

**IN THE SUPREME COURT OF MISSISSIPPI
NO. 2006-CA-01177**

**GLEN SOUTHERN, INC., AND
GEM SOUTHERN, INC.**

APPELLANTS

VS.

MARSHALL COUNTY, MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLEE

**ON APPEAL FROM THE CHANCERY COURT
OF MARSHALL COUNTY, MISSISSIPPI**

(ORAL ARGUMENT IS NOT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

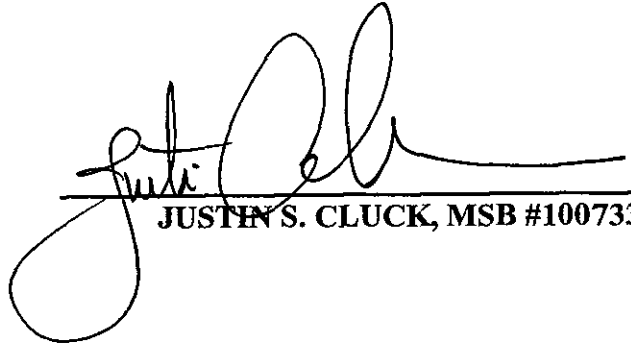
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would not be helpful in this case, as it would not aid in offering additional facts, law or argument in support of these issues. The issues before the Court are straightforward issues of law applied to the facts of this case. As such, oral argument would not be of benefit and is not requested.

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STATEMENT OF THE ISSUES

1. Whether the Chancery Court was correct in granting summary judgment to the Appellee based upon the Appellants' abandonment of the leased premises when they failed to comply with the occupancy use restriction contained in the parties' contracts and lease agreements.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and its Disposition with the Lower Court

On May 5, 2005, Marshall County, Mississippi (“Appellee”) filed suit in the Circuit Court of Marshall County, Mississippi seeking cancellation of a series of contracts and lease agreements with Glen Southern, Inc., and GEM Southern, Inc., (“Appellants”) and immediate possession of the leased premises. (R. 99). On the motion of Glen Southern, the case was transferred to the Chancery Court of Marshall County as Marshall County sought only equitable relief pursuant to the terms of the contracts and lease agreements which did not provide for money damages. (R. 99). After extensive discovery, Glen Southern filed a motion for summary judgment with Marshall County filing a response and cross motion. (R. 9-18, 69-88, 100).

In their respective motions for summary judgment, the parties stipulated that no genuine issues of material fact existed, seeking judgment as a matter of law. (R. 100-101). The Chancellor denied Marshall County’s motion for summary judgment on three issues, but on the fourth issue found that Marshall County was “entitled to summary judgment as a matter of law due to [Appellants’] failure to maintain a manufacturing business at the Byhalia facility, and to the remedy of termination of the contracts and leases with [Appellants] regarding the Byhalia facility.” (R. 109) (R.E. 1-13). Glen Southern then moved for reconsideration of the Chancellor’s order granting summary judgment, but that motion was denied and the Chancellor entered his Final Order canceling the contracts and granting Marshall County possession of the leased premises. (R. 124). (R.E. 14-15, 16).

Glen Southern then filed a Notice of Appeal on July 14, 2006, seeking *de novo* review of the Chancellor’s order granting summary judgment. (R. 125).

B. Statement of Facts

In July of 1952, Marshall County contracted with Gem Incorporated, a Mississippi corporation, to construct and lease a manufacturing facility in Byahlia, Mississippi. (R. 43). The construction of this manufacturing facility was financed through public bonds and tax incentives given to Gem Incorporated. (R. 43). The ability of Marshall County and Gem Incorporated to enter into this public-private venture was made possible by the Balancing Agriculture with Industry Act ("BAWI Act"). (R. 98). The BAWI Act was passed by the Mississippi Legislature in 1936 and enacted to alleviate areas of high unemployment in the rural areas of Mississippi by providing bond financing and favorable tax incentives to encourage private industry to use Mississippi's agricultural resources to create manufacturing jobs, *i.e.*, to process and manufacture corn, soybeans, cotton, etc, into products for sale on the open market. (R. 98). Use of the local agricultural goods in manufacturing facilities would provide citizens of certain rural areas with gainful employment in traditionally economically disadvantaged counties such as Marshall County. (R. 42-43). Accordingly, the 1952 contract specifically provided that the purpose of the parties when entering into this contract was to use the facility for manufacturing of goods as mandated by the BAWI Act. Ex. 1A, p. 1. (R.E. 17).

The 1952 contract authorized Marshall County to apply for industrial development bonds under the BAWI Act and use the funds derived from these bonds to acquire land and construct a 20,000 square foot manufacturing facility. (R. 43). The contract provided for a subsequent lease agreement once the manufacturing facility was ready for occupancy with a twenty (20) year primary lease term with options to renew for three successive twenty (20) year terms. Ex. 1A, p. 9. (R.E. 18). The contract further provided that the only variance between the primary term of the lease and the renewal terms of the lease was the amount of rent paid by the lessor. Ex. 1A, p.

9.(R.E. 18). The 1952 contract also gave the lessor the option to sublet the facility provided such sublease would not alter or modify any of the lessor's obligations under the contract. Ex 1A, p.10. The contract further provided a termination clause to be exercised at the option of Marshall County should the facility cease to be used for manufacturing purposes for over one year. Ex. 1A, p.9. On February 1, 1954 a lease agreement was executed between Marshall County and Gem Incorporated pursuant to the terms of the 1952 contract. Ex. 1B.

In 1955, 1958, 1963, 1967 and 1969, the parties entered into successive contracts for the expansion of the leased premises with industrial development bonds being issued to provide financing. Each contract expressly incorporated the terms and conditions of the 1952 contract as well as the terms and conditions of each prior contract. Ex. 1A, Ex. 2A, Ex. 3A, Ex. 4A, Ex. 5A1, Ex. 5A2 and Ex. 6A. After each contract was executed, companion lease agreements were signed which incorporated the terms and conditions of the prior contracts and lease agreements. Ex. 1B, Ex. 2B, Ex. 3B, Ex. 4B, Ex. 5B. In 1977, the parties entered into four separate lease agreements, each containing identical terms, but referring to and incorporating by reference a separate prior contract. Ex. 3B, Ex. 4B, Ex. 5B, Ex. 6B.

