In the

Supreme Court of Virginia

At Richmond

Record No. 090254

UNITED LEASING CORPORATION,

Appellant,

– v. –

LEHNER FAMILY BUSINESS TRUST,

Appellee.

BRIEF OF APPELLEE

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To the Honorable Chief Justice and Justices of the Supreme Court of Virginia: The Lehner Family Business Trust, by counsel, respectfully requests the Court to affirm the final judgment in this breach of contract action.

INTRODUCTION

The Record in this case demonstrates beyond cavil that there are no grounds upon which to disturb the Jury's verdict. The Record demonstrates that United Leasing Corporation (hereinafter, "ULC") waived and failed to preserve for appeal any objection or argument that the evidence presented at trial did not establish that Hugo Garcia had authority to assign the breach of contract claim of Garcia's Inc. to The Lehner Family Business Trust (hereinafter, the "Trust). Even assuming that ULC had properly preserved its objection for appeal – which is denied – this Record contains direct, express and unequivocal testimony and documentary evidence that Hugo Garcia, in fact, had authority and validly assigned the breach of contract claim to the Trust as director and "as trustee in liquidation of Garcia's Inc." *Joint Appendix (hereinafter, "JA"), 192-193 (the Trust accepted*

an assignment, executed by Garcia's Inc. and by Hugo Garcia, trustee in liquidation for Garcia's Inc., a Virginia corporation in dissolution, of "all of the legal claims, rights and causes of action that the Garcias had under the equipment leases and otherwise"); *see id. JA149 (Hugo Garcia signed the Assignment to the Trust as "trustee in liquidation" for Garcia's Inc.)*; *JA160 (the Trust "now owns the claims of Garcias Inc.")*; *JA161b (the Trust "bought out" Garcia's)*.

In its opening brief, ULC disregards the trial transcript, disregards the proper standard of review on appeal, and presents an almost one-sided version of the "facts" presented at trial. ULC offers the Supreme Court its own value judgments about the Garcias and James Lehner and attempts to re-invent itself as a "White Knight". The Jury has already weighed the evidence and judged the credibility of the parties and witnesses. ULC offers a statement of "facts" based almost exclusively on the testimony of its own president, who the Jury rejected as unbelievable. ULC states "facts" as if there had been no Jury verdict, and states only facts and inferences in a light most favorable to *its* arguments

and *its* positions on appeal. By ignoring the complete Record and omitting relevant parts of the transcript, ULC underscores the weakness of its position.

Several key failures at trial doom ULC's appeal.

First, after making an initial motion to strike the Trust's case on the ground that the Trust failed "to prove an assignment" from Garcia's Inc. to the Trust, *JA163-164*, ULC never renewed that motion. That failure, alone, should end this appeal because, as a matter of law, the failure to renew a motion to strike constitutes waiver of any objection to the sufficiency of the evidence.

Second, ULC agreed to submit the issue of Hugo Garcia's authority to the Jury. ULC's counsel participated in the drafting of Jury Instruction No. 23, *JA220*, and, on the Record, stated that "I agree with that" instruction. *JA205*. In agreeing to submit to the Jury the issue whether Hugo Garcia had authority to assign the breach of contract claim to the Trust, ULC waived any argument that the trial court erred in failing to rule as a matter of law on the issue.

Third, at the close of all the evidence and even after the Jury rendered its verdict, ULC ***never*** raised the objection that the "evidence does not establish that Hugo Garcia had authority to assign [the] alleged breach of contract claim [of Garcia's Inc.] to the Trust." Even in its lengthy post-trial motion to reconsider, *JA040-053*, ULC failed to ask the trial court to rule on the issue of the sufficiency of the evidence of Mr. Garcia's authority. Having waived its original motion to strike by putting on evidence, ULC was required to raise the issue of Hugo Garcia's authority expressly by way of a motion to strike at the close of ***all*** the evidence. ULC failed to make that motion, either (a) at the close of all the evidence or (b) after the Jury returned its verdict or, indeed, (c) after the trial court entered its November 6, 2008 final judgment. The Record is perfectly clear. Under this Court's very well-established precedent, ULC waived the "error" it now claims the trial court committed and cannot assert it on appeal.

The reason that ULC never renewed its original motion to strike is plain: there ***was*** ample evidence in the record to support the Jury's verdict.

The Jury's verdict was supported by (a) the testimony of Hugo Garcia, (b) the direct testimony ***and*** rebuttal testimony of James Lehner, (c) several exhibits admitted in evidence, and (d) reasonable and legitimate inferences and deductions from the evidence. All the testimony and exhibits came in ***without objection***. The Jury was properly instructed that after considering all the evidence, it could "accept or discard all or part of the testimony as you think proper." The Jury was properly instructed that it could "draw all reasonable and legitimate inferences and deductions from the evidence." *JA213*; *JA215*. The factual issues surrounding the assignment were properly presented to the Jury by agreed Instruction No. 23. JA205; *JA*220.

Based upon all the evidence presented and after drawing all reasonable and legitimate inferences and deductions from that evidence, the Jury determined that Hugo Garcia was director and trustee in liquidation of Garcia's Inc. at the time he assigned the breach of contract claim to the Trust and that Mr. Garcia authorized and consented to the transfer of the company's rights

to bring a legal action against ULC. The Jury determined which witnesses were more believable and weighed their testimony accordingly. *JA213*; *see id. Trial Transcript (Vol. III, 10/30/2008), p. 60:18-24* ("*You have heard the evidence and you may believe all or a portion of either side. That's your judgment on the credibility of the witnesses."*).

