

2007

Holladay Towne Center L.L.C. v. Brown Family Holdings L.C., a Utah limited liability company : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS, STATE OF UTAH

HOLLADAY TOWNE CENTER, L.L.C.,

Plaintiff/Appellant and Cross-Appellee,

vs.

BROWN FAMILY HOLDINGS, L.C., a
Utah limited liability company,

Defendant/Appellee and Cross-Appellant.

App. No. 20070496

Case No. 060913167

**BRIEF OF APPELLEE/CROSS-APPELLANT
BROWN FAMILY HOLDINGS, L.C.**

APPEAL FROM MAY 1, 2007 JUDGMENT DISMISSING DEFENDANT'S
COUNTERCLAIMS, HONORABLE JOHN PAUL KENNEDY

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2. BROWN FAMILY HOLDINGS, L.C., DEFENDANT/APPELLEE AND CROSS-APPELLANT.

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¹ The Trial Court limited the amount of attorney fees that Brown could collect relating to the Counterclaims asserted by Brown.

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JURISDICTION OVER APPEAL

The Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(a).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

ISSUES ON APPEAL

Issue: Did the Trial Court err in determining there was no easement relating to the Subject Property where the purported easement was never recorded against the property, there never had been any evidence on the ground of an easement, the path of the supposed easement had been blocked for twenty years by impassable berms and for ten years by storage sheds and there had been mesne conveyances of the property to bona fide purchasers?

Issue: Did the Trial Court err in granting summary judgment on Holladay Towne Center's claims for breach of the Ground Lease based on a claim that the property was encumbered by an easement when the Ground Lease demised the property "together with all . . . easements . . . in any way appertaining thereto, including but not limited to, any surface easements. . . ." (R. at 13). And specifically authorized the tenant, "at its own cost and expense, to contest or review by appropriate legal or administrative proceeding the validity or legality of any . . . covenants, restrictions, and conditions now or hereafter of record which may be applicable to Tenant or to all or any portion of the Premises" (R. at 11, 20-21).

ISSUE ON CROSS APPEAL:

Issue: Did the Trial Court err in failing to find that the Holladay Towne Center's pattern of intentionally late rental payments for the express purpose of forcing Brown Family Holdings to undertake action that was not the Landlord's/Brown Family Holdings' responsibility under the Ground Lease, and Holladay Towne Center's filing of a frivolous easement action against Brown Family Holding, while there was no easement as a matter of law, constituted a material breach of the lease? (R. at 928 pgs. 13-29, 32).

Standard of review: The trial judge concluded as a matter of law that the accepted facts did not amount to a material breach of the lease. Such a determination is a "question of law that the appellate court reviews for correctness, according no deference to the trial court's legal conclusions." Bakowski v. Mountain States Steel, Inc., 52 P.3d 1179, 1183 (Utah 2002); see also Coalville City v. Lundgren, 930 P.2d 1206, 1209 (Utah Ct. App. 1997) (citing McKeon v. Williams, 799 P.2d 198, 200 (Or. Ct. App. 1990)); see also State v. Deli, 861 P.2d 431, 433 (Utah 1993) ("We accord the trial court's conclusions of law no deference but instead review them for correctness."); see also State v. Pena, 869 P.2d 932, 936 (Utah 1994) ("'[C]orrectness' means the appellate court decides the matter for itself and does not defer in any degree to the trial court's determination of law.").

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case arises out of a lawsuit asserted by Holladay Towne Center, L.L.C. (“HTC”) a large developer, the tenant, against a small business owner Brown Family Holdings, L.C. (“Brown”). In March of 2005, HTC and Brown entered into a lease agreement (“Ground Lease”). Prior to entering into the Ground Lease, HTC procured a title report that did not show any type of easement over the Subject Property. The Ground Lease covers only lot 27 (“Subject Property”). An adjoining lot, lot 26 is not a part of the transaction between these parties, but is owned by a third party. The Ground Lease that is the subject of this matter contains the standard covenant that HTC will have quiet enjoyment of the leasehold. (R. at 33). Specifically, and contrary to the allegations of HTC, there is no covenant that the property would be free of encumbrances. (R. at 9-38). Nor would one expect such a covenant in a lease. The Ground Lease contains an option to purchase the property, but that option has not been exercised by HTC. (R. at 31 and R. at 578). The Ground Lease expressly gives HTC the right to remove any encumbrances that may be on the Subject Property. (R. at 20-21).

The easement which HTC claims to be an encumbrance on the property does not appear of record on the Subject Property. (R. at 543). An independent title expert verified that no easement was on the Subject Property. (R. at 543). The expert specifically determined, “after reviewing the relevant title documents, at no time was any type of easement recorded against lot 27 from 1980 until the present date.” (R. at 543).

The only document of record, recorded only against lot 26, and not lot 27, were two documents called a notice of contract. (R. at 603-605). In the 1980 notice of contract it was set out that lot 26 was under contract and included in the legal description was a purported easement over lot 27. (R. at 603-605; *see also* R. at 535-536). The 1980 notice of contract is not a conveyance of lot 26 and did not transfer any interest to any easement for title policy reasons. (R. at 543). After recording the notice of contract on lot 26, nothing happened for several years. (R. at 535). Then, the owner of both lots 26 and 27 conveyed lot 27 free and clear of any easements in 1984. (R. 606 and 535). After the 1984 conveyance of lot 27, Ralom Investment Company, the previous owner of lot 27 and present owner of lot 26, did not own lot 27 and thus could not convey an easement over lot 27. (R. at 535). The fee simple conveyance of lot 27 in 1984 conveyed clear title that was not subject to an easement. (R. at 543). In 1993, after lot 27 had been conveyed free and clear of any easement, Ralom Investment Company, who no longer owned lot 27, purported to convey lot 26 with an easement over lot 27 to Ben Aire Associates via warranty deed. (R. at 608-610; 535). The 1993 warranty deed to Ben Aire Associates was not recorded against lot 27. (R. at 608-610; 535). None of the conveyances of lot 27 ever included a reference to the purported easement on lot 27. (R. at 613-624). The purported easement on lot 27 will not impede acquisition of financing. (R. at 543). There is no physical evidence of the so-called easement. Indeed, the path of the claimed easement has been blocked for over twenty years by impassable berms, and for the past ten years the path has been blocked by storage units that Brown constructed

on the Subject Property. (R. at 544).

Since November of 2005, HTC has been perpetually late paying rent in a bad faith manner. (R. at 579). In June, 2006, HTC began delaying payment of rent in bad faith for over 25 days each month. (R. at 579). After HTC filed a lawsuit against Brown, Brown sent a letter to HTC on September 18, 2006, and gave notice to HTC that it was in breach of the Ground Lease because of the late payments and because of the meritless lawsuit. (R. at 394, 847-848). HTC refused to dismiss the lawsuit even though it has no merit and is a material breach of the Ground Lease. In addition, as HTC did not dismiss the lawsuit pursuant to the September 18, 2006, letter within 30 days as required by the notice and Ground Lease, HTC is in unlawful detainer of the Subject Property.

B. COURSE OF PROCEEDINGS

HTC filed suit against Brown on August 9, 2006, asserting claims for declaratory judgment, breach of contract, and specific performance. On September 18, 2006, Brown filed a motion to dismiss HTC's claims. The motion to dismiss was converted into a motion for summary judgment because the parties submitted affidavits supporting their claims. On November 15, 2006, Brown was forced to file a Counterclaim because HTC would not dismiss the lawsuit brought on August 9, 2006. HTC filed a motion to dismiss Brown's claims. At about the same time, HTC filed a motion for summary judgment and then Brown filed a motion for summary judgment. All the claims were combined into the summary judgment motions. On March 12, 2007, oral argument was held by the Trial Court. Oral argument regarding the order and attorney fees was also heard on May 1,

2007.

C. DISPOSITION OF THE TRIAL COURT

After review of the pleadings and oral argument before the Trial Court on March 12, 2007, the Trial Court determined that HTC did not have a claim against Brown. The Trial Court determined that Brown was the prevailing party and awarded attorney fees to Brown. (R. at 928). The Trial Court also determined that even though HTC's conduct was not excusable in withholding payments and filing a meritless lawsuit against Brown, it was not a material breach of the lease agreement and dismissed Brown's counterclaims. (R. at 928). HTC then contested the award of attorney fees and the proposed order and another hearing was held on May 1, 2007 regarding the order and the amount of attorney fees awarded. (R. at 928). The Trial Court made a specific award of attorney fees excluding attorney fees expended after HTC began making rent payments on time. HTC filed a Notice of Appeal on June 18, 2007. Brown filed a Notice of Appeal on June 27, 2007.

STATEMENT OF UNDISPUTED FACTS

1. Brown Family Holdings, L.C. ("Brown") and Holladay Towne Center, L.L.C. ("HTC"), a large developer, entered into a Ground Lease covering the Subject Property in March 2005. (R. at 9-38).
2. The Ground Lease covers lot 27. (R. at 9-38).
3. The adjoining parcel to lot 27 is lot 26. (R. at 603-605).
4. Prior to entering into the Ground Lease with Brown, HTC procured a title

report for the leasehold interest that did not show any type of easement on the Subject Property. (R. at 531 and 591-601).

5. The Ground Lease that is the subject of this matter contains the standard covenant that HTC will have quiet enjoyment of the leasehold. (Ground Lease Article 21 - R. at 33).

6. Specifically, and contrary to the allegations of HTC, there is no covenant that the property would be free of encumbrances. Nor would one expect such a covenant in a lease. (See Ground Lease - R. at 9-38).

7. The Ground Lease contains an option to purchase the property, but that option has not been exercised by HTC. (Ground Lease Article 16 - R. and Supplemental Affidavit of Rand Brown ¶ 7- R. at 578).

8. Now, because of HTC's default it can never exercise that option.

9. The Ground Lease also expressly gives HTC the right to remove any encumbrances that may be on the Subject Property. (See Ground Lease - R. at 20-21).

10. Paragraph 6.3 of the Ground Lease provides "[t]enant shall have the right, at its own cost and expense, to contest or review by appropriate legal or administrative proceeding the validity or legality of any such Legal Requirement" (See Ground Lease - R. at 20).

11. Legal Requirement is defined as "all covenants, restrictions, and conditions now or hereafter of record which may be applicable to Tenant or to all or any portion of the Premises" (See Ground Lease - R. at 11).

12. The easement which HTC claims to be an encumbrance on the property does not appear of record on this property. (See 1994 Title Report - R. at 582-589; Title Insurance Policy 2004 - R. at 591-601; Affidavit of Michael Moss, ¶ 13 - R. at 543). It does not appear today, it did not appear when the property was leased by HTC, nor when the property was purchased by Brown Family Holdings. (Supplemental Affidavit of Rand Brown - R. at 577-580).

13. An independent title expert verified that no easement was on the Subject Property. (R. at 543).

14. The expert specifically determined, “after reviewing the relevant title documents, at no time was any type of easement recorded against parcel 27 from 1980 until the present date.” (Affidavit of Michael Moss, ¶ 9 - R. at 543).

15. The expert further determined that “the purported easement against parcel 27 never was a valid easement and has no validity for title policy purposes.” (Affidavit of Michael Moss ¶ 6 - R. at 543).

16. After review of all the documentation in the case and having examined the facts relating to the physical characteristics of the ground in this case, a reasonable title search would not reveal the alleged encumbrance, since there was no indication of the alleged encumbrance. (Affidavit of Michael Moss, ¶ 15 at 544).

17. The only documents of record, recorded only against lot 26, and not lot 27, were two documents called a notice of contract. (R. at 603-605).

18. In the notice of contract it was set out that lot 26 was under contract and

included in the legal description was a purported easement over lot 27. (R. at 603-605; *see also* R. at 535-536).

19. The 1980 notice of contract is not a conveyance of lot 26 and did not transfer any interest to any easement for title policy reasons. (Affidavit of Michael Moss, ¶ 7 - R. at 543).

20. After recording the notice of contract on lot 26, nothing happened for several years. (R. at 535).

21. Then, the title owner of both lots 26 and 27 conveyed lot 27 free and clear of any easements in 1984. (R. at 606 and 535).

22. After the 1984 conveyance of lot 27, Ralom Investment Company, the previous owner of lot 27 and present owner of lot 26, did not own lot 27 and thus could not convey an easement over lot 27. (R. at 535).

23. The fee simple conveyance of lot 27 in 1984 conveyed clear title that was not subject to an easement for title policy reasons. (Affidavit of Michael Moss, ¶ 8 - R. at 543).

24. In 1993, after lot 27 had been conveyed free and clear of any easement, Ralom Investment Company, who no longer owned lot 27, purported to convey lot 26 with an easement over lot 27 to Ben Aire Associates via warranty deed. (R. at 608-610; 535).

25. The 1993 warranty deed to Ben Aire Associates was not recorded against lot 27. (R. at 608-610; 535).

26. None of the conveyances of lot 27 ever included a reference to the purported easement on lot 27. (R. at 613-624).

27. The purported easement on lot 27 will not impede acquisition of financing. (Affidavit of Michael Moss, ¶ 12 - R. at 543).

28. There is no physical evidence of the so-called easement. Indeed, the path of the claimed easement has been blocked for over twenty years by impassable berms, and for the past ten years the path has been blocked by storage units that Brown constructed on the property. (Affidavit of Michael Moss, ¶ 14 - R. at 544).

29. No one has ever asserted any rights under the purported easement. (R. at 579).

30. HTC began “putting pressure” on Brown by not paying rent on the first of the month as required under the Ground Lease. Instead, HTC would not pay the rent. After the 15 day grace period expired, Brown had its lawyers write a letter demanding payment of rent. Ten days thereafter, HTC would pay the rent. This conduct went on for several months. HTC admitted it engaged in this gamesmanship with regard to rent in order to put pressure on Brown. (R. at 577-580, 409).

31. The Ground Lease specifically prohibits this type of conduct. The Ground Lease specifically states:

This is a triple net lease, tenant agrees that the amount of annual rent will be paid without offset and that tenant will pay all impositions and costs relating to the property so that the Landlord has no cost or expense relating to the property during the term or any extension of the lease.

(R. at 14, Art. 3.1(a)).

32. Since November of 2005, HTC has been perpetually late paying rent in a bad faith manner. (Supplemental Affidavit of Rand Brown - R. at 577-580).

33. Brown never acquiesced to the late payments and has made continual demands for on time payments. (Supplemental Affidavit of Rand Brown - R. at 577-580).

34. After HTC filed suit against Brown, Brown sent a letter to HTC on September 18, 2006, and gave notice to HTC that it was in breach of the Ground Lease in several particulars. (R. at 394, 847-848).

35. Specifically, Brown stated that HTC was in breach of paragraph 22.9 of the Ground Lease which reads:

Except where a party hereto is specifically permitted to act in its sole and absolute discretion, each party hereto agrees to act reasonably and in good faith with respect to the performance and fulfillment of terms of each and every covenant of condition contained in the Lease.

(R. at 394, 34).

36. After receiving the September 18, 2006, letter from Brown, contrary to HTC's prior conduct of intentionally delaying rent payments, HTC began to make the rent payment much closer to the appropriate date. (R. at 394).

37. The September 18, 2006, letter also gave notice under paragraph 12(c) that filing the lawsuit against Brown was a material breach of the Ground Lease. (R. at 394, 847-848).

38. The September 18, 2006, letter also stated “[t]he above breaches of the Ground Lease must be cured within 30 days or Brown Family Holdings will be forced to pursue an action under the unlawful detainer statute and seek an award of attorney fees and costs as a result of your client’s actions.” (R. at 847).

39. Article 12.1(c) of the Ground Lease reads in relevant part:

(c) Tenant shall have failed to perform any term, covenant, or condition of this Lease to be performed by Tenant, except those requiring the payment of money, and Tenant shall have failed to cure same within thirty (30) days after written notice from Landlord, delivered in accordance with the provisions of this Lease, where such failure could reasonably be cured with said thirty (30) day period

(R. at 27-28).

40. HTC did not dismiss the lawsuit as required by the September 18, 2006, letter. (R. at 394).

41. On November 15, 2006, as HTC did not comply with the notice and dismiss the pending lawsuit, Brown filed a counterclaim for breach of contract and unlawful detainer requesting relief for HTC’s material breach. (R. at 393).

RESPONSE TO APPELLANT’S STATEMENT OF FACTS

Appellant’s ¶ 4 - BFH was obligated under the Lease to deliver possession of the Property on March 1, 2005, subject only to the Permitted Exceptions.

Response: This statement is not supported by the record. The Ground Lease speaks for itself and does not support this statement. (R. at 524; 9-38). The Ground Lease does not require Brown to rent the real property without an easement. (R. at 9-38).

Indeed, Brown leased the Premises, “together with all . . . easements . . . in any way appertaining thereto, including but not limited to, any surface easements. . . .” Ground Lease at Article 1.1. (R. at 13).

Appellant’s ¶ 6 - Holladay was never informed of any encumbrances on the Property. Further, the only Permitted Exception identified pursuant to the terms of the Lease was for property taxes and assessments accruing for the year 2005 and thereafter.

Response: The first sentence of this paragraph is supported by the record as there was no encumbrance. The title policy obtained by HTC showed that the supposed easement was never recorded against the Subject Property. (R. at 531 and 591-601). The second sentence, however, is not supported by the record. Article 1.1 entitled “Demise” states “[l]andlord hereby leases to Tenant the Premises, together with all . . . easements . . . in any way appertaining thereto, including but not limited to, any surface easements” (R. at 13). In addition, this statement violates the parol evidence rule and should be excluded. (R. at 345-352, 505-508).²

Appellant’s ¶ 7 - During Lease negotiations, Holladay made it clear to BFH that Holladay’s purpose in leasing the Property was to include it as part of Holladay’s larger commercial development project to develop, build, and market a large shopping center in the area. Holladay further made it clear that Holladay planned to demolish existing structures and construct new improvements. Holladay required the Lease to reflect this

² The Trial Court never ruled on Defendant Brown’s motion to strike the affidavit of Thomas Hulbert and Supplemental Affidavit of Thomas Hulbert, which supports Plaintiff HTC’s statement.

important purpose.

Response: This statement is not allowable based on the parol evidence rule. (R. at 345-352, 505-508).

Appellant's ¶ 9 - Holladay also required that the Lease allow Holladay to obtain financing to construct the planned improvements on the Property. The Lease specifically allows Holladay to use its leasehold interest and the improvements as collateral for such financing.

Response: HTC is again attempting to include parol evidence which is inadmissible. (R. at 345-352, 505-508).

Appellant's ¶ 10 - In order to use the Property as intended by Holladay, the Property must be free from encumbrances that will block or prohibit its development or construction of improvements.

Response: This statement contains inadmissible parol evidence. (R. at 345-352, 505-508).

Appellant's ¶ 11 - BFH's representation in the Lease that there were not other encumbrances on the Property except for the property taxes was a material and integral part of Holladay's decision to enter the Lease.

Response: As to the assertion that Brown represented there were not other encumbrances on the property, this assertion is not supported by the record. There is no covenant in the Ground Lease that the property is being leased free of all encumbrances. Indeed, Brown leased the Subject Property, "together with all . . . easements . . . in any

way appertaining thereto, including but not limited to, any surface easements. . . .” (R. at 13). Beyond that, this statement violates the parol evidence rule and is inadmissible. (R. at 345-352, 505-508).

Appellant’s ¶ 12 - In the early part of 2006, Mr. Thomas Hulbert’s (manager of Holladay) review of a survey map revealed that an easement may exist over the Property in favor of the adjoining lot, lot 26.

Response: This statement is not supported by the record. Mr. Hulbert is not an expert and cannot make a legal conclusion about the existence of a purported easement. (R. at 345-352, 505-508).

Appellant’s ¶ 13 - After investigating this further, Mr. Hulbert determined that the Easement existed. Holladay then asked its attorney to notify BFH of this easement and request that BFH take the necessary action to remove the easement as required by the Ground Lease.

Response: Mr. Hulbert is not an expert and cannot make a legal conclusion about the existence of a purported easement that is not recorded against lot 27. (R. at 345-352, 505-508).

Appellant’s ¶ 14 - By letter dated April 7, 2006, Holladay’s attorney informed BFH of the Easement and of their resultant default under the Ground Lease.

Response: This statement is not supported by the record. Brown was never in default under the Ground Lease. There is no easement. (R. at 543).

Appellant’s ¶ 15 - Despite repeated requests by Holladay, BFH refused to take any

action to remove the Easement, arguing instead that the Easement was of no force or effect.

Response: This statement is not supported by the record. There is no easement. (R. at 543).

Appellant's ¶ 17 - Mr. Capilli's research revealed that prior to August, 1980, Lot 26 and Lot 27 were owned by the same owner and that in August, 1980, Lot 26 was transferred with an easement for parking, and ingress and egress over a portion of Lot 27 and that the easement remained on the transferring documents up to Lot 26's current owner.

Response: This statement is not supported by the record. This statement is contrary to the documents attached to the Affidavit of Mr. Capilli. The title documents show that a notice of contract was recorded, but does not reflect any type of conveyance. Lot 27 was conveyed in 1984 without any reference to an easement. Thereafter, none of the conveying documents relating to lot 27 had any reference to an easement. (R. at 613-624).

Appellant's ¶ 18 - Mr. Capilli provided this information to Mr. Hulbert, and then on May 31, 2006, Mr. Capilli met with Mr. Hulbert, Rand Brown, and Pamela Brown regarding his findings. Mr. Capilli explained to them that he would not be able to issue a title insurance policy for the Property, without excepting the Easement from coverage under such policy.

Response: This statement is not supported by the record. Mr. Capilli's office

had in fact already issued a title insurance policy to HTC before HTC ever entered into the Ground Lease. (R. at 531 and 591-601). In the meeting described above, Mr. Hulbert was trying to strong arm Brown into renegotiating the Ground Lease by creating the spectre of an easement that was not of record. (R. at 363).

