

1987

## G.G.A. Inc v. Toula K. Leventis : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS

STATE OF UTAH

~~87-0546 C A~~

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G. G. A., INC., an Indiana Corporation,	)	
	)	
Plaintiff-Respondent	)	Case No. : 87-0546 C A
	)	
vs.	)	
	)	
TOULA K. LEVENTIS,	)	
	)	
Defendant-Appellant )	)	

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BRIEF OF APPELLANT

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APPEAL FROM THE DISTRICT COURT OF THE  
THIRD JUDICIAL DISTRICT FOR SALT LAKE COUNTY  
STATE OF UTAH

THE HONORABLE J. DENNIS FREDERICK, JUDGE PRESIDING

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IN THE COURT OF APPEALS

STATE OF UTAH

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G. G. A. INC., an Indiana Corporation,	)	<b>BRIEF OF APPELLANT</b>
Plaintiff-Respondent	)	
vs.	)	Case No. 87-0546 C A
TOULA K. LEVENTIS,	)	
Defendant-Appellant	)	

---

**JURISDICTION**

Jurisdiction upon the Supreme Court of the State of Utah is conferred pursuant to Article VIII, Section 3, of the Utah Constitution. Jurisdiction upon the Utah Court of Appeals is pursuant to a "pour-over" order from the Utah State Supreme Court, pursuant to a notice dated December 3, 1987.

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References are as follows:

Index pp. \_\_\_\_\_: refers to the pages of the original record as paginated by the Salt Lake County Clerk's Office.

Addendum, Ex. \_\_\_\_\_: refers to the exhibits attached in the Addendum of Appellant's Brief in accordance with Rule 24 (f) of the Rules of the Utah Court of Appeals.

### **NATURE OF THE PROCEEDINGS IN TRIAL COURT**

This is a civil case arising out of real estate transaction between plaintiff and defendant; the trial court granted plaintiff's motion for summary judgment, and entered an order and a judgment in accordance therewith. Defendant appeals from a final order of the trial court's granting plaintiff's motion for summary judgment, seeking reversal of the trial court's order and judgment.

### **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

The following issues are presented for review to the Court of Appeals:

1. Did the delivery of the Warranty Deed by defendant to plaintiff, and the acceptance of the same by plaintiff, constitute "merger", thus barring plaintiff from recovery against defendant ?

2. Did plaintiff waive its claims against defendant by electing to accept the deed of conveyance, and by paying the \$ 250,000.00 purchase price to the defendant ?

3. Did defendant's notice of rescission dated October 28, 1986, constitute a withdrawal of the continuing offer to plaintiff ?

4. Could plaintiff exercise a rescinded offer as an option pursuant to a "Right to First Refusal" ?

5. Did plaintiff's notice of purchase to defendant

dated December 6, 1986, constitute the exercise of a legal option to purchase ?

6. Was there a breach by defendant of the contract (lease) between the parties, entitling defendant to an award of attorney's fees ?

7. Is the exculpatory language - contractually agreed upon by plaintiff and defendant - applicable to the facts of the case at bar, thus relieving defendant from liability ?

#### **STATEMENT OF THE CASE**

##### **(A) Nature of the case**

This is a civil case wherein plaintiff sued defendant for the return of \$ 40,000.00, alleged to have been an overpayment, for the purchase of certain real estate owned by defendant, and which was in the possession of plaintiff pursuant to a long term lease.

##### **(B) Course of proceeding**

After the filing of a complaint and amended complaint by plaintiff, and the appropriate responsive pleadings by defendant, both parties made their respective motions. Plaintiff moved for an order granting summary

judgment to plaintiff, supporting its motion by affidavits. Defendant made her motion for judgment on the pleadings, or in the alternative a motion for summary judgment, and supported the same by affidavits.

The trial court had a hearing upon the respective motions of the parties, and having heard argument, and having considered the respective motions of the parties, entered its order granting plaintiff its motion for summary judgment and denying the relief requested by defendant; accordingly, an order was entered by the trial court dated August 31, 1987.

This appeal is taken from the final order of the lower court so entered (Addendum, Ex. "A").

#### **FACTS**

1. Defendant, as the landlord entered into a long term lease agreement (the "Lease") with plaintiff, pursuant to which plaintiff entered upon and occupied certain real property, located in Salt Lake County, Utah, hereinafter referred to as the "Premises" (Index pp. 9-27, Addendum, Ex. "B").

2. The Lease agreement provided, inter-alia, for plaintiff to have two (2) distinct, separate, and separable rights, to-wit: a) an Option to Purchase the Premises (Index pp. 22-23, Addendum, Ex. "B"); and b) a Right to [sic] First

Refusal (Index p. 23, Addendum, Ex. "B").