This action was fully, fairly and fiercely tried to verdict. The Supreme Court should affirm the trial court's decision to uphold the Jury's verdict.

STATEMENT OF THE CASE

On May 24, 2007, The Lehner Family Business Trust ("Trust"), assignee of Garcias, Inc., filed a Complaint against United Leasing Corporation ("ULC") in the Richmond Circuit Court, asserting that ULC breached certain equipment leases by misapplying payments, by refusing to account, and by failing to pay Garcias "over $1,000,000.00" in surplus proceeds from the disposition of collateral held as security for the equipment leases. *JA001-011*. In paragraph 41 of its Complaint, the Trust specifically alleged that it had acquired all of Garcia's Inc.'s claims

against ULC relating to the Garcia's leases "[b]y Assignment dated January 4, 2006". *JA007*.

United Leasing filed a motion craving oyer of the Assignment pursuant to which the Trust acquired the claims of Garcias, and the Trust filed the Assignment as part of the Record. *JA012-016*. The notarized Assignment warrants that Hugo Garcia, as trustee in liquidation for Garcia's Inc., a Virginia corporation in dissolution, had "full power and authority" to execute the Assignment and transfer the breach of contract claims and other rights to the Trust. *JA014*. The Assignment was executed under oath by Garcia's Inc. and by Hugo Garcia "as trustee in liquidation for Garcia's, Inc." *JA016*.

United Leasing filed a special plea in bar to the Trust's Complaint, alleging that the Assignment failed because "Hugo Garcia was ***removed*** [1] as a director [of Garcia's Inc.] in April 2002 by [ULC] acting pursuant to a Stock Pledge Agreement" "and was never reinstated." *JA025 (emphasis added)*. In

[1] The Court will note that ULC has conveniently changed its position. On appeal, ULC now claims that the Assignment fails because Hugo Garcia "voluntarily resigned". *ULC Brief, p. 5*.

overruling ULC's special plea, the trial court found that there were "[f]actual disputes, including inferences from the 'Stock Pledge Agreement'" that would be "resolved at trial". *JA027*.[2]

In January 2008, ULC filed an answer. *JA017-024*. About a month before trial, and after the parties had completed discovery, ULC filed an amended answer in which it materially changed certain prior responses to the Trust's Complaint.[3] *JA028-036*.

On October 28, 2008, the parties appeared for trial by Jury. The Jury considered all the evidence and testimony of all witnesses. On direct examination, Hugo Garcia was handed a copy of the Assignment in front of the Jury. *JA148*. Mr. Garcia confirmed to the Jury that he was offered $50,000 for the

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[2] Whether Hugo Garcia was ever lawfully "removed" or terminated as a "Director" of Garcia's Inc. was one of the factual issues resolved by the Jury in the Trust's favor.

[3] For instance, in its original answer ULC represented that it had voted the stock of Garcia's, Inc. to cause the removal of Hugo Garcia as "*manager*". *JA019, ¶ 19 (emphasis added)*. In its amended answer, ULC claimed that it had exercised its rights under the Stock Pledge Agreement to "remove" Hugo Garcia as "director". *JA030, ¶ 19*.

Assignment and that he "accepted". *Id.* Mr. Garcia further testified as follows:

> "Q. Mr. Garcia, you signed, you made the assignment to the Lehner Family Trust in January of 2006?
>
> A. Yes, I did.
>
> Q. Any you signed that document as the trustee in liquidation?
>
> A. Well, whatever it was, I accepted because I needed money at this point."

JA149.

The Jury was properly instructed that it was free to "accept or discard all or part of the testimony" of Hugo Garcia, and to draw "all reasonable and legitimate inferences and deductions" from his testimony. *JA213 (Jury Instruction No. 1)*; *JA215 (jury Instruction No. 7)*. Regardless whether Hugo Garcia's motive was "money", the Jury heard that Mr. Garcia signed the instrument and made the assignment as "trustee in liquidation".

In addition to the direct testimony of Hugo Garcia, the Trust called James Lehner to testify. On direct examination, Mr. Lehner testified ***without objection*** as follows:

"Q. One of the things that the trust now owns is the claims of Garcias Inc.?

A. That's correct.

Q. Could you tell the jury how it came about that you met with Hugo Garcia and purchased the claims?

A. Yes. I met with Mr. Garcia several times, actually. This was in 2006 … and I asked him would he sell me the rights to the company and he said he would."

JA160-161.[4]

On cross-examination, counsel for ULC affirmed the Trust's ownership of Garcias claims against ULC. The message counsel wanted to convey to the Jury, however, was that the real reason the Trust purchased the claims of Garcia's Inc. was because James Lehner was "mad" that he had lost an unrelated court case against ULC.

"Q. That's why you went out and bought out Mr. Garcia's, isn't it?

A. No, it isn't. No."

JA161b.

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[4] United Leasing never moved the trial court to strike James Lehner's testimony. Mr. Lehner's testimony was part of the trial evidence that the Jury was entitle to consider. *JA216 (Jury Instruction No. 10)* (*"The testimony of one witness whom you believe can be the greater weight of the evidence."*).

