel. Courts cannot substitute their view of the sagacity of a contract for that of the parties. This is a power that courts do not possess. See U.S. Constitution, Article I, § 10: "No state shall . . . pass any . . . Law impairing the Obligation of Contracts." See South Carolina Constitution, Article I, § 4: "No . . . law impairing the obligation of contracts . . . shall be passed."

**3. The Court applies an improper distinction between "improper inferences," which the Court says was not properly plead and standard of review.**

On page 4, in footnote 3, Opinion 28126, suggests Petitioner based his appeal on improper inferences from John and Robin Robinson's absence at trial. First, when the circuit court tried the case on July 26, 2017, it considered the evidence, including the testimony of the parties. After examining the evidence and evaluating the testimony, the trial Court entered its written Order on September 28, 2017. In July, 2017, John Robinson was no longer alive. Robin Robinson was, and is, alive (and she is the one who signed the Lease that is the subject of this case, Appendix at page 364), and was available to either party to call as a witness. Neither party called her. Neither party "controlled" her. Petitioner relied on the recorded Lease for obvious reasons, and asserted at trial, before the Court of Appeals, and here, that the Lease is not ambiguous and is enforceable as written because the intent of the parties is clear. The Petitioner did not appeal the trial court; the Respondent did. In petitioning this Court for *certiorari*, Petitioner asserted, and still asserts, that the Court of Appeals applied an erroneous standard of review because the Court of Appeals grounded its decision on speculation about testimony not in the record. Moreover, this case is in equity, and the plaintiff (Petitioner) carefully tailored his pleadings to keep the case in equity. An action for specific performance is one in equity. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 170 n.2, 568

S.E.2d 361, 362 n.2 (2002); *Wright v. Trask*, 329 S.C. 170, 176, 495 S.E.2d 222, 225 (Ct. App. 1997). In an action in equity, tried by the judge alone, without a reference, on appeal the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. *Townes Assocs., LTD v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). This standard of review does not allow a reviewing court to speculate about what an absent witness might have said, and because the case is in equity, the Respondent's conduct as a predatory lender is a pertinent fact because the purpose of equity is not to reward unclean hands. Thus, when the Court of Appeals relied on the absence of John Robinson (who was no longer alive) and Robin Robinson (who was available to either party) to draw any conclusion, it departed from the proper standard of review because while the appellate courts are free to examine the record and take their own view of the preponderance of the evidence, they are not free to enter the fray as a proxy litigant and speculate for either party because he or she is absent. ("Further, John Robinson was unavailable to testify as to his intent of the Right of First Refusal, and Robin Robinson defaulted and was not a party to the action." App. at page 494.) As hundreds of appellate case say, appellate judges make decisions on a "cold record," and frequently recognize that the trial court's findings cannot be disregarded as he or she had a better opportunity to evaluate the testimony and manner in which it was given, but even trial courts do not evaluate absent testimony.

In sum, it is impossible to view this record and find support for a forced ambiguity where none exists. Obviously the **Lease** provided Clarke's customers the right to park on Robinson's lot, and the **Right-of-First-Refusal** provided Clarke with an opportunity to match or beat an offer for the entire parcel as defined in Exhibit A. However, the Rightof-First-Refusal left the price, the timing, and the mechanics of the sale entirely in the hands of the Robinson's—the opposite of a "restraint" on alienation. It is an absurdity and a forced construction to conclude that the use of the parking lot is equivalent to the sale of the parcel, and the Court cannot overlook the obvious definition provided in § 1.1 "Demised Premises" and the precise legal description contained in the plat attached as Exhibit A.

**4. The type of conveyances prohibited are ones not likely to be employed to any substantial degree by the one restrained.**

This factor is a non-issue in the present case. The Right-of-First-Refusal is in the sole control of the Seller, and is triggered by the Seller's unrestricted decision to sell or not sell. It does not prevent the Seller from encumbering the property by pledging it as collateral, making improvements, demolishing the building, or exercising any other right of ownership. (This freedom is an important factor in all cases dealing with this subject, and it was an important factor in the Iowa case, *Franklin*, because the detailed easement/right-of-firstrefusal contained numerous requirements for

maintenance and use of the dominant and servient estates. None of these concerns are implicated here.) The record shows that Robin Robinson would have been much better served by having options that could have kept her from **losing everything she owned** for $10,057.80. (Appendix at page 373) Once again, the Respondent's conduct looms significantly because without granting the parties a rehearing and altering the Opinion under review, this Court provides a windfall for a litigant with unclean hands.

**5. The number of persons to whom alienation is prohibited is small.**

This was an important factor in the *Franklin* case because the parties in the dispute were the second and third generations of the original signatories to the Easement, and it imposed affirmative obligations regarding maintenance and access to the lake as well as curtailing "commercial" development. Here, the Agreement is limited in time and no one was affected by the document other than the original signatories, and it did not restrict the Robinson's in the slightest. Therefore, the application of this factor favors Petitioner and is a sufficient reason on its own to justify rehearing and reconsideration.

**6. The one upon whom the restraint is imposed is a charity.**

This factor is not implicated.

## Conclusion

For the reasons set forth above, Petitioner respectfully submits that Opinion No. 28126 overlooks and misapplies material facts and legal principles and requests that the Court allow the parties to re-argue and if necessary re-brief the case (See *Appellate Court Rules* 243(j): "If the petition is granted, the Clerk shall notify each party or his attorney, specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s)." Because the agreement, read as a whole, provides an exact description of the property encumbered and leaves the pricing, timing, and mechanics of any sale solely in the hands of the Sellers, it **promotes** alienability. For any and all of these reasons, Opinion No. 28126 should be reargued, and if desired, re-briefed, in order to conform to the law protecting the right to contract. As the Court says in its Opinion, a restraint is unenforceable if, and only if, it is an **unreasonable** restraint on alienation, or, as the Supreme Court of Georgia said: "Since the first refusal right is not tied to a fixed price method or some method of pricing which may not reflect true market value, but is conditioned upon meeting a sale price which the seller is willing to accept, the Agreement encourages the development of the property to its fullest potential." *Shiver v. Benton*, 251 Ga. 284, 304 S.E.2d 903 (1983) (The Georgia Supreme Court's formulation is exactly what Petitioner testified at trial: "Q. . . . does the right of first refusal inhibit the ability to sell the property or does it promote the ability to sell the property? A. It promotes it. Well, it doesn't inhibit

it, but it gives the owner of the property a better shot at getting more money." App. at page 303, lines 3-8) The Agreement here involved only the parties to the litigation (although Robinson defaulted), was limited in time, contained an exact legal description of the property encumbered, did not impede the Robinson's in the slightest, as the decision to sell or not sell and at what price and in what manner remained entirely in the discretion of the Robinson's. There may be a Goldilocks template for Rights-of-First-Refusal, but the Opinion under review is silent as to what it includes and why this Agreement fails. In voiding the document before the Court, it was required to fragment portions of the agreement and read them in isolation to contort the plain meaning of the document. When read as a whole, it is clear what the parties intended, and there is no ambiguity. While the Right here may be succinct, it must be read in conjunction with the rest of the Agreement and together they contain all the elements for enforceability without restricting the Robinson's in the slightest, and it is inequitable to allow a third party, predatory lender exploit its own negligence into a windfall. An unbroken chain of cases for over a hundred years requires the Court to read the contract as a whole, not as isolated parts. Finally, unless the Opinion under review is modified, it rewards sharp practice and unclean hands and punishes the innocent party.

For these reasons, the Petitioner respectfully requests that the case be scheduled for re-argument, and, should the Court desire additional briefing on particular points, additional briefing as directed by the Court

so the Opinion can be amended to conform to many years of historical precedent defining the courts' role in enforcing contracts.

Respectfully submitted,

January 17, 2023

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Barry Clarke—Direct Examination by Mr. Goldstein

* * *

[130] Q Did you and John Robinson negotiate the terms of that lease?

A Yes, we did.

Q Does it contain the terms that you wish to be included in the lease?

A Yes, he and I agreed on it.

Q All right. Does it contain the terms that he wished to be included in the lease?

[131] A Yes, we agreed. We went back and forth a little bit but we were friends and took care of it.

* * *

[133] Q All right. And that lease is what's been introduced into evidence as Plaintiff's Exhibit One that you have there in front of you?

A Yes, sir.

Q And did the two of you hire a lawyer to draft the lease?

A We had a lawyer there, yes, sir.

Q And was it a lawyer that you agreed to?

A We both agreed to it.

Q All right. Well, you anticipated my next question. Was it a lawyer that he agreed to?

A Yes, sir.

Q All right. And did the two of you review the lease before it was recorded?

A Yes, sir.

Q And was it recorded?

A Yes, sir.

Q Why did you record the lease?

[134] A Well, I record all of my leases with the commercial properties.

Q All right. Now, the lease provides that the term of the lease is your life plus six years.

A Yes, sir.

Q And why did you make the term of the lease your life plus six years?

A Well, I negotiated-that down, if you want me to tell that story. I'm sorry. It was going to be my life plus—I don't know, I told him 20 years or something like that, and we laughed about that, and the joke was if I die, you're still going to have aggravation.

Q Okay. Now, did you pay the rent on the lease at all times?

A Yes, sir, every month. I'm very careful about that.

* * *

[135] Q Okay. Did it become more difficult, less difficult, or stay the same after his death?

A As far as paying the rent?

Q Yeah.

A Oh, no, instead I paid a $1,000.

Q Okay.

A A year—I paid $1,000 a year.

Q Okay. What was the purpose of your having a right of first refusal? Why did you want it?

A Well, that benefits the property owner, so John was alright with it, and it ensures—

MR. MOORE: Objection, Your Honor.

THE COURT: What's your objection?

MR. MOORE: My objection is the dead man's statute. He's testifying as to what Mr. Robinson wanted, What Mr. Robinson said and intended. He cannot do that under the dead man's statute.

THE COURT: Well, just don't testify to what Mr. Robinson said, okay? I will sustain the objection.

Q Don't tell us what John said.

A Okay.

Q But you can tell us what you did and what you said.

A Okay.

Q So the question was why did you want a right of first refusal?

[136] A So that if anything happened, I got a shot at getting the property.

Q Okay. In your view, does the right of first refusal inhibit the ability to sell the property or does it promote the ability to sell the property?

A It promotes it. Well, it doesn't inhibit it, but it gives the owner of the property a better shot at getting more money.

Q Okay. Now, putting a right of first refusal in a lease, was that unique to this property or is that something you do as a matter of course?

A As I got experience with property, I found that that's the way to do it.

Q Okay. And for what reason?

A Because if someone offered me $1,000, he'd have competition because the other person may have $1,050 and it would be competition and they would be bidding on the same property, and I'd get the best price.

* * *

[137] Q Is there anything ambiguous in that to you?

A I don't see anything ambiguous in it, no.

[138] Q Well, if it were ambiguous, what would it mean?

A It would mean that it's not clear, but we sort of made it clear, because we had to exhibit what property I was getting as right of first refusal.

Q Okay. Did the lease that's recorded at the courthouse that contains the right of first refusal contain a legal description describing the premises?

A Of course.

Q And does the legal description include a plat?

A I would think so, Yes, sir.

Q So is there any question in your mind as to what you were getting the right of first refusal to?

A None in my mind and none in the lessor's mind.

MR. MOORE: Objection, Your Honor. He's testifying again as to the intention of the dead man's statute.

THE COURT: I will sustain the objection.

Q Is there anything about the right of first refusal that is unclear to you?

A Not that I know of.

Q Prior to the property being allegedly conveyed on December 2nd 2013, did anyone contact you and notify you that there was a potential buyer and that you had to match or exceed the offer?

A No, sir.

Q If someone had called you and said I got an offer on [139] this property for $150,000, what would you have done?

A I would have called you and Ashley.

Q Would you have been prepared to tender that price?

A Absolutely.

* * *

Barry Clarke—Cross Examination by Mr. Moore

* * *

[153] Q What I'm trying to understand from you, what you understood about this right of first refusal and how the price would be determined. and are you telling me is what you would do is because you have that right of first refusal is that you would have the right to participate in a bidding war?

A That's correct.

[154] Q And whoever won that war is the purchaser of the property.

A That's correct.

