IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
ASCEND ELEMENTS, INC. *et al.*,[1]	)	Case No. 26-90440 (CML)
Debtors.	)	(Jointly Administered)

DEBTORS' RESPONSIVE BRIEF IN OPPOSITION TO AM CONSTRUCTION INC. D/B/A AMCON INDUSTRIAL'S BRIEF AND MOTION FOR SUMMARY JUDGMENT ON THE ISSUES IDENTIFIED IN THE STIPULATION AND AGREED SCHEDULING ORDER

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Ascend Elements, Inc. (2893) and Ascend Elements US, LLC (8309). The location of the Debtors' service address is: 133 Flanders Road, Westborough, MA 01581.

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The above-captioned debtors and debtors in possession (collectively, the "Debtors") submit this responsive brief in opposition (the "Response") to *AM Construction Inc. d/b/a AMCON Industrial's Brief and Motion for Summary Judgment on the Issues Identified in the Stipulation and Agreed Scheduling Order* ("AMCON's MSJ"), filed by AM Construction Inc. d/b/a AMCON Industrial ("AMCON"). In opposing AMCON's MSJ, the Debtors incorporate the arguments and authorities set forth in the *Debtors' Motion for Summary Judgment Determining that AMCON Industrial's Asserted Mechanic's and Materialmen's Lien Does Not Attach to (I) The Debtors' Leasehold Interest in the Covington Property or (II) the Personal Property Sold in the Covington Sale* [Docket No. 593] ("Debtors' MSJ"), and respectfully state as follows:

PRELIMINARY STATEMENT

1. This lien dispute presents two narrow legal questions of Georgia law that the parties have asked the Court to decide on cross-motions for summary judgment: (i) whether AMCON's asserted Lien[2] attaches to the Debtors' interest in the Covington Lease; and (ii) whether the Lien attaches to the equipment, machinery, fixtures, trade fixtures, tenant improvements, and other assets at the Covington Facility that were sold pursuant to the Covington Sale. The answer to both questions is "no" and the Court can resolve both issues as a matter of law by applying the governing lease terms and Georgia's strictly construed lien statutes. The Debtors oppose AMCON's motion not because there are factual disputes that preclude judgment, but because AMCON has misinterpreted both the Covington Lease and the controlling authorities. On the undisputed record before the Court, AMCON has failed to carry its burden of proof, and the Debtors respectfully submit that they are entitled to summary judgment on both issues.

[2] Capitalized terms used but not defined herein shall have the meanings ascribed in the Debtors' MSJ.

2. AMCON's entire theory of lien attachment depends on the Covington Lease having conveyed a lienable estate for years, but the text of the Lease forecloses that conclusion. Georgia law does not automatically treat a long-term lease as an estate for years, and the Covington Lease is a textbook illustration of why that rule exists. Read in its entirety, the Lease reflects a landlord that retained comprehensive control over the property: approval rights with an unqualified veto over structural alterations, exclusive dominion over common areas, rights of entry on short notice or no notice at all, strict limits on Tenant's ability to assign, sublet, or encumber the leasehold, and an election right allowing Landlord to claim all improvements as its own property at expiration. These are not isolated clauses. They are the defining structure of the Covington Lease. When Georgia courts apply the settled multi-factor test to a lease that looks like the one before the Court, the result is a usufruct, not an estate for years.

3. Recognizing that the text of the Covington Lease cannot carry its argument, AMCON asks the Court to look beyond the four corners of the instrument to documents and events it contends are consistent with an estate for years, including the parties' construction contract that postdates the lease, the Debtors' bankruptcy schedules, and conduct during the lease term. But Georgia law is clear that the usufruct/estate-for-years determination is made by scrutinizing the lease instrument itself, not by reference to later characterizations in unrelated documents or conduct that post-dates the lease's execution. AMCON does not cite a single case in which a Georgia court consulted the type of extrinsic materials AMCON invokes to determine whether a lease conveyed a usufruct. The instrument before the Court is the only proper source of the answer, and that instrument unambiguously establishes a usufruct.

4. The legal consequence of that conclusion is dispositive. When a usufruct is created, no estate passes out of the landlord, the interest is personal to the tenant, cannot be conveyed

without the landlord's consent, and is not subject to levy. It follows, as a direct matter of statutory application, that a mechanics' and materialman's lien cannot attach to a usufruct interest. AMCON tries to escape that conclusion by invoking tax pass-through clauses and isolated textual references to a "leasehold estate." Georgia courts have consistently declined to allow isolated provisions to override the holistic character of the instrument as a whole, and have expressly held that tax-liability clauses are not dispositive of the usufruct/estate-for-years inquiry.

5. AMCON's secondary argument that its Lien independently attached to "facility-integrated assets" sold in the Covington Sale compounds rather than cures the deficiencies in its primary theory. Georgia's lien statutes are strictly construed against the lien claimant, and that burden is not met here on any theory AMCON actually advances. Critically, AMCON does not argue anywhere in its motion that its Lien attached to the equipment, machinery, or trade fixtures as personal property; its argument is focused exclusively on a fixture-integration theory, and having never asserted, briefed, or sought summary judgment on a personal property lien theory, AMCON is not entitled to judgment on that unargued basis. The fixture-integration theory fails on its own terms as well. If the challenged assets became fixtures permanently integrated into the realty, they are part of the real property itself. Because the Landlord, not the Debtors, owns the fee, and the Covington Lease is a usufruct, AMCON's Lien does not attach to fixtures and permanent improvements affixed to the real estate. If the assets remained personal property, AMCON was required to comply with Georgia's personal-property lien statute and specifically describe those items in its recorded Lien claim, which its real-property-focused Lien Statement plainly did not do. AMCON cannot have it both ways, and under either characterization its Lien does not reach the assets sold in the Covington Sale. The Court should deny AMCON's motion and enter judgment for the Debtors on both issues.