Appellant's ¶ 20 - First American Title Insurance Company stated that it will not issue a title policy for the Property without listing the Easement as an exception to coverage, regardless of whether it is an owner's policy or a lender's policy of title insurance.

Response: This statement is not supported by the record. Mr. Capilli's office had in fact already issued a title insurance policy to HTC before it ever entered into the Ground Lease. (R. at 531 and 591-601). The purported easement on lot 27 will not impede title insurance or the acquisition of financing. (Affidavit of Michael Moss, ¶ 12 - R. at 543).

Appellant's ¶ 21 - Instead of fulfilling its obligation under the Ground Lease to remove the Easement, BFH argued and continues to argue to Holladay that the Easement is invalid.

Response: This statement is not supported by the record. The Ground Lease is devoid of any language that requires Brown to remove any easement, especially an easement that does not exist. (R. at 9-38). Instead, the Ground Lease puts the onus on the tenant "at its cost" to pursue any such action. (R. at 14, Art. 3.1(a)).

Appellant's ¶ 23 - As a result of the existence of the Easement, Holladay is unable

to develop or construct the improvements on the Property, or obtain financing for the same.

Response: This statement is not supported by the record. Mr. Hulbert does not have sufficient foundation as to his ability to make such a determination. (*See* Brown’s motion to strike the affidavit of Mr. Hulbert- R. at 345-352, 505-508). Further, the purported easement on lot 27 will not impede acquisition of financing. (Affidavit of Michael Moss, ¶ 12 - R. at 543).

Appellant’s ¶ 24 - The location of the Property makes it unique for Holladay’s desired development.

Response: This statement is precluded by the parol evidence rule. (R. at 345-352, 505-508).

Appellant’s ¶ 25 - BFH admits that it will be obligated to remove the Easement if Holladay exercises its option to purchase the Property under the Lease, and if the Easement holder asserts his right to use it.

Response: This statement is not supported by the record. The Reply Memorandum actually states “[i]f Plaintiff were attempting to exercise it’s option (which is not available for several years), it might be a different story. But that is a different story for a different day if it ever comes about. That issue is simply not ripe.” (R. at 360).

SUMMARY OF ARGUMENTS

Brown owns a parcel of real estate known as lot 27, Peony Gardens (“Subject

Property”). In March of 2005, HTC and Brown entered into a Ground Lease regarding lot 27. The Ground Lease, a triple net lease, provides that rent would be paid without offset and without cost to the landlord. The Ground Lease further authorizes the tenant to contest, at its own expense, any legal requirements, defined as including any covenants, restrictions, or conditions of record which would include contesting the easement alleged in this case if the tenant had a genuine concern about the easement. The Ground Lease also provides for attorney fees to the prevailing party in legal actions relating to the Ground Lease.

In about 1980, Peony Gardens, who owned lots 27 and 26, recorded a notice of contract on lot 26 that described an easement across lot 27. That notice of contract was never recorded against lot 27.

Later, lot 27 was conveyed to Brown’s predecessor in title with no mention of the easement. Through mesne conveyances, none of which mention the easement, lot 27 came into the possession and ownership of Brown. An easement was never recorded against lot 27, and there is no evidence of an easement on the ground. In fact, for at least the past two decades, the path of the easement has been impassable because a berm is in the way. For the last 10 years, permanent storage facilities have been built upon the path of the purported easement. Furthermore, nobody has ever made a claim to the easement or attempted to use it. Also, nobody has ever tried to interfere with HTC’s quiet enjoyment of its leasehold on account of the easement. At the time the two parties entered into the Ground Lease, neither had knowledge of the alleged easement.

Despite the decades with no legal or actual recognition of the unrecorded easement, on August 9, 2006, HTC filed a complaint against Brown in Third District Court seeking declaratory relief, breach of contract, and specific performance, claiming that the easement is a violation of the Ground Lease.

Prior to and after the filing of the lawsuit, HTC withheld rent payments habitually and for the express purpose of trying to strong-arm Brown into taking action and incurring cost, which under the Ground Lease, HTC covenanted not to do. For several months prior to September, 2006, HTC did not pay rent. Each month Brown had to hire a lawyer to send a demand letter to HTC in order to collect the rent that was withheld until *after that demand letter was received*. In this fashion the tenant, HTC, caused Brown, on a regular basis, to incur costs to collect the rent contrary to the Tenant's express covenant to pay the rent without cost to the Landlord. A formal notice of default letter, stating that the habitual withholding of rents and the lawsuit filed against Brown was a material breach of the Ground Lease, was sent to HTC on September 18, 2006.

In November, 2006, Brown filed a counterclaim for unlawful detainer under Utah Code Ann. § 78-36-8, asserting that the lawsuit and HTC's pattern of not making rental payments until Appellant had hired a lawyer to demand payment were in breach of the Ground Lease by violating both the express covenants of the Ground Lease *and* the covenant of good faith and fair dealing, and causing Brown to incur costs in connection with the collection of rents.

The Trial Court correctly found that there is no easement affecting this property.

The purported easement was never recorded against the property in question that has now passed through the hands of several bona fide purchasers. There has never been any indication on the ground of this purported easement.

In the Findings of Fact, Conclusions of Law, and Order of March 16, 2007, Third Judicial District Court Judge John Paul Kennedy stated, “Because there is no easement affecting lot 27, there is no basis for the HTC’s claims against the defendant and *this action should not have been brought against the landlord*, causing the landlord to incur costs.” (See ¶ 2, Conclusions of Law - R. at 827) (Emphasis added).

The Judge also rightfully called HTC’s pattern of late payments, as well as the filing of the action against Brown, “not appropriate conduct.” (See ¶ 4, Conclusions of Law - R. at 828).

However, the Judge erred in his legal conclusion that despite HTC’s inappropriate conduct in bringing the action and its inappropriate conduct in habitually delaying rent payments, HTC’s actions did not constitute a material breach of the Ground Lease. Brown is appealing this determination by the Trial Court.

ARGUMENT

I. HTC PROCURED A TITLE REPORT ON LOT 27 BEFORE THE GROUND LEASE WAS SIGNED IN 2005 AND IT DID NOT SHOW THE PURPORTED EASEMENT.

HTC procured title insurance covering lot 27 on December 22, 2004. The purported easement was not “excepted” from the 2004 title report procured by HTC -- by the same title insurance company that is now asserting that an easement, that was never

recorded against lot 27, somehow affects the title. To the extent that HTC is attempting to persuade this Court that Brown had some ill intent, such assertions must be immediately dismissed. Further, Section 1.1 of the Ground Lease states Brown is delivering possession of the Property “subject to the following matters to the extent they affect the [Property]: (a) The Permitted Exceptions to the extent valid and subsisting and affecting the Premises as of the Effective Date” The Effective Date is defined as “all covenants, restrictions, and conditions now or hereafter of record which may be applicable to Tenant or to all or any portion of the Premises” (See Ground Lease Agreement - R. at 11). In reality, as far as the parties were concerned, Brown did deliver possession of the Subject Property with no knowledge of any title issues as attested by the Title Report procured by HTC.

II. THE SUBJECT PROPERTY IS NOT ENCUMBERED BY THE PURPORTED EASEMENT.

Brown is the owner and Lessor of lot 27. There is nothing recorded against lot 27 that gives notice of or even mentions the supposed easement. HTC tries to create a cloud on the title of lot 27 by reference to documents recorded against lot 26. The law simply will not support that assertion. The only documents of record, recorded only against lot 26, and not lot 27, were two documents called a notice of contract. (R. at 603-605). In the notice of contract it was set out that lot 26 was under contract and included in the legal description was a purported easement over lot 27. (R. at 603-605; *see also* R. at 535-536). After recording the notice of contract on lot 26, nothing happened for several

years.³ (R. at 535). Then, the owner of both lots 26 and 27 conveyed lot 27 free and clear of any easements in 1984. (R. at 606 and 535). After this point in time, Ralom Investment Company, the owner of lot 26, did not own lot 27 and thus could not thereafter convey an easement over lot 27. (R. at 535). In 1993, after lot 27 had been conveyed free and clear of any easement, Ralom Investment Company who no longer owned lot 27, purported to convey lot 26 with an easement over lot 27 to Ben Aire Associates via warranty deed. (R. at 608-610). That warranty deed was not recorded against lot 27. (R. at 613-624). None of the conveyances of lot 27 ever included a reference to the purported easement. (R. at 613-624). Therefore, there is no legal argument that can be made that lot 27 is subject to an easement.

As asserted previously, when lot 27 was purchased, a title report was done and the purported easement did not show up. Brown did not have notice of any purported easement. There is nothing on the ground that would give a purchaser notice of the purported easement. Indeed, the route of the easement has been impassable since before Brown purchased the property. Storage units have now been on the real property covering the path of the claimed easement for over ten years and the purported easement has never been used. The owner of lot 26 has never asserted any right to lot 27. Surely a dispute cannot exist where a legally insupportable easement has never been asserted. In

³ This factual scenario is also consistent with the Doctrine of Merger. “A servitude is terminated when all the benefits and burdens come into a single ownership. Transfer of a previously benefited or burdened parcel into separate ownership does not revive a servitude terminated under the rule of the section.” (RESTATEMENT (THIRD) OF PROPERTY § 7.5 2000).

addition, pursuant to Utah Code Annotated § 57-3-103 the following law is applicable:

Each document not recorded as provided in this title is void as against any subsequent purchaser of the same real property, or any portion of it, if:

- (1) the subsequent purchaser purchased the property in good faith and for valuable consideration; and
- (2) the subsequent purchaser's document is first duly recorded.

Id.

Under the facts provided by HTC, Brown has free and clear title pursuant to Utah Code Annotated §57-3-103 as Brown paid value and did not have notice of any recorded easement against lot 27. Further, the Ground Lease itself is but another in a long chain of transactions by bona fide purchasers who have paid value in connection with lot 27 with *no actual or constructive notice of the purported easement.*

HTC argues that the Trial Court should not have ruled on whether or not an easement was in existence. (HTC's brief, pg. 15-16). That argument might make some sense if there were a colorable argument that an easement exists. But in this case, HTC could just as easily argue that an owner of property in Wyoming has an easement over lot 27. Where the purported easement has never been recorded against lot 27 and there has never been any physical indication of the easement, there is no colorable claim that this property was ever encumbered. The Trial Court determined that as to HTC and Brown, *there was not an easement problem.* (R. at 828).

For the first time on appeal, HTC is attempting to argue that the owner of lot 26 is an indispensable party. This argument makes little sense because HTC was the plaintiff and should have included the owner of lot 26 in the action if it thought such a person was

an indispensable party. Further, the Trial Court granted leave to HTC to amend the complaint to include the owner of lot 26, if HTC so desired. HTC chose not to. (R. at 828). It is too late to now argue a failure to add an indispensable party.

III. THE GROUND LEASE DOES NOT REQUIRE BROWN TO CLEAR TITLE.

HTC continues to argue that the Ground Lease requires Brown to file a quiet title action and get clear title as to an easement recorded against another lot. One searches in vain to find any such language in the Ground Lease. There is no language in the Ground Lease that says if an easement appears post hoc recorded against another lot, Brown must file a quiet title action and remove the easement or a breach exists and HTC is entitled to specific performance. In reviewing the Ground Lease, it is clear that no warranty of title exists. In fact Article 1.1 entitled “Demise” states

[L]andlord hereby leases to Tenant the Premises, together with all rights, privileges, easements, and appurtenances belonging to or in any way appertaining thereto, including but not limited to, any and all surface easements, rights, titles, and privileges of Landlord now or hereafter existing in and to adjacent streets, sidewalks and alleys for the Term, at the rental, and upon all of the covenants and conditions set forth herein.

(R. at 13).

Appertaining is defined as “pertain or relate.” Webster’s New Universal Unabridged Dictionary 72 (1994). This language would clearly encompass an undisclosed easement recorded against another parcel of land. Further, it is highly unlikely that a quiet title action could be maintained against a lien, never recorded, never asserted, and which does not interfere with the Brown’s uses or HTC’s quiet enjoyment of the property.

IV. THE GROUND LEASE AUTHORIZES HTC TO FILE A QUIET TITLE ACTION IF IT SO DESIRES.

This very situation was contemplated by the Ground Lease. The Ground Lease allows HTC to spend its money pursuing this ephemeral problem, if HTC so desires. Pursuant to paragraph 6.3 the “[t]enant shall have the right, at its own expense, to contest or review by appropriate legal or administrative proceeding the validity or legality of any such Legal Requirement” (R. at 20-21). Legal Requirement is defined as “all covenants, restrictions, and conditions now or hereafter of record which may be applicable to Tenant or to all or any portion of the Premises, or to the use, occupancy, possession, operation, maintenance, alteration, repair or restoration of any of the Premises” (R. at 11). Instead of exercising its right under the Ground Lease, HTC filed a frivolous suit to attempt to force Brown to comply with terms that do not exist, expending money to cure a problem that does not exist. The frivolous lawsuit constitutes a material breach of the Ground Lease agreement and Brown is entitled to a judgment and an order of restitution excluding HTC from Lot 27.

HTC argues that somehow the express terms of the Ground Lease that authorize HTC to take care of the easement, if HTC so desires, somehow really does not give this ability to HTC. HTC cited the Elder v. Nephi case for the assertion that HTC did not have standing to bring a quiet title action. 164 P.3d 1238 (Utah 2007). Contrary to HTC’s assertion, the question in the Elder case was “whether and to what extent a plaintiff may in the course of prosecuting a tort claim seek to impose upon an unwilling

defendant a property interest based on principles of prescription or adverse possession.”

Id. at 1243. Ultimately, the Utah Supreme Court determined that the plaintiff did not have standing to claim a property interest on behalf of the railroad. Id. at 1244. The Elder Court specifically held that

[b]ecause we see no reason why these well-established standing requirements should not extend to claims by prescriptive easement, we decline to extend our rules to permit a party to create a property interest in a third party for the purpose of exposing that party to liability for damages. Although a circumstance may arise in which we might find appropriate the creation of a prescriptive right by proxy, we do not face that circumstance here.

Id. at 1244.

The facts of the Elder case have nothing to do with this case and are not helpful to this Court. More instructive is the Archer v. Board of State Lands and Forestry case wherein the lessee did have standing to challenge an easement as does HTC in the present case. 907 P.2d 1142 (Utah 1995). In the Archer case, a lessee of state school trust lands owned an access right to a pipeline easement and attempted to challenge the assignment of the easement. The Supreme Court of Utah determined that the lessee had standing to assert a challenge to an assignment of the easement affecting lessee where the assignment would harm lessee. Id. at 1145.

The Archer Court cited the Jenkins Court, which sets forth the standard to determine standing. Specifically,

Jenkins requires that a party seeking standing demonstrate only one of following: (1) a personal stake in the controversy and some causal relationship between the injury, the governmental actions, and the relief

requested; (2) that no other party has a greater interest in the outcome of the case and the issues are unlikely to be raised at all unless the present party has standing to raise them; or (3) that the issues are of such great public importance that they ought to be decided in furtherance of the public interest.

Jenkins v. Swan, 675 P.2d 1145, 1150-51 (Utah 1983); *cited in* Archer v. Board of State Lands and Forestry, at 1145.

In this case, the first category is easily satisfied by HTC. HTC claims, without sufficient underpinning, that it cannot develop the leasehold interest as contemplated without removing the purported easement. Therefore, HTC has a personal stake in the resolution of the easement issue and is bestowed standing. Further, the Ground Lease expressly bestows standing on HTC. HTC's argument that it does not have standing is without basis.

The final case discussed by HTC is an Idaho case that again is not helpful in this case. In Tower Asset Sub Inc. v. Lawrence, the Court made the determination that because tenant was not the record owner of the dominant estate, it "lacks standing to seek to quiet title to the easement."⁴ 152 P.3d 581, 584 (Idaho 2007). The Idaho Court made this determination because "Hall, who is not a party to this suit, is the record owner of the alleged dominant estate." Id. In this case, Brown is the title owner and is a party to this action. In addition, the Trial Court granted leave to HTC to include the owner of lot 26 in the present suit, if HTC desired to do so. (R. at 828). Further, the Ground Lease gives

⁴ HTC, in its brief, quoted the Idaho court as stating there was no standing "to seek a quiet title declaration as to existence of easement on neighbors' land, as it was not the record owner of the purported dominant estate." This language actually comes directly from the "West Headnotes" issue summary provided by Westlaw, not the court's opinion.

HTC the authority to clear any titles issues, which again was not the case in the Tower case. As a result, HTC's argument regarding standing has no merit.

A. HTC'S ARGUMENT THAT EVEN THOUGH THE PURPORTED EASEMENT IS NOT RECORDED AGAINST LOT 27, IT IS STILL A VIOLATION OF THE GROUND LEASE IS UNTENABLE.

HTC has argued that even if the purported easement is not recorded against lot 27, it is a breach of the Ground Lease because a "legal impossibility is [not] a defense to breach of a lease covenant against encumbrances," citing, Howe v. Professional Manifest, Inc., 829 P.2d 160, 162 (Ut. Ct. App. 1992). The facts of the Howe case have nothing to do with this case. HTC has failed to recognize the significant distinguishing facts as related to this case. This Ground Lease does not have a "prohibition against all encumbrances of any nature" like the governing documents in the Brewer and Howe cases. In addition, the purported easement in this case, does not encumber the Subject Property, was not recorded by Brown, unlike the frivolous encumbrances that constituted clouds on the title in Howe and Brewer. Howe, 829 P.2d at 162; Brewer v. Peatross, 595 P.2d 866 (Utah 1979). In the Howe case, the Court determined that even though the Trust Deed was invalid, it was still a violation of the lease because it was recorded against the real property, which was prohibited by the Ground Lease. Had the Ground Lease in this case contained a prohibition against all encumbrances of any nature and had Brown recorded an easement on the Subject Property, Howe might be applicable. That did not happen in this case. The Howe court further determined that "[t]he Valley Bank

trust deed burdened the Howes' fee interest until it was removed from the record because it purported to limit their rights. Manivest breached the lease covenant against encumbrances, therefore, by recording the trust deed regardless of its legal effect.” Id. at 163. In this case, Brown did not authorize anything to be recorded against the real property like in the Howe case. Had Brown conveyed an easement to a third party, the Howe case might be applicable. Instead, in this case, there is no prohibition against all encumbrances, the purported easement has never been recorded against lot 27 and not only was not recorded by Brown, but was unknown to Brown. In fact, HTC itself pulled a title report on the Subject Property prior to the execution of the Ground Lease and the report did not show an easement. An easement was never recorded against lot 27, which further distinguishes this case from Howe. Therefore, the Howe case is distinguishable on all fours from the present case.

In Brewer, the court determined that the requirement that the title be clear was breached because of a known lien on the real property. In fact, the real property was conveyed via warranty deed and the Seller represented that the S.I.D. was paid, when in reality it had not been paid. Specifically, “[t]he court reasoned that the property was encumbered because the existence of the improvements was either known to the grantors or was discoverable from the record by the lien filed.” Brewer, 595 P.2d at 868. As discussed above, this purported easement has never been recorded against lot 27 and Brown was not aware of the purported easement at the time the Ground Lease was signed. Nor was HTC, as HTC acquired a title report on the Subject Property prior to the

execution of the Ground Lease in December of 2004. Therefore, these cases are not helpful to this Court and do not impose a requirement that Brown remove a nonexistent easement that is not recorded against lot 27.

V. NO WARRANTY OF TITLE EXISTS REGARDING THE GROUND LEASE.

In reviewing the Ground Lease, it is clear that no warranty of title exists. In fact Article 1.1 entitled “Demise” states

[L]andlord hereby leases to Tenant the Premises, together with all rights, privileges, easements, and appurtenances belonging to or in any way appertaining thereto, including but not limited to, any and all surface easements, rights, titles, and privileges of Landlord now or hereafter existing in and to adjacent streets, sidewalks and alleys for the Term, at the rental, and upon all of the covenants and conditions set forth herein.

(R. at 13).

HTC has been unable to point Brown or this Court to anything in the Ground Lease that requires clear title to the Subject Property during the leasehold.

If HTC had exercised its option to purchase the real property, which will not now occur because of HTC’s default, section 16 of the Ground Lease would apply to such exercise. In section 16.5 of the Ground Lease it provides in part that

(b) Landlord’s Estate shall be conveyed to Tenant by grant deed, bill of sale, general assignment and other appropriate transfer instruments, all in form reasonably acceptable to both Tenant and Landlord; (c) Landlord’s Estate shall be subject to only the matters described in Section 1.1 and other matters reasonably approved by Tenant; (d) Landlord’s Estate shall be conveyed using a general warranty deed . . .

(R. at 31).

As discussed in Article 16.5, had HTC exercised its option, the real property would be conveyed via warranty deed and would be conveyed subject to the matters in Article 1.1 or other matters approved by Tenant. At that point, if the Tenant had not approved of the purported easement that is not recorded against lot 27, HTC may have decided not to exercise the option. However, the easement would still be exempted under subparagraph (e) of Article 1.1. HTC's argument that Article 16.5 helps this Court interpret the Ground Lease is without merit.

After review of all the documents submitted by HTC, Mr. Moss, an attorney and a title expert, determined that the easement is not valid and financing would not be impeded by this unenforceable easement. (R. at 543). Mr. Moss also pointed out that based on the information attached to the Affidavit of Joseph Capilli, his office would not have a problem issuing a title policy without an exception clause regarding the unenforceable easement. (R. at 543). Indeed, Mr. Capilli's own office was once ready and willing to insure the title to this property. Mr. Capilli's testimony, like the rest of HTC's case is nothing but a ruse designed to try and justify HTC's inexcusable breach of the Ground Lease.