3. During the occupancy by plaintiff of the defendant's Premises, defendant received on September 9, 1986, from a third party an Earnest Money Sales Agreement-Earnest Money Receipt, offering to defendant to purchase the Premises for the sum of \$ 210,000.00, the "Offer One" (Index 267, 269, Addendum Ex. "C"); the offer so made to defendant was made subject to the rights of the plaintiff by virtue of the existing Lease. (Index p. 267, Addendum, Ex. "C").

4. On September 15, 1986, defendant in writing, gave notice to plaintiff of the offer received, enclosing a copy of Offer One (Index p. 266, Addendum, Ex. "D").

5. On October 28, 1986, defendant was notified by the prospective purchaser that Offer One was withdrawn and rescinded, and defendant notified plaintiff of the withdrawal and rescission of Offer One (Index p. 270, Addendum, "E").

6. On November 20, 1986, defendant received from a different third party another Earnest Money Sales Agreement-Earnest Money Receipt, offering to defendant to purchase the Premises for the sum of \$ 250,000.00, the "Offer Two" (Index pp. 272-273, Addendum, Ex. "F"); Offer Two also recognized plaintiff's rights by virtue of the existing Lease (Index p. 272, Addendum, Ex. "F").

7. On November 21, 1986, defendant in writing

communicated to plaintiff the receipt of Offer Two (Index p. 271, Addendum, Ex. "G").

8. On December 6, 1986, plaintiff in writing (through a letter from its out of town corporate counsel) sought to purchase the Premises by exercising plaintiff's "Right to First Refusal" by offering to pay the sum of \$ 210,000.00 and in essence accepting the offer made as Offer One. (Index pp. 274-275, Addendum, Ex. "H").

9. On December 29, 1986, plaintiff, by and through its local counsel, sent a letter to the defendant, and the prospective purchaser of Offer Two, and to the real estate agent involved, giving notice to all parties that plaintiff intended to purchase the property for \$ 210,000.00 (Index p. 276-277, Addendum, Ex. "I").

10. On January 14, 1987, plaintiff, by and through its local counsel, sent again a letter to the defendant, threatening legal action against defendant, and seeking to enforce its alleged "right to purchase" for the sum of \$ 210,000.00 (Index 278-279, Addendum, Ex. "J").

11. On January 19, 1987, defendant through her counsel, informed plaintiff of her legal position relative to Offer One and the correspondence received by defendant from plaintiff's various counsel. (Index pp. 280-281, Addendum, Ex. "K").



12. On February 17, 1987, plaintiff, by and through its local counsel notified defendant and her counsel, of plaintiff's "... election to exercise its Option to Purchase [the Premises] in response to the Notice in your November 21, 1986 letter [Offer Two]..." (Index p. 282, Addendum, Ex. "L").

13. On February 20, 1987, defendant delivered a duly executed warranty deed including therewith an Assignment of Lease from defendant (Seller) to plaintiff (Buyer), (Addendum, Ex. "N") to the escrow agent. (Index p. 290-292, Addendum, Ex. "M").

14. On February 26, 1987, the transaction was fully consummated, the warranty deed was recorded, the purchase of \$ 250,000.00 was paid by plaintiff, and a closing statement was issued (Index p. 296, Addendum, Ex. "O").

#### SUMMARY OF ARGUMENTS

The trial court committed reversible error in failing to recognize and apply the defense of the principles of the doctrine of merger in the facts of the case at bar.

The delivery and acceptance of the executed warranty deed is considered, prima facie, to merge or supersede the provisions of the antecedent contract which may impose obligations upon the defendant (seller).

Even assuming arguendo that the doctrine of merger is not applicable in the facts of the case, defendant had merely offered to plaintiff, as a continuing offer, on September 15, 1986, the right to purchase the real property. Said offer remained open until October 28, 1986, at which time it was validly withdrawn. Plaintiff, having failed to respond by October 28, 1986, did not become vested with an irrevocable option to purchase for ninety days, flowing from plaintiff's "Right to First Refusal".

Plaintiff's election to purchase the real property, pursuant to the notice dated February 17, 1987, for the purchase price of \$ 250,000.00, and the closing of the transaction in accordance therewith, operates as a waiver of plaintiff's prior election to purchase the real property for \$ 210,000.00.

Furthermore, the award of attorney's fees to plaintiff should be reversed in that there is no breach of contract, there is no express agreement between the parties relating to attorney's fees, and there is no statutory authority or provision providing for the same.

In addition, the exculpatory language of the lease agreement expressly relieves defendant from liability, including attorney's fees, since any such liability arises after the date of the sale of the real property from

defendant to plaintiff.

## ARGUMENT

### POINT I

#### DEFENDANT'S DELIVERY OF THE WARRANTY DEED OPERATES AS MERGER THUS DEFEATING PLAINTIFF'S CLAIMS

- (A) The doctrine of merger  
bars plaintiff from recovery.