In addition to the direct testimony of Hugo Garcia and James Lehner, during the Trust's case-in-chief the Trust introduced in evidence a letter that expressly identified Hugo Garcia as a "director of Garcia's Inc." *JA057*. ULC introduced in evidence a Stock Pledge Agreement that expressly identified Hugo Garcia as a "Director" of Garcia's Inc. *JA065*. The only other document relating to Hugo Garcia's positions within the Company was Plaintiff's Exhibit 49 – a letter dated April 2, 2002. *JA061*. On redirect examination, Hugo Garcia clarified that he left the business in accordance with and pursuant to the terms of this letter. *JA157-158*. The letter, written by ULC, only purports to terminate Hugo Garcia as "President" of Garcia's Inc. The "letter" does ***not*** terminate or remove Hugo as "Director".[5]

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[5] ULC did not produce a single corporate record that showed that the shareholders or directors of Garcia's Inc. properly removed Hugo Garcia as a director. Nor did ULC produce any written resignation signed by Hugo Garcia. *See, e.g., § 13.1-679(A) of the Virginia Code (1950), as amended (a director may resign at any time by delivering a* ***written*** *resignation to the board or its chairman or to the secretary of the corporation)*. An officer of a Virginia stock corporation may resign by delivering "notice" to the corporation. *§ 13.1-695 of the Virginia Code (1950), as amended*.

Based upon the documentary evidence alone, the Jury was entitled to conclude that Hugo Garcia was a "Director" of Garcia's Inc. and was never terminated from that position.

At the close of the Trust's case, United Leasing moved to strike the case on the ground that "there's been a failure to prove an assignment from the corporation to the Lehner family business trust." *JA163*. Counsel for ULC argued that the "only witness" to testify concerning the assignment was Hugo Garcia. Counsel offered her interpretation of Mr. Garcia's testimony, arguing that Garcia "testified that he had relinquished all rights of any type … in … Garcias Inc. … So if he relinquished it all, he did not have any rights to assign to [the] Lehner family business trust vis-à-vis the claims of Garcias Inc." *JA163*.[6] The trial court denied the motion, ruling that there were factual issues, created by the

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[6] Rule 5:25 requires every objection to be "stated with reasonable certainty at the time of the ruling". ULC's original motion to strike fails to properly address the question of Hugo Garcia's "authority". ULC's objection generally talks about the "relinquishment" of "rights", not removal of Hugo Garcia or his "voluntary resignation" from *any* corporate position within Garcia's Inc. This appeal should be dismissed because ULC failed to comply with the contemporaneous objection Rule.

documentary evidence and testimony, that the Jury had to decide. *JA177*.

The trial court, like the Jury, also interpreted Hugo Garcia's ***actions*** differently than counsel for ULC.

In the spring of 2002, Hugo Garcia had no credit and no money to fight ULC. *JA148*. Garcia testified that when ULC gave him the April 2, 2002 letter/notice, the then president of ULC, Edward H. Shield ("Shield") told him that "he [Shield] [was] not allowing the company [Garcia's Inc.] no more, he take over. So I left the company." *JA 151*. Although Hugo Garcia testified that he "resigned all of his interests" in Garcia's Inc. and "left for Florida", *JA152*, the trial court and the Jury properly viewed this as Mr. Garcia "kind of throwing up his hand and going to Florida", *JA202*, nothing more.

The Jury was entitled to believe that Hugo Garcia left Virginia in frustration that he could not stand up to the powerful Shield. The trial court and Jury's interpretation of the evidence was correct.

After the trial court denied ULC's motion to strike, ULC put on evidence.

The Trust put on rebuttal evidence. In his rebuttal testimony, which came in ***without objection***, James Lehner testified as follows:

> "Q. Mr. Lehner, you heard some testimony about the assignment that was executed from Garcias Inc., a Virginia corporation in dissolution, Garcias Brothers, a Virginia partnership, and Hugo Garcia individually [and] as trustee in liquidation of Garcias Inc. … Did you accept that assignment from Garcias and Hugo Garcia, Garcia brothers?
>
> A. Let me see it, Mr. Biss.
>
> Q. Did you accept the assignment or did the trust accept it?
>
> A. Yes.
>
> Q. Did that assign all the legal claims, rights and causes of action that the Garcias had under the equipment leases and otherwise?
>
> A. Yes, sir."

JA192-193.

ULC's opening appeal brief ignores this testimony entirely. It cannot be ignored or dismissed.

At the close of all the evidence, and before the Jury was instructed, counsel for ULC stated, "Renew my motion to strike. For the record, I wanted to renew my motion to strike." *JA196*. At that time, ULC did not state ***any*** grounds for its renewed motion to strike.[7] *But see Rule 5:25*; *see Lee v. Lee*, 12 Va. App. 512, 514, 404 S.E.2d 736 (1991) (Rule 5A:18, which requires that objections with specific reasons be made to preserve issues for appeal, was intended to "allow the trial court to correct in the trial court any error that is called to its attention" and allow the opposing party to offer alternatives to any objectionable rulings); *id., Martinez v. Com.*, 42 Va. App. 9, 21, 590 S.E.2d 57 (2003) ("At the conclusion of all the evidence, [defendant] renewed the 'same motions' he made at the end of the Commonwealth's case. At no time did he argue the evidence was insufficient to prove

[7] ULC's original motion to strike at the conclusion of the trust's case was made on multiple grounds, *including* the insufficiency of the evidence of Hugo Garcia's authority. Counsel's statement at the conclusion of all the evidence, "[r]enew my motion to strike", invites the Supreme Court to guess whether the motion was made on one or more of the earlier grounds. As it turns out, ULC's counsel later specifically advised the trial court that the renewed motion to strike was ***only*** being made on the ground that there was no evidence of any "deficiency". *JA244-248*; *infra*.

malice. As the trial court was not given the opportunity to consider this issue at trial, we will not consider the issue on appeal.").

