

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CvS 5938

ESSA COMMERCIAL REAL ESTATE,)
INC.,)
)
Plaintiff,)
)
v.)
)
FIVE TREES, LLC, KEITH)
CANDIOTTI, and MARK WALKER,)
)
Defendants.)

FIVE TREES, LLC'S BRIEF IN
SUPPORT OF MOTION TO DISMISS

NOW COMES Defendant Five Trees, LLC ("Five Trees"), by and through its undersigned counsel, pursuant to Rules 9(b), 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure and other authority contained herein and submits the following brief in support of its Motion to Dismiss Plaintiff's Complaint in its entirety. Five Trees hereby incorporates by reference the arguments contained in Defendant Keith Candiotti's brief as if fully set forth herein.

INTRODUCTION¹

Sometime in 2003, Fred Rubenstein and his wife approached Plaintiff Essa Commercial Real Estate, Inc. ("Essa" or "ECRE") for assistance in developing a piece of real property located on Battleground Avenue in Greensboro, North Carolina (the "Property"). (Complaint at ¶ 6, attached as **Exhibit A**). On April 5, 2004, Fred Rubenstein and his son, Jeff Rubenstein, (collectively, the "Rubensteins") entered into a contract with Essa for the development of the Property. (Complaint at ¶ 15, at **Exhibit A**; Arbitration Award at p. 2, ¶ 8, attached as **Exhibit B**). Defendants Keith Candiotti ("Candiotti") and Mark Walker ("Walker") became involved

¹ Citations to allegations contained in Essa's complaints are not intended and should not be deemed an acknowledgement or admission by Five Trees of the truth of such allegations.

with the development of the Property sometime in 2004. (Complaint at ¶ 13, at **Exhibit A**). Five Trees was formed on November 5, 2004. Essa's efforts to develop the Property ultimately failed, resulting in four lawsuits and an arbitration.

PROCEDURAL HISTORY

The first lawsuit was filed on or about March 23, 2005, by Five Trees against Essa as a result of damages Five Trees sustained due to Essa's failure to develop the Property. In that lawsuit, Essa filed a motion to compel Five Trees to arbitrate pursuant to the April 5, 2004 Project Consulting Agreement. (See "Order" filed September 15, 2005 in Guilford County Action 05 CvS 5112, attached as **Exhibit C**). Finding that Five Trees was not a party to the Project Consulting Agreement and had never agreed to arbitrate, on September 7, 2005, the Honorable Lindsay R. Davis, Jr. denied Essa's motion to compel Five Trees to arbitrate. (*Id.*). That lawsuit was ultimately voluntarily dismissed.

The second lawsuit was filed on or about July 11, 2005, by Essa against the Rubensteins, Guilford County Action 05 CvS 7847. In that lawsuit Essa sought an order directing the Rubensteins to arbitrate "the issues between the parties as provided in the Project Consulting Agreement." (See Order at **Exhibit C**.) Essa and the Rubensteins ultimately held an arbitration before former Superior Court Judge, Peter M. McHugh (the "Arbitration"). (Complaint at ¶ 51, at **Exhibit A**). Essa served a Complaint in the arbitration proceeding upon counsel for the Rubensteins and the arbitrator. (A copy of the "Arbitration Complaint" is attached as **Exhibit D**). After a six day hearing, the arbitrator issued a five page Arbitration Award, which contained detailed findings of fact and conclusions of law. (Complaint at ¶ 52, at **Exhibit A**; Arbitration Award at **Exhibit B**). On October 4, 2006, the Arbitration Award was confirmed and judgment entered by the Honorable John W. Smith, II. (A copy of the Order Confirming Arbitration

Award and Judgment (“Judgment”) is attached as **Exhibit E**). Thereafter, Essa and the Rubensteins entered into a Settlement Agreement & Release in which Essa compromised the amount of the Judgment obtained through Arbitration. (A copy of the Settlement Agreement & Release is attached as **Exhibit F**).

The third lawsuit was filed on November 4, 2005, by Essa against Five Trees, Guilford County Action 05 CvS 11265. The complaint in that lawsuit was virtually identical to the Arbitration Complaint. On March 5, 2007, Essa filed a Notice of Voluntary Dismissal Without Prejudice of that lawsuit. (A copy of the Notice of Voluntary Dismissal is attached as **Exhibit G**).

This lawsuit, the fourth between Essa, Five Trees and/or the Rubensteins, was filed on April 27, 2007. As discussed in detail below, the allegations of the Complaint in this lawsuit are virtually identical to the allegations contained in the Arbitration Complaint. In fact, with the exception of a claim for declaratory relief and recovery of the Arbitration Award, the purported claims in this lawsuit are identical to the claims asserted in the Arbitration.

FACTUAL ALLEGATIONS

Although Five Trees, Candiotti and Walker were not parties to the Arbitration, this lawsuit is based on the exact same dispute that was addressed in the Arbitration. (A “Comparison” of the Arbitration Complaint and the Complaint in this lawsuit is attached as **Exhibit H**). Specifically, Essa contends that in the fall of 2003 it was approached by Fred Rubenstein and his wife about the construction, development and management of a retail shopping center in Greensboro. (Arbitration Complaint at ¶4, at **Exhibit D**; Complaint at ¶ 6, at **Exhibit A**). On November, 4, 2003, Essa entered into a Project Consulting Agreement and Listing Agreement with the Rubensteins to act as the exclusive project consultant until the

completion of the project in December 30, 2005. (Arbitration Complaint at ¶¶6, 7, at **Exhibit D**; Complaint at ¶¶ 8, 9, at **Exhibit A**).

Essa approached Defendants Walker and Candiotti about investing in the project, which they ultimately did. (Arbitration Complaint at ¶¶11-12, at **Exhibit D**; Complaint at ¶¶ 12, 14, at **Exhibit A**). After Five Trees was incorporated on November 5, 2004, the Rubensteins, Walker and Candiotti transferred their interests in the project to Five Trees, with the Rubensteins continuing to act as principals and/or agents of Five Trees. (Arbitration Complaint at ¶¶13-14, at **Exhibit D**; Complaint at ¶¶ 18-19, at **Exhibit A**). Essa further alleges that Five Trees, the Rubensteins, Walker and Candiotti sought to eliminate Essa from the project to keep the profits and avoid paying Essa. (Arbitration Complaint at ¶ 19, at **Exhibit D**; Complaint at ¶ 24, at **Exhibit A**).

In both the Arbitration and this Lawsuit, Essa purports to assert claims for breach of contract, unjust enrichment, fraud and unfair and deceptive trade practices (Complaint at ¶¶ 28-48, at **Exhibit A**; Arbitration Complaint at ¶¶ 27-47, at **Exhibit D**). The arbitrator ruled that the above allegations established nothing more than a breach of contract claim against the Rubensteins. (Arbitration Award at **Exhibit B**). For the reasons stated below, North Carolina law will not permit Essa to relitigate the same dispute, based upon the same injury, which was resolved by the Arbitration and for which Essa has recovered a judgment in full satisfaction of all alleged injuries.

ARGUMENT

I. ESSA LACKS STANDING TO BRING THIS LAWSUIT.

Dismissal of an action is appropriate under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure if the Court lacks subject matter jurisdiction. A court lacks subject matter

jurisdiction if the plaintiff does not have standing. Woodring v. Swieter, ___ N.C. App. ___, 637 S.E.2d 269, 274 (2006). Whether a plaintiff has standing is a question of law to be decided by the Court. State v. Prevette, 39 N.C. App. 470, 250 S.E.2d 682, 684 (1979). In deciding a motion to dismiss for lack of standing, the Court is not bound by the pleadings and may consider any evidence to resolve factual disputes concerning the existence of jurisdiction to hear the action. Cline v. Cline, 92 N.C. App. 257, 264, 374 S.E.2d 462, 466 (1988).

Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter. Woodring, ___ N.C. App. ___, 637 S.E.2d at 274. To have standing, the plaintiff must have “suffered a sufficiently concrete injury to justify the invocation of the judiciary’s remedial powers.” Cane Creek Conservation Authority v. Orange Water and Sewer Authority, 590 F.Supp. 1123, 1126 (M.D.N.C. 1984). North Carolina courts lack jurisdiction to hear an action unless the plaintiff can establish standing. Transcontinental Gas Pipe Line Corp. v. Calco Enterprises, 132 N.C. App. 237, 511 S.E.2d 671, 676 (1999). The Complaint and other documents attached hereto establish that Essa lacks standing to sue the Defendants in this lawsuit. See TWAM, LLC v. Cabarrus County Bd. Of Educ., 634 S.E.2d 641, 2006 WL 2671372 (N.C. App. Sept. 19, 2006) (unpublished) (affirming dismissal of complaint pursuant to Rules 12(b)(1) and 12(b)(6) on the basis of res judicata).

II. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Dismissal of a complaint under Rule 12(b)(6) is proper when one of the following three conditions are satisfied: (1) the complaint on its face reveals that no law supports plaintiff’s claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) some fact disclosed in the complaint necessarily defeats plaintiff’s claim.” Jackson v. Bumgardner, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986). Upon a motion to dismiss

pursuant to Rule 12(b)(6), the Court is not bound to accept unfounded legal conclusions contained within the complaint. Lloyd v. Babb, 296 N.C. 416, 427, 251 S.E.2d 843, 851 (1979) (for purposes of a 12(b)(6) motion, "the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of facts are not admitted"). For purposes of its 12(b)(6) motion, Five Trees requests that the Court take judicial notice of the attached Arbitration Complaint, Award, Judgment and other documents referred to in Essa's Complaint, which are attached hereto. See N.C. Rule of Evidence 201, N.C. Gen. Stat. § 8C-1 (2007) ("(b) A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. . . . (d) A court shall take judicial notice if requested by a party and supplied with the necessary information."); see also Coley v. North Carolina Nat'l Bank, 41 N.C. App. 121, 126, 254 S.E.2d 217, 220 (1979) (holding it proper on a 12(b)(6) motion for a trial court to consider documents that are the subject of the action and specifically referred to in the Complaint); Sun Chemical Trading Corp. v. CBP Resources, Inc., 2004 WL 1777582 (M.D.N.C. July 29, 2004) (unpublished) (taking judicial notice of arbitration award pursuant to Federal Rule of Evidence 201 in deciding motion to dismiss pursuant to 12(b)(6)). The Complaint and matters subject to mandatory judicial notice establish that the Complaint fails to state a valid claim for relief against the Defendants.

III. NORTH CAROLINA'S ONE SATISFACTION DOCTRINE BARS PLAINTIFF'S LAWSUIT IN ITS ENTIRETY.

North Carolina law holds that a plaintiff cannot recover more than one-satisfaction for the same injury, even if caused by different parties. See Sun Chemicals Trading Corp. v. SGS Control Services, Inc., 159 Fed. Appx. 459, 2005 WL 3403622 (4th Cir. Dec. 13, 2005) (unpublished) citing Holland v. Southern Public Utilities Co., Inc., 208 N.C. 289, 292, 80 S.E.

592, 593-94 (1935) and Chemimetals Processing, Inc. v. Schrimsher, 140 N.C. App. 135, 138, 535 S.E.2d 594, 596 (2000). Sun involved virtually identical facts to the facts of this case. Sun also cites relevant North Carolina law governing the single recovery doctrine.

In short, Sun and its principal shareholder (the “Sun Plaintiffs”) sued three different defendants for breach of contract, fraud, breach of warranty, unfair trade practices and infliction of emotional distress. Sun, 159 Fed. Appx. at 460. Sun had entered into a contract with two of the defendants, but not defendant SGS. The contract contained an arbitration clause. Id. Thus, the Sun Plaintiffs and the other two defendants agreed to arbitrate their claims. Id. SGS did not participate in the arbitration.

After conducting eight days of evidentiary hearings, the arbitrators issued a final award that addressed all claims and awarded the Sun Plaintiffs damages. Id. at 460-61. Sun then brought suit against SGS, alleging claims nearly identical to the claims asserted in the arbitration. Id. at 462. Affirming the dismissal of Sun’s complaint against SGS pursuant to 12(b)(6), the Fourth Circuit held that the complaint failed to state a claim because the arbitration award fully compensated the Sun Plaintiffs for all of their compensable injuries. Id. at 462.

As in Sun, Essa has obtained a judgment in Arbitration that fully compensates it for the same injury as alleged in this lawsuit. Even Essa admits that “[t]he Arbitration, which lasted approximately six (6) days, arose predominantly out of the same events and issues as exist in this pending action, and all but one of the members of the Partnership and Five Trees, Walker, testified therein.” (Complaint at ¶ 51 at **Exhibit A**). In fact, the Arbitration arose out of precisely the same events and involved the identical injury for which Essa seeks recovery in this lawsuit, albeit from different defendants. (See Comparison at **Exhibit H**); see also,

Chemimetals, 140 N.C. App. at 139, 535 S.E.2d at 596 (fact that one injury occurred is in no way altered by the fact that additional parties may have engaged in separate wrongdoing).

Essa's only injury is monetary loss caused by the alleged failure to receive payment for services related to the construction, development and management of a retail shopping center on Battleground Avenue in Greensboro, North Carolina. (Complaint ¶ 6, at **Exhibit A**; Arbitration Complaint at ¶ 4, at **Exhibit D**). The specific issue of whether the Rubensteins or Five Trees was responsible for paying for Essa's alleged services was raised by Essa through a claim for declaratory relief in the Arbitration, which stated in pertinent part:

22. Upon information and believe, the Rubensteins contend that they assigned any and all rights and obligations they had pursuant to the Agreement with ECRE to Five Trees.

23. Upon information and belief, Five Trees denies that it assumed the Agreements or that it received the benefits pursuant to the Agreements from ECRE; moreover, ECRE contends that the Rubensteins remain liable under the Agreements.

24. . . . there exists an actual controversy between ECRE and the Rubensteins relating to: (1) which parties are bound by the Agreements and (2) the respective rights and obligations of the parties under the Agreements.

(Arbitration Complaint at **Exhibit D**).

The arbitrator expressly ruled upon Essa's claim for declaratory relief and all other claims in the Arbitration Complaint, stating:

AWARDED AND DECREED

1. There exists an actual and justiciable controversy between Plaintiff Essa Commercial Real Estate, Inc. and the Defendants Fred Rubenstein and Jeff Rubenstein relating to: (1) Which parties are bound by the April 5, 2004 Project Consulting Agreement and (2) the respective rights and obligations of the parties under said Agreement.

7. This Award is in full satisfaction of all claims submitted to the Arbitrator. All claims not expressly granted herein are hereby denied.

(Arbitration Award at p. 5, at **Exhibit B**).

In this lawsuit, Essa again seeks payment for the exact same services based upon the exact same events for which it received full satisfaction in the Arbitration. (See Comparison at **Exhibit H.**) North Carolina law prohibits Essa from asserting another action to recover for the same losses from Defendants in this lawsuit. Chemimetals, 140 N.C. App. at 139, 535 S.E.2d at 597 (holding plaintiff could not assert second action to recover for losses for which it had previously been compensated by settlement agreement resolving first lawsuit). Therefore, Essa's Complaint must be dismissed pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. See Cane Creek, 590 F.Supp. at 1126 (Plaintiff lacks standing unless it can establish a concrete injury) and Sun, 159 Fed. Appx. at 464 (dismissing lawsuit pursuant to 12(b)(6) of Federal Rules of Civil Procedure based upon North Carolina's one satisfaction doctrine).

IV. THE ARBITRATION AWARD BARS THIS ACTION BASED UPON THE DOCTRINE OF RES JUDICATA .

The doctrine of res judicata applies to a judgment entered on an arbitration award the same as any other final judgment. Rodgers Builders, Inc. v. McQueen, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985). A judgment entered on an arbitration award is conclusive of all rights, questions and facts in issue, as to the parties and their privies, and acts as an absolute bar to a subsequent action arising out of the same cause of action or dispute. Id. The scope of an arbitration award and its res judicata effect are matters for judicial determination. Id. at 23, 331 S.E.2d at 730. Dismissal of a complaint based upon res judicata is appropriate under both Rule 12(b)(1) and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. TWAM, 634 S.E.2d

641, 2006 WL 2671372 (affirming dismissal of complaint pursuant to Rules 12(b)(1) and 12(b)(6) on the basis of res judicata).

Essa cannot seriously contend that the Arbitration did not raise the identical claims and issues as this lawsuit. (See Comparison at **Exhibit H**; Arbitration Award at **Exhibit B**). While Five Trees was not a party to the Arbitration, Essa alleged in the Arbitration and alleges in this lawsuit that Five Trees was in privity with the Rubensteins. For purposes of res judicata, the term privity has been defined as “a mutual or successive relationship to the same rights of property.” Leary v. Virginia-Carolina Joint Stock Land Bank, 215 N.C. 501, ___, 2 S.E.2d 570, 573 (1939).

The Arbitration specifically addressed the issue of whether Five Trees assumed all rights and obligations created by the Rubensteins. (Arbitration Complaint at ¶¶ 23, 24, at **Exhibit D**; Arbitration Award at p. 5, ¶¶ 1-7, at **Exhibit B**). For purposes of res judicata, Five Trees is in privity with the Rubensteins based upon Essa’s allegations that Five Trees is liable in this lawsuit for the same obligations imposed upon the Rubensteins in the Arbitration. (See Complaint at ¶¶ 19, 22, at **Exhibit A**; Arbitration Complaint at ¶¶ 22-24, at **Exhibit D**). Essa also alleges that the “Rubensteins continued thereafter to remain active in the Big Project as principals and/or agents of the Partnership and, later, Five Trees.” (Complaint at ¶ 19, at **Exhibit A**); See Leary, 215 N.C. at ___, 2 S.E.2d at 573 (When the relationship of two parties is analogous to that of principal and agent, master and servant or employer and employee, a judgment in favor of either acts as res judicata in an action by a third party).

This lawsuit is nothing more than an attempt to relitigate the identical dispute that was settled in the Arbitration. Thus, the Arbitration is res judicata. This lawsuit must be dismissed

pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. TWAM, 634 S.E.2d 641, 2006 WL 267137.