The foundation of plaintiff's recovery and judgment against defendant was the contract (Lease) as alleged in the complaint, resulting from an alleged overpayment of the purchase price, and a purported breach of lease.

When one applies the principles of the doctrine of merger, it is clearly evident that the contract upon which plaintiff sued is not available as the foundation of the action in the lower court, since the evidence clearly establishes that the plaintiff (buyer) accepted the deed from defendant (Seller) as performance of the contract.

As early as 1916 in Reese Howell Co. vs. Brown, 48 Utah 142, 158 P 684 (Utah 1916), continuously throughout, and as late as July of this year in Dobrusky v. Isbell, 62 Utah Adv. Rep 3, \_\_\_\_\_ P 2d \_\_\_\_\_ (Utah, 1987) our Supreme Court recognized and consistently applied and upheld the doctrine of merger.

In Dobrusky, supra, the Utah Supreme Court defined the doctrine of merger as follows:

... The doctrine of merger provides that on delivery and acceptance of a deed, the provisions of the underlying contract for the conveyance are merged into the deed and thereby become extinguished and unenforceable (emphasis supplied) Dobrusky, supra, p. 4.

In applying the doctrine of merger and explaining the necessity for it, the Supreme Court said in the Dobrusky case:

We regard a deed as the "final repository of the agreement which led to its execution." 716 P.2d at 792 (quoting Annot., 84 A.L.R. 1008, 1009 (1933)). Plaintiffs' argument that the deed did not reflect Adam's and Mitchell's intended agreement (that Mitchell's fence would serve as a boundary) does not overcome the doctrine of merger. When the terms of the deed cover the same subject matter as the antecedent agreement, the deed controls.

If the alleged agreement did exist, Mitchell and Adams would have been cognizant of the terms of that agreement. The fact the terms in the deed are otherwise inconsistent makes it

difficult to perceive but that the changes were made with deliberate intent. The cases so hold, and it may be said that in such a situation it would appear to be almost a conclusive presumption that the different terms of the deed were intended by the parties to supersede or merge those of the contract in this respect.

Annot., 38 A.L.R. 2d 1310, 1313 (1954).

Execution and delivery of the deed by Adams constituted full performance on his part, and Mitchell's acceptance of the deed manifested his acceptance of that performance even though the estate conveyed differed from that allegedly promised in an antecedent agreement. Therefore, the deed is the final agreement, and all prior terms, whether written or oral, are extinguished and unenforceable. (Emphasis supplied; some citations omitted) Dobrusky supra, p.4.

Accord: Kelsey v. Hansen, 18 Utah 2d 226, 419 P 2d 198 (Utah 1966).

The evidence clearly demonstrate that the instant case falls squarely within the principles of the doctrine of merger; therefore, the trial court committed reversible error in granting plaintiff relief in accordance with the prayer of its complaint.

The defense of the doctrine of merger is clearly available to the defendant and was properly asserted in defendant's Answer to Amended Complaint (Index pp. 177-184, paragraphs 35, 36, 37, 41 and 42, (Index p. 181, 182 & 183, Addendum, Ex. "P")).

The weight of authority throughout the jurisdictions, wherever similar issues were presented, are clearly in favor of the defendant. See cases and annotations in 84 A L R 980 (1933) and 38 A L R 2nd 1313 (1954).

There are certain exceptions to the doctrine of

merger which arise in equity and which have been recognized by the Utah Supreme Court.

The exceptions fall within three areas: a) fraud; b) mistake; and c) collateral right of the vendee which survive the delivery and acceptance of the deed.

In Secor v. Knight, 29 Utah Adv. Rep. 15, 716 P 2d 790, (Utah 1986) the Utah Supreme Court upheld and applied the principle of the doctrine of merger and discussed one of the exceptions relating to the allegations of fraud.

In Stubbs v. Hemmert, 567 P 2d 168 (Utah 1977), our Supreme Court recognized another exception of the doctrine, and stated:

However, if the original contract calls for performance by seller of some act collateral to conveyance of title, his obligation with respect thereto survive the deed and are not extinguished by it (emphasis added). Stubbs, supra, p. 169.

Appellant has been unable to find a Utah case where the exception of "mistake" is discussed or decided.

None of the above discussed exceptions applies to the facts in the instant case; neither plaintiff's original complaint (Index pp. 002-007), nor its amended complaint (Index pp. 136-143) assert, expressly or impliedly, any issues of fraud, or mistake, or a collateral obligation by the seller which could possibly survive the delivery and acceptance of the deed. None of the foregoing equitable

principles have been plead, or alleged in the complaint, nor were urged upon the trial court in plaintiff's various filing and affidavits, and none are evident in the record.

