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

GLEN SOUTHERN, INC.
AND GEM SOUTHERN, INC. — **DEFENDANTS-APPELLANTS**

v.

MARSHALL COUNTY, MISSISSIPPI — **PLAINTIFF-APPELLEE**

ON APPEAL FROM THE CHANCERY
COURT OF MARSHALL COUNTY, MISSISSIPPI
HONORABLE EDWIN H. ROBERTS, JR., CHANCERY JUDGE

BRIEF OF APPELLANT GLEN SOUTHERN, INC.

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v.

MARSHALL COUNTY, MISSISSIPPI **APPELLEE**

On Appeal From The Chancery Court of Marshall County, Mississippi
Honorable Edwin H. Roberts, Jr., Chancery Judge

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities 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:

1. Glen Southern, Inc. and GEM Southern, Inc., Defendants-Appellants.
2. Roy D. Campbell, III, Margaret Oertling Cupples, A. Kate Margolis, and the firm of Bradley Arant Rose & White, LLP, counsel for Defendants-Appellants Glen Southern, Inc. and GEM Southern, Inc.
3. Marshall County, Mississippi, Plaintiff-Appellee Marshall County, Mississippi.
4. Kent E. Smith and the firm of Smith Whaley, counsel for Plaintiff-Appellee.
5. Tacey Clark Clayton and the firm of Tacey Clark Clayton, PLLC, formerly counsel for Plaintiff-Appellee Marshall County, Mississippi.
6. The Hon. Edwin W. Roberts, Jr., Chancery Judge, the trial judge in this action.

RESPECTFULLY SUBMITTED, this the 16th day of January, 2007.

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STATEMENT REGARDING ORAL ARGUMENT

Glen Southern, Inc. and GEM Southern, Inc. do not request oral argument in this action. The record is complete and concise, and the single issue is straightforward. Thus, subject to consideration of the County's position regarding oral argument, Glen Southern, Inc. and GEM Southern, Inc. do not believe that oral argument is necessary to assist the Court.

STATEMENT OF THE ISSUES

For more than fifty years, beginning in 1952, Defendants-Appellants Glen Southern, Inc. and GEM Southern, Inc. (collectively, "Glen Southern") leased a facility in Marshall County, Mississippi from Plaintiff-Appellee Marshall County (the "County"), and operated the facility pursuant to a number of contracts and leases based on the contracts. The County contends that the contracts require the facility to be used only for manufacturing. But the contracts that contain such language limit the manufacturing-use restriction either to the primary term of the corresponding leases, or to the time period of Glen Southern's occupancy of the facility.

The sole issue presented by this appeal is whether the Chancery Court erred in construing the contracts to imply a requirement that the facility *always* be used only for manufacturing, regardless of the plain language of the contracts; and thus, whether the Chancery Court erred in denying Glen Southern's motion for summary judgment and granting the County's mirror-image motion on the same point.

STATEMENT OF THE CASE

A. Course of Proceedings in the Trial Court.

This case is a dispute over contract interpretation. Specifically, it concerns interpretation of a series of seven contracts and six related leases, entered into over a time period of more than 50 years. The parties to the contracts and leases are Plaintiff-Appellee Marshall County, Mississippi (the "County"), on the one hand, and Defendants-Appellants Glen Southern, Inc. and GEM Southern, Inc. (collectively, "Glen Southern"), on the other. Pursuant to the contracts and leases, beginning in 1952, Glen Southern built, operated, and leased a facility in Byhalia, Mississippi. *E.g.*, R. 98-99, R.E. 3-4.[1] The primary term of the last lease expired in 1990. *See* Ex. 6B at p. 5. In 1992, as permitted by contractual provisions, Glen Southern subleased the facility with the County's approval. Exs. 10, 11. A series of other subleases followed. Exs. 13, 15.

In May 2003, more than 50 years after the first contract was signed, the County filed this lawsuit in Marshall County Circuit Court, requesting that the leases be cancelled, and making other related claims. *See* R. 99, R.E. 4. In its amended complaint, the County made claims for breach of contract and for breach of the duty of good faith and fair dealing. R. 73-81. Without reciting any damages that it alleged it had incurred as a result of the claimed breaches, the County requested neither monetary damages nor specific performance, but a more unusual

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[1] References to the single volume of clerk's papers in the Record on Appeal are made in the following format: R. __. Citations to the transcript of the May 30, 2006 hearing on Glen Southern's Motion for Reconsideration or For Other Relief (*see* R. 111-17) are made as follows: Tr. ___.

In addition to these portions of the Record on Appeal, the Record also contains copies of the exhibits to Glen Southern's Motion for Summary Judgment (primarily, these are the contracts and leases at issue). The exhibits are loose pages in an expandable envelope; they are not consecutively numbered, but the pages within each exhibit are numbered. Thus, the exhibits are cited according to the number of each exhibit, followed by a page number within that exhibit, so that, for example, page 2 of Exhibit 1A to the Motion for Summary Judgment is cited in the following format: Ex. 1A, p. 2.

Finally, Glen Southern's Record Excerpts are cited as follows: R.E. ___.

remedy: that the Court *cancel* the contracts and leases, and grant the County immediate possession of the Byhalia facility. R. 78-80.[2]

Specifically, the County claimed that Glen Southern had violated the terms of their agreements by failing (1) to obtain the County's approval of an alleged assignment in 1992; (2) to obtain approval from the Mississippi Development Authority ("MDA")[3] for a sublease in 1997; (3) to remain qualified to do business and maintain a registered agent in Mississippi from 1993-2003; and (4) to operate the leased premises as "a factory for manufacturing" for a period of more than one year, "from January 2003 to the present". *See* R. 78-79 (Am. Complt. ¶ 13). The Chancery Court ruled against the County on all but the fourth claim, concerning whether the facility was required to be used only for manufacturing, and this appeal involves only that claim. R. 140 (Designation of the Issue on Appeal).

Glen Southern answered the complaint, R. 82-88, and moved to transfer the case to the Chancery Court of Marshall County, because the County sought equitable relief. R. 86. In May 2004, the Circuit Court entered an order transferring the case to the Chancery Court of Marshall County. *See* R. 99, R.E. 4. The parties filed cross motions for summary judgment. *See* R. 100, R.E. 5; R. 9-18 (Glen Southern Mtn. for Summary Jmt.), R. 69-88 (Marshall Cty. Resp. to [Glen Southern] Mtn. for Summary Jmt., & Cross-Mtn. for Summary Jmt.).

In its motion for summary judgment, *inter alia*, the County asserted (1) that the contracts and leases require that the facility be used at all times *only* for manufacturing; and (2) that any use other than manufacturing triggers the abandonment provision under some of the contracts,

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[2] The County also requested "any other relief which the Court may find warranted . . . and which equity may justify . . . ." R. 80.

[3] MDA was formerly known as the Mississippi Agricultural and Industrial Board, then the Mississippi Board of Economic Development, then the Mississippi Department of Economic and Community Development, before becoming the MDA. *See* R. 21 & n. 6. All are referenced herein as "MDA".

thus entitling the County to rescind the contracts and take possession of the facility. *See* R. 66 (County's Mtn. for Summary Jmt.); R. 80 (Am. Complt.; claim for possession of facility).[4]

Glen Southern pointed out in its motion that, contrary to the County's claim, the plain terms of the contracts at issue demonstrate, first, that any manufacturing use restriction was limited to the primary term of each lease or to the period when Glen Southern occupied the facility; and, second, that, in order for the premises to be "abandoned", they must have been empty and unused for at least one continuous year, which all parties agree has not occurred. *See* R. 12-15 (describing contracts, leases, subleases and substantially continuous occupancy of premises from 1952 to present).

