

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

**MERRILL LAND, LLC, a Florida Limited
Liability Company, and GREAT SOUTHERN
RESTAURANT GROUP OF PENSACOLA, INC.,
a Florida Corporation,**

Plaintiffs,

vs.

Case No.: 2014-CA-_____
Division:

**THE CITY OF PENSACOLA, a Florida
Municipal Corporation,**

Defendant.

COMPLAINT

Plaintiffs, Merrill Land, LLC and Great Southern Restaurant Group of Pensacola, Inc.,
sue Defendant, the City of Pensacola, and say:

JURISDICTION AND VENUE

1. This action arises out of a commercial lease of real property located in Escambia County, Florida.
2. Plaintiff, Merrill Land, LLC (“Merrill Land”), is a Florida Limited Liability Company with its principal place of business in Escambia County, Florida.
3. Plaintiff, Great Southern Restaurant Group of Pensacola, Inc. (“Great Southern”), is a Florida corporation with its principal place of business in Escambia County, Florida.
4. Defendant, The City of Pensacola (“City”), is a Florida municipal corporation within Escambia County, Florida.
5. This Court has jurisdiction over the subject matter of this action pursuant to § 26.012, Fla. Stat., because the amount in controversy exceeds \$15,000.00, exclusive of interest,

attorneys' fees and costs. This Court has jurisdiction of the declaratory judgment action alleged herein pursuant to § 86.011, Fla. Stat.

6. Venue is proper in Escambia County pursuant to section 47.011, Florida Statutes, as the real property which is subject of this action lies within Escambia County, Florida.

GENERAL ALLEGATIONS

7. The City is the fee owner of certain real property located in Escambia County, Florida referred to herein as the "Pitt Slip Marina" and more particularly described on **Exhibit 1**.

8. On September 18, 1985, the City and Florida Sun International, Inc. ("Florida Sun") entered into a written Lease Agreement for the Pitt Slip Marina (the "Lease"). A true and correct copy of the Lease is attached hereto as **Exhibit 2** and incorporated herein by reference. The Lease contains a provision for a certain minimum rent, with the additional requirement that if "gross sales" or "gross rentals" exceed certain thresholds, then a percentage of such sales or rentals will be paid to the City as additional rent.

9. On October 17, 1985, the Lease was amended to change the initial term of Parcel I-A to twenty-seven (27) years to coincide with the City's lease of such parcel from the State of Florida. A true and correct copy of the Amendment is attached hereto as **Exhibit 3**. The State of Florida has since conveyed Parcel I-A to the City for nominal consideration.

10. On July 1, 1986, Florida Sun assigned its rights under the Original Lease to Pensacola Marine, Ltd. A true and correct copy of this Assignment is attached hereto as **Exhibit 4**.

11. On July 25, 1990, the State of Florida conveyed Parcel I-A to the City of Pensacola. A true and correct copy of the warranty deed effecting such conveyance is attached hereto as **Exhibit 5**.

12. On September 7, 1990, during foreclosure proceedings, Pensacola Service Corporation purchased the rights of Pensacola Marine, Ltd. under the lease. A true and correct copy of the Amended Certificate of Title to Pensacola Service Corporation is attached hereto as **Exhibit 6**.

13. On July 29, 1994, Pensacola Service Corporation assigned its rights and obligations under the Original Lease to Trillium Corporation. A true and correct copy of the Assignment to Trillium Corporation is attached hereto as **Exhibit 7** (attachments to Exhibit 7 are not included due to the page volume and because they are duplicative of other exhibits provided herein).

14. On October 21, 1996, Trillium Corporation assigned its rights and obligations under the Original Lease to South Florida Marine Investors, Inc., which was renamed Seville Harbour, Inc. ("Seville Harbour"), on September 30, 1997. A true and correct copy of the Assignment to South Florida Marine Investors, Inc., is attached hereto as **Exhibit 8**, and a true and correct copy of the Articles of Amendment to Articles of Incorporation effecting the name change is attached hereto as **Exhibit 9**.