V. PLAINTIFF IS COLLATERALLY ESTOPPED FROM FURTHER LITIGATING THE ISSUES DECIDED IN THE ARBITRATION.

Collateral estoppel applies when: (1) the issues to be concluded in the present action are the same as in the prior action; (2) the issues were raised and litigated in the prior action; (3) the issues were material and relevant to the disposition of the prior action; and (4) the determination made of the issues in the prior action was necessary and essential to the judgment. Beckwith v. Llewellyn, 326 N.C. 569, 574, 391 S.E.2d 189, 191 (1990). Collateral estoppel is an absolute bar to further litigation of the issues previously decided. Murakami v. Wilmington Star News, Inc., 137 N.C. App. 357, 359, 528 S.E.2d 68, 69 (2000). The North Carolina Court of Appeals has expressly held that an arbitration proceeding in which the plaintiff's damages have been determined will collaterally estop the plaintiff from further litigating the issue of damages. Id. at 362, 528 S.E.2d at 71. Unlike the doctrine of res judicata, mutuality of parties is not an element of collateral estoppel. See Thomas M. McInnis & Assoc., Inc. v. Hall, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986) (holding that defendant who was not a party to prior lawsuit could assert collateral estoppel as a defense against a party that had previously had a full and fair opportunity to litigate and was merely seeking to reopen the identical issues with a new adversary).

The attached Comparison establishes without a doubt that not only was the issue of Essa's alleged damages determined by the Arbitration, but all of the other issues raised by the current lawsuit were determined in the Arbitration. (See Comparison at **Exhibit H**). For example, Essa sought recovery in the Arbitration for services allegedly provided with respect to "the construction, development and management of a retail shopping center to be located" in Greensboro, North Carolina. (Arbitration Complaint at ¶ 4, at **Exhibit D**; Complaint at ¶ 6, at

Exhibit A). Essa's claims in the Arbitration and this lawsuit are based upon a November 4, 2003 Project Agreement, (Arbitration Complaint at ¶ 6, at **Exhibit D**; Complaint at ¶ 8, at **Exhibit A**), Listing Agreement (Arbitration Complaint at ¶ 7, at **Exhibit D**; Complaint at ¶9, at **Exhibit A**) and an alleged modification of the Project and Listing Agreements (Arbitration Complaint at ¶ 9, at **Exhibit D**; Complaint at ¶ 15, at **Exhibit A**). Essa also previously sought recovery based upon the theory of unjust enrichment. (Arbitration Complaint at ¶¶ 23, 24, 30, at **Exhibit D**; Complaint at ¶¶ 22, 24, 31, at **Exhibit A**). The issue of Five Trees' liability for the Rubensteins' actions also has been raised and addressed. (Arbitration Complaint at ¶¶22, 24, at **Exhibit D**; Complaint at ¶ 19, at **Exhibit A**). Thus, the issue of damages and all other material issues raised in this lawsuit are identical to the issues raised in the Arbitration. (Comparison at **Exhibit H**).

The Arbitration Award clearly indicates that damages and all other material issues in the present lawsuit were litigated and ruled upon in the Arbitration. (Arbitration Award at **Exhibit B**). The validity of the agreements at issue, the amount of damages, the claim of unjust enrichment and the determination of which party was responsible under the above agreements were material and relevant to the Arbitration. (*Id.*) Finally, resolution of all these issues was necessary and essential to the Arbitration Award, upon which Judgment has been entered.

Essa has had the opportunity to fully litigate the issues raised in this lawsuit. Under the doctrine of collateral estoppel, Essa is barred from simply changing defendants and relitigating the same issues. *See Hall*, 318 N.C. at 434, 349 S.E.2d at 560 (no satisfactory rationalization exists for permitting one who has had his day in court to reopen identical issues by merely switching adversaries); *see also, In re McNallen*, 62 F.3d 619, 624 (4th Cir. 1995) (collateral estoppel "precludes relitigation of an issue decided previously in judicial or administrative

proceedings provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in an earlier proceeding). Given that Essa has already fully litigated the amount of its damages, the party responsible for payment of those damages, unjust enrichment, fraud and unfair trade practices arising out of the exact same factual allegations raised in this lawsuit, Essa is collateral estopped from relitigating those issue in this lawsuit.

VI. PLAINTIFF'S ELECTION TO SEEK RECOVERY FROM THE RUBENSTEINS PREVENTS IT FROM NOW SEEKING RECOVERY FROM FIVE TREES AND THE OTHER DEFENDANTS.

The election of remedies doctrine provides that prosecution of one remedial right to judgment is a conclusive election that bars the subsequent prosecution of inconsistent remedial rights. Pete Wall Plumbing Co. v. Harris, 266 N.C. 675, 686, 147 S.E.2d 202, 209 (1966). Under the election of remedies doctrine, any further suit is barred once the plaintiff makes its election, even if the plaintiff fails to secure full satisfaction through the first lawsuit. Id. Thus, an action that seeks a remedy inconsistent with the results of a prior action is properly dismissed. Harris, 266 N.C. at 686, 147 S.E.2d at 209; see also Howell v. Smith, 261 N.C. 256, 134 S.E.2d 381 (1964) (principle and agent are not jointly liable and party seeking damages cannot hold both liable, but must elect from which he will seek recovery).

In this case, Essa elected to seek recovery and obtained a judgment against the Rubensteins for the identical activities for which it now seeks to recover from Defendants. The Arbitration Award expressly found that a contract existed between Essa and the Rubensteins. (Arbitration Award at p. 4, ¶ 3, at **Exhibit B**). Essa's contract claim against the Defendants in this lawsuit is based upon the same agreements at issue in the Arbitration. (Comparison at **Exhibit H**). Moreover, Essa asserts that Five Trees is liable for the actions of the Rubensteins as it agents. (Complaint at ¶ 19, at **Exhibit A**). In fact, all of the claims Essa asserts in this lawsuit

are based upon the facts upon which Essa recovered in the Arbitration. (Comparison at **Exhibit H**); See Harris, 266 N.C. at 686, 147 S.E.2d at 209 (election of remedies doctrine applies whether the judgment is for or against plaintiff).

Essa had to elect from whom it would seek recovery for its alleged injury. Essa elected to seek recovery from the Rubensteins. Essa's prosecution of its claims to judgment against the Rubensteins bars Essa's claims against Defendants in this lawsuit. Therefore, under the election of remedies doctrine, this lawsuit must be dismissed. Harris, 266 N.C. at 686, 147 S.E.2d at 209 (granting defendant's compulsory motion for non-suit under the election of remedies doctrine).

CONCLUSION

Based upon the foregoing arguments and authorities, Plaintiff's Complaint must be dismissed in its entirety.

Respectfully submitted, this the 16th day of July, 2007.

/s/ J. Scott Hale

J. Scott Hale

N.C. State Bar No. 23402

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CERTIFICATION OF COMPLIANCE WITH WORD LIMITATION

Pursuant to Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court, I hereby certify that Five Trees, LLC's Brief in Support of Motion to Dismiss complies with the word limitation of Rule 15.8.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **FIVE TREES, LLC'S BRIEF IN SUPPORT OF MOTION TO DISMISS** was duly served upon counsel for Plaintiff in accordance with the provisions of Rule 5 of the North Carolina Rules of Civil Procedure by depositing it in the United States Mail, first-class postage prepaid, addressed as follows and by electronic mail by filing with the North Carolina Business Court:

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This the 16th day of July, 2007.

/s/ J. Scott Hale
J. Scott Hale

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ESSA COMMERCIAL REAL ESTATE, INC.

Plaintiff,

V.

FIVE TREES, LLC, KEITH
CANDIOTTI, and MARK WALKER

Defendants.

COMPLAINT
(Jury Trial Demanded)

1. Plaintiff Essa Commercial Real Estate, Inc. ("Plaintiff" or "ECRE") is a corporation organized and existing under the laws of the State of North Carolina and operating with its principal place of business in Guilford County.

3. Upon information and belief, Keith Candiotti ("Candiotti") is a citizen and resident of the State of Florida.

4. Upon information and belief, Mark Walker ("Walker") is a citizen and resident of the State of Florida.

5. Upon information and belief, Walker and Candiotti have sufficient contacts with the State of North Carolina for the assertion of *in personam* jurisdiction by the Courts of North Carolina.

6. In or about the fall of 2003, Fred and Susan Rubenstein approached ECRE and requested ECRE's assistance in the construction, development and management of a retail shopping center to be located in Greensboro, North Carolina (the "Initial Project").

7. Fred Rubenstein represented to ECRE that he had the financial ability to conduct such an undertaking, but that he required ECRE's knowledge and expertise.

8. On November 4, 2003, ECRE and Fred Rubenstein entered into a Project Consulting Agreement ("Project Agreement") whereby ECRE agreed to act as the exclusive project consultant until completion of the Initial Project, which was estimated to be December 30, 2005.

9. On November 4, 2003, ECRE and Fred Rubenstein also entered into an Exclusive Representation Agreement ("Representation Agreement") and a Listing Agreement of Property for Lease ("Listing Agreement") in which Fred Rubenstein granted ECRE the exclusive right to lease the Property and otherwise act as his agent until April 30, 2011.

10. Thereafter, ECRE began to provide valuable services towards the completion and success of the Initial Project.

11. In or about early 2004, the Rubensteins admitted to ECRE that they were struggling to meet the financial requirements of the Initial Project and the Agreements.

12. As a result of the financial condition of the Rubensteins and at their specific request, ECRE prepared detailed packages and met with prospective investors regarding the Initial Project, including, but not limited to Candiotti and Walker.

13. Upon information and belief, in or about April 2004, Candiotti and Walker agreed to partner with the Rubensteins in undertaking and completing the construction and development of the retail shopping center.

14. Both Candiotti and Walker represented to ECRE that they had the financial ability and willingness to undertake and complete the construction, development and management of a larger retail shopping center (the "Big Project") and to fulfill the terms of the Agreements.

15. On or about April 5, 2004, Fred Rubenstein, Jeff Rubenstein (collectively, "the Rubensteins") and ECRE entered into a new or modified Project Agreement, Representation Agreement and Listing Agreement (collectively referred to as the "Modified Agreements"). (Hereinafter, the Listing Agreement, Representation Agreement, Project Agreement and Modified Agreements shall be referred to collectively as the "Agreements.")

16. Thereafter, in reliance upon the representations of all Defendants, ECRE provided additional valuable services towards the completion and success of the Big Project.

17. Thereafter, ECRE continued, at the request of the Rubensteins, Walker and Candiotti (the "Partnership"), to provide valuable services pursuant to the Agreements and in addition thereto.

18. Upon information and belief, on or about November 5, 2004, the Rubensteins, Candiotti and Walker formally incorporated Five Trees with the North Carolina Secretary of State.

19. Upon information and belief, the Rubensteins transferred their interest in the Battleground properties, the Big Project and the Agreements to the Partnership and, subsequently, to Five Trees, although the Rubensteins continued thereafter to remain active in the Big Project as principals and/or agents of the Partnership and, later, of Five Trees.

20. Thereafter, ECRE continued, at the request of Defendants to provide valuable services to the Partnership and Five Trees pursuant to the Agreements and in addition thereto.

21. From time to time, the size of the retail center for which Essa was directed by Defendants to focus its efforts changed or shifted between a smaller, medium and larger-sized retail center.

22. At all times alleged herein, Defendants accepted the benefits of ECRE's services, made some payments to ECRE pursuant to the Agreements and, upon information and belief, otherwise assumed the rights and obligations of the Rubensteins under the Agreements.

23. As Essa's work towards the retail center proceeded, Defendants ceased making payments to ECRE for its services, although they received the benefits of ECRE's services.

24. Upon information and belief, Defendants formulated a scheme to use all of the valuable services (for which they had not yet fully paid), and sought to eliminate ECRE from the retail center so that they could keep all of the profits for themselves and avoid payments to ECRE.

25. In or about January of 2005, Defendants made additional misrepresentations to ECRE in furtherance of their Scheme. These misrepresentations included: (a) that Five Trees wanted to develop the smaller project first with ECRE, and then develop the larger project with ECRE soon after; and (b) that Five Trees accepted the obligations of a new agreement with ECRE.

26. On or about February 14, 2005, ECRE ceased work due to the failure and refusal of Defendants to pay money owed pursuant to the Agreements and for services rendered.

FIRST CLAIM FOR RELIEF
(Breach of Contract)

27. The allegations set forth in Paragraphs 1 through 26 of this Complaint are realleged and incorporated herein as if fully set out.

28. As alleged herein, Defendants breached the Agreements with ECRE by, among other things: (a) wrongfully and prematurely terminating the Agreements; and (b) failing to pay ECRE monies owed for services rendered.

29. As a result of Defendants' breach of contract, ECRE has suffered damages in excess of Ten Thousand Dollars (\$10,000.00) and is entitled to recover such damages from Defendants.

SECOND CLAIM FOR RELIEF
(Unjust Enrichment)

30. The allegations set forth in Paragraphs 1 through 29 of this Complaint are realleged and incorporated herein as if fully set out.

31. As alleged herein, ECRE has performed services for the benefit of Defendants pursuant to and in addition to those set out in the Agreements.

32. In performing such services, ECRE conferred a non-gratuitous benefit upon Defendants.

33. Defendants consciously accepted said benefits from ECRE, but have failed to pay or reimburse ECRE for said benefits and services.

34. As a result, Defendants have been unjustly enriched, and ECRE is entitled to recover from Defendants an amount in excess of Ten Thousand Dollars (\$10,000.00).

THIRD CLAIM FOR RELIEF
(Fraud)

35. The allegations set forth in Paragraphs 1 through 34 of this Complaint are realleged and incorporated herein as if fully set out.

36. Defendants deceived ECRE by means of false representations of material facts, concealment of material facts, or both (herein collectively called "misrepresentations").

37. Among other things, Defendants falsely represented to ECRE that:

- a. They had the financial ability and willingness to undertake the development and construction of a retail shopping center;
- b. ECRE would be the exclusive listing and managing agent for the retail shopping center;
- c. They would honor and uphold the Agreements entered into by the Rubensteins;
- d. Five Trees accepted the obligations of a new agreement with ECRE;
- e. They would enter into additional development projects with ECRE if ECRE would handle the Project; and
- f. They had contacts in the retail and development businesses.

38. The misrepresentations made by Defendants were reasonably calculated to deceive ECRE, and Five Trees intended to deceive ECRE or made such representations with reckless indifference as to their truth.

39. ECRE reasonably relied upon the false representations made by Defendants and was, in fact, deceived by the representations of Defendants.

40. ECRE could not have learned of the fraud of Defendants with due diligence.

41. ECRE suffered damages and continue to suffer damages as a result of the fraud of Defendants.

42. As a result of the fraud of Defendants, ECRE has suffered damages in excess of Ten Thousand Dollars (\$10,000.00).

43. The actions of Defendants as alleged herein were fraudulent and willful and wanton, and, therefore, ECRE is entitled to recover punitive damages from Defendants.

FOURTH CLAIM FOR RELIEF
(Unfair and Deceptive Trade Practices)

44. The allegations set forth in Paragraphs 1 through 43 of this Complaint are realleged and incorporated herein as if fully set out.

45. The acts of Defendants in the course of this transaction constitute unfair or deceptive acts or practices in or affecting commerce, in violation of N.C. Gen. Stat. § 75-1.1.

46. As a proximate result of the unfair or deceptive acts and practices of Defendants, ECRE has suffered damages in excess of Ten Thousand Dollars (\$10,000.00).

47. ECRE prays, pursuant to N.C. Gen. Stat. § 75-16, that any damages awarded by the Court be trebled.

48. Pursuant to N.C. Gen. Stat. § 75-16.1, ECRE prays for an award of attorney's fees upon the finding by the Court that the actions of Defendants constituted an unfair and deceptive trade practice.

FIFTH CLAIM FOR RELIEF
(Recovery of Arbitration Award)

49. The allegations set forth in Paragraphs 1 through 48 of this Complaint are realleged and incorporated herein as if fully set out.

50. On or about March 6, 2006, arbitration proceedings ("the Arbitration") were held before the Honorable Peter McHugh pursuant to N.C. Gen. Stat. § 1-569.7 and the April 5, 2004 Project Consulting Agreement by and between ECRE, Fred Rubenstein and Jeff Rubenstein.

51. The Arbitration, which lasted approximately six (6) days, arose predominantly out of the same events and issues as exist in this pending action, and all but one of members of the Partnership and Five Trees, Walker, testified therein.

52. At the conclusion of the Arbitration and after the submission of briefs by the parties, an award ("Arbitration Award") was entered in favor of ECRE in the amount of \$325,051.83 in liquidated damages arising out of the Project Consulting Agreement.

53. The Arbitration Award was confirmed by the Court and entered as Judgment on or about September 27, 2006.

54. ECRE is entitled to collect the Arbitration Award from Defendants.

WHEREFORE, Plaintiff ECRE prays that:

1. ECRE recover actual damages in an amount in excess of \$10,000.00 from Defendants, including, but not limited to, the Arbitration Award;
2. ECRE recover punitive damages in an amount in excess of \$10,000.000 from Defendants;
3. That any damages awarded pursuant to Chapter 75 be trebled;
4. The costs of this action, including reasonable attorneys' fees as allowed by law, be taxed against Defendants;
5. A trial by jury be had on all issues; and
6. The Court grant Plaintiff such other and further relief as the Court deems just and proper.

This the 27 day of April, 2007.

Amiel J. Rossabi/EM
Amiel J. Rossabi
Emily J. Meister
Emily J. Meister
Attorneys for Plaintiff

OF COUNSEL:

FORMAN ROSSABI BLACK, P.A.
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Greensboro, North Carolina 27404-1027
Telephone: (336) 378-1899

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

GUILFORD COUNTY

ARBITRATION PROCEEDING

ESSA COMMERCIAL REAL
ESTATE, INC.,

Plaintiff

vs.