In 1982, GEM Inc., entered into a corporate re-organization and changed its name to GEM Southern, Inc., (R. 44). GEM Southern next sublet the Byhalia manufacturing facility to one of its shell companies, GEM 1981. Ex. 8. The sublease incorporated all previous leases by reference referring to them as the "Prime Leases" and further stating that they were subject to all terms and conditions of the "Prime Leases." Ex. 8, p. 4. In 1992, GEM Southern sublet a portion of the Byhalia manufacturing facility to another subsidiary company, E.D Smith-GEM, Inc. Ex. 11. This sublease also incorporated by reference the prior leases this time labeling them collectively as the "Master Lease." Ex. 10, p.2. During the E.D. Smith-GEM, Inc. sublease, the

Byhalia facility was used exclusively for manufacturing as contemplated by all previous contracts and lease agreements. (R. 124). In 1996, GEM Inc, now Glen Southern, Inc., a Canadian corporation headquartered in Ontario, Canada, subleased the Byhalia facility to Havatampa, Inc., who used the leased premises for manufacturing commensurate with the terms of the previous contracts and lease agreements. Ex 19, p. 25, Ex. 13. This sublease also incorporated the previous lease agreements classifying them as the "Master Lease." Ex. 13, p. 2.

In February of 2003, Glen Southern began negotiating a new sublease with Hunter Fan, as there were no business activities, manufacturing or otherwise, taking place in the Byhalia facility, Ex. 16, p. 27. Glen Southern then approached Marshall County, Mississippi and explained that it planned to sublease the Byhalia facility to Hunter Fan, who would no longer use the leased premises for manufacturing. Ex. 16, p. 28-29. (R.E. 37-38). However, at the time of the sublease, Glen Southern and Hunter Fan acknowledged and understood that use of the premises was restricted only to manufacturing activities pursuant to the terms of the Master Lease. Ex. 16, p. 28-29, 36. (R.E. 37-39). Marshall County then filed suit seeking cancellation of the contract and lease agreements when it had been made clear that Glen Southern no longer had any interest in leasing the premises to a manufacturing tenant and employment on the premises had been reduced to a skeleton crew consisting of only six (6) persons. Ex. 16, p. 69-70. (R.E. 40-41).

SUMMARY OF THE ARGUMENT

The contracts and lease agreements executed by Marshall County and Glen Southern specifically state that the leased premises, a facility in Byhalia, Mississippi, was to be constructed and used during the life of agreements for manufacturing operations. This use restriction was utilized by the parties to comply with the Balancing Agriculture with Industry Act, which mandated that governmental entities and private corporations taking advantage of the tax incentives made available by this legislation, create new jobs for impoverished regions of Mississippi. Each contract and lease agreement signed by the parties was executed for a primary term, but gave a renewal option with an increase in the amount of rent being the only difference between the primary and renewal terms.

Over the course of approximately fifty years, each contract contained clauses restricting the operations at the Byhalia facility to manufacturing. Glen Southern continued to use the leased premises for manufacturing until 2003, when it subleased the Byhalia facility to a company who abandoned all manufacturing operations using the premises for warehousing instead. During this time, employment at the Byhalia facility decreased from several hundred to only six employees. Conversion of the premises from manufacturing to warehousing automatically voided the contracts and lease agreements allowing Marshall County to terminate the same.

The terms of each contract and lease agreement specifically provide Marshall County the right to terminate the contracts if the Byhalia facility is used for anything other than manufacturing. Further, the contracts do not provide for any other remedy other than termination, such as liquidated damages or specific performance.

ARGUMENT

A. Legal Standard

When reviewing a trial court's grant of summary judgment, the Appellate Court applies a *de novo* standard of review. Willing v. Estate of Benz, ___ So.2d ___, 2007 WL 901646 (citing Busby v. Mazzeo, 929 So.2d 369, 372 (Miss. App. 2006)). Rule 56(c) of the Mississippi Rules of Civil Procedure provides that summary judgment is proper where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When considering a motion for summary judgment, the deciding court must view all evidence in a light most favorable to the non-moving party. Mazzeo, 929 So.2d at 372. Only when the moving party has met its burden by demonstrating that there are no genuine issues of material fact should summary judgment be granted. Tucker v. Hinds County, 558 So.2d 869, 872 (Miss. 1990).

The Court has implemented a three-tiered process for contract interpretation. Gatlin v. Sanderson Farms, Inc., ___ So.2d ___, 2007 WL 416104 (citing Pursue Energy Corp. v. Perkins, 558 So.2d 349, 351-53 (Miss. 1990)). First, the Court looks to the "four corners" of the contract and at the language used in expressing their agreement. Id. "When an instrument's substance is determined to be clear or unambiguous, the parties' intent must be effectuated." Id. Where the instrument is not so clear, the Court "will, if possible, harmonize the provisions in accord with the parties' apparent intent." Id. If the Court is unable to determine the parties' intent from examining the four corners of the instrument, the Court may apply the canons of contract construction. Id. If the intent is still unclear, the Court may then consider parol or extrinsic evidence. Id.

“The rule is well settled that where a contract is ambiguous, the Court may look to the construction which the parties have placed upon it in order to ascertain its true meaning. What the parties to a contract consistently do thereunder is evidence of what the contract between them required that they should do.” Delta Wild Life & Forestry, Inc. v. Bear Kelso Plantation, 281 So.2d 683 (Miss. 1973) (citing Goldberg v. L.H. Realty Corp., 86 So.2d 326 (Miss. 1956)). The contemporaneous construction placed upon the instrument by the parties thereto is entitled to very great weight in reaching the intent and purpose of the instrument. Id. citing Spengler v. Stiles-Tull Lumber Co., 48 So. 966 (Miss. 1909).

B. The Manufacturing Use Restriction Applies to Both the Primary and Renewal Terms of the Contracts

The bulk of Glen Southern’s argument is based upon making a distinction between the primary and renewal terms of the contracts which, if there is such a distinction, would require the leased premises to be used only for manufacturing during the primary term, but would permit unfettered and completely discretionary use of the premises during the renewal terms. Contrary to Glen Southern’s argument, there is absolutely no contractual authority supporting such a distinction. Instead, the only distinction between the primary and renewal terms, according to the specific renewal clauses contained in each contract, is the difference in rent paid by Glen Southern.