15. In 1998, a restaurant named the "Fish House" opened within the Pitt Slip Marina as a sub-tenant of Seville Harbour. The Fish House has operated continuously since that time, although ownership thereof has changed and the restaurant is now owned by Great Southern. Today, the Fish House, and a related restaurant nearby (Atlas Oyster Bar), also within Pitt Slip Marina, remain owned by Great Southern, which is unrelated to Seville Harbour.

16. On April 20, 2000, Seville entered into the Pitt Slip Marina Sublease Agreement ("Sublease Agreement") with Merrill Land. The Sublease Agreement was recorded in the public records of Escambia County at Official Record Book 4551, Page 0319, and a true and correct

copy is attached hereto as **Exhibit 10**, and has been continuously a matter of public record since that time. The Sublease Agreement leases a portion of the Pitt Slip Marina to Merrill Land, and retains the remainder. Merrill Land, since the execution of Exhibit 10 has continuously sub-leased the portions of the Pitt Slip Marina occupied by the Fish House and its related restaurant, Atlas Oyster Bar, to Great Southern who has operated such restaurants continuously. Merrill Land and Great Southern have made substantial improvements to the building and facilities. Merrill Land has also sub-leased areas within Pitt Slip marina to other sub-tenants.

17. The Sublease Agreement does not transfer Seville Harbour's entire interest in the Pitt Slip Marina, or any portion thereof, to Merrill Land, and Seville Harbour retained various right, duties, and obligations under the Lease Agreement.

18. On December 15, 2000, then City Manager, Thomas J. Bonfield, notified the Mayor and City Council of the City that Merrill Land was subleasing a portion of the Pitt Slip Marina, and that the Lease Agreement had not been assigned to Merrill Land.

19. For more than thirteen years, the City accepted rental payments solely from Seville Harbour as stated in the Lease Agreement. During that time period, Seville Harbour, when periodically requested by the City, reported its rental revenues and sales to the City, and included in such revenues the rental income received from Merrill Land by Seville Harbour. At no time during that time period did the City ever inform Seville Harbour that it had any objection or opposition to the rent being paid to and accepted by the City or its method of calculation. Merrill Land and Great Southern have relied on the course of dealing between the parties over this thirteen year period.

20. At no time between April 2000, and November 2013, a period of thirteen and one half years, did the City ever contend that the 2000 Sublease Agreement, was an assignment or anything other than a sublease.

21. Great Southern is not a subsidiary or a “business combination” of Merrill Land. Neither Merrill Land nor Great Southern own any interest in the other. Merrill Land was formed approximately two years after the formation of Great Southern and is a real estate development, operation and management company. Great Southern owns and operates multiple restaurant businesses, including, but not limited to, the Fish House and Atlas Oyster Bar, including restaurant and event businesses not within the Pitt Slip Marina, and in facilities owned and operated by parties other than Seville Harbour or Merrill Land. Neither Merrill Land nor Seville Harbour has the right or ability to exercise any direct control over the other, and the two are, at all times, maintained as separate and distinct business entities.

22. On or about February 7, 2008, then City Attorney, John Fleming, responded to an inquiry from then City Accountant, Pam Childers, and stated:

If the issue is simply whether the rent which the City is entitled to from its lessee is measured by the gross sales of the lessee’s sublessees [sic], the answer generally is no. Except as noted below, the City is entitled under the lease to a percentage of the gross sales only from the business enterprises of the lessee, its subsidiaries, business combinations and agents However, the City is entitled under the lease to a percentage of the gross rentals received by the lessee from its subtenants. So, if a sublease provides that a sublessee pays rent to the lessee, based in whole or in part upon the gross sales of the sublessee, then the City would be entitled to a percentage of the gross rentals received by the lessee from its sublessees, including any part of such gross rentals which may be measured by the sales activities of the sublessee.