For plaintiff to be able to succeed, it must carry its burden and show and demonstrate that it comes clearly within one of the foregoing exceptions to the application of the doctrine of merger. Appellant respectfully submits that plaintiff has failed to meet its burden of proof.

It is respectfully submitted that the trial court erred in failing to recognize the defense of the doctrine of merger and apply it in the case at bar. Therefore, this Court should issue its mandate reversing the decision of the trial court and remanding the case to the trial court with an order directing judgment in favor of the defendant and dismissing plaintiff's complaint.

- (B) Plaintiff having elected to purchase the property by accepting Offer Two, has waived its claims and is not entitled to any relief.

Plaintiff on February 17, 1987, notified defendant in writing (Index p. 282, Addendum, Ex. "L") that it wished to purchase the property for the purchase price of \$ 250,000.00. Plaintiff's counsel's letter to defendant and her counsel stated:

You are hereby notified on behalf of our client, GGA of its election to exercise its Option to purchase the above described property as set forth in Article XIV of the Real Estate Ground Lease in response to the Notice in your November 21, 1986, letter. (emphasis supplied) (Index p. 282, Addendum Ex. "L").

It is unequivocally clear that what plaintiff was doing by sending this letter was to agree to purchase the property at the purchase price of \$ 250,000.00, i.e., responding to Offer Two. Pursuant thereto defendant delivered title of the property and all other rights pursuant to the Lease, by Warranty Deed (Index p. 290-291, Addendum, Ex. "M"), and by an Assignment (Index p. 292, Addendum, Ex. "N"). A closing statement was also prepared by the title company in connection with the closing (Index p. 296, Addendum Ex. "O").

After the transaction was closed and plaintiff obtained title to the property, plaintiff amended its complaint seeking then to obtain a money judgment against defendant on the theory of breach of contract.

Plaintiff's motion in the trial court for summary judgment and the relief sought was bottomed upon the theory of breach of contract. Plaintiff states in its complaint (paragraph 24) that it was "forced" to pay an additional \$ 40,000.00. Plaintiff's position however is untenable. No



one forced plaintiff to act. Plaintiff voluntarily elected to accept the \$ 250,000.00 offer. There were other avenues open to plaintiff. It is important to note that at the time it closed the transaction, it had already instituted the legal action for the District Court; if plaintiff was operating under its theory of breach of contract, it could very easily have deposited the sum of money, the \$ 210,000.00 (the price at which it thought it was entitled to purchase the property) with the Court, in accordance with and consistent with its theories, and could have asked for declaratory judgment as to the validity of its December 6, 1986, "acceptance of its option", and seek all other remedies, including specific performance and injunctive relief.

There simply is not one "iota" of evidence in the lower court which goes to the issue of a breach of contract by the defendant. Defendant consistently performed in strict compliance with the provisions of the Lease and in fact delivered to plaintiff (tenant) by good and sufficient warranty deed the real estate affected by the Lease.

The only obligation and legal duty which defendant had was to deliver title of the property to plaintiff; that it did... . There was not any agreed upon or implied collateral obligation on the part of the defendant, nor there

was any agreed upon or implied collateral right of the plaintiff, which could conceivably survive the delivery of the warranty deed.

The Lease upon which plaintiff relies had given plaintiff certain possessory rights. There is no allegation in plaintiff's complaint that defendant prevented plaintiff from possessing the real property, nor was plaintiff prevented from conducting its business thereupon. All of defendant's duties and obligations pursuant to and in accordance with the Lease were fully complied and lawfully discharged by defendant.

It is important to note that both Offer One and Offer Two as presented to the defendant by the third parties (Index pp. 267-269 and pp. 272-273, Addendum, Ex. "C" and Ex. "F") expressly stated that the offer to purchase was made subject to and in full cognizance of all of the rights of plaintiff as expressed in section XIV of the Lease.

Plaintiff's theory that the withdrawal by defendant of the September 16, 1987, Offer One, constitutes a breach of the Lease, simply can not be maintained, and it is not supported by any evidence.

## POINT II

**PLAINTIFF'S RIGHT TO FIRST REFUSAL DID NOT BECOME A LEGAL OPTION BUT IT WAS MERELY A CONTINUING OFFER SUBJECT TO WITHDRAWAL.**

The gravamen of plaintiff's cause of action is the fact that when defendant gave notice to plaintiff on September 15, 1986, that she had an offer to sell the Premises, that that alone created a legal and binding "option" for ninety days.