In the initial 1952 contract, the parties agreed that the only difference between the primary and renewal terms of the contract would be the amount of rent paid by the Appellant.

The terms agreed to by parties is clearly set forth in the renewal clause of the 1952 contract:

n. The Company shall have the right and option to renew beyond the original twenty (20) year term for three (3) successive twenty (20) year terms each and for a final renewal term of nineteen (19) years upon the same terms

and conditions **except as to the amount of rent** contained in the original primary lease. (emphasis added)

Ex. 1A, p. 9 (R.E. 18).

Over the course of the next fifty or more years, the parties subsequent contracts never created any such distinction altering the parties' obligations in this regard, other than requiring an increase in the amount of rent, which is specifically incorporated using similar language in each subsequent contract:

1955 Contract

j. The Company shall have the right and option to renew beyond the original term for three successive 20-year terms each and for a final renewal term of 19 years upon the same terms and conditions, **except the amount of rent.** (emphasis added)

Ex. 2A, p. 6. (R.E. 20).

1958 Resolution

j. The Company shall have the right and option to renew beyond the original term for three successive 20-year terms each and for a final renewal term of 19 years upon the same terms and conditions, **except the amount of rent.** (emphasis added)

Ex. 3A, p. 3 (R.E. 22).

1963 Contract

j. The Company shall have the right and option to renew beyond the original term for three successive 20-year terms each and for a final renewal term of 19 years upon the same terms and conditions, **except the amount of rent.**(emphasis added)

Ex. 4A, p. 7 (R.E.24).

1967 Contract

(o) Said lease shall also provide that the Company shall have the right and option to renew beyond the original primary term for seven (7) successive ten (10) year terms each and a final renewal term of eight (8) years, **upon the terms and conditions herein stipulated for the primary term.** (emphasis added)

Ex. 5A1, p. 15 (R.E.33).

1969 Contract

(o) Said lease shall also provide that the Company shall have the right and option to renew beyond the original primary term for seven (7) successive ten (10) year terms each and a final renewal term of eight (8) years, **upon the terms and conditions herein stipulated for the primary term.** (emphasis added)

Ex. 6A, p. 16 (R.E. 26).

This same language, varying only by the amount of rent paid, is also mirrored in the attendant lease agreements:

1954 Lease

Lessee shall have the right and option to renew beyond the original twenty year primary term, for three successive twenty year terms each, and for a final renewal of nineteen years upon the same terms and conditions as contained in this lease, **except as to the amount of rent.**

Ex. 1B, p.4 (R.E. 28).

1957 Lease

Lessee shall have the right and option to renew beyond the original 17 year primary term, for three (3) successive (20) twenty year terms each, and for a final renewal of 19 years, upon the same terms and conditions as contained in this lease, **except as to the amount of rent.**

Ex. 2B, p. 3

1977 Lease

Lessee shall have the right and option to renew beyond the original twenty (20) year primary term, for three (3) successive 20 year terms and for a final renewal of 19 years upon the same terms and conditions as contained in this lease, **except as to the amount of rent.**

Ex. 3B, p. 4. (R.E.30).

Again, the parties' intent in not making any distinction between the primary and renewal terms is reiterated and memorialized in not only the contracts, but in the lease agreements as well.

In order to justify the argument regarding the purported distinction between the primary and renewal terms, Glen Southern takes great creative license in interpreting the subleasing clause of the first 1967 contract. Specifically, Glen Southern represents that section 7(q) of the 1967 contract permits it to "sublet the premises to any tenant, whether a manufacturing tenant or otherwise." See Appellants' Brief in Chief, p. 21. In stark contrast to this position, there is absolutely no language in section 7(q) supporting such an "interpretation" of this clause. When the entire clause is read as a whole, section 7(q) actually contains specific language requiring all subleases to comply with all obligations imposed by the previous contracts, including the manufacturing use restriction:

(q) Said lease shall also provide that during the primary term of the lease the Company may, with prior consent of the Agricultural and Industrial Board of the State of Mississippi, or its successors, and said Districts, assign the lease or sub-let the premises to any person, firm or corporation, **but no such assignment or sub-letting shall release the Company from any of its obligations thereunder or the contract giving rise thereto** unless the District in writing expressly agrees to said release with the consent of the Agricultural and Industrial Board of the State of Mississippi, or its successors. After the expiration of the primary terms, the Company may, at its discretion, assign any lease or renewal thereof or sub-let the said premises to any person, firm or corporation. (emphasis added)

Ex. 5A1, p. 16-17. (R.E.34-35).

As section 7(q) is quoted herein in its entirety, it is clear that the assignability clause of the 1967 contract is unambiguous as it allows the sublease or assignment of the lease to any person or entity with said sublease or assignment still being subject to the terms and conditions of the previous contracts. In contrast, Glen Southern's interpretation of this clause, which is present in only one of the contracts, would unilaterally wipe away any and all obligations in other sections, even those not pertaining to use restrictions once the primary term expired.

In addition to mischaracterizing the intention of the contracts and leases, Glen Southern also attempts to distort the type of restriction agreed to by the parties citing scholarly articles which analyze "continuous use" restrictions and argue that such restrictions are *per se* invalid. See App. Brief in Chief, p. 21, n. 17. However, the Mississippi Supreme Court held that when contracts contain both assignability clauses and use restriction clauses, such restrictions on the use of the leased property are valid. See Lloyd's Estate v. Mullen Tractor & Equipment, 4 So.2d 282, 285 (Miss. 1941) (finding no restraint on alienation where perpetual lease could be assigned). Further continuous use restrictions are not even analogous to the case herein. Instead, the matter at bar involves an express restriction permitting only a specific type of use (manufacturing) for the premises during the tenant's occupancy. Thus, the restriction present in the Marshall County/Glen Southern contracts is an "occupancy use" restriction, not a "continuous use" restriction. In *Caveat Lessor: Court's Unwillingness to Find Implied Covenants of Continuous Use in Commercial Real Estate Leases*, the author gives the following illustrative example of a continuous use restriction:

Rather than operate at a loss when business conditions deteriorate, sometimes a shopping mall tenant chooses to cease operations and continues to pay minimum rent until its lease expires.