On May 17, 2006, the Chancery Court issued an opinion granting the County's motion for summary judgment, R. 98-110, R.E. 3-15. The Opinion granted the County's motion *solely* on the basis of the Court's finding that Glen Southern had breached the contracts at issue "due to failure to maintain a manufacturing business at the Byhalia facility." R. 109, R.E. 14. The Court found for Glen Southern on all of the County's remaining claims. *See* R. 101-05, R.E. 6-10.

Glen Southern moved for reconsideration of the Court's order granting summary judgment for the County. Glen Southern argued that the Court's ruling had misinterpreted the contractual provisions concerning use of the facility for manufacturing. R. 111-12. The Court held a hearing on May 30, 2006 on the motion for reconsideration. Tr. 3-28. By Order filed June 30, 2006, the Court reaffirmed its May 17, 2006 Opinion granting summary judgment to the County. R. 123-24, R.E. 17-18. By separate order, also filed on June 30, 2006, the Court also

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[4] Although the County alleges a breach of the contracts and requests a remedy for that breach, the County's Amended Complaint is entirely silent as to its actual damages. *See* R. 78-79 (Am. Complt.); *cf.*, *e.g.*, *Guinn v. Wilkerson*, __ So. 2d __, 2006 WL 3199610, at *3 (Miss. Ct. App. Nov. 7, 2006) (citing *Favre Property Mgmt., LLC v. Cinque Bambini*, 863 So. 2d 1037, 1044 (Miss. Ct. App. 2004) (elements of breach of contract claim are (1) a valid contract; (2) a breach of that contract by the defendant, and (3) "*money damages suffered by the plaintiff*" (emphasis added)). The County's Amended Complaint is silent as to monetary damages, and indeed, the County nowhere claims that it has not received all payments due under the contracts and leases.

directed the Chancery Clerk to cancel the leases and contracts and granted possession of the facility to the County. R. 122, R.E. 16.[5]

Glen Southern appealed from the Chancery Court's June 30, 2006 Orders on July 14, 2006. R. 125. The County did not file a cross-appeal. Thus, the only issue presented in this appeal is whether the Chancery Court erred in granting the County's motion for summary judgment (and denying Glen Southern's mirror-image motion) based on the County's claim that the contracts require that the facility be used for manufacturing purposes only, and that failure to use it in that manner constitutes an abandonment of the premises.

B. Statement of Facts.

1. The initial contract for the Byhalia facility.

Beginning in July 1952, the County contracted with Glen Southern's corporate predecessor[6] to build, then later expand, and lease a commercial facility in Byhalia, Mississippi. R. 98, R.E. 3; *see* Ex. 1A, p. 1; *see also Gem Inc. v. United States*, 192 F. Supp. 841, 842 (N.D. Miss. 1961).[7] The initial construction, as well as a number of later expansions, were financed through bond issues under the statutory "Balance Agriculture with Industry" ("BAWI") program, legislation designed to spur economic growth in non-agricultural industries. *See* R. 98, R.E. 3. BAWI incentives, which were part of the development here, were designed to "promot[e] and

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[5] Although the correspondence reflecting their agreement is not in the record here, the parties have agreed to a stay of the Chancery Court's order granting the County possession of the facility, and to suspend or escrow rental payments, pending the outcome of this appeal.

[6] Glen Southern began its corporate existence as Gem Incorporated, in 1952. In 1982, it changed its name to GEM Southern, Inc.; and in 1992, it changed to its current name, Glen Southern, Inc. *See* Ex. 7 pp. 15-17; Ex. 19 pp. 10-16. As the Chancery Court found, all are the same entity, *see* R. 101 ("The Court finds that this [change from GEM Southern, Inc. to Glen Southern] was just a name change, not a sale of the business"). All are referenced collectively herein as "Glen Southern". The County entity that negotiated and contracted with Glen Southern was the Third Supervisors District of Marshall County. *E.g.*, Ex. 11, p. 1.

[7] The *Gem Inc.* case, which discusses the facts surrounding the original lease, involved Glen Southern's successful appeal from a wrongful tax assessment. 192 F. Supp. at 841, 849.

develop[] commercial, industrial, agricultural, and manufacturing enterprises", *Board of Supervisors of Lamar Cty. v. Hattiesburg Coca-Cola Bottling Co.*, 448 So. 2d 917, 919 & n.2 (Miss. 1984), through issuance of municipal bonds to finance construction projects such as those involved here. *See* Miss. Code Ann. §§ 57-3-3 (1972); *and see generally* Miss. Code Ann. §§ 57-1-1 to 57-1-70 (1972) and §§ 57-3-1 to 57-3-33 (1972). Since about 1960, in addition to manufacturing, the program has promoted not only manufacturing projects, but a number of other enterprises, including "any enterprise for storing or warehousing products," research and development, and other commercial activities. Miss. Code Ann. §§ 57-3-5(2)(b) *through* (3) (1972).

In its original 1952 contract with Glen Southern, the County agreed to apply for $100,000 of industrial development bonds to finance construction of a "factory building or buildings", which Glen Southern would build, lease, and operate "as a factory for manufacturing dust mops, wet mops and other yarn and textile products . . . during the period of the primary term" of the lease. Ex. 1A at §§ 4, p 2; 11(j), p. 8; *and* 11(m), p. 9. The "primary term" of the lease was 20 years. Glen Southern also had an option to renew for three additional 20-year periods, and one additional 19-year period. *Id.* at §§ 11(b), p. 2; *and* 11(n), p. 9; *see also Gem, Inc.*, 192 F. Supp. at 842.

2. Expansions; new contracts and leases.

As its business grew over the years, Glen Southern expanded the facility five times, pursuant to separate contracts with the County in 1955, 1958, 1963, 1967, and 1969. R. 98, R.E. 3.[8] For each construction project, as with the initial one in 1952, each contract was followed by a lease. R. 98-99, R.E. 3-4. Glen Southern attached copies of the contracts and leases to its

[8] Glen Southern also purchased, and owns outright, the property surrounding the facility on three sides; the fourth side is bounded by a railroad line. *See* Ex. 15 at p. 1 & Ex. 15, Exhibit A at p. 21 (showing real property owned by Glen Southern surrounding facility and railroad line abutting property).

motion for summary judgment, and the documents are included in the Record on Appeal as Exhibits 1A to 6B.[9] As finally developed, the facility comprises several hundred thousand square feet, all more or less under a single roof. *See, e.g.*, Ex. 15 at § 1.02, p. 1 (sublease to Hunter Fan; leased premises equal to 278,000 square feet); Ex. 15 at Exhibit B, p. 23 (map of buildings).

To the extent that there is any conflict between the leases and the contracts, the contracts control. *E.g.*, Ex. 1A, § 11, p. 5 (lease is "subject to" contract's "terms and conditions"); Ex. 1B, § 1, p. 1 (contract is incorporated into lease by reference, "as if copied" therein).