Q So in this situation, if they came to you and said it's $150,000; you could have come and said 160.

A Yeah.

Q He could have said 300.

A Right.

Q You could have said 350?

A Yes, sir.

Q And it could have gone all the way up to a million dollars?

A Might could have gone to a hundred million dollars, who knows? But they aren't going to pay more than what it's worth. I would. I will pay more than it's worth.

Q Where does it say that in your lease of the right of first refusal?

A It's an obvious thing. In my opinion, when you have right of first refusal, the guy comes to you with the price and then you have a bidding war. That's what the right of first refusal is, sir, as to my understanding.

Q All right. And that was your understanding of what you negotiated in your right of first refusal that's in Exhibit Number One?

A That's why I gave the right of first refusal to anybody [155] who rented from me.

* * *

STATE OF SOUTH CAROLINA )
)
COUNTY OF CHARLESTON )

LEASE AND AGREEMENT

THIS LEASE AND AGREEMENT made this 8th day of January ~~1998~~ 1999, by and between GROUP INVESTMENT COMPANY, INC., (hereinafter referred to as "Lessor"), and BARRY CLARKE, (hereinafter referred to as "Lessee").

WITNESSETH:

In consideration of the mutual covenants hereinafter set forth and the premises, the parties hereto agree and covenant as follows:

ARTICLE I

Demise of the Premises and Warranties

With Respect Thereto

Section 1.1: Demises: Subject to and upon the terms, conditions, covenants and undertakings hereinafter set forth, Lessor hereby leases and permits the use to Lessee, and Lessee hereby leases from Lessor the property generally described in Exhibit "A" attached hereto, located in the County of Charleston, State of South Carolina (hereinafter referred to as "the premises").

Section 1.2: Warranties: The Lessor hereby warrants and covenants that it is a valid South Carolina corporation presently in good standing. All necessary meetings have been held to authorize the officers of the

Lessor to lease the said premisses to the Lessee. The Lessor further warrants and covenants that it has a good and marketable fee simple title to the subject property and there are no liens or encumbrances against the property that would prevent the leasing hereof.

## ARTICLE II

## Improvements

Section 2.1: Delivery of Existing Improvements: The improvements are delivered "as is" and in such condition as on the date of this lease. The premises is unimproved property to be used as a parking lot by both the Lessor and the Lessee.

Section 2.2: Future Improvements: All future improvements made on the premises shall be made at the sole cost and expense of Lessor to provide suitable parking.

## ARTICLE III

## Term and Commencement Date

Section 3.1: Term: ~~The term of this lease is for ninety-nine (99) years.~~ The lease shall commence on the 8th day of January, 1999 and terminate on the ~~last day of _____ 2099.~~ [6TH YEAR ANNIVERSARY OF LESSEE'S (BARRY CLARKE'S) DEATH.

ARTICLE IV

Rent

Section 4.1: Rent: Lessee agrees to pay as rental to the Lessor the yearly am of one thousand and No/100 ($1000.00) Dollars; payable monthly, in the amount of _____ per month.

Section 4.2: Payment of Utilities: Lessor shall pay all charges for sewerage, water, gas, electricity, and other public utilities now in existence or hereafter added if needed for parking.

Section 4.3: Taxes: Lessor shall pay and be responsible for all county property taxes on the premises.

ARTICLE V

Section 5.1: Option to Renew: There are no options to renew.

Section 5.2: Right of First Refusal: Lessor grants the Lessee the right of first refusal should it wish to sell.

ARTICLE VI

Surrender Upon Termination or Cancellation

No Holding Over

Section 6.1: Surrender: Upon the expiration of this Lease, Lessee shall quietly and peaceably surrender possession of the premises.

Section 6.2: Holding Over: There shall not be any holding over by Lessee or any assigned beyond the expiration or sooner termination of this lease.

## ARTICLE VII

### Use of the Premises: Lessor's Covenant of Quiet Enjoyment: Right of Entry and Inspection

Section 7.1: Use: Lessee shall use and occupy the premises jointly with the Lessor for his purposes. The Lessee and Lessor shall be entitled to use of one half (1/2) of the spaces contained in the parking lot [which encumbrances all of the property described in Exhibit A ]. However, in the event either parties' spaces are not used then the other party may use the said unused spaces.

Section 7.2: Quiet Enjoyment: Lessee shall permit Lessor or Lessor's duly authorized agents, employees or representatives to enter upon the premises at all reasonable times for the purpose of inspecting the same. It shall be the responsibility of the Lessor to maintain the premises and to make such repairs as may be necessary to maintain the premises for a parking lot.

## ARTICLE VIII

### Repair and Maintenance: Indemnification of Lessor Liability Insurance

Section 8.1: Liens: Lessor shall, during the term of this lease, promptly remove or release, by the

posting of a bond as either required or permitted by law, any lien against the premises or any portion thereof arising by reason of any fault or omission on the part of the Lessor, and shall save and hold Lessee harmless from or against any such lien. In the event any such lien does attach against the premises, and shall not be released as aforedescribed within fifteen (15) days after notice thereof, Lessee, in Lessee's sole discretion, may pay and discharge the same and relieve the premises therefrom; thereafter, Lessee may deduct from any rent such sum paid (including attorneys' fees) by Lessee in discharging such lien, which sum shall include interest at the rate of one (5%) per cent above the prime lending rate as established by the Wall Street Journal per annum from the date such lien is paid by Lessee until the date Lessee is reimbursed by Lessor. Notwithstanding the foregoing, Lessor may contest any such lien or claim of lien upon furnishing Lessee with a valid and sufficient bond issued by a reputable bonding or surety company legally qualified to do business in the State of South Carolina, indemnifying Lessee against any loss, liability or damage on account thereof.

Section 8.2: Indemnification: Lessor hereby indemnifies and agrees to hold Lessee harmless from and against any and all injuries sustained on the premises while occupied by the Lessee or Lessor, and any and all actions, claims and demands arising out of the use, occupancy, or non-use of the premises as herein provided, including, but without limitation of the foregoing; any carelessness, negligence, improper

conduct or breich of this lease by Lessor or its agents, employees, patrons, suppliers, or assigns, and all costs, expenses and fees, including attorneys' fees, incurred by Lessor incident thereto.

Section 8.3: Insurance: To further protect Lessee and assure compliance by Lessor with the foregoing provisions of this agreement, Lessor shall obtain and maintain at all times during the term hereof, with a responsible insurer, for the benefit of Lessor and Lessee as their respective interests may appear, comprehensive general liability insurance against any loss or liability for damages and any expense of defendant against any claim for damages which might result from the use or occupation or condition of the premises and those premises of the Lessor used for ingress and egress by the Lessee, its agents, employees, customers, suppliers, or assigns, in such amount or amounts as shall not be less than is customary and usual for operations of the type, character and scope to be carried on by Lessee on the premises, but in no event in amounts affording protection of less than One Million and No/100 ($1,000,000.00) Dollars in respect to any injury to or death of one person, One Million and No/100 ($1,000,000.00) Dollars in respect of personal injuries or death occurring as a result or arising out of one accident or event, and Fifty Thousand and No/100 ($50,000.00) Dollars in respect of property damages. Lessor shall furnish a copy of such insurance policy and renewals thereof to Lessee.

## ARTICLE IX

### Personal Property on the Premises: Lessee's Rights Therein

Section 9.1: Personal Property: Lessee, at its sole costs and expense, may place or install such fixtures, equipment and other personal property on the premises as Lessee shall deem necessary for the efficient conduct of the business to be carrie or on thereon or therefrom. Lessee may also, at its sole cost and expense. (1) place a sign or signs on the premises announcing the business to be carried on therein or therefrom; the size and shape of said sign and (2) place such sign or signs on the premises as may establish a definite landmark for said business or appropriately advertise the same.

Section 9.2: Lessee's Rights: All of the aforementioned personal property shall at all times be and remain the personal property of Lessee, regardless of the manner in which any or all of the said personal property may be affixed or attached to the premises. Accordingly, in the event any such,personal property purchased by Lessee shall at the time of or as a result of said purchase be subject to a purchase money security interest or other security interest, Lessor's rights in such personal property, if any, shall be subject and subordinate thereto. The foregoing provisions for the subordinate of Lessor's interest is intended to be self-operative; nevertheless, at Lessee's request, Lessor shall execute such document or documents as may further evidence the subordination of Lessor's interest.

## ARTICLE X

### Assignment and Subletting

Section 10.1: Assignment: The Lessee shall have the right to assign its interest in this lease, or any part thereof, to any person, corporation, partnership, association or other entity.

Section 10.2: Subletting: The Lessee shall have the right to sublet the premises.

## ARTICLE XI

### Default: Lessor's Remedies

Section 11.1: Default: it shall be an event of default by Lessee hereunder if Lessee shall fail to pay the rent within 60 days after notice.

## ARTICLE XII

### Subrogation

Section 12.1: Lessor and Lessee, to the maximum extent permitted by insurance policies owned by lessor or which may be acquired by lessee, do waive for the benefit of each other all rights of subrogation which any insurer of either may otherwise have.

## ARTICLE XIII

### Binding Effect: Successors and Assigns

Section 13.1: This lease shall be binding upon, and.inure to the benefit of, the parties hereto, Lessee's

successors and assigns and Lessor's successors and assigns.

ARTICLE XIV

Notice: payments

Section 14.1: Notices: Any and all notices, requests or demands required hereunder shall be in writing and shall be delivered in person or sent by United States certified or registered mail (return receipt requested), addressed as follows:

| | |
|---|---|
| If to Lessor: | 2347 Sol Legare Road<br>Charleston, SC 29412 |
| If to Lessee: | 2162 Westriver Drive<br>Charleston, SC 29412-2091 |

Any such notice, request or demand shall be effective as of the date the same is received. The address of either party hereinabove set forth may be changed from time to time by giving written notice in that regard.

Section 14.2: Payments: All payments required to be made hereunder shall be made at the appropriate address hereinabove set forth or to such other address as either of the parties may from time to time specify in writing.

ARTICLE XV

Entire Agreement Herein or Changes Waivers

Section 15.1: This lease shall be deemed to include the entire agreement between the parties hereto

and no waiver of any right, agreement or condition hereof and no modification hereof shall be binding upon either of the parties hereto unless in writing and signed by the party to be charged therewith. Any waiver agreed upon shall be limited to the particular instance and shall not be deemed to waive any other breaches of such right, agreement or condition herein contained.

## ARTICLE XVI

### Headings

Section 16.1: The headings as to the contents of particular Articles and Sections herein are inserted only for convenience and are in no way to be construed as part of this lease or as a limitation on the scope of the particular Articles or Section to which they refer.

IN WITNESS WHEREOF, the parties hereto have executed this Lease and Agreement at Charleston, South Carolina, the day and year first above written.

WITNESSES:

/s/ [Illegible]

GROUP INVESTMENT COMPANY, INC.

Lessor

/s/ Elizabeth A. [Illegible]
(As to Lessor)

Bc RR

By: /s/ ~~NA~~
~~John Robinson,~~
~~President~~

By: /s/ Robin M. Robinson
Robin [M.] Robinson,
~~Secretary~~ President

/s/ Rita J. McKinley
/s/ Dan M. David
(As to Lessee)

/s/ Barry Clarke
Barry Clarke, Lessee

---

STATE OF SOUTH CAROLINA )
)
COUNTY OF CHARLESTON )

ACKNOWL-EDGEMENT

I hereby acknowledge that Robin M. Robinson, as President of Group Investment Company, 'Inc., and Barry Clarke personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

SWORN to before me this 8th day of January, 1999.