Caveat Lessor: Court's Unwillingness to Find Implied Covenants of Continuous Use in Commercial Real Estate Leases, 24 Real Est. L.J. 236 (1996). In other words, the tenant may not cease its commercial operation, vacate the premises and find another tenant to sublease the premises. Under the lease restriction in the matter at bar, regardless of whether the tenant remains in the premises or subleases the premises to another tenant, both the lessor and sublessor are bound by the contractual obligation to use the premises for manufacturing during the term of the lease. Again, Glen Southern's argument is based solely upon misquoted and misconstrued provisions of the contracts.

Although Glen Southern mischaracterizes the language of the contracts in order to void the manufacturing restriction, the unambiguous terms of each contract, signed in 1952, 1955, 1958, 1963, 1967 and 1969, created absolutely no variance between the primary and renewal terms, except for the amount of rent. There is no language in any clause cited above which specifically states that the manufacturing use restriction is limited only to the primary term of the contracts.

The intent of the parties to create a permanent manufacturing use restriction is not only found in the terms of the contract, but was also understood by Glen Southern and those companies who sub-let the premises. Specifically, the Hunter Fan company who sub-let the premises for warehousing knew and understood that the Byhalia facility could be used only for manufacturing at the time it signed the sublease agreement:

- Q. Before the lease was executed by Hunter Fan, the lease there in Exhibit 2, did anyone ever tell you that the master lease between Marshall County and Glen Southern required a sublease to be a manufacturer.
- A. Yes.
- Q. Did Hunter Fan consider the operation that ya'll were putting in the GEM building to be one of manufacturing?
- A. No.

See Deposition of Glen Bailey, Ex. 16, p. 28 (R.E. 37).

- Q. Did Mike Thornton ever discuss the manufacturing requirement?
A. Yes, he did.
Q. Can you tell me what was said about that?
A. Just the fact that it is supposed to be a manufacturing operation in that facility based on the lease, on the master lease.
Q. Was he saying that - - well, tell me why he was saying that in your opinion?
A. Just saying to us that that was part of the agreement with Glen Southern that they would have manufacturing in that facility.

See Deposition of Glen Bailey, Ex. 16, p. 36. (R.E. 38). The actions of the parties, specifically the actions of Marshall County in continuing to enforce a manufacturing use restriction in 2003, and the Hunter Fan sub-lessor in acknowledging this restriction as part of the "Master Lease," is undisputable evidence that the parties intended to continue this restriction past the primary term of the contracts. As such, Glen Southern's argument making any distinctions between the primary and renewal terms of each contracts are clearly without merit.

C. The Manufacturing Use Restriction Should be Enforced According to the Terms of the Contracts and in Compliance with the Balancing Agriculture with Industry Acts and the Mississippi Constitution

Glen Southern next argues that although the original purpose of the contracts was for construction and use of the leased premises as a manufacturing facility, it should now be allowed to use the Byhalia facility for any lawful purpose it unilaterally deems appropriate. See App. Brief in Chief, p. 21-22. This argument is based solely upon the premise that restrictive covenants are to be construed against the person seeking to enforce them when the covenant later becomes inconvenient or unprofitable. Glen Southern simultaneously argues that use restrictions must be expressly stated in the contracts, even though every contract in dispute herein contains an express manufacturing use restriction. However, in making these erroneous arguments, Glen Southern conspicuously omits the single most important purpose upon which the manufacturing

use restriction is based: providing employment and creating economic growth in Marshall County.

In 1936 the Mississippi Legislature enacted the Balancing Agriculture with Industry Act (“BAWI”) for the purpose of using Mississippi’s agricultural resources to create manufacturing jobs in a state with a largely rural economy. *Balancing Agriculture with Industry Act*, Chapter 241 of the General Laws of Mississippi for 1944.¹ The purpose of the BAWI Act, which is also the purpose of the contracts and leases at dispute herein, was explained in detail by the Mississippi Supreme Court in Albritton v. City of Winona, 178 So. 799 (Miss. 1938) as follows:

[P]ublic necessity requires that cotton, cotton seed, clay, sand, gravel, wood, vegetable oil, nut oil, hides, vegetables, grain, grass, hay, potatoes, sugar cane, and other natural resources and products of this state should be processed and prepared in this state for market, thereby giving employment to the citizens and preventing dependency on governmental assistance through doles and relief

Albritton v. City of Winona, 178 So. 799, 802 (Miss. 1938). The BAWI Act allowed local county governments to partner with private industry to obtain bond financing and tax breaks for the construction and operation of manufacturing facilities to create employment opportunities for the local citizenry. The importance of such legislation, which encouraged manufacturing enterprises to create jobs for the local citizenry, was addressed in detail by the Court in Albritton:

Manufacturing enterprises, as all will agree, will tend to relieve unemployment and both directly and indirectly furnish markets for agricultural and other products. This state, in comparison with others, has few such enterprises, and has long sought in vain to procure them by offering them special inducements, e.g., exemption from taxation.

Id. at 805.

¹ The Balancing Agriculture with Industry Act was amended after the parties executed their initial contract and lease agreement. Each subsequent contract and lease agreement references the BAWI Act of 1936.

Empowered with this legislation, Marshall County entered into a series of contracts and attendant lease agreements with Glen Southern thereby providing Glen Southern with favorable bond financing and generous tax incentives to build and operate a manufacturing facility in Marshall County. In exchange, Glen Southern agreed to provide manufacturing jobs to the people of Marshall County for the life of the lease agreements. The parties memorialized their intent, as well as the policy underlying the contracts, in the preamble of the 1952 contract by stating:

WHEREAS, the County wishes the Company to establish a factory of the nature and location hereinafter described, and to induce it to do so is willing to undertake the obligations hereinafter contained;
WHEREAS, the Company, in consideration thereof, is willing to establish such a factory;

Ex. 1A p.1 (R.E. 17).