Consistent with the BAWI statutes, each contract specified that the County would recoup its costs associated with the construction – such as costs to purchase the real property, for architects' and engineers' fees, and to issue the bonds used to finance the project – through lease payments made by Glen Southern during the primary term of each lease. *E.g.*, Ex. 1A, § 11(c), pp. 5-6; *Gem Inc.*, 192 F. Supp. at 842 ("maturity schedules and rental payments were so arranged [by the parties as to] . . . completely pay and retire the bonds and the interest coupons thereon" during the primary lease term); *see Hattiesburg Coca-Cola*, 448 So. 2d at 918 (describing similar financing and repayment arrangement).

Until the bonds were repaid, the State of Mississippi, through the MDA, was empowered to supervise the leases. Once the primary term of each lease expired, and the County thus had

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[9] The contracts and leases are dated as follows:

> July 11, 1952 contract (Ex. 1A), with corresponding lease entered February 1, 1954 (Ex. 1B);
> January 14, 1955 contract (Ex. 2A), with corresponding lease entered March 13, 1957 (Ex. 2B);
> April 7, 1958 contract (Ex. 3A), with lease dated December 12, 1977 (Ex. 3B);
> July 22, 1963 contract (Ex. 4A), with lease dated December 12, 1977 (Ex. 4B);
> Two 1967 contracts, dated May 29, 1967 (Ex. 5A-1) and November 13, 1967 (Ex. 5A-2), with lease dated December 12, 1977 (Ex. 5B); and
> August 5, 1969 contract (Ex. 6A), with lease dated December 12, 1977 (Ex. 6B).

See R. 98-99; Exs. 1A-6B.

recovered its costs through the lease payments, the need for MDA's supervision ended. *E.g.*, Ex. 5A-1, § 7(c), (d), at pp. 6-8; Ex. 5A-2, ¶ 2, pp. 11-12.

Under these contracts and the associated leases, Glen Southern operated its manufacturing business at the Byhalia facility for nearly 50 years. The primary term of the final lease expired in 1990. *See* R. 34 *and* Ex. 6B at p. 5 (primary term of 1977 lease, entered pursuant to 1969 contract, is "20 years from October 1, 1970").

3. Subleases to E.D. Smith, Havatampa, and Hunter Fan.

In 1992, two years after the primary term of the sixth and final lease between Glen Southern and the County expired, *see* R. 34 *and* Ex. 6B at p. 5, Glen Southern subleased the premises to E.D. Smith-Gem, Inc. ("E.D. Smith") for a ten-year period. Ex. 10. The County approved the E.D. Smith sublease, and submitted it to MDA for approval (which MDA granted). *See* Exs. 11, 12. The sublease essentially removed *any* restriction on the use of the facility; it stated that E.D. Smith may use the premises "only for the *warehouse and/or* manufacture of food and health and beauty aids, *or for any other lawful purpose. . . .*" Ex. 10, § 15.01, p. 18 (emphasis added). Glen Southern was required to consent to any uses that involved hazardous substances or uses that would create a nuisance. *Id.*

Before E.D. Smith's sublease expired, E.D. Smith sold its assets to Havatampa, Inc. ("Havatampa"). Consequently, in 1996, Glen Southern and Havatampa entered into a sublease which was substantially identical to the E.D. Smith sublease. It likewise permitted Havatampa to use the facility for warehousing, manufacturing, or any other lawful purpose.[10] Ex. 13, § 15.01, p. 17. When the Havatampa sublease expired in 1992, Havatampa continued to sublease the premises on a month-to-month basis, until June or July 2003, when it vacated the premises. Ex. 17, ¶ 4. Thereafter – and *after* this lawsuit was filed in May 2003 – Glen Southern entered into a

[10] The County approved the Havatampa sublease, but did not submit it to the MDA for approval. Ex. 14.

similar sublease with Hunter Fan, which continues to use the facility for warehousing. R. 99, R.E. 4 (suit filed in May 2003); Ex. 15, § 15.01, pp. 1, 13, 19 (Hunter Fan sublease, including description of permitted warehousing and "light assembly" uses; executed June 19, 2003).

4. Specific provisions of the contracts and leases regarding continuous manufacturing use and abandonment.

Specific provisions of several of the contracts and leases are central to the County's claims and to Glen Southern's defenses. The County's claim, in simplest terms, is that Glen Southern's failure to use the premises for "manufacturing" for a period of more than one continuous year somehow is equivalent to an "abandonment" of the premises, thus entitling the County to terminate the contracts, cancel the leases, and take possession of the facility. *See* R. 71, ¶ 4 (County's Cross-Mtn. for Summary Jmt.; "Defendant Glen Southern has failed to operate the Byhalia facility for manufacturing purposes for over one continuous year, as required by certain of the contracts. Such failure constitutes a material breach and justifies termination and cancellation of the contracts and leases."). This claim – based on a mistaken construction of the contract language – incorrectly combines separate contractual terms (1) describing the business enterprises for which the facility may be used and (2) defining "abandonment" of the premises. That language therefore bears emphasis and some detailed discussion.

a. The 1952 contract.

The initial, 1952 contract contains a specific provision regarding the uses to which Glen Southern may put the facility, and the time period during which that use restriction will apply.

> m. The Company [Glen Southern] agrees ... that it will operate said premises **during the period of the primary term** herein provided **for the manufacture of some such product** suitable to the Company.

Ex. 1A, § 11(m), p. 9 (emphasis added). The "primary term" is defined as twenty years from the date that Glen Southern takes possession of the premises. *Id.* at § 11(b), p. 5; *see also* Ex. 1B, § 3, at p. 2 (primary term of lease is for twenty years from the first day of November, 1953, that

being the first day of the month following the date of Glen Southern's taking possession of the facility). The primary term of the 1952 lease, therefore, ended in 1973.

The following sentence – a separate provision – defines "abandonment" of the premises, and the consequences of abandonment:

> With the express provision that **if the Company [Glen Southern] should abandon said premises and fail to use or operate them for a period of one continuous year ...** then at the option of the County this agreement may be terminated without further liability to either party.

Ex. 1A, § 11(m), p. 9 (emphasis added). In other words, the 1952 contract – on which all the later ones are based – provides that the facility is intended to be used for manufacturing, but only *during the primary term of the original lease – i.e.*, until 1973. And, it separately defines abandonment: if, at *any* time, either during the primary term or thereafter, the facility is abandoned, *i.e.*, not "use[d] or operate[d]" for "one continuous year", then the County may cancel the contract. *Id.*

b. "Manufacturing use" restrictions – or lack thereof – in subsequent contracts.

Absolutely no restriction concerning the uses to which the facility may be put appears in the second, third, or fourth contracts, entered in 1955, 1958, and 1963. Exs. 2A, 3A, 4A.[11] In 1967, the parties entered into two new contracts. Exs. 5A-1, 5A-2. Not surprisingly, the first of these contains several miscellaneous references to Glen Southern's current use of the premises' "factory building" for its "manufacturing operation". After all, these contracts were entered into during the primary term of the original contract (pre-1973), at a time when the original manufacturing-use restriction was still in place. *See* Ex. 1A, § 11(m), p. 9; *id.* at § 11(b), p. 5;

[11] Each of these later contracts, however, incorporates the 1952 contract and each earlier contract by reference. *E.g.*, Ex. 2A, at p 1 (1955 contract; reciting that 1952 contract is "incorporated herein by reference"); Ex. 3A at p 1, p. 2 (1958 contract; incorporating 1952 and 1955 contracts by reference); Ex. 4A at p. 1 (1963 contract, incorporating 1952 contract and [later] "agreements . . . to expand and enlarge" the facility by reference).