RESPONSE

I. AMCON Has Failed to Carry Its Burden on Summary Judgment Regarding the Attachment of its Purported Lien to the Covington Assets and Sale Proceeds.

6. Because AMCON has the burden of proof at trial on proving the validity, priority, and extent of its asserted Lien,[3] it must demonstrate "beyond peradventure *all* of the essential elements" on the issues presented to the Court to warrant summary judgment in its favor. *See Guzman v. Allstate Assur. Co.*, 18 F.4th 157, 160 (5th Cir. 2021) (quoting *Fontenot v. Upjohn Co*., 780 F.2d 1190, 1194 (5th Cir. 1986)). Here, this means AMCON must establish there are no genuine issues of material fact and it is entitled to judgment as a matter of law on the Issues before the Court, *i.e.* that its purported Lien attached to the Debtors' property interests sold in connection with the Covington Sale. *See Martin v. Alamo Cmty. Coll. Dist.*, 353 F.3d 409, 412 (5th Cir. 2003) ("A grant of summary judgment is proper when there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law."). By contrast, the Debtors, who do not have the burden of proof at trial, may establish their entitlement to summary judgment by identifying evidence that negates an essential element of AMCON's asserted Lien claim, or showing there is no evidence to support an essential element thereof. *See Axis Surplus Insurance Company v. Mercer*, 577 F.Supp.3d 563, 567 (N.D. Tex. 2021) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986)). Whether the Covington Lease conveyed a usufruct or an estate for years is a question of law, which is well-suited for resolution on summary judgment. *See In re Ionosphere Clubs, Inc.*, 145 B.R. 386, 391 (Bankr. S.D.N.Y. 1992) (on cross motions for summary judgment, holding that the debtor's leasehold interests were usufructs under Georgia law and therefore the contractor's liens could not attach to those interests).

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[3] *See* 11 U.S.C. § 363(p)(2) ("In any hearing under this section. . . the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.").

7. The existence of a rebuttable presumption in the moving party's favor does not disturb this well-established framework or shift the ultimate burden of persuasion. *See, e.g., White v. Houston Indep. Sch. Dist.*, 815 F.Supp. 1016, 1018-19 (S.D. Tex. 1993) (summary judgment granted in defendant's favor based on evidence that rebutted presumption of discrimination on plaintiff's age discrimination claim); *In re Sadler Clinic, PLLC,* 2016 WL 921983, at *4 (Bankr. S.D. Tex. Mar. 7, 2016) (preference defendant must come forward with evidence of the debtor's solvency to rebut the presumption of insolvency under section 547 of the Bankruptcy Code at the summary judgment stage, but the burden of proof remains at all times with the trustee). The "only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact." *Pennzoil Co. v. F.E.R.C.*, 789 F.2d 1128, 1136 (5th Cir. 1986) (citing Fed. R. Evid. 301) *accord Horton v. Hendrix*, 662 S.E.2d 227, 231 (Ga. Ct. App. 2008) (if a presumption arises under Georgia civil law, "the burden of going forward with the evidence shifts to the other party," but "the burden being shifted to the other party is the burden to produce evidence rebutting the presumption . . . ; it is *not* the ultimate burden of persuasion, which never shifts from the party asserting the claim . . . ."). This means that "if the party against whom the presumption operates produces evidence challenging the presumed fact, the presumption simply disappears from the case." *Pennzoil*, 789 F.2d at 1136-37.

8. On cross-motions for summary judgment, moreover, the nonmovant satisfies its responsive burden by cross-citing to its own motion for summary judgment. *See, e.g., CQ, Inc. v. TXU Min. Co., L.P.,* 565 F.3d 268, 274 (5th Cir. 2009) (holding that courts should consider the evidence offered in a nonmovant's own cross-motion for summary judgment to determine whether it presented a disputed issue of material fact precluding summary judgment in favor of the movant). The Debtors do so here.

9. The Debtors oppose AMCON's MSJ not because there are factual disputes that preclude judgment, but because AMCON misinterprets both the undisputed documents[4] and controlling Georgia law. For the reasons set forth in the Debtor's MSJ and in this Response, the correct application of Georgia law confirms that AMCON's asserted Lien does not attach to any of the assets sold in the Covington Sale or the resulting sale proceeds. While the Debtors must point to facts in the summary judgment record rebutting the presumption under Georgia law that the Covington Lease established a lease for years (which they have for the reasons set forth below), the burden of proof on the Issues remains with AMCON. Because AMCON has failed to carry its burden of proof, the Court should deny AMCON's MSJ and grant the Debtors' MSJ.