The parties then reiterated the nature of their agreement in the body of the contract:

m. The Company agrees that as promptly as is reasonably possible with due diligence after delivery to it of possession of the premises it will complete the installation of such additional machinery and equipment as it shall deem necessary to the operation of a factory for the purpose of manufacturing dust mops, wet mops, and other yarn and textile products of cotton or other fibre as it may see fit, and further agrees that it will operate said premises for the manufacture of some such product suitable to the Company. With the express provision that if the Company should abandon said premises and fail to use or operate them for a period of one continuous year except such temporary cessation as may be caused by matters not within the control of the Company, such as damage, strikes, and force majeure, then at the option of the County this agreement may be terminated without further liability to either party.

Ex. 1A, p. 9 (R.E. 18).

The nature of the partnership, to create a manufacturing enterprise creating employment opportunities pursuant to the BAWI Act, was echoed in the companion lease agreement signed in 1954:

WHEREAS, the parties have entered into a contract dated July 11, 1952, for the establishment of a textile manufacturing type of industry as a County or municipal industrial enterprise under the provision of Chapter 241 of the General Laws of Mississippi of 1944, as amended, said contract and the amendments thereto now appearing of record upon the minutes of the Board of Supervisors of said County and being made part hereof by this reference as fully, and with the same effect, as if copied at length herein.

Ex. 1B, p. 1 (R.E. 27).

Clearly, the initial contract and lease agreement were specifically tailored to effectuate the legislative purpose of the BAWI Act, which was to promote employment in the manufacturing industry by operating the leased premises as a manufacturing facility. Further, each subsequent contract and lease agreement expressly and unambiguously incorporated the purpose of the 1952 contract so as to remain in full compliance with the spirit of the BAWI Act:

1955 Contract

WHEREAS, the Company entered into an agreement dated July 11, 1952, with Marshall County, Mississippi to enter upon a progress of industrial development, as provided by Chapter 241 Laws of 1944 said agreement appearing in the minutes of the board of supervisors in Minute Book 28, pages 362-365 and being incorporated herein by reference. (emphasis added)

Ex. 2A, p.1 (R.E. 19).

* * * * *

1958 Resolution

2. That said application is for the **expansion and enlargement of a textile manufacturing type of industry** being operated by Gem, Incorporated, as revealed from a study of the resources and products of said Supervisors of District 3. (emphasis added)

Ex. 3A, p. 1(R.E. 21).

* * * * *

1963 Contract

WHEREAS, the **Company entered into an agreement dated July 11, 1952, with Marshall County, Mississippi, to enter upon a program of industrial development, as provided by Chapter 241, Laws of 1944;** said agreement appearing in the minutes of the Board of Supervisors in Minute Book 28, pages 362-365, and being incorporated herein by reference. (emphasis added)

Ex. 4A, p. 1 (R.E. 23).

* * * * *

1967 Contract

D. LEASE OF ENTERPRISE

Nothing in this contract or the lease hereinafter mentioned shall hereinafter mentioned shall be construed to prohibit or restrict Company from changing the type of manufacturing operation conducted on said enterprise, **to manufacture additional or different types of products, or in any manner change, modify or alter the nature of the product or products manufactured, so long as the Company shall perform all other obligations imposed upon it by this contract and the said lease.** (emphasis added)

Ex. 5A2, ¶D, p. 11

* * * * *

1969 Contract

WHEREAS, the **Company is now operating upon the manufacturing facilities** as the herein attached Exhibit "A" shows the legal description of the present Gem, Incorporated and asked to be made a part hereof as though fully set forth herein. (emphasis added)

Ex. 6A, p.1 (R.E. 25).

WHEREAS, **this manufacturing facility, constructed as aforesaid, was leased to Gem, Incorporated by Marshall County, Mississippi, on the 1st day of February, 1954, which lease is incorporated herein by reference** as though copied at length herein, and hereinafter referred to as "Original Lease." (emphasis added)

Ex. 6A, p. 3 (R.E. 26).

WHEREAS, the District wishes **the Company to expand its manufacturing facilities** located on the lands hereinbefore described and to induce it so to do is willing to undertake the obligations hereinafter contained. (emphasis added)

Ex. 6A, p. 3 (R.E. 26).

Evidenced by the clear terms of the contracts as well as each subsequent lease agreement, the agreements between the parties were drafted with the full knowledge that the BAWI Act controlled the performance of agreements. Further, the single guiding principal behind Marshall County's partnership with Glen Southern was to provide the employment created by large manufacturing operations which is not created in such volume by other industry. The benefits of the manufacturing industry is still seen today by Mississippi's continual pursuit of employers such as Nissan and Toyota.

As emphasized by the Court in Albritton, the promise of a manufacturing enterprise utilizing the natural resources of the region and creating new jobs for the local citizenry was the consideration paid to Marshall County under the auspices of the BAWI Act. The Mississippi Supreme Court was unequivocal in Albritton when it held that using a municipality or county's leased premises for any purpose other than that specified in the BAWI Act, is clearly against public policy and the spirit of the Act as they lose their status as "public works," instead becoming purely private ventures operated solely for the pecuniary enrichment of the private corporation:

Where such enterprises are engaged in by individuals under charters of incorporation, they are not the less undertakings in which the public have an interest. They are public works, intended to promote the interests of the community. The individual corporators, in the anticipated pecuniary benefit which may result to them, have an object and an interest distinct from that of the public. In that respect the enterprise is individual and the corporation private.

But the object and purpose of the incorporation are the public advantage. This gives to the work its public character. A corporation created by the legislature with a view to the construction of a work of public utility, is the agency or means by which its intentions are designed to be carried into effect.

Id. at 807-808.