The trial court and counsel for the parties worked through the jury instructions. An agreed instruction was prepared on the validity of the assignment. *JA198-206*. Counsel for ULC actively participated in the drafting of the ultimate jury instruction. *JA204*. When counsel for the Trust suggested the final version of the instruction, counsel for ULC stated, "I agree with that." *JA205*. The following instruction (Instruction No. 23) was given ***without objection*** by ULC:

> "You shall find that a valid assignment existed for Garcia's Inc. to Plaintiff, Lehner Family Business Trust, if you find that Hugo Garcia was a director and trustee in liquidation of Garcia's Incorporated and that Mr. Garcia authorized or consented to the transfer of the company's rights, if any, to bring a legal action against Defendant, United Leasing Corporation.
>
> An assignment is a contract.
>
> An assignee obtains its rights from the assignor, and, thus, is said to 'stand in the shoes' of the assignor when pursuing an action on the contract or instrument assigned."

JA220.

In her closing argument, counsel for ULC repeatedly, emphatically and unequivocally admitted that the Trust had "bought" the breach of contract claim "from Mr. Garcia". *JA227*; *JA228 ("Mr. Garcia … sold this claim")*; *JA233 ("The person who bought the claim … is the one challenging this amount.")*; *JA240 ("Now that he's bought Hugo's claim …)*. Counsel for ULC told the Jury that:

> "The only question, as Mr. Biss said, the only question for you to decide is: Was there a failure to remit proceeds back to Garcia's? That's really the only question in this case."

JA241.[8]

Consistent with counsel's representations to the Jury, after closing arguments and before the Jury reached its verdict, ULC actually stated the grounds for its renewed motion to strike.

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[8] In her opening statement, counsel for ULC also expressly and intentionally informed the Jury that the Trust had purchased the claim of Garcia's Inc. for "$50,000". Having paid $50,000 for assignment of the breach of contract claim, counsel for ULC suggested to the Jury that it would be somehow unfair or wrong to allow the Trust to "pocket" any surplus found to be owing by ULC. *JA131.* At trial and even after trial, ULC used the fact that there was a valid assignment when it suited ULC's purposes. On appeal, ULC now claims there was no evidence of a valid assignment to suit its obvious purpose in upsetting the Jury's verdict.

ULC renewed its motion to strike on one ground – and one ground only.

The Record is 100% crystal clear that on its renewed motion to strike ULC ***only*** argued that the Trust had failed to prove that there was a "deficiency". *JA244*.

The complete trial transcript cannot be ignored:

> "THE COURT: Ms. Elliott, you want to renew your motion to strike?
>
> MS. ELLIOTT: Yes.[9] I wanted to renew my motion to strike at the end as we had stated, stating that the plaintiff did not prove its case that there was a deficiency in this situation."

JA244-248.

The trial court denied ULC's renewed motion to strike. *JA248*.

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[9] In its appeal brief, p. 17, ULC intentionally stops in its tracks at the word "Yes". The reason is obvious: After the word "Yes", counsel for ULC expressly and unequivocally renews of her motion to strike on ***only*** one ground. Counsel never mentions Hugo's authority. She completely abandons the argument. In a very hollow effort to avoid dismissal of this appeal, ULC now argues that "the trial court interrupted United Leasing's argument and cut off further discussion". *ULC Brief, p. 17*. The trial court did not cut off anyone. Beginning on page 244 of the Joint Appendix and continuing to page 248, counsel for ULC addressed the "deficiency" issue ***only***.

The Jury unanimously returned a verdict in favor of the Trust. *JA037*; *JA249*. In accordance with the agreed instruction given, *JA220 (Jury Instruction No. 23)*, the Jury found that Hugo Garcia was a director and trustee in liquidation of Garcia's Inc. and that Mr. Garcia authorized or consented to the transfer of the company's rights to bring a legal action against ULC.

ULC made a motion to set aside the verdict. *JA249*. In making its post-verdict motion, ULC did ***not*** renew the motion to strike it made at the close of the Trust's case, *JA163*, and did ***not*** argue that the evidence failed to establish that Hugo Garcia had authority to assign the breach of contract claim to the Trust. *JA249-256*. ULC never once mentioned Hugo Garcia's authority to assign the breach of contract claim of Garcia's Inc. to the Trust. The trial court denied ULC's motion to set aside the Jury's verdict, finding that the Jury had properly resolved the factual issues submitted to it as trier of fact. *JA039*.

On November 6, 2008, the trial court entered final judgment on the Verdict in favor of the Trust. *JA038-039*.

On November 10, 2008, ULC filed a lengthy "Motion to Reconsider Motion for Judgment Notwithstanding Verdict Or, Alternately, Motion to Set Aside Verdict and For New Trial". ***Nowhere*** in its motion did ULC object to the trial court's rulings or the Jury's verdict on the ground that there was no evidence that Hugo Garcia had authority to assign the breach of contract claim of Garcia's Inc. to the Trust. ULC's ***sole*** argument was that the amount of the "surplus" determined by the Jury to be owed by ULC was "not supported by the law or evidence." *JA040-053*.

Even worse than failing to object, ULC affirmatively conceded in its motion to reconsider that the Assignment was valid and that the Trust was valid "assignee". *JA051 ("The Trust allegedly was assigned rights by the Company, Garcia's Brothers and Hugo Garcia.")*; *JA046 ("The credit due to the Trust,* ***as Hugo Garcia's assignee***, … was, as a matter of law, $296,142.00") (emphasis added); *see id. JA051-052 ("Accordingly, the Trust, as Hugo Garcia's assignee, only has the right to recover for one-half (1/2) the value of the Joplin Road property if a surplus exists")*.