/s/ Rita J. McKinley (SEAL)
Notary Public for South Carolina
My Commission Expires: 9/22/2007

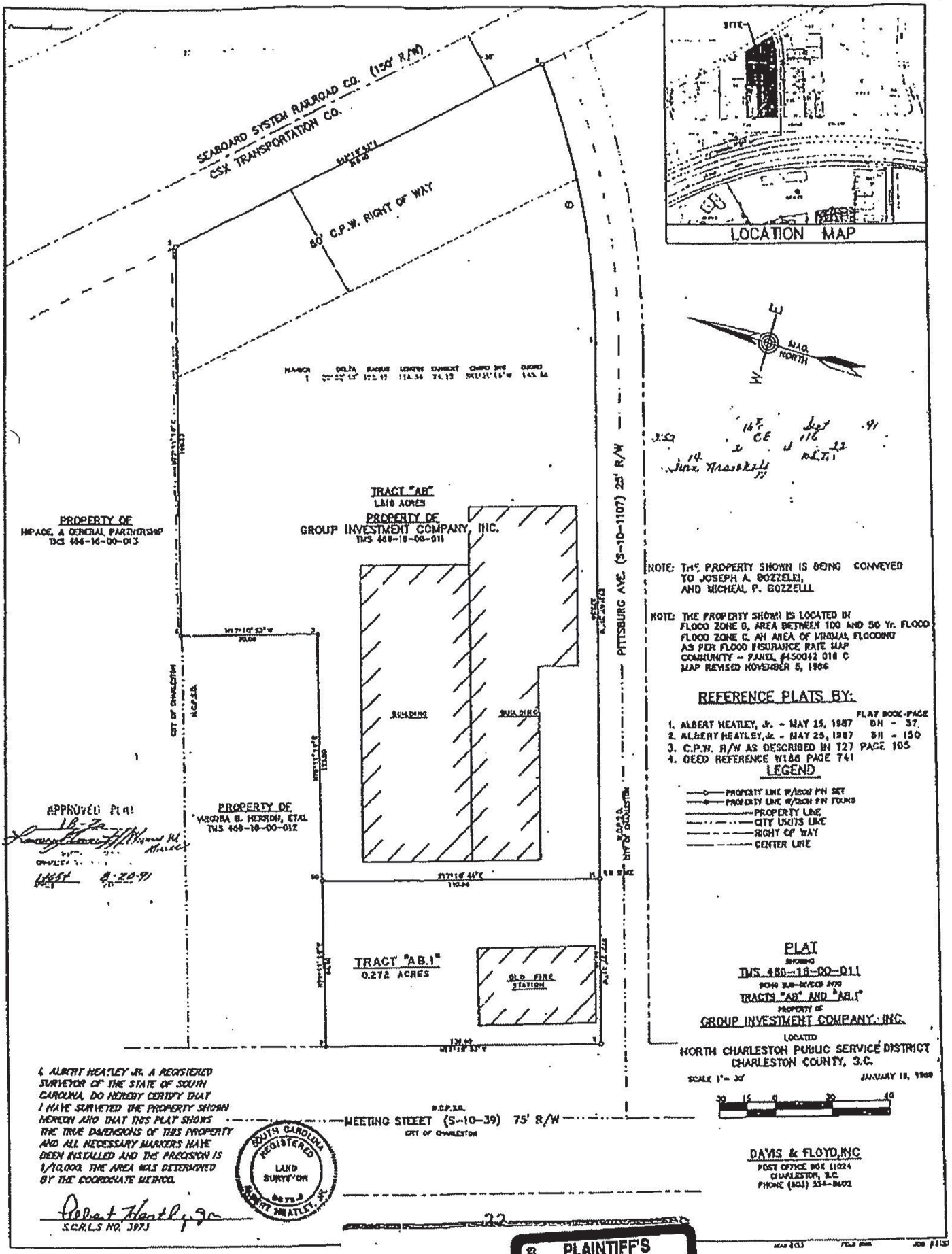
---

Exhibit A

ALL that piece, parcel or tract of land, situate, lying and being in Charleston County, South Carolina, known and designated as "Tract "AB", 1.610 Acres, Property of Group Investment Company, Inc., TMS 466-16-00-0011" on a plat entitled "Plat Showing TMS

466-16-00-011, being subdivided into Tracts "AB" and AB.1", Property of Group Investment Company, Inc., Located North Charleston public Service District, Charleston County, SC", made by Davis & Floyd, Inc., dated January 19, 1989 and recorded in the RMC Office for Charleston County in Plat Book CE, page 116, said tract having such size, shape, dimensions, buttings and boundings as will reference to said plat more fully and at large appear.

Being the same premises conveyed to Group Investment Company, Inc., by deed of Cheryl Robinson, dba C. R. Intermodel, recorded in the RMC Office for Charleston County on February 18, 1997 in Book D280, Page 27.



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| STATE OF SOUTH CAROLINA ) | TITLE TO |
| ) | REAL ESTATE |
| COUNTY OF CHARLESTON ) | |

KNOW ALL MEN BY THESE PRESENTS, that RRJR, LLC, in the State and County aforesaid, for and in consideration of the sum of ONE HUNDRED FIFTY THOUSAND and NO/100 ($150,000.00) DOLLARS, to me in hand paid at and before the sealing of these presents by Fine Housing, Inc., in the State and County aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these Presents do hereby grant, bargain, sell and release unto the said Fine Housing, Inc., its successors and assigns, all my right, title and interest in the following described property to-wit:

SEE EXHIBIT "A" ATTACHED HERETO

THIS CONVEYANCE IS MADE SUBJECT TO all covenants, restrictions, conditions, easements and rights of way of record.

Grantee's Address: 102 Lake Road
Congers, NY 10920

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

TO HAVE AND TO HOLD, all and singular, an interest in the said Premises before mentioned unto the

said Fine Housing, Inc., its successors and assigns forever.

AND RRJR, LLC does hereby bind itself and its Successors and Assigns to warrant and forever defend, all and singular, the said Premises unto the said Grantee, its successors and assigns, against RRJR, LLC and its Successors and Assigns, and all persons whomsoever so lawfully claiming, or to claim the same or any part thereof,

WITNESS our Hands and Seals this 2d day of December, in the year of our Lord Two Thousand and Thirteen.

SIGNED, SEALED AND DELIVERED
IN THE PRESENTS OF:

/s/ Janice [Illegible] /s/ Robin Robinson
Witness #1 Grantor

/s/ William H. Sloan
Notary Public as Witness #2 [SEAL]

---

STATE OF SOUTH CAROLINA )
)
COUNTY OF BERKELEY )

PERSONALLY appeared before me the first witness and made oath that s/he saw the within named RRJR, LLC sign, seal and as its act and deed, deliver

the within written Deed, that s/he with the other witness witnessed the execution thereof.

/s/ Janice [Illegible]

Sworn to before me this 2d day of December, 2015.

/s/ William H. Sloan
NOTARY PUBLIC FOR SOUTH CAROLINA [SEAL]
My Commission expires: 6/14/2015

---

Exhibit A

ALL that piece, parcel or tract of land situate, lying and being in Charleston County, South Carolina, known and designated as "Tract A, 1.610 Acres, Property of Group Investment Company, Inc., TMS 466-16-00-011" on a plat entitle "Plat Showing TMS 466-16-00-011, being subdivided into tracts 'AB' and 'AB.1', property of Group Investment Company, Inc., located North Charleston Public Service District, Charleston County, SC," made by David & Floyd, Inc., dated January 19, 1989 and recorded in the RMC Office for Charleston County in Plat Book CE, Page 116; said tract having such size, shape, dimensions, buttings and boundings as will be referenced to said plat more fully and at large appear.

BEING the same property conveyed to RRJR, LLC by deed of Group Investment Company, Inc. dated

February 19, 2007 and recorded April 25, 2007 in the RMC Office for Charleston County at Book H623, Page 181

TMS# 466-16-00-011

---

Dale of Transfer of Title
Closing Date: 12/2/13

STATE OF SOUTH CAROLINA )
) AFFIDAVIT
COUNTY OF BERKELEY )

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

1. I have rend the information on this Affidavit and I understand such information.
2. The property is being transferred on: 12/2/13

   by: PAIR, LLC

   to: Fine Housing, Inc.,
3. Check one of the following. The Deed is:

   (A) _X_ Subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.

   (B) ___ Subject to deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner or owner of the entity, or is a transfer to a trust or as distribution to a trust beneficiary.

(C) ___ EXEMPT from deed recording fee because: Exemption #

Explanation if required. **Transfer to Family Trust**

(If exempt, please skip items 4.6, and go to item 7 of this Affidavit).

4. Check one of the following if either item 3(a) or 3(b) above has been checked.

(A) _X_ The fee is computed on the consideration paid or to be paid in money or money's worth In the amount of $150,000.00

(B) ___ The fee is computed on the fair market value of the realty which is $_____.

(C) ___ The fee is computed on the fair market value of the realty as established for property lax purposes which is **.

5. Check: YES ___ or NO _X_ to the following: A lien or encumbrance existed an the land, tenement or realty before the transfer and remained on the land, tenement or realty after transfer. If "YES" the amount of the outstanding balance of this lien or encumbrance is $_____.

6. The Deed Recording Fee is computed as follows:

(A) 150,000.00 the amount listed in item 4 above.

(B) 0 the amount listed in item 5 above (no amount, place zero)

(C) 150000.00 subtract line 6(b) front line 6(a) and place the result.

7. As required by Code Section 12-24-70,1 state that t am a responsible person who was connected with the transaction as: Attorney

8. Check If property other than real property is being transferred on this Deed:

   (A) ___ Mobile Home (B) ___ Other

9. ___ DEED OF DISTRIBUTION – ATTORNEY'S AFFIDAVIT: Estate of _____ deceased, Case Number _____. Personally appeared before me the undersigned attorney who, being duly sworn, certifies that s/he is licensed to practice into In the State of South Carolina; that s/he has prepared the Deed of Distribution for the Personal Rep in the Estate of _____ deceased, and that the grantee(s) therein arc correct and conform to the estate file for the above-referenced decedent.

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

SWORN this 2nd day of December, 2013.

/s/ Janice R. Lambert
Notary Public for South Carolina
My Commission expires:
3-24-2020 [SEAL]

THE SLOAN LAW FIRM, P.A.

/s/ William H. Sloan, Jr.
William H. Sloan, Jr.

OMB Approval No. 2502-0265

[SEAL] **A. Settlement Statement (HUD-1)**

**B. Type of Loan**

| | | | |
|---|---|---|---|
| 1. ☐ FHA 2. ☐ RHS<br>3. ☐ Conv. Unins. 4. ☐ VA<br>5. ☐ Cons. Ins. | 6. File Number:<br>13-264 | 7. Loan Number: | 8. Mortgage Insurance Case Number: |

**C. Note:** *This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.*

| **D. Name & Address of Borrower:** | **E. Name & Address of Seller:** | **F. Name & Address of Lender:** |
|---|---|---|
| Fire Housing Inc<br>2028 Pittsburg Ave /<br>2470 Sol Legare RD<br>Charleston, SC 29405 | Robin M. Robinson and<br>RRJR, LLC | |
| **G. Property Location:**<br>2028 Pittsburg Ave /<br>2470 Sol Legare RD<br>Charleston, SC 29405<br>Charleston County, South Carolina | **H. Settlement Agent:** 20-4238424<br>Sloan Law Firm<br>1055 N Main St Suite F<br>Summerville, SC 29483<br>Ph. (843)873-7531<br>_____<br>Place of Settlement:<br>1055 N Main St Suite F<br>Summerville, SC 29483 | **I. Settlement Date:**<br>December 2, 2013 |

| **J. Summary of Borrower's Transaction** | |
|---|---|
| 100. Gross Amount Due from Borrower | |
| 101. Contract sales price | 850,000.00 |
| 102. Personal property | |
| 103. Settlement charges to borrower (line 1400) | |
| 104. | |
| 105. | |
| **Adjustment for items paid by Seller in advance** | |
| 106. City/town taxes to | |
| 107. County taxes to | |
| 108. Assessments to | |
| 109. | |
| 110. | |
| 111. | |
| 112. | |
| **120. Gross Amount Due from Borrower** | 850,000.00 |
| **200. Amount Paid by or in Behalf of Borrower** | |
| 201. Deposit or earnest money | |

| **K. Summary of Seller's Transaction** | |
|---|---|
| 400. Gross Amount Due to Seller | |
| 401. Contract sales price | 850,000.00 |
| 402. Personal property | |
| 403. | |
| 404. | |
| 405. | |
| **Adjustment for items paid by Seller in advance** | |
| 406. City/town taxes to | |
| 407. County taxes to | |
| 408. Assessments to | |
| 409. | |
| 410. | |
| 411. | |
| 412. | |
| **420. Gross Amount Due to Seller** | 850,000.00 |
| **500. Reductions In Amount Due Seller:** | |
| 501. Excess deposit (see instructions) | |