Ex. 1B, § 3, at p. 2. Importantly, however, the first of the two 1967 contracts does *not* require that such an operation be continued past the primary term of the lease. Indeed, Glen Southern

> acknowledges that in good faith [it] will use [the facility] . . . in connection with the operation of its manufacturing plant . . . **during its occupancy thereof.**

Ex. 5A-1, § 7(r), p. 17 (emphasis added).[12] The same contract makes it clear that Glen Southern's "occupancy" need not last past the primary term of the lease: Glen Southern has the absolute right, "at its discretion," to assign or sublet the facility to another tenant – not necessarily a manufacturing tenant – following the primary term of the lease. *See* Ex. 5A-1, § 7(q), p. 17.[13] In other words, the first of the 1967 contracts necessarily contemplates the possibility that the premises may be used for a non-manufacturing purpose after the primary term of the lease.

The second 1967 contract, like the initial 1952 contract, again confines the manufacturing use restriction to the primary lease term only:

> 3. Employment: Company [Glen Southern], recognizing the intent of the aforesaid Mississippi Statutes to provide employment, hereby covenants and agrees, **during the primary term of the General Obligation and this Supplemental Lease herein referred to or until all rentals required under the primary term hereof have been paid to District,** to

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[12] Arguably, a use "in connection with" Glen Southern's manufacturing operations includes uses that are not themselves manufacturing. Such uses are expressly contemplated by the BAWI statutory scheme. *E.g.*, Miss. Code Ann. §§ 57-3-5(2)(d), (e) (1972) (permitting uses including "research *in connection with*" a number of commercial enterprises; and including "[a]ny industrial enterprise for national, regional or divisional offices or facilities *in connection with* the management, supervision or service of its manufacturing, processing, assembling, storing, warehousing, distribution or research operations, *wherever located*") (emphasis added). Because Glen Southern in fact used the facility for manufacturing during the entire period of its occupancy of the premises, it is not necessary to discuss this interpretation further.

[13] The County contended in the trial court that all subleases required the consent of the County and the MDA. R. 62 (County's Mtn. for Summary Jmt.). Again, the County misreads the plain language of the contract. The applicable provision states that such approval (not surprisingly) *is* required for a sublease *during the primary term* (presumably, because the municipal bonds financing the project would not necessarily have been repaid); but "[a]fter the expiration of the primary term, the Company [Glen Southern] may, *at its discretion*, assign any lease or renewal thereof or sub-let the said premises to any person, firm or organization." Ex. 5A-1, § 7(q), p. 17 (emphasis added).

> exercise due diligence **to maintain and operate a manufacturing, processing or other similar type of industry in the said building**, and to provide steady employment in such operations.

Ex. 5A-2, p. 13 (emphasis added).

In other words, in this second 1967 contract, as in the initial contract, any intent to limit use to "manufacturing, processing or other similar type of industry" existed only during the primary term of the lease, while the debt incurred by the County to finance the expansion was outstanding. The primary term of the lease executed pursuant to the 1967 contracts expired in October 1988.[14] Four years later, in 1992, the County itself (as well as the MDA) approved a sublease to E.D. Smith for purposes including manufacturing *or* warehousing – or virtually anything else. Ex. 10, § 15.01, p. 18 (E.D. Smith sublease with provisions for "any lawful use" including warehousing); Exs. 11, 12 (County and MDA approvals).[15]

Finally, Glen Southern and the County entered into a final contract in 1977. That contract, like the first of the 1967 contracts, limits any manufacturing restriction only to the time period of Glen Southern's "occupancy." Also like the first 1967 contract, the 1977 contract

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[14] The first of the two 1967 contracts defines the primary term of the lease it contemplates as expiring November 1, 1973. Ex. 5A-1, § 7(b), p. 6. The second 1967 contract contains a "Supplemental Lease" provision that defines the primary term as "expiring and terminating on January 1, 1978". Ex. 5A-2, Supplemental Lease ¶ 1, at p. 11. The parties actually failed to execute a lease pursuant to the 1967 contracts until some time later, however. *See* Ex. 5B, § 4, at p. 2 ("the parties failed to execute said lease . . . ; however, the [parties] . . . have observed the terms and conditions of the aforementioned contract and have acted as though the lease called for was duly executed and filed."). When they did execute the lease in 1977, they agreed that its primary term would be "20 years from October 1, 1968." Ex. 5B, p. 3.

[15] The Chancery Court found that the County's explicit consent to use of the premises for warehousing during the subleases was not relevant because, as it turned out, both E.D. Smith and Havatampa in fact used the premises for manufacturing. R. 107. That coincidence cannot write the express consent to warehousing – or other uses, only one of which may be manufacturing – out of the sublease documents, however. A contract must be construed so that all of its terms have meaning and effect. *E.g.*, *Terry v. Protective Life Ins. Co.*, 717 F. Supp. 1203, 1206 (S.D. Miss. 1989) (court must construe phrases in contract to give reasonable effect to each, rather than ignoring any) (citations omitted); RESTATEMENT (SECOND) OF CONTRACTS, § 203(a) (1981) (in interpretation of a contract, an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferable to one which leaves a part unreasonable, unlawful, or of no effect).

gives Glen Southern the right to sublease or assign its lease to anyone – whether a manufacturing tenant or not – after the primary term. *See* Exs. 5A-1 and 6A, §§ 7(k), (n), (q) and (r), at pp. 13, 15, 16-17; *accord* Ex. 6A, §§ 7(k), (n), (q), (r), at pp. 15-18. The primary term of the lease executed pursuant to the 1977 contract is defined as "20 years from October 1, 1970". Ex. 6B, p. 5.

The primary term of the final lease between Glen Southern and the County expired in 1990. Ex. 6B, at p. 5. There is no dispute that Glen Southern used the facility only for manufacturing until 1992, when it first subleased the facility. Ex. 16, ¶ X.

As already noted, the subleases to E.D. Smith and Havatampa – which the County expressly approved – plainly permit the subleasing tenant to use the facility for warehousing, manufacturing, or any other lawful purpose. Ex. 10, § 15.01, p. 18; *see also* Ex. 13, § 15.01, p.p. 17-18.[16]

c. "Abandonment" provisions – or lack thereof – in subsequent contracts.

To the extent that contracts other than the first contract discuss abandonment, they are consistent with the original contract. The abandonment provision in the contracts, where it appears, is a separate provision from, and operates independently of, of any manufacturing-use restriction. The May 29, 1967 and August 5, 1969 contracts (which form the basis for the final two leases) contain the same language regarding abandonment as is quoted above: regardless of the current use of the facility, if Glen Southern "should abandon and fail to use and operate [the facility] for a period of one (1) continuous year . . . at the option of the County this agreement

[16] The Hunter Fan sublease was executed after this lawsuit was filed, and thus is not relevant to the County's claim for breach of contract. *See* R. 78-79 (Am. Complt.; claim for breach of contract makes no mention of Hunter Fan sublease). For completeness, however, Glen Southern notes that the Hunter Fan sublease also contains similar language expressly permitting warehousing and other uses. Ex. 15, § 15.01, p. 13.

may be terminated without further liability to either party". Ex. 5A-1 § 9, p. 20; *accord* Ex. 6A § 9, pp. 20-21.

