1976

Woodland Theatres, Inc., a corporation v. ABC Intermountain Theatres, Inc., a corporation, and Plitt Intermountain Theaters, Inc., a corporation : Brief of Appellant

Utah Supreme Court

Christensen, Gardiner, Jensen and Evans; Roger P. Christensen; Attorneys for Defendants-Respondents.
Berman and Giauque; Daniel L. Berman; Richard D. Burbidge; Randall L. Dunn; Attorneys for Plaintiff-Appellant.

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT

OF THE STATE OF UTAH

WOODLAND THEATRES, INC., a corporation, Plaintiff-Appellant, vs. ABC INTERMOUNTAIN THEATRES, INC., a corporation, and PLITT INTERMOUNTAIN THEATRES, INC., a corporation, Defendants-Respondents.	Case No. 14440 Case No. 14441

APPEAL FROM JUDGMENT OF THE

DISTRICT COURT OF SALT LAKE COUNTY

HONORABLE MARCELLUS K. SNOW, DISTRICT JUDGE

BRIEF OF APPELLANT

BERMAN & GIAUQUE
Daniel L. Berman
Richard D. Burbidge
Randall L. Dunn
500 Kearns Building
Salt Lake City, Utah 84101
Attorneys for Plaintiff-Appellant

CHRISTENSEN, JENSEN, GARDINER
& EVANS
Roger P. Christensen
900 Kearns Building
Salt Lake City, Utah 84101
Attorneys for Defendants-Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES--(Continued)

IN THE SUPREME COURT

OF THE STATE OF UTAH

WOODLAND THEATRES, INC., a corporation, Plaintiff-Appellant, vs. ABC INTERMOUNTAIN THEATRES, INC., a corporation, and PLITT INTERMOUNTAIN THEATRES, INC., a corporation, Defendants-Respondents.	Case No. 14440 Case No. 14441

BRIEF OF APPELLANT

INTRODUCTION

The plaintiff-appellant Woodland Theatres, Inc., (hereinafter "Woodland") hereby appeals from the trial court's Order of Summary Judgment in favor of the defendant-respondent Plitt Intermountain Theatres, Inc., (hereinafter "Plitt") in separate actions filed by Woodland for unlawful detainer and for breach of lease and termination of leasehold.

On or about March 9, 1971, the plaintiff-appellant Woodland entered into a lease agreement with ABC Intermountain Theatres, Inc., (hereinafter "ABC"). ABC leased real property commonly known and referred to as the Woodland Drive-In

Theatre from Woodland for a period of fifteen (15) years. By the terms of the lease agreement, ABC covenanted to keep the theatre premises in good repair and to make certain improvements to the physical plant of the theatre. ABC further covenanted not to assign the leasehold without securing written permission from the lessor. The lease provided for a fixed monthly rental plus percentages of the gross gate receipts and concession sales above certain amounts.

ABC flagrantly and repeatedly breached the lease agreement by assigning the leasehold without Woodland's authorization, by allowing the theatre premises to deteriorate physically and by not making the improvements to the physical plant of the theatre clearly required by the lease terms. ABC and Plitt did not run the Woodland Drive-In Theatre business in good faith, and consequently, Woodland received negligible amounts under the percentage rental provisions of the lease agreement. In light of ABC's breaches and lack of good faith performance of the lease agreement, Woodland filed two actions: one under the Utah unlawful detainer statute, U.C.A. § 78-36-3; and one for breach of the lease and termination of the leasehold.

On December 12, 1975, ABC's assignee Plitt moved for summary judgment in both actions on the ground that Woodland had waived any and all claims for breaches, violations and

forfeitures under the lease agreement by accepting rent, and that as a matter of law Woodland had no claim for damages under the percentage rental provisions of the lease. The trial court granted defendant's Motion for Summary Judgment. Whereupon Woodland brought this appeal.

QUESTIONS PRESENTED

I. Did the trial court err in holding that as a matter of law Woodland waived the defendants-respondents' forfeiture of the leasehold by accepting rental payments?

II. Did the trial court err in holding that as a matter of law Woodland waived all of the defendants-respondents' breaches of the lease agreement by accepting rental payments?

III. Did the trial court err in holding that as a matter of law there was no implied covenant on the part of the defendants-respondents to operate the Woodland Drive-In Theatre in good faith so that Woodland could receive the full benefit of performance under the lease agreement?

PROCEEDINGS AND DISPOSITION BELOW

After the complaints in these actions had been filed and before completion of discovery, the defendant-respondent

Plitt moved, pursuant to Rule 56 of the Utah Rules of Civil Procedure, for summary judgment in both actions and for a consolidated hearing of its motions. Woodland responded with a memorandum of points and authorities in opposition to Plitt's motions for summary judgment. The hearing on the motions, consolidated pursuant to stipulation of counsel for the parties, was held on December 12, 1975. At the close of the hearing, the court granted Plitt's motion for summary judgment regarding Woodland's claims of forfeiture of the leasehold and breaches of the lease agreement arising from alleged failures to repair, maintain and improve the physical plant of the Woodland Drive-In Theatre. The plaintiff-appellant Woodland files this brief seeking to reverse the trial court's summary judgment rulings.

STATEMENT OF FACTS

A. The Lease Agreement and Its Provisions.

On or about March 9, 1971, the plaintiff-appellant Woodland entered into a lease agreement with the defendant ABC. (A copy of the lease agreement is attached as Exhibit A.) Woodland Theatres, Inc., is a Utah corporation owning real property known as the Woodland Drive-In Theatre, located at 4005 South, 700 East, Salt Lake County, Utah. According to the

provisions of the lease agreement, Woodland leased the Woodland Drive-In Theatre to ABC for a fifteen (15) year term, with an option to renew the lease for an additional five (5) years. (See Exhibit A, Paragraphs 1 and 20.)

ABC agreed to pay a fixed annual rental of $32,500.00 in equal monthly installments throughout the term of the lease. In addition, ABC covenanted to pay an annual percentage rental of fifteen percent (15%) of the gross admission receipts above $183,333.00 and fifteen percent (15%) of the gross concession receipts in excess of $65,000.00. The lease provided that ABC's records of gross admission and concession receipts would be open for Woodland's inspection during regular business hours. (See Exhibit A, Paragraph 2.)