A true and correct copy of Fleming’s correspondence is attached hereto as **Exhibit 11**.

23. Pursuant to the terms and conditions of the Lease Agreement, on July 21, 2011, Marina Management Corp., on behalf of Seville Harbour, notified the City of Seville Harbour’s

renewal of the 1985 Pitt Slip Marina Lease Agreement, as provided in the Lease Agreement. A true and correct copy of the renewal notice is attached hereto as **Exhibit 12**.

24. On September 22, 2011 (some two months later), interim City Attorney, Jim Messer, responded for the first time to Exhibit 12, stating, without explanation or elaboration, his “legal position that [Marina Management Corp’s] letter does not constitute an automatic renewal of the lease,” and also stating his intent to negotiate a new lease agreement. A copy of Messer’s correspondence is attached hereto as **Exhibit 13**.

25. On October 11, 2011, counsel for Seville Harbour, Daniel Lozier, responded to Exhibit 13, explaining the validity of the July 21, 2011, renewal (Exhibit 12), and stating that he would be “happy to schedule a meeting.” A true and correct copy of Lozier’s response is attached hereto as **Exhibit 14**.

26. On September 20, 2013, representatives of Seville Harbour, Merrill Land, and Great Southern met with the City Administrator, Colleen Castille, at the invitation of Seville Harbour, Merrill Land and Great Southern, to provide information and answer whatever questions she had regarding the Lease Agreement, the Sublease Agreement, and the relationship of Merrill Land and Great Southern. At the conclusion of the meeting, Castille said that she would review the information provided and contact Seville Harbour, Merrill Land, or Great Southern if she had additional questions or needed any more information. She also stated that the information provided was very helpful. Castille never contacted Seville Harbour, Merrill Land, or Great Southern for any additional information or to obtain answers to any questions.

27. The City issued no further written communication on the matter until, on November 15, 2013, counsel for the City of Pensacola sent a letter entitled “Notice of Default” to Seville Harbour and Merrill Land, erroneously referring to Merrill Land as “partial assignee of

the Marina Lease” and stating that Seville Harbour and Merrill Land were “in default under Article III, Section B of the Marina Lease for their failure to pay to the City, as additional rent, amounts equal to five percent (5%) of the gross sales of the Fish House restaurant and the Atlas Oyster House restaurant . . . and . . . amounts equal to five percent (5%) of gross rentals (2.5% with respect to office rentals) received by Merrill Land, LLC from subleases of Parcel IA described in the Marina Lease.” The letter also states that, unless the Seville Harbour and Merrill Land deliver the money demanded within ninety (90) days, “the City intends to declare the Marina Lease forfeited.” The letter also erroneously claimed that the restaurants are owned by Merrill Land when, in fact, they are owned by Great Southern. A true and correct copy of this correspondence is attached hereto as **Exhibit 15**.

28. Neither Seville Harbour nor Merrill Land have ever been paid or received any of the gross sales of the Fish House or Atlas Oyster Bar (except to the limited the extent that rent paid to Merrill Land by Great Southern was paid by the proceeds from such sales).

29. On November 27, 2013, counsel for Seville Harbour, Merrill Land, and Great Southern responded to Exhibit 15, a true and correct copy of which is attached hereto as **Exhibit 16**.

30. On December 10, 2013, counsel for the City rescinded Exhibit 15, by letter, a true and correct copy of which is attached hereto as **Exhibit 17**. However, each side reserved all rights, claims and defenses as stated therein, so Exhibit 17 is not fairly considered a resolution of the issues described herein, and, since issuing Exhibit 17, the City has also publicly stated that its position was unchanged as shown by **Exhibit 18**.

31. All conditions precedent to the bringing of this action have been performed, occurred, waived, excused, or otherwise satisfied.