II. AMCON's Purported Lien Does Not Attach to the Debtors' Leasehold Interest in the Covington Lease

A. Application of the Five-Factor Test Establishes the Covington Lease Conveyed a Non-Lienable Usufruct.

10. The Debtors acknowledge that the term of the Covington Lease triggers a rebuttable presumption of an estate for years. *See* Debtors' MSJ ¶ 40. But that presumption carries far less weight than AMCON suggests. The presumption "has never intended to hold that a lease for five years or more is *ipso facto* and as a matter of law an estate for years." *Warehouses, Inc. v. Wetherbee*, 46 S.E.2d 894, 896 (Ga. 1948). Courts must "examine the terms of the lease agreements and determine what interests the parties intended to convey," and if the restrictions are sufficiently inconsistent with use of the property "in as absolute a manner as may be done with" an estate for years, the presumption gives way. *E. Air Lines v. Joint City-County Bd. of Tax Assessors*, 315 S.E.2d 890, 891-92 (Ga. 1984) (holding that thirty-year lease agreement granted a usufruct).

[4] As explained in the Debtors' MSJ and below, the Debtors disagree with AMCON that the Court may consider documents other than the lease instrument itself to determine whether the Covington Lease conveyed a usufruct or estate for years. *Compare* Debtors' MSJ at ¶¶ 36, 42 and infra Section II.B. *with* AMCON's MSJ at ¶¶ 85-101. Indeed, the only authority AMCON cites does not support its position. AMCON's MSJ at ¶ 85.

11. The inquiry, in other words, is not mechanical. It is textual, contextual, and objective. The cases AMCON cites support this very proposition. AMCON's MSJ ¶¶ 43, 44 (citing *Richmond Cnty. Bd. of Tax Assessors v. Richmond Bonded Warehouse Corp.*, 325 S.E.2d 891, 892-93 (Ga. Ct. App. 1985) (fifty-year lease created a usufruct as it limited the lessee's use to warehouse purposes, required construction according to plans approved by the lessor, required compliance with applicable laws and regulations, imposed express maintenance obligations, and barred assignment or shared use without written consent); *Chatham Cnty. Bd. of Assessors v. Jay Lalaji, Inc., Airport Hotels*, 849 S.E.2d 768, 770-71 (Ga. Ct. App. 2020) (fifty-year agreement to construct and operate a hotel on airport-commission property was not an estate for years because the lessor retained significant dominion and control, restricted the lessee's use of the property, and prohibited subletting, assignment, or transfer without consent); *City of College Park v. Paradies-Atlanta, LLC*, 815 S.E.2d 246, 250 (Ga. Ct. App. 2018) (presumption rebutted because the seven-year lease agreements expressly characterized the rights as a usufruct, required consent for assignment or encumbrance, imposed pervasive operational restrictions, and required surrender of improvements at the end of the terms).

12. For the reasons described in the Debtors' MSJ and in this Response, the Covington Lease's restrictions overcome the presumption that the lease conveyed an estate for years.

i. The Terms of the Instrument Confirm a Usufruct.

13. AMCON begins its argument with a superficial textual point: the Covington Lease never uses the word "usufruct." AMCON's MSJ ¶ 49. But Georgia law does not decide by labels alone. On this first element, the Georgia Supreme Court has instructed that "the terms of the instrument itself must be scrutinized" to determine what interest the parties intended to convey. *Allright Parking of Ga. v. Joint City-County Bd. of Tax Assessors*, 260 S.E.2d 315, 320 (Ga. 1979).

The question is therefore not whether the Covington Lease contains certain buzzwords, but whether the legal effect of the rights and restrictions set forth in the Covington Lease conveyed an estate in land or only a circumscribed right of use.

14. AMCON principally relies on *Jekyll* to attempt to illustrate that the Covington Lease conveyed an estate for years. *See* AMCON's MSJ ¶¶ 47, 50 (citing *Jekyll Dev. Assocs., L.P. v. Glynn Cnty. Bd. of Tax Assessors*, 523 S.E.2d 370 (Ga. Ct. App. 1999)). But *Jekyll* is readily distinguishable. There, the lease expressly created a "leasehold estate" identified as an "estate for years," gave the lessee a 55-year initial term with unusual renewal leverage, required the lessee to provide broad insurance and "pay all taxes and assessments," and preserved significant transfer rights notwithstanding a provision which limited assignment without the landlord's consent. *Jekyll*, 523 S.E.2d at 372-74. Even then, the court acknowledged that the use restriction (permitting the property to be used "solely for the operation of a top quality, family, tourist, and convention oriented resort hotel") and landlord inspection rights were features "more typical of the grant of a usufruct." *Id.* at 373-74. *Jekyll*, therefore, turned on ownership-type features that outweighed the restrictions in that lease – features that are conspicuously absent from the Covington Lease.

15. The Covington Lease has no comparable language. Its grant is cast in ordinary landlord-tenant terms: "Landlord leases to Tenant, and Tenant leases from Landlord, for the Term, the 'Premises,'" and Tenant is merely "entitled to" take possession on the commencement date. Covington Lease §§ 1.1-1.2. Georgia courts have repeatedly treated this kind of possession-and-occupancy language as consistent with a usufruct, particularly where the lease does not expressly grant an estate for years in the operative grant itself. *See Diversified Golf, LLC v. Hart Cnty. Bd. of Tax Assessors*, 598 S.E.2d 791, 794 (Ga. Ct. App. 2004); *Allright Parkin*g, 260 S.E.2d at 320.

16. As discussed more fully below regarding the Landlord's dominion and control, the Covington Lease's extensive restrictive provisions further confirm the Landlord conveyed only a limited right of use, not "the right to use the property in an as absolute manner" as may be done with an estate for years. O.C.G.A. § 44-6-103. For example, the Lease Summary confines the Premises to "the operation of a lithium battery recycling facility and for no other purpose." Section 3.1 requires compliance with the lease's use restrictions and building rules, section 3.3 subjects non-approved signage to Landlord approval, and the lease makes the Tenant financially responsible if its use increases the Landlord's insurance burden. *See* Lease Summary ¶ 12; Covington Lease §§ 3.1, 3.3; Exs. C-D.