The alleged "error" that ULC now invites the Supreme Court to reverse was waived and was never preserved for appeal.

By Order entered November 24, 2008, the trial court denied ULC's motion to reconsider. *JA054*.

By Order entered June 4, 2009, the Supreme Court awarded ULC an appeal from the judgment rendered by the trial court on the Jury's verdict. The appeal is limited to a single assignment of error presented by ULC.

QUESTIONS PRESENTED

1. By failing to ever renew its initial motion to strike made at the conclusion of the Trust's case, did ULC waive any objection it had to the sufficiency of the evidence?

2. By assenting to an agreed-upon instruction, submitting to the Jury the issue of Hugo Garcia's authority to assign the breach of contract claim to the Trust, did ULC waive any contention that the trial court erred by failing to rule on the issue as a matter of law?

3. By failing to raise the issue of Hugo's authority in either (a) its motion made at the conclusion of all the evidence, (b) its

motion to set aside the Jury's verdict, (c) its post-verdict motion to reconsider or (d) in any supporting memorandum, did ULC waive the point?

4. When all the evidence presented at trial and all reasonable and legitimate inferences and deductions to be drawn from it are viewed in a light most favorable to the Trust, was the evidence sufficient to support the Jury's factual findings that Hugo Garcia was a director and trustee in liquidation of Garcia's Inc. and that Mr. Garcia authorized or consented to the transfer of the company's rights to bring a legal action against ULC?

STATEMENT OF THE FACTS

In March 1995, Garcias, Inc. leased certain trucks and equipment from ULC pursuant to "Equipment Lease Agreement" nos. 4077, 4078, 4079, and 4080. Between July and October 1996, Garcias leased additional trucks and equipment from ULC pursuant to lease nos. 4340, 4368 and 4388. *JA079-128*. In December 2000, February 2001 and June 2001, ULC financed the purchase of several more trucks, roll off containers, and the payment of certain "dumping fees". Garcias executed lease nos.

5067, 5103 and 5155. Part of the proceeds of lease nos. 5067, 5103 and 5155 paid off the older leases. *JA149a*.

ULC held substantial security for payment of the Garcias leases. ULC took a UCC lien on all the Garcias' vehicles, containers, equipment, customer accounts, general intangibles, documents, chattel paper, and "proceeds of the foregoing." ULC had an assignment of "100% Stock of Garcia's, Inc. and Voting Rights." As additional security, ULC obtained a deed of trust against Garcias' principal place of business at 18417 Joplin Road, Prince William, Virginia (hereinafter, the "Joplin Road Property"). As further security, ULC required personal guarantees from the owners of Garcias – brothers Hugo and Aurelio Garcia – and their wives, and also required the Garcias to pledge their personal residences as collateral. *JA079-128*; *JA149a-149b*.

In spite of the fact that Garcias paid off leases, ULC failed to provide accountings and refused to cancel the old leases. ULC delivered default notices, but never explained how it came up with the numbers. Garcias asked for accountings, but no accountings were ever provided. *JA151a-151b*.

Garcias disputed the "amount of the indebtedness" owed to United Leasing. *JA062*. On February 6, 2001, ULC and Garcias executed a "Stock Pledge Agreement", pursuant to which an "audit and accounting" was to have been done of any "deficiency on the Leases". *JA062*. That audit and accounting was never performed. *JA150a*.

The Stock Pledge Agreement represents and confirms that Hugo Garcia is "***Director***" of Garcias. *JA065 (emphasis added)*. Hugo Garcia was ***never*** removed as a Director of Garcias, Inc. ULC offered no corporate resolution or consent to show that Hugo Garcia had ever been removed as "Director", either during the term of the Stock Pledge Agreement or thereafter or at trial. Rather, the only evidence presented at trial of Hugo Garcia's purported "termination" from any position – an April 2, 2002 "letter" – demonstrates that Hugo Garcia was ***only*** terminated from his position as "President" of Garcia's, Inc.

Significantly, the Stock Pledge Agreement became "null and void" by its own terms on February 13, 2002. Paragraph 14 of the Agreement states that the "entire agreement is contingent"

on certain payments being made on certain leases "on or before 7 calendar days from the date that this Agreement is executed". If the payments were not made on time, "this Agreement is "null and void … No cure period applies to this requirement." *JA067*. Garcias failed to make the required payments within 7 days of February 6, 2002. *JA200*.

Based upon the express and unambiguous language of the Stock Pledge Agreement, the Jury was entitled to conclude that after February 13, 2002 – seven (7) calendar days from the date of execution of the Agreement – ULC had no authority as at all to "terminate" Hugo Garcia from ***any*** position with Garcia's Inc.

Between November 2000 and April 2002, Garcias continued to make payments to ULC. In or before March 2002, ULC brokered a sale of the assets of Garcia's to Allied Waste Industries, Inc. *JA151c*. On March 14, 2002, counsel for Garcia's informed ULC of the specific terms and conditions under which Hugo Garcia would sign the letter of intent with Allied Waste and proceed with the asset sale. Among those terms and conditions was the following:

> "United Leasing, as sole shareholder of Garcia's, Inc. shall, subject to Hugo Garcia's sole option, retain Hugo Garcia as the president of Garcia's, Inc. as well as a ***director*** of Garcia's, Inc."