FRED RUBENSTEIN and
JEFF RUBENSTEIN,

Defendants

ARBITRATION AWARD

This matter came on for hearing before the undersigned arbitrator on March 6, 2006 in Greensboro, North Carolina. The undersigned, having been designated in accordance with the Arbitration Agreement entered into between the above-named parties, and having been duly empanelled, has heard the proofs and allegations of the parties. The Plaintiffs and the Defendants presented evidence in the form of sworn testimony from Mr. Carl Essa, who testified on behalf of the Plaintiff, Mr. Fred Rubenstein and Mr. Jeff Rubenstein, the individual Defendants, and from various witnesses who testified on behalf of the Plaintiff and the Defendants, as well as documentary evidence. The undersigned has determined the admissibility, relevance, materiality and weight of the evidence. The undersigned has had the opportunity to see and observe each witness, and to determine the weight and credibility to be assigned to the testimony of each witness.

Based upon a consideration of all of the evidence presented, and a review of the records of this action, and after considering the arguments of counsel for Plaintiff and Defendants, and the Post-Hearing Briefs and Reply Briefs filed by counsel for Plaintiff and Defendants, the undersigned does hereby FIND AND AWARD as follows:

FINDINGS OF FACT

1. Plaintiff Essa Commercial Real Estate, Inc. is a corporation organized and existing under the laws of the State of North Carolina and operating with its principal place of business in Guilford County.



2. Defendant Fred Rubenstein is a citizen and resident of Guilford County, North Carolina

3. Defendant Jeff Rubenstein is a citizen and resident of Guilford County, North Carolina

4. During the fall of 2003 Defendant Fred Rubenstein approached Plaintiff Essa Commercial Real Estate, Inc. and requested the Plaintiff's assistance in the construction, development and management of a retail shopping center to be located on Battleground Avenue in Greensboro, North Carolina.

5. On November 4, 2003 Plaintiff and Defendant Fred Rubenstein entered into a Project Consulting Agreement whereby Plaintiff agreed to act as the exclusive project consultant until completion of the project, which was estimated to be December 30, 2005. The real property which was the subject of said Project Consulting Agreement was set out in said agreement as being "located at 2414 and 2410 Battleground Avenue in Greensboro, North Carolina for use as Retail Shopping Center Buildings" (Joint Arbitration Exhibit J-1).

6. Thereafter, Plaintiff Essa Commercial Real Estate undertook to render services in accordance with the terms of the Project Consulting Agreement of November 4, 2003

7. The Project Consulting Agreement of November 4, 2003 was subsequently modified.

8. On April 5, 2004 Plaintiff and Defendants Fred Rubenstein and Jeff Rubenstein entered into a Project Consulting Agreement whereby Plaintiff agreed to act as exclusive project consultant for a project to "construct buildings and prepare and develop land into income producing property located at or adjacent to those properties known as 2410, 2414, 2420, 2448, 2450, 2500, 2504 Battleground Avenue and 2605 Branchwood Drive and 2606A & B Branchwood Dive and 2801 Lawndale Drive in Greensboro, North Carolina (hereinafter, the "Property") (Joint Arbitration Exhibit J-4).

9. Paragraph 4 of the Project Consulting Agreement entered into by the Plaintiff and the Defendants on April 5, 2004 provided for the payment of a consulting fee of \$1,352,700 to be paid in equal monthly installments from May 1, 2004 (or an alternative commencement date which did not occur) until December 30, 2005.

10. During the summer of 2004 the Defendants experienced difficulty in meeting the financial requirements of the April 5, 2004 Project Consulting Agreement. Defendants did not pay monthly installments as provided for in Paragraph 4 of the Project Consulting Agreement. However, the Defendants did make payments of certain amounts, which were accepted and acquiesced in by the Plaintiff. From May 19, 2004 to December 9, 2004 Defendants paid \$184,684.51 to Plaintiff as consulting fees.

11. During the summer and fall of 2004 the Plaintiff conducted meetings with prospective investors in the project described in the April 5, 2004 Project Consulting Agreement. Said

prospective investors had been identified and contacted by the Defendants. During this period Plaintiff consulted with engineers, architects contractors and subcontractors in furtherance of the Project Consulting Agreement of April 5, 2004. Plaintiff also assisted the Defendants in attempting to secure bank financing for the development.

12. The Defendants failed to make certain payments due to the Plaintiff for services performed by Plaintiff pursuant to the Project Consulting Agreement of April 5, 2004.

13. On or about February 14, 2005, Plaintiff ceased work on the Project.

14. By paper writing dated February 14, 2005 and entitled "Termination Notice of April 5, 2004 Project Consulting Agreement", signed by Carl Essa and served upon Defendant Fred Rubenstein, Plaintiff terminated the Project Consulting Agreement of April 4, 2005 for failure by Defendants to make payments due pursuant to said contract.

15. Paragraph 5 of the Project Consulting Agreement of April 5, 2004 provides for the assessment of damages payable to the Consultant (Plaintiff) upon notice of termination. Said paragraph provides, inter alia, for the payment of a fee of \$324,648.00. In addition to said fee, Paragraph 5 further provides, as damages for breach, the payment of a portion of the agreed upon consulting fee of \$1,352,700.00, said portion being calculated according to a formula set out therein. Damages further are defined in Paragraph 5 as including all expenses incurred by the Consultant and not previously reimbursed by Owner (Defendants). Finally, Paragraph 5 provides as damages, in addition to all amounts set out above, the remainder of the consulting fee not previously paid by the Owner.

Based upon the foregoing Findings of Fact, the undersigned enters the following

FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Pursuant to the formula established in Paragraph 5 of the Project Consulting Agreement of April 5, 2004, Plaintiff herein asserts that it owed the sum of \$2,165,150.12

2. If Defendants had fully performed their obligations pursuant to the April 5, 2004 Project Consulting Agreement, Plaintiff would have been entitled to a payment of \$1,352,700.00.

3. The April 5, 2004 Project Consulting Agreement provides in Paragraph 5 that "Owner agrees that the damages and lost profits Consultant would suffer by reason of its termination of this Agreement are substantial and difficult to calculate, but that the sums outlined above represent a reasonable estimate of such damages that Consultant would suffer".

4. The damages assessed in Paragraph 5(a) and 5(c) of the April 5, 2004 Project Consulting Agreement are clear and unambiguous. Such damages reflect a good-faith effort to estimate in advance the actual damage from the breach of said Agreement. Such damages are valid and enforceable as liquidated damages.

5. The damages assessed in Paragraph 5(b) and 5(d) of the April 5, 2004 Project Consulting do not bear a logical relationship to any actual losses suffered by Plaintiff as a result of a breach of the Agreement.

6. Plaintiff has provided no credible explanation of why the assessment of damages provided for in Paragraph 5(b) and 5(d) represents a reasonable estimate of the loss actually experienced. The Plaintiff has failed to present evidence of any calculation performed when the Agreement was prepared to validate the formula. Plaintiff has failed to demonstrate a good faith effort to estimate in advance the actual damage would probably ensue from a breach.

7. The formula providing for a calculation of damages as set out in Paragraphs 5(b) and 5(d) does not yield a reasonable forecast of probable loss, and is not enforceable as liquidated damages. Said formula is an invalid penalty

Based upon the foregoing Further Findings of Fact and Conclusions of Law, the undersigned enters the following

CONCLUSIONS OF LAW

1. The April 5, 2004 Project Consulting Agreement is a valid and enforceable contract between the Plaintiff Essa Commercial Real Estate, Inc. and the Defendants Fred Rubenstein and Jeff Rubenstein.

2. The Defendants breached the April 5, 2004 Project Consulting Agreement

3. The existence of a valid written agreement between the parties precludes the Plaintiff's claim for unjust enrichment.

4. The conduct of the Defendants in breaching the contract with the Plaintiff does not, as a matter of law, constitute fraud.

5. The conduct of the Defendants in breaching the contract with the Plaintiff does not, as a matter of law, constitute unfair and deceptive trade practices.

6. The Defendants' obligations under the April 5, 2004 Project Consulting Agreement were not excused due to impossibility of performance.

7. The Defendants' obligations under the April 5, 2004 Project Consulting Agreement were not excused due to frustration of purpose.

8. The Agreement between the Plaintiff and the Defendants was not abandoned.

9. Defendants have failed to show fraud in the inducement of the Agreement.

10. The amount which Plaintiff seeks to recover pursuant to Paragraph 5(a) and 5(d) of the April 5, 2004 Project Consulting Agreement is valid and enforceable as liquidated damages.

11. The amount which Plaintiff seeks to recover pursuant to Paragraph 5(b) and 5(d) of the April 5, 2004 Project Consulting Agreement is a penalty and is invalid and unenforceable.

Now, therefore, it is

AWARDED AND DECREED

1. There exists an actual and justiciable controversy between Plaintiff Essa Commercial Real Estate, Inc. and the Defendants Fred Rubenstein and Jeff Rubenstein relating to: (1) Which parties are bound by the April 5, 2004 Project Consulting Agreement and (2) the respective rights and obligations of the parties under said Agreement.

2. It is hereby declared and decreed that Plaintiff Essa Commercial Real Estate, Inc. and the Defendants Fred Rubenstein and Jeff Rubenstein are bound by the terms of the April 5, 2004 Project Consulting Agreement.

3. It is hereby declared and decreed that the Defendants have breached the terms of said Agreement.

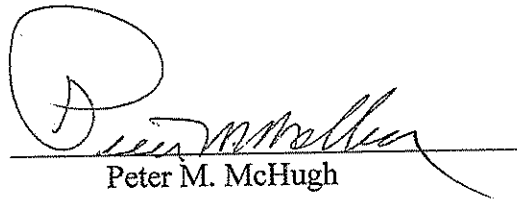
4. The Plaintiff shall have and recover of the Defendants Fred Rubenstein and Jeff Rubenstein, jointly and severally, the sum of \$324,648.00 as liquidated damages for breach of contract pursuant to Paragraph 5(a) of the April 5, 2004 Project Consulting Agreement.

5. The Plaintiff shall have and recover of the Defendants Fred Rubenstein and Jeff Rubenstein, jointly and severally, the sum of \$403.83 as liquidated damages pursuant to Paragraph 5(c) of the April 5, 2004 Project Consulting Agreement.

6. The compensation and expenses of the arbitrator shall be borne by the parties as required by the provisions of the Arbitration Agreement entered into between the parties.

7. This Award is in full satisfaction of all claims submitted to the Arbitrator. All claims not expressly granted herein are hereby denied.

This the 2nd day of August, 2006.


Peter M. McHugh
Arbitrator

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for all parties with a copy of the foregoing **AWARD** by depositing a copy of the same in the United States Mail in a properly addressed envelope with adequate postage thereon, in the manner prescribed by Rule 5 of the North Carolina Rules of Civil Procedure, addressed as follows:

Amiel J. Rossabi, Esq.
Forman Rossabi Black, P.A.
Post Office Box 41027
Greensboro, North Carolina 27404-1027

Mack Sperling, Esq.
Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P.
Post Office Box 26000
Greensboro, North Carolina 27420-6000

This the 2nd day of August, 2006.



ARBITRATOR

NORTH CAROLINA

GUILFORD COUNTY

FIVE TREES, LLC,

Plaintiff,

vs.

ESSA COMMERCIAL REAL ESTATE,
INC. and CARL ESSA,

Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
05 CVS 511205 SEP 15 PM 12:01
GUILFORD COUNTY S.S.C.BY *PC*

ORDER

THIS MATTER came on for hearing before the undersigned during the August 29, 2005 civil session of Superior Court of Guilford County (Greensboro), on the defendant's motion to stay action and compel arbitration. The Court extended the session and took the motion under advisement, to which the parties agreed.

This action was commenced on March 23, 2005. It arises out of the acquisition and efforts to develop real property located on and near Battleground Avenue, in Greensboro. The Second Amended Complaint alleges eight claims for relief:

Claim

- I Declaratory judgment that no contract exists between Essa Commercial Real Estate, Inc. (ECRE) and Five Trees, LLC (Five Trees).
- II ECRE's breach of a contract that obligates ECRE to perform duties including "finding leases for the proposed development, assisting in obtaining financing, and securing commitments from a builder and an architect . . ."
- III Declaratory judgment that a contractual provision purporting to require payment to ECRE of a termination fee is unenforceable as a penalty or forfeiture.

- IV "Money Owed" on account of ECRE's overbilling for services and expenses.
- V "Unjust Enrichment" for ECRE's overbilling for services and expenses.
- VI Rescission of agreements for fraud in the inducement.
- VII "Money Owed" for rents collected from tenants.
- VIII Conversion by ECRE of Five Trees money held in trust.
- IX "Money Owed" for ECRE's payment of its legal expenses with Five Trees' money.
- X Breach of Fiduciary Duty by ECRE and Carl Essa (Mr. Essa).

Claims II, III, V and VI are alleged in the alternative to Claim I.

Discussion

ECRE has moved to stay litigation in this action and for an order compelling arbitration.¹ ECRE has instituted a separate action ("Essa Commercial Real Estate, Inc. vs. Fred Rubenstein and Jeff Rubenstein," 05 CRS 7847-Guilford), purportedly pursuant to N.C.G.S. § 1-569.7, seeking an order directing Fred Rubenstein and Jeff Rubenstein (collectively, the Rubensteins) to arbitrate "the issues between the parties as provided in the Project Consulting Agreement."

Five Trees defends against the motion in this case on various grounds, including non-existence of an agreement to arbitrate and waiver. The latter is based on ECRE's prior attempt to obtain a temporary restraining order or order of attachment. Because the Court determines that ECRE has not

¹ The motion appears to invoke an agreement to arbitrate contained in a document entitled "Project Consulting Agreement" dated April 5, 2004 (the April 5, 2004 PCA), which the ECRE contends is a "modification" of the November 4, 2003 PCA. The motion further seeks an order compelling arbitration of disputes under both of these agreements, and a "Listing Agreement of Property for Lease" dated November 4, 2003 (the Listing Agreement), on grounds that any disputes under the November 4, 2003 PCA and the Listing Agreement "arise[] out of or relate[] to the [April 5, 2004 PCA]." Motion to Compel Arbitration, p. 3, para. 8.

shown existence of an agreement to arbitrate to which Five Trees is bound, the Court finds it unnecessary to consider other grounds.

With respect to ECRE's motion in this action, "[t]he question of whether a dispute is subject to arbitration is an issue for judicial determination. . . . This determination involves a two-step analysis requiring the trial court to 'ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether "the specific dispute falls within the substantive scope of that agreement."' See Revels v. Miss America Org., 165 N.C.App. 181, 188, 599 S.E.2d 54, 59, discr. review denied, 359 N.C. 191, 605 S.E.2d 153 (2004). The burden is on the movant. Id.

It is undisputed that the only agreement to arbitrate is contained in the April 5, 2004 PCA, and that Five Trees is not a signatory to that agreement. Under circumstances in which a nonsignatory has enjoyed or attempts to enjoy the benefits of a contract containing an arbitration provision, courts have bound them to the arbitration provision on the basis of equitable estoppel. See International Paper Co. v. Schwabedissen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000). The International Paper case involved the Federal Arbitration Act (FAA). The Court of Appeals cited it for the same proposition in LSB Fin. Serv., Inc. v. Harrison, 144 N.C.App. 542, 548-49, 548 S.E.2d 574, 579 (2001), also an FAA case.

More recently, the Court of Appeals quoted International Paper for that proposition: "[A] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it [is seeking or] receives a "direct benefit" from a contract containing an arbitration clause.'" See Ellen v. A. C. Schultes of Md., Inc., ___ N.C.App. ___, 615 S.E.2d 729, ___, 205 N.C.App. Lexis 1425, * (Aug. 2, 2005). In Ellen, the Court affirmed denial of a motion to compel arbitration, finding that it is not enough for estoppel to operate that the contract containing the arbitration clause forms part of the "factual foundation" for the nonsignatory's claims, distinguishing International Paper because there the nonsignatories' "entire case" hinged on the contract. Id. at *12.

Considering this discussion, the Court makes further findings and conclusions, as follows:

1. In this case, Five Trees claims (other than Claim I) clearly arise out of some business relationship with ECRE, but

it is not clear that these claims arise out of the April 5, 2004 PCA, the November 4, 2003 PCA, the Listing Agreement or some other contract implied in fact or law.

2. ECRE's arguments that the April 5, 2004 PCA is a modification of the November 3, 2003 PCA is not persuasive. The former is, if anything, a new agreement or novation.

3. The argument that any dispute under any agreement other than the April 5, 2004 PCA is subject to its terms, is also not persuasive.

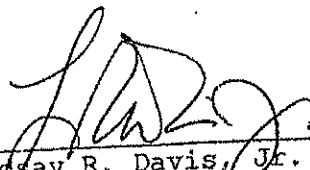
4. None of Five Trees' claims is peculiar to the April 5, 2004 PCA. Indeed, ECRE's responsibilities under that agreement and the November 4, 2003 PCA are essentially identical.

5. The situation presented here is analogous to that in Ellen, which the Court of Appeals found insufficient to show an estoppel to deny application of the arbitration clause.

6. ECRE has failed to show that the agreement to arbitrate in the April 5, 2004 applies, and it is unnecessary to address the question of the scope of the agreement.

NOW, THEREFORE, IT IS ORDERED that ECRE's motion to stay and to compel arbitration is denied.

This 1 day of September, 2005.



Lindsay R. Davis, Jr.
Superior Court Judge

STATE OF NORTH CAROLINA

ARBITRATION PROCEEDING

GUILFORD COUNTY

ESSA COMMERCIAL REAL
ESTATE, INC.

Plaintiff,

v.

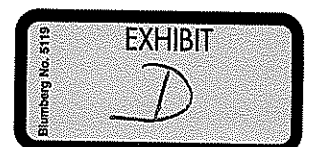
FRED RUBENSTEIN and JEFF
RUBENSTEIN,

Defendants.

COMPLAINT

Plaintiff Essa Commercial Real Estate, Inc., by and through its undersigned counsel, asserts for its Complaint against Fred Rubenstein and Jeff Rubenstein (collectively referred to as "the Rubensteins") as follows:

1. Plaintiff Essa Commercial Real Estate, Inc. ("Plaintiff" or "ECRE") is a corporation organized and existing under the laws of the State of North Carolina and operating with its principal place of business in Guilford County.
2. Upon information and belief, Fred Rubenstein is a citizen and resident of Guilford County, North Carolina.
3. Upon information and belief, Jeff Rubenstein is a citizen and resident of Guilford County, North Carolina.
4. In or about the fall of 2003, Fred Rubenstein and his wife, Susan Rubenstein, approached ECRE and requested ECRE's assistance in the construction, development and management of a retail shopping center to be located on Battleground Avenue in Greensboro, North Carolina (the "Project").