VI. THERE IS NO AMBIGUITY IN THE GROUND LEASE.

As explained above, there is no ambiguity in the Ground Lease. In fact, the parties have not pointed to a certain paragraph and had differing meanings derived therein. The language of the Ground Lease speaks for itself. Thus, outside evidence of intent is not relevant, but burdening. The parol evidence rule functions "to exclude evidence of

contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an *integrated* contract.” Hall v. Process Instruments & Control, Inc., 890 P.2d 1024, 1026 (Utah 1995). The Ground Lease provides the following:

This Lease, and the Exhibits and addenda, if any, attached hereto, constitute the entire agreement between the parties, and there are no agreements or representations between the parties except as expressed herein. The recitals set forth above are incorporated herein and made a part of this Lease. All prior negotiations and agreements between Landlord and Tenant with respect to the subject matter hereof are superseded by this Lease. Except as otherwise provided herein, no subsequent change or addition to this Lease shall be binding unless in writing and signed by the parties hereto.

(Paragraph 22.11 - R. at 35).

Therefore, as no assertion has been made that the Ground Lease is not lucid, all statements regarding intent and anticipations are not relevant in interpreting the terms of the Ground Lease.

VII. EVEN IF THE PURPORTED EASEMENT EXISTS, IT IS ALLOWABLE UNDER THE EXPRESS TERMS OF THE GROUND LEASE.

In the definition section of the Ground Lease it states, “‘premises’ shall mean the Leased Property and the Improvements now or hereafter located thereon.” (R. at 3). Therefore, “premises” in the Ground Lease refers to the Subject Property. “‘Effective Date’ means the date first written above, which is the effective date upon which each party has caused to be delivered to the other party this Lease, Landlord’s exclusive right to use the Premises has terminated and the Landlord has actually vacated the Premises.”

(Pg. 2, Ground Lease Agreement - R. at 10). Article 1.1 of the Ground Lease provides in relevant part:

Concurrently with the Effective Date, Landlord has delivered possession of the Premises to Tenant, subject to the following matters to the extent that they affect the Premises:

(a) The Permitted Exceptions to the extent valid and subsisting and affecting the Premises as the Effective Date;

(e) Present violations . . . or requirements that might be disclosed by an examination and inspection or search of the Premises by any federal, state, county or municipal department or authority having jurisdiction, as the same may exist on the Effective Date.

(R. at 13).

HTC has argued on several occasions that because the purported easement was not listed on the “Permitted Exceptions” list under subsection (a), that the existence of the purported easement was a violation of the Ground Lease. This makes no sense based on paragraph (e) of the exceptions. Article 1.1 of the Ground Lease states that the Leasehold interest is delivered

subject to the following matters to the extent that they affect the Premises Present violations . . . or requirements that might be disclosed by an examination and inspection or search of the Premises by any federal, state, county or municipal department or authority having jurisdiction, as the same may exist on the Effective Date.

(R. at 13).

If the easement exists, section (e) specifically exempts the purported easement as it could have been discovered on the “Effective Date” by examination or inspection of county records. Therefore, even if the purported easement exists, it is an allowable exception

under the terms of the Ground Lease and as a result, all of HTC's claims fail.

VIII. BROWN'S AFFIDAVIT OF ATTORNEY FEES COMPLIES WITH THE UTAH RULES OF CIVIL PROCEDURE AND IS IN ACCORDANCE WITH THIS COURT'S RULING.

HTC inaccurately argues that Brown is entitled to only a portion of its attorney fees.

As the Trial Court correctly found,

With respect to bring[ing] the lawsuit, I'm going to dismiss the plaintiff's lawsuit and I'm also going to dismiss the counterclaims, except for the attorney's fees which I am going to grant to defendants in this case because they have prevailed on the major issue, which is in respect to the easement.

(R. at 928, pg. 63).

This ruling is also supported by the attorney fees clause in the Ground Lease which reads "[i]n any proceeding or controversy associated with or arising out of this Lease or claimed or actual breach hereof, the prevailing party shall be entitled to recover from the other party as a part of the prevailing party's costs, such party's actual and reasonable attorneys' fees and court costs." (R. at 33). The lower court clearly ruled that Brown was the prevailing party and thus entitled to all attorney fees and costs associated with the controversy. Further, while the court found that HTC's conduct in regularly and intentionally withholding rent past the due date under the Ground Lease was not sufficient grounds to evict HTC, the Trial Court did find that such conduct was not acceptable conduct. Specifically, the Trial Court stated the following: "I don't find that the lack, or the gamesmanship that was played by the plaintiff to be acceptable conduct . . . If it was indeed to put pressure on the landlord, I think it is an unsuccessful way in engaging in

some self help that parties just ought not to do.” (R. at 928, pg. 63). Case law also supports the award of attorney fees and costs to the prevailing party. Crowley v. Blake, 2007 UT App. 245 ¶13, 167 P.3d 1087, 1090 (“In certain circumstances, a court may easily determine which party is the prevailing party. For example, . . . ‘if defendant successfully defends and avoids adverse judgment, defendant has prevailed.’”), *quoting* R.T. Nielson Co. v. Cook, 2002 UT 11, ¶23, 40 P.3d 1119.

Although HTC cannot argue that Brown is not entitled to an award of attorney fees, HTC is attempting to argue that Brown did not clearly set out the amount of attorney fees that were due and what work was done to incur the attorney fees. HTC first argues that “there is no basis for the award stated in the Kimball Affidavit.” A brief review of paragraph 4(b) provides “188.5 hours have been spent by attorneys in this firm to prosecute this claim to judgment, or to the stage for which attorney’s fees are claimed.” (R. at 820).

HTC is also arguing that “BFH [Brown] has wholly failed to submit sufficient evidence to substantiate its claim for fees, or to allow the Trial Court to determine the reasonableness of the fees.” (Appellant’s brief, pg. 19). This assertion is incorrect. As paragraph 11 of the Kimball Affidavit shows, Brown has provided reasonable details as to the services provided in the case. In fact, the following list is provided:

11. Attorney Services.

a. The following services have been rendered by myself primarily, but also by Brennan Moss and Blake Atkin in this case: Review of documents pertaining to the case; Legal Research; Preparation of 10 Day Notice to Pay or Quit; Reviewing of Title and the Deeds and all other

Documents regarding to this Matter; Preparation of Motion to Dismiss; Motion and Memorandum in Support of Motions to Strike; Memorandum in Opposition to Motion to Dismiss; Summary Judgment Motion and Memorandum; working on discovery issues; Motion to Strike Affidavits; Subpoena; Preparing for the Hearing; Conference and meetings with expert; hearing preparation and attendance; Reviewing the Request to Submit for Decision; Reply Memorandum in Support of Motion to Strike Affidavit; Finding of Facts and Conclusions of Law; Preparation of Affidavit of Attorneys Fees and Costs, discussions with opposing party regarding settlement, and correspondence between client and third parties; extensive conferences with client regarding the case; Post trial hearings and preparation of pleadings including orders and responses to objections.

(R. at 841).

This information is also provided under the heading Attorney Services, which clearly sets out that the services were provided by attorneys. In addition, paragraph 11 shows that the hours were billed at the rates of \$175.00 to \$200.00 per hour. HTC then argues that the Kimball Affidavit also fails to give any analysis as to why the factors listed show that the fee is reasonable. This assertion is again inaccurate. The Kimball Affidavit provides the following in relevant part:

6. I am generally familiar with the billing rates charged by attorneys with various levels of experience and expertise in this community. Therefore, it is my opinion that a fair and reasonable fee in this matter is \$39,675.50, taking into account the following factors:

- a. The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
- b. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- c. The fee customarily charged in the locality for similar legal services;
- d. The amount involved and the results obtained;
- e. The time limitations imposed by the client or by the circumstances;

- f. The nature and length of the professional relationship with the client;
- g. The experience, reputation and ability of the lawyer or lawyers performing the services; and
- h. Whether the fee is fixed or contingent.

(R. at 842-843).

Brown has submitted a sworn opinion regarding the amount of attorney fees incurred in the case and then told this Court that the above factors were considered in that opinion. Therefore, the opinion clearly sets out the necessary factors to determine a reasonable amount of attorney fees and costs incurred. In addition, and more importantly, HTC has not contradicted Brown's sworn testimony with a counter expert or any sworn testimony that this Court could rely on.

HTC argues "[n]o hearing was held with regard to the Trial Court's award of fees and costs." (HTC's brief, pg. 19). This statement is incorrect. On May 1, 2007, the Trial Court held a hearing regarding the order in the case and the award of attorney fees was ruled on and discussed. The Trial Court made the following factual findings:

The Court: Why was it resolved? How was it resolved? What caused your client to stop doing what they were doing? He says, Mr. Atkin says it's because we came in and we took action, legal action, either writing letters, making phone calls, somehow intervened and got them to change their conduct.

Mr. Miller: I don't know. I'd have to ask my client Your Honor. I personally wasn't involved back then and I'd be speculating to represent to the Court any differently.

The Court: I'm going to award fees to the extent that that happened and I don't know how much time was involved but you can go through your records and if you find that you were writing letters of whatever you were doing on that issue, I think I'll award fees for that. I won't award fees beyond that on that issue.

Mr. Miller: So that I'm clear, Your Honor, you're still finding that it is not a breach of the implied covenant of good faith and fair dealing nor a violation of the lease but fees will be awarded to the extent you've just outlined?

The Court: Yes. And the reason I'm doing that is because I think the conduct was unacceptable under the lease and he had to come in to get them to stop and so they stopped it. I didn't find because they had stopped it, because he'd been accepting the payments and so forth and as time went on, I didn't find it as a violation but I found it as unacceptable conduct that was required. I don't know how much time it took you to do that though.

(R. at 928, pgs. 81-82).

After the hearing on May 1, 2007, Brown submitted the following supplemental affidavit of attorney fees which in part states:

2. At a hearing before this Court on May 1, 2007, this Court reaffirmed its previous order awarding attorney fees to Defendant as the prevailing party in this case and as a result, this affidavit is submitted to this Court.
3. Specifically, this Court determined as to Plaintiff's claims, Defendant is entitled to attorney fees and costs.
4. As to the claims asserted by Defendant, Defendant is entitled to attorney fees incurred until Plaintiff started paying rent on the first of the month as provided in the Lease Agreement.
5. This suit was initiated on August 9, 2006.
6. On approximately September 18, 2006, counsel for Defendant sent a letter requiring that the rent be paid on the first of the month as required by the Lease Agreement. (See attached Exhibit A).
7. As a result of the September 18, 2006, letter, Plaintiff began paying rent on the first of the month starting in October of 2006.
8. After October of 2006, counsel for Defendant drafted a Counterclaim, filed a motion to set the amount of the possession bond and drafted a response to Plaintiff's Motion to Dismiss to base on failure to state a claim.
9. The attorney fees incurred to draft the Counterclaim, motion to set the amount of possession bond and response to Plaintiff's motion to dismiss have not been calculated as attorney fees awarded to Defendant. This determination has been made as succinctly as possible to follow this Court's order. In addition, Defendant has reduced some of the preparation time for the hearing that took place on March 12, 2007. Likely, this

reduction was not necessary as the preparation time that went into the motion to dismiss submitted by Plaintiff was minimal.

(R. at 839-841).

After reviewing the Supplemental Affidavit, the Trial Court correctly entered an award of attorney fees and costs as reduced pursuant to the May 1, 2007, hearing.

IX. FILING THIS FRIVOLOUS LAWSUIT AGAINST BROWN AND DELAYING RENT PAYMENTS IN BAD FAITH IS A MATERIAL BREACH OF THE GROUND LEASE.

As established by prior affidavits and pleadings, shortly after HTC signed the Ground Lease with Brown, HTC started causing problems. In fact, instead of paying rent on time, HTC met with representatives of Brown and attempted to force a renegotiation of the Ground Lease. After Brown refused, HTC began withholding the rent in a bad faith manner to cause Brown financial stress. The Ground Lease requires the rent to be paid on the first of the month with a 15 day grace period. If the rent is not paid within the grace period, Brown then has to serve a 10 day notice to pay rent. This went on for several months until HTC attempted to apply additional pressure by filing this lawsuit. After Brown raised the lawsuit as a violation of the duty to act in good faith, HTC then began paying rent again as agreed in the Ground Lease.

However, the September 18, 2006, letter to HTC was notice that HTC was in material breach of the Ground Lease because HTC filed a frivolous lawsuit against Brown. HTC did not dismiss the lawsuit and thereafter Brown was forced to file a counterclaim for breach of contract and unlawful detainer. Filing a frivolous lawsuit

against the landlord is a material breach of the Ground Lease.

A material breach is defined as an action that

constitutes so serious a breach as to justify rescission is not easily reduced to precise statement, but certainly a failure of performance which “defeats the very object of the contract” or “[is] of such prime importance that the contract would not have been made if default in that particular had been contemplated” is a material failure.

Coalville City v. Lundgren, 930 P.2d 1206, 1210 (Utah Ct. App. 1997).

Willston on Contract also sets forth elements to determine whether a material breach has taken place. Specifically, *Willston* provides:

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including reasonable assurances;
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

23 *Williston on Contract* § 63:3 (4th ed.).

In this case, HTC, the tenant, tried to renegotiate the Ground Lease after it was signed. When that failed, HTC sued Brown, the landlord, to try and force Brown to remove an easement that is not recorded on the Subject Property and also ceased paying rent until Brown demanded payment through an attorney. This unreasonable conduct

happened month after month requiring Brown to incur attorney fees each month to collect the rent. Brown gave HTC appropriate notice that the lawsuit needed to be dismissed as it was a material breach of the Ground Lease. HTC did not dismiss the lawsuit. After pleadings and argument were submitted to the Trial Court, the Trial Court determined that there is not a violation of the Ground Lease on Brown's part and HTC should have filed their own quiet title action, if they so desired as the Ground Lease allows such. The lower Court then allowed HTC to remain as the tenant even though HTC filed a meritless lawsuit against the landlord, Brown. The lawsuit brought by HTC constitutes a material breach of the Ground Lease. HTC has undermined the very purpose of the Ground Lease by making late payments and suing Brown based on a frivolous claim. The actions by HTC go to the very heart of the Ground Lease and undermine the income stream it was designed to bring. Therefore, the actions of HTC should be considered a material breach of the Ground Lease.

A. HTC HAS VIOLATED THE DUTY OF GOOD FAITH AND FAIR DEALING.

HTC has repeatedly violated the implied covenant of good faith and fair dealing. "Under a covenant of good faith and fair dealing, each party impliedly promises that he will not intentionally or purposely do anything which will destroy or injure the other party's right to receive the fruits of the contract." St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199 (Utah 1991); cited in Mark Technologies Corp. v. Utah Resources International, Inc., 147 P.3d 509 (Ut Ct. App. 2006). Further, the

Ground Lease specifically provides “each party hereto agrees to act reasonably and in good faith with respect to the performance and fulfillment of the terms of each and every covenant and condition contained in the Lease.” (Ground Lease Article 22.9 - R. at 34). The Ground Lease provides that HTC is required to pay rent on the first of the month. (R. at 14). HTC is aware that Brown relies on this money being timely paid for income. (R. at 520). Instead of making timely payments as required, HTC intentionally withheld rent payments and required Brown to retain an attorney and give notice in accordance with the Ground Lease to make HTC make the payments as required. Had this happened one time, it would be a different story. However, this has taken place numerous times. In fact, this retaliatory conduct took place until Brown’s counsel sent a letter in September, 2006, stating that such conduct was a violation of the covenant of good faith and fair dealing. HTC even admits that rent was intentionally withheld as retribution. (R. at 409). HTC’s actions clearly breached the duty to act in a good faith manner.

X. AS HTC REFUSED TO DISMISS THE LAWSUIT AGAINST BROWN WITHIN 30 DAYS, HTC IS IN UNLAWFUL DETAINER OF THE SUBJECT PROPERTY AND MUST BE EXCLUDED.

Brown served proper notice on HTC requesting that HTC stop withholding rent payments and dismiss the lawsuit. (R. at 393-398 and 847-848). The September 18, 2006, letter provided the following in relevant part:

As you are aware, our office represents Brown Family Holdings, L.C. In March of 2005, Holladay Towne Center, LLC entered into a Ground Lease with Brown Family Holdings, L.C. At this time, Holladay is in default of the Ground Lease. First, for the past several months, Holladay has been withholding rent until near the end of each month which is

contrary to the requirement in the Ground Lease that rent be paid on the first day of each month. It appears that your client is playing games, which is contrary to paragraph 22.9. Paragraph 22.9 provides that “[e]xcept where a party hereto is specifically permitted to act in its sole and absolute discretion, each party hereto agrees to act reasonably and in good faith with respect to the performance and fulfillment of the terms of each and every covenant and condition contained in this Lease.” Therefore, Brown Family Holdings, demands that you immediately start paying rent on time, on the first of each month, as you are in breach of paragraph 22.9.

In addition, your client has filed suit against Brown Family Holdings, which is a material breach of the Ground Lease. Brown Family Holdings demands that you immediately dismiss your suit as it has no basis in law and is contrary to the terms of the Ground Lease.

The above breaches of the Ground Lease must be cured within 30 days or Brown Family Holdings will be forced to pursue an action under the unlawful detainer statute and seek an award of attorney fees and costs as a result of your client’s actions.

This letter is formal notice under paragraph 12.1(c) of the Ground Lease.

(R. at 847-848)(Emphasis in original).

Utah Code Annotated § 78-36-3(1) provides in relevant part:

A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

(e) when he continues in possession, in person or by subtenant, after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held . . . after notice in writing requiring in the alternative the performance of the conditions or covenant . . .

As the undisputed facts show, HTC did not comply with the September 18, 2006, notice to dismiss the lawsuit. Therefore, after the thirty day notice expired, HTC was in unlawful detainer of the Subject Property and continues to be at this time. HTC should

be excluded from the Subject Property pursuant to the unlawful detainer statute.

XI. BROWN IS ENTITLED TO ATTORNEY FEES AND COSTS INCURRED RELATING TO BROWN'S COUNTERCLAIMS⁵ AND ATTORNEY FEES AND COSTS INCURRED ON APPEAL.

The Ground Lease between the parties provides

[i]n any proceeding or controversy associated with or arising out of this Ground Lease or claimed or actual breach hereof, the prevailing party shall be entitled to recover from the other party as a part of the prevailing party's costs, such party's actual and reasonable attorneys' fees and court costs.

(R. at 33).

As Brown is the prevailing party in this case and likely will be on this appeal, Brown is entitled to attorney fees and costs. Pursuant to Rule 24(a)(9) of the Utah Rules of Appellate Procedure, Brown, who is seeking an award of attorney fees on appeal, is required to "state the request explicitly and set forth the legal basis for such an award." Therefore, pursuant to the Ground Lease between the parties, Brown as the prevailing party, requests an award of attorney fees and costs incurred on the appeal. Further, Brown requests an award of attorney fees and costs incurred relating to Brown's counterclaims, if this honorable Court determines that HTC's actions constitute a material breach of the Ground Lease.

CONCLUSION

Brown requests that this Court uphold the District Court's order to dismiss HTC's complaint and award attorney fees to Brown as the prevailing party. Brown also requests

⁵ The Trial Court limited the amount of attorney fees that Brown could collect relating to the Counterclaims asserted by Brown.


that this Court correct the Lower's Courts erroneous legal conclusion that the intentional and repeated failure to pay rent in a timely manner and the filing of a frivolous lawsuit was not a material breach of the Ground Lease and order the Ground Lease forfeit and return possession of the Subject Property to Brown and award attorney fees and costs to Brown pursuant to the Ground Lease.

ADDENDUM

The attached Addendum contains the following: "A" Ground Lease; "B" March 12, 2007 Oral Ruling; "C" Findings of Fact, Conclusions of Law, and Order; "D" Judgment; "E" Order Re: Award of Attorney Fees and Costs; "F" May 1, 2007 Hearing Transcript.

RESPECTFULLY SUBMITTED and DATED this 22 day of February, 2008.

ATKIN LAW OFFICES, P.C.



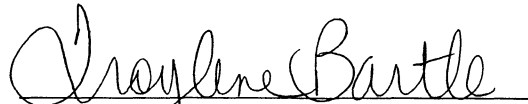
Blake S. Atkin
William O. Kimball
Attorneys for Appellee/Cross Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of February, 2008, I served a true and correct copy of the foregoing **BRIEF OF APPELLEE/CROSS-APPELLANT BROWN FAMILY HOLDINGS, L.C.** upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Paxton R. Guymon
James W. Anderson
Joel T. Zenger
Miller Guymon, P.C.
165 South Regent Street
Salt Lake City, Utah 84111

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile


Legal Assistant

Addendum A

GROUND LEASE

THIS GROUND LEASE (this "**Lease**"), dated as of March 1, 2005 (the "**Effective Date**"), is made by and between the BROWN FAMILY HOLDINGS, , L.C., a Utah limited liability company ("**Landlord**"), and HOLLADAY TOWNE CENTER, L.L.C., a Utah limited liability company ("**Tenant**"), with respect to the following facts:

RECITALS

A. Landlord is the fee owner of that certain real property situated in the City of Holladay, Salt Lake County, State of Utah, which real property is legally described on Exhibit "A" attached hereto, together with all rights and interest, if any, of Landlord in and to the land lying in the streets and roads in front thereof and adjoining thereto and in and to any easements or other rights appurtenant thereto (the "**Landlord Property**" or "**Land**").