| | | | |
|---|---|---|---|
| 202. Principal amount of new loan(s) | | 502. Settlement charges to Seller (line 1400) | 187,456.13 |
| 203. Existing loan(s) taken subject to | | 503. Existing loan(s) taken subject to | |
| 204. | | 504. Payoff First Mortgage to Capital One | 381,644.72 |
| 205. | | 505. Payoff Second Mortgage to Charleston Capital One | 29,982.31 |
| 206. | | 506. | |
| 207. | | 507. Federal Tax Lien to IRS | |
| 208. Closing Cost Credit | | 508. Closing Cost Credit | |
| 209. December's Rent and deposit | | 509. December's Rent and deposit | |
| Adjustments for items unpaid by Seller | | Adjustments for items unpaid by Seller | |
| 210. City/town taxes to | | 510. City/town taxes to | |
| 211. County taxes to | | 511. County taxes to | |
| 212. Assessments to | | 512. Assessments to | |
| 213. Credit | 35,000.00 | 513. Credit | 35,000.00 |
| 214. | | 514. | |
| 215. | | 515. Federal Tax Lien | 101,000.00 |
| 216. | | 516. Federal Tax Lien | 39,000.00 |
| 217. | | 517. State Tax Lien to IRS | 5,539.04 |
| 218. | | 518. to IRS | |
| 219. | | 519. 2012 & 2013 Taxes | 60,320.00 |
| 220. Total Paid by/for Borrower | 35,000.00 | 520. Total Reduction Amount Due Seller | 839,942.20 |
| 300. Cash at Settlement from/to Borrower | | 600. Cash at Settlement to/from Seller | |
| 301. Gross amount due from borrower (line 120) | 850,000.00 | 601. Gross amount due to seller (line 420) | 850,000.00 |
| 302. Less amounts paid by/for borrower (line 220) | ( 35,000.00) | 602. Less reductions in amounts due seller (line 520) | ( 839,942.20) |
| 303. Cash ☒ From ☐ To Borrower | 815,000.00 | 603. Cash ☒ To ☐ From Seller | 10,057.80 |

The undersigned hereby acknowledge receipt of a completed copy of this statement & any attachments referred to herein.

Borrower /s/ _____
Fire Housing Inc

Seller /s/ Robin M. Robinson
Robin M. Robinson

/s/ Robin M. Robinson
RRJR, LLC
[authorized member of RRJR, LLC]

The Public Reporting Burden for this collection of information is estimated at 35 minutes per response for collecting, reviewing, and reporting the data. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number. No confidentiality is assured; this disclosure is mandatory. This is designed to provide the parties to a RESPA covered transaction with information during the settlement process.

**L. Settlement Charges**

| | Paid From Borrower's Funds at Settlement | Paid From Seller's Funds at Settlement |
|---|---|---|
| 700. Total Real Estate Broker Fees | | |
| *Division of commission (line 700) as follows:* | | |
| 701. $ to | | |
| 702. $ to | | |
| 703. Commission paid at settlement | | |
| 704. | | |
| 705. | | |
| **800. Items Payable in Connection with Loan** | | |
| 801. Our origination charge $ (from GFE #1) | | |
| 802. Your credit or charge (points) for the specific interest rate chosen $ (from GFE #2) | | |
| 803. Your adjusted origination charges (from GFE #A) | | |
| 804. Appraisal fee to (from GFE #3) | | |
| 805. Credit report to (from GFE #3) | | |
| 806. Tax service to (from GFE #3) | | |
| 807. Flood certification to (from GFE #3) | | |
| 808. (from GFE #3) | | |
| 809. (from GFE #3) | | |
| 810. (from GFE #3) | | |
| 811. (from GFE #3) | | |
| **900. Items Required by Lender to be Paid in Advance** | | |
| 901. Daily interest charges from to @ $ /day (from GFE #10) | | |
| 902. MIP Tot. Ins. for Life of Loan months to (from GFE #3) | | |
| 903. Homeowner's insurance for years to (from GFE #11) | | |
| 904. (from GFE #11) | | |
| 905. (from GFE #11) | | |
| **1000. Reserves Deposited with Lender** | | |
| 1001. Initial deposit for your escrow account (from GFE #9) | | |
| 1002. Homeowner's insurance months @ $ per month $ | | |
| 1003. Mortgage insurance months @ $ per month $ | | |
| 1004. Property Taxes $ | | |
| 1005. $ | | |
| 1006. months @ $ per month $ | | |
| 1007. months @ $ per month $ | | |
| 1008. $ | | |
| 1009. $ | | |
| 1100. Title Charges | | |
| 1101. Title services and lender's title insurance (from GFE #4) | | 100.00 |
| 1102. Settlement or closing fee to Sloan Law Firm $ | | 3,000.00 |
| 1103. Owner's title insurance to S (from GFE #5) | | 1,800.00 |
| 1104. Lender's title insurance to S | | |
| 1105. Lender's title policy limit $ | | |
| 1106. Owner's title policy limit $ 850,000.00 | | |
| 1107. Agent's portion of the total title insurance premium to Sloan Law Firm $ 1,080.00 | | |
| 1108. Underwriter's portion of the total title insurance premium to S $ 720.00 | | |
| 1109. Binder Title to Donian Title Agency | | 100.00 |

| | | |
|---|---|---|
| 1110. Sloan Law Firm | | |
| 1111. | | |
| 1112. Atty Fee to Will Swope | | 49,000.00 |
| 1113. Atty Fee to Joseph Scaumato | | 3,500.00 |
| **1200. Government Recording and Transfer Charges** | | |
| 1201. Government recording charges (from GFE #7) | | |
| 1202. Deed $ Mortgage $ Release $ Other $ | | |
| 1203. Transfer taxes (from GFE #8) | | |
| 1204. City/County tax/stamps $ $ | | 3,145.00 |
| 1205. State tax/stamps Deed $ $ | | 20.00 |
| 1206. Inspection Fee to AAA | | 5,500.00 |
| 1207. Broker Fee to John Liatsis | | 8,500.00 |
| **1300. Additional Settlement Charges** | | |
| 1301. Required services that you can shop for (from GFE #6) | | |
| 1302. Fees to Charleston County | | 15,748.80 |
| 1303. pay/Judgment Xiphias Holdings to Xiphias Holdings | | 72,866.39 |
| 1304. Federal Tax Lien | | |
| 1305. Pay to SCOOR | | 24,175.94 |
| **1400. Total Settlement Charges (enter on lines 103, Section J and 502, Section K)** | | 187,456.13 |

By signing page 1 of this statement, the signatories acknowledge receipt of a completed copy of page 2 & 3 of this brokerage statement.

/s/ [Illegible]
Sloan Law Firm, Settlement Statement

| **Comparison of Good Faith Estimate (GFE) and HUD-1 Charges** | | **Good Faith Estimate** | **HUD-1** |
|---|---|---|---|
| Charges That Cannot Increase | HUD-1 Line Number | | |
| Our origination charge | #801 | | |
| Your credit or charge (points) for the specific interest rate chosen | #802 | | |
| Your adjusted origination charges | #803 | | |
| Transfer taxes | #1203 | | |

| **Charges That In Total Cannot Increase More Than 10%** | | **Good Faith Estimate** | **HUD-1** |
|---|---|---|---|
| Government recording charges | #1201 | | |

| | | |
|---|---|---|
| **Total** | | |
| **Increase between GFE and HUD-1 Charges** | $ 0.00 or | 0.00% |

| **Charges That Can Change** | | **Good Faith Estimate** | **HUD-1** |
|---|---|---|---|
| Initial deposit for your escrow account | #1001 | | |
| Daily interest charges | #901 | $ /day | |
| Homeowner's insurance | #903 | | |

**Loan Terms**

| | |
|---|---|
| Your initial loan amount is | |
| Your loan term is | _____ years |
| Your initial interest rate is | _____ % |
| Your initial monthly amount owed for principal, interest, and any mortgage insurance is | $ _____ includes<br>☒ Principal<br>☒ Interest<br>☐ Mortgage Insurance |
| Can your interest rate rise? | ☒ No ☐ Yes, it can rise to a maximum of _____%. The first change will be on _____ and can change again every ___ months after ____. Every change date, your interest rate can increase or decrease by _____%. Over the life of the loan, your interest rate is guaranteed to never be lower than _____% or higher than _____%. |
| Even if you make payments on time, can your loan balance rise? | ☒ No ☐ Yes, it can rise to a maximum of $_____. |
| Even if you make payments on time, can your monthly amount owed for principal, interest, and mortgage insurance rise? | ☒ No ☐ Yes, the first increase can be on _____ and the monthly amount owed can rise to $_____. The maximum it can ever rise to is $_____. |
| Does your loan have a prepayment penalty? | ☒ No ☐ Yes, your maximum prepayment penalty is $_____. |

| | |
|---|---|
| Does your loan have a balloon payment? | ☒ No ☐ Yes, you have a balloon payment of $_____ due in _____ years on _____. |
| Total monthly amount owed including escrow account payments | ☒ You do not have a monthly escrow payment for items, such as property taxes and homeowner's insurance. You must pay these items directly yourself.<br>☐ You have an additional monthly escrow payment of $_____ that results in a total initial monthly amount owed of $_____. This includes principal, interest, any mortgage insurance and any items checked below:<br>☐ Property taxes<br>☐ Homeowner's insurance<br>☐ Flood insurance<br>☐<br>☐<br>☐ |

**Note:** If you have any questions about the Settlement Charges and Loan Terms listed on this form, please contact your lender.

**HUD-1 Attachment**

| | |
|---|---|
| Borrower(s): | FireHousing Inc<br>2028 Pittsburg Ave/<br>2470 Sol Legare RD<br>Charleston, SC 29405 |
| Seller(s): | Robin M. Robinson and RRJR, LLC |
| Settlement Agent: | Sloan Law Firm<br>(843)873-7531 |
| Place of Settlement: | 1055 N Main St Suite F<br>Summerville, SC 29483 |
| Settlement Date: | December 2, 2013 |
| Property Location: | 2028 Pittsburg Ave/<br>2470 Sol Legare RD<br>Charleston, SC 29405<br>Charleston County,<br>South Carolina |

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**Seller Loan Payoff Details**

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**Payoff First Mortgage to Captial One**

Loan Payoff As of

Total Additional Interest _____ days @ Per Diem

**Total Loan Payoff** 381,644.72

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**Payoff Second Mortgage to Charleston Captial One**

Loan Payoff As of

Total Additional Interest _____ days @ Per Diem

**Total Loan Payoff** **29,982.31**

| Title Services and Lender's Title Insurance Details | BORROWER | SELLER |
|---|---|---|
| Binder Fee to Donlan Title Agency | | 100.00 |
| Total | $ 0.00 | $ 100.00 |

| Settlement or Closing Fee Details | BORROWER | SELLER |
|---|---|---|
| Atty Fee to Sloan Law Firm | | 2,100.00 |
| Title Exam to Sloan Law Firm | | 200.00 |
| Doc Prep to Sloan Law Firm | | 200.00 |
| Courier Fee to Sloan Law Firm | | 500.00 |
| Total | $ 0.00 | $ 3,000.00 |

| Owner's Title Insurance | BORROWER | SELLER |
|---|---|---|
| Owner's Policy Premium to S | 1,800.00 | |
| Total | $ 0.00 | $ 1,800.00 |

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

**WARNING: It is a crime to knowingly make false statements to the United States on this or any similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 U.S. Code Section 1001 and Section 1010.**

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(13-264.PFD/13-264/25)

**Single Ledger Balance Report – Sorted By Ref/Ck Number**

Selection Criteria

| | | | |
|---|---|---|---|
| Trust Account: | *RE2* | Trust Account Description: | *Real Estate Trust Account* |
| File ID: | *13-264* | Client / Matter: | *Inc, Fire Housing* |
| Responsible Party: | | Ledger Comment: | |
| Settlement Date: | *12/02/13* | Property: | *2028 Pittsburg Ave/* |
| Starting Date: | | | *2470 Sol Legare RD/C* |
| | | Ending Date: | |