17. AMCON also points to two isolated references in the Covington Lease to a "leasehold estate." *See* AMCON's MSJ ¶ 50. But those passing references are not made in the operative grant, which as discussed above, uses ordinary possession and occupancy language rather than estate granting terminology. The "leasehold estate" language arises in collateral provisions dealing with a notice of commencement, condemnation, and security rights, and do not override the dense set of retained controls elsewhere in the instrument. *See* Covington Lease §§ 2.7, 5.5, 12.3. Georgia law does not favor creating estates by implication, *see* O.C.G.A. § 13-2-2(8) ("Estates and grants by implication are not favored"), and when conducting the usufruct/estate for years analysis, courts must look to the cumulative effect of a lease's provisions, not isolate them one by one. *See Camp,* 205 S.E.2d at 196; *Macon-Bibb,* 414 S.E.2d at 637; *Chatham County*, 849 S.E.2d at 770-71. Even *Jekyll* treated express characterization language as only "a factor to be taken into consideration," not the end of the inquiry. *See Jekyll*, 523 S.E.2d at 372; O.C.G.A. § 13-2-2(8). So too here.

18. AMCON further argues that the grant of a landlord's lien on "all fixtures and equipment placed in the Premises" shows an ownership interest indicative of an estate for years. *See* AMCON's MSJ ¶ 51 (citing Covington Lease § 2.7). This argument fails for several reasons. First, when read in its entirety and in context, Section 2.7 of the Covington Lease effectively grants the Landlord a lien on all of Ascend's personal property placed on the Premises, including trade fixtures belonging to Ascend, not fixtures attached to the real estate itself.[5] Second, whether the Covington Lease allowed the Tenant to pledge its personal property interests has no bearing on Ascend's interest in the leasehold itself. *See, e.g., Nationwide Mortg. Resources, Inc. v. Stalzer*, 455 S.E.2d 402, 404 (Ga. Ct. App. 1995) (recognizing that a usufruct could coexist with a provision allowing the levy of the tenant's personal property located on the premises). Third, AMCON conflates two distinct legal concepts: a landlord's lien on the tenant's personal property as a remedy for unpaid rent and the nature of the leasehold interest itself. *See* Covington Lease § 2.7 ("To secure the payment of all rent and other sums of money due and to become due hereunder…); O.C.G.A. § 44-14-341 (granting landlords a general lien on the property of the debtor which is subject to levy and sale). Fourth, the existence of the landlord lien provision reinforces, rather than diminishes, the Landlord's dominion and control, because it establishes a framework in which the Landlord has reserved the ultimate power to prevent Tenant from removing its own installed property from the Premises.

ii. Because Covington Industrial Remains Liable for Taxes, the Second Factor Confirms a Usufruct.

19. The Covington Lease itself shows why AMCON's tax argument fails. Section 2.3 requires Tenant to pay only its proportionate share of "Operating Costs." Operating Costs are

[5] As explained in the Debtor's MSJ, trade fixtures are treated as removeable personal property of the tenant under Georgia law. Debtors's MSJ ¶ 71.

defined to include real estate taxes and assessments paid or payable by Landlord with respect to the Building, Land, and landlord-owned improvements. *See* Covington Lease §§ 2.3(a), (c)-(d). The Covington Lease then separately requires Tenant to pay taxes attributable to its own personal property, trade fixtures, business, occupancy, or sales. *Id*. § 2.4. In other words, the Covington Lease requires the Tenant to reimburse the Landlord's tax expense. It does not impose direct *ad valorem* liability on a separately taxable leasehold. The reimbursement of landlord expenses, as opposed to the direct assessment of the tenant's leasehold as a separately taxable unit, is a recognized feature of a usufruct.

20. AMCON misinterprets the authorities it cites. *See* AMCON's MSJ ¶¶ 55-57. For example, in *Buoy*, the lease expressly required the lessees to pay "all real estate taxes and assessments, if any levied, against improvements erected by the lessee," and the court treated that obligation—together with the lessees' duties to repair and maintain the premises, provide broad insurance coverage, and pay utilities—as evidence that the parties intended to convey a taxable leasehold estate. *Buoy*, 235 S.E.2d at 557-58. *Jekyll*, too, involved a very different tax structure: there, the lessee had to "pay all taxes and assessments," and the court described that obligation, along with the lessee's broad insurance duties, as "generally the responsibility of the holder of an estate in the property." *Jekyll*, 523 S.E.2d at 373. Here, by contrast, Covington Industrial remained the party assessed for taxes on the real property, and Ascend merely reimbursed a share of that expense through "Operating Costs." That is a materially different arrangement than those present in *Jekyll* and *Buoy*.