Only one of the leases – the second one, Ex. 2B – discusses abandonment. Likewise, it is consistent with the contract language quoted above; *i.e.*, it provides that "if [Glen Southern] should abandon said premises and fail to use or operate them for a period of one continuous year, . . . then at the option of [the County] this agreement may be terminated without further liability to either party." Ex. 2B, p. 3.

The parties agree that the premises have never been empty for one continuous year. *See* Ex. 17, ¶¶ 3, 4; Ex. 16, p. 64; R. 15, ¶ W ("leased premises have been continuously occupied, either by [Glen Southern] or one of [its] sub-lessees, from the inception of the first lease up to June or July 2003, when Havatampa vacated the leased premises. The leased premises were subsequently occupied in approximately September, 2003 by Hunter Fan and they have been continuously occupied by Hunter Fan since.") (internal citations omitted; citing Ex. 16 at p. 64, Ex. 17 at ¶ 4).

SUMMARY OF THE ARGUMENT

The County claims that Glen Southern breached the contracts and leases that the parties entered, "by ceasing manufacturing operations [at the Byhalia facility] continuously for over one year." R. 66. This claim conflates two separate kinds of provisions that appear in some, but not all, of the contracts and leases:

- *first*, provisions that describe the uses to which the facility may be put during either the primary term of the applicable lease or during Glen Southern's occupancy of the facility, Ex. 1A, § 11(m), p. 9; *see also* Ex. 5A-1, § 7(r), p. 17; Ex. 5A-2, p. 13; and

- *second*, separate provisions that permit the County to terminate the contracts and leases if the facility is "abandon[ed]", *i.e.*, not "use[d] or operate[d] . . . for a period of one continuous year . . . ." Ex. 1A, § 11(m), p. 9; *accord* Ex. 5A-1, § 9, p. 20; Ex. 6A, § 9, pp. 20-21.

The contractual provisions that arguably limit use of the facility to manufacturing occur in the initial 1952 contract, and in the two contracts that the parties signed in 1967. Each of the seven contracts incorporates the prior ones by reference. The 1952 contract expressly provides that the manufacturing use restriction is *limited to the primary term of the lease* that follows that contract. Ex. 1A, § 11(m), p. 9. The primary term of that lease expired in 1973. Ex. 1B, § 3, p. 2 (lease term). One of the 1967 contracts contains substantially identical language, again limiting the restriction to the primary lease term, which expired in this instance in 1988. Ex. 5A-2, p. 13 (second 1967 contract); *see* Ex. 5B, p. 3 (term of lease). And, the other 1967 contract limits the manufacturing use of the facility to the period of Glen Southern's "*occupancy*" of the premises. Ex. 5A-1, § 7(r), p. 17 (emphasis added). The parties agree that Glen Southern in fact used the premises for manufacturing during the entirety of the primary term of every lease between the parties, the last of which expired in 1990; and that the manufacturing use continued during the entire time of Glen Southern's occupancy, which ended in 1992. *E.g.*, R. 16 ¶ X.

Some of the contracts and leases also contain language providing that the County may cancel the contracts and leases if Glen Southern "abandons" the premises, *i.e.*, if the facility is not "use[d] or operate[d]" for a period of at least "one continuous year." Ex. 1A, § 11(m), p. 9; *accord* 5A-1 § 9, p. 20; Ex. 6A § 9, pp. 20-21. The County attempts to cobble together this abandonment provision with its erroneous argument that the facility must always be used solely for manufacturing, to justify its claim for termination of the leases and contracts. This argument fails, first, because Glen Southern has not breached any requirement for manufacturing use (because the time limits on any such restriction had expired before the facility was used for any other purpose). Second, the argument fails because the abandonment provision and any manufacturing-use restriction are separate provisions: abandonment, under the plain language of the contracts, has no necessary connection to the manufacturing use, but rather requires that the

facility be "abandoned" – not used or operated for at least a continuous year – which has never occurred. *E.g.*, Ex. 17 ¶¶ 3-4; Ex. 16, p. 64; R. 15-16 ¶¶ X-W.

Finally, Glen Southern submits that the Court should not permit the County to terminate the contracts – a radical remedy and one which is disfavored under settled law – under this theory, especially where the County itself approved several subleases of the facility for uses other than manufacturing. Ex. 10, § 15.01, p. 18; Ex. 13, § 15.01, p. 17. In fact, the statutes under which the County financed construction of the facility (and upon which it incorrectly relies for its public policy argument that manufacturing is the only permissible use of the facility) expressly provide for exactly these other uses. *E.g.*, Miss. Code Ann. §§ 57-3-3, 57-3-5 (1972).

The contracts and leases here are unambiguous. Glen Southern agrees that several contain limitations that arguably permit it to use the facility only for manufacturing; but just as plainly, those limitations expire either upon expiration of the primary term of the applicable leases, or, in some instances, when Glen Southern's occupancy of the premises ends. The non-manufacturing uses that were permitted (or that occurred) after the primary term of *all* the leases and after Glen Southern's occupancy cannot constitute an abandonment of the premises, and they cannot justify a termination of the contracts and leases.

Because the Chancery Court incorrectly construed the contracts and leases to require that the facility be used permanently for manufacturing only, it granted the County's motion for summary judgment on this point, and entered an order allowing the County to cancel the contracts and leases and take possession of the facility. R. 98-110, R.E. 3-15; R. 122, R.E. 16; R. 123-24, R.E. 17-18. This was error, and that error requires reversal. Glen Southern is entitled to summary judgment, because it has not breached the contracts or leases.

ARGUMENT

A. Legal Standard.

This Court reviews the grant or denial of a motion for summary judgment under the same standard as is employed by the trial court under Rule 56(c). In other words, the Court "conducts a *de novo* review of orders granting or denying summary judgment," *e.g., APAC-Mississippi, Inc. v. Goodman*, 803 So. 2d 1177, 1180-81 (Miss. 2002), and looks at "all the evidentiary matters before it – admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied." *Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co.*, 594 So. 2d 1170, 1172 (Miss. 1992).

Ordinary rules of contract interpretation govern the Court's review of contracts and leases such as those involved in this case. *E.g., Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352 (Miss. 1990). In Mississippi, determining whether a contract is ambiguous is a question of law decided by the court, not a matter of fact determined by a jury. *Hicks v. The Quaker Oats Co.*, 662 F.2d 1158, 1175 (5th Cir. 1981); *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 751-52 (Miss. 2003); *Simmons v. Bank of Mississippi*, 593 So. 2d 40, 43 (Miss. 1992). The fact that the parties may disagree over the interpretation of terms in the contract does not, by itself, render the contract ambiguous. *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 104 (Miss 1998).