An analysis of the "right" granted to plaintiff by defendant which arose from the "Right to First Refusal" clearly demonstrates that it was not an "option"; in order for it to be an "option" it must be supported by consideration. Consideration was glaringly absent in this transaction and in the claim asserted by plaintiff. What plaintiff had pursuant to the "Right to First Refusal" was merely an offer for plaintiff to purchase, which offer could be withdrawn, and in fact it was withdrawn, prior to acceptance. Defendant readily admits that one of the rights given to plaintiff, to-wit: the naked "Option to Purchase" the "premises" (Index p. 263, page 22 of Addendum, Ex. "B") (the first right granted to Tenant) was in fact supported by consideration... consideration being the execution of the

lease. The issue in the instant case arises out of the second, which is a separate and separable right as created by the lease, to-wit: A "Right to [sic] First Refusal". This second right is not the same and cannot be legally construed, nor factually be supported as a legal "option". It is indeed a very fine line distinguishing the two rights ... but which, in any event, based upon the evidence must be resolved in favor of the defendant.

The discussion of the option contracts in 77 Am. Jur. 2d, Vendor and Purchaser § 34 (1975) is instructive, appropriate and on point. Therein it is stated that:

It is essential to the existence of a valid option that it be supported by a valuable consideration ... An option to purchase without consideration is nudum pactum until accepted, and in effect a mere continuing offer, which may be withdrawn at any time before acceptance.

The consideration for the option is a thing apart from the consideration for the sale of the land. There must be some consideration on which the finger may be placed, and of which it may be said, "this was given by the proposed purchaser to the proposed vendor, as the price for the option, or privilege to purchase ...". Id @ p. 214 (citations omitted), (Emphasis supplied).

Factually, in the instant case, defendant pursuant to and in accordance with section XIV of the Lease (Right to First Refusal) notified plaintiff, in writing, on September 15, 1986, that she had received an offer to purchase her

property from Mr. Brown for the sum of \$ 210,000.00; she included a copy of the earnest money agreement, which recognized plaintiff's Lease and plaintiff's rights flowing therefrom. At that point in time an offer was created in favor of plaintiff; there was no consideration given by plaintiff for an "option" to be created. Plaintiff can not point out nor can the "finger" be placed upon any consideration given to defendant. The offer so created was a continuing offer to plaintiff, subject obviously to a withdrawal.

On October 28, 1986, defendant notified plaintiff, in writing again, that the proposed sale fell apart because the proposed buyer had elected to rescind the transaction. The operative effect of this notification to plaintiff (Index p. 270), was the withdrawal of the offer to the plaintiff.

Plaintiff had an open offer between September 15, 1986 and October 28, 1986, to purchase the property but plaintiff failed to act. Plaintiff had an opportunity to accept the offer during the forty-three (43) days that the offer remained open. It certainly can not be said that a telephone conversation by plaintiff's officer Arlt constituted an oral acceptance of the offer; it is axiomatic that a written offer can only be accepted in writing and not orally. In any event, the "evidence" so presented by the Arlt

Affidavit were, timely and properly, objected to by the defendant, as non admissible and not conforming to Rule 56 of the Utah Rules of Civil Procedure, and therefore such "evidence" is excludable and not properly before the trial court. (Index pp. 257-259, Addendum, Ex. "Q").

The first attempt by plaintiff to accept the offer was made by plaintiff on December 6, 1986, when plaintiff sent to defendant a letter by plaintiff's attorneys wherein it discussed the legal position of the plaintiff and notified defendant "... of its [plaintiff's] election to exercise its option ..."; (Index pp. 274-275, Addendum, Ex. "H"). Thus, plaintiff's purported acceptance of the offer came thirty nine (39) days after the offer was withdrawn by defendant, and after written notice of the withdrawal, and after Offer Two was communicated to plaintiff by defendant.

Plaintiff attempts to bootstrap its theory of the existence of consideration by stating in paragraph 6 of the Arlt affidavit that the "Option to Purchase" and "Right to First Refusal" was contained in the Lease and thus it was a material consideration of the parties for the execution of the Lease. Such a hypothesis however is not available to plaintiff, for plaintiff is not seeking to enforce the "Option to Purchase" as created by the express provisions of the Lease. Here, plaintiff seeks to take advantage of

defendant by wanting to pay a lesser value for the land, than the value which market forces had created. Plaintiff asserts that it had been granted an additional and different option which arises out of the "Right to First Refusal"; all the "Right to First Refusal" created and made available to plaintiff, was an offer; that is, in the event (as per the lease) "... Landlords (sic) shall receive a bona fide offer to purchase said demised premises, Landlords (sic) shall first notify Tenant ... of such offer ...". The offer so created can not be transformed into a legal option without additional consideration, and can be withdrawn at any time prior to acceptance.

Before, however, getting to the point of the alleged acceptance by plaintiff of the first offer of \$ 210,000.00, certain events transpired. On November 21, 1986, defendant again notified plaintiff that she had a different offer for \$ 250,000.00, Offer Two. It was, at all times, defendant's unquestionable right to obtain and to receive the maximum possible amount of dollars in connection with the sale of the property.