Respecting maintenance, ABC covenanted, inter alia, to keep the theatre premises in good repair, replacing worn out or damaged equipment at its own expense. (See Exhibit A, Paragraph 8.) ABC further agreed to make improvements to the theatre premises, including enlarging the snack bar to approximately double its initial size, oiling and spreading a layer of rock chips on the theatre grounds, resurfacing portions of the theatre premises and repainting the theatre screen. (See Exhibit A, Paragraphs 7, 25, 28.) ABC also covenanted not to assign the leasehold without obtaining Woodland's written permission, not to be unreasonably withheld. (See Exhibit A, Paragraph 11.)

B. The Defendants-Respondents' Performance Under The Lease.

ABC only operated the Woodland Drive-In Theatre until the beginning of the year, 1974. At that time, ABC assigned the lease to a successor corporation, Plitt Intermountain Theatres, Inc., and Plitt and its employees took over the management of the theatre without any notice being given to Woodland. The substitution of Plitt for ABC constituted an unauthorized transfer of the leasehold in clear violation of the express terms of Paragraph 11 of the lease agreement providing that "[t]he Lessee [ABC] covenants and agrees that it will not assign this lease or enter into any sublease of the premises or any part thereof, without the written consent of the Lessor... ." (See Plaintiff's Response to Defendant's Interrogatories, Answer to Interrogatory No. 2.)

Neither Plitt nor ABC have adequately maintained the physical plant of the theatre, and it has deteriorated both visually and operationally over time. On an inspection of the theatre premises on June 24, 1974, Woodland found the theatre grounds strewn with papers and other garbage, the fence leaning and broken down in places, and water running through part of the theatre from a broken sprinkler connection. Several speaker posts were broken, the screen tower paint was peeling and the screen was bare in places. The snack bar

addition was blocked off from the operating portion of the concession area by a cinder block wall, and the electrical system of the theatre was partially burned out, with auxiliary ground cables running to the back of the snack bar supplying power. (Plaintiff's Response to Defendant's Interrogatories, Answer to Interrogatory No. 4.)

At a further inspection at the theatre on July 26, 1974, employees of Woodland observed the west and north driveways of the theatre broken and pitted in places, the theatre screen stained with rust and its paint peeling, several speaker posts broken down and many water connections broken. Many of the bubble lights at the entrance to the theatre were broken or removed, the fence was weathered and unpainted, and many speakers previously removed were unreplaced. At that time, the broken sprinkler, noted before, remained unrepaired, and some of the wiring through the theatre was still not functioning. (Plaintiff's Response to Defendant's Interrogatories, Answer to Interrogatory No. 4.) The plaintiff-appellant's representatives inspected the theatre again on July 31, 1974 and found that the deteriorating conditions observed on July 26 had not been corrected. In addition, they found that there were peeling paint and standing water within the operating snack bar, and the surface of the theatre was in need of an application of oil and rock chips. The fence was patched

with odd pieces of wood and propped up by two-by-fours in places, and two large wires taped to an open junction box were exposed, with a large "Danger" sign painted near them. Seventy (70) speakers were totally inoperable, and forty-seven (47) more gave poor sound. (Plaintiff's Response to Defendant's Interrogatories, Answer to Interrogatory No. 4.)

By allowing the physical plant of the Woodland Drive-In Theatre to deteriorate to a great extent, ABC and Plitt undermined the business of the theatre. The facilities that they provided were inadequate to accommodate the theatre's patrons. For example, on or about June 24, 1975, Eugene Woodland was contacted by Kenny Lloyd, local branch manager for Twentieth Century Fox. Mr. Lloyd reported that during a showing of a Fox film at the Woodland Drive-In Theatre, only 518 speakers were operational, and the theatre was turning away hundreds of patrons due to the unavailability of operable speakers. (Plaintiff's Response to Defendant's Interrogatories, Answer to Interrogatory No. 4.)

ABC had covenanted in the lease agreement to enlarge the snack bar to approximately double its size at the inception of the agreement within six (6) months of the effective date of the lease. (See Exhibit A, Paragraph 7.) An addition to the snack bar was constructed, but until August of 1975 it was

blocked off from the operating portion of the snack bar and used solely for storage. (Plaintiff's Response to Defendant's Interrogatories, Answer to Interrogatory No. 5.) Projected increases in concession sales were thus stifled by the defendants-respondents' lack of good faith in implementing the provisions of the lease agreement mandating an addition to the snack bar.

C. Woodland's Suits

Woodland filed its action against ABC and Plitt for unlawful detainer on August 21, 1974 and its action for breach of the lease and termination of the leasehold on September 24, 1974. Prior to those filings, a notice of default and notice to quit the Woodland Drive-In Theatre premises were served on ABC and Plitt on August 2, 1974, and from that date, Woodland did not accept rental payments for subsequent periods of the defendants-respondents' occupancy of the theatre premises. (Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment, pp. 6-7.)

Negotiations aimed at settling the differences between Woodland and the defendants-respondents were conducted by counsel for the parties, and a tentative agreement was reached in December, 1974. Assuming that the settlement would be ratified by the defendants-respondents, Woodland accepted rental payments soon thereafter as a good faith gesture,

fully intending to continue its actions if the settlement should fall through. When the terms of the negotiated settlement were repudiated by the defendants-respondents, Woodland continued with the prosecution of its lawsuits. (Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment, p. 7.)

The defendant-respondent Plitt subsequently moved for summary judgment in both of Woodland's actions on the ground that by accepting rental payments, Woodland thereby waived all of Plitt's and ABC's breaches of the lease agreement. Plitt also argued that as a matter of law there was no implied obligation under the lease agreement to make payments under its percentage rental provisions, introducing no factual evidence in support of its argument. The trial court granted summary judgment in Plitt's favor on Woodland's claims of forfeiture of the leasehold and breaches of the lease agreement through failure to repair, maintain and improve the theatre premises. However, its rulings were based solely on the flat, legal propositions advanced by the defendants-respondents, and it made no factual determinations relating to Woodland's claims. Woodland appeals to this Court to reverse the trial court's holdings and reinstate its actions for unlawful detainer and breach of the lease and termination of the leasehold.

ARGUMENT

I. The trial court erred in finding that as a matter of law, Woodland waived the defendants-respondents' forfeiture of the leasehold and breaches of the lease agreement by accepting rent. Initially it should be noted that defendants' motion for summary judgment was based solely upon the fact that plaintiff had accepted rent. Defendant did not assert or show that as a matter of uncontroverted fact, plaintiff had expressed or demonstrated an intent to waive its claims of forfeiture. The defendant did not assert or show that as a matter of uncontroverted fact the plaintiff had undertaken activities which clearly constituted a waiver of its claims of forfeiture. The defendant relied solely on the proposition that the acceptance of rent by a landlord as a matter of law, and without regard to the attendant factual circumstances, waives all past claims of forfeiture and breach. That proposition is clearly erroneous and the Court's acceptance thereof in its order of summary judgment is improper and should be reversed.