32. Merrill Land has retained the undersigned attorneys to bring this action and is obligated to pay counsel a reasonable attorneys' fee. While Merrill Land contends that it is not a party to the Lease Agreement or a partial assignee thereof, to the extent that the City takes the position that it is in privity with Merrill Land under the Lease Agreement, then Merrill Land should be entitled to recover its attorneys' fees from the City in this action pursuant to Article XIV of the Lease Agreement. In addition, Merrill Land and Great Southern are entitled to recover their attorneys' fees from the City under the wrongful act doctrine.

COUNT I – DECLARATORY JUDGMENT

33. This is an action for a declaratory judgment pursuant to § 86.011, Fla. Stat.

34. Merrill Land and Great Southern re-allege paragraphs 1 through 32 above and incorporates them herein by reference.

35. Merrill Land and Great Southern are interested in and may be in doubt about their rights under the Lease Agreement and the Sublease Agreement based upon the position, albeit rescinded, taken by the City in Exhibit 15.

36. Merrill Land and Great Southern requests that the Court order a speedy hearing and advance it on the calendar, as provided in § 86.111, Fla. Stat.

37. Merrill Land and Great Southern request that this Court make such declarations and rulings to resolve the issues in dispute between Seville Harbour and the City, including, without limitation, that:

- a. Seville Harbour is not in default under the Lease Agreement;
- b. Seville Harbour properly renewed the Lease Agreement;
- c. The Sublease Agreement between Seville Harbour and Merrill Land is a sublease, and not a partial assignment of the Lease Agreement;

- d. Neither Merrill Land nor Great Southern are a “subsidiary” or “business combination” of Seville Harbour;
- e. Great Southern is neither a “subsidiary” nor a “business combination” of Merrill Land;
- f. Merrill Land is neither a “subsidiary” nor a “business combination” of Great Southern;
- g. Even if the Sublease is a partial assignment, Merrill Land is not obligated under the Lease Agreement to pay rent to the City based upon the gross sales of the restaurants operated by a sub-subtenant, Great Southern;
- h. The allegations and assertions made by the City in Exhibit 15 are inaccurate and erroneous;
- i. The City is obligated to pay Merrill Land’s attorneys' fees and costs for instigating the controversy necessitating the commencement of this action because the City contends (although Merrill Land denies) that the City is in privity with Merrill Land under the Lease Agreement, and therefore the City is estopped to deny or contradict the effect of Article XIV of the Lease Agreement;
- j. The City is obligated to pay the attorneys' fees and costs of Merrill Land and Great Southern pursuant to the “wrongful act doctrine;” and
- k. That the appraisal provision relating to Parcel I-A in part II.B of the Lease Agreement is of no current effect since the City is no longer leasing from the State of Florida and therefore no amount has been “charged to” the City by the State of Florida.

38. There is a bona fide, actual, present, and practical need for a declaration from the Court as to the matters set forth herein.

39. A declaration as to the matters set forth herein will deal with a present, ascertained, or ascertainable state of facts or present controversy as to a state of facts.

40. Immunities, powers, privileges, or rights of Merrill Land and Great Southern are dependent upon the facts or the law applicable to the facts.

41. Merrill Land and Great Southern on the one hand, and the City on the other, have an actual, present, adverse, and antagonistic interest in the subject matter of this case, either in fact or law.

42. Such a declaration by the Court of the rights and obligations of Merrill Land, Great Southern, and the City under the terms of the Lease Agreement and the Sublease Agreement would address a present, ascertainable controversy.

43. Great Southern and Merrill Land also seek injunctive relief, enjoining the City from demanding percentage rent(s) based on the gross income of sub-tenant, Merrill Land, or Merrill Land's sub-subtenants, including, without limitation, Great Southern.

44. Merrill Land, Great Southern, and the City are the persons who have, or reasonably may have, an actual, present, adverse interest in the subject matter of this action, either in fact or law, and are, or will be, before the Court by proper process.

45. The relief sought herein is not merely the giving of legal advice by the courts or to answer questions propounded from curiosity.