21. Moreover, even a clause making the tenant directly liable for taxes is not dispositive where the overall restrictions of the instrument establish a usufruct. *See Chatham Cnty. Bd. of Assessors*, 849 S.E.2d at 770; *see also City of College Park*, 815 S.E.2d at 251(lease provisions

that do not explicitly address ad valorem real property taxes "shed no light" on whether the tenant's interest itself is taxable). The Covington Lease nowhere states that Ascend's leasehold itself is separately taxable; instead, it treats real estate taxes as part of landlord-incurred Operating Costs and separately addresses Tenant's own taxes on personal property and trade fixtures. *See* Covington Lease §§ 2.3(c)-(d), 2.4. That structure is consistent with a usufruct, not a taxable estate for years. Tenant's responsibility for personal property, business, occupancy, and sales taxes is irrelevant to the usufruct/estate for years analysis, which concerns the classification of real property interests and ownership, not personal property tax obligations. *See Fulton Cnty. Bd. of Assessors v. McKinsey & Co.*, 481 S.E.2d 580, 582-83 (Ga. Ct. App. 1997) (finding without merit the landlord's argument that an assessment of personal property taxes was indicative of an estate for years). AMCON's arguments to the contrary are unsupportable. *See* AMCON's MSJ ¶ 58.[6]

iii. Covington Industrial Retained Significant Control and Dominion.

22. AMCON's dominion-and-control argument starts from the wrong premise. AMCON appears to argue that landlord control matters only if it rises to the level of direct involvement in the tenant's operations. AMCON's MSJ ¶¶ 60-72. But Georgia law asks a different question: whether the lease reserves enough control that the tenant cannot use the property "in as absolute a manner as may be done with a greater estate." O.C.G.A. § 44-6-103. The inquiry is therefore functional and lease-specific, turning on the legal effect of the landlord's retained rights, not on whether the landlord was literally micromanaging day-to-day operations. *See Camp*, 205 S.E.2d at 196-97; *Fulton Cnty. Bd. of Assessors*, 481 S.E.2d at 582-83.

[6] To the extent AMCON relies on the Internal Revenue Code's treatment of payments as "rents from real property," that federal income tax concept, which appears designed to define qualifying income for tax exempt organizations and real estate investment trust purposes, has no bearing on Georgia's property-law inquiry into whether a lease conveyed a usufruct or an estate for years. AMCON cites no authority applying it in that context. *See* AMCON's MSJ ¶ 52 (citing Covington Lease § 14.16).

23. The Covington Lease satisfies this standard. Ascend could use the Premises only for a circumscribed lithium-battery-recycling purpose. *See* Covington Lease Summary ¶ 12; Covington Lease § 3.1. The Covington Lease further imposed extensive environmental provisions governing the use of the Premises. *See* Covington Lease § 3.4. Landlord retained rights to enter, inspect, repair, show the space, access building systems, and use exterior walls and roof areas. *See* Covington Lease §§ 4.1-4.2, 11.3. Tenant's alterations required Landlord approval, approved contractors, and lien waivers or releases. *See* Covington Lease § 5.3. The Lease terms and Rules and Regulations dictated when repairs and improvements could be performed, where heavy articles could be placed, how deliveries would be made, restricted Tenant's use of vending and other food- and beverage-dispensing equipment without Landlord's prior written consent, and controlled how refuse and exterior areas would be handled and how parking and traffic flow would be managed. *See* Covington Lease §§ 3.1-3.3, 4.1-4.2, 5.3; Ex. D §§ 3, 6, 8, 10-11, 14-15. The First Amendment further tightened the Landlord's control over the leased Premises by adding conditions to Tenant's use of the Additional Outdoor Space, such as requiring the Tenant to install fencing, prohibiting the Tenant from erecting walls, roofing material, and outside storage without Landlord approval. *See* First Amendment §§ 2-3. Read together, these provisions are the kind of pervasive use-and-control limitations that Georgia courts have repeatedly found incompatible with an estate for years.[7]

24. The case law confirms it. For example, in *Camp*, the Georgia Supreme Court focused on the combined effect of the landlord's retained service and maintenance duties,

[7] AMCON contends that treating this use restriction as evidence of the Landlord's retained dominion and control would "render absurd results" by converting nearly every commercial lease in Georgia into a usufruct. *See* AMCON's MSJ ¶ 72. That policy argument misconstrues the Debtors' position. The Debtors do not contend that the use restriction alone creates a usufruct; rather, Georgia courts assess the cumulative effect of all of a lease's restrictions, and it is the combination of the use restriction with the Landlord's extensive entry, approval, alteration, and transfer rights, discussed throughout this Section, that establishes a usufruct here.

assignment restrictions, approval requirements for improvements and signs, and the tenant's obligation to obey the city's rules and regulations in holding that the tenant had only a "circumscribed and limited use of the premises and facilities." 205 S.E.2d at 196-97. In *Macon-Bibb*, the Georgia Supreme Court looked to the aggregate restraints on use and control, including regulatory requirements, use limitations, and the landlord's right to take back part of the premises, in concluding the tenant did not have an estate for years. 414 S.E.2d at 636-37. In *City of College Park*, the Georgia Court of Appeals held that seven-year airport agreements created usufructs where the landlord could inspect, relocate, expand or contract the parcels, control deliveries, hours, services, and pricing, and require surrender of improvements at the end of the lease term. 815 S.E.2d at 250-52. Similarly, in *Chatham County*, 849 S.E.2d at 770-71, and *Joint Dev. Auth. of Jasper Cnty.*, 887 S.E.2d at 387-89, broad approval rights, environmental and operational restrictions, and limits on assignment and use were enough to overcome much longer lease terms.