JA057 (emphasis added). Hugo Garcia signed the letter of intent, and was retained as "director of Garcia's Inc."

After the letter intent was signed, further disputes arose between Garcias and ULC. ULC declared the equipment leases in default, and "took over" the business of Garcias. *JA151*; *JA179*.

On April 2, 2002, ULC gave notice that it was calling a "meeting of the Board of Directors of Garcia's Inc. at 8:00 a.m. on April 3, 2002". ULC claimed to be calling the meeting "as the Secured Party under the Stock Pledge Agreement". The "Agenda" for the meeting included the termination of Hugo Garcia as "***President***" of Garcias, Inc. *JA061 (emphasis added)*.

Regardless whether the "notice" was lawful,[10] ULC, as

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[10] As stated above, the Pledge Agreement was already "null and void" by its express terms prior to April 2, 2002. Furthermore, although shareholders and directors of a Virginia stock corporation may call a special meeting, no provision of Virginia law permits a secured creditor to call a board of directors meeting. *See, e.g.,§§ 13.1-655, 13.1-658 and 13.1-686 of the Virginia Code (1950), as amended.*

"Secured Party", gave no notice and took no action to remove Hugo Garcia from his position as "***Director***" of Garcia's.

In its opening appeal brief, ULC claims that upon receipt of the April 2, 2002 letter/notice and "without waiting for the board meeting,[11] Hugo voluntarily resigned as a director and officer of Garcia and moved to Florida." *ULC Brief, p. 5*. By claiming that Hugo Garcia "voluntarily" resigned, ULC puts itself in an inescapable box. By statute in Virginia law, every resignation by a director must be "written" and delivered to the "board of directors or its chairman or to the secretary of the corporation." *§ 13.1-679(A)*; *see Estate of Pelfrey v. Sorah*, 2003 WL 21524635 *1 (Va. App. 2003) (unpublished) ("Mrs. Sorah … signed the minutes from the meeting … and these minutes provided written notice that she was being 'removed from all association with the corporation due to her health.'"). A resignation is effective "when the resignation is delivered". *§ 13.1-679(B)*. There is no

[11] The fact that Hugo "voluntarily resigned" on April 2, 2002, "without waiting" for prior to the April 3, 2002 board meeting scheduled by the "Secured Party", is a fact added to the Record by counsel for ULC.

testimony or written resignation in the Record. Any "voluntary resignation" by Hugo Garcia was ineffective as a matter of law.

An officer of a Virginia stock corporation may be lawfully removed by a "board of directors … at any time with or without cause". *§ 13.1-695(B)*. The Court knows that Hugo Garcia was ***not*** lawfully removed by the board of directors of Garcia's Inc. because ULC admits in its appeal brief that the "meeting of the Board of Directors of Garcia's Inc." scheduled by ULC as "Secured Party" for "8:00 a.m. on April 3, 2002" never took place. According to ULC, Hugo did not wait for the "board meeting". He "moved to Florida". *ULC Brief, p. 5*.

With regard to Hugo Garcias' purported "termination", the testimony was clear: ULC, as "Secured Party", unilaterally gave Mr. Garcia the April 2, 2002 letter/notice and told him to "move out". Garcia left the business premises "under the impression that they follow the contract and I was supposed to be out". *JA153*. On re-direct examination, Mr. Garcia clarified and specifically confirmed that he "moved out" pursuant to the terms of the letter dated April 2, 2002. *JA157-158*. The letter, on its

face, ***only*** purports to terminate Hugo Garcia as "President" of Garcia's Inc. It is not signed by Hugo Garcia. The letter makes absolutely no mention of any termination of Hugo or resignation by Hugo as "Director".

The trial court itself agreed that the letter "speaks for itself", and would not allow counsel to examine Mr. Garcia on its contents. *JA158*.

From a review of Plaintiff's Exhibit 49 and having heard Hugo Garcia's testimony on redirect, the Jury could reasonably have found that Hugo Garcia did not resign and was ***not*** terminated from his position as Director of Garcia's Inc. Using common sense and considering the "intelligence" of ULC and the plain language of April 2, 2002 letter, drafted by ULC, the Jury could reasonably have concluded that ULC meant to accomplish what it stated in the letter – termination of "Hugo Garcia as President of Garcia's, Inc." – and nothing more. To suggest that the letter goes further to terminate Hugo as "Director" is tantamount to re-writing the letter and it would abrogate the

function of the Jury, which is to "draw all reasonable and legitimate inferences and deductions from the evidence".

Beginning in April 2002, United Leasing began to liquidate and dispose of the collateral that had been pledged as security for the Garcias leases. *JA190e-190f*.

The Jury found that the "Equipment Lease Agreements" between Garcias and ULC were financing instruments, and not "true leases". *JA221-224*. Based upon all the evidence presented, including conflicting evidence about the amount owing by Garcia's to ULC, the Jury found that there was a "surplus" from the disposition of the collateral security held for the leases in the amount of $1,100,000. *JA037*; JA220. The Jury resolved the myriad factual issues in favor of the Trust, as assignee of Garcia's Inc.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

I. *Waiver; Failure to Preserve Issue for Appeal*

(Questions Presented Nos. 1, 2 and 3)

The mandate expressed in Rule 5:25 of the Rules of the Supreme Court is unequivocal: "Error will not be sustained to any ruling of the trial court … unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice."

The Supreme Court of Virginia has consistently enforced Rule 5:25 in a variety of different contexts applicable to this case.