NOW, THEREFORE, in consideration of the above recitals, and the representations, warranties, covenants and conditions contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, Landlord and Tenant agree as follows:

DEFINITIONS

As used in this Lease, the following capitalized terms shall have the meanings set forth below:

"**Affiliate**" means any Person which (1) directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, the Tenant or Landlord or (2) owns twenty-five percent (25%) or more of the equity interest of which is held beneficially or of record by the Tenant or Landlord, as the context may require. "**Control**" means the possession, directly or indirectly, of the power to cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract, family relationship or otherwise.

"**Anniversary Date**" means the date exactly one (1) year after the date on which an event occurred in a previous calendar year.

"**CPI**" means the increase in the Consumer Price Index from the same date in the preceding year

"**Commencement Date**" is the first day of the first full month beginning after the Effective Date

"Default Rate" means two percentage points in excess of the **"Prime Rate"**. The interest rate ascertained as the Default Rate under this Agreement shall change as often as, and when, the Prime Rate changes or changes in the law occur, as the case may be.

"Effective Date" means the date first written above, which is the effective date upon which each party has caused to be delivered to the other party this Lease, Landlord's exclusive right to use the Premises has terminated and the Landlord has actually vacated the Premises.

"Hazardous Substances" means any hazardous or toxic substances, materials or wastes, including, but not limited to, those substances, materials, and wastes listed in the United States Department of Transportation Hazardous Materials Table (49 CFR 172.101) or by the Environmental Protection Agency as hazardous substances (40 CFR Part 302); Hazardous Chemicals as defined in the OSHA Hazard Communication Standard; Hazardous Substances as defined in the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, et. seq.; Hazardous Substances as defined in the Toxic Substances Control Act, 15 U.S.C. § 2601-2671; and all substances now or hereafter designated as "hazardous substances," "hazardous materials" or "toxic substances" under any other federal, state or local laws or in any regulations adopted and publications promulgated pursuant to said laws, and amendments to all such laws and regulations thereto, or such substances, materials, and wastes which are or become regulated under any applicable local, state or federal law.

"Imposition" means all taxes (including possessory interest, real property, ad valorem, and personal property taxes), assessments, charges, license fees, municipal liens, levies, excise taxes, impact fees, or imposts, whether general or special, ordinary or extraordinary imposed by any governmental or quasi-governmental authority pursuant to law directly as a result of Tenant's leasehold ownership of the Premises or ownership of the Improvements located thereon which may be levied, assessed, charged or imposed, or may be or become a lien or charge upon the Premises, or any part thereof, or upon the leasehold estate hereby created.

"Improvements" means any structures hereafter constructed on and affixed to the Land.

"Indebtedness" means the amount which is outstanding at any given time under a Permitted Mortgage.

"Indemnified Parties" means either the Landlord Indemnified Parties or the Tenant Indemnified Parties, as applicable; an "Indemnified Party" means any individual within either such group, as applicable.

"Insurance Proceeds" means any amount received by Tenant from an insurance carrier, after deducting therefrom the reasonable fees and expenses of collection, including but not limited to reasonable attorneys' fees and experts' fees.

"Landlord's Estate" means all of Landlord's right, title, and interest in its fee estate in the Premises, its reversionary interest in the Improvements pursuant hereto, and all other

Rent and benefits due Landlord hereunder.

"Lease Expiration Date" means the earlier to occur of the following dates:

(a) that date which is twenty (20) years following the Commencement Date or (b) that date upon which this Lease is sooner terminated pursuant to the provisions of this Lease or the mutual agreement of the parties hereto.

"Leased Property" means the Landlord Property that is leased by the Tenant as legally described in the attached Exhibit "A".

"Legal Requirements" means all present and future laws, statutes, requirements, ordinances, orders, judgments, regulations, administrative or judicial determinations, even if unforeseen or extraordinary, of every governmental or quasi-governmental authority, court or agency claiming jurisdiction over the Premises now or hereafter enacted or in effect (including, but not limited to, Environmental Laws and those relating to accessibility to, usability by, and discrimination against, disabled individuals), and all covenants, restrictions, and conditions now or hereafter of record which may be applicable to Tenant or to all or any portion of the Premises, or to the use, occupancy, possession, operation, maintenance, alteration, repair or restoration of any of the Premises, even if compliance therewith necessitates structural changes to the Improvements or the making of Improvements, or results in interference with the use or enjoyment of all or any portion of the Premises.

"Mortgagee" means any one or more holders of the beneficial interest and secured position under any Permitted Mortgage.

"Official Records" means the Official Records of Salt Lake County, Utah.

"Partial Taking" is defined in Section 11.2.

"Permitted Exceptions" means those matters described in Exhibit "B" attached hereto affecting Landlord's title to the Land all of which have been approved by Tenant.

"Permitted Mortgage" means collectively (a) any deed(s) of trust and other collateral security instruments (including, without limitation, financing statements, security agreements and other documentation required pursuant to the Utah Uniform Commercial Code, and any absolute or conditional assignments of rents and subleases) serving as security for one or more construction loans and/or permanent loans (otherwise permitted to be incurred hereunder) which encumber Tenant's Estate, together with any modification, substitution, amendment, extension, increase, refinancing, replacement or recasting (otherwise permitted to be incurred hereunder) thereof and (b) any instruments required in connection with an assignment-subleaseback transaction involving Tenant's Estate; provided, however, in no event shall any such Permitted Mortgage encumber Landlord's Estate.

"Premises" shall mean the Leased Property and the Improvements now or hereafter located thereon.

"**Prime Rate**" means the Key Bank Reference Rate as announced from time to time, or if there is no Key Bank Reference Rate, then the Prime Rate shall be the prime rate announced from time to time by the banking institution in the State of Utah having the greatest dollar volume of deposits.

"**Purchase Option**" is defined in Article 16.

"**Rent**" means all sums due and payable to Landlord by Tenant hereunder.

"**Sublease**" means any present or future ground sublease, space sublease, use, or occupancy agreement, entered into in accordance with Article 14 below, and any modification, extension or termination of any of the foregoing entered into in accordance with Article 14 below. Subleases shall also include any ground lease, space lease, use or occupancy agreement between Tenant, as lessor thereunder, and a lessee, the demised premises under which are partially situated within the Premises and partially situated within other portions of Tenant's Project.

"**Subtenant**" means any person or entity entitled to the use of all or any portion of the Premises under any Sublease. Subtenants shall also include each lessee under any ground lease, space lease, use or occupancy agreement between Tenant, as lessor thereunder, and such lessee, the demised premises under which are partially situated within the Premises and partially situated within other portions of Tenant's Project.

"**Tenant's Estate**" means all of Tenant's right, title and interest in its leasehold estate in the Premises, its fee estate in the Improvements, and its interest under this Lease.

"**Tenant's Project**" means the Leased Property and any adjacent land and improvements owned or controlled by Tenant.

ARTICLE 1: DEMISE OF PREMISES

1.1 Demise. Landlord hereby leases to Tenant the Premises, together with all rights, privileges, easements, and appurtenances belonging to or in any way appertaining thereto, including but not limited to, any and all surface easements, rights, titles, and privileges of Landlord now or hereafter existing in and to adjacent streets, sidewalks and alleys for the Term, at the rental, and upon all of the covenants and conditions set forth herein.

Concurrently with the Effective Date, Landlord has delivered possession of the Premises to Tenant, subject to the following matters to the extent that they affect the Premises:

(a) The Permitted Exceptions to the extent valid and subsisting and affecting the Premises as of the Effective Date;

(b) The effect of all present building restrictions and regulations and present and future zoning laws, ordinances, resolutions, and regulations of the City of Sandy (the "City") which are of general application in the City and the County of Salt Lake and all present ordinances, regulations and orders of all boards, bureaus, commissions and bodies of the City (which are of general application in the City) and any county, state or federal agency, now having, or hereafter having acquired, jurisdiction of the Premises and the use and improvement thereof;

(c) The condition and state of repair of the Premises on the Effective Date;

(d) All taxes, duties, assessments, special assessments, water charges and sewer rents, and any other Impositions, accrued or unaccrued, fixed or not fixed, prorated as hereinafter more fully provided; and

(e) Present violations of law, ordinances, orders or requirements that might be disclosed by an examination and inspection or search of the Premises by any federal, state, county or municipal department or authority having jurisdiction, as the same may exist on the Effective Date.

1.2 Memorandum of Lease. This Lease shall not be recorded; however, to establish the status of Tenant's title, to establish the priority of this Lease as a condition of title, Landlord and Tenant agree to execute and acknowledge a short form Memorandum of this Lease which Tenant may record in the Official Records on or after the Effective Date. In the event of a discrepancy between the provisions of such Memorandum and this Lease, the provisions of this Lease shall prevail. Recordation of such Memoranda shall be at the expense of Tenant.

ARTICLE 2: TERM

2.1 Term. The term of this Lease shall commence on the Commencement Date and shall expire on the date which is (20) years after the Commencement Date, unless sooner terminated .

ARTICLE 3: RENT.

3.1 Payment of Rent. Tenant shall pay Rent during the term of this Ground Lease to Landlord as follows:

(a) Annual Rent. As annual rent ("Annual Rent") the sum of \$58,200.00, payable in advance in equal monthly installments of \$4,850.00 beginning on the first day of the calendar month after the Commencement Date and thereafter on the first day of each calendar month and is subject to adjustment as provided in subsection (b) below. This is a triple net lease, tenant agrees that the amount of annual rent will be paid without offset and that tenant will pay all impositions and costs relating to the property so that the Landlord has no cost or expense relating to the property during the term or any extension of the lease.

(b) Adjustment to Annual Rent. On the sixth (6th) anniversary of the Commencement Date, the Annual Rent shall be increased to \$64,200.00 payable in monthly installments of \$5,350.00. On the eleventh (11th) anniversary of the Commencement Date, the Annual Rent shall be increased to \$70,800.00 payable in monthly installments of \$5,900.00. On the sixteenth (16th) anniversary of the commencement Date, the Annual Rent shall be increased to \$78,060.00 payable in monthly installments of \$6,505.00..

3.2 Manner of Payment. Rent to be paid to Landlord shall be paid in legal tender for the payment of public and private debts to Landlord at such address as Landlord may from time to time designate in writing. For any period of less than a full month, quarter or year for which Rent is payable, the applicable Rent shall be prorated.

ARTICLE 4: PAYMENT OF TAXES AND OTHER CHARGES

4.1 Payment of Impositions. Commencing on the Effective Date and continuing for the entire Initial Term and the Primary Term (collectively, the "**Term**") of this Lease and any extension thereof, Tenant covenants and agrees (except as specifically otherwise provided in Sections 4.2 and 4.4 below) to pay and discharge or cause to be paid and discharged all Impositions promptly before delinquency and before any fine, interest or penalty shall be assessed by reason of its nonpayment. If, at any time during the Term or any extension thereof the methods of taxation prevailing at the Effective Date shall be so altered so that in lieu of any Imposition described in this Section 4.1 there shall be levied, assessed or imposed an alternate tax, however designated, such alternate tax shall be deemed an Imposition for the purpose of this Article and Tenant shall pay and discharge such Imposition as provided by this Article. If the Effective Date is a day other than the first day of a "tax" or "fiscal" year, i.e., July 1 (a "**Tax**

Year'), all such Impositions shall be prorated such that Tenant shall be responsible only for those Impositions payable in connection with the Premises following the Effective Date, such proration to be based on the ratio that the number of days in such fractional Tax Year bears to 365. Payment of Impositions with respect to the final Tax Year within the Term shall be similarly prorated. Notwithstanding the foregoing, if prior to the Effective Date or after the expiration or earlier termination of this Lease, any Imposition is not payable with respect to the Premises because Tenant is exempt under applicable law from paying such Imposition, then such Imposition shall not be prorated, and Tenant shall be responsible for 100% of such Imposition attributable to the period following the Effective Date or prior to the expiration or earlier termination of this Lease, as the case may be.

4.2 Contesting Impositions In the event that Tenant shall desire to contest or otherwise review by appropriate legal or administrative proceeding any Imposition, Tenant shall give Landlord written notice of its intention to so contest same, after giving such notice to Landlord, Tenant shall not be in default hereunder by reason of the non-payment of such Imposition if Tenant shall have (a) obtained and furnished to the applicable taxing authority (other than Landlord) a bond or other security to the extent required by applicable law, and (b) established reserves reasonably sufficient to pay such contested Imposition and the penalties and interest that may be reasonably payable in connection therewith. Any such contest or other proceeding shall be conducted solely at Tenant's expense and free of expense to Landlord. Tenant shall pay the amount so determined to be due, together with all costs, expenses, interest, and penalties related thereto.

4.3 Utilities All water, gas, electricity, or other public utilities used upon or furnished to the Premises during the Term hereof shall be promptly paid by Tenant as billed and prior to delinquency.

4.4 Payment by Landlord Unless Tenant is contesting any Impositions as provided in Section 4.2 above, Landlord may, at any time after the date any Imposition is delinquent, give written notice to Tenant specifying same, and if Tenant continues to fail to pay or contest such Imposition, then at any time after ten (10) days from Tenant's receipt of such written notice, Landlord may pay the Imposition specified in said notice. Tenant covenants to reimburse and pay Landlord any amount so paid or expended in the payment of such Imposition upon demand therefor, with interest thereon at the Default Rate from the date of such payment by Landlord until repaid by Tenant.

ARTICLE 5: ENCUMBRANCE OF TENANT'S ESTATE; MORTGAGEE PROTECTION

5.1 Encumbrance of Tenant's Estate Tenant shall have the right to encumber Tenant's Estate or any portion thereof or interest therein or any Sublease pursuant to one or more Permitted Mortgages, provided Tenant shall refrain from encumbering or purporting to encumber, by means of a Permitted Mortgage or otherwise any portion of the Landlord Property other than Tenant's interest in easements and covenants. Tenant shall, promptly following its receipt of any notice of default or other notice of the acceleration of the maturity of a Permitted

Mortgage from a Mortgagee, deliver a true and correct copy thereof to Landlord.

5.2 Mortgagee Protections. Provided that any Mortgagee provides Landlord with a conformed copy of each Permitted Mortgage which contains the name and address of such Mortgagee, and provided such Permitted Mortgage was executed in compliance with the terms hereof, Landlord hereby covenants and agrees to faithfully perform and comply with the following provisions with respect to such Permitted Mortgage:

(a) No Termination. No action by Tenant or Landlord to cancel, surrender, or materially modify the terms of this Lease or the provisions of this Article 5 shall be binding upon a Mortgagee without its prior written consent.

(b) Notices. If Landlord shall give any notice, demand, election or other communication which may adversely affect the security for a Permitted Mortgage, including without limitation a notice of an Event of Default hereunder (hereinafter collectively "**Notices**") to Tenant, Landlord shall simultaneously give a copy of each such Notice to the Mortgagee at the address theretofore designated by it. Such copies of Notices shall be sent by Landlord and deemed received as described in Article 17 below. No Notice given by Landlord to Tenant shall be binding upon or affect said Mortgagee unless a copy of said Notice shall be given to Mortgagee pursuant to this Section. In the case of an assignment of such Permitted Mortgage or change in address of such Mortgagee, said assignee or Mortgagee, by written notice to Landlord, may change the address to which such copies of Notices are to be sent. Landlord shall not be bound to recognize any assignment of such Permitted Mortgage unless and until Landlord shall be given written notice thereof, a copy of the executed assignment, and the name and address of the assignee. Thereafter, such assignee shall be deemed to be the Mortgagee hereunder with respect to the Permitted Mortgage being assigned.

(c) Performance of Covenants. The Mortgagee shall have the right to perform any term, covenant or condition and to remedy any default by Tenant hereunder within the time periods specified herein, and Landlord shall accept such performance with the same force and effect as if furnished by Tenant; provided, however, that said Mortgagee shall not thereby or hereby be subrogated to the rights of Landlord.

(d) Delegation to Mortgagee. Tenant may delegate irrevocably to the Mortgagee the non-exclusive authority to exercise any or all of Tenant's rights hereunder, but no such delegation shall be binding upon Landlord unless and until either Tenant or the Mortgagee shall give to Landlord a true copy of a written instrument effecting such delegation. Such delegation of authority may be effected by the terms of the Permitted Mortgage itself, in which case service upon Landlord of an executed counterpart or conformed copy of said Permitted Mortgage in accordance with this Article 5, together with written notice specifying the provisions therein which delegate such authority to said Mortgagee, shall be sufficient to give Landlord notice of such delegation.

(e) Default by Tenant. In the event of an Event of Default by Tenant in the payment of any monetary obligation hereunder, Landlord agrees not to terminate this Lease

unless and until Landlord provides written notice of such Event of Default to any Mortgagee and such Mortgagee shall have failed to cure such Event of Default within thirty (30) business days following delivery of such notice. In the event of an Event of Default by Tenant in the performance or observance of any non-monetary term, covenant, or condition to be performed by it hereunder, Landlord agrees not to terminate this Lease unless and until Landlord provides written notice of such Event of Default to any Mortgagee and such Mortgagee shall have failed to cure such Event of Default within thirty (30) days following the expiration of any grace or cure periods granted Tenant herein; provided, however, if such Event of Default cannot practicably be cured by the Mortgagee without taking possession of the Premises, or if such Event of Default is not susceptible of being cured by the Mortgagee, then Landlord shall not terminate this Lease if and as long as:

(i) In the case of an Event of Default which cannot practicably be cured by the Mortgagee without taking possession of the Premises, the Mortgagee has delivered to Landlord, prior to the date on which Landlord shall be entitled to give notice of lease termination, a written undertaking wherein the Mortgagee agrees that it will cure such Event of Default;

(ii) In the case of an Event of Default which cannot practicably be cured by the Mortgagee without taking possession of the Premises, said Mortgagee shall proceed diligently to obtain possession of the Premises as Mortgagee (including possession by receiver), and, upon obtaining such possession, shall proceed diligently to cure such Event of Default in accordance with the undertaking delivered pursuant to Subsection (i) above but in no event later than 180 days after obtaining possession; and

(iii) In the case of an Event of Default which is not susceptible to being cured by the Mortgagee (for example, the insolvency of Tenant), the Mortgagee shall institute foreclosure proceedings and diligently prosecute the same to completion (unless in the meantime it shall acquire Tenant's Estate hereunder, either in its own name or through a nominee, by assignment in lieu of foreclosure) and, upon such completion of foreclosure or acquisition, such Event of Default shall be deemed to have been cured.

The Mortgagee shall not be required to obtain possession or to continue in possession as Mortgagee of the Premises pursuant to Subsection (ii) above, or to continue to prosecute foreclosure proceedings pursuant to Subsection (iii) above, if and when such Event of Default shall be cured. Nothing herein shall preclude Landlord from exercising any of its rights or remedies with respect to any other Event of Default by Tenant during any period of such forbearance, but in such event the Mortgagee shall have all of its rights provided for herein. If the Mortgagee, its nominee, or a purchaser in a foreclosure sale, shall acquire title to Tenant's Estate hereunder and shall cure all Events of Default which are susceptible of being cured by the Mortgagee or by said purchaser, as the case may be, then prior Events of Default which are not susceptible to being cured by the Mortgagee or by said purchaser shall no longer be deemed Events of Default hereunder.

(f) Foreclosure. Foreclosure of any Permitted Mortgage, or any sale thereunder, whether by judicial proceedings or by virtue of any power contained in the Permitted Mortgage, or any conveyance of the leasehold estate hereunder from Tenant to any Mortgagee or its

designee through, or in lieu of, foreclosure or other appropriate proceedings in the nature thereof, shall not require the consent of Landlord or constitute a breach of any provision of or a default under this Lease, and upon such foreclosure, sale or conveyance Landlord shall recognize the Mortgagee or such designee as the Tenant hereunder. If any Mortgagee or other third party shall acquire Tenant's Estate as a result of a judicial or non-judicial foreclosure under any Permitted Mortgage, or by means of a deed in lieu of foreclosure, or through settlement of or arising out of any pending or contemplated foreclosure action, such Mortgagee or such other third party purchaser shall thereafter have the right to further assign or transfer Tenant's Estate to an assignee upon obtaining Landlord's consent with respect thereto, which consent shall not be unreasonably withheld or delayed, and subject to all of the other provisions of Article 15 below. Upon such acquisition of Tenant's Estate as described in the preceding sentence by Mortgagee or its designee, Landlord shall immediately execute and deliver a new ground lease of the Premises to such Mortgagee, upon the written request therefor by such Mortgagee given not later than one hundred twenty (120) days after such party's acquisition of the Tenant's Estate. Such new ground lease shall be substantially similar in form and content to the provisions of this Lease, except with respect to the parties thereto, the term thereof (which shall be co-extensive with the remaining term hereof), and the elimination of any requirements which have been fulfilled by Tenant prior thereto, and such new ground lease shall have priority equal to the priority of this Lease. Upon execution and delivery of such new ground lease, Landlord shall cooperate with the new Tenant, at the sole expense of said new Tenant, in taking such action as may be necessary to cancel and discharge this Lease and to remove Tenant named herein from the Premises.

(g) Mortgagee Loss Payable. Landlord agrees that the names of each Mortgagee shall be added to the "Loss Payable Endorsement" of any and all insurance policies required to be carried by Tenant under this Lease on condition that the insurance proceeds are to be applied in the manner specified herein.

(h) New Lease. Landlord agrees that in the event of termination of this Lease by reason of any Event of Default by Tenant, or by reason of the disaffirmance hereof by a receiver, liquidator or trustee for Tenant or its property, Landlord will enter into a new lease of the Premises with the most senior Mortgagee requesting a new lease for the remainder of the Lease Term, effective as of the date of such termination, at the rent, and upon the terms, provisions, covenants and agreements as herein contained and subject to the rights, if any, of any parties then in possession of any part of the Premises, provided:

(i) Mortgagee agrees to pay Landlord's reasonable attorney fees in connection with such new lease.