App. 118

| Ref/Ck No. | Transaction Date | Payee Name / Memo | Medium | Cleared Date | Amount |
|---|---|---|---|---|---|
| | | | **Beginning Balance:** | | **$0.00** |
| **Deposits** | | | | | |
| | 12/02/13 | ProForm generated incoming funds Real Estate Closing | wire | 12/31/13 | $815,000.00 |
| | 06/20/14 | Charleston County User Fee / overpayment 466-1 Ich | check | 06/30/14 | $3,574.71 |
| | | | **Total of 2 Deposits** | | **$818,574.71** |
| **Checks** | | | | | |
| 17654 | 12/03/13 | Stewart Title | check | 06/30/14 | $720.00 |
| 17655 | 12/03/13 | Donlan Title Agency | check | 12/31/13 | $1,080.00 |
| 17656 | 12/03/13 | Charleston County ROD Office | check | 12/31/13 | $3,165.00 |
| 17658 | 12/03/13 | Joseph Scaumato | check | 12/31/13 | $3,500.00 |
| 17661 | 12/03/13 | Robin M. Robinson and RRJR,LLC | Check | 12/31/13 | $8,557.80 |
| 17662 | 12/03/13 | Charleston County Fees | check | 12/31/13 | $15,748.80 |
| 17664 | 12/03/13 | Charleston Captial One Payoff Second Mortgage | check | 12/31/13 | $29,982.31 |
| 17665 | 12/03/13 | Will Swope | check | 12/31/13 | $50,600.00 |
| 17666 | 12/03/13 | Charleston County Treasurer | check | 12/31/13 | $60,320.00 |
| 17667 | 12/03/13 | Charles Feeley | check | 12/31/13 | $250.00 |
| 17668 | 12/03/13 | Sloan Law Firm Settlement Agents Fees | check | 12/31/13 | $2,950.00 |
| 17669 | 12/03/13 | SCDOR | check | 12/31/13 | $5,539.04 |
| 17670 | 12/05/13 | SCDOR | check | 12/31/13 | $24,175.94 |
| 17671 | 12/06/13 | Tamara Lahe Inc | check | 12/31/13 | $5,500.00 |
| 17672 | 12/11/13 | The Cherie DuMez Agency | check | 12/31/13 | $9,311.00 |
| 17673 | 12/16/13 | Charleston County ROD Office Lost Mortgage Satisfactions (2 | check | 12/31/13 | $10.00 |
| 18144 | 11/05/14 | United States Department of Treasury | Cashier Ck | | $55,342.52 |
| | | | **Total of 17 Checks** | | **$276.652.41** |
| **Miscellaneous** | | | | | |
| | 12/03/13 | Haynesworth Sinkler Ich | wire | 12/31/13 | $72,866.39 |
| | 12/03/13 | Sci John Liatsis Ich | wire | 12/31/13 | $8,500.00 |
| 1540 | 12/03/13 | Check Ich | cashiers c | 12/31/13 | $381,644.72 |
| | | | **Total of 3 Miscellaneous items:** | | **$463,011.11** |
| **Report Totals:** | | | **Balance:** | | **$78,911.19** |
| | | | **Ending Balance:** | | **$78,911.19** |



Date of Report: *11/5/14*
Time of Report: *09:07:42AM*
Report By: *Janice*

AGREEMENT OF LEASE

THIS AGREEMENT OF LEASE, made effective the 18th day of December, 2012 (the "Effective Date"), between ~~TAMARA LANE INC.~~ [Fine Housing, Inc.], having an address at 102 Lake Road, Congers, New York 10920 (the "Landlord") and ~~FMB REALTY, INC., a New York corporation having offices at 170-180 Route 9W, Congers, New York, 10920~~ [Robin Robinson, Anthony Fogler and Daniel DeaHaven] (the "Tenant").

WHEREAS, Landlord wishes to lease certain premises to Tenant and Tenant wishes to lease said premises from Landlord; and

WHEREAS, the Landlord and Tenant have agreed that the terms and conditions of the lease of the real property shall be in accordance with this Agreement of Lease;

NOW, THEREFORE, for valuable consideration, receipt of which is hereby acknowledged and with the foregoing being deemed incorporated hereinbelow, it is agreed as follows:

WITNESSETH

1. PREMISES.

1.1 That Landlord hereby leases to Tenant and Tenant hereby hires and takes from Landlord premises known as ~~170 & 180 ROUTE 9W, CONGERS, NEW YORK 10920~~ [2028 Pittsburg Ave. W. Chs. Ste. and 2470 Sol. Logan Rd. Charleston, SC 29412], identified on Exhibit "A" to this Lease, which is incorporated

herein as if stated forth below, ("Premises"), together with the right of access to Tenant, Tenants employees, agents and servants, in common with all other lawfully entitled thereto, on, over and through the common areas of the said building in accordance with the laws of the municipality.

## 2. USE.

2.1 To be used and occupied by Tenant for ~~an auto body repair shop~~ [current purpose]. The premises shall be used for no other purpose unless approved in writing by Landlord, such approval not to be unreasonably withheld.

## 3. TERM.

3.1 The term of this Lease shall be for ~~ONE YEAR~~ [Three years] commencing on the ~~18th~~ [2nd] day of December, 2012 and terminating ~~on the 17th day of December, 2013~~ [30th day of Nov. 2016].

## 4. RENT AND SECURITY.

4.1 Tenant shall pay to Landlord rent in the yearly amount ONE HUNDRED ~~FORTY FOUR~~ [Fifty-Three] THOUSAND 00/100 DOLLARS (~~$144,000.00~~) [15,30,00] per year ("Rent") payable in monthly installments of TWELVE THOUSAND 00/100 DOLLARS (~~$12,000.00~~) [12,750.00] per month due and payable on the 1st day of each month. [seven hundred fifty]

4.2 There shall be no security required for the term of this Lease.

4.3 The premises are leased for the entire term hereof. The entire rent for the term hereof is payable at the time of the execution of this Lease and the provisions in this Lease for the payments of such rent installments are for the convenience of the Tenant only.

4.4 PROMPT PAYMENT CREDIT: In the event Tenant's monthly rent payment shall be received by the Landlord ***on or before*** the due date, Tenant shall be entitled to a Prompt Payment Credit for the current month's rent of ONE THOUSAND 00/100 DOLLARS ($1,000.00).

4.5 As Additional Rent, Tenant shall pay to the Landlord as and when the same shall be billed to the Tenant, the cost of any and all Landlord's expenses for real estate taxes, utilities, insurance and property maintenance according to attached Lease Rider A.

## 5. TENANTS INSTALLATIONS.

5.1 Tenant shall have the privilege of installing Tenant's equipment and furnishings in such manner as Tenant may desire, provided, however, that if Tenant's installation of said equipment and furnishings costs more than $1,500 Tenant shall get prior written approval by Landlord, which shall not be unreasonably withheld, and shall have full responsibility for complying with all local codes and regulations. There shall be

no construction without Landlord's prior written approval.

## 6. REPAIRS AND MAINTENANCE

6.1 Throughout the term of this Lease, Tenant shall, at Tenant's Own cost and expense (i) replace any and all damages and/or broken glass in and about the demised premises; (ii) relamp lighting fixtures; (iii) maintain the leased premises and the improvements now or hereafter comprising same, and all Landlord supplied fixtures and equipment therein; (iv) make all repairs to the interior of the lease premises caused by actions of Tenant or Tenant's invitees, servants, agents, or employees; (v) Tenant shall not be responsible to make exterior repairs to the foundations, supporting walls, roof, uprights, beams and other structural members unless damage to such portions of the building occurs as a mesh of Tenant, Tenant's agents', servants', employees' or invitees' acts or omissions.

6.2 Any and all replacements or repairs to the leased premises, including supplied fixtures and equipment therein shall be subject to Landlord's prior approval. Any contractors utilized to make any such replacements or repairs shall also be subject to Landlord's prior approval.

6.3 Except as may be otherwise set forth in this Lease, all rent and additional rent shall accrue hereunder from the commencement date until the termination of this Lease and shall be payable in lawful money

of the United States to Landlord at Landlord's mailing address.

## 7. SERVICES.

7.1 Landlord shall furnish to Tenant access to the premises twenty-four (24) hours a day, seven (7) days a week. Tenant shall provide and pay for all services required by Tenant, including utilities (as provided for elsewhere in this Lease), janitorial and the cost of fire and security systems. If Tenant makes installs a security system, Tenant shall pay for the cost of that system's removal at the end of the Lease term.

## 8. IMPROVEMENTS AND ALTERATIONS.

8.1 Tenant, upon the prior written consent of Landlord, (which consent maybe withheld or delayed in Landlord's sole discretion), may place partitions, trade or other fixtures (including lighting fixtures), and the like, in the premises and may make such improvements and alterations in the interior thereof as Tenant may desire, at Tenant's own expense.

> 8.1.1 All alterations, decorations cad installations anode by Tenant shall be performed in a good workmanlike manner and at a time not to disturb neighbors in the building or overburden the building facilities, and shall comply with all federal, state and local laws. Tenant or Tenant's contractors shall take out and pay for all permits, as required. Tenant or Tenant's contractors shall also be responsible for rubbish removal, hoisting of

materials or other reasonable charges, of a similar nature relating to such work, Tenant or Tenant's contractors shall consult with Landlord on any work affecting the premises' mechanical or electrical systems prior to commencing such work, in the event any mechanic's liens are filed against the building or land of which the Premises form a part by reason of work performed by or on behalf of Tenant, then Tenant agrees to remove or bond such lien within ten (10) days notice from Landlord or by other source, at Tenant's expense.

All such things heretofore or hereafter made or installed by Tenant if not removed by Tenant at the end of the Lease shall become the property of Landlord and in the case of damage or destruction thereto by fire or other causes, Landlord shall have the right to recover the value thereof as Landlord's own loss from any insurance company with which landlord or Tenant has insured the same, or to claim an award in the event of condemnation, notwithstanding that any of such things might be considered a part of the premises.

8.2 Notwithstanding the foregoing to the contrary, Tenant shall submit plans and specifications to Landlord for Landlord's prior review and written approval for all alterations or rearrangement work Tenant plans to make in Tenant's space in the building that Tenant estimates will cost in excess of One Thousand, Five Hundred ($ 1,500) Dollars. Landlord shall review Tenants plans and specifications and agrees that Landlord will not unreasonably withhold approval for Tenant to proceed with Tenants contemplated work providing said work is not structure) in nature. Tenant must

secure Landlords written approval in order to proceed with any alterations or rearrangement work.

9. SURRENDER.

9.1 At the expiration of this Lease or any extension or renewal thereof, Tenant shall surrender the demised premises in good order and condition, reasonable wear and tear, other casualty and the elements and repairs which Landlord is required to make herein excepted. All alterations, additions and improvements in or upon the premises or the building made by tither party hereto shall become the property of Landlord and shall remain upon and be surrendered with the premises as apart thereof at the termination or other expiration of the tenet hereby granted. All furniture, including "built-in" that are removable without permanent damage to the premises, furnishings and trade fixtures including, without limitation, business machines and equipment, apparatus and any other movable property installed by Tenant or at the expense of Tenant, shall remain the property of Tenant and Tenant shall remove all or any part thereof at any time prior to the expiration of the terms of this Lease, in which case Tenant shall restore the demised premises in good order and condition (normal wear and tear excepted). Any property of Tenant which may remain in the demised after the expiration of the terns of this Lease, or if this Lease be renewed after the expiration of the last renewal term, shall be deemed to have been abandoned by Tenant and maybe retained by Landlord as

Landlords property or may be disposed of in such manner as Landlord may see fit at Tenant's expense.

## 10. INSPECTION.

10.1 Landlord shall, upon advance oral notice to Tenant (except in an emergency) have the right at all times, to enter the premises to inspect the same and, at all times, to make repairs or replacements therein as required by this Lease, or as may be necessary or desirable in Landlord's sole discretion, provided, however, that Landlord shall use reasonable effort riot to disturb Tenant's use and occupancy of the premises.