If a contract is unambiguous, the Court interprets its meaning as a matter of law. No parol or extrinsic evidence is admitted to vary its meaning. *Brashier v. Toney*, 514 So. 2d 329, 331 (Miss. 1987); *Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416, 419 (Miss. 1987); *Great*

Atlantic & Pac. Tea Co. v. Lackey, 397 So. 2d 1100, 1102 (Miss. 1981); *Goldberg v. Lowe*, 509 F. Supp. 412, 421 (N.D. Miss. 1981). Relevant documents, such as the series of contracts here, "must be construed together." *United Miss. Bank v. GMAC Mortgage Co.*, 615 So. 2d 1174, 1176 (Miss. 1993).

In interpreting a contract, the Court first examines the language of the document in order to determine the objectively expressed intent of the parties. *Pursue Energy*, 558 So. 2d at 352. "[C]ontracts must be interpreted by objective, not subjective standards. A court must effect 'a determination of the meaning of the language used, not the ascertainment of some possible but unexpressed intent of the parties.'" *Cherry*, 501 So. 2d at 419; *accord Sharpsburg Farms, Inc. v. Williams*, 363 So. 2d 1350, 1354 (Miss. 1978) (object is to determine intent as expressed by language used, not unexpressed intent of parties).

And, if the parties' intentions are "clear and unambiguous" based on a reading "of the instrument itself, the Court should look solely to the instrument" and enforce the parties' agreement "as written." *Barnett v. Gettie Oil Co.*, 266 So. 2d 581, 586 (Miss. 1972). *See Howser v. Brent Towing Co.*, 610 So. 2d 363, 365 (Miss. 1992) (stating well-known maxim that "the terms of a clear and unambiguous writing may not be varied by parol evidence").

Only if the objective language of the agreement is unclear or ambiguous does the Court move to a second level of inquiry. *Pursue Energy*, 558 So. 2d at 352. If relevant provisions of the contract are inconsistent or contradictory, the court should seek to "harmonize the provisions in accord with the parties' apparent intent," *Pursue Energy*, 558 So. 2d at 352, and, if necessary, apply the discretionary "canons" of contract construction. *Id.* at 353. If the document's meaning is *still* unclear, the Court may permit the introduction of extrinsic evidence. *Id. Clark v. State Farm Mut. Auto Ins. Co.*, 725 So. 2d 779, 781 (Miss. 1998). But even where extrinsic evidence

is admissible to explain ambiguous terms, it may not be used to vary or contradict terms whose meaning is clear. *Busching v. Griffin*, 542 So. 2d 860, 865 (Miss. 1989).

B. The Contracts at Issue Here are not Ambiguous; Any "Manufacturing Use" Restriction was Limited to the Primary Term of the Applicable Leases, Which has Long Since Expired.

The County's argument depends on its contention that the contracts between it and Glen Southern required Glen Southern, at all times, to use the Byhalia facility only for manufacturing. *E.g.*, R. 58-59 (County's motion for summary judgment; "Given this clear and unambiguous intent of the parties that the facility be leased for the purpose of manufacturing, it is incredulous [sic] for [Glen Southern] to assert that any use other than manufacturing is permissible.")

Glen Southern agrees with the County that the contracts are not ambiguous. But Glen Southern submits that **the plain language of the contracts demonstrates that any manufacturing-use restriction was limited to the primary term of the leases that the parties entered into pursuant to those contracts; or at most, to the time period when Glen Southern occupied the facility.** The County, unsurprisingly, seeks to use miscellaneous language in the contracts to make this restriction permanent; but neither the language of the contracts nor settled law permits such a covenant of continuous use to be imposed by implication.

As already noted, only three of the parties' seven contracts contain the language on which the County relies to argue that the Byhalia facility may be used only for manufacturing. In the 1952 contract, the parties agree that Glen Southern "will operate [the] premises *during the period of the primary term herein provided* for the manufacture of some . . . product . . . ." Ex. 1A, § 11(m), p. 9 (emphasis added). The second of the 1967 contracts contains substantially the same language. Ex. 5A-2, § 3, p. 13 (agreement to use due diligence to "maintain and operate a manufacturing processing or other similar type of industry" during primary term). The first 1967

contract provides that Glen Southern "will use [the facility] . . . in connection with the operation of its manufacturing plant . . . *during its occupancy* thereof" Ex. 5A-1, § 7(r), p. 17 (emphasis addes), and that after the primary term of the lease, it may sublet the premises to any tenant, whether a manufacturing tenant or otherwise. *Id.* at § 7(q), properties. 16-17.[17] There is no dispute that Glen Southern used the premises solely for manufacturing during the primary term of each lease, and during the entire time it occupied the premises, *see* R. 15-16, ¶¶ W- X; Ex. 16, p. 64; Ex. 17, ¶¶ 3, 4.

C. Restrictions on Permitted Uses Must be Construed Narrowly, and Against the Party Seeking to Enforce Them.

Because the plain language of the contracts does not support its position, the County falls back on an argument about what it contends the parties intended. *E.g.*, R. 61-62 (County's motion for summary judgment). The County points to general language in the contracts, such as a phrase in the 1952 contract which states that the "purpose of this contract . . . is to operate the premises as a factory", Ex. 1A, p. 8; and to similar language in the second 1967 contract, stating that Glen Southern may from time to time change the "type of manufacturing operations" or the types of products it makes. Ex. 5A-2, p. 11.

This language proves nothing: Glen Southern does not deny that the original purpose of the contracts was for it to build a facility to manufacture various products, and that, at the time it executed each contract (and during the primary term of each of the subsequent leases), it actually was using and did use the premises for manufacturing. But this does not alter the plain language

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[17] Commentators considering similar issues have concluded that a right to sublease the premises for operations other than the restricted use supports a conclusion that the restricted use is not intended to be exclusive. *See, e.g.*, William J. Hammett, *Comment, Percentage Leases: Is there a Need to Imply a Covenant of Continuous Operation?*, 72 Marq. L. Rev. 559, 569 (1989) ("Essentially, if there is an express right to sublease the premises or assign the lease . . . courts will not imply a covenant of continuous operation"); Frances N. Mastroianni, *Caveat Lessor: Courts' Unwillingness to Find Implied Covenants of Continuous Use in Commercial Real Estate Leases*, 24 Real Est. L.J. 236 (1996) ("In general, the presence of an assignment clause weighs against finding an implied covenant of continuous use.").

of the contracts, which permits the facility to be used for *other* purposes after the primary term expires (in 1990), or after Glen Southern's occupancy has ended (in 1992). The County, indeed, plainly understood these provisions, because, *after* the primary term of the final lease to Glen Southern had expired, it approved the E.D. Smith and Havatampa subleases. These subleases specifically permitted virtually *any* other use, including warehousing. *E.g.*, Ex. 10, § 15.01, p. 18 (E.D. Smith sublease).