A. Woodland did not waive the defendants-respondents' forfeiture of the leasehold by accepting rent. Waiver is uniformly recognized as the intentional relinquishment of a known right. See Lucas Hunt Village Co. v. Klein, 218 S.W.

2d 595, 599 (Mo. 1949). In the disposition of a claim of waiver, it is the intention of the party charged with making the waiver which is controlling. See Brazeal v. Bokelman, 270 F.2d 943, 947 (8th Cir. 1959); In re Wil-Low Cafeterias, Inc., 95 F.2d 306, 309 (2d Cir. 1938).

Accordingly, a determination of whether a landlord has waived a right or claim of forfeiture to a leasehold is a factual question concerning the intentional relinquishment by the landlord. Concerning the showing which must be made in order to establish a waiver, the Missouri Supreme Court in Lucas Hunt Village Co. v. Klein, 218 S.W.2d 595, 599 (Mo. 1949), unauthorized subletting, affirmed the rule that:

> . . . [T]he intention of the party charged with making the waiver is controlling, and if not shown by express declaration, but implied by conduct, there must be a clear, unequivocal and decisive act of the party showing such purpose, and so manifestly consistent with and indicative of an intention to waive that no other reasonable explanation is possible. Lucas Hunt Village Co. v. Kelin, 218 S.W.2d 595, 599 (Mo. 1949).

See also B.J.M. Realty Corp. v. Ruggieri, 326 F.2d 281, 284 (2d Cir. 1963); Brazeal v. Bokelman, 270 F.2d 943, 947 (8th

Cir. 1959); In re Wil-Low Cafeterias, Inc., 95 F.2d 306, 309 (2d Cir. 1938); Miller v. Reidy, 260 P. 358, 360 (Cal. 1927).

In suits involving a claim of forfeiture of a leasehold, courts have been unwilling to find claims of forfeiture or breach waived by the mere acceptance of rent in circumstances in which the landlord had evidenced a contrary intent. In that regard courts have recognized the institution of litigation against a tenant as a clear indication that the landlord has elected and is pursuing its right of forfeiture despite the fact that rental payments are made in the interim.

For example, in the case of Fogel v. Hogan, 496 P.2d 322, 324 (Colo. 1972), defendants filed a cross claim to terminate a lease, asserting as a basis therefore that the premises had not been maintained as provided in the lease. The tenant argued that the landlord had waived its claims of breach by accepting rental payments during the pendency of the action. The Colorado Supreme Court of Appeals, however, held that:

> . . . when a tenant continues in possession pending a determination of an action brought by the landlord to enforce a forfeiture, the tenant is under an obligation to pay rent and acceptance of these payments does not constitute waiver of the breach. (496 P.2d at 324.)

Similarly, in Merkowitz v. Mahoney, 215 P.2d 317 (Colo. 1949), a landlord brought suit to repossess a leasehold charging that the tenant had operated the premises in violation of the law and in breach of the lease. The tenant argued that the landlord's acceptance of rent during the pendency of the action constituted a waiver of its claims of forfeiture. Rejecting the tenant's argument, the Supreme Court of Colorado stated:

> Where the landlord upon breach of a covenant gives notice of forfeiture and brings an action for possession, his suit presumably constitutes a final election to terminate the lease. The lease being terminated, the landlord is entitled to possession, and neither the landlord nor tenant is further bound by provisions of the lease as to the remainder of its term. However, where the right of the landlord to forfeit the term is disputed by the tenant and he continues in possession pending a determination of the action brought by the landlord to enforce a forfeiture, the tenant is under obligation of payment to the landlord for his possession. (Id.at 320.)

The court held that although a landlord could agree during the pendency of litigation to accept back rent and terminate litigation, a determination of whether payments accepted during litigation were pursuant to such an agreement would have to be made from the circumstances of the case. (215 P.2d at 321.) The court, however, clearly held that the receipt of rental does not necessarily constitute waiver. In that regard, the court adopted the reasoning expressed in

Myers v. Herskowitz, 165 P. 1031, 1033 (Cal. 1917), quoting that decision as follows:

> The tenant having succeeded in retaining possession of the premises during the pendency of the action, plaintiff was entitled to compensation therefor, and after the benefit had been received by the defendant the plaintiff might reasonably accept such compensation to which he was entitled without being held to have waived the right of action which he was then prosecuting.

See also Fogel v. Hogan, 496 P.2d 322 (Colo. 1972); Wecht v. Anderson, 444 P.2d 501, 505 (Nev. 1968).

In this case the clear intent expressed and demonstrated at all times by the plaintiff-appellant was to fully litigate its claims of forfeiture. At no time did Woodland express or imply that its claims for forfeiture or breach would be dropped absent a full settlement with defendants-respondents, nor has it by its course of action given any indication to that effect. In this regard, it is important to note that defendants-respondents made no claim whatsoever that plaintiff-appellant led them to believe it was waiving its claims of forfeiture. Defendants-respondents did not assert that they held that belief in reliance upon any actions of the plaintiff-appellant. On the contrary, defendants-respondents rely solely on the fact that Woodland accepted the rent for defendants'respondents' possession of its property during the pendency of the actions to defeat

Woodland's claims. Such a superficial analysis cannot support summary judgment, particularly in the absence of any factual determinations whatsoever. The trial court's order of summary judgment should be reversed and Woodland's claims of forfeiture of the leasehold reinstated.

B. Woodland did not waive the defendants-respondents' breaches of the lease agreement by accepting rent. The principle that a clearly demonstrated intent is essential to a finding of waiver applies with even greater force to substantive breaches of the lease agreement than to the forfeitures discussed in the preceding section. A lessor does not forfeit all rights to enforce the terms of a lease agreement by accepting rental payments. Nevertheless, defendants based their motion for summary judgment on the ground that acceptance of rent by a landlord with knowledge of breaches of the lease agreement, without more, waives those breaches as a matter of law, and its motion was granted by the trial court.