A. The Failure to Renew A Motion to Strike

See, e.g., Ortiz v. Commonwealth, 276 Va. 705, 723, 667 S.E.2d 751 (2008) (the Supreme Court "will not" address challenge to sufficiency of the evidence, where defendant moved to strike evidence at conclusion of Commonwealth's case, but did not renew his motion to strike at the conclusion of all the evidence); *Spangler v. Commonwealth*, 188 Va. 436, 438, 50 S.E.2d 265 (1948) ("When a defendant in a civil or criminal case

proceeds to introduce evidence in his own behalf, after the trial court has overruled his motion to strike, made at the conclusion of the introduction of plaintiff's evidence in chief, he waives his right to stand upon such motion. Plaintiff's case may be strengthened by defendant's evidence. ***If thereafter*** a motion is made to strike the evidence or to set aside the verdict, the court must consider the entire record in reaching its conclusion.") (emphasis added) (citing *Rawle v. McIlhenny*, 163 Va. 735, 740-742, 177 S.E. 214 (1934) (further citations omitted) (failure to renew a motion to strike operates as a waiver of any objection to the sufficiency of the evidence)).

B. Agreed Submission Of Issue to The Jury

See, e.g., City of Richmond v. Holt, 264 Va. 101, 107-108, 563 S.E.2d 690 (2002) (defendant waived for purpose of appeal argument that plaintiff was guilty of contributory negligence as a matter of law, by agreeing to submit issue for jury's consideration under jury instruction); *Holles v. Sunrise Terrace, Inc.*, 257 Va. 131, 137-138, 509 S.E.2d 494 (1999) (when an issue has been submitted to the jury under instructions given without objection,

such assent constitutes a waiver of any contention that the trial court erred in failing to rule as a matter of law on the issue) (citing *Spitzli v. Minson*, 231 Va. 12, 18, 341 S.E.2d 170 (1986) (the defendant's failure to preserve his objection at the instruction stage constitutes waiver of any contention that the trial court erred in not ruling as a matter of law on issues of contributory negligence and proximate cause – motion to set aside verdict did not save defendant from his failure to object to jury instructions); *Hilton v. Fayen*, 196 Va. 860, 866, 86 S.E.2d 40 (1955) (by requesting and agreeing to a jury instruction, the "defendant waived all objections theretofore made, thereby eliminating all prior questions of error from our consideration.")).

C. <u>Failure to Preserve Issue Post-Verdict</u>

See, e.g., Little v. Cooke, 274 Va. 697, 718, 652 S.E.2d 129 (2007) (defendants did not challenge the sufficiency of the evidence to support a claim for punitive damages by motion to strike, or in their closing argument, or in a motion to set aside the verdict, nor did they oppose an award of punitive damages in their post-trial brief, or ask the trial court to reconsider its award

of punitive damages – Held, that "***the Defendants did not properly preserve the issue for appeal.***" (emphasis added); *Schnupp v. Smith*, 249 Va. 353, 368, 457 S.E.2d 42 (1995) (defendant "failed to preserve" issue whether punitive damage award was excessive, and "waived the point and cannot assert it for the first time on appeal", where "[n]either in his motion to set aside the verdict nor in his supporting memorandum was the subject of the excessiveness of the punitive damage award even mentioned.").

The Supreme Court should not deviate from its long history of consistent enforcement of Rule 5:25. The legion of cases cited above are directly on point. This appeal should be dismissed and the trial court's final judgment affirmed for the following reasons:

1. ULC failed to renew its motion to strike, and, thus, ULC has waived any objection to the sufficiency of the evidence.

2. The issue of Hugo Garcia's authority was submitted to the Jury under an agreed instruction. ULC's assent constitutes a waiver of any contention that the trial court erred in failing to rule as a matter of law on the issue.

In its opening brief, p. 11, counsel for ULC now suggests that Jury Instruction No. 23, *JA220*, was given at the "Trust's request", but also admits that No. 23 was an "agreed instruction". To be clear, the Record demonstrates that the instruction was the result of a group grope, was agreed to on the Record by counsel for ULC ("I agree with that"), and was given ***without objection*** by ULC. The Record cannot be disputed. *JA198-206*.

3. The Record demonstrates beyond any doubt that neither in its renewed motion to strike, *JA244-248*, nor in its motion to set aside the Jury's verdict, *JA249-256*, nor in its motion to reconsider, *JA040-053*, nor in any supporting memorandum was the subject of Hugo Garcia's authority to assign the breach of contract ever mentioned. Hence, ULC "waived the point and cannot assert it for the first time on appeal. Rule 5:25." *Schnupp, supra*.

Even assuming, *arguendo*, that ULC had properly preserved for appeal the issue of the alleged insufficiency of the evidence of Hugo Garcia's authority – which is expressly denied – the trial

court's judgment on the Jury verdict must be affirmed under the familiar principles cited below.

II. ***Sufficiency of the Evidence***

(Question Presented No. 4)

A plaintiff who is "[a]rmed with a jury verdict approved by the trial court, … stands in 'the most favored position known to the law.'" *Bitar v. Rahman*, 272 Va. 130, 137, 630 S.E.2d 319 (2006) (quoting *Ravenwood Towers, Inc. v. Woodward*, 244 Va. 51, 57, 419 S.E.2d 627 (1992)). The trial court's judgment is presumed to be correct. The Supreme Court views the evidence and all reasonable inferences fairly deducible from it in the light most favorable to the prevailing party at trial. *Banks v. Mario Industries of Virginia, Inc.*, 274 Va. 438, 450-451, 650 S.E.2d 687 (2007); *Estate of Taylor v. Flair Property Assoc.*, 248 Va. 410, 414, 448 S.E.2d 413 (1994). The Supreme Court will not set aside a trial court's judgment sustaining a jury verdict, unless it is "plainly wrong or without evidence to support it." *§ 8.01-680*.