In arguing the facility must forever be used only for a single purpose, the County argues not only against its own actions, but also against a strong and longstanding public policy that allows lessees the maximum freedom to use their property for any lawful purpose. *E.g.*, *Kinchen v. Layton*, 457 So. 2d 343, 345 (Miss. 1984);[18] *Andrews v. Lake Serene Property Owners Ass'n, Inc.*, 434 So. 2d 1328, 1331 (Miss. 1983); *see also Skrmetta v. BTN, Inc.*, 129 Fed. Appx. 906, 908 (5th Cir. 2005) (construing Mississippi law). Even where the parties contemplated that leased premises would be used in a particular manner, the lessee is not obliged to use them in such a manner forever – unless the contract documents expressly require it. *Security Builders, Inc. v. Southwest Drug Co.*, 244 Miss. 877, 147 So. 2d 635, 637 (1962). Importantly, restrictive covenants or other agreements that attempt to limit the manner in which a party may use property – including provisions that purport to require a continuous use of the property for a particular

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[18] The Chancery Court considered the *Kinchen* case to be distinguishable because it concerned "an owners [sic] use of residential property and . . . a situation where the covenant is ambiguous", whereas this case "is about a manufacturing facility that was clearly built to be used as such." R. 106. This distinction is wholly unsupportable.

As an initial matter, the manufacturing-use restriction in this action (including the fact that it is limited to the primary term of the lease in the 1952 and second 1967 contracts and to Glen Southern's occupancy of the property in the first 1967 contract) is not ambiguous.

Moreover, nothing in *Kinchen* limits the holding of that case, or its application, to contracts involving residential property. *See Kinchen*, 457 So. 2d at 345 (nowhere limiting holding to residential properties). Indeed, many cases arising from commercial disputes apply the same rule. *E.g.*, *Skrmetta*, 129 Fed. Appx. at 908 (commercial use of property for gaming) (citing *Kinchen*); *Delta Wild Life & Forestry, Inc. v. Bear Kelso Plantation, Inc.*, 281 So. 2d 683, 686-87 (Miss. 1973) (dispute between incorporated hunting club and commercial lessee); *Security Builders*, 147 So. 2d at 637 (commercial dispute between drug store and shopping center).

purpose – are construed against the person seeking to enforce them. *Ewing v. Adams*, 573 So. 2d 1364, 1368 (Miss. 1990); *Kemp v. Lake Serene Property Owners' Ass'n, Inc.*, 256 So. 2d 924, 926 (Miss. 1971); *Kinchen*, 457 So. 2d at 345; *Andrews*, 434 So. 2d at 1331. Restrictions such as continuous use provisions must be explicit; they may not be left to implication. *Delta Wild Life & Forestry, Inc. v. Bear Kelso Plantation, Inc.*, 281 So. 2d 683, 687 (Miss. 1973).

Thus, provisions such as those on which the County relies – that the "purpose of this contract. . . is to operate the premises as a factory", Ex. 1A, p. 8; and similar miscellaneous language in the second 1967 contract, Ex. 5A-2, p. 11 – are construed permissively: to *allow* the stated use, but not to prohibit other uses. *See, e.g., Ewing*, 573 So. 2d at 1368 (quoting *Forman v. United States*, 767 F.2d 875, 880 (Fed. Cir. 1985) (lease terms providing that premises were to be used as drive-in movie theater did not limit lessee's use of the property solely to that purpose)). Such provisions generally set out the parties' intent as to the *initial* use of the property, but they do not mandate that the lessee will use the property in that manner forever, or exclude other uses. *Id.*; *accord Independent Healthcare Mgt., Inc. v. City of Bruce*, 746 So. 2d 881, 885-86 (Miss. Ct. App. 1999) (lease providing that lessee "shall" use premises to operate an emergency room did not require lessee to operate emergency room and skilled nursing facility throughout the term of the lease, even though lease stated that "no other use will be permitted" without lessor's consent); *Great Atlantic & Pac. Tea Co.*, 397 So. 2d at 1101 (lease providing that building was to be used for "general merchandise business" held not to require continuous use for that purpose); *Security Builders*, 147 So. 2d at 636 (provision that building "*shall* be occupied and used by Lessee as retail drug store and lunch counter" was permissive, not mandatory, and did not restrict lessee to stated uses).

The County argues, and the Chancery Court noted, that use of the premises for manufacturing is in keeping with the public interest and the objectives of the BAWI. *See, e.g.,*

R. 57-59 (County's Resp. to Glen Southern's Mtn. for Summary Jmt.); R. 79 (Am. Complt. ¶ 15); R. 108-09 (Chancery Ct.'s Op.), R.E. 13-14; Tr. 24-25. But the statutes pursuant to which the facility was developed permit – and even specifically encourage – not only manufacturing but "enterprise[s] for storing or warehousing products", as well as a number of other commercial activities, such as distributing products, research and development, or even simply for offices connected with such operations. Miss. Code Ann. §§ 57-3-5(2)(b) *through* 57-3-5(2)(e) (1972). That Glen Southern eventually subleased the facility to an entity that uses it for warehousing thus does not violate any public policy interest under the BAWI. Indeed, such a use is entirely in keeping with the very public policy objectives that the County uses to support its case.

Moreover, even in cases where the lessor has an undeniable public interest in continuing the restricted use of property, no such restriction can be enforced absent precise and clear language requiring it. *E.g.*, *City of Bruce*, 746 So. 2d at 885-88. In the *City of Bruce* case, for example, the City leased premises to a health care company, IHC, for operation of a hospital. The lease stated, in its § 3.1, that:

> Lessee shall use the Leased Premises in a careful and proper manner for the operation of a hospital, Hospital Emergency Room and skilled nursing facility. . . . *No other use will be permitted* without prior written consent of Lessor.

746 So. 2d at 885 (emphasis added). IHC later closed its emergency room, and the City sued. The Court acknowledged that the City had a powerful interest in having an emergency room available:

> . . . 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. The issue remains, however, whether the terms of the lease bind IHC to affirmatively meet the City's aspirations.

Id. But even in that instance, where not just jobs but the health and welfare of the city's population was at stake, and where the lease expressly *prohibited* other uses of the property

absent written consent by the City, the Court refused to say that the hospital's failure to operate an emergency room was a default:

> Thus, we find Section 3.1 to be a provision restricting the lessee in its permissible activities and not one creating an affirmative duty to carry out any particular activity on the premises. Certainly, it would have been possible (and quite easy) to draft a provision that would have clearly stated IHC's affirmative obligation to maintain an emergency room throughout the entire term of the lease. Absent such a provision, we decline to read such an affirmative duty on IHC's part into Section 3.1.

Id.[19]

As the Court pointed out in the *City of Bruce* case, it is a straightforward exercise to draft a contractual provision that expressly requires that the premises be used in a particular manner for a particular time period. *Accord Security Builders*, 147 So. 2d at 638 (had parties wished to require continuous use "for the balance of the term of the lease", they "could and would have" included specific language to that effect in the lease).

Here, Glen Southern submits, the parties did exactly what the Court contemplated in *Security Builders* and in *City of Bruce*. That is, the parties here drafted a specific contractual provision, in the 1952 contract and in the 1967 contracts, that limited the use of the facility to manufacturing *during the primary term of the lease* (in the case of the 1952 and second 1967 contracts); and to the time period of *Glen Southern's occupancy* (in the first 1967 contract). The parties do not dispute that the facility was used exclusively for manufacturing during the primary terms of all of the leases at issue, the last of which expired in 1990; and they do not dispute that the facility continued to be used only for manufacturing during the remainder of Glen Southern's occupancy, *i.e.*, until 1992. Thus, Glen Southern complied fully with the limitations that were

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[19] The Court in the *City of Bruce* case went on to find that the lease did require IHC to maintain a *hospital*, though not an emergency room, on the premises throughout the term of the lease – analogous to the provision in the leases here, that Glen Southern may not entirely abandon the premises. Because IHC had not complied with this requirement, the Court found it in default for that independent reason. 746 So. 2d at 886-88. Glen Southern, by contrast, has never abandoned the premises. *See* R. 99 (describing subleases and current use of facility).

specifically expressed in the contracts it entered into with the County. No additional requirements can be imposed by implication. [20]

D. The Premises Have Never Been "Abandoned".

In its motion for summary judgment, the County sought unusual relief: not merely monetary damages under the contracts, or specific performance of them, but also "termination and cancellation of the contracts and leases". R. 70, 72 (County's Mtn. for Summary Jmt.). The County also requested that the Court award it possession of the facility. R. 80 (Am. Complt. p. 8).