(i) The senior Mortgagee shall make written request upon Landlord for the new lease within sixty (60) days after the date of termination:

(ii) The senior Mortgagee shall pay to Landlord at the time of the execution and delivery of the new lease any and all sums which would, at the time of the execution and delivery thereof, be due and unpaid pursuant to this Lease but for its termination, and in addition thereto any expenses, including reasonable attorneys' fees, to which Landlord shall have been subjected by reason of the Event of Default;

(iii) The senior Mortgagee shall perform and observe all covenants herein contained on Tenant's part to be performed which are susceptible to being performed by the senior Mortgagee, and shall further remedy any other conditions which Tenant under the terminated Lease was obligated to perform under its terms, to the extent the same are curable or may be performed by the senior Mortgagee; and

(iv) The tenant under the new lease shall have the same right, title and interest in and to all improvements located on the Premises as Tenant had under the terminated Lease immediately prior to its termination.

(v) Notwithstanding anything to the contrary expressed or implied elsewhere in this Lease, any new lease made pursuant to this Section 5.2 (h), shall be prior to any Permitted Mortgage or other lien, charge or encumbrance on the Premises, to the same extent as the terminated Lease, and shall be accompanied by a conveyance of title to the existing improvements (free of any mortgage, deed of trust, lien, charge, or encumbrance created by Landlord) for a term of years equal to the term of the new lease, subject to the reversion in favor of Landlord upon expiration or sooner termination of the new lease. The rights granted any Mortgagee to a new lease shall survive any termination of this Lease.

(vi) If a Mortgagee shall elect to demand a new lease under this Section 5.2(h), Landlord agrees, at the request of, on behalf of and at the sole cost and expense of the Mortgagee, to institute and pursue diligently to conclusion any appropriate legal remedy or remedies to oust or remove the original Tenant from the Premises, and those Subtenants actually occupying the Premises, or any part thereof, as designated by the Mortgagee subject to any non-disturbance or attornment agreements with such Subtenants. Such Mortgagee shall indemnify, defend and hold harmless Landlord for any losses, claims, costs and expenses (including, without limitation, reasonable attorneys' fees) arising out of Landlord's compliance with the provisions of this subparagraph (vi).

(vii) Unless and until Landlord has received notice from all Mortgagees that the Mortgagees elect not to demand a new lease as provided in Section 5.2(h), or until the period therefore has expired, Landlord shall not cancel or agree to the termination or surrender of any existing Subleases nor enter into any new subleases hereunder without the prior written consent of the Mortgagee.

(i) No Obligation to Cure. Nothing herein contained shall require any Mortgagee to enter into a new lease pursuant to Section 5.2(h) above, or to cure any default of Tenant referred to above.

(j) No Personal Liability. In the event any Mortgagee or its designee becomes the Tenant under this Lease or under any new lease obtained pursuant to either Section 5.2(f) or 5.2(h) above, the Mortgagee or its designee shall be personally liable for the obligations of Tenant under this Lease or a new lease. (k) Insurance Proceeds. The proceeds from any insurance policies or arising from a condemnation shall be paid to and held by the senior Mortgagee and distributed pursuant to the provisions of this Lease.

(l) Material Notices The parties hereto shall give all Mortgagees notice of any arbitration, litigation, or condemnation proceedings, or of any pending adjustment of insurance claims as each may relate to the Premises, and any Mortgagee shall have the right to intervene therein and shall be made a party to such proceedings. The parties hereto do hereby consent to such intervention. In the event that any Mortgagee shall not elect to intervene or become a party to the proceedings, such Mortgagee shall receive notice and a copy of any award or decision made in connection therewith.

(m) Separate Agreement Landlord shall, upon request, execute, acknowledge and deliver to each Mortgagee, an agreement prepared at the sole cost and expense of Tenant, in form satisfactory to each Mortgagee, between Landlord, Tenant and the Mortgagees, agreeing to all of the provisions hereof, provided that Tenant shall pay Landlord's reasonable attorney fees for review of any such agreement.

(n) Further Amendments Landlord hereby agrees to cooperate with Tenant in including in this Lease by suitable amendment from time to time any provision which Tenant may reasonably request as being from any proposed Mortgagee for the purpose of implementing the Mortgagee protection provisions contained in this Lease and allowing such Mortgagee reasonable means to protect or preserve the lien of the Permitted Mortgage, as well as such other documents containing terms and provisions customarily required by Mortgagees (taking into account the customary requirements of their participants, syndication partners or ratings agencies) in connection with any such financing. Landlord agrees to execute and deliver (and to acknowledge, if necessary, for recording purposes) any agreement necessary to effectuate any such amendment as well as such other documents containing terms and provisions customarily required by Lenders in connection with any such financing, provided, however, that any such amendment shall not in any way affect the term or Rent under this Lease, nor otherwise in any material respect adversely affect any rights of Landlord under this Lease. Tenant agrees to pay Landlord's reasonable attorney fees in connection with any such amendments or documents.

ARTICLE 6: POSSESSION, USE, COMPLIANCE WITH LAWS, MAINTENANCE AND REPAIRS

6.1 Possession Tenant acknowledges that as of the Effective Date it shall accept possession of the Land.

6.2 Use Subject to the provisions of this Article 6, Tenant may use the Premises for a shopping center, retail store(s), office(s), or any other purpose permitted under Utah law. Tenant may construct all the Improvements on the Land as part of Tenant's Project.

6.3 Compliance With Laws Subject to the provisions of Article 8 below, Tenant shall comply with all Legal Requirements in the use, occupation, control and enjoyment of the Premises and in the prosecution and conduct of its business thereon. Tenant shall have the right, at its own cost and expense, to contest or review by appropriate legal or administrative proceeding the validity or legality of any such Legal Requirement, and during such contest

Tenant may refrain from complying therewith provided that compliance therewith may legally be held in abeyance without subjecting Landlord to any liability, civil or criminal, of whatsoever nature for failure so to comply therewith and without the incurrence of a lien, charge or liability against the Premises or Landlord's Estate, and provided further that all such proceedings shall be prosecuted by Tenant with due diligence

6.4 Maintenance Tenant shall, during the term hereof, keep and maintain the Premises in compliance with all Legal Requirements and all appurtenances thereto in good order and repair, and shall allow no nuisance to exist or be maintained therein. Landlord shall not be obligated to make any repairs, replacements, or renewals of any kind, nature, or description whatsoever to the Premises

ARTICLE 7: CHANGES, ALTERATIONS AND NEW CONSTRUCTION

7.1 Generally Tenant shall have the right to alter, repair, restore, replace or reconstruct any of the Improvements located on the Land (which right shall necessarily include the right to demolish any of the Improvements), provided that all such work shall be performed by Tenant in compliance with this Article 7

7.2 Notice of Completion Upon completion of any work of Improvement upon the Premises, Tenant shall file or cause to be filed, if required by applicable law, a valid Notice of Completion in a timely fashion

7.3 Title to Improvements All Improvements constructed or installed upon the Premises by Tenant at any time prior to the Lease Expiration Date shall be and thereafter remain real property, and are and shall be the property of Tenant, provided, however, that upon the Lease Expiration Date, title to such Improvements shall vest in Landlord and the same shall become the property of Landlord. Notwithstanding anything to the contrary contained in this Section, Tenant hereby covenants and agrees to promptly execute and acknowledge (at no cost or expense to Tenant) a quitclaim deed or any other documentation reasonably required by Landlord to effectuate the provisions of this Section, Tenant's covenant to do so shall survive the Lease Expiration Date

ARTICLE 8: ENVIRONMENTAL MATTERS

8.1 Environmental Compliance Commencing on the Effective Date, Tenant shall at all times comply with applicable Environmental Laws affecting the Premises. Tenant shall at its own expense maintain in effect any permits, license or other governmental approvals relating to Hazardous Substances, if any, required for Tenant's use, and cause each Subtenant to maintain in effect any such permits, license or other governmental approvals, if any, required for such Subtenant's use, of the Premises. Tenant shall make all disclosures required of Tenant by any such Environmental Laws, and shall comply with all orders, with respect to Tenant's and its employees', agents', contractors' and invitees' use of the Premises, issued by any governmental authority having jurisdiction over the Premises and take all action required by such governmental authorities to bring Tenant's and its employees', agents', contractors' and invitees' activities on the

Premises into compliance with all Environmental Laws affecting the Premises.

8.2 Notices. If at any time Tenant or Landlord shall become aware, or have reasonable cause to believe, that any actionable level of Hazardous Substance has been released or has otherwise come to be located on or beneath the Premises, such party shall immediately upon discovering the release or the presence or suspected presence of the Hazardous Substance, give written notice of that condition to the other party. In addition, the party first learning of the release or presence of an actionable level of Hazardous Substance on or beneath the Premises, shall immediately notify the other party in writing of: (i) any enforcement, cleanup, removal, or other governmental or regulatory action instituted, completed, or threatened pursuant to any Environmental Laws; (ii) any claim made or threatened by any person against Landlord, Tenant or the Premises arising out of or resulting from any actionable level of Hazardous Substances; and (iii) any reports made to any local, state, or federal environmental agency arising out of or in connection with any actionable level of Hazardous Substance.

8.3 Indemnity.

(a) By Landlord. Landlord shall indemnify, defend (by counsel acceptable to Tenant), protect, and hold harmless Tenant, Tenant's Affiliates and their respective partners, members, shareholders, trustees, beneficiaries, officers, directors, employees, attorneys, agents, heirs, representatives, successors and assigns ("**Tenant Indemnified Parties**"), from any and all claims, liabilities, penalties, fines, judgments, forfeitures, losses, costs, or expenses (including reasonable attorneys', consultants', and expert fees) (collectively, "**Claims**") arising from, related to, or in connection with the death of or injury to any person or damage to any property whatsoever, arising from or caused in whole or in part, directly or indirectly, by the presence in, on, under, or about the Land, or any discharge or release in or from the Land of any Hazardous Substance, to the extent that any such presence, discharge, or release is caused by Landlord's activities or the activities of any of Landlord's employees, agents, contractors or invitees prior to the Effective Date.

(b) Tenant. Tenant shall indemnify, defend (by counsel acceptable to Landlord), protect, and hold harmless Landlord, Landlord's Affiliates and their respective commissioners, directors, trustees, beneficiaries, officers, partners, member, directors, employees, attorneys, agents, successors and assigns ("**Landlord Indemnified Parties**"), from and against any and all Claims arising from, related to, or in connection with the death of or injury to any person or damage to any property whatsoever, arising from or caused in whole or in part, directly or indirectly, by (i) the presence in, on, under, or about the Premises or any discharge or release in or from the Premises of any Hazardous Substance, to the extent that any such presence, discharge, or release is caused by Tenant's activities, or the activities of any of Tenant's Subtenants, employees, agents, contractors or invitees, or (ii) Tenant's failure to comply with its covenants under Section 8.1 and occurs after the Effective Date.

(c) Costs Included; Survival. The indemnity obligations created hereunder shall include, without limitation, whether foreseeable or unforeseeable, any and all costs incurred in connection with any site investigation, and any and all costs for repair, cleanup, detoxification or decontamination, or other remedial action of the Premises. The obligations of the parties

hereunder shall survive the expiration or earlier termination of this Lease.

ARTICLE 9: INSURANCE

9.1 All Risk Insurance. Tenant, at its sole cost and expense, from the Effective Date forward shall throughout the entire Term keep the Insured Property insured against loss or damage by fire, windstorm, tornado, hail, water damage, lightning, vandalism and malicious mischief and against loss or damage by such other, further and additional risks as now are or hereafter may be embraced by the standard "all risk" forms or endorsements, and any coverage available under the so-called "installation floater", in each case in the full amount of the replacement value of the Insured Property and 100% of the replacement value of the rental receipts of the Insured Property on an actual loss-sustained basis (the "Full Insurable Value"). Likewise, any new Improvements constructed on the premises shall be insured as described above as of the Date of Substantial Completion. For purposes of the immediately preceding sentence, any building or structure and the Improvements related thereto or contained therein shall be deemed to be substantially completed when such building or structure and its related Improvements, taken as a whole, are substantially completed.

9.2 Additional Insurance. Tenant, at its sole cost and expense, shall throughout the entire Term procure and maintain:

(a) Liability Insurance. Liability insurance against claims for bodily injury, death or property damage occurring upon, in or about the Insured Property, including the public areas adjacent thereto, including, in a form no less than a commercial general liability policy, explosion, collapse and underground coverage, such insurance to afford immediate protection at the Effective Date for not less than \$1,000,000 per occurrence/aggregate and \$1,000,000 complete operations per occurrence/aggregate. Such insurance shall, among other things, provide broad form contractual liability coverage (including without limitation indemnification or hold harmless obligations of Tenant under this Lease) and personal injury (including without limitation coverage for assault and battery not committed by or at the direction of the insured). Such insurance for the Insured Property shall also provide so-called "cross -liability" coverage for all of the insureds in respect of the employees of each insured. Landlord shall be named an additional insured under such policy.

9.3 Builder's Risk Insurance. During the construction of any Improvements the insurance required by Section 9.1 shall, as to such Improvements which are part of the Insured Property, be in the form commonly known as "Builder's Risk" on an "all risk" basis including without limitation coverage against fire, lightning, wind damage, hail and collapse and coverage under the so-called "installation floater". The policy shall be secured and maintained by Tenant in a form and amount as may from time to time be determined by Tenant. Coverage shall include all materials, supplies and equipment that are intended for specific installation in the Insured Property while such materials, supplies and equipment are located in or on the Insured Property, in transit and while temporarily located away from the Insured Property for the purpose of repair, adjustment or storage at the risk of one of the insured parties.

9.4 Named Insureds and Insurance Trustee. All policies of insurance required

under Section 9.2 to be furnished under this Lease shall include as named insureds Landlord, Tenant, any Leasehold Mortgagee, Tenant's managers, and their respective officers, directors, trustees, partners, employees and agents, as their respective interests may appear. All policies of insurance required under Sections 9.1 and 9.3 to be furnished under this Lease shall include as named insureds Tenant, any Leasehold Mortgagee, Tenant's general partners, and their respective officers, directors, trustees, partners, employees and agents, as their respective interests may appear, and Landlord as an additional insured as its interest may appear. All such policies of insurance shall provide that the loss, if any, shall be payable to the Insurance Trustee, provided that payments may be made directly to the third-party claimants under liability policies. Promptly upon the Insurance Trustee's receipt of any payments under any such policy, the Insurance Trustee shall (a) reimburse Landlord, Tenant, any Leasehold Mortgagee and the Insurance Trustee for their reasonable expenses incurred in the collection of the insurance proceeds and (b) pay to Landlord, Tenant and any Leasehold Mortgagee their respective shares of the proceeds paid under any such policy.

9.5 Insurance in General. (a) Each policy of insurance required under this Lease shall include provisions that the holder of such policy shall not cancel or terminate such policy, or cause such policy to expire, due to non-renewal by Tenant, and that coverages under such policy shall not be materially reduced, unless at least 7 days notice of such proposed expiration or reduction has been provided to all the insureds named in such policy by such holder.

(b) To the extent allowed by Tenant's Lenders, all proceeds of such policies shall be used for the restoration or repair of the Insured Property.

(c) Each policy of insurance required under this Lease shall include a provision for a waiver of subrogation in favor of Landlord, Tenant and all other insureds.

9.6 Copies to Landlord. Upon the execution and delivery of this Lease and thereafter not less than ten days prior to the expiration date of any insurance policy delivered pursuant to this Article, Tenant shall deliver to Landlord certified copies (or certified extracts approved by Landlord) of to be furnished hereunder all policies of insurance required. Pending issuance of such policies, Tenant may deliver to Landlord a commitment evidencing the coverages required under this Lease, provided that Tenant shall replace such commitment with certified copies (or extracts, as permitted herein) prior to the expiration date of such commitment.

9.7 Adjustment of Loss. Any loss under any policy of insurance required to be furnished under this Lease shall be adjusted solely by Tenant.

9.8 Unearned Premiums. The unearned premiums on all insurance policies in force at the end of the Term which Landlord desires to keep in effect shall be reimbursed by Landlord to Tenant and, upon such reimbursement, Tenant shall transfer to Landlord all of Tenant's interest in such insurance policies, unless a New Lease is entered into by Landlord, in which case Tenant shall transfer to the new lessee under such New Lease all of Tenant's interest in such insurance policies.

9.9 Blanket Insurance. Nothing in this Article shall prevent Tenant from taking out insurance of the kind and in the amounts provided for under this Article under any blanket insurance policy which covers other properties owned or operated by Tenant or its Affiliates as well as the Insured Property, provided that any such policy of insurance (a) shall specify therein, or Tenant shall furnish Landlord with a written statement from the insurers under such policy specifying, the amount of the total insurance allocated to the Insured Property, which amount shall be not less than the amount required by this Article to be carried, and (b) shall not contain any clause which would result in the insured thereunder being required to carry insurance with respect to the Insured Property in an amount equal to a minimum specified percentage of the Full Insurable Value of such Insured Property in order to prevent the named insured therein from becoming a co-insurer of any loss with the insurer under such policy. Tenant shall furnish to Landlord, within 30 days after the filing thereof with any insurance ratemaking body, copies of the schedule or make-up of all property covered by any such policy of blanket insurance.

9.10 Primary and Excess Coverages. Limits of liability for insurance required hereunder may be provided by primary insurance or a combination of both primary and excess insurance coverages.

9.11 Insurance Non-Contributory. Neither Tenant nor Landlord shall carry separate insurance, concurrent in form and contributing, in the event of loss, for any insurance required under the provisions of this Article unless, in conformity with the requirements of this Article, all the named insureds listed in Section 9.4 are included therein as the named insureds. Tenant and Landlord shall each promptly notify of and deliver to the other each such separate insurance policy.

ARTICLE 10: DAMAGE OR DESTRUCTION

10.1 Damage. If, during the Term, there occurs any material or substantial damage to or destruction of the Premises or any part thereof resulting from any cause whatsoever (except for any damage or destruction caused by Landlord, its invitees or permittees), Tenant shall give prompt notice thereof to Landlord and the Mortgagee, and Tenant shall take such action as is reasonably necessary to assure that neither the Premises nor the Improvements constitutes a nuisance or otherwise presents a health or safety hazard, such work to be accomplished at Tenant's sole cost and expense. The foregoing obligation shall not be contingent upon the availability of any Insurance Proceeds; however, Tenant shall be reimbursed out of the Insurance Proceeds for such work to the extent available.

10.2 Cancellation. Tenant shall have the right, under any circumstance that would excuse the obligation of Tenant to restore the Premises, to terminate this Lease, by notifying Landlord within sixty (60) days after such date of damage or destruction. If the Premises shall be damaged so that Tenant reasonably determines that the cost would make restoration thereof unfeasible, notwithstanding the availability of Insurance Proceeds therefor, Tenant may terminate this Lease within sixty (60) days after such damage. Within 360 days after such termination, Tenant shall raze the then existing Improvements on the Land and clear the Land of debris and rubble.

10 3 Restoration If this Lease is not terminated as provided in Section 10 2 above, Tenant shall, subject to the terms of any Permitted Mortgage, proceed with the repair or restoration of the damaged Premises within ninety (90) days following such damage or destruction or, if greater than eighty percent (80%) of the estimated cost of such restoration is covered by insurance, then such later date as the Insurance Proceeds are available therefor, and once commenced such restoration shall be diligently prosecuted to completion. Landlord agrees to make available to Tenant any Insurance Proceeds (subject to the rights of any Mortgagee) payable to Landlord attributable and to be used for the restoration and repair of the Premises as herein provided. Landlord shall have no liability to Tenant, and Tenant shall not be entitled to terminate this Lease by virtue of any delays in completion of repairs and restoration, except to the extent caused by Landlord.

10 4 Insurance Proceeds All Insurance Proceeds shall be collected, held and disbursed in accordance with the terms of the applicable Permitted Mortgage. All Insurance Proceeds payable as a result of any damage or destruction which are to be used by Tenant for such repairs and restoration shall be payable to Tenant and used by Tenant to the extent necessary for payment of the cost of repairs and restoration required hereby. Any unused proceeds may be retained by Tenant (subject to the requirements of the applicable Permitted Mortgage).

ARTICLE 11: EMINENT DOMAIN

11 1 Substantial Taking If forty percent (40%) or more of the Premises shall be taken for a public or quasi-public use by the exercise of the power of eminent domain or by purchase under threat of condemnation by any governmental agency, this Lease shall terminate in its entirety on the date the condemning authority actually consummates such taking of the Premises, and the Rent required to be paid by Tenant hereunder shall be appropriately prorated and paid to such date of taking or reduced as provided hereinbelow. In the event of any such taking, Landlord and Tenant shall together make one claim for an award for their combined interests in the Premises including an award for severance damages if less than the whole shall be so taken. The Condemnation Proceeds shall be distributed to Tenant (subject to the rights of the applicable Mortgagee under its Permitted Mortgage) to the extent that it is attributable to Tenant's Estate, or Tenant's personal property or the Improvements (or that of its invitees, agents or Subtenants) and to Landlord to the extent that it is attributable to the Landlord's Estate.

11 2 Partial Taking If less than forty percent (40%) of the Premises shall be taken for any public or quasi-public use under the power of eminent domain or by purchase under threat of condemnation by any governmental agency, or if any appurtenances of the Premises or any vaults or areas outside the boundaries of the Premises or rights in, under or above the streets adjoining the Premises or the rights and benefits of light, air or access from or to such streets, shall be so taken, or the grade of any such streets shall be changed, in any such case in a manner that the remaining portion of the Premises can be adapted and economically operated for the purposes and in substantially the same manner as it was operated prior thereto in Tenant's good faith business judgment, Tenant shall give prompt notice thereof to Landlord, this Lease shall continue in full force and effect and Base Rent shall be equitably abated. Tenant shall proceed, with reasonable diligence, to perform any necessary repairs and to restore the Premises to an

economically viable unit in strict accordance with all Legal Requirements and the requirements of Article 7 above, and as nearly as possible to the condition the Premises was in immediately prior to such taking. The Condemnation Proceeds shall be paid to Tenant (subject to the rights of any Mortgagee) to the extent that it is attributable to Tenant's Estate, or Tenant's personal property or the Improvements (or that of its invitees, agents or Subtenants) and to Landlord to the extent that it is attributable to the Landlord's Estate.