To the contrary, courts have held that material breaches of a lease agreement are not waived by the acceptance of rent. See Atkinson v. Trehan, 334 N.Y.S. 2d 293 (1972); Wecht v. Anderson, 444 P.2d 501, 504-05 (Nev. 1968); Klein v. Longo, 34 A.2d 359, 360 (Mun. Ct. of Appeals,

D.C. 1943). In the Wecht case, the lessee had covenanted to construct a fifty (50) ton capacity retort for refining mercury on mineral-rich land by a certain date and never fulfilled that obligation. In the meantime, the lessor continued to accept rent but ultimately sought to terminate the lease on the basis of the lessee's breach in not building the retort. The court ruled that the lessor had not waived the lessee's breach by accepting rental payments with knowledge of the breach.

In Fogel v. Hogan, 496 P.2d 322 (Colo. 1972), the lessee failed adequately to maintain the leased premises and thus breached the maintenance provision of the lease agreement. Id. at 324. In a suit filed by the lessee against the lessors, the lessors filed a cross-claim for termination of the leasehold and continued to collect rental payments throughout the pendency of the action. The lessee argued that the lessors had waived any breaches of the lease agreement by accepting rent while their action proceeded. However, the court disagreed, finding that the lessee was obligated to continue making rental payments as long as he remained on the leased premises. Id. The factual situation in the Fogel case is strikingly similar to that in the actions presently before this Court, and the same principle should apply.

To accept the defendants-respondents' argument that the acceptance of rent waives all foregoing breaches of a lease

agreement as a matter of law would narrowly limit the choice of remedies available to a lessor faced with a lessee's breaches. The lessor would be left with the options of foregoing rent while filing suit to terminate the leasehold, or of accepting rent while suffering the consequences of the lessee's breaches without redress. The proposition is absurd on its face.

A landlord is fully entitled to enforce the terms of a lease without requiring its termination. The injured lessor thus may file suit to require compliance with provisions of a lease agreement or to secure an award of damages for the lessee's breaches while receiving payments of rent.

II. The trial court erred in granting summary judgment on Woodland's claims regarding the defendants-respondents' implied obligations under the lease agreement. In its complaint for breach of the lease and termination of the lease-hold, Woodland alleges that the defendants-respondents breached the lease agreement by failing to operate the Woodland Drive-In Theatre in a prudent and businesslike manner. In addition to the fixed annual rental established in the lease agreement, ABC covenanted to pay an annual percentage rental of fifteen percent (15%) of the concession receipts above $65,000.00. (See Exhibit A, Paragraph 2.) The complaint avers and plaintiff-appellant will show, if allowed to proceed at trial, that defendants-respondents failed to fulfill their covenants to maintain and improve the theatre and, in fact, were grossly negligent in its maintenance and operation. The direct consequence of defendants-respondents' manifold breaches of the lease agreement was to totally frustrate plaintiff-appellant's opportunity to realize the benefits intended from the percentage rental provision.

Defendants-respondents moved for summary judgment respecting plaintiff-appellant's claims under the percentage rental provisions solely on the ground that as a matter of law a percentage rental provision does not give rise to any

duties on the part of the lessee respecting operation or maintenance of the theatre in order to produce revenue therefrom. In their motion, defendants-respondents do not attempt to demonstrate any uncontroverted facts concerning the activities of the parties in this case or their intent in subscribing to the subject provision of the lease. Defendants-respondents make no attempt to demonstrate what the parties intended by the lease agreement nor to demonstrate that on the basis of the facts involved in this case, duties averred by the plaintiff-appellant could not have arisen. Defendants-respondents' sole basis for the motion for summary judgment is the single proposition that as a matter of law a percentage lease provision does not give rise to the duties averred by plaintiff-appellant.

Defendants-respondents' motion must fail for, inter alia, two basic reasons. First, the controlling authorities fail to support defendants-respondents' contention that, as a matter of law, percentage lease agreements do not give rise to duties concerning operation of and production of income from a leasehold. Second, the controlling authorities clearly hold that the duties attendent to a percentage lease agreement can only be ascertained by a determination of the intent of the parties and of the surrounding facts and circumstances.

The cases cited by defendants-respondents make it clear that in order to adjudicate the rights of a lessor under a percentage lease agreement, the court must make specific reference to the facts before it. Further, the only Utah case cited by defendants-respondents concerning a situation similar to that before the Court clearly demonstrates the Utah Supreme Court's embrace of the principle that a lessee under a percentage lease agreement may have substantive obligations concerning the operation of its business on the premises. In Flowers v. Wrights, 227 P.2d 768 (Utah 1951), the Court considered a claim by a lessor for additional rentals which it attributed to the business done by a sublessee. In this case, the lessee had agreed to pay a rental based upon a percentage of its total sales. At the time the lease was entered into, however, the Court held that the lessee was given the right to sublease and the parties contemplated that the sales of the sublessee would not be included within the terms of the percentage rental agreement. In discussing the legal standards applicable generally to a percentage lease situation, the court cited the case of Cissna Loan Company v. Baron, 149 Wash. 386, 270 P. 1022 (1928). The court stated that it did not disagree with the findings in the Cissna case but distinguished the case on the grounds that the lease before it specifically excluded the sales of the sublessee.

In the Cissna case a lessee occupied a building with rental consideration provided through a percentage of gross sales of a department store conducted by lessee in the building. After taking occupancy the lessee moved two important departments of his store to an adjoining building. The court held that the lessor was entitled to a percentage of the sales in those departments.

In distinguishing the Cissna case, the Utah Supreme Court held that unlike the case before it, in the Cissna case there was no clear contemplation at the time of signing the lease that such a move of departments would take place.

Comparing those facts to the instant suit, the parties clearly expressed the affirmative covenants which would have direct bearing on the gross percentage rental figure. This is not a case where a lessee has moved a department or moved an aspect of business. Rather, it is a case where the lessee has intentionally and negligently failed to fulfill the covenants of the agreement which have direct implication in the profitability of the business. Further, the Cissna case and the adoption of its principles in Flowers by the Utah Supreme Court clearly support the finding of obligations on the part of a lessee under a gross rental provision to conduct its business in good faith in order that the lessor has a fair opportunity to realize the benefit of that provision.

In this respect, it is important also to note that in Flowers v. Wrights, the Utah Supreme Court clearly stated that an intentional effort on the part of the lessee to reduce the percentage rental was clearly actionable. In this respect, the Supreme Court stated:

> Doubtless the reason why the lessee's right to sub-let space was so restricted was to prevent the lessee from using the right to sub-lease space as a device to reduce the percentage rental which would ordinarily accrue to the lessor. Numerous cases are cited by the plaintiffs to the effect that a lessee cannot use the authority to sub-let as such a device. With that principle we are in complete accord.