## 11. CASUALTY.

11.1 If the Premises are damaged by fire or any other cause, the following provisions of this article shall apply:

11.1.1 If the damage is to such extent that the cost of restoration, as estimated by Landlord, will equal or exceed thirty (30%) percent of the replacement value of the building (exclusive of foundations) in its condition just prior to the occurrence of the damage, Landlord may, net later than the thirtieth (30th) day following the damage, give Tenant a notice stating that Landlord elects to terminate this Lease. If such notice shall be given: (i) this Lease shall terminate on the third (3rd) day after the giving of said notice; (ii) Tenant shall surrender possession of the premises within a reasonable time thereafter not to exceed thirty (30) days; and (iii) the rent

shall be apportioned as of the date of such surrender and any rent paid for any period beyond said date shall be repaid to Tenant.

11.1.2 If the cost of restoration as estimated by Landlord shall amount to *less* than thirty (30%) percent of said replacement value of the building or if, despite tire cost, Landlord does not elect to terminate this Lease, Landlord shall restore the building and the premises with reasonable promptness, subject to delays beyond. Landlords control and delays in the making of insurance adjustments by Landlord, and Tenant shall not have the tight to terminate this Lease.

11.1.3 Landlord need not restore fixtures, improvements or other property damaged as a result of any casualty, force majeure, labor dispute or other willful acts.

11.1.3 In any case in which the use of the premises is affected by any damage to the building, there shall be either an abatement or an equitable reduction in rent depending on the period for which and the extent to which the premises ire not reasonably usable for the purposes for which they are leased .hereunder. The words "restoration" and "restore" as used in this article shall include repairs. If the damage results from the fault of Tenant or Tenant's agents, servants, visitors or licenses, Tenant shall not be entitled to any abasement or reduction of rent except to the extent, if any, that Landlord receives the proceeds of sent insurance from Tenant's insurance company in lieu of such rent.

12. PROPERTY AND LIABILITY INSURANCE.

12.1 From and after the date of the execution of this Lease, Tenant shall pay as Additional Rent, the cost of Landlord's insurance as follows:

> 12.1.1 property raid casualty insurance covering the premises against loss or damage by fire or water in an amount sufficient to meet the co-insurance requirements of the policies, but not less than the full insurable value of the premises, exclusive of the architectural and engineering fees, excavation, footings, and foundations or other structural responsibilities. The term "full insurable value" shall mean herein the cost of replacement Landlord shall be named insured with Tenant on said policy or policies which may, in Landlord's discretion, also list all mortgages, if any, as insured parties and said policies may not he cancelled without at least thirty (30) days prior notice to Landlord by the insurance carrier,
>
> 12.1.2 public liability insurance (personal injury insurance) covering any loss, liability, damage or claim is the aggregate amount of it least One Million ($1,000,000) DOLLARS for each incident and at least One Million, Five Hundred Thousand ($1,500,000) DOLLARS in the aggregate, for any matter alleged to have arisen from or relating to the leased premises and all parking and public areas related to the premises.

12.2 Tenant and Landlord hereby mutually waive theft respective rights of recovery against each other for any loss to the extent insured by fire, extended

coverage and other property insurance policies existing for the benefit of the respective parties. Each party shall obtain any special endorsements, if required by each party's respective insurer, to evidence compliance with the aforementioned waiver and Tenant shall bear the cost of any additional premium charged resulting there from.

12.3 In the event Tenant's use of the premises causes the premium of the insurance policies to increase either for the Tenant, Landlord or other Tenants, then and in that event, Tenant shall pay Tenant's, Landlord's and other Tenants' increased premiums.

12.4 At Landlord's sole discretion, Landlord may require Tenant to obtain at Tenant's sole cost and expense, public liability insurance (personal injury insurance) covering any loss, liability. damage or claim in the aggregate amount of at least One Million ($1,000,000) DOLLARS for each incident and at lease One Million, Five Hundred Thousand ($1,500,000) DOLLARS in the aggregate, for any matter alleged to have arisen from or relating to the leased premises and all parking and public areas related to the premises and provide a certificate of insurance naming Landlord as an additional insured under such policies,

## 13. CONDEMNATION.

13.1 If at any time during the term, the whole of the premises shall be taken for any public or quasi-public use, under any statute, or by right of eminent domain, oi-if any part of the premises shall be so taken and the

remaining part shall in the Landlord's opinion be insufficient for the conduct of Tenant's business as contemplated by this Lease, then, in such event, the term hereby granted and all rights of Tenant, except as hereinafter reserved, shall immediately cease and terminate as of the data of such taking, and the rent shall be apportioned and paid to the time of such termination. In case of any such taking, whether involving the whole or any part of the premises, the entire award shall be paid to Landlord, including the value of the improvements to the premises installed at Tenant's own expense (regardless of whether the improvements shall be or become the property of Landlord under the terms of this Lease), plus the value of Tenant's fixtures but not for moving and relocation expenses of the Tenant.

13.2 In the event that only a part of the premises shall be so taken and if the part not so taken shall be reasonably sufficient to enable Tenant to continue the conduct of Tenant's business on and in the remaining premises, this Lease shall remain unaffected. except:

> 13.2.1 Tenant shall be entitled to a pro rate reduction of rent and additional rents payable hereunder based on the proportion which the area of the space so taken bears to the area of the space demised hereunder immediately prior to such taking, provided that consideration shall be given to the respective values of the arcs so taken, and the area not so taken, and any dispute with respect to the amount of the reduction shall be resolved by the manner provided in this Lease;

13.2.2 The entire award for a partial taking shall be paid to Landlord which, at Landlord's own expense out of such award, shall restore the affected part of the building to substantially the same condition and tenantability as existed prior to the Liking, including all of the work and Tenant's alterations, costs in excess of the award shall be paid by Tenant. If such partial taking shall occur in the last year of the tern of this Lease, either patty, irrespective of the area of the space remaining may elect to terminate this Lease and the term hereby granted, provided such party shall, within thirty (30) days after having received office of such taking, give notice to that effect, and upon the giving of such notice, this Lease and the term hereby granted shall expire and came to an end upon the expiration of thirty-five (35) days following the date of said notice of taking. The rent shall be apportioned and paid to such expiration date. If either party shall so elect to end this Lease and the term hereby granted, the entire award for partial condemnation shall be paid to Landlord, and Tenant shall have no claim against Landlord for any part thereof.

## 14. TAXES.

14.2 Tenant shall be responsible to pay to the Landlord as Additional Rent, the cost of all property taxes assessed for the Premises.

## 15. SIGNS.

15.1 Tenant may at its sole cost and expense install signs on or about the build-mg subject to meeting all codes and standards set by the municipality and subject to the approval of the Landlord, such approval not to be unreasonably withheld.

## 16. DEFAULT.

16.1 If Tenant makes default in the payment of rent or additional rent reserved herein and said default shall continue for a period of knee. (15) days attar written notice of nonpayment by Landlord to Tenant, this Lease shall fully and completely expire on the tenth (10) day from the date said notice is given, as though the Lease and term. herein had ended on said date. If Tenant shall make default of any other condition of this Lease and such default shall continue for thirty (30) days after written notice to Tenant, or such default shall continue for a period of thirty (30) days sifter written, notice thereof from Landlord specifying such default, and thereafter shall continue beyond such period as may be reasonably necessary to correct such default so long as Tenant is diligently occupied in correcting the same, or, if the premises shall be vacant or deserted and Tenant shall cease paying tear, or if any execution or attachment shall be issued against Tenant or any of Tenant's property whereupon the premises shall be taken or occupied or attempted to be taken or occupied by someone other than Tenant and the same shall not be bonded or dismissed or

discharged as promptly as may be under the circumstances, but in no event more than five (5) business days, then, and in any such event, Landlord may give thirty (30) days notice of intention to end the term of this Lease and then upon the expiration of said thirty (30) days the term of this Lease shall, unless Tenant has cored such default. expire as fully and completely as if that day were the day herein definitely. fixed for the expiration of said term, and Tenant shall then quit the premises and surrender the same, but shall remain liable as hereinafter provided.

16.2 lithe notices provided is the above paragraph shall have been given and the term hereof shall expire *as* aforesaid, then, Landlord may, without flasher notice, re-enter the premises and dispossess Tenant and the legal representatives of Tenant or other occupant of the premises by summary proceedings or otherwise, and remove their effects and bold the premises as if this Lease has not been made; and Tenant hereby waives the service of notice of intention to re-enter or to institute legal proceedings to that end.

16.3 In case of such re-entry, expiration and/or dispossess by summary proceedings or otherwise, (1) the rent shall become due thereupon and ***be*** paid for the full term of this Agreement of Lease. Together with such mimeses as Landlord may incur for legal expenses, reasonable attorneys fees, brokerage and/or putting the premises in good order for re-rental; (ii) Landlord may mid the premises or any part or parts thereof, either in Landlord's own name or otherwise, for a term or terms which may, at Landlord's option, be

shorter or longer than the period which would otherwise have constituted the remainder of the term of this Lease to such extent as Landlord, in landlord's judgment, considers advisable and necessary to valet the same; and (iii) Tenant or Tenant's successors shall also pay Landlord as liquidated damages for the failure of Tenant to observe and perform Tenant's covenants contained herein, any deficiency between the rent hereby reserved and the net amount, if any, of the rents collected on account of the Lease or Leases of the premises for each month of the period which would otherwise have constituted the remained of the term hereof In computing such liquidated damages there shall be added to said deficiency such reasonable expenses as Landlord may incur in connection with retelling such as legal expenses, attorneys fees, brokerage and for keeping or restoring the premises to good order, for retelling. Any such liquidated damages shall be paid in monthly installments on the tent day specified in this Lease and any suit brought to collect the amount of the deficiency for any month shall not prejudice in any ways the rights of Landlord to collect the deficiency for any subsequent month by a similar proceeding. Landlord, at Landlord's option, may make such alterations, repairs, replacements and decorations in the building upon the demised premises as Landlord, in Landlord's reasonable judgment, considers advisable and necessary for the purpose of reletting the premises; and the making of such alterations and decorations shall not operate or be construed to release Tenant from liability thereunder. In the event of a breach by Tenant of any of the covenants or provisions

hereof, Landlord shall have the right of injunction and the right to invoke any remedy allowed at law or in equity as if re-entry, summary proceedings and other remedies were not provided for herein. Mention in this Lease of any particular remedy shall not preclude landlord from any other remedy in law or at equity. Tenant hereby expressly waives any and all rights of redemption granted by or under any present or future laws in the event of Tenant being evicted or dispossessed, for any cause, or in the event of Landlord obtaining possession of the premises by reason of the violation by Tenant of any of the covenants and conditions of this Lease or otherwise.

16.4 In the event Tenant defaults under any of the terms or provisions of this Lease Agreement, the Tenant shall be responsible to pay all of Landlord's legal fees, costs and expenses in addition to any other amounts due hereunder.

## 17. HOLDOVER.

17.1 If Tenant remains in the premises beyond the expiration of this Lease, as said Lease may have been extended, such holding over in itself shall not constitute a renewal or extension of the Lease but, in such event, a tenancy from month-to shall arise at double the monthly rent due during the test month of occupancy pursuant to the terms of this Agreement of Lease.

## 18. NOTICES.

18.1 All notices or other communications required or permitted to be given by either patty to the other under or pursuant to this Agreement must be n writing and shall be deemed to have been duly given only if delivered personally, by confirmed facsimile transmission or certified mail, return receipt requested (first class postage prepaid) or by Federal Express or other nationally recognized overnight delivery service, except for the United States Postal Service (Overnight Delivery") addressed to the parties as follows:

if to Landlord to:

~~TAMARA LANE INC.~~ [Fine Housing, Inc.]
~~102 Lake Road, Congers~~
~~New York 10920~~ [845-406-2206]

if to Tenant to:
FMB ~~REALTY, INC.~~
170 – ~~180 Route 9W~~
Congers, New York 10920

Telephone: (845) ___-____
Facsimile: (845) ___-____

18.2 All such notices, requests and other communications shall; if personally delivered or by Overnight Delivery, be effective upon receipt, and mailed, be personally effective upon the earlier of (i) actual receipt, or (ii) five (5) days after first being postmarked by the United States of America Postal Service, if delivered by facsimile transmission, be deemed given upon confirmation. The Parties hereto and any other parties entitled to receive copies of notices or other

communications shall be entitled to change the address or the facsimile number to which the sane shall be delivered or mailed by giving written notice of such change of address or facsimile number in the manner provided for the giving of other notices.