25. AMCON's reliance on *Jekyll* and *Buoy* is likewise misplaced, as both cases on their own reasoning favor the Debtors. *See* AMCON's MSJ ¶¶ 61, 66, 67. *Jekyll* did not treat a specific-use restriction as irrelevant. Rather, the court recognized that the hotel-use clause and inspection rights within the lease were features "more typical of the grant of a usufruct" and that they "evince a retention by the lessor of a degree of use or control over the property generally inconsistent with the grant of an estate for years." *Jekyll*, 523 S.E.2d at 373-74. *Jekyll* came out the other way because the lease also contained unusually strong ownership-type features—an express grant of a "leasehold estate" and "estate for years," a 55-year term with unusual renewal leverage, broad tax and insurance obligations, and significant transfer and financing rights. *Id*. at 372-77. None of those features is present in the Covington Lease. *Buoy* turned on a lease that, when read as a whole, gave the lessees the right to build and operate a motel, impose a mortgage on their leasehold rights,

pay taxes on improvements, provide broad insurance, and bear the ordinary burdens of operating the property, while the lessor "did not purport to exercise any dominion or control over the operation of the motel." *Buoy*, 235 S.E.2d at 557-58. That final point was central to the holding in *Buoy*, and it is exactly what distinguishes this case. Covington Industrial retained comprehensive control over use, access, alterations, signage, exterior storage, and transfer rights. On their own reasoning, *Jekyll* and *Buoy* favor the Debtors, not AMCON.

26. AMCON incorrectly characterizes the First Amendment as evidence that the Lease's approval requirements were routinely waived and therefore cannot be taken as reflecting genuine landlord control. *See* AMCON's MSJ ¶ 71, n.7. The facts say the opposite. The First Amendment was negotiated specifically because the Tenant had made material alterations and occupied outdoor space without obtaining the prior Landlord approval that the Covington Lease required. *See* First Amendment Recitals C-F. The First Amendment addressed that unauthorized conduct. Rather than ratifying Tenant's conduct as an exercise of unrestricted ownership-like dominion, the First Amendment imposed additional restrictions: a fencing requirement, a prohibition on enclosing the Additional Outdoor Space without Landlord's consent in Landlord's sole discretion, and limitations on Tenant's use of the outdoor space for equipment and material storage to designated areas subject to Landlord approval. *See* First Amendment §§ 2-3, 7. Under Georgia law, the usufruct/estate-for-years determination is made by scrutinizing the terms of the instrument itself, not by examining whether those terms were enforced on any particular occasion. A landlord that responds to a tenant's violation of its lease obligations by negotiating a written amendment reinforcing and expanding those obligations is exercising, not abandoning, the dominion and control that defines a usufruct.

iv. Covington Industrial Retained Primary Maintenance Duties, with Ascend Obligated to Perform Limited Maintenance.

27. AMCON also misconstrues the maintenance provisions of the Covington Lease. *See* AMCON's MSJ ¶¶ 75-76. The relevant question is not whether Ascend had limited duties to repair portions of the Premises it leased; nearly every commercial tenant does. The question is whether the Landlord retained meaningful responsibility and control over the condition of the Premises. *See Chatham County*, 849 S.E.2d at 771; *Joint Dev. Auth. of Jasper Cnty.*, 887 S.E.2d at 389. It undoubtedly did.

28. The Covington Lease divides maintenance and improvements in a way that preserves landlord control. Landlord remains responsible for the structural frame, roof, exterior walls, base-building systems, utility lines, entrances, driveways, grounds, sidewalks, parking, landscaping, and common areas. Covington Lease § 5.1. Tenant's duties are narrower and closely supervised: Tenant maintains only improvements and systems exclusively serving the Premises, must use landlord-preapproved contractors, must obtain approval for non-minor alterations, and must furnish lien waivers and supervision fees for alterations. *Id.* §§ 5.2-5.3. On termination, leasehold improvements become the Landlord's property or must be removed at the Landlord's election, and the lease separately bars any lien on the Landlord's fee interest. *Id.* §§ 5.4-5.5. Georgia courts have treated that combination—tenant repair obligations paired with retained landlord control and reversion of improvements—as consistent with a usufruct, not an estate for years. *See Chatham County*, 849 S.E.2d at 771.

v. The Assignability Restrictions Confirm a Usufruct.

29. The assignment provisions point in the same direction. Ascend could not assign, sublease, mortgage, or otherwise transfer the Lease or the Premises without Landlord consent, except for limited affiliate and change-of-control carveouts. Covington Lease §§ 8.1(a), (d). The Covington Lease also specifies circumstances in which withholding consent is not unreasonable,

prohibits profit-based occupancy arrangements, and keeps Tenant liable after any permitted transfer. *Id*. §§ 8.1(b), (d).

30. AMCON's reading of the caselaw on the alienability factor is incorrect. AMCON's MSJ ¶¶ 80-81. For example, *Jekyll* held only that a reasonableness qualifier narrowed the lessor's consent power in a lease that already contained several strong ownership-type features not present here. 523 S.E.2d at 376-77. *Warehouses* likewise emphasized the absence of a meaningful assignment restriction. 46 S.E.2d at 899. Here, however, the Landlord consent requirement remains a meaningful restriction, especially when combined with the Covington Lease's separate recapture right.

31. Section 8.1(c) is clear: if Ascend sought to assign or sublet more than fifty percent of the remaining term, Covington Industrial could terminate the Lease or recapture the space. Covington Lease § 8.1(c). This landlord-controlled transfer regime is the opposite of the freely alienable interest described in O.C.G.A. § 44-6-103. Taken together, the assignment and recapture provisions are among the strongest indicators that the Convington Lease conveyed a usufruct. *See* Debtors' MSJ ¶ 60 (collecting cases).