As an initial matter, Glen Southern notes that termination or forfeiture of a contract is an extraordinary remedy; "equity abhors a forfeiture", and if some other remedy is possible, it is generally preferable to nullifying a contract. *E.g.*, *Columbus Hotel Co. v. Pierce*, 629 So. 2d 605, 609-10 (Miss. 1993) (citations omitted); *UHS Qualicare v. Gulf Coast Cty. Hosp.*, 525 So. 2d 746, 755-56 (Miss. 1987) (termination of a contract is a "radical remedy"; reading contract's termination clause to be triggered where language is not clear and compelling would produce "harsh, unreasonable, expensive, and *unintended* consequences") (emphasis in original). The County's claim that it is entitled to terminate the contract and take possession of the facility (rather than seeking money damages or specific performance) is a request for just such a "radical

[20] The contracts here are unambiguous, so there is no need for the Court to go beyond them to parse the parties' intentions. *E.g.*, *Pursue Energy*, 558 So. 2d at 352. But, should the Court wish to go beyond this plain language of the contracts between the County and Glen Southern, it need only look to the subleases to E.D. Smith and Havatampa. Both of the subleases were expressly approved by the County. Ex. 10 (E.D. Smith sublease); Ex. 11 (County approval of E.D. Smith sublease); Ex. 13 (Havatampa sublease); Ex. 14 (County approval of Havatampa sublease). These subleases explicitly authorize E.D. Smith and Havatampa to use the premises to "*warehouse and/or manufacture*" goods, among other permissible uses. Ex. 10, § 15.01, p. 18 (emphasis added); Ex. 13, § 15.01, p.p. 17-18 (emphasis added). In other words, at the time those subleases were entered, the County evidently *also* agreed that any requirement to use the facility only for manufacturing was limited to the primary terms of the leases (already over), or to Glen Southern's occupancy of the premises (which would end when the subleases took effect). Plainly, the County agreed that the premises could then be used by a sub-lessee to "warehouse" goods, among other uses.

remedy", *id.*, based not on clear language, but on a misreading of the abandonment clause that is present in several of the contracts. That language permits the County to terminate the contracts "if [Glen Southern] should abandon said premises and fail to use or operate them for a period of one continuous year . . ." Ex. 1A, § 11(m), p. 9.[21]

As the Court stated in *UHS-Qualicare*, it is

> wholly unreasonable that the language of a twenty year, multimillion dollar contract, be read to provide that any failure (whether material or not) to keep, observe or perform, etc. will suffice to trigger the termination clause. Such a result would be productive of great economic waste.

525 So. 2d at 756. The same can be said of the County's claim for termination of the leases and contracts here – particularly given that it expressly approved a number of non-manufacturing uses in the subleases to E.D. Smith and Havatampa. *E.g.*, Ex. 10, § 15.01, p. 18 (E.D. Smith sublease); Ex. 11 (County approval); Ex. 13, § 15.01, p. 17-18 (Havatampa sublease); Ex. 14 (County approval).

The County's claim for breach and for the remedies of termination and possession depends on the application of the one-year abandonment period that appears in several of the contracts. The County asserts, indeed, that "[Glen Southern] breached the contracts and leases *by ceasing manufacturing operations continuously for over one year*." R. 65 (County's Resp. to Glen Southern's Mtn. for Summary Jmt. (emphasis added)). But the abandonment clause (which appears in some, but not all, of the contracts) is separate from, and should not be conflated with, the manufacturing-use restriction that the County erroneously argues is a permanent restriction. The argument that a non-manufacturing use of the facility equals abandonment is unsupportable.

[21] By comparison, other provisions that deal with a breach or default by Glen Southern do not entitle the County to terminate the contract or to immediate possession, until the County has provided Glen Southern with notice and an opportunity to cure the breach. *E.g.*, Ex. 1A, § 11(o), p. 10 (provision for notice and opportunity to cure default if Glen Southern fails to pay rental amounts due).

As already discussed, the plain language of the contracts demonstrates that uses other than manufacturing are permissible after the primary term of the lease and/or after Glen Southern's occupancy ended. In light of the County's approval of a variety of other uses of the facility by sub-lessees, it is disingenuous for it now to claim that such uses constitute an abandonment, but that is precisely what the County does.

Such uses cannot constitute an "abandonment" of the premises. To the contrary, "abandonment", under the contracts, is a separate provision, which requires – regardless of *how* the premises last were being used – that they be *unused* for "a period of one continuous year". *E.g.*, Ex. 1A, § 11(m), p. 9 (County has option to terminate agreement if Glen Southern "should abandon said premises *and fail to use or operate them*" for one year).

The case on which the County relies for this argument, and which the Chancery Court cited in its opinion, R. 109, proves this point. In *Farm Services, Inc. v. Oktibbeha County Bd. of Supervisors*, using a municipal bond issue similar to those here, the County entered into a lease with Riverside Mill. 860 So. 2d 804, 805 (Miss. 2003). With the County's permission, the lessee later subleased the premises to another company. *Id.* at 805. The sub-lessee then sublet the premises to yet another company, Farm Services. *Id.* Farm Services later entirely ceased operations, began to dismantle the facility, and defaulted on its rent. At that point, the County voted to terminate the lease and repossess the property, "because Farm Services had failed to operate a business on the site for more than a year, failed to employ residents of the county, and failed to pay rent." *Id.* Under these circumstances, unsurprisingly, the trial court found that the County was entitled to terminate the lease, and this Court affirmed the judgment. *Id.*

No such situation exists in this case. The parties do not dispute that the premises have never been unused for "one continuous year." The facility has not been dismantled – indeed, it is still being used – and the County has never complained of a failure to receive the rental

payments due to it. No "abandonment" of the premises (or other breach of contract) has occurred, and the County is not entitled to terminate the leases or to take possession of the property.

CONCLUSION

For the reasons set out above, Defendants-Appellants Glen Southern, Inc. and GEM Southern, Inc. respectfully request that the Court reverse the Chancery Court's denial of their Motion for Summary Judgment; and that the Court enter a judgment in favor of Glen Southern, Inc. and GEM Southern, Inc.

RESPECTFULLY SUBMITTED, this the 16th day of January, 2007.

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CERTIFICATE OF SERVICE

I, Margaret Oertling Cupples, certify that I have this day caused to be served a true and correct copy of this document by United States mail, postage prepaid, on the following:

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The Honorable Edwin H. Roberts, Jr.
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Trial Court Judge

THIS, the 16th day of January, 2007.

Margaret O Cupples

MARGARET OERTLING CUPPLES

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