11.3 Temporary Taking If the temporary use (but not leasehold title) of the whole or any part of the Premises shall be taken as aforesaid for less than ten (10) days in any calendar year, this Lease shall not be affected in any way and Tenant shall continue to pay all Rent due hereunder. All Condemnation Proceeds as a result of such temporary use shall be paid to Tenant.

11.4 Proceedings In any condemnation proceeding affecting the Premises which may affect Landlord's Estate and Tenant's Estate, both parties shall have the right to appear in and defend against such action as they deem proper in accordance with their own interests. To the extent possible, the parties shall cooperate to maximize the Condemnation Proceeds payable by reason of the condemnation. Issues between Landlord and Tenant required to be resolved pursuant to this Article shall be joined in any such condemnation proceeding to the extent permissible under then applicable procedural rules of such court of law or equity for the purpose of avoiding multiplicity of actions and minimizing the expenses of the parties.

ARTICLE 12: DEFAULT

12.1 Events of Default A breach of this Lease by Tenant shall exist if any of the following events (individually an "**Event of Default**" and collectively "**Events of Default**") shall occur:

(a) Tenant shall have failed to pay the Rent within fifteen (15) days of when due and such failure shall not have been cured within ten (10) days after receipt of written notice from Landlord respecting such overdue Rent payment, or

(b) Tenant shall have failed to pay any other charge, or any obligation of Tenant requiring the payment of money under the terms of this Lease (other than the payment of Rent) within thirty (30) days of when due and such failure shall not have been cured within thirty (30) days after receipt of written notice from Landlord respecting such overdue payment, or

(c) Tenant shall have failed to perform any term, covenant, or condition of this Lease to be performed by Tenant, except those requiring the payment of money, and Tenant shall have failed to cure same within thirty (30) days after written notice from Landlord, delivered in accordance with the provisions of this Lease, where such failure could reasonably be cured within said thirty (30) day period (subject to the occurrence of a Force Majeure Event), provided, however, that where such failure could not reasonably be cured within said thirty (30) day period, that Tenant shall not be in default unless it has failed to promptly commence and thereafter be continuing to make diligent and reasonable efforts to cure such failure as soon as practicable and

in no event later than one hundred eighty (180) days (subject to extension based on the occurrence of a Force Majeure Event as provided in Section 22.3).

(d) Abandonment of the Premises, Improvements or of the leasehold estate, except in accordance with Article 13 hereof; or

(e) The subjection of any right or interest of Tenant under this Lease to attachment, execution, or other levy, or to seizure under legal process, if not released or appropriately bonded within ninety (90) days after receipt of written notice by Landlord; or

(f) The appointment of a receiver to take possession of the Premises and/or Improvements or of Tenant's Estate or of Tenant's operations for any reason if not discharged within ninety (90) days of such appointment, including but not limited to, assignment for the benefit of creditors or voluntary or involuntary bankruptcy proceedings, but not including receivership (i) pursuant to administration of the estate of any deceased or incompetent Tenant or of any deceased or incompetent individual partner of Tenant, or (ii) pursuant to a Permitted Mortgage, or (iii) instituted by Landlord, the event of default being not the appointment of a receiver at Landlord's instance but the event justifying the receivership, if any; or

(g) An assignment by Tenant for the benefit of creditors or the filing of a voluntary or involuntary petition by or against Tenant under any law for the purpose of adjudicating Tenant as bankrupt; or for extending time for payment, adjustment or satisfaction of Tenant's liabilities to creditors generally; or for reorganization, dissolution, or arrangement on account of or to prevent bankruptcy or insolvency; unless the assignment or proceeding, and all consequent orders, adjudications, custodies, and supervisions are dismissed, vacated, or otherwise permanently stayed or terminated within ninety (90) days after the assignment, filing, or other initial event.

12.2 Notice to Certain Persons. Landlord shall, before pursuing any remedy, give notice of any Event of Default to Tenant, to all Mortgagees whose names and mailing addresses were previously given to Landlord in the manner provided in this Lease. In addition, Landlord shall use its reasonable good faith efforts to give such notice to all Subtenants who have requested the same. Each notice of an Event of Default shall specify the Event of Default and shall describe any damage resulting from any such act.

12.3 Landlord's Remedies. If any Event of Default by Tenant shall continue uncured, following notice of default as required by this Lease, for the period applicable to the default under the applicable provision of this Lease, subject to the rights of any Mortgagee under Article 5 hereof, Landlord shall have the following remedy in addition to all other rights and remedies provided by law or equity, to which Landlord may resort cumulatively or in the alternative:

(a) Termination. If Landlord elects to terminate this Lease, then it shall give Tenant written notice of such termination and all of Tenant's rights in the Premises and in the Improvements shall terminate upon its receipt of such notice. Promptly after notice of termination, Tenant shall surrender and vacate the Premises and the Improvements in broom-

clean condition, and Landlord may reenter and take possession of the Premises and the Improvements and eject all parties in possession or eject some and not others or eject none; provided that no Subtenant provided with a Nondisturbance Agreement shall be ejected and provided Landlord shall not eject a Mortgagee in possession that is then in compliance with the provisions of this Lease. Termination shall not relieve Tenant from the payment of any sums due to Landlord hereunder plus interest thereon from the date due at the Default Rate, or from any claim for damages previously accrued or then accruing against Tenant up to the date of termination.

12.4 Cumulative Remedies. The remedies given to Landlord herein shall not be exclusive but shall be cumulative with and in addition to all remedies now or hereafter allowed by law and elsewhere provided in this Lease.

12.5 Waiver of Breach. No waiver by a party of any default by the other shall constitute a waiver of any other breach or default by the other, whether of the same or any other covenant or condition. No waiver, benefit, privilege, or service voluntarily given or performed by a party shall give the other any contractual right by custom, estoppel, or otherwise.

12.6 Tenant Remedies. In the event Landlord shall neglect or fail to perform or observe any of the covenants, provisions or conditions contained in this Lease on its part to be performed or observed within thirty (30) days after written notice of default, then in that event Landlord shall be liable to Tenant for any and all actual damages sustained by Tenant as a result of Landlord's breach. In addition to and together with any monetary or other damages or remedies Tenant may receive at law or equity, Tenant may terminate this Lease if Landlord's breach of this Lease persists past such thirty (30) day period and Landlord is not actively and diligently engaged in curing the same (which cure shall be completed within a reasonable period of time).

ARTICLE 13: SURRENDER OF THE PREMISES

On the Lease Expiration Date or earlier termination of this Lease pursuant to the provisions hereof, Tenant shall quit and surrender the Premises to Landlord without delay, and in reasonable good order, condition and repair, ordinary wear and tear (and damage and destruction or condemnation if this Lease is terminated pursuant to either Article 10 or 11) excepted. Such surrender of the Premises shall be accomplished without the necessity for any payment therefor by Landlord. Upon such event, title to the Improvements shall automatically vest in Landlord without the execution of any further instrument; provided, however, Tenant covenants and agrees, upon either such event, to execute (at no cost or expense to Tenant) such appropriate documentation as may be reasonably requested by Landlord to transfer title to the Improvements to Landlord. Notwithstanding anything to the contrary contained in Article 14 below, no such surrender shall cause or be deemed to cause a merger of Landlord's Estate and Tenant's Estate, unless Landlord, and any Mortgagee holding a Permitted Mortgage, the lien of which was not reconveyed upon such surrender, expressly so agree in writing.

ARTICLE 14: PERMITTED SUBLEASES

14.1 Tenant's Right to Sublease. Tenant may sub-ground lease or sub-space lease portions of the Premises during the Term of this Lease pursuant to Subleases with Subtenants who will occupy all or any portion of the Premises for the conduct of business consistent with the uses permitted herein, subject to the requirements set forth in this Article 14.

14.2 Required Sublease Terms. Each Sublease shall contain the following terms and conditions:

(a) The Sublease shall state that it is subject and subordinate to this Lease and to any extension, modifications or amendments of, this Lease, unless Landlord specifically requires that such Sublease be prior and superior to this Lease;

(b) That in the event of the cancellation or termination of this Lease prior to the Lease Expiration Date, the Subtenant under such Sublease shall make full and complete attornment to Landlord for the balance of the term of such Sublease with the same force and effect as though said Sublease were originally made directly from Landlord to the Subtenant; provided that such Subtenant has received a non-disturbance agreement from Landlord, as provided below.

14.3 Non-Disturbance Agreements. Landlord shall issue a commercially reasonable subordination, non-disturbance, and attornment agreement (each, a "**Non-Disturbance Agreement**"), to each Subtenant requesting same, which Non-Disturbance Agreement shall require such Subtenant to acknowledge in writing to the effect that this Lease is prior to and paramount to the Sublease, and providing that Landlord shall recognize the Sublease and not disturb the Subtenant's possession thereunder so long as Subtenant is not in default under its Sublease (subject to the following sentence) and agrees to attorn to Landlord for the balance of the term of such Sublease with the same force and effect as though said Sublease were originally made directly from Landlord to the Subtenant. Any such Non-Disturbance Agreement may condition the Subtenant's right to non-disturbance on Landlord's continued receipt of Rent in the amount provided herein. In addition, such Non-Disturbance Agreement shall not prohibit the right of the Landlord to (or to require Tenant to) demolish Improvements on the Property other than (i) the premises under Sublease to which such Non-Disturbance Agreement relates and (ii) means of reasonable access thereto.

14.4 Obligations under Lease. Landlord acknowledges and agrees that Tenant may assign any obligation or obligations under this Lease to any Subtenants without Landlord's prior consent; provided, that Tenant shall not be released from any such obligations in the event such Subtenant fails to perform same.

ARTICLE 15: TRANSFER

Landlord may not assign, convey and transfer its rights, interests and titles, or delegate any and all of its duties under this Lease. Tenant shall not transfer this Lease or its interest herein or in the Land, either directly or indirectly, by operation of law or otherwise,

without Landlord's prior written consent, which Landlord will not unreasonably refuse. A transfer will not affect tenant's liability under this lease agreement.

ARTICLE 16: TENANT'S OPTION TO PURCHASE PREMISES

Landlord hereby grants to Tenant an option exercisable in Tenant's sole and absolute discretion to purchase Landlord's Estate ("**Purchase Option**"), on the following terms and conditions:

16.1 Exercise Period. The Purchase Option may be exercised during the period commencing on the first day of the sixty-first (61st) month of the Term and ending on the Lease Expiration Date..

16.2 Condition Precedent. It shall be a condition precedent to Tenant's right to exercise the Purchase Option that (i) this Lease shall, at the time of delivery of Tenant's exercise notice, be in full force and effect, and (ii) there shall not then exist any Event of Default by Tenant as of the date of delivery of Tenant's exercise notice that Tenant has not begun diligently to cure in accordance herewith as of such date

16.3 Exercise. Tenant shall exercise its Purchase Option by giving written notice thereof ("**Purchase Option Notice**") to Landlord within the option exercise period described in Section 16.1 above. The "**Option Purchase Price**" (herein so called), shall be as set forth in Section 16.4 below.

16.4 Option Purchase Price and Terms.

(a) Option Purchase Price. The purchase price shall be \$750,000.00.

(b) Purchase Terms. The Option Purchase Price shall be paid in cash at Purchase Closing.

16.5 Closing of Option. Following the exercise by Tenant of the Purchase Option, the "**Purchase Closing**" (herein so called) shall occur within sixty (60) days of the date on which Landlord receives Tenant's Purchase Option Notice. Upon the Purchase Closing, (a) the Purchase Option Price for Landlord's Estate shall be paid to the Landlord or its successor as described in Section 16.4, (b) Landlord's Estate shall be conveyed to Tenant by grant deed, bill of sale, general assignment and other appropriate transfer instruments, all in form reasonably acceptable to both Tenant and Landlord; (c) Landlord's Estate shall be subject to only the matters described in Section 1.1 and other matters reasonably approved by Tenant; (d) Landlord's Estate shall be conveyed using a general warranty deed; (e) Tenant and Landlord shall each be responsible for their own attorneys' fees; (f) Landlord shall provide at its sole expense a standard form Owner's Title Insurance Policy issued by First American Title Insurance Company, and (g) Tenant shall be responsible for all property taxes and cost of closing.

ARTICLE 17: NOTICES

17.1 Any notice, approval, demand or other communication required or desired to be given pursuant to this Lease shall be in writing and shall be personally served (including by means of professional messenger service or air express service using receipts) or in lieu of personal service, deposited in the United States mail, postage prepaid, certified or registered mail, return receipt requested, and unless sooner received, each notice shall be deemed received seventy-two (72) hours after same shall have been so deposited in the United States mail addressed as set forth below:

If to Landlord: Brown Family Holdings, L.C.
c/o Rand D. Brown
1434 E. 9400 S., Ste. 204
Sandy, UT 84093

If to Tenant: Holladay Towne Center, L.L.C.
515 West Pickett Cir., Suite 400
Salt Lake City, UT 84115
Attention: Tom Hulbert

Either Landlord or Tenant may change its respective address by giving written notice to the other in accordance with the provisions of this Section.

ARTICLE 18: ESTOPPEL CERTIFICATES

18.1 Estoppel Certificates. Tenant agrees within thirty (30) days following request by Landlord or the holder of any deed of trust, mortgage or other encumbrance on Landlord's Estate to execute and deliver an Estoppel Certificate to whichever of them has requested the same. Landlord agrees promptly following request by Tenant or a Mortgagee to execute and deliver an Estoppel Certificate to whichever of them has requested the same. The term "Estoppel Certificate" shall mean an estoppel certificate, certifying (a) that this Lease is unmodified and in full force and effect, or, if modified, stating the nature of such modification and certifying that this Lease, as so modified, is in full force and effect and the date to which the Rent and other charges are paid in advance, if any, (b) that there are no uncured defaults on the part of Landlord and Tenant hereunder, or if there exist any uncured defaults on the part of Landlord and/or Tenant hereunder stating the nature of such uncured defaults on the part of Landlord and/or Tenant, and (c) the correctness of such other information respecting the status of this Lease as may be reasonably required by the party hereto requesting execution of such Estoppel Certificate. A party's failure to so execute and deliver an Estoppel Certificate following written request as required above, shall be conclusive upon such party that as of the date of said request for the same (a) that this Lease is in full force and effect, without modification except as may be represented by the party hereto requesting execution of such Estoppel Certificate, (b) that there are no uncured Events of Default in Landlord's or Tenant's obligations under this Lease except as may be represented by the party hereto requesting execution of such Estoppel Certificate, and (c) that no Rent has been paid in advance except as may be represented by the party hereto requesting execution of such Estoppel Certificate.

ARTICLE 19: ENFORCEMENT AND ATTORNEYS' FEES

19.1 In any proceeding or controversy associated with or arising out of this Lease or a claimed or actual breach hereof, the prevailing party shall be entitled to recover from the other party as a part of the prevailing party's costs, such party's actual and reasonable attorneys' fees and court costs.

ARTICLE 20: NO MERGER

20.1 No Merger; Subleases. The voluntary or other surrender of this Lease by Tenant, or a mutual cancellation thereof, shall not work a merger and shall, at the option of Landlord, operate as an assignment to Landlord of any or all Subleases of Subtenants.

20.2 Permitted Mortgages. Landlord agrees that neither the surrender, cancellation, expiration or termination of this Lease, nor Landlord's acquisition of Tenant's Estate by any means contemplated hereunder, shall, either by the election of Landlord or by operation of law, work a merger of Landlord's Estate and Tenant's Estate unless and until all indebtedness under any Permitted Mortgage has been repaid pursuant to the terms thereof. The lien of such Permitted Mortgage shall remain unaffected and in full force and effect upon and following the occurrence of any of the events described in the preceding sentence, and Landlord shall be subject to, and bound by, the provisions of such Permitted Mortgage as the successor tenant hereunder following the occurrence of any of such events.

ARTICLE 21: QUIET ENJOYMENT - LANDLORD'S RIGHT TO INSPECT

21.1 Landlord covenants that, provided no Event of Default has occurred under the terms of the Lease and has continued beyond all applicable cure periods set forth in this Lease or any other written agreement between Landlord and any Mortgagee, Tenant shall have quiet and peaceful possession of the Premises as against Landlord and any person claiming the same by, through or under Landlord. Landlord reserves the right to enter the Premises and the Improvements during normal business hours upon reasonable prior written notice for purposes of conducting normal and periodic inspections of the Premises, provided such inspections shall be subject to the terms of, and shall not interfere with, the rights of any Subtenant under any Sublease.

ARTICLE 22: GENERAL

22.1 Captions. The captions used in this Lease are for the purpose of convenience only and shall not be construed to limit or extend the meaning of any part of this Lease.

22.2 Counterparts. Any executed copy of this Lease shall be deemed an original for all purposes. This Lease may be executed in one or more counterparts, each of which shall be an original, and all of which together shall constitute a single instrument.

22.3 Time of Essence. Time is of the essence for the performance of each covenant and term of this Lease. Notwithstanding the foregoing, any non-monetary obligation of Tenant or Landlord which cannot be satisfied due to war, strikes, acts of God or other events which are beyond the reasonable control of Tenant or Landlord, as the case may be (each, a "Force Majeure Event"), shall be excused until the cessation of such Force Majeure Event. In addition, Tenant's Rent obligations hereunder, and all dates for the performance of any of Tenant's other obligations hereunder, shall be automatically extended on a day for day basis in the event of any act of Landlord in violation of this Lease which actually delays Tenant's performance, as hereinabove set forth in this Lease, provided that (a) Tenant has previously notified Landlord of such fact in writing and Landlord has not cured the cause of such delay within three (3) days of the receipt of said notice and (b) in no event shall any Force Majeure Event excuse any obligation for longer than a 24 month period from the occurrence of such Force Majeure Event.

22.4 Severability. If any one or more of the provisions contained herein shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Lease, but this Lease shall be construed as if such invalid, illegal or unenforceable provision had not been contained herein.

22.5 Interpretation. This Lease shall be construed and enforced in accordance with the laws of the State of Utah. The language in all parts of this Lease shall in all cases be construed as a whole according to its fair meaning, and not strictly for or against either Landlord or Tenant. When the context of this Lease requires, the neuter gender includes the masculine, the feminine, a partnership or corporation or joint venture or other entity, and the singular includes the plural.

22.6 Successors and Assigns. The covenants and agreements contained in this Lease shall be binding upon and shall inure to the benefit of the parties hereto and their respective permitted heirs, successors, and assigns (to the extent this Lease is assignable).

22.7 Waivers. The waiver of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained.

22.8 Remedies. All remedies herein conferred shall be deemed cumulative and no one remedy shall be exclusive of any other remedy herein conferred or created by law.

22.9 Good Faith. Except where a party hereto is specifically permitted to act in its sole and absolute discretion, each party hereto agrees to act reasonably and in good faith with respect to the performance and fulfillment of the terms of each and every covenant and condition contained in this Lease.

22.10 No Partnership. The parties hereto agree that nothing contained in this Lease shall be deemed or construed as creating a partnership, joint venture, or association between Landlord and Tenant, or cause either party to be responsible in any way for the debts or

obligations of the other party, and neither the method of computing Rent nor any other provision contained in this Lease nor any acts of the parties hereto shall be deemed to create any relationship between Landlord and Tenant other than the relationship of landlord and tenant.

22.11 Integration. This Lease, and the Exhibits and addenda, if any, attached hereto, constitute the entire agreement between the parties, and there are no agreements or representations between the parties except as expressed herein. The recitals set forth above are incorporated herein and made a part of this Lease. All prior negotiations and agreements between Landlord and Tenant with respect to the subject matter hereof are superseded by this Lease. Except as otherwise provided herein, no subsequent change or addition to this Lease shall be binding unless in writing and signed by the parties hereto.

22.12 Commissions. Landlord and Tenant each represent and warrant to the other that they have employed no broker, finder or other person in connection with the transactions contemplated under this Lease which might result in the other party being held liable for all or any portion of a commission hereunder. Landlord and Tenant each hereby agree to indemnify and hold the other free and harmless from and against all claims and liability arising by reason of the incorrectness of the representations and warranties made by such party in this Section, including, without limitation, reasonable attorneys' fees and litigation costs.

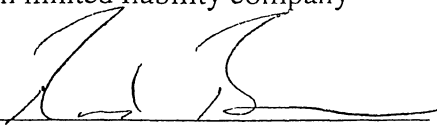
22.13 Survival. Notwithstanding anything to the contrary contained in this Lease, the provisions (including, without limitation, covenants, agreements, representations, warranties, obligations, and liabilities described therein) of this Lease which from their sense and context are intended to survive the expiration or earlier termination of this Lease (whether or not such provision expressly provides as such) shall survive such expiration or earlier termination of this Lease and continue to be binding upon the applicable party.

[SIGNATURES ON NEXT PAGE]

LANDLORD AND TENANT hereby enter into and execute this Lease as of the date first set forth above.

LANDLORD

BROWN FAMILY HOLDING, L.C.
a Utah limited liability company

By: 
Rand Brown
It's Manager

TENANT

HOLLADAY TOWNE CENTER, L.L.C.,
a Utah limited liability company

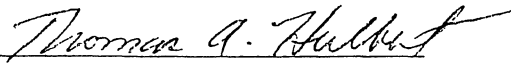
By: 
Thomas A. Hulbert
It's Manager

EXHIBIT "A"

LANDLORD PROPERTY

Known as 2240 E. Laney Avenue, Holladay, Salt Lake County, Utah and Legally Described as
Lot 27 , Peony Gardens; containing .44 acres.