## 19. ASSIGNMENT.

19.1 Tenant may not assign this Least or sublet all or an part of the premises at any time during the term hereof, except with the prior written consent of Landlord, which consent shall not be unreasonably withheld. Tenant shall give Landlord thirty (30) days notice of Tenant's intent to assign or sublet and shall give the name of the Tenant who shall occupy the space end use proposed by said Tenant, as well as reasonable financial information about the proposed Tenant that Landlord may require, Landlord shall have thirty (30) days after receipt of said notification Landlord's election to permit the assignment or subletting, deny the assignment or subletting, or to cancel this Lease in the event of a proposed assignment or subletting. If Landlord elects to cancel the Lease, Tenant shall have the right to withdraw the assignment or sublease within five (5) days of receipt of notice of termination, in which case this Lease shag continue in full force and effect. Failure of Landlord to give notice to Tenant of approval of a sublease or assignment within said time period shall constitute a denial of consent to Tenant, If Landlord permits Tenant, by written consent or by operation of this article, to make such assignment or subletting, Tenant shall remain responsible for the faithful

performance of all the covenants, terms and conditions hereof on Tenant's part to be performed.

## 20. QUIET ENJOYMENT.

20.1 Tenant, on paying the rent and performing the covenants of this Lease on this Lease on Tenant's part to be performed, may peaceably and quietly have, hold and enjoy the premises for the term of this Lease

## 21. VENUE.

21.1 The venue for any action shall be in the Supreme Court of the State of New York or lower court of competent jurisdiction, County of Westchester or Rockland, without regard to principles of conflicts of laws.

## 22. GOVERNING LAW.

22.1 This Agreement shall be governed by and construed under and pursuant to the laws of the State of New York, without regard to principles of conflicts of laws.

## 23. SUBORDINATION AND NON-DISTURBANCE.

23.1 Tenant agrees that this Lease is subordinate to any mortgage or mortgages that now are or hereafter may be placed upon the demised premises and to any and all advances to be made there under and to the interest thereon and all renewals, replacements, consolidations and extensions thereof, and Tenant shall

execute such further instrument or instruments as shall be reasonably requested by Landlord to effectuate the foregoing. Failure by Tenant to so cooperate shall be deemed to be a default pursuant to the (emu of this Agreement.

23.2. In order to effectuate the subordination provisions of the Agreement of Lease, the Tenant hereby grants to Landlord a limited Power-of-Attorney coupled with an interest authorizing Landlord to execute any and all subordination documents requested by Landlord's mortgages both existing as of the date of this Agreement of Lease and any such mortgages of the premises in the future. This paragraph shall be deemed to be self-operating and landlord and Tenant acknowledge that any and all mortgages of the premises may rely upon said Power-of-Attorney.

## 24. RULES AND REGULATIONS.

24.1 Tenant shall abide by and observe such reasonable rules or regulations as may be promulgated from time to time by Landlord for the operation, safety, security and maintenance of the premises, provided that the same are in conformity with common practice and usage in similar buildings, are not inconsistent with the provisions of this Lease or the leased premises, and a copy thereof is sent to Tenant.

## 25. FLOOR LOAD, NOISE AND FURNISHINGS.

25.1 Tenant shall not place a load upon any floor of the premises which exceeds the load per square foot which such floor was designed to carry and which is allowed by law.

25.2 Business and other machines and mechanical equipment belonging to the Tenant which cause noise or vibration that may be transmitted to the structure of the building or to the premises to such a degree as to be objectionable to Landlord or other tenants in the building or area, shall be placed and maintained by the party owning the machines or equipment, at such party's expense, in setting of cock, rubber or spring-type vibration eliminators sufficient to eliminate noise or vibration.

25.3 To the extent reasonably possible, Tenant's improvements, alterations, equipment, furnishings and fixtures, shall be of non-combustible and non-toxic materials.

## 26. SECURITY SYSTEM.

26.1 Tenant shall maintain any security and fire alarm systems as are located in said premises and shall make all repairs to and monthly maintenance payments for said systems as same are required.

## 27. OPERATING EXPENSES.

27.1 Tenant will be responsible for all operating expenses associated with maintenance of the Premises.

## 28. LAWS AND ORDINANCES, ENVIRONMENTAL COMPLIANCE.

28.1 Tenant shall, at Tenant's expense, comply with all laws, orders, ordinances and regulations of federal, state, county and municipal authorities and with any direction made pursuant to law of any public officer or officers which shall, with respect to the occupancy, use or manner of use of the premises, or to any abatement of nuisance, impose any from violation, order or duty upon Landlord or Tenant arising from Tenant's occupancy, use or manner of use of the premises or any installations made therein.

28.2 Tenant shall be responsible for and shall comply with all laws, rules, regulations or orders of any governmental authority having jurisdiction over the premises with respect to the abatement, removal, disposal or containment of Hazardous Substances (hereinafter defined) in or on the premises to the extent that such Hazardous Substances were brought upon or introduced to the premises by Tenant or Tenant's agents, contractors or employees. Tenant shall indemnify and hold Landlord harmless from and against any and all cost, claims, suits, causes or action, losses, injury or damage (including, without limitation. Attorney's fees, costs and expanses) resulting from Tenant's liability and such indemnity shall survive the expiration or earlier termination of this Agreement of Lease.

28.3 As used herein, "Hazardous Substances" shall mean any hazardous wastes, hazardous and toxic substances or related materials, asbestos, polychlorinated

biphenyis or any other substance or material as defined by any federal, state or local environmental law, ordinance, rule or regulation including, without limitation, the comprehensive Environmental Response Compensation and Liability Act, as amended, the Hazardous Materials Transportation Act, as amended, 42 U.s .CA. Section 9601 (subparagraph 14) and any regulations adopted and publications promulgated pursuant to each of the foregoing.

## 29. RIGHT TO SHOW PREMISES.

29.1 During the six (6) months prior to the expiration of the term of this Lease, or during the six (6) months after Tenant gives notice of Intent to terminate the lease, Landlord may exhibit the premises to prospective tenants and/or purchasers, subject to giving reasonable advance notice to Tenant.

## 30. BROKER.

30.01. The parties hereto agree that NO BROKER brought about this Lease.

## 31. NON-WAIVER

31.1 Failure to insist upon strict compliance-with any of the terms, covenants or conditions shall not be deemed a waiver of such terms, covenants or conditions nor shall any waiver or relinquishment of any tights or powers hereunder at any one time or more

times be deemed a waiver or relinquishment of such rights or powers at any other time or times.

## 32. ATTORNEYS FEES.

32.1 In the event of a violation of the terms of this Lose by the Tenant, Tenant shall be responsible for the Payment of any and all legal fees incurred by the Landlord to remedy the default or for the removal of the Tenant from the Premises.

## 33. COUNTERPARTS.

33.1 This Agreement maybe executed in any number of counterparts, each of which shall be deemed an original, and all which together shall be deemed on instrument.

## 34. BASEMENT STORAGE.

34.1 The Tenant acknowledges that be his no right to storage in any part of the Landlord's Premises that is not conveyed in Ibis Lease.

## 35. DISTURBANCE DUE TO CONSTRUCTION.

35.1 Tenant acknowledges that the building in which the premises are located is in the process of being renovated by the Landlord and therefore, Tenant waives any and all claims of disturbance, interference, annoyance or inconvenience created by the renovations. Landlord will make reasonable attempts to limit any

disturbance, interference, annoyance or inconvenience created by renovations.

## 36. ENVIRONMENTAL WARRANTIES AND COVENANTS

36.1 Warranties: The Tenant, being the former owner of the Premises and having conveyed the same to the Landlord concurrent with the execution of this Lease, makes the following representations and warranties: to the best of Tenant's knowledge: (i) Tenant is in compliance in all respects with all applicable federal, state and local laws and regulations, including, without limitation, those relating to toxic and hazardous substances and other environmental matters (the "Laws"), (ii) no portion of the Premises is being used for the disposal, storage, treatment, processing or other handling of any hazardous or toxic substances, in a manner not in compliance with the Laws, (iii) the soil and soy surface water and ground water which are a part of the Premises are free from any solid wastes, toxic or hazardous substance or contaminant and *any* discharge of sewage or affluent; and (iv) neither the federal government not the State of New York Department of Environmental Conservation or any other governmental or quasi-governmental entity has filed a lien on the Mortgaged Property, nor are there any governmental, judicial or administrative actions with respect to environmental matters pending, or to the best of the Tenants knowledge, threatened, which involve the Premises.

Tenant makes the following additional representations and warranties; Throughout the term of and any extensions of this Lease: (i) Tenant is in compliance in all respects with all applicable federal, state and local laws and regulations, including, without limitation, those relating to toxic and hazardous substances and other environmental matters (the "laws"), (ii) no portion of the Premises is being used for the disposal, storage, treatment, processing or other handling of any hazardous or toxic substances, in a manner not in compliance with the Laws, (iii) the soil and any surface water and ground water which are a part of the Premises are free from any solid wastes, toxic or hazardous substance or contaminant and any discharge of sewage or affluent and (iv) neither the federal government not the State of New York Department of Environmental Conservation or any other governmental or quasi-governmental entity has filed a lien on the Mortgaged Property, nor are-there any governmental, judicial or administrative actions with respect to environmental miners pending, or to the best of dm Tenant's knowledge, threatened, which involve the Premises.

36.2 Agreement to Comply: If any environmental contamination is found on the Premises for which any removal or remedial action is required pursuant to Law, ordinance, order, rule, regulation or governmental action, Tenant agrees that it will at its sole cost and expense taken such removal or remedial action promptly and to Landlord's satisfaction.

36.3 Indemnification: Tenant agrees to defend, indemnify and hold harmless Landlord, its employees, agents, officers and directors' from and against any claims, actions demands, penalties, fines, liabilities, settlements, damages, costs or expenses (including, without limitation, attorney and consultant fees, investigations and laboratory fees, court-costs and litigation expenses of whatever kinder nature known or unknown contingent or otherwise arising out of or in any way related to: (i) disposal, release or threatened releases of any hazardous or toxic substances co the Premises; (ii) any personal injury (including wrongful death or property damage, real or personal) arising out of or related to such hazardous or toxic substances; (iii) any lawsuit brought or threatened, settlement reached or government order given relating to such hazardous or toxic substances; and/or (iv) any violation of any law, order, regulations, requirement, or demand of any government authority, or any policies or requirements of Landlord, which are based upon or in any way related to such hazardous or toxic substances.

36.4 Other Sites: Tenant knows of no on-site or off-site locations where hazardous or toxic substances from the operation of the facility on the Premises have been stored, treated, recycled or disposed of.

36.3 Leases: Tenant agrees not to sublease of the Premises to a subtenant whose operations may result in contamination of the Premises with hazardous or toxic substances.

36.6 Non-operation by Landlord: Tenant acknowledges that any action Landlord takes under this Lease shall be taken to protect Landlord's interest only; Landlord dots not hereby intend to be involved in the operations of the Tenant.

36.7 Compliance Determinations: Tenant. acknowledges that any determinations Landlord makes under this Section regarding compliance with environmental laws shall be made for Landlord's benefit only and are not intended to be relied upon by any other party.

36.8 Survival of Conditions: The provisions of the is section shall be in addition to any other obligations and liabilities Tenant may have to Landlord at common law, and shall survive the transactions contemplated herein.

IN WITNESS WHEREOF, this agreement of Lease has been duly executed by the parties hereto on the of December, 2012.

SIGNATORIES:

WITNESSED BY: FOR THE LANDLORD:
~~TAMARA LANE INC.~~

_____ By: _____

WITNESSED BY: FOR THE TENANT:
~~FMB REALTY, INC.~~

_____ By: _____

The obligation of the Tenant herein are hereby personally guaranteed by the undersigned:

WITNESSED BY:

_____ /s/ Robin Robinson
~~FRANK [Illegible]~~, Robin H. Robinson, Guarantor

_____ /s/ Robin H. Robinson
Robin H. Robinson, Guarantor

_____ /s/ Anthony Fogler
Anthony Fogler, Guarantor

_____ /s/ Daniel DeHaven
Daniel DeHaven, Guarantor

**OPTION TO PURCHASE**
**REAL ESTATE AGREEMENT**

This Lease to Purchase Option Agreement ('Option to Purchase Agreement') is made on December 2, 2013 between RRJR, LLC and Robin M. Robinson (the "Buyers-Tenants') and Fine Housing, Inc. (Sellers-Landlords)

**WHEREAS**, Seller/Landlord is/are the fee owner of certain real property being, lying and situated in Charleston County, South Carolina, such real properties having addresses of 2470 Sol Legare Road, Charleston, SC 29412 and 2028 Pittsburgh Ave., North Charleston, SC 29405. And TMS Nos. of 3300800007 (Sol Legare) and 4661600011 (Pittsburgh)

**WHEREAS**, Seller/Landlord and Buyer/Tenant have together executed a prior lease agreement, the subject of which Is the aforementioned Property (the "Lease Agreement").