It is also important to note that plaintiff's own actions relating to the purchase of the property and to the "Right to First Refusal", confirms that plaintiff was in doubt as to the validity of its position, i.e., that it had a

valid option to purchase, open for ninety (90) days; realizing how vulnerable and unattainable its position was, and having waited eight-eight (88) days from the date of Offer Two, it elected to purchase; if plaintiff thought that it had a valid and legal "option" created as a result of Offer One, it would have exercised its other alternatives, as discussed elsewhere herein under Point I(b), especially in view of the fact that plaintiff had filed its original action seeking inter-alia equitable injunctive relief as against the defendants, which it later abandoned when it amended its complaint.

Defendant's right to seek and obtain the best possible price for her property was clearly recognized by the parties to the Lease in that they provided for two (2) alternative methods to obtain the maximum amount of dollars for the benefit of the seller. First, the "Option to Purchase" as described in the first part of Section XIV, wherein "... a board of three (3) appraisers ..." would determine the fair market value of the property; second, it was intended by the parties that the market forces would operate in establishing the fair market value of the property, and thus the parties agreed on the "Right to First Refusal" as an alternate method of valuation.

In any event, the second offer to purchase was duly



communicated to the plaintiff on November 21, 1986 (Index p. 271, Addendum, Ex. "G"). After the receipt by plaintiff of the withdrawal of the first offer and the receipt of the second offer, plaintiff decided on or about December 6, 1986, that it had elected to accept the heretofore withdrawn first offer.

Defendant notified plaintiff on or about January 19, 1987, of defendant's legal position and that the purported election by plaintiff to accept the first offer was "nudum pactum".

On February 6, 1987, plaintiff filed its original complaint seeking specific performance (for the price of \$ 210,000.00) as against defendant and other injunctive relief as against the other defendant named therein. It is also important to note that at no time plaintiff tendered funds, to-wit the \$ 210,000.00; plaintiff did not do it at the time it asserts it exercised its "option", nor at the time it filed the within action.

In its memorandum before the trial court plaintiff relied upon J.R. Stone Co., Inc. vs. Keate, 576 P 2d 1285 (Utah, 1987); such reliance, however, is totally misplaced. As a matter of fact the discussion of our Supreme Court as to the distinction between an offer to sell and an option, clearly supports defendant's position in the instant case.

Our Court said that plaintiff's argument in that case

... represents a misconception of the distinction between an offer to sell and an option. The former, as any other offer, may be withdrawn at any time before its acceptance. Whereas, the granting of an option to sell, supported by a consideration, commits the offeror to sell according to the conditions of the option until the option by its terms expires... id at p. 1288 (emphasis supplied).

Plaintiff in the lower court also appeared to have relied upon Russell v. Park City Utah Corporation, 548 P. 2d 889 (Utah, 1976), for the proposition that plaintiff was granted a 90-day non-revocable option. However, neither the facts nor the holding of the Russell case support plaintiff's position. The lease in Russell specifically provided for the additional consideration of \$ 2,000.00 for the "... other privileges to purchase ..."; it was this additional consideration which made the right of first refusal in Russell to become an irrevocable right to purchase. In the case at bar the offer, as made to the defendant, had not ripened into an option; it merely constituted an offer to the plaintiff subject to withdrawal, so long as such withdrawal was made prior to acceptance.

In the lower court Plaintiff's reliance upon Hofmann v. Sullivan, 599 P 2d 505 (Utah 1979) is also not appropriate as being dispositive of the issue; the critical

element which made the language in that lease an option, was the fact that \$100.00 out of each \$375.00 monthly lease payment was expressly and contractually reserved to be applied toward the agreed upon purchase price of \$ 49,500.00, thus creating the option.

It is respectfully submitted that the right granted to plaintiff as created on September 15, 1986, was a revocable continuing offer, which was rescinded on October 28, 1986, thus leaving nothing to plaintiff for it to exercise.

### POINT III

#### THE AWARD OF ATTORNEY'S FEES TO PLAINTIFF WAS IN ERROR

Assuming arguendo that plaintiff, factually and legally was granted a ninety day "option", and it was that "option" which the trial court considered legally binding upon defendant and thus it became the contract upon which plaintiff was entitled to recover, that "contract" does not provide for the award of attorney's fees.

The discussion in this brief on pages 8 through 10, clearly demonstrate that there is no evidence in the record preponderating in favor of plaintiff, supporting a theory of breach of contract. Absent that, it was clearly error for the trial court to award attorney's fees to plaintiff.