EXHIBIT "B"

PERMITTED EXCEPTIONS

1. Property Taxes and Assessments accruing for the year 2005 and thereafter. Landlord Warrants that all previous property Taxes for any year prior to the year 2005 tax year have been paid.

Addendum B

1 THE COURT: You're still - I'm still lost as to why
2 you couldn't just simply say we're going to bring quiet title
3 action with respect to this property, we are the leasehold
4 interest with an option to purchase and anyone who challenges
5 our contention that we have clear title can come in and
6 object to it and we'll send a copy of this to the current
7 owner of Lot 26 just to make sure they're aware. Why
8 couldn't you have done that?

9 MR. MILLER: Because I believe that's enforcing the
10 fee right, Your Honor, not the tenant right.

11 THE COURT: But I mean, whose better to do that
12 than you?

13 MR. MILLER: The person -

14 THE COURT: You're the only one that's worried
15 about it. They're not worried about it.

16 MR. MILLER: The BFP who claims to have purchased
17 this (inaudible) notice.

18 THE COURT: So are you a BFP. They're not worried
19 about it. They wouldn't even come into your case if you
20 filed it. They would sit on the sidelines.

21 MR. MILLER: I don't become a BFP until I take the
22 deed, right?

23 THE COURT: No, you're a bonafide purchaser of the
24 leasehold interest under your lease.

25 MR. MILLER: But I'm not a BFP of the fee until I

1 get the fee.

2 THE COURT: No, of course not but you're saying
3 it's the same thing under Paragraph 1.1.

4 MR. MILLER: I'm saying the title issues are the
5 same but not my rights.

6 THE COURT: Sure, but the concerns, the legal
7 issues are the same under that provision and in fact it
8 strengthens your argument, or would strengthen an argument
9 that you had legal title to the property or legal title to
10 your leasehold interest, in any event.

11 MR. MILLER: That I can get it in five years, but
12 my problem is I need it now.

13 THE COURT: Well, but I'm saying then you have a
14 leasehold interest now and your leasehold interest now is not
15 suppose to be subject to any kind of a prescriptive easement
16 or a recorded easement over part of the property and you have
17 a concern that it is for whatever reason but you have a
18 concern that it is so you bring a quiet title action and you
19 say, we have a leasehold interest, we have an option to
20 purchase, we want to make sure that we can finance this
21 property and we're worried about this potential easement.

22 So you bring your action and it's regarding
23 property such-and-such and we want the court to quiet title
24 to it and to settle our interest as a leasehold holder in
25 this property free and clear of any purported easement. So

1 you file that action, the landlord sits on the sideline
2 because he doesn't contest that.

3 MR. MILLER: We would be suing the landlord saying
4 you breached titled 1.1 -

5 THE COURT: You don't sue the landlord, there's no
6 breach of anything. You just say you want to quiet the title
7 to make sure that no one has a claim that's contrary to our
8 claim.

9 MR. MILLER: Well, Your Honor, if there is a claim
10 that's contrary to our claim then it has to be a violation of
11 1.1. If it's not a violation of 1.1 then there is not going
12 to be an easement to violate your claim.

13 THE COURT: But what would happen is if the court
14 should determine that there is a violation and that there is
15 an easement then you've got a cause of action against the
16 landlord.

17 MR. MILLER: My point, I suppose is we would be
18 doing the same thing we're going here but we'd have a
19 different party here and there would be arguments but-

20 THE COURT: Exactly, you wouldn't have the landlord
21 here. They wouldn't be incurring the expenses that they're
22 incurring today defending it and that's what they're
23 objecting to among other things, I guess.

24 MR. MILLER: They could have brought them in too.

25 THE COURT: You filed the action. Why should they

1 have to bring in anybody? Why should they even have to hire
2 a lawyer? They should just be sitting there saying, you
3 know, to the court, maybe they'd be in the back row today
4 saying boy, we sure hope the judge decides that there's no
5 easement and if the they were really worried that the judge
6 is going come out and say that there is an easement, they may
7 move to intervene as a party in interest.

8 MR. MILLER: I would have to bring in the party, we
9 are the party -

10 THE COURT: You'd serve them notice of quiet title
11 action. If they don't want to come in they don't have to
12 come in.

13 MR. MILLER: I guess my point is, Your Honor, it
14 wouldn't just be a quiet title action, it would be a breach
15 of 1.1, same thing we've got here.

16 THE COURT: There is no breach of 1.1 until the
17 Court determines that there's an easement and right now I
18 don't see any easement. I don't see one as of record from
19 the affidavits both of you have submitted, I don't see one as
20 a prescriptive easement.

21 MR. MILLER: I'm sorry Your Honor, I would bring it
22 against the breached lease. They would argue. We'd be here
23 but we'd have a different party also saying - it wouldn't
24 make a whole bit of difference but we would have total
25 ability to render a final judgment as to the validity of that

1 easement.

2 THE COURT: I don't think I - I think between the
3 two of you I can certainly say that there's no easement but
4 with respect to someone else and that's your concern -

5 MR. MILLER: Yes.

6 THE COURT: - because you want to get a title
7 company to say as with respect to the rest of the world, not
8 just these two parties there's no easement, the way you do
9 that is to bring a quiet title action. You don't sue the
10 landlord for breach of the lease.

11 MR. MILLER: Then 1.1 has no meaning in our lease.

12 THE COURT: Well, of course it has a meaning in
13 your lease. You say that it's violated because someone might
14 come in and raise an argument. That's not damage today that
15 someone might come in and raise an argument.

16 MR. MILLER: The damage is we can't get insurance
17 and we've done that, we've tried.

18 THE COURT: They don't guarantee that you can get
19 insurance, do they?

20 MR. MILLER: They'd guarantee title which is why we
21 wanted Exhibit B of the permitted exceptions so it could be
22 insured.

23 THE COURT: Where do they guarantee title?

24 MR. MILLER: 1.1.

25 THE COURT: And you're saying they violated a

1 guarantee of title because of why?

2 MR. MILLER: Because the existence of this easement
3 preventing us from getting –

4 THE COURT: The Court finds that there is no
5 easement. Where is the violation of 1.1?

6 MR. MILLER: Well, without a third party sitting
7 here it doesn't really help.

8 THE COURT: That's my point and that's why I don't
9 understand why we're here with this party as a defendant in
10 this case.

11 MR. MILLER: They're the party we contracted with,
12 they gave us the title. If they'd given us a warranty deed
13 in five years that I believe is no different, we'd be doing
14 the same thing, bringing an action under the breach of
15 warranty. There's no difference in doing it now or doing it
16 in five years, it's the same provision.

17 THE COURT: But there's no reason why you couldn't
18 bring a quiet title action today as a leasehold holder, a
19 leasehold interest holder. Why didn't you bring a quiet
20 title action today or six months ago or whenever you brought
21 this action?

22 MR. MILLER: Your Honor, we've been through that.
23 I don't believe we have the standing and –

24 THE COURT: I'm telling you you do have standing.
25 You have the standing under your lease and your option to

1 purchase goes with the lease. You have standing. If they
2 didn't give decent title to you, you could sue them for it.
3 If you think that there's some party out there that might
4 come in and raise the issue then that party needs to be here
5 if you're going to have a ruling that there is no cloud on
6 that title.

7 So I mean, I don't know what that does to your
8 lawsuit. It seems to me the problem that you have is as you
9 grab this tiger by the tail and the tiger is coming around
10 and biting you and you didn't have to grab it by the tail,
11 you could have avoided that, let the tiger come in if it
12 wanted to which it wouldn't because it has no reason to be
13 concerned about it. Now if you really think there's some
14 chance that some judge can say, yeah, there's a easement
15 here, maybe they would come in but that's their decision
16 based on that kind of an action. They wouldn't be required
17 to come in. They could sit on the sidelines and get a
18 decision that, yeah, there's an easement and they're subject
19 to it. That would be their choice but you haven't given them
20 a choice. You've brought the action against them. They've
21 counterclaimed. Now they're trying to say we don't want to
22 deal with you guys because you're going to nothing but a
23 headache to us for the next five years until you buy the
24 property and because of that they're saying maybe they
25 violated this lease, how are we going to get them out of here

1 and throw them out and you end up with your client losing the
2 loss of its bargain initially and trying to get a piece of
3 property to develop and all the effort that they've gone
4 through up to this point.

5 And they're saying, well, yeah, throw them out,
6 they violated by playing games with the payment of rent and
7 they violated also by bringing this action and dragging us in
8 and making us incur all these legal costs.

9 And what I'm saying to you is I don't find the
10 first argument very good but I find the second argument a
11 reasonable argument from their position and that they
12 probably incurred some significant damage in terms of legal
13 fees. I don't know if they've incurred any other damage but
14 certainly in terms of legal fees.

15 MR. MILLER: With all due respect to the second, I
16 don't see it as a breach of the lease itself. I understand
17 where Your Honor is coming from but I think one party trying
18 to enforce -

19 THE COURT: Does the lease have an attorneys fees
20 provision in it? Does it say if you bring an action and you
21 lose, you pay attorney's fees?

22 MR. MILLER: I believe there is.

23 MR. ATKIN: It does, Your Honor.

24 MR. MILLER: I believe it does.

25 THE COURT: Either way, you're going to get stuck

1 with attorney's fees.

2 MR. MILLER: I thought you were addressing the
3 issue of termination of lease, Your Honor.

4 THE COURT: Well, yeah, you can terminate the lease
5 and argue that you've caused them that damage or you can say
6 we're not going to terminate the lease but they win the
7 lawsuit and they get attorney's fees that way. You're still
8 able to go ahead with your client's project but you end up
9 having to pay for their costs in the interim and you now have
10 a landlord who is sitting on pins and needles waiting for the
11 next breach to happen where he can come after you or your
12 client. That's where I see the case as is exists.

13 MR. MILLER: Anything else, Your Honor?

14 THE COURT: No. Mr. Atkin, do you have anything
15 else that you want to say?

16 MR. ATKIN: Just very quickly, Your Honor. My
17 clients owned this income property and it had a regular flow
18 of income and as the Court has pointed out, there's no
19 penalty for this scheme of late -

20 THE COURT: Yeah, but I don't know that that's
21 something - that's a drafting problem probably more than
22 anything else or original agreement if they try to get it but
23 the fact is that the lease permits the action that they've
24 engaged in here.

25 MR. ATKIN: Your Honor -

1 THE COURT: For example, it's conceivable that a
2 party could have problems one month after another. You're
3 saying, well, we've got to look at the motivation of the
4 problem but I don't see anything in the lease that describes
5 that and I don't think that there's anything that's broad
6 enough to generate even by implication that they couldn't do
7 that.

8 MR. ATKIN: I have nothing further to say then,
9 Your Honor.

10 THE COURT: All right. I think if parties really
11 wanted to prevent it, you know, they'd have put in a fee or
12 interest provision or something like that. That's how you
13 prevent it.

14 MR. ATKIN: That was the only issue I had anyway.

15 THE COURT: Well, I think my feeling is here that
16 with respect to these two parties, that there is no easement,
17 that there is no recorded easement that's valid. In fact,
18 the one that was recorded I think was recorded on the wrong
19 parcel, therefore, is void. I don't see any evidence of
20 prescriptive easement. The only party that today seems to me
21 that could argue a prescriptive easement would be someone who
22 would benefit from it and we don't have anybody here claiming
23 a prescriptive easement and, in fact, if anything, the
24 evidence is to the contrary that there is a blockage that
25 would block the easement both in the form of the storage

1 sheds as well as the (inaudible) and in addition, that
2 there's been no evidence of usage of the easement and at
3 least for a period of 10 years, it hasn't been possible. So
4 if there were an easement vis-a-vie these two parties, it
5 would have been abandoned by this point. So I don't see an
6 easement either prescriptive or one by legal right.

7 I don't find that the lack of - put it this way, I
8 don't find that the gamesmanship that was played by the
9 plaintiff to be acceptable conduct. On the other hand, I
10 don't find it to be unlawful or conduct that would be in
11 violation of the lease. I think, if it indeed was to, you
12 know, try to put some pressure on the landlord, I think it is
13 an unsuccessful way of engaging in some self-help that the
14 parties just ought not to do. But on the other hand I'm not
15 going to find it to be a violation of the lease.

16 With respect to bringing the lawsuit, I'm going to
17 dismiss the plaintiff's lawsuit and I'm also going to dismiss
18 the counterclaims except for attorney's fees which I'm going
19 to grant to the defendants in this case because they have
20 prevailed I think on the major issue and that is with respect
21 to the easement. There really isn't any cloud on this title
22 and it is so clear it seems to me to the Court that this case
23 should not have been brought even but again, I'm not ruling
24 that that's a violation of the lease. So I think that leaves
25 the plaintiff where they were in November or whenever it was

1 that this whole thing started, maybe it was earlier 'cause
2 that's when the counterclaim was filed.

3 As far as I'm concerned I don't see any reason why
4 you couldn't still bring a quiet title action based on your
5 leasehold interest. It seems to me that you have sufficient
6 interest in this property through your lease and your option
7 to purchase to ask a court to quiet title to this property
8 and if you wanted to file an amended complaint, for example,
9 in this case, not saying you should or you have to but if you
10 wanted to file an amended complaint deleting the defendant
11 and asking the court simply to quiet title with respect to
12 this property to make clear that there was no effective
13 easement for the purposes of financing or title insurance,
14 whatever you need, I would find that you had standing to do
15 that based on your lease and the option to purchase which I
16 find are still in effect.

17 Anything further?

18 MR. ATKIN: I don't believe so, Your Honor. Would
19 you like me to prepare the order?

20 THE COURT: Yeah, if you think you can.

21 MR. ATKIN: I'll do that.

22 THE COURT: I know both sides have been taking
23 notes so I'll assume you'll come up with an appropriate
24 order. Let the other side see it, of course.

25 MR. ATKIN: Certainly, Your Honor, I will.

1 THE COURT: Can you do that within a week?

2 MR. ATKIN: Your Honor, the rule gives me 15 days -

3 THE COURT: I know, I'm asking if you can do it
4 within a week?

5 MR. ATKIN: I could do that but it would be - I've
6 got a real hectic next week but I will -

7 THE COURT: But you've got good people in your
8 office.

9 MR. ATKIN: We'll do it in a week.

10 THE COURT: Okay. All right. If you have a
11 problem, call the other side and let them take a shot at it
12 and then whoever gets the proposed order, I'll give you a
13 week also to respond and get it back to the court and so I
14 guess I'm dismissing the defendant and granting leave to the
15 plaintiff to amend the complaint.

16 MR. ATKIN: Fair enough, I'll go ahead and do that.

17 THE COURT: Okay?

18 MR. MILLER: Your Honor, I don't want to be a
19 problem here. I intend a quiet title action to include the
20 defendants should they wish to come in. I think it's only
21 proper that I include them in the amended complaint. It's
22 their rights I would be affecting.

23 THE COURT: Well, I guess you could name them and
24 they could enter just -

25 MR. ATKIN: No contest to the quiet title?

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THE COURT: Yeah.

MR. ATKIN: We could do that.

THE COURT: I wouldn't see a problem with that.
Okay. All right. Another fine kettle of fish. Thank you
all.

(Whereupon the hearing was concluded)

Addendum C

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FILED DISTRICT COURT
Third Judicial District

MAY 01 2007

SALT LAKE COUNTY

By u R
Deputy Clerk

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE CITY, STATE OF UTAH

HOLLADAY TOWNE CENTER, L.L.C.,

Plaintiff,

vs.

BROWN FAMILY HOLDINGS, L.C., a Utah
limited liability company,

Defendant.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER**

Case No.: 060913167

Judge John Paul Kennedy

This matter came on regularly for hearing on the parties' cross motions for summary judgment on March 12, 2007. Plaintiff was represented by Blake Miller, defendant was represented by Blake S. Atkin. Having read the written submissions of the parties, having heard the arguments of counsel and being fully advised in the premises, the Court enters the following Findings of Fact Conclusions of Law and Order.

FINDINGS OF FACT

1. The real property that is the subject of this dispute is in Salt Lake County, State of Utah.

2. Defendant is the fee owner of a parcel of real estate known as lot 27, Peony gardens.
3. In March of 2005, Plaintiff and Defendant entered into a Ground Lease with regard to lot 27 . The Ground Lease provides that it is a triple net lease and that rent would be paid without offset and without cost to the landlord. The Ground Lease further authorizes the Tenant to contest, at its own expense, any legal requirements, defined as including any covenants restrictions or conditions of record. The Ground Lease also provides for attorney fees to the prevailing party in actions relating to the Ground Lease.
4. In about 1980, the owner of Lot 27, who also owned lot 26, Peony Gardens, recorded a notice of contract on lot 26 that described an easement across lot 27. That notice of contract was never recorded against lot 27.
5. Thereafter, lot 27 was conveyed to defendant's predecessor in title without any mention of the easement.
6. Through mesne conveyances, none of which mention the easement, the property came into the possession and ownership of defendant.
7. The easement was never recorded against lot 27.
8. There is no evidence of the easement on the ground. For at least the past 20 years, the path of the easement has been impassable because of the existence of a berm and for the past 10 years, permanent storage facilities have been built upon the path of the easement.
9. No one has ever made a claim to the easement or attempted to use the easement.

10. No one has ever tried to interfere with plaintiff's quiet enjoyment of its leasehold on account of the easement.

11. At the time they entered into the ground lease, neither party had any knowledge of the easement.

12. On August 9, 2006, Plaintiff filed a complaint against Defendant in Third District Court seeking declaratory relief, breach of contract, and specific performance, claiming that the easement is a violation of the lease.

13. In November, 2006, defendant filed a counterclaim for unlawful detainer pursuant to Utah Code Annotated, § 78-36-8 claiming that the suit and defendants prior pattern of not making rental payments until plaintiff had hired a lawyer to demand payment were in breach of the lease by violating the covenant of good faith and fair dealing and causing the Landlord to incur costs in connection with the collection of rents.

CONCLUSIONS OF LAW

1. There is no easement on lot 27. There is no evidence of an easement on the ground and to the extent that an easement purporting to affect lot 27 is recorded against lot 26, that easement is void because it was not recorded against lot 27.

2. Because there is no easement affecting lot 27, there is no basis for the plaintiff's claims against the defendant and this action should not have been brought against the landlord, causing the landlord to incur costs.

3. If the easement anciently recorded against lot 26 creates legal requirements that interfere with plaintiff's use of its leasehold, plaintiff has the right under the lease and by virtue of its leasehold to contest those legal requirements by quiet title action or otherwise, but such action should be conducted in such a manner as to result in no cost to the Landlord.

4. The plaintiff's pattern of late rental payments, while not appropriate conduct, is not a material breach of the lease at this time where the conduct stopped at the demand of the Landlord and has been followed by consistent on time rental payments. The costs to the Landlord caused by that behavior can be remedied at this time by the payment of the Landlord's attorney fees and costs. The filing of this action, while not appropriate conduct under the lease, is not a material breach of the lease because the cost caused to the Landlord can be remedied at this time by the payment of the Landlord's attorney fees and costs.

ORDER

1. Plaintiff's complaint against defendant will be dismissed, no cause of action.

2. Defendant's counterclaim for unlawful detainer will be dismissed without prejudice, should the conduct of the Tenant be repeated in the future.

3. Leave is granted to the plaintiff to amend the complaint in this matter, so long as the *ended complaint, if any, is filed on or before May 21, 2007, and so long as the* allegations of the amended complaint require nothing on the part of the Landlord except to file a notice of no contest to any action to quiet title against the easement. *JK*

4. Plaintiff shall pay all of defendant's costs and attorney fees relating to this action and

*with the limitations described by the Court during
the May 1, 2007, hearing* *JK*

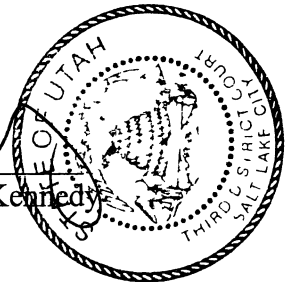
to defendant's collection of rent. Such costs and attorney fees shall be established by affidavit.

DATED this 1 day of ~~March~~ ^{May}, 2007.

BY THE COURT:

JK

The Honorable John Paul Kennedy
Third District Court Judge



Addendum D

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FILED DISTRICT COURT
Third Judicial District

MAY 01 2007

SALT LAKE COUNTY

By 
Deputy Clerk

Attorney for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE CITY, STATE OF UTAH

HOLLADAY TOWNE CENTER, L.L.C.,

Plaintiff,

vs.

BROWN FAMILY HOLDINGS, L.C., a Utah
limited liability company,

Defendant.

JUDGMENT

Case No.: 060913167

Judge John Paul Kennedy

Pursuant to the Court's Findings of Fact, Conclusions of Law and Order, it is hereby
ORDERED ADJUDGED AND DECREED:

1. That plaintiff's complaint against defendant is dismissed, no cause of action.
2. That defendant's counterclaim for unlawful detainer is dismissed at this time without prejudice to the Landlord renewing such a claim if in the future the Tenant engages in conduct that results in costs to the Landlord in violation of the covenants of the Ground Lease.

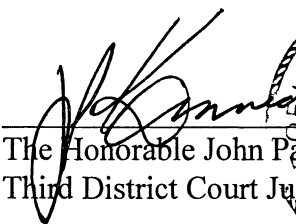
3. Plaintiff shall pay defendant's costs and attorney fees incurred in connection with this
action and in connection with defendant's collection of rents from plaintiff as limited

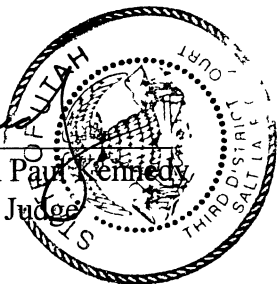
by the Court on May 1, 2007.

pk

DATED this 1^{may} day of ~~March~~, 2007.