Accordingly, the manufacturing use restriction was not just a restriction bargained for and agreed to by two commercial operations, or wealth maximizers, during the course of negotiations, but instead was also a legal prerequisite necessary to procure tax incentives and bond financing under the BAWI Act. Further, each party benefited from the manufacturing facility; Marshall County now had an industry which provided jobs for its citizens and Glen Southern was provided with public monies to create a manufacturing facility and operate the facility under tax incentives not available to its competitors. Again, we see the importance of such agreements when the State of Mississippi uses similar financing and tax schemes to lure large automobile manufacturers to the State. The effects of Glen Southern's abandonment are clearly borne out by the meager work force it now employees at the Byhalia facility, with its employees seeing the number of job reduced from the hundreds to less than ten people. See Depo. of Glen Bailey, Ex. 16, p. 69-70. (R.E.39-40).² Now, in using the leased premises for its own pecuniary benefit and allowing employment on the premises to dwindle to only six employees, what public good does Glen Southern bestow upon the citizens of Marshall County in exchange for using taking advantage of the public financing and tax incentives bestowed upon it through the BAWI Act? It seems clear that once Glen Southern was purchased by a Canadian conglomerate, it lost all interest in providing any economic benefits to the citizens of Marshall County, Mississippi.

² Q. Okay. How many employees do you have just at the GEM facility?

A. We have six employees.

Q. Six?

A. Six employees.

Q. Six full time employees in the Gem building?

A. Correct.

Q. Those are not seasonal employees, and those are six full time Hunter Fan employees?

A. Correct.

Not only is Glen Southern's abandonment of manufacturing contrary to the terms of the contracts themselves and contravenes the purpose of the BAWI Act, but it is also patently unconstitutional. Any such contractual agreement which provides economic benefits to a private corporation at the expense of the public, essentially taxing the people of Mississippi for a private purpose, is expressly prohibited by section 183 of the Mississippi Constitution:

No county, city, town, or other municipal corporation shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation, or loan its credit in aid of such corporation or association.

Section 183 of Mississippi Constitution. See also Albritton v. City of Winona, 178 So. at. 809 ("it is well settled in this state that taxes cannot be levied for private purposes."). The bond issues and tax breaks were provided to Glen Southern with the express understanding, as evidenced by the language of the contracts and lease agreements, that it would benefit the indigent or unemployed of Marshall County. These public monies must be spent in furtherance of their public purpose, otherwise the tax incentives become unconstitutional. "No persons are entitled to be supported at the public expense . . . [t]o allow money to a private person or organization, to be dispensed according to the will and judgment of such private person, uncontrolled by law, would be to take the taxpayer's property without due process contrary to section 14 of the state Constitution, and the Fourteenth Amendment of the Constitution of the United States." Miller v. Tucker, 105 So. 774, 780-781 (Miss. 1925).

Even if this Court finds that the BAWI Act does not provide any authority for incorporation of a manufacturing use restriction, the express terms of the contracts create a contractually binding use restriction in that they all reference the 1952 contract which obligates Glen Southern to use the premises for manufacturing. However, should this Court determine that the contracts are ambiguous, the actions of the parties clearly evidence an intent to create a

binding restriction, or affirmative covenant controlling the use of the Byhalia facility. When an agreement is ambiguous, the Court must “look to the construction which the parties have placed upon it in order to ascertain its true meaning.” Delta Wild Life & Forestry, Inc. v. Bear Kelso Plantation, Inc., 281 So.2d 683, 686 (Miss. 1973). “What the parties to a contract consistently do thereunder is evidence of what the contract between them required that they should do.” Id. (citing Goldberg v. L.H. Realty Corp., 86 So.2d 326 (1956)). If the actions of the parties are to be the measuring tape for discerning the intent of the parties, then there is no dispute about the following factual account regarding the actual use of the premises:

- (1) the original purpose of the contracts was to build a facility to manufacture of products derived from agricultural goods (App. Brief in Chief, p. 21);
- (2) at the time the parties executed each contract Glen Southern actually was using and did use the premises for manufacturing (App. Brief in Chief, p. 21);
- (3) Glen Southern and its sub-lessors in fact used the facility for manufacturing during the entire period of its occupancy of the premises. (App. Brief in Chief, p. 12, n. 12.);
- (4) in 2003 Glen Southern entered into a sublease with Hunter Fan who never intended to use the facility for manufacturing (App. Brief in Chief, p. 9-10);
- (5) when Hunter Fan signed the sublease it understood that the Master Lease required the premises to be used solely for manufacturing (Ex. 16, p. 28, 36); and
- (6) when Glen Southern ceased using the facility for manufacturing and informed Marshall County of the same, Marshall County, sought to terminate the lease.³ (App. Brief in Chief, p. 9-10).

³ Glen Southern argues that Marshall County actually filed suit before the sublease with Hunter Fan was signed. However, an engineering inspection was done in March of 2003 for Hunter Fan, and Glen Southern actually informed Marshall County of its intent to abandon the premises before March of 2003. The instant lawsuit was not filed until May of 2003, well after Marshall County sought assurance from Glen Southern that it would continue to use the leased premises for its intended purpose, but received no such assurance. Ex. 16, p. 27-29. It is a well understood maxim that when a party seeks assurance that a contract will be performed according to its terms and conditions, it is entitled to such assurance and in the absence thereof, may seek to cancel the contract and seek damages.

Accordingly, “it is evident from the acts of the parties themselves covering many years that they contemplated” the leased premises were to be used for manufacturing. Delta Wild Life & Forestry, Inc., 281 So.2d at 686. Only after Glen Southern failed to give reasonable assurances of continued manufacturing operations did Marshall County seek cancellation of the contract. If the contract is indeed ambiguous, then the actions of the parties in continually renewing these contracts and leases over the past fifty years, and Marshall County’s subsequent termination of the contract in 2003, prompted only by Glen Southern’s cessation of manufacturing operations that year, clearly manifests the parties intent to create a permanent occupancy use restriction.

The parties’ actions seem to be at least of one of the factors considered by the Chancellor when he granted Marshall County’s motion for summary judgment:

The parties intent from the first contract and in the subsequent contracts was that the use of this property and facility for manufacturing purposes and to bring jobs to Marshall County, Mississippi. In so doing, the property was consistently used in that way for 50+ years until 2003, when it was begun to be used as a warehouse shortly before the filing of this lawsuit. This Court is left with the reasonable conclusion that the parties intended to provide a tax payer subsidized method for providing jobs as a result of a manufacturing operation. This Court does not find that it is reasonable to glean that the intent of the parties was to construct a warehouse facility through tax incentives that would provide little or no economic job benefit to the citizens and tax payers of Marshall County.