WHEREFORE, Merrill Land and Great Southern respectfully request that this Court enter a declaratory judgment as set forth herein, and further award Merrill Land and Great

Southern their costs and attorneys' fees, and grant such other and further relief as this Court deems proper.

**COUNT II – TORTIOUS INTERFERENCE WITH ADVANTAGEOUS
BUSINESS RELATIONSHIPS**

46. This is an action for damages which exceed \$15,000.00.

47. Merrill Land and Great Southern re-allege paragraphs 1 through 32 above and incorporates them herein by reference.

48. Business relationships exist and will exist between and among Seville Harbour, Merrill Land, Great Southern, and other persons.

49. As a result of the facts and circumstances set forth above, and despite the City's knowledge of such actual and prospective business relationships, the City intentionally and unjustifiably interfered with these relationships by publically and improperly declaring that Merrill Land and Seville Harbour were in default under the Lease Agreement, creating questions as to Merrill Land's and Great Southern's creditworthiness and reputation, and damaging the businesses of the sub-tenants and sub-subtenants at the Pitt Slip Marina.

50. The City knew or should have known that its Notice of Default (Exhibit 15) was improper. The City's true motivation and purpose for issuing the Notice of Default was to try to coerce Seville Harbour, Merrill Land, and their sub-tenants and sub-subtenants to change the terms of the Lease Agreement from those negotiated and agreed to by the City in 1985.

51. As a direct and proximate result of the City's intentional and unjustifiable interference with Merrill Land and Great Southern's existing business relationships, Merrill Land and Great Southern have been damaged, including, without limitation, to the reputations of Merrill Land, Great Southern, and the restaurants.

52. The City has no recognized excuse or justification for its intentional and unjustifiable interference with Merrill Land and Great Southern's business relationships.

53. All conditions precedent to the commencement of this action have occurred, been waived or have otherwise been satisfied.

WHEREFORE, Merrill land and Great Southern demand judgment against City for damages, pre-judgment interest, the costs of this action, attorneys' fees and such other and further relief as this Court deems proper.

COUNT III – SLANDER OF TITLE

54. This is an action for damages which exceed \$15,000.

55. Merrill Land and Great Southern re-allege paragraphs 1 through 32 above and incorporates them herein by reference.

56. The statements and assertions made by and on behalf of the City in Exhibit 15 were communicated by the City to third parties.

57. The statements and assertions made by and on behalf of the City in Exhibit 15 disparage Merrill Land and Great Southern's leasehold interests in the Pitt Slip Marina.

58. The statements and assertions made by and on behalf of the City in Exhibit 15 are not true in fact, and were made for the improper purpose of trying to coerce Seville Harbour, and its sub-tenants, including Merrill Land, to re-negotiate the terms and conditions of the Lease Agreement and Sublease Agreement.

59. The City knew or should have known that the statements and assertions made by and on behalf of the City in Exhibit 15 would lead a reasonable person to foresee that the conduct of a third person would be determined or affected by such statements and assertions.

60. The publication of the statements and assertions made by or on behalf of the City in Exhibit 15 has, in fact, induced others not to deal with Merrill Land, and its sub-subtenants, including, without limitation, Great Southern.

61. The publication of the statements and assertions made by and on behalf of the City in Exhibit 15 has directly and proximately caused damage to Merrill Land and Great Southern.

62. In addition to its actual, consequential, and special damages, Merrill Land and Great Southern are entitled to recover their attorneys' fees incurred in this action to remove the cloud upon its leasehold interest created by Exhibit 15, and also pursuant to the terms of the Lease Agreement.

WHEREFORE, Merrill Land and Seville Harbour demand judgment against the City for damages, prejudgment interest, attorneys' fees, the costs of this action, and such other and further relief as this Court deems proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury as to all issues so triable in Counts II and III.

Respectfully submitted,

/s/P. Michael Patterson

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