B. AMCON's Attempt to Rely on Documents and Conduct Outside of the Covington Lease to Prove an Estate for Years is Wrong as a Matter of Georgia Law.

32. AMCON devotes substantial time to supposed "additional factors" outside the four corners of the instrument—the Master Agreement's use of the word "Owner," the Debtors' schedules, and events in this bankruptcy case—but none of those materials answers the only relevant question: what interest the parties conveyed when they executed the Covington Lease. AMCON's MSJ ¶¶ 86-99. Georgia law directs the Court only to consider the lease instrument itself. *See Allright Parking*, 260 S.E.2d at 320 ("[P]rovisions of the lease must be scrutinized objectively to determine whether the legal effect of the agreement between Allright and MARTA

is to give Allright a usufruct or an estate for years."), *In re Mikart, Inc.*, 9 B.R. 144, 147 (Bankr. N.D. Ga. 1981) (stating that to "determine what interest the parties to a lease agreement intended to be conveyed, the terms of the agreement itself must be scrutinized"). This forecloses AMCON's attempt to let later characterizations substitute for what the Covington Lease text does not show. Although AMCON argues that the five factors established by the Georgia Supreme Court are not exclusive for determining whether a lease conveyed an estate for years or usufruct, that proposition is found nowhere in the authority on which it relies. AMCON's MSJ ¶ 85 (citing *Chatham Cnty. Bd. of Assessors*).

33. *Diversified Golf* is especially instructive on whether the Court may consider evidence outside the four corners of the lease instrument to determine if a usufruct was conveyed. There, the taxing authority argued that the tenant's later conduct—subleasing without consent and carrying improvements on its balance sheet—showed the tenant held an estate for years. The court rejected that evidence as inadmissible parol evidence that could not alter the lease's meaning. 598 S.E.2d at 797. AMCON's reliance on later agreements, schedules, and bankruptcy filings fails for the same reason.

34. Even if the Court were to consider those extraneous materials (which it should not), they do not establish an estate for years. Boilerplate references to Ascend as "Owner" or "Property Owner" in a construction contract do not make Ascend the fee owner, and describing the premises as "leased property" says nothing about whether the lease is a usufruct or an estate for years.

III. AMCON's Lien Neither Attached to the Personal Property Located at the Covington Facility Nor the Property Integrated Into the Real Estate.

35. Issue 2 fails for a threshold reason: Georgia law does not recognize the free-standing lien category AMCON labels "facility-integrated assets." The Covington Lease and First Amendment instead treat the challenged items as alterations, improvements, fixtures, equipment,

and outdoor-space installations subject to Landlord approval, anti-lien protection, and removal obligations. *See* Covington Lease §§ 5.3-5.5; Rider 1 § 2; First Amendment Recitals C-G; §§ 2, 7, 13. Georgia law likewise provides that if an item becomes a fixture or permanent improvement, it is treated as part of the realty and the AMCON's ability to lien the item corresponds with AMCON's ability to lien Ascend's leasehold. *See* O.C.G.A. § 44-1-6(a) ("Anything which is intended to remain permanently in its place even if it is not actually attached to the land is a fixture which constitutes a part of the realty and passes with it."). If an item remained personal property, AMCON had to satisfy Georgia's separate personal-property lien statute. *See* O.C.G.A. § 44-14-363(c)(1) (requiring that a mechanic claiming a lien on personal property record a claim of lien describing the specific property). Either way, AMCON's integrated-assets theory fails for the reasons explained below.

36. Georgia's lien statutes are strictly construed in favor of the property owner and against the lien claimant, and a lien claimant must bring itself clearly within the statute it invokes. *See Mull v. Mickey's Lumber & Supply Co., Inc.*, 461 S.E.2d 270, 272-73 (Ga. Ct. App. 1995); *Handy Andy of Eastman, Inc. v. Evans*, 712 S.E.2d 589, 591 (Ga. Ct. App. 2011); *D. H. Overmyer Warehouse Co. v. W. C. Caye & Co.*, 157 S.E.2d 68, 70 (Ga. Ct. App. 1967). AMCON cannot do so here. Because the Covington Lease is a usufruct, Ascend held no lienable estate in real property. AMCON's lien, therefore, does not reach any fixture, permanent improvement, or other asset, that became part of the realty. Items that remained personal property fare no better under AMCON's theory, because it never proceeded under the personal-property lien statute and never described those items in its recorded Lien.

A. Because Ascend's Interest in the Covington Lease is a Usufruct AMCON's Lien Does Not Attach to Any Interest in the Covington Real Estate, Including Fixtures and Permanent Improvements.

37. A contractor's lien attaches to the "real estate of the owner for which the labor, services, or materials are furnished at the instance of the owner, contractor, or some other person acting for the owner or contractor[.]" O.C.G.A. § 44-14-361(b). Georgia law defines "real estate" or "realty" to include "all lands and the buildings thereon," "all things permanently attached to land or to the buildings thereon," and "[a]ny interest existing in, issuing out of, or dependent upon land or the buildings thereon." O.C.G.A. § 44-1-2. A "fixture" is anything intended to remain permanently in place, even if not actually attached to the land, and such a fixture "constitutes a part of the realty and passes with it." O.C.G.A. § 44-1-6(a). The point is straightforward: permanently integrated improvements are not some third category of collateral—they are part of the realty.