5. Fred Rubenstein represented to ECRE that he and his family had the financial ability to conduct such an undertaking, but that they required ECRE's knowledge and expertise.

6. On November 4, 2003, ECRE and Fred Rubenstein entered into a Project Consulting Agreement ("Project Agreement") whereby ECRE agreed to act as the exclusive project consultant until completion of the Project, which was estimated to be December 30, 2005.

7. On November 4, 2003, ECRE and Fred Rubenstein also entered into a Listing Agreement of Property for Lease ("Listing Agreement") in which Fred Rubenstein granted ECRE the exclusive right to lease the Property and otherwise act as his agent until April 30, 2011.

8. Thereafter, ECRE began to provide valuable services towards the completion and success of the Project.

9. The Listing Agreement and Project Agreement were subsequently modified on April 5, 2004, and signed by Fred and Jeff Rubenstein (copies of the Modified Agreements are attached hereto as Exhibits A and B, respectively).

10. In or about the summer of 2004, the Rubensteins admitted to ECRE that they were struggling to meet the financial requirements of the Project and the Modified Agreements.

11. As a result of the financial condition of the Rubensteins and at their specific request, ECRE, throughout the summer and into the fall, prepared detailed packages and met with prospective investors regarding the Project, including, but not limited to Keith Candiotti ("Candiotti") and Mark Walker ("Walker").

12. Both Candiotti and Walker represented to ECRE that they had the financial ability to undertake and complete the Project and to fulfill the terms of the Modified Agreements.

13. Upon information and belief, on or about November 5, 2004, the Rubensteins, Candiotti and Walker formed Five Trees.

14. After the incorporation of Five Trees, the Rubensteins represented to ECRE that they had transferred their interest in the Battleground properties, the Project and the Modified Agreements to Five Trees, although the Rubensteins continued thereafter to remain active in the Project.

15. In late 2004, Five Trees, the Rubensteins and ECRE negotiated and made further changes to the Modified Project Agreement (a copy of which is attached hereto as Exhibit C). (Hereinafter, the documents attached hereto as Exhibits A-C shall be referred to collectively as the Agreements.)

16. Thereafter, ECRE continued, at the request of Five Trees and the Rubensteins, to provide valuable services pursuant to the Agreements.

17. Five Trees and the Rubensteins accepted the benefits of ECRE's services and made some payments to ECRE pursuant to the Agreements.

18. As the work on the Project proceeded, Five Trees and the Rubensteins ceased making payments to ECRE for its services, although they acquired the benefits of ECRE's services.

19. Upon information and belief, Five Trees and the Rubensteins began to devise a way to use all of the valuable services (for which they had not yet fully paid), and sought to eliminate ECRE from the Project so that they could keep all of the profits for themselves and avoid payments to ECRE.

20. On or about February 14, 2005, ECRE ceased working on the Project due to the failure and refusal of Five Trees and the Rubensteins to pay money owed pursuant to the Agreements and for services rendered in connection with the Project.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment)

21. The allegations set forth in Paragraphs 1 through 20 of this Complaint are realleged and incorporated herein as if fully set out.

22. Upon information and belief, the Rubensteins contend that they assigned any and all rights and obligations they had pursuant to the Agreements with ECRE to Five Trees.

23. Upon information and belief, Five Trees denies that it assumed the Agreements or that it received benefits pursuant to the Agreements from ECRE; moreover, ECRE contends that the Rubensteins remain liable under the agreements.

24. Within the meaning of the provisions of the Uniform Declaratory Judgment Act, as the same exists in the State of North Carolina, N.C. Gen. Stat. §1-253 *et seq.*, there exists an actual controversy between ECRE and the Rubensteins relating to: (1) which parties are bound by the Agreements and (2) the respective rights and obligations of the parties under the Agreements.

25. ECRE seeks a declaratory judgment which declares and decrees that: (a) the Rubensteins are bound by the terms of the Agreements; (b) the Rubensteins have breached the terms of the Agreements; and (c) ECRE is in compliance with the terms and conditions of the Agreements.

SECOND CLAIM FOR RELIEF
(Breach of Contract)

26. The allegations set forth in Paragraphs 1 through 25 of this Complaint are realleged and incorporated herein as if fully set out.

27. As alleged herein, the Rubensteins breached the Agreements with ECRE by, among other things: (a) wrongfully and prematurely terminating the Agreements; and (b) failing to pay ECRE monies owed for services rendered.

28. As a result of the Rubensteins' breach of contract, ECRE has suffered damages in excess of Ten Thousand Dollars (\$10,000.00) and is entitled to recover such damages from the Rubensteins.

THIRD CLAIM FOR RELIEF
(Unjust Enrichment)

29. The allegations set forth in Paragraphs 1 through 28 of this Complaint are realleged and incorporated herein as if fully set out.

30. As alleged herein, ECRE has performed services for the benefit of the Rubensteins pursuant to and in addition to those set out in the Agreements.

31. In performing such services, ECRE conferred a non-gratuitous benefit upon the Rubensteins.

32. The Rubensteins consciously accepted said benefits from ECRE, but have failed to pay or reimburse ECRE for said benefits and services.

33. As a result, the Rubensteins have been unjustly enriched, and ECRE is entitled to recover from the Rubensteins an amount in excess of Ten Thousand Dollars (\$10,000.00).

FOURTH CLAIM FOR RELIEF
(Fraud)

34. The allegations set forth in Paragraphs 1 through 33 of this Complaint are realleged and incorporated herein as if fully set out.

35. The Rubensteins deceived ECRE by means of false representations of material facts, concealment of material facts, or both (herein collectively called "misrepresentations").

36. Among other things, the Rubensteins falsely represented to ECRE that:

- a. They had the financial ability to undertake the Project;
- b. ECRE would be the exclusive listing and managing agent for the Project;
- c. They would enter into additional development projects with ECRE if ECRE would handle the Battleground Project;
- d. They had contacts in the retail and development businesses; and
- e. They had assigned their rights and obligations under the Agreements to Five Trees, who would fulfill the terms of the Agreements and make payment to ECRE for its services.

37. The misrepresentations made by the Rubensteins were reasonably calculated to deceive ECRE, and the Rubensteins intended to deceive ECRE or made such representations with reckless indifference as to their truth.

38. ECRE reasonably relied upon the false representations made by the Rubensteins and was, in fact, deceived by the representations of the Rubensteins.

39. ECRE could not have learned of the fraud of the Rubensteins with due diligence.

40. ECRE suffered damages and continue to suffer damages as a result of the fraud of the Rubensteins.

41. As a result of the fraud of the Rubensteins, ECRE has suffered damages in excess of Ten Thousand Dollars (\$10,000.00).

42. The actions of the Rubensteins as alleged herein were fraudulent and willful and wanton, and, therefore, ECRE is entitled to recover punitive damages from the Rubensteins.

FIFTH CLAIM FOR RELIEF
(Unfair and Deceptive Trade Practices)

43. The allegations set forth in Paragraphs 1 through 42 of this Complaint are realleged and incorporated herein as if fully set out.

44. The acts of the Rubensteins in the course of this transaction constitute unfair or deceptive acts or practices in or affecting commerce, in violation of N.C. Gen. Stat. § 75-1.1.

45. As a proximate result of the unfair or deceptive acts and practices of the Rubensteins, ECRE has suffered damages in excess of Ten Thousand Dollars (\$10,000.00).

46. ECRE prays, pursuant to N.C. Gen. Stat. § 75-16, that any damages awarded by the Arbitrator be trebled.

41. Pursuant to N.C. Gen. Stat. § 75-16.1, ECRE prays for an award of attorney's fees upon the finding by the Arbitrator that the actions of the Rubensteins constituted an unfair and deceptive trade practice.

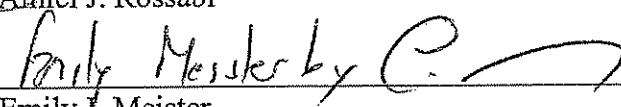
WHEREFORE, ECRE prays that:

1. The Arbitrator enter a declaratory judgment pursuant to the provisions of the Uniform Declaratory Judgment Act, as the same exists in North Carolina, which declares and decrees that: (a) the Rubensteins are bound by the terms of the Agreements; (b) the Rubensteins have breached the terms of the Agreements; and (c) ECRE is in compliance with the terms and conditions of the Agreements;

2. ECRE recover actual damages in an amount in excess of \$10,000.00 from the Rubensteins, jointly and severally;
3. ECRE recover punitive damages in an amount in excess of \$10,000 from the Rubensteins, jointly and severally;
4. That any damages awarded pursuant to Chapter 75 be trebled;
5. The costs of this action, including reasonable attorneys' fees as allowed by law, be taxed against the Rubensteins;
6. The Arbitrator grant ECRE such other and further relief as he deems just and proper.

This the 5th day of December, 2005.



Amiel J. Rossabi

Emily J. Meister

Attorneys for Essa Commercial Real Estate, Inc.

OF COUNSEL:

FORMAN ROSSABI BLACK, P.A.
3623 North Elm Street, Suite 200
Post Office Box 41027
Greensboro, North Carolina 27404-1027
Telephone: (336) 378-1899

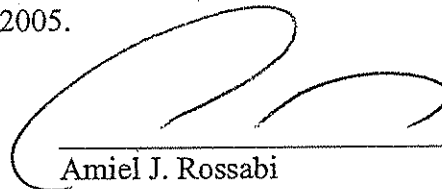
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **COMPLAINT** was duly served upon all parties listed below in accordance with the provisions of Rule 5 of the North Carolina Rules of Civil Procedure by: (1) facsimile transmission; and (2) depositing it in the United States Mail, first-class postage prepaid, addressed as follows:

Mack Sperling, Esq.
BROOKS PIERCE MCLENDON
HUMPHREY & LEONARD
Post Office Box 26000
Greensboro, North Carolina 27420
Facsimile: 378-1001

The Honorable Peter McHugh
915 Country Club Drive
Reidsville, North Carolina 27320
Facsimile: 361-9569

This the 5th day of December, 2005.



Amiel J. Rossabi

LISTING AGREEMENT OF PROPERTY FOR LEASE

This Listing Agreement of Property for Lease is made this 5th day of April 2004,

by and between Essa Commercial Real Estate, Inc.
(Name of Firm)

("Listing Agency")
and Fred Rubenstein and Jeff Rubenstein, Its Affiliates, Members, Associates, and Assigns ("Landlord").

In consideration of Listing Agency's agreement to list the following described property, hereinafter known as "Property" for Lease and to use its efforts to find a Lessee, the undersigned Landlord agrees with Listing Agency as follows:

1. **EXCLUSIVE RIGHT TO LEASE.** For a period extending until midnight on December 30th, 2020. Listing Agency shall have the exclusive right to Lease the Property as agent of Landlord at the rate and on the terms set forth below, or upon such other terms as may be agreed upon in writing by Landlord with any Tenant.

2. **BROKER COOPERATION/AGENCY RELATIONSHIPS.** Listing Agency has advised Landlord of Listing Agency's general company policy regarding cooperating with Subagents, Tenant's Agents or Dual Agents. Landlord has received and read the "Working with Real Estate Agents" publication, and agrees to authorize the Listing Agency to compensate (subject to paragraphs 7.b. (iv) and 7.b. (v) and cooperate with the following:
(CHECK ALL APPLICABLE AGENCIES)

☒ Subagents representing only the Landlord

☒ Tenant Agents representing only the Tenant

☒ Landlord authorizes Listing Agency to act as a Dual Agent representing both the Landlord and the Tenant in the same transaction.
(When Dual Agency occurs, a separate agreement will be executed.)

Listing Agency agrees to inquire of all agents at the time of initial contact as to their agency status. A written disclosure of agency shall be provided to Landlord in connection with the presentation of any contract pursuant to this Listing Agreement.

3. **PROPERTY:** (Address): 2410, 2414, 2420, 2448, 2450, 2500, 2504 Battleground Avenue, & 2605, 2606 A&B Branchwood Dr.
All Parcels are located in Greensboro, North Carolina; Guilford County. * and 2801 Lawndale Drive
(Legal Description/Description) 2410, 2414, 2420, 2448, 2450, 2500, 2504 Battleground Avenue, & 2605, 2606 A&B
Branchwood Dr., and 2801 Lawndale Drive: All Parcels are located in Greensboro, North Carolina; Guilford County

☒ See attached Exhibit A for legal description/description of premises.

4. LEASING GUIDELINES:

Rental ~~to be determined or by executed lease~~

Possession Delivered at Certificate of Occupancy

Taxes Paid By Tenant

Other Terms based on triple net leases

Insurance Paid By Tenant

Utilities Paid By Tenant

Maintenance Paid By Tenant

SIGNS: You ☒ may ☐ may not place a sign on the Property. Landlord agrees to remove all other signs.

ADVERTISING: You ☒ may ☐ may not advertise the Property.

DATA BASE LISTING: This listing ☒ may be ☐ may not be entered in available database listings.

MARKETING EXPENSE: In the event that the Property does not lease during the term of this Agreement, Landlord shall nonetheless be obligated to reimburse Listing Agency for actual expenses incurred in marketing the Property up to the amount of \$ actual cost.

5. SPECIAL PROVISIONS (an addendum, if attached, is incorporated herein by reference):

If there is a co-brokerage agency involved, then the Landlord agrees to pay the co-brokerage agency 4% of the gross value of the lease in full at rent commencement and occupancy, and the Listing Agency, in a co-brokerage transaction to be paid 4% of the gross value of the lease over the time of the lease as stated in section 7 of this agreement. If non co-broker involved see #7

6. COOPERATION WITH LISTING AGENCY:

a. EXCLUSIVE RIGHTS: Landlord agrees to cooperate with Listing Agency (or agents acting for or through it) to facilitate the leasing of the Property. The Property may be shown only by appointment made by or through Listing Agency. Landlord shall refer to Listing Agency all inquiries or offers it may receive regarding this Property. Landlord agrees to cooperate with Listing Agency in bringing about a lease or sublease of the Property, to furnish Listing Agency with a copy of any lease or master lease affecting the Property and to immediately refer to Listing Agency all inquiries by anyone interested in the Property. All negotiations shall be conducted through Listing Agency. Listing Agency shall be identified as the contact firm with all state and local economic development agencies being notified of the Property's availability.

b. SERVICES: No management services, repair services, collection services, notices, legal services or tax services shall be implied as being provided by the Listing Agency by this agreement. In the event that the Listing Agency does procure any of these services at the request of the Landlord, it is understood and agreed that Listing Agency shall only be acting in the capacity of procurer for the Landlord and shall accrue no liability or responsibility in connection with any services so obtained on behalf of Landlord. This exclusion of liability and responsibility shall not apply in the event that Listing Agency directly contracts with Landlord to provide any such service.

c. LATER LEASE TO PROSPECT: If within 365 days after the expiration of the exclusive listing period Landlord shall directly or indirectly lease or agree to lease the Property to a party to whom Listing Agency (or any other agent acting for or through Listing Agency) has communicated concerning the Property during this exclusive period, Landlord shall pay Listing Agency the same commission to which it would have been entitled had the lease been made during the exclusive listing period; provided, that names of prospects are delivered or postmarked to the Landlord within 60 days after the expiration of the exclusive listing period. In the event the subject Property is exclusively listed for lease or sale with another agency after the expiration of this agreement and a registered prospect leases, options or contracts to purchase or lease the Property within 365 days of the expiration of this agreement, then the Landlord shall pay to the Listing Agency 100 % of the commission provided for in Paragraph 7 below. It is not Listing Agency's intention to hereby obligate Landlord to pay two commissions; Landlord should insure that any prospects registered pursuant to this subparagraph are excluded from any subsequent listing agreement.

7. COMMISSIONS: The amount, format or rate of real estate commissions is not fixed by law. Commissions are set by each broker individually and may be negotiable between principal and broker.

a. Lease or sublease Commissions:

(i) Commissions shall be earned on execution of a lease by Landlord and a Tenant in accordance with the following rates (all commissions and fees paid as a result of a lease or sublease being executed shall be leasing fees only):

(complete each option which might apply)

(1) _____ % of the total base rental (including common area fees) for the first _____ months in which rent is to be paid, plus _____ % of the total base rental (including common area fees) for the remainder of the term, payable in full upon execution of a lease by Landlord and Tenant; or

(2) Commissions paid over the term of the Lease: In the event the Listing Agency elects to collect a leasing or subleasing fee or commission over the term of the lease, or sublease, the fee shall be paid with ten (10) days of the receipt of each Lease payment by the Landlord during the base term and any options, renewals, extensions and expansions. The leasing or subleasing fee or commission shall be calculated based upon 6 % of all dollars collected from the Tenant including but not limited to lease payments, late fees, taxes, insurance, return check charges and common area fees or \$ _____ per collection period, whichever is more.

b. General Commissions Provisions:

(i) Option(s) or Right(s) of First Refusal to Renew, Extend Lease or Occupy Additional Space: If a Lease for which a commission is payable hereunder contains (1) an option(s) or right(s) of first refusal to renew or extend, and a lease term(s) is renewed or extended, whether strictly in accordance with the terms of such option(s) or right(s) or otherwise and/or (2) an option(s) or right(s) of first refusal to expand, and a Tenant occupies additional space, whether strictly in accordance with the terms of such option(s) or right(s) or otherwise, then Landlord shall:

☒ pay a commission in accordance with Paragraph 7.a.(i), calculated at the commission rate applicable hereunder to the years of the lease in which the additional base rental is payable or,

☐ pay a commission of _____ % of the additional base rental to be paid on the additional base rental to be paid, said Commission shall be earned and payable at the time the extended term commences or the additional space is occupied, as applicable.

(ii) Purchase of Property by Tenant: If a Tenant under a lease for which a commission is payable hereunder, its successors or assigns, or any agent, officer, employee or shareholder of a Tenant purchases the Property, whether strictly in accordance with the terms of any option, right of first refusal, similar right or otherwise during (a) the term of the lease, (b) any extension thereof, or (c) within 180 days after the expiration thereof, then a sales commission shall be calculated and paid in accordance with the provisions of Paragraph 12.