The holding of the Utah Supreme Court is consistent with the standards embraced by Williston on Contracts, Rev. Ed., Vol. 1, § 104A, at 357:

> A third class of cases, not wholly inconsistent with the first, finds from the business situation, from the conduct of the parties, and from the startlingly disproportionate burden otherwise cast upon one of them, a promise implied in fact by the seller to continue in good faith production or sales, or on the part of the buyer to maintain his business or plant as a going concern and to take its bona fide requirements. In other words, this view implies an obligation to carry out the contract in the way anticipated, and not for purposes of speculation to the injury of the other party.

Embracing the principle above-referenced, the Court in State Auto & Cas. Underwriters v. Salisbury, 494 P.2d 529, 531 (Utah 1972), stated:

> Arising from what is commonly known and accepted as to the customs and experience in the everyday affairs of life, the parties each has the right to assume that the other will perform the duties he agrees to with reasonable care, competence, diligence and good faith, even though such terms are not expressly spelled out in the contract... .

See also Beaugureau v. Beaugureau, 463 P.2d 540, 542 (Ariz. 1970); Coleman Eng'r Co. v. North Amer. Aviation Inc., 420 P.2d 713, 720 (Cal. 1966); Miller v. Othello Packers, Inc., 410 P.2d 33, 34 (Wash. 1966).

In Flowers v. Wrights, however, the court clearly found that the good faith of the lessee had not been questioned in any respect. In this case, the lack of good faith of the lessee is the thrust of plaintiff-appellant's claims which are the subject of defendants-respondents' motion.

Further, supportive of the Utah Supreme Court's finding are a substantial number of decisions from other jurisdictions which, in contravention to the findings of the cases cited by defendants, clearly impose upon a lessee under a percentage lease agreement obligations to fulfill the fair expectations of the lessor under that provision.

In Selber Bros., Inc. v. Newstadt's Shoe Stores, 194 So. 579 (La. 1940), the Supreme Court of Louisiana held that a lessor stated a valid cause of action seeking additional rent under a percentage rental agreement complaining of lessee's

substitution of a store specializing in close-out sales of cheap brands and slow-moving old styles of shoes for a "high-class and fashionable store." 194 So. at 580. The lessor obviously intended that the lessee would maintain a quality merchandise shoe store on the leasehold premises during the lease term, but once again the ruling was made in spite of a minimum rental provision that had not been breached.

In this case, at the time the lease was entered into, the clear intent of the parties was that the Woodland Drive-In Theatre would be profitably managed. Otherwise, the percentage rental provisions and the corresponding provisions for plaintiff-appellant's inspection of defendants-respondents' financial records would be meaningless. (See Exhibit A, Paragraph 2.) Paragraph 7 of the lease agreement expressly provides that the lessee is to approximately double the size of the snack bar-concessions area. After substantial delay, defendants built an addition to the snack bar but blocked it off with a cinder block wall and used it solely for storage. That action breached an express covenant of the lease agreement as well as an implied covenant to run the theatre concessions in good faith in a businesslike manner.

In Mayfair Operating Corp. v. Bessemer Properties, Inc., 7 So.2d 342 (Fla. 1942), the Supreme Court of Florida held that a lessee of a movie theatre was obligated to keep the

theatre operating all year and do its best to maximize revenues under a percentage rental agreement in light of a provision of the lease agreement requiring it to "use its best efforts to obtain and maintain the highest volume of business on the premises." This ruling was made despite the lessee's uncontested allegations that lessee "made improvements on the theatre not required in the lease, that the theatre business . . . [was] seasonal and that the theatre was closed in the summer months in order to maintain a high standard of entertainment... ." (7 So. at 343.)

In this case, the lease agreement expressly provides that the:

> Lessee covenants to use and occupy said premises for the operation of a drive-in theatre business and any business which is usually incident thereto, and covenants and agrees to keep the improvements upon said premises, including all theatre equipment, in a good state of repair at the expense of the Lessee. (See Exhibit A, Paragraph 8.)

Plaintiff-appellant has stated a valid cause of action for defendants-respondents' failure to operate the Woodland Drive-In Theatre in a prudent and businesslike manner. The defendants-respondents had an obligation to operate the theatre in good faith without allowing it to deteriorate. Defendants-respondents have disregarded that obligation in their operation of Woodland Theatre, and the plaintiff-appellant is entitled to go to trial on the issue of damages arising from their failure to fulfill that obligation.

CONCLUSION

In granting Plitt's motion for summary judgment, the trial court ignored the substantial issues of material fact raised by Woodland and relied erroneously on the overly broad propositions of law advanced by Plitt. Woodland is entitled to an adequate opportunity to prove its claims of forfeiture of the leasehold and to damages for the defendants-respondents' breaches of the lease agreement. Such an opportunity was not given by the trial court, making no findings of fact relating to Woodland's claims. Plitt and ABC are not entitled to judgment as a matter of law in either of the plaintiff-appellant's actions, and this Court should accordingly reverse the trail court's summary judgment orders.

DATED this 10th day of May, 1976.

BERMAN & GIAUQUE
Daniel L. Berman
Richard D. Burbidge
Randall L. Dunn
500 Kearns Building
Salt Lake City, Utah 84101
(801) 533-8383

By Richard D. Burbidge
Richard D. Burbidge
Attorneys for Plaintiff-Appellant
Woodland Theatres, Inc.

LEASE

Woodland Theatres, Inc.

Lessor,

and

ABC Intermountain Theatres, Inc.

Lessee

Woodland Drive-In Theatre
Salt Lake City, Utah

EXHIBIT A

Table of Contents

Table of Contents (Cont'd)

L E A S E

THIS LEASE, made and entered into at Salt Lake City, Utah, this 9th day of March, 1971, by and between WOODLAND THEATRES, INC., a corporation of Utah, hereinafter referred to as Lessor, and ABC INTERMOUNTAIN THEATRES, INC., a corporation of the State of Delaware, duly qualified to do business in Utah, hereinafter referred to as Lessee;

WITNESSETH, that in consideration of the payment of the rent and the keeping and performance of the covenants and agreements by the said Lessee, hereinafter set forth, the Lessor hereby leases unto the Lessee the following described premises situated in Salt Lake County, State of Utah:

Beginning at the Northeast corner of Lot 8, Block 5, Ten Acre Plat "A", Big Field Survey, and running thence South 0° 08' 26" West, 572.63 feet to the Southeast corner of said Lot 8; thence South 89° 59' west 206.47 feet along the South line of said Lot 8 to the Northeast corner of Lot 16 A, Clearview Acres Subdivision; thence South 0° 12' 40" West, 18.00 feet to the Southeast corner of said Lot 16 A; thence North 89° 54' West, 100.00 feet to the Southeast corner of said Lot 16 A; thence South 89° 59' West, 100.00 feet to the Southeast corner of Lot 18 A, Clearview Acres Subdivision; thence North 88° 24' 50" West, 100.04 feet to the Southwest corner of said Lot 18 A; thence North 89° 02' 30" West 100.01 feet to the Southwest corner of Lot 19 A, Clearview Acres Subdivision; thence North 0° 12' 40" East 13.30 feet to the Northwest corner of said Lot 19 A; thence South 89° 59' West, 160.00 feet to the Southwest corner of said Lot 8, Block 5, Ten Acre Plat "A"; thence North 0° 12' 40" East 573.07 feet to the Northeast corner of said Lot 8; thence South 89° 59' East 89.30 feet; thence along the arc of a 622.03 foot radius curve to the right, 715.24 feet to the point of beginning; said arc being subtended by a chord of South 89° 59' East, 676.48 feet. And including a 50 foot right-of-way from the leased premises to Ninth East Street to serve as an entrance or exit from the Woodland Drive-In Theatre or a right-of-way of sufficient width to serve the purpose of an entrance or an exit to the Woodland Drive-In Theatre to Ninth East Street as required by law.

Together with all the improvements thereon situated and all appurtenances thereto, including the swimming pool.

Together with all of the equipment and personal property used in the operation of the Woodland Drive-In Theatre, as set forth in the attached Schedule marked Exhibit A.

1. The term of this lease shall commence on the _____ day of _____, 1971, and continue for fifteen (15) years to and including _____, 1986.

2. The Lessee covenants and agrees to pay as rental to the Lessor a minimum annual guaranteed rental of Thirty-Two Thousand Five Hundred Dollars ($32,500.00) per year during each year of the term of this Lease or any extension thereof. Except for the first year of the term of this Lease, such minimum annual guaranteed rental shall be paid annually in twelve (12) monthly installments of Two Thousand Seven Hundred Eight Dollars and Thirty-Three Cents ($2,708.33). Each installment shall be due on the first day of each month of each lease year, commencing with the first month of the second year of the term of this Lease. The minimum annual guaranteed rental of Thirty-Two Thousand Five Hundred Dollars ($32,500.00) for the first year of the fifteen (15) year term of this Lease shall be paid by the Lessee to the Lessor within thirty (30) days after the commencement date of this Lease. The parties acknowledge that the Lessor has already received Twenty-Five Thousand Dollars ($25,000.00) of such Thirty-Two Thousand Five Hundred Dollars ($32,500.00) prepaid minimum annual guaranteed rental and that the Lessee shall only be required to pay the Lessor an additional Seven Thousand Five Hundred Dollars ($7,500.00) within thirty (30) days from the commencement date of this Lease and upon the payment of such Seven Thousand Five Hundred Dollars ($7,500.00) the Lessee shall have fully prepaid the minimum annual guaranteed rental of Thirty-Two Thousand Five Hundred Dollars ($32,500.00) for the first year of the original fifteen (15) year term of this Lease.

The Lessee, in addition, covenants and agrees to pay as a percentage rental to the Lessor during each year of the term of this Lease or any extension thereof:

A. Fifteen percent (15%) of the gross admission receipts, if any, of the Theatre in excess of One Hundred Eighty-Three Thousand Three Hundred and Thirty-Three Dollars ($183,333.00), and

B. Fifteen percent (15%) of the gross concession receipts, if any, of the Theatre in excess of Sixty-Five Thousand Dollars ($65,000.00).

The gross admission receipts and gross concession receipts of the Theatre upon which the determination of the percentage rental, if any, due under this Lease are to be computed, shall be calculated at the end of each year of the term of this Lease and the amount of percentage rental, if any, due the Lessor as percentage rental shall be paid by the Lessee without demand no later than thirty (30) days after the end of each such lease year. A written statement of gross admission receipts and of gross concession receipts, certified to be correct by a financial officer of Lessee, shall be delivered by Lessee to Lessor within such thirty (30) day period regardless of whether any percentage rental is due under the Lease.

The Lessee shall regularly keep proper books of account showing gross admission receipts and gross concession receipts from the Theatre, which books shall during regular business hours of the Lessee be open to the inspection of Lessor and its agents at Lessee's office in Salt Lake City, Utah.

Gross admission receipts as used for purposes of this Lease shall mean the total receipts for admission to the Theatre, including all ticket sales, less any and all taxes and license fees applicable to such admission receipts required to be paid by any governmental authority, whether local, county, city, state or federal.

Gross concession receipts as used for purposes of this Lease shall mean any receipts from the sale of concession commodities, including snack bar sales, food, candy, and soft drinks on the Theatre premises, less any and all taxes and license fees applicable to any such gross concession receipts required to be paid by any governmental authority, whether local, county, city, state or federal.

The Lessee in no way guarantees that there shall be any percentage rental earned and due and payable under the terms and conditions of this Lease.

Lease year shall mean a period of twelve (12) consecutive calendar months during the term of this Lease, measured from the first day of the first full calendar month of the term of this Lease and ending on the day prior to each anniversary of said first day of the first full calendar month.

In addition to the annual financial statement with regard to gross admission receipts and gross concession receipts provided for above, the Lessee agrees to furnish Lessor with a quarterly statement of gross admission and gross concession receipts and shall make available for the Lessor's inspection the daily box office reports.

3. The Lessee shall have thirty (30) days grace and no more in which to pay any annual percentage rental payment to the Lessor from the date such rental payment is due under Paragraph 2 above.

4. The Lessor shall pay the general personal property and real property taxes levied against the leased premises during the term of this lease; provided, however, the Lessee agrees to pay any increase in taxes over and above the amount of the taxes for the year 1963, which shall be levied during the term of the lease. Lessor shall furnish to Lessee upon request a copy of each tax bill required to be paid (in part) by Lessee under this paragraph as well as a copy of the bill for the 1963 tax year.

5. Lessee agrees to pay all utilities, including water, heat, lights and sewer charges and Lessee also agrees to pay all city, county, state and federal licenses, or any licenses that may be imposed by any other governmental agency.