#### POINT IV

#### **DEFENDANT IS NOT LIABLE TO PLAINTIFF BY VIRTUE OF THE RELEASE PROVISION CONTAINED IN ARTICLE XVIII OF THE LEASE**

Article XVIII of the Lease (Index p. 265) provides the following exculpatory language:

Any party hereto shall have the right at any time to sell, transfer, assign, or convey his, her or its interest (whether fee, leasehold, or otherwise) in the demised premises (but subject to the option to purchase and rights of first refusal hereinabove set forth) to any person, firm or corporation; and upon the making of any such sale, transfer, assignment or conveyance such party shall cease to be liable hereunder on account of any liability or obligation which would otherwise have accrued following the date of such sale, transfer, assignment, or conveyance. (emphasis added).

On February 17, 1987, defendant was notified by Plaintiff that plaintiff was electing to exercise to purchase defendant's property (Index pp. 282-283, Addendum, Ex. "L"); it was plaintiff's intent to purchase the property "... for the price and upon the stated terms and conditions contained in your notice [Notice of Defendant to plaintiff dated November 21, 1986, stating the price to be \$ 250,000.00]..."

Defendant in accordance with plaintiff's acceptance notified on the same day (February 17, 1987), by letter of

her attorney of the time and place of the closing (Index pp. 284-285, Addendum, Ex. "R"). Two days later another letter was hand-delivered to plaintiff's counsel with a copy of the preliminary title report affecting the real property in question (Index p. 286).

On February 27, 1987, defendant transferred and conveyed to the plaintiff by Warranty Deed, (Addendum Ex. "M") all of plaintiff's right, title and interest in the real property and the Lease, (Addendum, Ex. "N").

Plaintiff is suing to recover \$ 40,000.00 because it feels it paid it under protest. Assuming arguendo that defendant had some liability for the return of the \$40,000.00 to plaintiff, defendant's liability or obligation arises after the date of sale, to-wit February 17, 1987, and therefor pursuant to section XVIII, "... such party [defendant] shall cease to be liable hereunder on account of any liability or obligation which would otherwise have accrued following the date of such sale ...".

#### CONCLUSION

Defendant respectfully submits that the trial court committed reversible error in granting plaintiff's motion for summary judgment.

This Court should enter its order reversing the judgment of the trial court and granting defendant's motion

on the pleadings or her motion for summary judgment, or in the alternative, remanding the case to the trial court with the direction that an order be entered dismissing plaintiff's complaint with prejudice.

Additionally, defendant should be awarded its costs and attorney's fees in connection with this appeal, and such other relief as this Court deems proper in the premises.

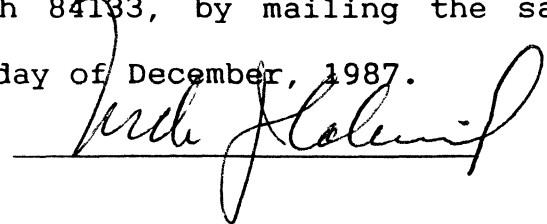
DATED this 10<sup>th</sup> day of December, 1987.



NICK J. COLESSIDES  
Attorney for  
Defendant-Appellant  
Toula K. Leventis  
466 South 400 East  
Salt Lake City, Utah 84111-3303  
Tele. No.: (801) 521-4441

MAILING CERTIFICATE

Served four (4) copies of the foregoing Brief of Appellant to Bryan A. Larson, attorney for plaintiff-respondent, 1200 Kennecott Building, 10 East South Temple Street, Salt Lake City, Utah 84133, by mailing the same, postage prepaid, this 10<sup>th</sup> day of December, 1987.



## **ADDENDUM**

**EXHIBIT "A"**

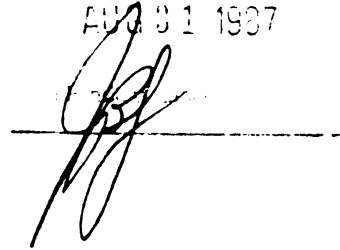


# JUDGMENT

FILED IN CLERK'S OFFICE  
SALT LAKE COUNTY, UTAH

AUG 31 1987

Bryan A. Larson (#4070)  
McKAY, BURTON & THURMAN  
1200 Kennecott Building  
10 East South Temple Street  
Salt Lake City, Utah 84133  
Telephone: (801) 521-4135  
Attorney for Plaintiff



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Bk 213 NC 3863  
9-2-87-828

G.G.A., INC., an Indiana corporation,  
  
Plaintiff,  
vs.  
TOULA K. LEVENTIS,  
  
Defendant.

ORDER  
  
Civil No. C87-943  
Judge Frederick

On August 10, 1987, Plaintiff brought its Motion for Summary Judgment before the Honorable J. Dennis Frederick of the above-entitled court. In addition, Defendant brought her Motion for Summary Judgment before the above-entitled court. After review of the written Memoranda on file with the court and hearing oral argument by Bryan A. Larson on behalf of the Plaintiff and Nick Colessides on behalf of the Defendant, the court granted Plaintiff's Motion and denied Defendant's Motion.