(iii) Percentage Rent: If a lease for which a commission is payable hereunder contains a percentage rent clause, Landlord shall pay a commission on the percentage rent payable by the Tenant at the commission rate applicable to the period of the lease term for which the percentage rent is payable. This commission shall be payable within fifteen (15) days after receipt of Tenant payment.

(iv) Listing Agency shall not be required to compensate or pay any commission to, either directly or indirectly, a Tenant (or principal, officer, director, partner, member or substantial shareholder thereof) who seeks to be compensated or paid a commission in connection with any transaction with Landlord pursuant to this agreement.

(v) If Listing Agency shall have worked directly with a Tenant in connection with the Property, either as a client or a customer, and such relationship is evidenced in writing (either by an Agency Disclosure - NCAR Form 510 or substantially similar registration document), then Listing Agency shall not be permitted to compensate or pay any commission to another real estate agent (not associated with Listing Agency) in connection with any transaction pursuant to this agreement, which transaction involves said Tenant so registered; provided however, Listing Agency shall be permitted to compensate a cooperating agency who is the procuring cause of such a transaction.

(vi) In the event Landlord fails to make payments within the time limits set forth herein, then the delinquent amount shall bear interest from the date due until paid at the maximum rate permitted in the state in which the office of the Listing Agency is located. If Listing Agency is required to institute legal action (including arbitration) against Landlord relating to this or any agreement of which it is a part, Listing Agency shall be entitled to reasonable attorney's fees and costs.

(vii) In the event Landlord sells or otherwise disposes of its interest in the Property, Landlord shall remain liable for payment of the commissions provided for in this and any other agreement of which it is a part, including, without limitation, the commission obligations set forth in Paragraph 7.a., unless the purchaser or transferee assumes all of such obligations in writing and Listing Agency agrees in writing to such assumption.

(viii) The term "Landlord" as used herein shall be deemed to include, but not be limited to, the owner of the Property, a party under contract to acquire the Property, a Tenant under a ground lease and a Tenant of the Property wishing to effect a sublease, lease assignment, or lease cancellation. The term "Tenant" as used herein shall be deemed to include, but not be limited to any subtenant, or assignee of a Tenant, and the term "lease" shall be deemed to include but not be limited to a sublease or lease assignment.

8. **REPRESENTATIONS:** Landlord represents and warrants to Listing Agency that it has the right to offer the Property for lease and further represents and warrants that it has the right and authority to execute and deliver such instruments as may be necessary to effectuate any transaction contemplated hereby.

9. **ENVIRONMENTAL MATTERS:** Landlord, directly or through whom a claim may be made by any other party or parties against the Listing Agency shall indemnify, defend and hold harmless the Listing Agency, its agents and employees from any loss, liability, damage, cost or expense, including without limitation, reasonable legal, accounting, consulting, engineering, court costs and other expenses related to the presence of storage tanks or the presence or release of hazardous substances, which are defined as those substances, materials, and wastes, including but not limited to, those substances and materials listed in the United States Department of Transportation Hazardous Materials Table (490 CFR 172.101) or by the Environmental Protection Agency as hazardous substances (40 CFR Part 302) and amendments thereto, or such substances, materials and wastes which are or become regulated under any applicable local, state or federal law, including, without limitation, any material, waste or substance which is (i) petroleum, (ii) asbestos, (iii) polychlorinated biphenyl, (iv) designated as a "hazardous substance" pursuant to Section 311 of the Clean Water Act, 33 U.S.C. Sec. 1251, et seq. (33 U.S.C. Sec. 1321) or listed pursuant to Section 307 of the Clean Water Act (33 U.S.C. Sec. 1317), (v) defined as a "hazardous waste" pursuant to Section 1004 of the Resource Conservation and Recovery Act, 42 U.S.C. Sec. 6901, et seq., (42 U.S.C. Sec. 6903) or (vi) defined as a "hazardous substance" pursuant to Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Sec. 9601, et seq. (42 U.S.C. Sec. 9601).

10. **BANKRUPTCY:** In the event that the Property comes under the jurisdiction of a bankruptcy court, Landlord shall immediately notify the Listing Agency of the same and, if Landlord is the subject of bankruptcy, shall promptly take all steps necessary to obtain court approval of Listing Agency's appointment to sell or lease the Property, unless Listing Agency shall elect to terminate this Agreement upon said notice.

11. **INDEMNIFICATION:** Landlord represents and warrants that the information set forth herein and any other information as may be furnished by the Landlord is correct to the best of Landlord's knowledge; Listing Agency shall have no obligation, or responsibility for checking or verifying any such information. Further, Landlord agrees to indemnify Listing Agency for any and all loss or damage sustained by Listing Agency as a result of Listing Agency's or Landlord's furnishing such information to a tenant or anyone else.

12. **SALE PROTECTION PROVISION:** In the event that the Property is sold during the term hereof, and this agreement does not specify the amount of such sale commissions, it is acknowledged that a commission shall be nonetheless earned upon execution of such sale agreement and payable in accordance with the terms of this agreement. The parties agree that the commission payable shall be 6 % of the gross sales price, including all consideration received or receivable, in whatever form, including but not limited to the assumption or release of existing liabilities, but excluding rent previously paid and credited against the gross sales price, which was subject to a rental commission and hereunder.

13. **PARTIES AND BENEFIT:** This agreement shall binding upon and inure to the benefit of the parties, their heirs, successors and assigns and their personal representatives. Each signatory to this agreement represents and warrants that he or she has full authority to sign this agreement on behalf of the party for whom he or she signs and that this agreement binds such party. This agreement contains the entire agreement of the parties and may not be modified except in a writing signed by all of the parties hereto.

14. **THE BROKER SHALL CONDUCT ALL HIS BROKERAGE ACTIVITIES IN REGARD TO THIS AGREEMENT WITHOUT RESPECT TO THE RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, HANDICAP OR FAMILIAL STATUS OF ANY BUYER OR PROSPECTIVE BUYER, SELLER OR PROSPECTIVE SELLER, TENANT OR PROSPECTIVE TENANT, LANDLORD OR PROSPECTIVE LANDLORD.**

THIS DOCUMENT IS A LEGAL DOCUMENT. EXECUTION OF THIS DOCUMENT HAS LEGAL CONSEQUENCES THAT COULD BE ENFORCEABLE IN A COURT OF LAW. THE NORTH CAROLINA ASSOCIATION OF REALTORS® MAKES NO REPRESENTATIONS CONCERNING THE LEGAL SUFFICIENCY, LEGAL EFFECT OR TAX CONSEQUENCES OF THIS DOCUMENT OR THE TRANSACTION TO WHICH IT RELATES AND RECOMMENDS THAT YOU CONSULT YOUR ATTORNEY.

LISTING AGENCY: Essa Commercial Real Estate
(Name of Firm)

By: Carl Essa (SEAL)
Carl Essa

LANDLORD:

Individual:

Fred Rubenstein (SEAL)
Fred Rubenstein

Jeff Rubenstein (SEAL)
Jeff Rubenstein

Business Entity:

(Name of Firm)

By: _____ (SEAL)

Title: _____

Lot 6 = 2504 Battleground Ave
 Lot 7 = 2500 Battleground Ave
 Lot 8 = 2450 Battleground Ave
 Lot 13 = 2448 Battleground Ave
 Lot 12 = 2420 Battleground Ave
 Lot 9 = 2414 Battleground Ave



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GUILFORD COUNTY TAX MAPS
 MOREHEAD TOWNSHIP

SHEET NO. 319

[illegible]

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GUILFORD COUNTY TAX MAPS
MOREHEAD TOWNSHIP

396

SCALE: 1" = 100'

EXHIBIT B

North Carolina

Project Consulting Agreement

Guilford County

This Project Consulting Agreement is made and entered into as of the 5th day of April, 2004 by and between Fred Rubenstein and Jeff Rubenstein (Owner), North Carolina residents and ESSA COMMERCIAL REAL ESTATE, INC. (Consultant), a North Carolina corporation.

RECITALS:

Owner wishes to construct buildings and prepare and develop land into income producing property located at or adjacent to those properties known as 2410, 2414, 2420, 2448, 2450, 2500, 2504 Battleground Avenue, and 2605 Branchwood Drive, and 2606 A & B Branchwood Drive, and 2801 Lawndale Drive in Greensboro, North Carolina (hereinafter, the "Property"). The Property is shown on the attached Exhibit A. The construction of buildings, preparation and development of land is hereinafter referred to as the "Project".

Consultant is familiar with development of improvements of the type intended to be developed by Owner, and Owner desires to engage Consultant as Owner's exclusive Consultant for the Project.

Now, therefore, for and in consideration of the mutual covenants herein contained, Owner and Consultant hereby agree as follows:

1. ENGAGEMENT.

Owner hereby engages Consultant, and Consultant hereby accepts such engagement, as Owner's exclusive Project consultant. Subject to the conditions set forth in this Agreement, Owner hereby grants and delegates to Consultant the full authority to perform, in Owner's name or otherwise on behalf of Owner, all acts Consultant deems necessary or appropriate to carry out Consultant's responsibilities under this Agreement. Consultant shall be an independent contractor and not an employee of Owner.

2. RESPONSIBILITIES OF CONSULTANT.

Consultant shall have the responsibility to use his good faith best efforts to accomplish the following on behalf of the Owner and otherwise advise and consult with the Owner relating to the following, all of which shall be subject to the final approval of Owner:

- A. Consult with the architect designated by Owner on the design, drawings, plans and specifications for the construction of the improvements involved in the Project.
- B. Assist the architect and contractor in obtaining all necessary building and use permits for the Project.
- C. Assist in the negotiation of the bid and/or pricing process with the general contractor and subcontractors.
- D. Consult with the general contractor selected, subcontractors and architect in value engineering the Project so as to achieve cost effective solutions.
- E. Assist the Owner in preparing cost and income "proformas" necessary to secure bank financing.
- F. Assist in the management of the construction process including construction draw requests, construction loan advances, lien waivers, contractors' retainage, construction completion, punch list and warranties.

3. RESPONSIBILITIES OF OWNER

In addition to the obligation to pay Consultant the consulting fee described below, Owner agrees to provide the services necessary to acquire and prepare the Land on which to construct the building(s) and, thereafter, to provide Consultant with full information relating to the Project and Owner's objectives, constraints and requirements relating thereto, and to provide such reviews and approvals as are necessary for the orderly progress of Consultant's services hereunder and the development of the Project. Further, Owner agrees to enter into contracts with such architects, engineers, contractors, inspectors and others whose services are necessary or appropriate for the development and financing of the Project; and to indemnify Consultant against all loss, damage and costs incurred by Consultant in the performance of his services hereunder (except as relates to acts of intentional wrongdoing or gross negligence by Consultant), it being expressly agreed that the development of the Project shall be the risk of the Owner rather than Consultant. Owner understands and agrees that it has read, understands, and accepts the risks and contents of the attached Disclosure statements attached to this agreement as Exhibit B.

4. COMPENSATION.

In consideration of the responsibilities accepted herein by Consultant, Owner agrees to pay to Consultant a consulting fee in the amount of \$1,352,700.00

(one million, three hundred fifty two thousand seven hundred dollars), such amount to be paid in equal monthly installments beginning the earlier of May 1, 2004 or the date the General Contractor of the Project first breaks ground and continuing until December 30, 2005.

In addition, Consultant shall be reimbursed by Owner no less frequently than monthly for all expenses and costs incurred by Consultant relating to his efforts to perform his responsibilities under this Agreement.

5. TERM.

The term of this agreement shall commence on the date hereof and shall continue, unless earlier terminated as provided below, until the earlier of substantial completion of the Project, but in no event later than December 30, 2005.

Consultant shall have the option of terminating this Agreement by written notice to Owner in any of the following events: (a) if Owner shall fail to make any payment due hereunder to Consultant; (b) if any other default under this Agreement by Owner remains uncured by Owner for fifteen (15) days after written notice thereof to Owner by Consultant; or (c) if the Owner modifies the responsibilities of Consultant to the Project, without prior written consent of the Consultant. Upon a termination by Consultant pursuant to this Paragraph, Owner shall pay to Consultant within five (5) days of such termination by Consultant a fee of (a) \$324,648.00 (three hundred twenty four thousand six hundred forty eight dollars) plus (b) a portion of the consulting fee outlined in section 4 of this Agreement, calculated as follows: divide the number of days that have elapsed from and after the date hereof through and including the date of notice of termination is sent or delivered by Consultant by the number of days between the date hereof and December 30, 2005, and multiply that fraction times the total consulting fee plus (c) all expenses incurred by Consultant and not previously reimbursed by Owner plus (d) the remainder of the consulting fee not previously paid to Consultant. Owner agrees that the damages and lost profits Consultant would suffer by reason of its termination of this Agreement are substantial and difficult to calculate, but that the sums outlined above represent a reasonable estimate of such damages that Consultant would suffer.

Owner shall have the option to terminate this Agreement by written notice to Consultant if Consultant fails to comply with his obligations hereunder and such failure continues for a period of fifteen (15) days after Owner gives written notice of such failure to Consultant. Upon a termination by Owner pursuant to this Paragraph, Owner shall pay to Consultant within five (5) days of such termination by Owner a fee of (a) \$324,648.00 (three hundred twenty four thousand six hundred forty eight dollars) plus (b) a portion of the consulting fee outlined in section 4 of this Agreement, calculated as follows:

divide the number of days that have elapsed from and after the date hereof through and including the date of notice of termination is sent or delivered by Owner by the number of days between the date hereof and December 30, 2005, and multiply that fraction times the total consulting fee plus (c) all expenses incurred by Consultant and not previously reimbursed by Owner

6. NOTICES

Notices under this Agreement shall be hand delivered or sent by certified mail return receipt requested, addressed as follows:

Consultant: Essa Commercial Real Estate	Owner: c/o Fred Rubenstein
445 Dolley Madison Road, Suite 400	5900 Mary Hall Court
Greensboro, North Carolina 27410	Summerfield, NC 27455

7. MISCELLANEOUS.

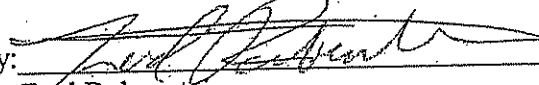
A. This Agreement shall be governed by North Carolina law and shall be binding upon the parties hereto, their heirs, successors and permitted assigns. Neither party may assign its or his rights under this Agreement without prior written consent of the other party.

B. Dispute Resolution: Any dispute or controversy that may arise between the parties hereto concerning any transaction or the construction, performance or breach of this or any other agreement between said parties, whether entered into prior, on or subsequent to the date hereof, shall be determined by an arbitration to take place in Guilford County, North Carolina in accordance with Article I, Chapter 45A of the North Carolina General Statutes, and shall be final and binding on all parties. Prior to either party making a demand for arbitration, both parties shall use their best efforts to mediate their dispute. If such mediation does not resolve the dispute, the Owner and Consultant will each select one arbitrator, who shall be a person licensed to practice law in the State of North Carolina; the two arbitrators selected will then select a third arbitrator, who also will be a person licensed to practice law in the State of North Carolina. The Owner and Contractor will each pay one half of the cost of the arbitrators; however, the arbitrators will be authorized to award such costs (and attorney's fees) in favor of the prevailing party at the arbitration.

C. This Agreement contains the entire understanding of the parties as to the subject matter hereof and may not be modified except by written document signed by both parties.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed under seal the day and year first above written.

OWNER: Fred Rubenstein

By:  (SEAL)
Fred Rubenstein

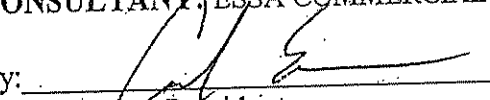
Date: 4/5/04

OWNER: Jeff Rubenstein

By:  (SEAL)
Jeff Rubenstein

Date: 4/5/04

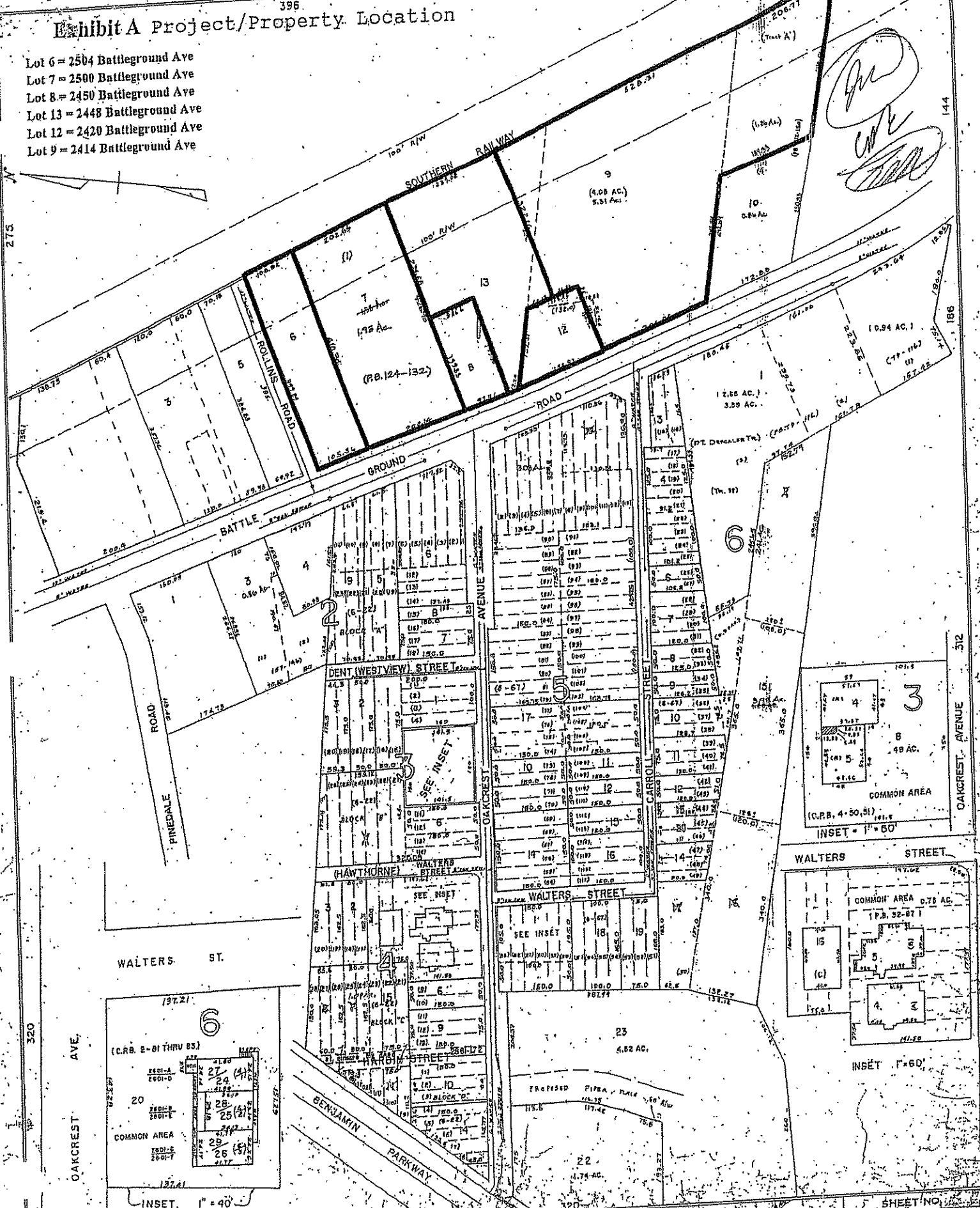
CONSULTANT: ESSA COMMERCIAL REAL ESTATE, INC.