**NOW, THEREFORE**, for and in consideration of the covenants and obligations contained herein and other good and valuable consideration, the receipt and sufficiency of which Is hereby acknowledged, Seller/Landlord hereby grants to Buyer/Tenant an exclusive option to purchase the aforementioned 'Property.' The parties hereto hereby agree as follows:

**1. OPTION TERM.** The option to purchase period commences on December 2, 2013 and expires at 11:59 PM November 30, 2016. The option to purchase must be exercised and the transaction completed on or

before the above date. Buyer must give notice in form of certified letter to Seller at his address.

**2. NOTICE REQUIRED TO EXERCISE OPTION.** To exercise the Option to Purchase, the Buyer/Tenant must deliver to the Seller/Landlord written notice of Buyer/Tenant's intent to purchase. In addition, the written notice must specify a valid closing date. The closing date must occur before the original expiration date of the Lease Agreement, or the date of the expiration of the Option to Purchase Agreement designated In paragraph 1, whichever occurs later.

**3. OPTION CONSIDERATION.** As consideration for this Option to Purchase Agreement, the Buyer/Tenant shall pay the Seller/Landlord a non-refundable fee of $5.00, FIVE DOLLARS, receipt of which is hereby acknowledged by the Seller/Landlord. This amount shall be credited to the purchase price at closing. If Buyer fails to purchase this property within the time allowed, this entire deposit shall be treated as a security deposit and MAY be refunded minus the amount of damage Buyer leaves, save normal wear and tear.

**4. PURCHASE PRICE.** The total purchase price for the Property is $ONE MILLION ONE HUNDRED FIFTY THOUSAND DOLLARS ($1,150,000.00) The total price must be paid to purchase both properties. The Seller will not sell just one of the two properties. **None of the lease payments of 12,750 each month shall go to the purchase price listed here.**

**5. EXCLUSIVITY OF OPTION.** This Option to Purchase Agreement is exclusive and non-assignable and exists solely for the benefit of the named parties above. Should Buyer/Tenant attempt to assign, convey, delegate, or transfer this option to purchase without the Seller/Landlord's express written permission, any such attempt shall be deemed null and void.

**6. CLOSING AND SETTLEMENT.** Buyer shall determine the attorney's office at which settlement shall occur and shall inform Buyer/Tenant of this location in writing. Buyer/Tenant agrees that closing costs In their entirety, including any points, fees, and other charges required by the third-party lender, shall be the sole responsibility of Buyer/Tenant, exclusive of the previous sentence. The only expense related to closing costs apportioned to Seller/Landlord shall be the pm-rated share of the ad valorem taxes due at the time of closing, for which Seller/Landlord is solely responsible. Seller will also pay deed stamps and deed preparation. Seiler will provide a tax-proration for the tax bill of the year that Buyer purchases the property.

**7. FINANCING AVAILABILITY.** SELLER/LANDLORD MAKES NO REPRESENTATIONS OR WARRANTIES AS TO THE AVAILABILITY OF FINANCING REGARDING THIS OPTION TO PURCHASE. BUYER/TENANT IS SOLELY RESPONSIBLE FOR OBTAINING FINANCING IN ORDER TO EXERCISE THIS OPTION. FAILURE OF BUYER TO OBTAIN FINANCNING IN SPITE OF DILLIGENT EFFORTS TO DO SO DOES NOT ABSOLVE THE BUYER OF

ANY RESPONSIBILITES OR DUTIES IN THIS CONTRACT.

**8. FINANCING DISCLAIMER.** The parties acknowledge that it Is impossible to predict the availability of obtaining financing towards the purchase of this Property. Obtaining financing shall not be held as a condition of performance of this Option to Purchase Agreement The parties further agree that this Option to Purchase Agreement is not entered into in reliance upon any representation or warranty made by either party.

**9. REMEDIES UPON DEFAULT.** If Buyer/Tenant defaults under this Option to Purchase Agreement or the Lease Agreement, then in addition to any other remedies available to Seller/Landlord at law or in equity, Seiler/Landlord may terminate this Option to Purchase by giving written notice of the termination. If terminated, the Buyer/Tenant shall lose entitlement to any refund of rent or option consideration. For this Option to Purchase Agreement to be enforceable and effective, the Buyer/Tenant must comply with all terms and conditions of the Lease Agreement.

**10. COMMISSION.** No real estate commissions or any other commissions shall be paid in connection with this transaction.

**11. RECORDING OF AGREEMENT.** Buyer/Tenant shall not record this Option to Purchase Agreement on the Public Records of any public office without the express and written consent of Seller/Landlord. If this agreement is recorded, it will be null and void on

December 1, 2015 and any title searcher may ignore same as void if the property has not been sold to Buyers.

**12. ACKNOWLEDGMENTS.** The parties are executing this Option to Purchase Agreement voluntarily and without any duress or undue influence. The parties have carefully read this Option to Purchase Agreement and have asked any questions needed to understand its terms, consequences, and binding effect and fully understand them and have been given an executed copy, The parties have sought the advice of an attorney of their respective choice if so desired prior to signing this Option to Purchase Agreement.

**13. TIMING.** Time is of the essence in this Option to Purchase Agreement This option to purchase is complete and totally void if Buyer fails to close and fund its loan to purchase this property by November 30, 2015.

**14. GOVERNING LAW AND VENUE.** This Option to Purchase Agreement shall be governed, construed and Interpreted by, through and under the Laws of the State of South Carolina. The parties further agree that the venue for any and all disputes related to this Option to Purchase shall be Dorchester County, South Carolina.

**15. OPTION TO PURCHASE CONTROLLING.** In the event a conflict arises between the terms and conditions of the Lease Agreement and the Option to Purchase Agreement, the Option to Purchase Agreement shall control.

**16. ENTIRE AGREEMENT; MODIFICATION.** This document sets forth the entire agreement and understanding between the parties relating to the subject matter herein and supersedes all prior discussions between the parties. No modification of or amendment to this Option to Purchase Agreement nor any waiver of any rights under this Option to Purchase Agreement, will be effective unless in writing signed by the party to be charged.

SELLER/LANDLORD:

/s/ Vincent DeStaso

/s/ Vincent DeStaso 12/3/13
FINE HOUSING, LLC

BY: Vincent DeStaso

Its: pres.

Before me personally appeared the undersigned witness and made oath that he-she saw the within named Seller-Landlord sign, seal and as his act and deed deliver the within document and that he-she with the other witness witnessed the execution thereto.

Joseph Kowalchuk Sr.
Notary Name Printed

[Illegible]
Notary Signature

Frank Savino 12/3/13
Witness Signature

Commission expires: 12/2/14

[Stamp Omitted]

BUYER/TENANT:

/s/ [Illegible] /s/ Robin Robinson
RRJR, LLC

/s/ William H. Sloan

BY:

Its:

Before me personally appeared the undersigned witness and made oath that he-she saw the within named Buyer-Tenant sign, seal and as his act and deed deliver the within document and that he-she with the other witness witnessed the execution thereto.

William H. Sloan — William H. Sloan
Notary Name Printed — Notary Signature

William H. Sloan — [Illegible]
Witness Signature

Commission expires: 6/14/2015

[Stamp Omitted]

BUYER/TENANT:

/s/ [Illegible] /s/ Robin Robinson
ROBIN M. ROBINSON

/s/ William H Sloan

BY: :Robi

Its:

Before me personally appeared the undersigned witness and made oath that he-she saw the within named Buyer-Tenant sign, seal and as his act and deed deliver

the within document and that he-she with the other witness witnessed the execution thereto.

| | |
|---|---|
| William H. Sloan | William H. Sloan |
| Notary Name Printed | Notary Signature |
| William H. Sloan | [Illegible] |
| | Witness Signature |

Commission expires: 6/14/2015

[Stamp Omitted]

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Legal Description A

All that piece, parcel or lot of land, together with the buildings and improvements thereon, situate, and lying and being in Charleston County, James Island, known in the present street numbering is 2347 Sol Legare Road, one of said tracts being lettered X containing .20 acres, the other tract containing 3.18 acres, all as is more fully shown on a plat named, "PLAT OF GENERAL SURVEY OF NO. 23447 SOL LEGARE ROAD AND PARCEL x OWNED BY ADOLPH G HOLLINGS, JAMES ISLAND 3.38 ACRES TOTAL TMS 330.08-00-07" WHICH plat is recorded in the RMC Office for Charleston County Book M-239, Page 141. The plat was written by W.L. Gaillard dated September 1, 1993, revised February 24, 1994.

Also, all of the Seller's rights (title not insured) in and to that certain marsh shown on said plat containing 2.00 acres, the eastern boundary line of said marsh measuring 275' and having the following metes S33

degrees, 24'50" the western boundary line of said marsh measuring 180' and having the metes N00 degrees, 15'00" E.

Being the same premises conveyed to Fine Housing, Inc. by deed of RRJR, LLC, dated December 2, 2013 and recorded simultaneously herewith at the RMC Office for Charleston County.

TMS No. 3300800007

Property Address 2470 Sol Legare Road, Charleston, SC 29412

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Legal Description B

All that piece, parcel or lot of land, together with the buildings and improvements thereon, situate, lying and being in Charleston County and being designated as "Tract A, 1.610 acres, Property of Group Investment Company, Inc. TMS No. 466-16-00-011 on a plat entitled "Plat Showing TMS 466-16-00-011" being subdivided into Tracts AB and AB1, property of Group Investments Company, Inc., located North Charleston Public Service District, Charleston County, SC" made by David and Floyd, Inc., dated January 19, 1989, and recorded in the RMC Office for Charleston County in Plat Book CE, Page 116; said tract having such size, shape, dimensions, buttings, boundings and borders as will be referenced to said plat more fully and at large appear.

Being the same premises conveyed to Fine Housing, Inc. by deed of RRJR, LLC, dated December 2, 2013 and recorded simultaneously herewith at the RMC Office for Charleston County.

TMS NO. 4661600011

Property Address: 2028 Pittsburgh Ave., North Charleston, SC 29405

| | |
|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF CHARLESTON<br>Barry Clarke,<br>Plaintiff,<br>v.<br>Fine Housing, Inc. and RRJR, LLC,<br>Defendants. | IN THE COURT OF COMMON PLEAS<br>NINTH JUDICIAL CIRCUIT<br>CASE NO. 2015-CP-10-03038<br>**FINE HOUSING, INC.'S RESPONSE TO PLAINTIFF'S FIRST REQUEST FOR ADMISSION** |

**TO: ASHLEY G. ANDREWS, ESQUIRE AND THOMAS R. GOLDSTEIN, ESQUIRE, ATTORNEYS FOR THE PLAINTIFF:**

Pursuant to Rule 26 and 36 of the South Carolina Rules of Civil Procedure, the Defendant Deborah P. McCaskill ("Defendant"), by and through its undersigned counsel, hereby responds to the Plaintiff's First Set of Request for Admission as follows:

**RESPONSE TO REQUESTS FOR ADMISSION**

1. Admit that no shareholder, director, employee, attorney, or agent of Fine Housing, Inc. notified Barry Clarke of Fine Housing, Inc.'s intent to purchase 2028 Pittsburg Avenue, N. Charleston, SC 29405 from RRJR, Inc. on or before taking title to said property on December 2, 2015.

**Answer: Admitted.**

/s/ W. Cliff Moore
W. Clliff Moore, III
(SC Bar No. 4067)
Adams and Reese LLP
PO Box 2285
Columbia, SC 29202
P: 803-254-4190
F: 803-779-4749
cliff.moore@arlaw.com
Attorney for Defendant
Fine Housing, Inc.

November 9, 2016
Columbia, South Carolina