38. Because the Covington Lease is a usufruct, AMCON's lien does not attach to fixtures and permanent improvements affixed to the real estate that was sold by the Debtors. *See Jones v. E. I. Rooks & Son*, 52 S.E.2d 580, 582 (Ga. Ct. App. 1949) (holding a lessee with only a usufruct had no estate in realty to which a materialman's lien could attach and that the lessor's fee could not be reached through the lessee's improvement contract); *In re Ionosphere Clubs, Inc.*, 145 B.R. 386, 391 (Bankr. S.D.N.Y. 1992) (holding that mechanic's liens could not attach once the debtor's airport interests were classified as usufructs under Georgia law).

39. AMCON nevertheless contends that its Lien reaches integrated equipment regardless of whether the Covington Lease created a usufruct. AMCON's MSJ ¶ 102. That argument fails because the Covington Lease and First Amendment themselves treat the disputed installations as tenant alterations, improvements, fixtures, and equipment placed in or on the Premises and Land, require landlord approval and lien waivers, and preserve landlord remedies if

liens are recorded. *See* Covington Lease §§ 5.3-5.5; Rider 1 § 2; First Amendment Recitals C-G; §§ 2, 6-7. AMCON's cited fixture cases address only the scope of an otherwise valid real-property lien; they do not eliminate the need for a lienable underlying real-property interest in the first place. *See* AMCON's MSJ ¶¶ 109-113, 124 (citing *Skandia Draperies Mfg. Co. v. Augusta Innkeepers*, Ltd., 277 S.E.2d 282 (Ga. Ct. App. 1981); *Waycross Opera House Co. v. Sossman*, 20 S.E. 252 (Ga. 1894); *Brigham v. Overstreet*, 57 S.E. 484 (Ga. 1907); *D.H. Overmyer Warehouse Co.*, 157 S.E.2d at 71). Therefore, even if AMCON could prove that some equipment became fixture-like, that would show the equipment became part of the realty; it would not answer whether Ascend held a lienable estate in that realty. *See James G. Wilson Mfg. Co. v. Chamberlin-Johnson-Du Bose Co*., 79 S.E. 465, 465 (1913) (holding that the statutory lien may attach to the interest of a lessee who has an estate for years).

40. The same problem defeats AMCON's fallback personal-property theory. If the machinery or equipment became part of the realty, the lien fails for the reasons above. If the machinery or equipment remained personalty, Georgia required AMCON to proceed under O.C.G.A. § 44-14-363, which governs mechanics' liens on personal property, and to describe the specific property in the recorded claim. AMCON did neither in the real-property lien statement it recorded here. Indeed, AMCON does not argue anywhere in its MSJ that its Lien attached to any non-integrated equipment, machinery or trade fixtures. *See* AMCON's MSJ ¶¶ 102-113. Having never asserted, briefed, or sought summary judgment on a personal property lien theory, AMCON is not entitled to judgment on that unargued basis.

41. The cases AMCON cites underscore this point. *See* AMCON's MSJ ¶ 124. For instance, in *Skandia Draperies Mfg. Co. v. Augusta Innkeepers, Ltd.*, the court held that draperies and bedspreads were not lienable because they remained loose, movable chattels rather than

fixtures. 77 S.E.2d at 282-83. Similarly in *Waycross Opera-House Co. v. Sossman*,, the Georgia Supreme Court held that stage scenery and scenic apparatus were lienable because they were part and parcel of the edifice and essential to the completeness of that kind of building. 20 S.E. at 252. And in *Overmyer*, the court held that machinery is not lienable unless it is attached to and incorporated with the realty. 157 S.E.2d at 71. Finally, in *Brigham v. Overstreet*, the court held that fixtures intended to remain permanently with the building pass as part of the realty. 57 S.E. at 485-86. These authorities confirm that fixture-like items are part of the realty, not a separate category of lienable collateral that bypasses the need for a lienable underlying real estate.

B. AMCON's Lien Statement Does Not Sufficiently Describe Property Other Than Realty.

42. AMCON's recorded Lien Statement confirms the same point. The Statement claims a lien on "the leasehold estate for years and ***any other property interests held by Ascend Elements, Inc.*"** only insofar as those interests exist "in certain buildings and/or structures and in the premises or real estate upon which such are erected or built." (emphasis added). Read as a whole, the filing is aimed at real-property interests in the described premises, not at separately identified items of personal property.

43. And if AMCON is now attempting to pivot to a personal-property lien, the recorded claim still fails. O.C.G.A. § 44-14-363(c)(1) requires a mechanic claiming a lien on personal property to describe the property. In *Bollers v. Noir Enters., Inc.*, the Georgia Court of Appeals held that a lien fails when its description is internally inconsistent and does not identify the property. 677 S.E.2d 338, 341-42 (Ga. Ct. App. 2009). And in *Mull*, the court held that a description aimed at the wrong personal property rendered the lien unenforceable. 461 S.E.2d at 272-73. AMCON did not record a claim identifying particular machinery, equipment, or other personalty; it recorded a real-property lien tied to the leasehold and the described premises. Under Georgia's

strict-construction rule, those authorities do not support recasting that filing as a different lien on unspecified personalty. *See Bollers v. Noir Enters., Inc.*, 677 S.E.2d at 341-42; *Mull*, 461 S.E.2d at 272-73.

CONCLUSION

44. For all of these reasons, and because AMCON cannot satisfy its burden of proving a valid lien under Georgia law against any property sold in the Covington Sale, the Court should deny the AMCON's MSJ and grant the Debtors' MSJ.

[Signature Page to Follow]

Dated: August 5, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 5, 2026, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Ryan Manns
Ryan E. Manns