By:  (SEAL)
Carl Essa, President

Date: April 5, 2004

Exhibit A Project/Property Location

- Lot 6 = 2504 Battleground Ave
- Lot 7 = 2500 Battleground Ave
- Lot 8 = 2450 Battleground Ave
- Lot 13 = 2448 Battleground Ave
- Lot 12 = 2420 Battleground Ave
- Lot 9 = 2414 Battleground Ave



Handwritten signature and initials.

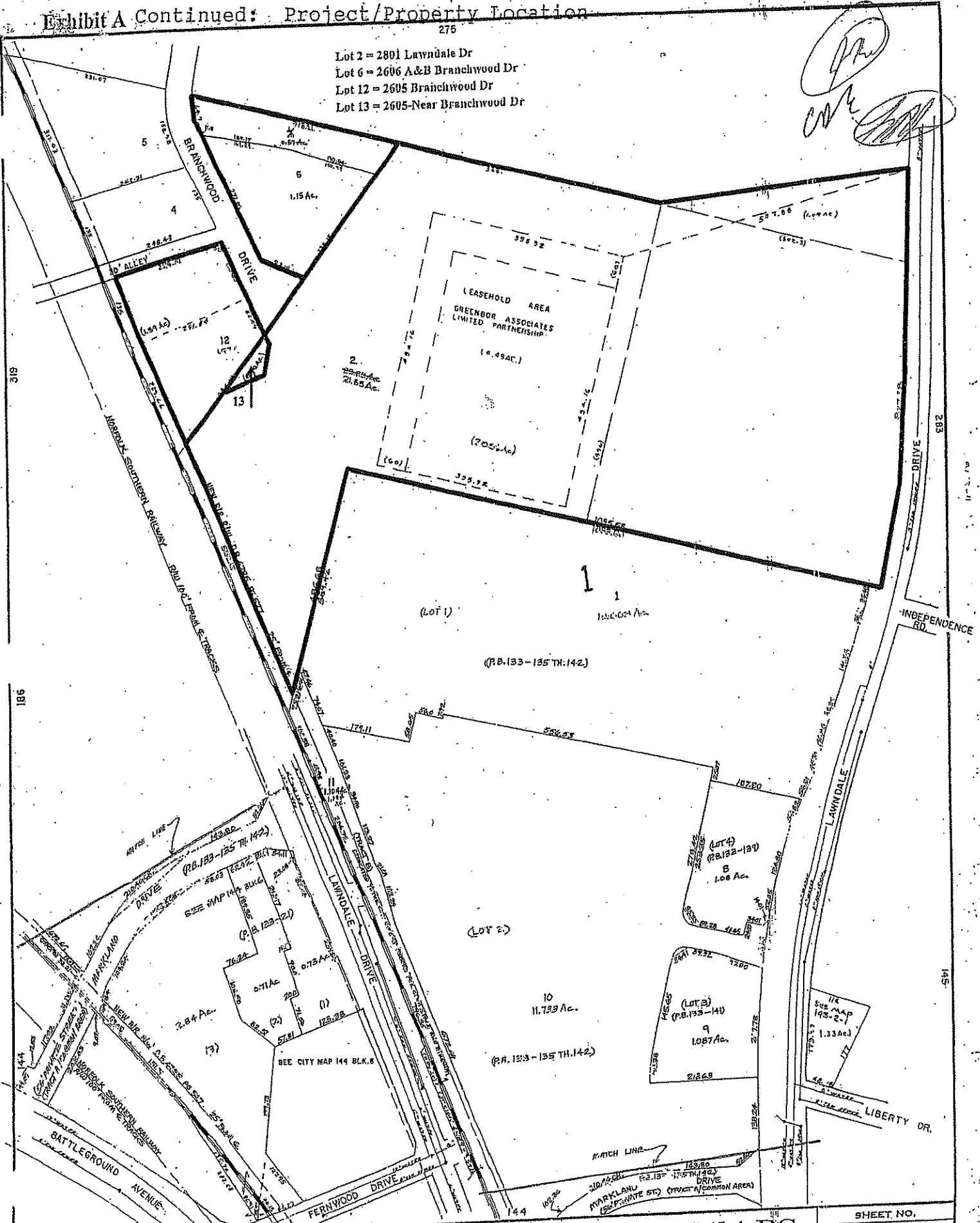
REVISIONS

1	1/1/1999	1/1/1999
2	1/1/1999	1/1/1999
3	1/1/1999	1/1/1999
4	1/1/1999	1/1/1999
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6	1/1/1999	1/1/1999
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10	1/1/1999	1/1/1999

GUILFORD COUNTY TAX MAPS
MOREHEAD TOWNSHIP

SHEET NO. 319
SCALE 1"=40'

Lot 2 = 2801 Lawndale Dr
 Lot 6 = 2606 A&B Branchwood Dr
 Lot 12 = 2605 Branchwood Dr
 Lot 13 = 2605-Near Branchwood Dr



REVISIONS

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GUILFORD COUNTY TAX MAPS
 MOREHEAD TOWNSHIP

SHEET NO.

396

SCALE: 1" = 100'

Exhibit B: Disclosures to Owner

THIS PROJECT IS SPECULATIVE AND INVOLVE SUBSTANTIAL RISK, INCLUDING THE RISK THAT INVESTORS WILL LOSE THEIR ENTIRE INVESTMENT. ACCORDINGLY, THIS PROJECT IS SUITABLE ONLY FOR PERSONS OF SUBSTANTIAL MEANS WHO HAVE NO NEED FOR LIQUIDITY IN THIS INVESTMENT AND WHO CAN AFFORD A TOTAL LOSS OF THIS INVESTMENT.

You should not construe the contents of this development plan as legal, tax or investment advice. You should consult your own counsel, accountants and business advisors as to the legal, tax and business implications of the attached project.

Certain statements in this Project may be "forward-looking statements" that are not based on historical facts and that reflect the current views and estimates of the Project about future economic circumstances and the future of the project. Such statements involve known and unknown risks and uncertainties, including the ability of Essa Commercial Real Estate to implement its real estate development program, that could cause the actual results of such program to differ materially from any expressed in, or implied from, such forward-looking statements. Although Essa Commercial Real Estate believes that the expectations in the forward-looking statements are reasonable, it cannot guarantee future performance. Essa Commercial Real Estate does not undertake any obligation to update or revise any such statements.

This project involves a high degree of financial risk. Although it is not possible to foresee and describe all relevant risks, each prospective investor of the attached project should carefully consider the following risk factors and other matters before committing to the attached project.

Essa Commercial Real Estate can provide no assurance that the project will be completed on time or within budget. Investments in real estate are subject to numerous risks, which are subject to change and outside the control of Essa Commercial Real Estate. These risks include changes in the supply or demand for real property, changes in available financing, changes in interest rates, increases in property operating and maintenance costs, adverse use of neighboring real estate, changes in applicable zoning, tax, eminent domain, environmental and other laws and regulations, changes in applicable tax rates and assessments, adverse developments in general or local demographic, political or economic conditions and fires or natural disasters, any of which might delay or prevent construction of the attached project or impair the financial viability of the overall development of the attached project.

All information provided herein is from sources presumed to be reliable; however, no warranty or representation is made as to the accuracy thereof, and the information provided is subject to errors, omissions, change of price, rental or other conditions, prior sale, lease or financing or withdrawal without notice. No liability of any kind is to be imposed on Essa Commercial Real Estate. It is your responsibility to independently

confirm its accuracy and completeness. Any projections, opinions, assumptions or estimates used are for example only and do not represent the current or future performance of the investigation of the property. The value of this transaction to you depends on tax and other factors which should be evaluated by your tax, financial, environmental, and legal advisors. You and your advisors should conduct a careful, independent investigation of the property to determine to your satisfaction the suitability of the property for your needs.

are [signature]
[signature]

EXHIBIT C

North Carolina

Project Consulting Agreement

Guilford County

This Project Consulting Agreement is made and entered into as of the ____ day of _____, 2004 by and between Fred Rubenstein and Jeff Rubenstein (Owner), North Carolina residents and ESSA COMMERCIAL REAL ESTATE, INC. (Consultant), a North Carolina corporation.

RECITALS:

Owner wishes to construct buildings and prepare and develop land into income producing property located at 2414 Battleground Avenue in Greensboro, North Carolina (hereinafter, the "Property"). The Property is shown on the attached Exhibit A. The construction of buildings, preparation and development of land is hereinafter referred to as the "Project".

Consultant is familiar with development of improvements of the type intended to be developed by Owner, and Owner desires to engage Consultant as Owner's exclusive Consultant for the Project.

Now, therefore, for and in consideration of the mutual covenants herein contained, Owner and Consultant hereby agree as follows:

1. ENGAGEMENT.

Owner hereby engages Consultant, and Consultant hereby accepts such engagement, as Owner's exclusive Project consultant. Subject to the conditions set forth in this Agreement, Owner hereby grants and delegates to Consultant the full authority to perform, in Owner's name or otherwise on behalf of Owner, all acts Consultant deems necessary or appropriate to carry out Consultant's responsibilities under this Agreement. Consultant shall be an independent contractor and not an employee of Owner.

2. RESPONSIBILITIES OF CONSULTANT.

Consultant shall have the responsibility to use his good faith best efforts to accomplish the following on behalf of the Owner and otherwise advise and consult with the Owner relating to the following, all of which shall be subject to the final approval of Owner:

- A. Consult with the architect designated by Owner on the design, drawings, plans and specifications for the construction of the improvements involved in the Project.

- B. Assist the architect and contractor in obtaining all necessary building and use permits for the Project.
- C. Assist in the negotiation of the bid and/or pricing process with the general contractor and subcontractors.
- D. Consult with the general contractor selected, subcontractors and architect in value engineering the Project so as to achieve cost effective solutions.
- E. Assist the Owner in preparing cost and income "proformas" necessary to secure bank financing.
- F. Assist in the management of the construction process including construction draw requests, construction loan advances, lien waivers, contractors' retainage, construction completion, punch list and warranties.

3. RESPONSIBILITIES OF OWNER

In addition to the obligation to pay Consultant the consulting fee described below, Owner agrees to provide the services necessary to acquire and prepare the Land on which to construct the building(s) and, thereafter, to provide Consultant with full information relating to the Project and Owner's objectives, constraints and requirements relating thereto, and to provide such reviews and approvals as are necessary for the orderly progress of Consultant's services hereunder and the development of the Project. Further, Owner agrees to enter into contracts with such architects, engineers, contractors, inspectors and others whose services are necessary or appropriate for the development and financing of the Project; and to indemnify Consultant against all loss, damage and costs incurred by Consultant in the performance of his services hereunder (except as relates to acts of intentional wrongdoing or gross negligence by Consultant), it being expressly agreed that the development of the Project shall be the risk of the Owner rather than Consultant. Owner understands and agrees that it has read, understands, and accepts the risks and contents of the attached Disclosure statements attached to this agreement as Exhibit B.

4. COMPENSATION.

In consideration of the responsibilities accepted herein by Consultant, Owner agrees to pay to Consultant a consulting fee in the amount of \$238,300.00 (two hundred thirty eight thousand three hundred dollars), such amount to be paid in equal monthly installments beginning the earlier of May 1, 2004 or the

date the General Contractor of the Project first breaks ground and continuing until September 30, 2005.

In addition, to the consulting fee referred above, Consultant shall be reimbursed by Owner no less frequently than monthly for all expenses and costs incurred by Consultant relating to his efforts to perform his responsibilities under this Agreement.

In addition, to the other fees and reimbursements addressed above, Consultant shall be paid the payment amount of \$32,307.46 prior to December 9th, 2004 for services rendered in October and November 2004 in connection with due diligence planning performed on certain recommendations towards the development of adjoining properties to the Project.

In addition, to the other fees and reimbursements addressed above, it is understood and agreed to by Consultant and Owner that, if it is determined by Owner to continue due diligence planning of the adjoining properties, hereinafter referred to as (Additional Development Work), then Owner shall send a written authorization to Consultant to begin such Additional Development Work and upon such authorization, Owner agrees to pay Consultant a fee of \$3.38 per maximum developable gross square foot as determined by general building code practices for any adjoining property to the Project. Payment of fee amounts for the Additional Development Work shall be paid in equal monthly installments beginning the earlier of the date of written authorization to Consultant or the date the General Contractor of the Additional Development Work first breaks ground and continuing until the date of substantial completion as determined in the General Contractor's contract and approved by Consultant. In good faith, after Owner authorizes Consultant to perform the Additional Development Work as referenced above, Consultant agrees to proportionately credit Owner toward Consultant's future invoices of such Additional Development Work in the amount of \$0.09 per maximum developable gross square foot.

5. TERM.

The term of this agreement shall commence on the date hereof and shall continue, unless earlier terminated as provided below, until the earlier of substantial completion of the Project, but in no event later than September 30, 2005.

Consultant shall have the option of terminating this Agreement by written notice to Owner in any of the following events: (a) if Owner shall fail to make any payment due hereunder to Consultant; (b) if any other default under this Agreement by Owner remains uncured by Owner for fifteen (15) days after written notice thereof to Owner by Consultant; or (c) if the Owner modifies the responsibilities of Consultant to the Project, without prior written

consent of the Consultant. Upon a termination by Consultant pursuant to this Paragraph, Owner shall pay to Consultant within five (5) days of such termination by Consultant a fee of (a) \$190,000.00 (one hundred ninety thousand dollars) plus (b) a portion of the consulting fee outlined in section 4 of this Agreement, calculated as follows: divide the number of days that have elapsed from and after the date hereof through and including the date of notice of termination is sent or delivered by Consultant by the number of days between the date hereof and September 30, 2005, and multiply that fraction times the total consulting fee plus (c) all expenses incurred by Consultant and not previously reimbursed by Owner plus (d) the remainder of the consulting fee not previously paid to Consultant. Owner agrees that the damages and lost profits Consultant would suffer by reason of its termination of this Agreement are substantial and difficult to calculate, but that the sums outlined above represent a reasonable estimate of such damages that Consultant would suffer.

Owner shall have the option to terminate this Agreement by written notice to Consultant if Consultant fails to comply with his obligations hereunder and such failure continues for a period of fifteen (15) days after Owner gives written notice of such failure to Consultant. Upon a termination by Owner pursuant to this Paragraph, Owner shall pay to Consultant within five (5) days of such termination by Owner a fee of (a) \$190,000.00 (one hundred ninety thousand six hundred forty eight dollars) plus (b) a portion of the consulting fee outlined in section 4 of this Agreement, calculated as follows: divide the number of days that have elapsed from and after the date hereof through and including the date of notice of termination is sent or delivered by Owner by the number of days between the date hereof and September 30, 2005, and multiply that fraction times the total consulting fee plus (c) all expenses incurred by Consultant and not previously reimbursed by Owner

6. NOTICES

Notices under this Agreement shall be hand delivered or sent by certified mail return receipt requested, addressed as follows:

Consultant: Essa Commercial Real Estate	Owner: c/o Fred Rubenstein
445 Dolley Madison Road, Suite 400	5900 Mary Hall Court
Greensboro, North Carolina 27410	Summerfield, NC 27455

7. MISCELLANEOUS.

A. This Agreement shall be governed by North Carolina law and shall be binding upon the parties hereto, their heirs, successors and permitted assigns. Neither party may assign its or his rights under this Agreement without prior written consent of the other party.

B. Dispute Resolution: Any dispute or controversy that may arise between the parties hereto concerning any transaction or the construction, performance or breach of this or any other agreement between said parties, whether entered into prior, on or subsequent to the date hereof, shall be determined by an arbitration to take place in Guilford County, North Carolina in accordance with Article I, Chapter 45A of the North Carolina General Statutes, and shall be final and binding on all parties. Prior to either party making a demand for arbitration, both parties shall use their best efforts to mediate their dispute. If such mediation does not resolve the dispute, the Owner and Consultant will each select one arbitrator, who shall be a person licensed to practice law in the State of North Carolina; the two arbitrators selected will then select a third arbitrator, who also will be a person licensed to practice law in the State of North Carolina. The Owner and Contractor will each pay one half of the cost of the arbitrators; however, the arbitrators will be authorized to award such costs (and attorney's fees) in favor of the prevailing party at the arbitration.

C. This Agreement contains the entire understanding of the parties as to the subject matter hereof and may not be modified except by written document signed by both parties.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed under seal the day and year first above written.

OWNER: Fred Rubenstein

By: _____ (SEAL)
Fred Rubenstein

Date: _____

OWNER: Jeff Rubenstein

By: _____ (SEAL)
Jeff Rubenstein

Date: _____

CONSULTANT: ESSA COMMERCIAL REAL ESTATE, INC.