In ruling on a motion to strike at the end of a plaintiff's case-in-chief, a trial court must "accept as true all the evidence

favorable to the plaintiff as well as any reasonable inference a [fact finder] might draw therefrom which would sustain the plaintiff's cause of action. The trial court is not to judge the weight and credibility of the evidence, and may not reject any inference from the evidence favorable to the plaintiff unless it would defy logic and common sense." *Austin v. Shoney's, Inc.*, 254 Va. 134, 138, 486 S.E.2d 285 (1997). "[T]he trial judge is obliged to 'adopt those inferences most favorable to the party whose evidence is challenged, even though he may believe different inferences are more probable.'" *Butler v. Yates*, 222 Va. 550, 553-554, 281 S.E.2d 905 (1981) (quotations omitted). "[T]he trial court should in every case [deny] the motion where there is any doubt on the question. 'The … motion … should be [granted] only [in] those cases in which it is *conclusively apparent* that [the] plaintiff has proven no cause of action against [the] defendant.'" *Brown v. Koulizakis*, 229 Va. 524, 531, 331 S.E.2d 440 (1985) (quoting *Leath v. Richmond, Fredericksburg & Potomac R.R. Co.*, 162 Va. 705, 710, 174 S.E. 678 (1934) (emphasis added).

A litigant, such as ULC, who chooses to introduce evidence on its behalf after the trial court denies its motion to strike, waives its right to rely on its first motion to strike. In deciding whether there is sufficient evidence to support the jury's verdict at the conclusion of all the evidence, the trial court is entitled to consider all the evidence and not just the evidence presented in the plaintiff's case-in-chief. *See, e.g., Estate of Taylor v. Flair Property Assoc.*, 248 Va. 410, 414, 448 S.E.2d 413 (1994).

In reaching its Verdict in this case, the Jury considered the following evidence:

- Hugo Garcia's direct testimony that he made the assignment to the Trust, and signed the document as the "trustee in liquidation" *JA149*.

- James Lehner's direct testimony that the Trust "owns" the claims of Garcia's Inc., and "bought" the claims from Hugo Garcia. *JA160-161*; *JA161b*.

- The Stock Pledge Agreement signed by ULC, which identifies Hugo Garcia as a "Director" of Garcia's Inc. *JA065*.

- The March 14, 2002 letter that identifies Hugo Garcia as a "director of Garcia's Inc." *JA057*.

- Hugo Garcia's clarification on redirect that he left the business pursuant to the April 2, 2002 "letter", which, if lawful and effective, only purports to terminate and remove Hugo as "President" of Garcia's Inc.

- Hugo Garcia's actions in leaving the business, viewed in light of the fact that he simply had no money to fight ULC and that Shield had told him that "he [Shield] [was] not allowing the company [Garcia's Inc.] no more, he take over. So I left the company." *JA 151*.

  Mr. Garcia was "kind of throwing up his hand and going to Florida", *JA202*, nothing more.

- James Lehner's rebuttal testimony that the Trust accepted assignment of the legal claims, rights and causes of action of Garcia's Inc. under the equipment leases from Garcia's Inc. and from Hugo Garcia "as trustee in liquidation of Garcias Inc." *JA192-193*.

Based upon all the evidence presented, and after drawing all reasonable and legitimate inferences and deductions from that evidence, the Jury found that Hugo Garcia was a director and trustee in liquidation of Garcia's Inc. and that Mr. Garcia authorized or consented to the assignment of the company's rights to the Trust.

James Lehner's rebuttal testimony alone supports the Jury's verdict. ULC failed to object to this testimony at trial, and, notably, ULC fails to address it on appeal.

It is well-established that an objection to the admissibility of evidence "must be made when the evidence is presented." *Bitar*, 272 Va. at 139, 630 S.E.2d at 324 (quoting *Kondaurov v. Kerdasha*, 271 Va. 646, 655, 629 S.E.2d 181 (2006)).

> [I]f a litigant sits by and permits evidence to go to the jury which the court, if it had been objected to, would have excluded, the jury have the right and it is their duty to consider it along with all the evidence and give it such weight as they think it is entitled to.

Bitar, 272 Va. at 141, 630 S.E.2d at 325 ("Dr. Jacob's testimony, having been admitted without objection, was properly considered by the jury") (quoting *TransiLift Equip., Ltd. V. Cunningham*, 234 Va. 84, 91-92, 360 S.E.2d 183 (1987) (if a party does not timely object to the admission of evidence, the objection is waived)).

CONCLUSION AND REQUEST FOR RELIEF

There are numerous unassailable reasons why the trial court's final judgment should be summarily affirmed. For the reasons stated above and at the argument of this appeal, the Trust hereby requests the Supreme Court to affirm the trial court and award the Trust its costs of this appeal.

DATED: August 3, 2009

Respectfully Submitted,

THE LEHNER FAMILY BUSINESS TRUST

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 5:18(b) and 5:28(g), I hereby certify that on August 3, 2009, fifteen (15) copies of the foregoing Brief of Appellee were filed with the Clerk of the Supreme Court of Virginia and three (3) copies were mailed or delivered to counsel for Defendant-Petitioner, United Leasing Corporation:

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Rule 5:26(d) has been complied with.

/s/Todd M. Ritter