(R. 124). Given the parties’ performance of the contracts over the years, the Chancellor was manifestly correct in granting summary judgment in favor of Marshall County.

D. The Proper Remedy Under the Contract was Cancellation or in the Alternative, Any Agreement Permitting Use of the Premises for Activities Other Than Manufacturing is Void Pursuant to Public Policy and the Mississippi Constitution.

Glen Southern next takes issue with the Chancellor's cancellation of the contract and lease arguing that the premises were never abandoned and that cancellation is not a proper remedy. Glen Southern's argument is based upon its own belief or opinion that "as long as the premises are used for something there is no abandonment." (R. 33). This argument is directly contrary to the express provisions of the contracts and leases which specifically state that the Byhalia facility is to be used for manufacturing only. Accordingly, the term "abandonment" while not specifically defined in the contract must be read to comply with the purpose of the contract, which was to prevent the lessee from using the premises in a manner inconsistent with the BAWI Act. Thus, the one-year abandonment clause clearly applies to the cessation of manufacturing activities. Following Glen Southern's argument, as long the premises could be used for any imaginable purpose, whether such use is contemplated by the leases or not, Glen Southern would never be required to vacate the premises under any circumstances. However, Glen Southern's argument, incorporating only choice provisions of the abandonment clause, (section "m" of the initial 1952 contract) while ignoring the full text, must be read together and as one fully incorporated provision:

m. The Company agrees that as promptly as is reasonably possible with due diligence after delivery to it of possession of the premises it will complete the installation of such additional machinery and equipment as it shall deem necessary **to the operation of a factory for the purpose of manufacturing dust mops, wet mops, and other yarn and textile products of cotton or other fibre as it may see fit, and further agrees that it will operate said premises for the manufacture of some such product suitable to the Company. With the express provision that if the Company should abandon said premises and fail to use or operate them for a period of one continuous year except such temporary cessation as may be caused by matters not within the control of the Company, such as damage, strikes, and force majeure, then**

at the option of the County this agreement may be terminated without further liability to either party. (emphasis added)

Ex. 1A, p. 9

When section “m” is read in its entirety, the conditions constituting abandonment of the premises are clear: Glen Southern is obligated to “operate said premises for the manufacture of some such product suitable to the Company” but, “if the Company should abandon said premises” “this agreement may be terminated.”

In addition to the abandonment clause in the 1952 contract, the 1969 contract also contained an express abandonment clause:

The Company agrees with the express provision that if the Company should abandon and fail to use and operate them for a period of one (1) continuous year except such temporary cessation as may be caused by matters not within the control of the Company, such damage, strikes, and force majeure then **at the option of the County this agreement may be terminated without further liability to either party.** (emphasis added)

Ex. 6A, p. 21

When read as intended, by incorporating all termination provisions of the 1952, 1955, 1958, 1963 and 1967 contracts, the 1969 contract specifically contemplates cancellation of the contracts and leases as was ordered by the Chancellor.

Glen Southern readily concedes that no manufacturing operations have taken place in the Byhalia facility since January 2003. Accordingly, the premises have not been used for the purpose contemplated by the contracts and leases for over four (4) years as of the filing of this brief. Further, Glen Southern has presented testimony at the trial court level showing that it has absolutely no intention of returning manufacturing operations to the Byhalia facility should the leases be reinstated. (R. 39). Cancellation was therefore completely appropriate pursuant to the termination clauses agreed to by the parties.

Marshall County next submits that even if this Honorable Court finds that cancellation was not an appropriate remedy, any lease agreement permitting anything other than manufacturing, whether approved by the parties or not, is void pursuant to public policy and the Mississippi Constitution. The Mississippi legislature, when passing the BAWI Act, did not intend county governments to issue bonds and create tax incentives if the funds gained from the Act were not used for operating manufacturing facilities and to promote employment. Accordingly, Marshall County could not have lawfully entered into a private contract under the BAWI Act except to promote employment in the manufacturing industry. See Albritton v. City of Winona, 178 So. 799 (Miss. 1938). In fact, the Court in Albritton actually contemplated this same scenario by recommending the incorporation of a “use restriction” clause in BAWI leases which, upon abandonment of the premises, would operate to terminate the lease:

[T]he Mississippi Industrial Commission will take care that the provisions of the leases will meet the requirements of the statute. If they do not, the leases will be void. It may not be amiss, however, to say that one effectual method for preventing the lessee from holding the property without carrying out the purposes for which it was acquired would be to insert in the lease a clause setting forth the character and capacity of the proposed industry, and providing for the termination of the lease if the lessee fails within a specified time to equip and operate the industry as described in the lease or discontinues for a specified time thereafter to so operate it.

Id. at 808.

Thus, under Albritton there is both an implied obligation to operate the premises for a BAWI public purpose, and legal authority for manufacturing use restrictions to ensure the same. Marshall County’s termination of the contract and lease is valid under either maxim.

In support of its argument against cancellation of the lease, Glen Southern cites Independent Healthcare Mgt., Inc., v. City of Bruce for the proposition that even when a lessor has a public interest in continuing restricted use of a property, it cannot cancel the lease for

failure to operate the premises for that public use, unless there is clear language regarding such in the contract. As referenced above, the contracts between Glen Southern and Marshall County specifically require the Byhalia facility be used only for manufacturing. However, in making this point, Glen Southern omits the most relevant portions of the Court's holding in City of Bruce, which ultimately held that the lessor, while not breaching a covenant to operate an emergency room, did breach its affirmative duty to continue operation of a hospital, thereby permitting cancellation of the lease. Independent Healthcare Mgt., Inc., v. City of Bruce, 746 So.2d 881, 888-889 (Miss. App. 1999). When read in its entirety, the City of Bruce actually supports Marshall County's position that Glen Southern had a duty under the lease to operate a manufacturing facility by providing a well reasoned opinion outlining the distinction between "use restrictions" and "affirmative covenants" in lease agreements. The Court differentiated between a "limitation on the lessee's permissible scope of activity on the premises" and an "affirmative covenant to maintain a particular activity" by giving the following example:

A tenant who, for example, covenanted to limit his activities to operating a commercial warehouse would be in default if he attempted to operate a restaurant, but would not typically be deemed in default if he temporarily ceased his business activities altogether so long as he remained current on his lease payments and faithfully performed all obligations under the lease.