By: _____ (SEAL)
Carl Essa, President

Date: _____

STATE OF NORTH CAROLINA FILED IN THE GENERAL COURT OF JUSTICE

GUILFORD COUNTY 06 OCT -4 PM 1:07 SUPERIOR COURT DIVISION 05-CvS-7847 ✓

ESSA COMMERCIAL REAL ESTATE, INC. BY: [Signature]

6P
OCT 04 2006

Plaintiff,

v.

FRED RUBENSTEIN and JEFF
RUBENSTEIN,

Defendants.

**ORDER CONFIRMING ARBITRATION
AWARD AND JUDGMENT**

THIS MATTER coming on to be heard and being heard before the undersigned Superior Court Judge Presiding at the regularly scheduled September 5, 2006 civil session of Guilford County Superior Court, upon the following Motions: (a) Plaintiff's Motion for Confirmation and Judgment on Arbitration Award; and (b) Motion of Defendants Fred Rubenstein and Jeff Rubenstein to Vacate Arbitration Award; Amiel J. Rossabi appearing on behalf of Plaintiff and Mack Sperling appearing on behalf of Defendant; and it appearing to the Court, after reviewing all the documents presented by counsel, the court file and case law and statutes, that: (a) Defendants' Motion to Vacate should be denied; and (b) an Order Confirming the Arbitration Award and Judgment should be entered in favor of Plaintiff;

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that:

1. Defendants' Motion to Vacate Arbitration Award should be and hereby is denied;
2. Plaintiff's Motion to Confirm Arbitration Award should be and hereby is granted;
and
3. The Judgment of the Arbitrator is hereby confirmed in all respects, and Defendants are liable to Plaintiff, jointly and severally, in the amount of

6P
OCT 05 2006

JMT-1

10-4-06 c/o A. Rossabi



\$325,051.83, plus interest thereupon at the legal rate from the date of entry of this

Order until paid.

This the 27 day of September, 2006.



THE HONORABLE JOHN W. SMITH, II
Superior Court Judge Presiding

COPY

SETTLEMENT AGREEMENT & RELEASE

THIS SETTLEMENT AGREEMENT & RELEASE (the "Agreement") is entered into by and between Essa Commercial Real Estate, Inc. ("ECRE"), Fred Rubenstein and Jeff Rubenstein (collectively, "the Rubensteins"). Hereinafter, ECRE and the Rubensteins shall be referred to collectively as the "Parties."

WHEREAS, on or about July 11, 2005, ECRE brought suit in the Superior Court of Guilford County, North Carolina, entitled Essa Commercial Real Estate, Inc. v. Fred and Jeff Rubenstein, Case No. 05-CvS-7847, against the Rubensteins to compel the arbitration of various matters, including, but not limited to claims for declaratory relief, breach of contract, unjust enrichment, fraud, and unfair and deceptive trade practice;

WHEREAS, the Rubensteins consented to the arbitration of such issues and asserted various counterclaims against ECRE, including, but not limited to claims for breach of fiduciary duty and fraud;

WHEREAS, at the conclusion of the Arbitration Proceedings, the Honorable Peter McHugh issued an Arbitration Award in favor of ECRE in the amount of \$324,648.00;

WHEREAS, on or about October 4, 2006, the Arbitration Award was confirmed by The Honorable John W. Smith, II and judgment was entered in favor of ECRE (hereinafter the "Judgment"). ECRE has since initiated execution proceedings upon the Judgment.

WHEREAS, on or about October 25, 2006, the Rubensteins filed a Notice of Appeal with the North Carolina Court of Appeals regarding the confirmation of the Arbitration Award and Judgment; and

WHEREAS, the Parties to this Agreement desire to compromise, settle and adjust all matters and things in controversy between them relating to, arising out of, or connected with the Arbitration Proceedings, Arbitration Award and the Judgment as further outlined hereinbelow.

NOW, THEREFORE, for an in consideration of the foregoing promises and the mutual covenants hereinafter set forth, and for other good and valuable consideration, the Parties do hereby agree and covenant as follows:

1. The Rubensteins shall pay to ECRE in certified funds the sum of \$25,000.00 on or before March 7, 2007.

2. The Rubensteins, as members of Five Trees, LLC ("Five Trees") and holders collectively of a twenty-five percent share in the limited liability corporation, agree to take such steps as are necessary to transfer or assign any and all interests and rights they have in the assets of Five Trees to ECRE, including, but not limited to executing simultaneously herewith the Assignments of Interest attached hereto as Exhibits A and B.

3. Should ECRE receive less than \$125,000 in total from the Rubensteins' interest in Five Trees, from Five Trees remaining principals, or pursuant to litigation anticipated to be filed by ECRE (the "Five Trees Litigation") the Rubensteins shall be obligated to pay to ECRE the difference between the amount received and \$125,000 (the "Five Trees Security Payment").

4. To ensure that ECRE can recover the Five Trees Security Payment, if necessary, as allowed in Paragraph 3 above, the Rubensteins shall, simultaneously herewith, cause the real estate owned by Stanley Road LLC, ^{W/ 3-12-07} ~~and~~ to be offered as security by means of a deed of trust for the benefit of ECRE in the amount of \$125,000 and simultaneously herewith offer as security to ECRE their interest in the distributions of Red Wolf Investments, Inc. (Red Wolf) which distributions are to be transferred to ECRE only in the event of a default of the obligation to pay

the Five Trees Security Payment. The pledge of collateral as indicated herein will be for the purpose of collateralizing the obligation to pay the Five Trees Security Payment. Fred Rubenstein recognizes under this Agreement his good-faith obligation not to in any way interfere with the normal and customary Distributions which he has a right to receive from Red Wolf Investments, Inc. The Five Trees Security Payment shall be made within ten (10) days after a final order is entered in the Five Trees Litigation or fifteen months from the date of this Agreement, whichever occurs later. In the event a final order in the Five Trees Litigation has not be entered within fifteen months from the date of this Agreement, the Rubensteins agree to place \$125,000 in an interest bearing escrow account with the funds to be distributed in accordance with the terms of this agreement. ECRE shall be entitled to all interest generated from the escrowed funds. Upon notification of the funding of the escrow account in accordance with this settlement, ECRE shall release all property securing the Rubensteins obligations under this agreement and shall promptly cause to be filed any documents necessary to release said security interests.

5. The Rubensteins hereby agree to cooperate and render truthful testimony in any litigation between ECRE, Five Trees, LLC, Mark Walker and/or Keith Candiotti.

6. Within five days of the signing of this Agreement, the Rubensteins agree to dismiss with prejudice their appeal regarding the confirmation of the Arbitration Award and Judgment.

7. Nothing in this Agreement shall release Fred Rubenstein, Susan Rubenstein or Stanley Road Properties from any obligations owed to ECRE in connection with or as set out in the Settlement Agreement and Mutual General Release and Confession of Judgment executed on or about August 30, 2006. In addition, nothing in this Agreement shall act to release, dispose of,

compromise or otherwise impair the right or ability of ECRE to seek recovery from Five Trees, its members or members of its members under any theory of law or for recovery of the Arbitration Award. Furthermore, nothing in this Agreement shall act to release, dispose of, compromise or otherwise impair any rights of indemnification and/or contribution which the Rubenstein individually, or by and through, their interest in Five Trees, may have against Five Trees, the other members of Five Trees or members of its other members.

8. Conditioned upon the payment of the \$150,000.00, execution of the assignment of interest and assets of Five Trees, LLC, and the proper recording of the Deed of Trust and other security set forth herein, ECRE shall, within ten (10) days, take such steps as are necessary to have the Judgment marked satisfied.

9. In consideration of the mutual releases herein, the sufficiency of which is received, and the other consideration set forth in this acknowledgement, Fred Rubenstein hereby waives, remises, releases and forever discharges, and by these presents does for himself, his employees, agents, representatives, heirs, successors, assigns and all other persons, partnerships, corporations, or entities claiming by or through him, waive, remise, release and forever discharges ECRE, its directors, partners, officers, agents, employees, personal representatives, affiliates, successors and assigns from any, every and all actions and causes of action, suits, debts, agreements, claims (including claims for contribution or indemnity), demands, liabilities, losses, damages (of any type or nature and including punitive damages), defenses, costs, attorneys' fees, expenses or other sums of money he ever had or now has against ECRE or those acting on its behalf, whether asserted or unasserted, arising out of, related to, or in any way connected to: (a) the assertions and allegations made during the course of the Arbitration

Proceedings; and (b) any and all matters related to these Parties, save and except only the obligations specifically addressed in this Agreement.

10. In consideration of the mutual releases herein, the sufficiency of which is received, and the other consideration set forth in this acknowledgement, Jeff Rubenstein hereby waives, remises, releases and forever discharges, and by these presents does for himself, his employees, agents, representatives, heirs, successors, assigns and all other persons, partnerships, corporations, or entities claiming by or through him, waive, remise, release and forever discharges ECRE, its directors, partners, officers, agents, employees, personal representatives, affiliates, successors and assigns from any, every and all actions and causes of action, suits, debts, agreements, claims (including claims for contribution or indemnity), demands, liabilities, losses, damages (of any type or nature and including punitive damages), defenses, costs, attorneys' fees, expenses or other sums of money he ever had or now has against ECRE or those acting on its behalf, whether asserted or unasserted, arising out of, related to, or in any way connected to: (a) the assertions and allegations made during the course of the Arbitration Proceedings; and (b) any and all matters related to these Parties, save and except only the obligations specifically addressed in this Agreement.

11. Upon the completion of the obligations of the Rubensteins as set forth in Paragraphs 1 through 5 above, ECRE, waives, remises, releases and forever discharges, and by these presents does for itself, its officers, directors, employees, agents, attorneys, representatives, affiliates, parents, predecessors, subsidiaries, shareholders, successors, assigns, and all other persons, partnerships, corporations, or entities claiming by or through it, waives, remises, releases and forever discharges Fred Rubenstein and Jeff Rubenstein, their agents, employees, personal representatives, affiliates, heirs, successors and assigns from any, every and all actions

and causes of action, suits, debts, agreements, claims (including claims for contribution or indemnity), demands, liabilities, losses, damages (of any type or nature and including punitive damages), defenses, costs, attorneys' fees, expenses or other sums of money it ever had or now has against Fred Rubenstein and Jeff Rubenstein or those acting on his behalf, whether asserted or unasserted, arising out of, related to, or in any way connected to: (a) the assertions and allegations made during the course of the Arbitration Proceedings; and (b) any and all matters related to these Parties, save and except only the obligations specifically addressed in this Agreement. ECRE is specifically not releasing Five Trees, any of its other members or members of its other members.

12. This instrument shall be construed and interpreted in accordance with the laws of the State of North Carolina.

13. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument. Counterpart copies of this Agreement may be signed by a party and exchanged by telecopier or facsimile. The Parties intend that such copies signed and exchanged as provided in the preceding sentence shall be fully binding. Counterpart originals of such signature pages shall be exchanged by the United States Mail or express service promptly following exchange of signature pages by telecopier or facsimile.

14. This Agreement has been negotiated by the Parties and their respective counsel. By entering into this Agreement, the Parties represent they have completely read all terms hereof, that said terms are fully understood and voluntarily accepted by each of them, and that each of them has been adequately represented by counsel of their own choosing in connection with this Agreement and all matters related thereto.



15. This Agreement constitutes the entire understanding between the Parties hereto concerning the subject matter hereof, and may not be modified or amended except by an instrument in writing signed by Parties hereto.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement effective as of the 12 day of MARCH, 2007.

ESSA COMMERCIAL REAL ESTATE

By: Carl Ewen
Title: President

Sworn to and subscribed before me

this the 12 day of MARCH, 2007.

Camille B. Simpson
Notary Public
Camille B. Simpson
Notary Public/Hand Written



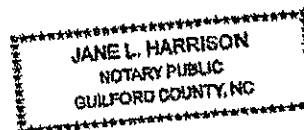
My Commission expires: 01-11-2010

Fred Rubenstein
FRED RUBENSTEIN

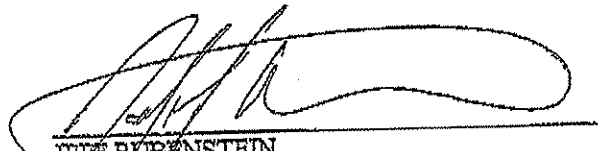
Sworn to and subscribed before me

this the 15 day of MARCH, 2007.

Jane L. Harrison
Notary Public
JANE L. HARRISON
Notary Public/Hand Written



My Commission expires: 9/27/2010


JEFF RUBENSTEIN

Sworn to and subscribed before me

this the 15 day of March, 2007.

Jane L. Harrison
Notary Public
JANE L. HARRISON
Notary Public/Hand Written

My Commission expires: 9/27/2010

JANE L. HARRISON
NOTARY PUBLIC
GUILFORD COUNTY, NC

NORTH CAROLINA

ASSIGNMENT OF INTEREST IN
ASSETS OF FIVE TREES, LLC.

GUILFORD COUNTY

WHEREAS, Jeffrey K. Rubenstein ("Assignor") owns a 12.5% ownership interest in Five Trees, LLC., a North Carolina limited liability company (the "Company"); and

WHEREAS, Assignor has entered into a Settlement Agreement with Essa Commercial Real Estate, Inc. ("Assignee") as part of the settlement of the civil lawsuit brought in the Superior Court of Guilford County, North Carolina, Case No. 05-CvS-7847, and arbitrated before the Honorable Peter McHugh; and

WHEREAS, such Settlement Agreement requires the assignment of Assignor's individual interest in the assets of the Company to Assignee.

NOW THEREFORE, for and in consideration of the mutual promises set forth in the Settlement Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor hereby assigns all rights, title and interest in all Company assets which, as a member of the Company, he presently owns or may be entitled to receive in the future. Such assets include, but are not limited to, all interim distributions of cash payments, if any, made or to be made to Assignor as a member, all funds held in trust by the firm of Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., pursuant to an Order filed December 4, 2006, and any final payments for interests in the Company in the event of dissolution of the Company or the liquidation of Assignor's membership in the Company. Assignor shall protect and preserve the interest in Company assets being assigned to Assignee and shall take no actions, nor refrain from taking any actions, which would result in the deterioration of the value of Company assets. Assignor executes this document to indicate his agreement and acquiescence to this assignment of his interest in the assets of the Company to Assignee.

Witness the signatures of the following parties to this Assignment.

This the 15 day of March, 2007.

ASSIGNOR:


Jeffrey K. Rubenstein (Seal)

ASSIGNEE:

ESSA COMMERCIAL REAL ESTATE, INC.

BY:  (Seal)

NORTH CAROLINA

ASSIGNMENT OF INTEREST IN
ASSETS OF FIVE TREES, LLC.

GUILFORD COUNTY

WHEREAS, Frederick M. Rubenstein ("Assignor") owns a 12.5% ownership interest in Five Trees, LLC., a North Carolina limited liability company (the "Company"); and

WHEREAS, Assignor has entered into a Settlement Agreement with Essa Commercial Real Estate, Inc. ("Assignee") as part of the settlement of the civil lawsuit brought in the Superior Court of Guilford County, North Carolina, Case No. 05-CvS-7847, and arbitrated before the Honorable Peter McHugh; and

WHEREAS, such Settlement Agreement requires the assignment of Assignor's individual interest in the assets of the Company to Assignee.

NOW THEREFORE, for and in consideration of the mutual promises set forth in the Settlement Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor hereby assigns all rights, title and interest in all Company assets which, as a member of the Company, he presently owns or may be entitled to receive in the future. Such assets include, but are not limited to, all interim distributions of cash payments, if any, made or to be made to Assignor as a member, all funds held in trust by the firm of Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., pursuant to an Order filed December 4, 2006, and any final payments for interests in the Company in the event of dissolution of the Company or the liquidation of Assignor's membership in the Company. Assignor shall protect and preserve the interest in Company assets being assigned to Assignee and shall take no actions, nor refrain from taking any actions, which would result in the deterioration of the value of Company assets. Assignor executes this document to indicate his agreement and acquiescence to this assignment of his interest in the assets of the Company to Assignee.

Witness the signatures of the following parties to this Assignment.

This the 15 day of March, 2007.

ASSIGNOR:

 (SEAL)
Frederick M. Rubenstein

ASSIGNEE:

ESSA COMMERCIAL REAL ESTATE, INC.

BY:  (SEAL)

NORTH CAROLINA

ASSIGNMENT OF INTEREST IN
DISTRIBUTIONS OR ALLOCATIONS
OF RED WOLF INVESTMENTS, INC.

GUILFORD COUNTY

WHEREAS, Frederick M. Rubenstein ("Assignor") owns an interest in Red Wolf Investments, Inc., a North Carolina corporation (the "Corporation"); and

WHEREAS, Assignor has entered into a Settlement Agreement with Essa Commercial Real Estate, Inc. ("Assignee") as part of the settlement of the civil lawsuit brought in the Superior Court of Guilford County, North Carolina, Case No. 05-CvS-7847, and arbitrated before the Honorable Peter McHugh; and

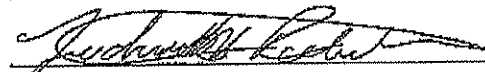
WHEREAS, such Settlement Agreement requires the assignment of Assignor's individual interest in the distributions or allocations to which Assignor is or may become entitled on account of his ownership interest in the Corporation to Assignee. This assignment shall be used for the purpose of collateralizing the Five Trees Security Payment and no transfer of distributions shall occur until or unless a default of the obligation to pay the Five Trees Security Payment occurs as set forth in the Settlement Agreement.

NOW THEREFORE, for and in consideration of the mutual promises set forth in the Settlement Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor hereby assigns all rights, title and interest in all distributions or allocations to which Assignor is or may become entitled to on account of his ownership interest in the Corporation. Assignor shall protect and preserve his interest in the assets, distributions or allocations of the Corporation and shall take no actions, nor refrain from taking any actions, which would result in the deterioration of the Corporation, the assets of the Corporation, the ability of the Corporation to make any distributions or allocations, or the value of any distributions or allocations. Assignor executes this document to indicate his agreement and acquiescence to this assignment of his interest in any and all distributions or allocations of the Corporation to Assignee.