6. No paragraph 6.

7. The Lessee covenants and agrees that the Lessee shall, within six (6) months from the date of the effective date of this Lease enlarge the present snack bar to approximately double its present

size. The Lessee shall be relieved of the obligations pursuant to this paragraph if zoning regulations prohibit the fulfillment of such obligations or government approval for such construction cannot be obtained, but the Lessee and Lessor shall undertake to use their best efforts to obtain any zoning classification and any approval necessary to the fulfillment of their obligations. Lessee further covenants and agrees to move the existing marquee from its present location to the northwest property line of the demised premises on Seventh East and to situate such marquee of such location so that both sides of the double marquee are utilized to advertise the present attraction; to provide larger lamp houses, and to oil and chip the demised premises, all to be done prior to December 31, 1971.

8. The Lessee covenants to use and occupy said premises for the operation of a drive-in theatre business and any business which is usually incident thereto, and covenants and agrees to keep the improvements upon said premises, including all theatre equipment, in a good state of repair at the expense of the Lessee. In this connection, the Lessee agrees to replace any equipment, at its expense, as such replacement shall become necessary in the proper and effective operation of the theatre business. Such replaced equipment shall be the equivalent to, or better than, that which is replaced. The Lessee shall keep the premises free from all litter, dirt, debris, and obstructions, and in a clean, sanitary condition, as required by all ordinances and health and police regulations; nor shall said premises be used for any purposes which are unlawful, or which would render the insurance thereon void or the insurance risk more hazardous. At the expiration of the lease, Lessee agrees to surrender possession to Lessor of the said premises and the improvements and equipment upon said premises in a good state of repair, ordinary wear and tear, acts of God, and damage by fire or other insured casualty excepted.

9. As a part of the consideration of the execution of this Lease by Lessee, Lessor warrants that Lessor is the owner of the above described real and personal property, and that if Lessee shall

perform all the covenants of this Lease by said Lessee to be performed, the Lessee shall and may peaceably and quietly have, hold and enjoy the said demised property for the full term aforesaid.

10. The Lessee agrees that during the term of the lease the present name of the theatre shall not be changed, except that Lessee may indicate its operation of the theatre, provided such additional designation or description shall be subordinate to the name Woodland Drive-In Theatre; and the name "Park Vu", or any name other than Woodland, shall not be displayed in any marquee or signature display in newspaper advertising.

11. The Lessee covenants and agrees that it will not assign this Lease or enter into any sublease of the premises or any part thereof, without the written consent of the Lessor, which consent Lessor agrees not to unreasonably withhold, provided that the Lessee may assign this lease or sublet the premises to a corporation in which Lessee or a parent or affiliated corporation owns the controlling interest. In no event shall the assignment of this Lease relieve the Lessee of its obligations to the Lessor hereunder.

12. Lessee agrees to assume and perform any film contracts previously negotiated by the Lessor or by the prior occupant which may not have been liquidated and performed prior to the commencement date of the term of this lease. Lessor represents that the only outstanding unperformed film contract or contracts are as follows:

In any event the foregoing shall apply only to film contracts with confirmed dates as of the commencement of the term of this Lease.

13. In the event said leased property or any part thereof be so damaged by fire or act of God that the same cannot be used for theatre purposes, the Lessor shall rebuild, repair or replace the same at Lessor's expense, in such manner that the same shall be equal to said leased property prior to such damage. In the event said Lessor shall not commence said repairs or replacements within sixty (60) days following said damage, and thereafter proceeds therewith with due diligence, said Lessee, at Lessee's election, may proceed to make said repairs or replacements and deduct the cost thereof and all reasonable expenses in connection therewith from the ensuing payments of rental required to be made hereunder, or said Lessee, at Lessee's election, as aforesaid, may terminate this lease. Said Lessee shall be relieved from making the rental payments provided hereby during such part of the above-mentioned period as said premises shall be unfit for occupancy for theatre purposes, and also during such period as the theatres in the above City may be closed by the City, State or Federal authorities under Martial Law, Health Quarantine, or other emergency, and rentals paid in advance for such periods shall be credited upon the ensuing rental payments to be made pursuant hereto.

14. The Lessee agrees to maintain fire insurance with full extended coverage, including wind damage, at Lessee's sole expense, to the extent of at least 80 percent of the value of the equipment and improvements. The proceeds of such insurance shall be payable to the Lessor for the purpose of repair as aforesaid. In the event the proceeds of such insurance are insufficient to cover the replacement cost, Lessee agrees to pay the difference of such replacement cost.

15. The Lessee agrees to provide and maintain public liability insurance for the protection of Lessor and Lessee, covering the use and occupancy of the premises by the Lessee, in the sum of $100,000.00 for each person and $300,000.00 for each occurrence, and Lessee covenants and agrees to save Lessor harmless from any liability of any kind which may arise out of the use and occupancy of the leased

premises by the Lessee.

16. Lessor grants unto Lessee the first right to purchase a marketable title to the demises premises at the same price and upon the same terms at which the same may be offered for sale to any other prospective purchaser, subject to the terms of this lease, and Lessee shall have thirty (30) days after notice of said proposed sale within which to elect whether to purchase said premises. In the event Lessee notifies Lessor, within the time specified above, of Lessee's election to purchase said premises, then said purchase shall be consummated within fifteen (15) days after service of written notice upon Lessor of Lessee's election to purchase the same.

17. The parties hereto agree that in the event of any litigation between the parties hereto to enforce the terms of this lease, or pertaining to the tenancy hereby created, the court may award the successful party its reasonable attorneys' fees.

18. All the covenants and agreements in this lease shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto.

19. No paragraph 19.

20. The Lessor covenants and agrees that the Lessee may have an option to renew this lease under the same terms and conditions and at the same rental for a period of an additional five (5) years. Notice of the intention to exercise this option must be given in writing to the Lessor at least six (6) months before the expiration of this lease, otherwise such option shall terminate and be of no effect.

21. The Lessor shall have the right to audit the books and records of the Lessee relating to the leased premises once each year in order to verify the accuracy of the reports made to the Lessor with respect to the gross receipts received by Lessee during each year of the term.

22. Lessee covenants and agrees that it will promptly pay for any improvements or replacements of equipment made by Lessee to the end that no liens or repossessions occur. Title to all improvements and equipment and replacements thereof shall be and remain in the Lessor, and possession thereof, subject to reasonable wear and depreciation, shall be given to the Lessor upon the termination of this lease for any cause.

23. At least sixty (60) days prior to the expiration of this lease or the extension thereof, the Lessor shall have the right to exhibit a sign for lease conspicuously on said premises as Lessor may desire, without seriously interfering with the operation of the theatre by the Lessee; and at any reasonable hour of the day the Lessor, through its appointed representative, shall have the right to enter upon, inspect and view the premises.