Id. at 886-887. The Court reasoned that "unlike the typical lessor, the City did have an interest, not only in limiting its lessee to certain specific activities, but also in seeing that its lessee did, in fact, carry on those contemplated activities." Id. This example is analogous to the lease agreement in the matter at bar which may, under the reasoning applied in the City of Bruce, be more aptly characterized as an affirmative covenant to maintain a manufacturing facility on the leased premises in order to promote job growth and economic expansion. Accordingly, when

Glen Southern covenanted to limit its activities to manufacturing, but instead used the Byhalia facility for warehousing, it was in default under the terms of the contract.

The City of Bruce is also instructive on another poignant issue: under what conditions are the premises deemed abandoned? In the City of Bruce, the Court held that the lease may be cancelled when the premises were no longer used to operate a hospital. In determining what act or omission constituted abandonment under the lease, the Court held that when the lessor “for all practical purposes ... effectively ceased to operate as a viable operation,” the lease was breached entitling the municipality to terminate the lease. Id. at 888. This is the same result reached by the Court in Farm Services, Inc., v. Oktibbeha County Bd. of Supervisors, where forfeiture of a lease between Oktibbeha County and the lessee was affirmed when the lessee ceased operations and failed to provide employment in the county for over one year. See Farm Services, Inc., v. Oktibbeha County Bd. of Supervisors, 860 So.2d 804, 808 (Miss. 2003.) Just as in the City of Bruce and Oktibbeha County, Glen Southern has confessed that since 2003, it has not used the Byhalia facility for manufacturing and does not intend to revert back to manufacturing. Instead, Glen Southern wants this Court to ratify its unilateral decision to continue warehousing for the remainder of the lease.⁴ It is therefore certain, by party admission, that for all practical purposes Glen Southern has permanently ended all viable manufacturing operations in the Byhalia facility permitting termination of the contract and lease.

Glen Southern attempts to address this counter-argument by quoting UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, 525 So.2d 746 (Miss. 1987), for the blanket and unqualified proposition that termination is a “radical” remedy. UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, 525 So.2d 746, 756 (Miss. 1987). However, in UHS-Qualicare, the

⁴ It should also be noted that Glen Southern has the right to renew the lease, without the right of refusal by Marshall County, for a 78 year lease term dating back to 1977. This would allow Glen Southern to continue tax payer subsidized warehousing in the Byhalia facility until 2055.

Appellee attempted to terminate the contract on a mere technicality, not a material breach. Finding that the breach was not material and not subject to termination, the Court held that termination is an appropriate remedy only when “the breach of the contract is such that upon a reasonable construction of the contract, it is shown that the parties considered the breach as vital to the existence of the contract.” UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, 525 So.2d at 756 (citing Matheney v. McClain, 161 So.2d 516, 520 (Miss. 1964)). In the matter at bar, manufacturing operations were considered the key component of the contract, and the purpose behind the entire agreement among the parties. Ending manufacturing at the leased premises was therefore “a failure to perform a substantial part of the contract” which “substantially defeats its purpose.” UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, 525 So.2d at 756 (citing Gulf South Capital Corp. v. Brown, 183 So.2d 802, 805 (Miss. 1966)). Given this, Marshall County’s contractual option to terminate the agreement, upon material breach by Glen Southern, should be upheld.

Finally, although Glen Southern continually reminds this Honorable Court that the “law abhors a forfeiture,” the remedy of cancellation and termination was specifically agreed to by the parties when executing the contracts and lease agreements. No other option such as the payment of liquidated damages or specific performance was provided for in any of the contracts or leases. In hindsight, this is actually the most prudent option as it is virtually impossible to replace cancellation with any other remedy such as specific performance, as the Court would necessarily be required to provide unremittent supervision of Glen Southern’s business operations to ensure constant compliance with the black letter law of the contracts. Since Glen Southern has affirmatively represented that it has no intention to return to manufacturing operations, coupled

with the absence of other practically feasible remedies, the Chancellor's cancellation of the contracts and leases is the most judicially efficient remedy available.

CONCLUSION

For the foregoing reasons, the Appellee respectfully requests that this Honorable Court affirm the Chancellor's decision to grant Marshall County's Motion for Summary Judgment, ordering cancellation of the contracts and lease agreements at issue herein and granting immediate possession of the Byhalia facility to Marshall County, Mississippi.

RESPECTFULLY SUBMITTED, this the 11th day of April, 2007

MARSHALL COUNTY, MISSISSIPPI

Appellant

By: 

HON. KENT E. SMITH (MSB# [REDACTED])

HON. JUSTIN S. CLUCK (MSB# [REDACTED])

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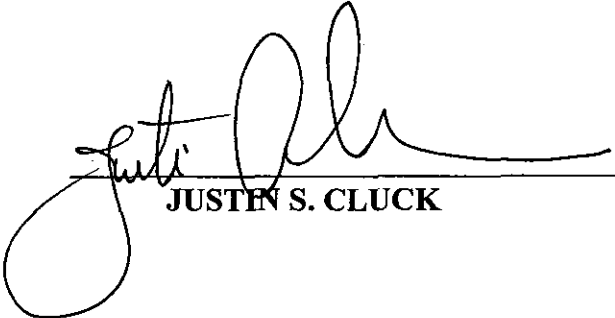
CERTIFICATE OF SERVICE

This will certify that the undersigned attorney for Smith Whaley, PLLC, that I have this date delivered a true and correct copy of the above and foregoing *Brief of Appellee, Marshall County, Mississippi*, to all counsel of record by placing a true and correct copy thereof in the United States Mail, postage prepaid, addressed as follows:

**Honorable Edwin W. Roberts, Jr.
Chancery Court Judge
P.O. Box 49
Oxford, MS 38655**

**Roy D. Campbell, Esq.
Margaret O. Cupples, Esq.
P.O. Box 1789
Jackson, MS 39215**

THIS, the 11th day of April, 2007.


JUSTIN S. CLUCK