BY THE COURT:


The Honorable John Paul Kennedy
Third District Court Judge



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of March, 2007, I served a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER, AND JUDGMENT upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Blake Miller
James W. Anderson
165 South Regent Street
Salt Lake City, Utah 84111

X U.S. Mail, postage prepaid

 Hand-Delivered

 Overnight Mail

X Facsimile


Legal Assistant

Addendum E

\$

FILED DISTRICT COURT
Third Judicial District

MAY 22 2007

SALT LAKE COUNTY

By [Signature]
Deputy Clerk

Blake S. Atkin #4466
William O. Kimball #9460
ATKIN LAW OFFICES, P.C.
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Telephone: (801) 533-0300
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ENTERED IN REGISTRY
OF JUDGMENTS
DATE 05/23/07

RECEIVED

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE CITY, STATE OF UTAH

HOLLADAY TOWNE CENTER, L.L.C.,

Plaintiff,

vs.

BROWN FAMILY HOLDINGS, L.C., a Utah
limited liability company,

Defendant.

**ORDER RE: AWARD OF ATTORNEY
FEES AND COSTS**

Case No.: 060913167

Judge John Paul Kennedy

This matter came on regularly for hearing on the parties' cross motions for summary judgment on March 12, 2007 and on May 1, 2007 regarding the order and award of attorney fees. Based on the Supplemental Affidavit of Attorney Fees submitted by Defendant and being fully advised in the premises, the Court enters the following Order:

ORDER

1. Plaintiff shall pay Defendant's attorney fees in the amount of \$39,675.50 and costs in the amount of \$5,818.06 for a total award of \$45,493.56.
2. The attorney fees and costs shall be paid by Plaintiff within 20 days of entry of this

Order re: Award of Attorney Fees and Costs @J



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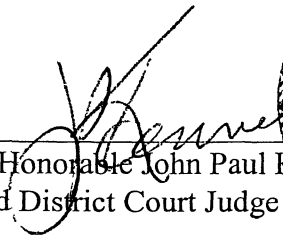
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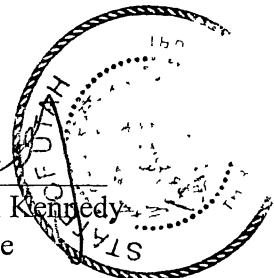
Order to Defendant.

3. Defendant shall be entitled to all attorney fees and costs incurred in the collection of the attorney fees and costs awarded to Defendant.
4. To the extent that additional objections or pleadings are submitted by Plaintiff and additional attorney fees and costs are expended by Defendant as a result, Defendant shall be entitled to file a motion to supplement the amount of attorney fees and costs incurred.

DATED this 21 day of May, 2007.

BY THE COURT:


The Honorable John Paul Kennedy
Third District Court Judge



MAILING CERTIFICATE

I hereby certify that I caused to be mailed a true and correct copy of the above and foregoing **ORDER RE: AWARD OF ATTORNEY FEES AND COSTS** in the U.S. mail, first class, postage prepaid on this 7 day of May, 2007, to the following:

Paxton R. Guymon
James W. Anderson
Miller Guymon, P.C.
165 South Regent Street
Salt Lake City, Utah 84111

☒ U.S. Mail, postage prepaid

☐ Hand-Delivered

☐ Overnight Mail

☐ Facsimile


Legal Assistant

Addendum F

1 it the other way around, you get your fees if there's a
2 breach and I think Utah law is pretty clear that you only get
3 your fees for the portion in which you're prevailing. They
4 did not prevail on that. Those are my only two objections,
5 Your Honor.

6 THE COURT: All right. Let's go back to, first of
7 all, with respect to the easement. I think the Court found
8 that the unrecorded or the document that was not recorded
9 with respect to Lot 27 was void. I think it's correct to say
10 that that doesn't necessarily mean there is no easement
11 because I suppose someone could come in and establish an
12 easement with evidence that we don't have right now.

13 MR. ATKIN: Would you like me to address that?

14 THE COURT: Yeah.

15 MR. ATKIN: The Court's judgment was that there is
16 no easement and while it may be true that a third party might
17 be able to come in and say, well, I'm not bound by that
18 judgment, that burden should be on the third party that's
19 coming in to try and make that kind of an argument. There's
20 no reason for this Court to couch its decision in caveats
21 that there might be somebody out there that might be able to
22 assert that they are not bound by the judgment. The Court
23 had before it two parties and the Court ruled that there was
24 no easement based on the evidence that was presented to the
25 court. If they do amend the complaint and bring in a third

1 party, there may be numerous circumstances under which that
2 third party would be bound by this statement. That third
3 party might have some relationship to either the defendant or
4 the plaintiff and be in privity to them such that the
5 judgment would bind them. That third party might have known
6 about this controversy and intentionally sat on the sidelines
7 rather than being involved. In those circumstances they
8 might well be bound by the judgment of the Court. I fail to
9 see any legitimate concern in the Court stating its
10 conclusions and facts and decision with regard to these
11 parties and then if there's later a third party let that
12 third party bear the burden of trying to say they're not
13 bound by the judgment.

14 MR. MILLER: Your Honor, using the same rationale,
15 I don't see there's any reason to go beyond the two parties
16 in this action in making a finding. You found for the
17 purpose of the lease there was no easement that came within
18 the terms of 1.1 of the lease.

19 THE COURT: Also, there was no prescriptive
20 easement.

21 MR. MILLER: Right.

22 THE COURT: Vis-a-vie these parties.

23 MR. MILLER: Vis-a-vie these parties. We have no
24 objection to that. We think that's what the Court ordered
25 and that's what we think should be --

1 THE COURT: What about his argument that if
2 somebody wants to come in and say I'm not bound by that
3 ruling, they can do it?

4 MR. MILLER: I think we're putting the cart before
5 the horse if we make an order - I thought it was (inaudible)
6 against my own interest because I'd love to have an order
7 saying it's quiet, the title is quieted and I can take it to
8 the title company. I just don't think it procedurally right
9 because until that party comes in and makes the claim, I
10 think it's improper to make a ruling that stems beyond these
11 two parties. That's why Your Honor gave us the authority to
12 file -

13 THE COURT: I tell you Mr. Atkin's argument is that
14 it doesn't extend, it just extends to the litigants and
15 others who might be bound by other rules of procedure. So
16 I'll accept that argument that Mr. Atkin has made.

17 Let's go onto the other issue on the attorney's
18 fees. I guess I'm not quite clear what your argument is.
19 Maybe you could expand on that a little bit for me, Mr.
20 Miller, so that I'll understand that better.

21 MR. MILLER: I'm sorry for being less than clear.

22 THE COURT: It's not your fault. I think it's
23 probably my fault for not being more perceptive. Go ahead.

24 MR. MILLER: There are two aspects that the
25 defendants were arguing were breaches. One was regarding a

1 delay of payment. The other was bringing the action
2 regarding 1.1 of the title issue. The later Your Honor ruled
3 there is no easement, no prescriptive or otherwise between
4 these parties, no easement and they were the prevailing
5 party.

6 As to the delay of rent payment issue you found
7 that was not a breach. In the proposed order they still want
8 fees for that, claiming that payment fees renders the breach,
9 corrects the breach. That's inaccurate because you didn't
10 find there was a breach, Your Honor, and even if you did you
11 wouldn't pay fees in order to rectify a breach, you'd pay
12 fees because there was a breach and secondly, Your Honor,
13 attorney's fees in Utah law are granted for the prevailing
14 party on the issues they win. We cited a case in our
15 memorandum or objection that indicates that. That's all,
16 Your Honor.

17 THE COURT: So are they entitled to any fees at
18 all?

19 MR. MILLER: Yes.

20 THE COURT: They would be entitled to fees on the
21 other issue but not on the rent issue?

22 MR. MILLER: Correct.

23 THE COURT: Mr. Atkin, do you want to respond to
24 that?

25 MR. ATKIN: Yes, Your Honor. Couple of responses.

1 First of all while the Court did find that the Court was not
2 going to grant the remedy that we had requested in our
3 counterclaim, namely eviction of the plaintiffs for the delay
4 in paying rent, the Court did state that the Court found that
5 that conduct was not appropriate but that the Court was not
6 going to grant us the death penalty remedy of eviction.

7 No doubt the Court's decision was based in large
8 measure upon the fact that after we wrote them the letter
9 that said you're in breach of the lease by this practice of
10 regularly withholding rent until we make a demand upon you
11 and then waiving the full 20 days after the demand to pay the
12 rent, after we sent them that letter saying you're in breach
13 for doing that and we're going to seek to have you evicted,
14 they then changed their course of action and began paying the
15 rent on time under the terms of the lease. When we were here
16 last time they argued strenuously that because of that change
17 in conduct that the Court shouldn't find that they were in
18 breach of the lease and therefore subject to eviction. While
19 the Court did not grant us the remedy we were seeking, namely
20 eviction, we did obtain in this controversy, we obtained
21 relief, that is they stopped the conduct that was
22 objectionable under the terms of the lease. No doubt if the
23 defendants had continued that conduct the Court's decision
24 could have been different and the Court could have granted us
25 the eviction. So, from that point of view we prevailed in

1 the controversy and if the Court looks at the language of the
2 lease with regard to attorney's fees, it's not related to
3 litigation. It says whenever there has been a controversy
4 that has arisen with regard to the lease, that the prevailing
5 party is entitled to attorney's fees.

6 It's our position that we're the prevailing party
7 on this rent collection matter because when we brought the
8 counterclaim, sent them the letter saying stop doing this,
9 you're in breach of the covenant of good faith and fair
10 dealing, they stopped the conduct.

11 Secondly, the Court will recall that their
12 justification for this regular monthly withholding of rent
13 until my client had hired us and we had to send the demand
14 letters was they said in their letter, we're doing this
15 because you haven't brought this action to clear up this
16 easement that's on the property. So their conduct was
17 conduct designed to put pressure on us to do something that
18 the Court has now determined we had no duty to do and so in
19 that regard we're also the prevailing party with regard to
20 this whole rent collection controversy because it was tied
21 into this claim they had that we had some duty with regard to
22 the easement. So anyway you look at it, we are the
23 prevailing party with regard to the rent collection issue and
24 should be entitled to recover the fees.

25 THE COURT: Do you want to respond to that?

1 MR. MILLER: Briefly, Your Honor. Your Honor,
2 actually I think the reason why Your Honor found there was
3 not a breach was that's the way the lease provided. It was
4 under the terms of the lease and the defendants accepted the
5 lease payments even though paid later. So, that's I think if
6 you read the transcript, that's why the Court came out.

7 Looking at the transcript Your Honor, Your Honor
8 indicated that I'm not going - with respect to the rent, I'm
9 not going to find it to be a violation of the lease and
10 dismissed the complaint and granted the defendants attorney's
11 fees because they prevailed on the issue regarding the
12 easement. Utah law (inaudible) Clarke says that when you are
13 successful in one but not another you are entitled to fees on
14 that matter. So as to the easement, yes, that's what the
15 court ordered clearly. I don't believe the Court said and
16 even though I find there's no breach, I'm going to give the
17 defendants attorney's fees on something I found there was no
18 breach. That's what the order does.

19 THE COURT: Didn't the Court say though that
20 consistently paying the rent late as you were doing was not
21 in keeping with the implied covenant of good faith and fair
22 dealing?

23 MR. MILLER: No, I think the opposite, Your Honor.
24 If you give me a minute I can find the language.

25 THE COURT: Okay.

1 MR. MILLER: I remember reading it last night, Your
2 Honor. I apologize for the delay.

3 Attached to the defendant's memorandum is a kind of
4 typewritten of the audio. The first paragraph in that is
5 Your Honor's comments. About the middle of it you're talking
6 about the delay of rent, Your Honor says, "The fact they"
7 meaning the defendants "accepted the payments waives any
8 violation that implied coverage of fair dealing." I don't
9 know if that's an accurate transcript but it says the
10 acceptance of that eliminated their argument that the payment
11 of rent in this matter violated the implied covenant of good
12 faith and fair dealing and that's in the transcript.

13 THE COURT: Well, Mr. Atkin says that you were in
14 violation, you brought the lawsuit, that puts you to the
15 point where you stopped violating on a regular basis and he
16 ought to receive credit for that in terms of attorney's fees.
17 What's your response to that argument?

18 MR. MILLER: The rent issue was resolved months
19 before the lawsuit was filed. It was a separate issue
20 resolved and Your Honor found there was a waiver on it and
21 we're done with that issue. When the complaint was filed we
22 were dealing with the quiet title issue and for those issues
23 from the complaint, Your Honor clearly granted attorney's
24 fees. What the defendants are doing is trying to seek
25 attorney's fees even before this complaint was filed for an

1 issue that existed months before and for which they accepted
2 those payments and Your Honor found that waived the implied
3 covenant of good faith and fair dealing. They were trying to
4 reach back months before this litigation was even commenced.
5 I believe they're separate, Your Honor.

6 THE COURT: All right. I'll give you one more bite
7 at the apple, Mr. Atkin.

8 MR. ATKIN: Thank you, Your Honor. This is the
9 court's exact language with regard to their conduct. "I
10 don't find that the lack or the gamesmanship that was played
11 by the plaintiff to be acceptable conduct if it was indeed to
12 put pressure on the landlord. I think it is an unsuccessful
13 way in engaging in some self-help that parties just ought not
14 to do," and this argument that somehow the timing of the
15 lawsuit and the ending of the gamesmanship makes some
16 difference, it does not under the provision of the lease.

17 The provision in the lease with regard to attorney's
18 fees is "in any proceeding or controversy associated with or
19 arising out of this lease or a claimed or actual breach
20 hereof, the prevailing party shall be entitled to recover
21 from the other party as part of the prevailing parties' costs
22 such parties actual and reasonable attorney's fees, costs and
23 court costs." So, there is some dispute over exactly when
24 they stopped this practice but they stopped this practice in
25 response to our letter telling them that they were in breach

1 of the lease and that we were therefore seeking to have them
2 evicted with regard to the lease and then they stopped
3 practice that this Court found to unacceptable and under the
4 attorney fee provision we should be entitled to recover fees.

5 THE COURT: He says you waived it by accepting the
6 payments.

7 MR. ATKIN: We may have waived the right to seek
8 eviction but what we didn't waive was the right to remedy the
9 conduct that was unacceptable conduct. There may be issues
10 as to can you accept - we thought that we could accept the
11 payments and still have them evicted for breaching the
12 covenant of good faith and fair dealing. There may be some
13 issue with regard to that.

14 My colleague just pointed out that the complaint
15 was filed on August 9 and we sent the demand letter on
16 September 18 claiming that they were in breach of the
17 covenant of good faith and fair dealing.

18 But in response to the Court's question, while
19 there may be some issues as to what remedy we were entitled
20 to as a result of their gamesmanship or their breach of the
21 covenant of good faith and fair dealing, that doesn't change
22 the fact that we prevailed in getting them to stop the
23 conduct that was inappropriate.

24 THE COURT: So you're saying that the conduct was
25 still ongoing when you became involved and you took action as

1 attorneys to stop that conduct whether it was filing a
2 lawsuit or writing letters or whatever it was and that the
3 conduct eventually did stop and you're asserting that it
4 stopped at least in part because of what you were doing as
5 attorneys?

6 MR. ATKIN: That's correct.

7 THE COURT: All right, thanks.

8 MR. MILLER: If I may, one quick comment?

9 THE COURT: Sure.

10 MR. MILLER: Counsel was reading from the
11 transcript but stopped at this point. He mentioned "I think
12 it's an unsuccessful way of engaging in some self-help the
13 parties had ought not to do." The very next sentence, "On
14 the other hand I'm not going to find it to be a violation of
15 the lease." You then found that with respect to the lawsuit
16 you didn't grant attorney's fees. I think it's clear that
17 you found it not to be a violation of the lease or the
18 implied covenant of good faith and fair dealing, but as to
19 the lawsuit and the quiet title issues, granted fee.

20 THE COURT: He's saying that regardless of what I
21 ordered then that I should order fees because of what he did
22 to have you stop that conduct and that he came in with that
23 conduct ongoing. I don't know whether there were phone calls
24 or letters or the complaint itself but eventually the conduct
25 stopped because of his involvement. Address that.

1 MR. MILLER: Your Honor, I've addressed just in the
2 past whta I thought was consistent with your order. We're
3 now discussing whether or not you should?

4 THE COURT: Yes.

5 MR. MILLER: Okay. The conduct that they complain
6 about all occurred before the initiation of the lawsuit and
7 resolved before this action. In fact they filed their
8 counterclaim -

9 THE COURT: Why was it resolved? How was it
10 resolved? What caused your client to stop doing what they
11 were doing? He says, Mr. Atkin says it's because we came in
12 and we took action, legal action, either writing letters,
13 making phone calls, somehow intervened and got them to change
14 their conduct.

15 MR. MILLER: I don't know. I'd have to ask my
16 client Your Honor. I personally wasn't involved back then
17 and I'd be speculating to represent to the Court any
18 differently.

19 THE COURT: I'm going to award fees to the extent
20 that that happened and I don't know how much time was
21 involved but you can go through your records and if you find
22 that you were writing letters of whatever you were doing on
23 that issue, I think I'll awards fees for that. I won't award
24 fees beyond that on that issue.

25 MR. MILLER: So that I'm clear, Your Honor, you're

1 still finding that it is not a breach of the implied covenant
2 of good faith and fair dealing nor a violation of the lease
3 but fees will be awarded to the extent you've just outlined?

4 THE COURT: Yes. And the reason I'm doing that is
5 because I think the conduct was unacceptable under the lease
6 and he had to come in to get them to stop and so they stopped
7 it. I didn't find because they had stopped it, because he'd
8 been accepting the payments and so forth and as time went on,
9 I didn't find it as a violation but I found it as
10 unacceptable conduct that was required. I don't know how
11 much time it took you to do that though.

12 MR. ATKIN: We'll file a supplemental affidavit in
13 regard to that, Your Honor.

14 THE COURT: All right. So, now with respect to the
15 order, do we need to change any wording of the order to
16 reflect all of this? I think the second to the last sentence
17 I'm going to insert with the limitations described by the
18 Court during the May 1st hearing. Okay?

19 MR. ATKIN: Fair enough. Thank you, Your Honor. I
20 take it the Court is willing to sign an order with that?

21 THE COURT: I have signed the order with that
22 change.

23 MR. ATKIN: Thank you, Your Honor.

24 THE COURT: Now, you've also submitted a judgment.
25 Does the defendant have any problem with the form of the

1 judgment? I'm going to amend Paragraph 3 to say as limited
2 by the Court on May 1st.

3 MR. MILLER: Your Honor, is it Your Honor's
4 intention that this be a final judgment of 54B? The reason I
5 ask is that language in there about not dismissing the
6 defense claim about prejudice and the right to amend in the
7 order, I don't know how that affects it and I'm just asking
8 for the Court's direction.

9 MR. ATKIN: Your Honor, we would suggest that this
10 is not a final order pursuant to 54B because of the right
11 they have to amend and bring in a third party.

12 MR. MILLER: I assume we don't do that based on
13 Your Honor's order today though that this ought to be filed
14 on a failure, decision not to do that. May I suggest a
15 solution?

16 THE COURT: Go ahead.

17 MR. MILLER: If you were to grant my clients a
18 certain number of days to amend the complaint, if they do
19 it's not final. If they don't it becomes final the next day,
20 next business day following the expiration of that period. I
21 think that makes it procedurally clear.

22 THE COURT: I could do that or I could certify it
23 for an interlocutory appeal, either way. I think it's
24 probably wise in either event though to limit the time so
25 that might be a better solution.

1 All right, I'm going to amend the third paragraph
2 of the order which says "Leave is granted to plaintiff to
3 amend this complaint in this matter so long as the amended
4 complaint, if any, is filed on or before" what date do you
5 need?

6 MR. MILLER: May 20th? I don't know if that's a
7 business day or not, Your Honor. How about May 21st?

8 THE COURT: Okay. "On or before May 21, 2007 and
9 so long as the allegations of the amended complaint require
10 nothing on the part of the landlord," etc.

11 Okay. Thank you. Anything further that we need to
12 do on this today?

13 MR. MILLER: Just a clarification. If on May 22nd
14 no amended complaint is filed, is this a final judgment?

15 THE COURT: I think the Appellate Court decides
16 whether something is a final judgment or not but in my view
17 it's final.

18 MR. MILLER: All right. Second thing is you made a
19 comment in the order I believe that as long as the
20 allegations don't require anything from the defendants, does
21 that include responding to it because an amended complaint, I
22 would have them as a party. They can do with that as they
23 wish but it might require an answer. Do I violate the
24 Court's order by doing that?

25 THE COURT: I don't think so. I contemplated that

there would be minimal effort required by the other side if you do file an amended complaint so I don't think filing a minimal answer would be in violation.

MR. MILLER: Thank you.

THE COURT: I don't think that's creating a serious problem for...

MR. ATKIN: My understanding from the prior hearing, Your Honor, is that all that would be required to do is to agree that there is no easement and we're not contesting their attempt to establish that there is no easement.

THE COURT: Yes, so then you could file some kind of an answer so stating.

MR. ATKIN: Okay. Thank you Your Honor.

MR. MILLER: I just don't want to be in violation of the order.

THE COURT: Thank you.

Okay. Any other questions or issues that we need to talk about?

MR. ATKIN: I don't believe so Your Honor.

THE COURT: Okay.

(Whereupon the hearing was concluded)