24. (a) ~~If Lessee shall fail to make a payment of rent or additional rent required under paragraph 2 for thirty (3) days after written notice specifying the default, or (b) if Lessee shall fail to make any other payment required hereunder for thirty (30) days after written notice specifying the default~~ or (c) if Lessee shall fail to perform any other obligation under this lease for thirty (30) days after written notice specifying the default (or within such period Lessee has not commenced diligently to correct such default so specified or has not thereafter diligently pursued such correction to completion), ~~this lease and the term hereof shall, at the option of Lessor, upon the date specified in a notice by certified or registered mail, which date shall not be less than ten (10) days after the date of mailing of such notice by Lessor to Lessee,~~ be annulled and Lessor shall have, in addition to any other right or remedy Lessor may have at law or in equity, the right to thereupon re-enter and take possession of the said premises.

The specified remedies to which either Landlord or Tenant may resort under the terms of this lease are cumulative and are not intended to be exclusive of any other remedies or means of redress to

which either may be lawfully entitled in case of any breach or threatened breach by the other of any provision of this lease. The failure of either to insist in any one or more cases upon the strict performance of any of the covenants of this lease or to exercise any option herein contained shall not be construed as a waiver or relinquishment for the future of such covenant.

It is the intent of the parties that the number of notices and the time periods provided by the applicable statutes of the State of Utah shall not be increased or enlarged, and if Lessee is given the two (2) notices provided for in this Lease in order to annul this Lease, and the minimum time periods provided for in this Lease, then even if such notices and such time periods are given pursuant to said statutes, they shall be deemed to also be the notices provided for herein.

25. The Lessee shall make a surfacing application during the summer of 1971 to the surfacing of the Woodland Drive-In Theatre of the same grade and quality as was applied to such surfacing in the summer of 1967, and, thereafter, the Lessee shall make such applications from time to time as needed to keep and maintain the surfacing of the Woodland Drive-In Theatre in good condition. On or before _____, 1971, Lessee shall purchase four hundred (400) new 1,000 watt in-car electric heaters with thermostatic controls which shall become the property of Lessor as provided in paragraph 22 above. Lessor shall pay Lessee half the cost of said heaters.

26. Daniel B. Woodland, Eugene N. Woodland and Patricia Hutchens, and any member of the immediate family of said named persons, shall have the right to use the swimming pool at any time, provided that such use will not interfere with the operation of the Lessee's business, and provided further that such use shall be at their own risk; and the Lessor agrees to indemnify and save Lessee harmless from any claim, demand, or cause of action which may arise against the Lessee out of such use of the swimming pool by anyone named in this paragraph, or their immediate family and guests.

27. Until further written notice, any notices or communications required or made pursuant to this Lease shall be directed (by registered or certified mail) as follows:

To the Lessor: To Daniel B. Woodland
755 East 4070 South
Murray 7, Utah

To the Lessee: To ABC Intermountain Theatres, Inc.
52 West Second South
Salt Lake City, Utah 84101

With a second copy to Lessee

c/o American Broadcasting Companies, Inc.
Att. Legal Counsel
1330 Avenue of the Americas
New York City, New York 10019

28. The Lessee shall repaint the Woodland Drive-In Theatre screen during the summer of 1971, and thereafter as needed during the term of the lease or any renewal thereof but not less than once every four (4) years.

29. The Woodland Drive-In Theatre shall not be expanded on additional property or any entrance or exit added other than the Ninth East entrance and exit, or any entrance or exit discontinued without the Lessor's written permission.

30. Eugene N. Woodland may have a right-of-way over the Ninth East exist and entrance for access to and from the property owned by him which adjoins on the south of said entrance and exit.

31. The Lessor and the individual stockholders thereof (Daniel B. Woodland and Eugene N. Woodland) agree to assist and cooperate in every necessary and desirable way with the Lessee to obtain all necessary zoning and other permits for use of the Ninth East exit and entrance way and for all other improvements provided in this lease.

32. Neither Lessor nor its individual stockholders will erect or permit to be erected on any property which they may own adjacent to the Woodland Drive-In Theatre any flashing or revolving lights which will in any way interfere with the view of the patrons

of the theatre watching the picture on the screen at the theatre, and they will not cause or permit any loud or unusual noises in connection with the use of such adjoining property which will interfere with the operation of said drive-in theatre.

33. The Lessor and Lessee agree to execute a short form of lease, acknowledged and otherwise in proper form for recording pursuant to the Statutes of Utah, pertaining thereto. This short form shall recite (a) the date of the execution of the lease; (b) the description of the premises demised by the lease; (c) the term of the lease; (d) the right of extension or renewal; and (e) the first right to purchase a marketable title to the demised premises. The original executed copy of said short form lease shall be recorded and shall be returned, after recording, to Lessee.

34. Lessor shall have the right to terminate this lease at any time during the term thereof upon the following terms and conditions:

A. Lessor shall have received an offer from a third party to purchase the premises for use other than as a motion picture drive-in theatre;

B. Lessee shall have been given notice thereof and the first right to purchase pursuant to paragraph 16 of the lease and Lessee shall have failed to elect to purchase;

C. Lessor shall have given Lessee no less than ninety (90) days advance written notice of the effective date of such termination, but the effective date shall in no event be during the period July 1 through Labor Day;

D. Lessor shall pay to Lessee (1) a sum equal to twice the amount of Lessee's investment in the Woodland Drive-In Theatre, which shall include, without limitation, the $125,000.00 paid by Lessee for the leasehold assignment, the cost of heaters, if any, and the cost of expanding the snack bar, plus (2) if the effective date of termination be within the first five (5) years of the fifteen (15) year extended term, an amount as follows:

Termination Date During	Added Amount
1st year	25% of amount under (1).
2nd year	20% of amount under (1).
3rd year	15% of amount under (1).
4th year	10% of amount under (1).
5th year	5% of amount under (1).

In addition, Lessor shall return to Lessee any prepaid rent, including the security deposit, which would otherwise be applied to rent for the last year.

IN WITNESS WHEREOF, the Lessor, Woodland Theatres, Inc., and the Lessee, ABC Intermountain Theatres, Inc., have each executed this Lease by their duly authorized officers and attached their seals the day and year first above written.

ATTEST:

Pres.

WOODLAND THEATRES, INC.

By

Its

ATTEST:

ABC INTERMOUNTAIN THEATRES, INC.

By

Its