Witness the signatures of the following parties to this Assignment.

This the 15 day of March, 2007.

ASSIGNOR:

 (SEAL)
Frederick M. Rubenstein

ASSIGNEE:

ESSA COMMERCIAL REAL ESTATE, INC.

BY: _____ (SEAL)

STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

ESSA COMMERCIAL REAL
ESTATE, INC.,

Plaintiff,

v.

FIVE TREES, LLC,

Defendant.

FILED
2007 MAR -5 AM 10:05
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

05 CVS 11265

BY _____

**NOTICE OF VOLUNTARY
DISMISSAL WITHOUT PREJUDICE**

(VD)

COMES NOW Plaintiff Essa Commercial Real Estate, Inc. ("ECRE"), pursuant to Rule 41(a)(1)(i) of the North Carolina Rules of Civil Procedure, and hereby gives notice of dismissal without prejudice of its claims against Defendant Five Trees, LLC ("Five Trees"), upon the following conditions agreed to by Five Trees:

1. ECRE intends to reassert its claims against Five Trees, and also to make new claims against two of the individual members of Five Trees (Dr. Mark Walker and Dr. Keith Candiotti) on an individual basis. Dr. Walker and Dr. Candiotti will agree to accept service of those claims.

2. The discovery taken in the current proceeding, and in the arbitration proceeding between ECRE and two of the individual members of Five Trees (Fred Rubenstein and Jeff Rubenstein), may be used in any new proceeding.

3. The parties will bear their own costs and fees in connection with this dismissal.

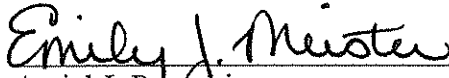
4. The undersigned counsel for Five Trees personally agrees, as the person with signature authority over the funds on deposit from the sale of the Battleground Property, that he will maintain those funds on deposit following the dismissal in accordance with the terms of the Order signed by Judge Davis in this proceeding on November 29, 2006. Upon initiation of a



new lawsuit, Five Trees will agree to the entry of an Order containing the same terms as the November 29th Order, the pertinent portions of which provide that:

- a. The proceeds shall remain in the Account, and shall not be released, until the first to occur of (a) an agreement signed by all parties as to the release of those funds or (b) the application to the Court by either party for a release of some or all of those funds and the entry of an Order by the Court granting that application.
- b. No member of Five Trees may have signature authority over the Account and no member of Five Trees may demand that the person having signature authority over the Account release the funds other than as provided otherwise in this Order.
- c. Either party, upon good cause shown, shall have the right to apply to the Court for a modification of this Order.

This the 2nd day of March, 2007.



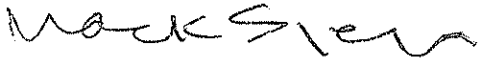
Amiel J. Rossabi
Emily J. Meister

FORMAN ROSSABI BLACK, P.A.

3623 North Elm Street, Suite 200
Post Office Box 41027
Greensboro, North Carolina 27404-1027
Telephone: (336) 378-1899

Attorney for Plaintiff
Essa Commercial Real Estate, Inc.

CONSENTED TO BY:



Mack Sperling
**BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.**
Suite 2000 Renaissance Plaza
230 North Elm Street (27401)
Post Office Box 26000
Greensboro, NC 27420-6000
Telephone: 336/271-3125

Attorney for Defendant Five Trees, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing VOLUNTARY DISSMISAL, dated the 2nd of March, 2007, was served upon the following by depositing a copy thereof in the United States Mail, postage prepaid, and addressed as follows:

Mack Sperling, Esq.
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Post Office Box 26000
Greensboro, N.C. 27420-6000

Attorney for Defendant
Five Trees, LLC

This the 2nd day of March, 2007.

Amiel J. Rossabi/Edm
Amiel J. Rossabi

Arbitration Complaint	Essa v. Five Trees Complaint
4. In or about the fall of 2003, Fred Rubenstein and his wife, Susan Rubenstein, approached ECRE and requested ECRE's assistance in the construction, development and management of a retail shopping center to be located on Battleground Avenue in Greensboro, North Carolina (the "Project").	6. In or about the fall of 2003, Fred and Susan Rubenstein approached ECRE and requested ECRE's assistance in the construction, development and management of a retail shopping center to be located in Greensboro, North Carolina (the "Initial Project").
5. Fred Rubenstein represented to ECRE that he and his family had the financial ability to conduct such an undertaking, but that they required ECRE's knowledge and expertise.	7. Fred Rubenstein represented to ECRE that he had the financial ability to conduct such an undertaking, but that he required ECRE's knowledge and expertise.
6. On November 4, 2003, ECRE and Fred Rubenstein entered into a Project Consulting Agreement ("Project Agreement") whereby ECRE agreed to act as the exclusive project consultant until completion of the Project, which was estimated to be December 30, 2005.	8. On November 4, 2003, ECRE and Fred Rubenstein entered into a Project Consulting Agreement ("Project Agreement") whereby ECRE agreed to act as the exclusive project consultant until completion of the Initial Project, which was estimated to be December 30, 2005.
7. On November 4, 2003, ECRE and Fred Rubenstein also entered into a Listing Agreement of Property for Lease ("Listing Agreement") in which Fred Rubenstein granted ECRE the exclusive right to lease the Property and otherwise act as his agent until April 30, 2011.	9. On November 4, 2003, ECRE and Fred Rubenstein also entered into an Exclusive Representation Agreement ("Representation Agreement") and a Listing Agreement of Property for Lease ("Listing Agreement") in which Fred Rubenstein granted ECRE the exclusive right to lease the Property and otherwise act as his agent until April 30, 2011.
8. Thereafter, ECRE began to provide valuable services towards the completion and success of the Project.	10. Thereafter, ECRE began to provide valuable services towards the completion and success of the Initial Project.
10. In or about the summer of 2004, the Rubensteins admitted to ECRE that they were struggling to meet the financial requirements of the Project and the Modified Agreements.	11. In or about the summer of 2004, the Rubensteins admitted to ECRE that they were struggling to meet the financial requirements of the Initial Project and the Agreements.
11. As a result of the financial condition of the Rubensteins and at their specific request, ECRE, throughout the summer and into the fall, prepared detailed packages and met with prospective investors regarding the Project, including, but not limited to Keith Candiotti ("Candiotti") and Mark Walker ("Walker").	12. As a result of the financial condition of the Rubensteins and at their specific request, ECRE prepared detailed packages and met with prospective investors regarding the Initial Project, including, but not limited to Candiotti and Walker.
12. Both Candiotti and Walker represented to ECRE that they had the financial ability to undertake and complete the Project and to fulfill the terms of the Modified Agreements.	14. Both Candiotti and Walker represented to ECRE that they had the financial ability and willingness to undertake and complete the construction, development and management of a larger retail shopping center (the "Big Project") and to fulfill the terms of the Agreements.
9. The Listing Agreement and Project Agreement were subsequently modified on April 5, 2004, and signed by Fred and Jeff Rubenstein (copies	15. On or about April 5, 2004, Fred Rubenstein, Jeff Rubenstein (collectively, "the Rubensteins") and ECRE entered into a new or



Arbitration Complaint	Essa v. Five Trees Complaint
of the Modified Agreements are attached hereto as Exhibits A and B, respectively).	modified Project Agreement, Representation Agreement and Listing Agreement (collectively referred to as the "Modified Agreements"). (Hereinafter, the Listing Agreement, Representation Agreement, Project Agreement and Modified Agreements shall be referred to collectively as the "Agreements.")
16. Thereafter, ECRE continued, at the request of Five Trees and the Rubensteins, to provide valuable services pursuant to the Agreements.	17. Thereafter, ECRE continue, at the request of the Rubensteins, Walker and Candiotti (the "Partnership"), to provide valuable services pursuant to the Agreements and in addition thereto.
13. Upon information and belief, on or about November 5, 2004, the Rubensteins, Candiotti and Walker formed Five Trees.	18. Upon information and belief, on or about November 5, 2004, the Rubensteins, Candiotti and Walker incorporated Five Trees with the North Carolina Secretary of State.
14. After the incorporation of Five Trees, the Rubensteins represented to ECRE that they had transferred their interest in the Battleground properties, the Project and the Modified Agreements to Five Trees, although the Rubensteins continued thereafter to remain active in the Project.	19. Upon information and belief, the Rubensteins transferred their interest in the Battleground properties, the Big Project and the Agreements to the Partnership and, subsequently, to Five Trees, although the Rubensteins continued thereafter to remain active in the Big Project as principals and/or agents of the Partnership and, later, of Five Trees.
16. Thereafter, ECRE continued, at the request of Five Trees and the Rubensteins, to provide valuable services pursuant to the Agreements.	20. Thereafter, ECRE continued, at the request of Defendants to provide valuable services to the Partnership and Five Trees pursuant to the Agreements and in addition thereto.
17. Five Trees and the Rubensteins accepted the benefits of ECRE's services and made some payments to ECRE pursuant to the Agreements.	22. At all times alleged herein, Defendants accepted the benefits of ECRE's services, made some payments to ECRE pursuant to the Agreements and, upon information and belief, otherwise assumed the rights and obligations of the Rubensteins under the Agreements.
18. As the work on the Project proceeded, Five Trees and the Rubensteins ceased making payments to ECRE for its services, although they acquired the benefits of ECRE's services.	23. As Essa's work towards the retail center proceeded, Defendants ceased making payments to ECRE for its services, although they received the benefits of ECRE's services.
19. Upon information and belief, Five Trees and the Rubensteins began to devise a way to use all of the valuable services (for which they had not yet fully paid), and sought to eliminate ECRE from the Project so that they could keep all of the profits for themselves and avoid payments to ECRE.	24. Upon information and belief, Defendants formulated a scheme to use all of the valuable services (for which they had not yet fully paid), and sought to eliminate ECRE from the retail center so that it could keep all of the profits for themselves and avoid payments to ECRE.
20. On or about February 14, 2005, ECRE ceased working on the Project due to the failure and refusal of Five Trees and the Rubensteins to pay money owed pursuant to the Agreement and for services rendered in connection with the Project.	26. On or about February 14, 2005, ECRE ceased work due to the failure and refusal of Defendants to pay money owed pursuant to the Agreements and for services rendered.

Arbitration Complaint	Essa v. Five Trees Complaint
(Declaratory Judgment)	
22. Upon information and belief, the Rubensteins contend that they assigned any and all rights and obligations they had pursuant to the Agreements with ECRE to Five Trees.	
23. Upon information and belief, Five Trees denies that it assumed the Agreements or that it received benefits pursuant to the Agreements from ECRE; moreover, ECRE contends that the Rubensteins remain liable under the agreements.	
24. Within the meaning of the provisions of the Uniform Declaratory Judgment Act, as the same exists in the State of North Carolina, N.C. Gen. Stat § 1-253, <i>et seq.</i> , there exists an actual controversy between ECRE and the Rubensteins relating to: (1) which parties are bound by the Agreements and (2) the respective rights and obligations of the parties under the Agreements.	
25. ECRE seeks a declaratory judgment which declares and decrees that: (a) the Rubensteins are bound by the terms of the Agreements; (b) the Rubensteins have breached the terms of the Agreements; and (c) ECRE is in compliance with the terms and conditions of the Agreements.	
(Breach of Contract)	(Breach of Contract)
27. As alleged herein, the Rubensteins breached the Agreements with ECRE by, among other things: (a) wrongfully and prematurely terminating the Agreements; and (b) failing to pay ECRE monies owed for services rendered.	28. As alleged herein, Defendants breached the Agreements with ECRE by, among other things: (a) wrongfully and prematurely terminating the Agreements; and (b) failing to pay ECRE monies owed for services rendered.
28. As a result of the Rubensteins' breach of contract, ECRE has suffered damages in excess of Ten Thousand Dollars (\$10,000.00) and is entitled to recover such damages from the Rubensteins.	29. As a result of Defendants' breach of contract, ECRE has suffered damages in excess of Ten Thousand Dollars (\$10,000.00) and is entitled to recover such damages from Defendants.
(Unjust Enrichment)	(Unjust Enrichment)
30. As alleged herein, ECRE has performed services for the benefit of the Rubensteins pursuant to and in addition to those set out in the Agreements.	31. As alleged herein ECRE has performed services for the benefit of Defendants pursuant to and in addition to those set out in the Agreements.
31. In performing such services, ECRE conferred a non-gratuitous benefit upon the Rubensteins.	In performing such services, ECRE conferred a non-gratuitous benefit upon Defendants.
32. The Rubensteins consciously accepted said benefits from ECRE, but have failed to pay or reimburse ECRE for said benefits and services.	33. Defendants consciously accepted said benefits from ECRE, but have failed to pay or reimburse ECRE for said benefits and services.
33. As a result, the Rubensteins have been	34. As a result, Defendants have been

Arbitration Complaint	Essa v. Five Trees Complaint
unjustly enriched, and ECRE is entitled to recover from the Rubensteins an amount in excess of Ten Thousand Dollars (\$10,000.00).	unjustly enriched, and ECRE is entitled to recover from Defendants an amount in excess of Ten Thousand Dollars (\$10,000.00).
(Fraud)	(Fraud)
35. The Rubensteins deceived ECRE by means of false representations of material facts, concealment of material facts, or both (herein collectively called "Misrepresentations").	36. Defendants deceived ECRE by means of false representations of material facts, concealment of material facts, or both (herein collectively called "misrepresentations").
36. Among other things, the Rubensteins falsely represented to ECRE that:	37. Among other things, Defendants falsely represented to ECRE that:
a. They had the financial ability to undertake the Project;	a. They had the financial ability and willingness to undertake the development and construction of a retail shopping center;
b. ECRE would be the exclusive listing and managing agent for the Project;	b. ECRE would be the exclusive listing and managing agent for the retail shopping center;
c. They would enter into additional development projects with ECRE if ECRE would handle the Battleground Project;	e. They would enter into additional development projects with ECRE if ECRE would handle the Project; and
d. They had contacts in the retail and development businesses; and	d. They had contacts in the retail and development businesses.
e. They had assigned their rights and obligations under the Agreements to Five Trees, who would fulfill the terms of the Agreements and make payment to ECRE for its services	c. They would honor and uphold the Agreements entered into by the Rubensteins; d. Five Trees accepted the obligations of a new agreement with ECRE:
37. The misrepresentations made by the Rubensteins were reasonably calculated to deceive ECRE, and the Rubensteins intended to deceive ECRE or made such representations with reckless indifference as to their truth.	38. The misrepresentations made by Defendants were reasonably calculated to deceive ECRE, and Five Trees intended to deceive ECRE or made such representations with reckless indifference as to their truth.
38. ECRE reasonably relied upon the false representations made by the Rubensteins and was, in fact, deceived by the representations of the Rubensteins.	39. ECRE reasonably relied upon the false representations made by Defendants and was, in fact, deceived by the representations of Defendants.
39. ECRE could not have learned of the fraud of the Rubensteins with due diligence.	40. ECRE could not have learned of the fraud of Defendants with due diligence.
40. ECRE suffered damages and continue to suffer damages as a result of the fraud of the Rubensteins.	41. ECRE suffered damages and continue to suffer damages as a result of the fraud of Defendants.
41. As a result of the fraud of the Rubensteins, ECRE has suffered damages in excess of Ten Thousand Dollars (\$10,000.00).	42. As a result of the fraud of Defendants, ECRE has suffered damages in excess of Ten Thousand Dollars (\$10,000.00).
42. The actions of the Rubensteins as alleged herein were fraudulent and willful and wanton, and	43. The actions of Defendants as alleged herein were fraudulent and willful and wanton, and

Arbitration Complaint	Essa v. Five Trees Complaint
therefore, ECRE is entitled to recover punitive damages from the Rubensteins.	therefore, ECRE is entitled to recover punitive damages from Defendants.
(Unfair and Deceptive Trade Practices)	(Unfair and Deceptive Trade Practices)
44. The acts of the Rubensteins in the course of this transaction constitute unfair or deceptive acts or practices in or affecting commerce, in violation of N.C. Gen Stat. § 75-1-1.	45. The acts of Defendants in the course of this transaction constitute unfair or deceptive acts or practices in or affecting commerce in violation of N.C. Gen. Stat. § 75-1.1.
45. As a proximate result of the unfair or deceptive acts and practices of the Rubensteins, ECRE has suffered damages in excess of Ten Thousand Dollars (\$10,000.00).	46. As a proximate result of the unfair or deceptive acts and practices of Defendants, ECRE has suffered damaged in excess of Ten Thousand Dollars (\$10,000.00).
46. ECRE prays, pursuant to N.C. Gen Stat. § 75-16, that any damages awarded by the Arbitrator be trebled.	47. ECRE prays, pursuant to N.C. Gen. Stat. § 75-16, that any damages awarded by the Court be trebled.
47. Pursuant to N.C. Gen. Stat. § 75-16.1, ECRE prays for an award of attorney's fees upon the finding by the Arbitrator that the actions of the Rubensteins constituted an unfair and deceptive trade practice.	48. Pursuant to N.C. Gen. Stat. § 75-16.1, ECRE prays for an award of attorney's fees upon the finding by the Court that the actions of Defendants constituted an unfair and deceptive trade practice.
	(Recovery of Arbitration Award) 50. On or about March 6, 2006, arbitration proceedings ("the Arbitration") were held before the Honorable Peter McHugh pursuant to N.C. Gen. Stat. § 1-569.7 and the April 5, 2004 Project Consulting Agreement by and between ECRE, Fred Rubenstein and Jeff Rubenstein.
	51. The Arbitration, which lasted approximately six (6) days, arose predominantly out of the same events and issues as exist in this pending action, and all but one of members of the Partnership and Five Trees, Walker, testified therein.
	52. At the conclusion of the Arbitration and after the submission of briefs by the parties, an award ("Arbitration Award") was entered in favor of ECRE in the amount of \$325,051.83 in liquidated damages arising out of the Project Consulting Agreement.
	53. The Arbitration Award was confirmed by the Court and entered as Judgment on or about September 27, 2006.
	54. ECRE is entitled to collect the Arbitration Award from Defendants.