EXHIBIT "A"

Based upon the foregoing and good cause appearing therefore, it is hereby

ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Summary Judgment plus costs and attorneys fees is hereby granted and judgment is hereby entered against Toula K. Leventis in the amount of:

\$ 40,000.00 principal;  
\$ ~~5,956.50~~ <sup>7,796.50</sup> attorneys fees;  
\$ 101.33 in costs;

~~\$ 46,057.83~~ TOTAL JUDGMENT

44 79.75

with interest on the judgment at the legal rate of 12% per annum on the unpaid balance from the date of entry until paid, plus after accruing costs and attorneys fees.

It is further hereby ORDERED, ADJUDGED, AND DECREED that Defendant's Motion for Summary Judgment is hereby denied.

DATED this 31<sup>st</sup> day of Aug, 1987.

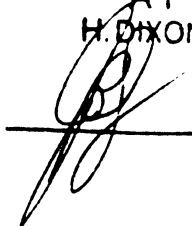
BY THE COURT

  
J. DENNIS FREDERICK

Approved as to form:

Nick Colessides

ATTEST  
H. DIXON HINDLEY  
Clerk

By   
Deputy Clerk

BAL3/h1

**EXHIBIT "B"**

REAL ESTATE GROUND LEASE

THIS INDENTURE OF LEASE, made and entered into this 9th day of September, 1976, by and between TOULA K. LEVENTIS, of Salt Lake county, Utah, hereinafter referred to as "Landlords", whether one or more, and G.G.A., Inc., an Indiana corporation, with its principal office and place of business in the City of Evansville, Vanderburgh County, Indiana, hereinafter referred to as "Tenant", WITNESSETH THAT:

Landlords, for and in consideration of the covenants and agreements herein contained and set forth to be kept and performed by Tenant and subject to and upon the terms and conditions hereinafter set forth, do hereby lease, let and demise unto Tenant, and Tenant does hereby take and hire of and from Landlords the following described real estate situated in the City of Salt Lake, Salt Lake County, State of Utah, to-wit:

A certain tract or parcel of real estate containing Thirty-six Thousand Eight Hundred Seventy-two (36,872) square feet, more or less, said tract or parcel being more commonly known and referred to as 550 East 4th South and 418 South 6th East, Salt Lake City, Utah, and said real estate being more particularly described in Exhibit A attached hereto and made a part hereof,

which real estate is hereinafter referred to as the "demised premises:.

TO HAVE AND TO HOLD said demised premises unto Tenant for the period commencing as of the date hereof and extending to the first day of February, 1977, (said latter date being the "commencement date") plus a term of twenty-five (25) years commencing on said commencement date, with the right to extend said term as hereinafter set forth, all upon and subject to the limitations, terms, covenants, provisions and conditions hereof as hereinafter set forth.

I.

RENTAL

Tenant covenants and agrees to pay to Landlords, without demand, at such place as Landlords may, from time to time,

EXHIBIT "B"

000003

designate in writing, and Landlords agree to accept, as rental for the demised premises during the term of this lease the sums set forth in the following schedule:

- A. For a period of four (4) months after the execution of this lease, no rental has to be payable by the Tenant hereunder and the Landlords will make monthly payments to ~~XXXX~~ Tenant ~~XXX~~ of Nine Hundred Dollars (\$900.00) per month for said period of four (4) months.
- B. The sum of Twelve Thousand Dollars (\$12,000.00) per year, net rental, payable at the rate of One Thousand Dollars (\$1,000.00) per month in advance on the first day of each calendar month for the first five (5) years of said term.
- C. The sum of Thirteen Thousand Two Hundred Dollars (\$13,200.00) per year, net rental, payable at the rate of One Thousand One Hundred Dollars (\$1,100.00) per month in advance on the first day of each calendar month during the 6th through the 10th years of said term.
- D. The sum of Fourteen Thousand Four Hundred Dollars (\$14,400.00) per year, net rental, payable at the rate of One Thousand Two Hundred Dollars (\$1,200.00) per month in advance on the first day of each calendar month during the 11th through the 15th years of said term.
- E. The sum of Fifteen Thousand Six Hundred Dollars (\$15,600.00) per year, net rental, payable at the rate of One Thousand Three Hundred Dollars (\$1,300.00) per month in advance on the first day of each calendar month during the 16th through the 25th years of said term.
- F. The sum of Sixteen Thousand Eight Hundred Dollars (\$16,800.00) per year, net rental, payable at the rate of One Thousand Four Hundred Dollars (\$1,400.00) per month in advance on the first day of each calendar month during the 26th through the 35th years (the first two [2] extension terms) of said lease.
- G. The sum of Eighteen Thousand Dollars (\$18,000.00) per year, net rental, payable at the rate of One Thousand Five Hundred Dollars (\$1,500.00) per month in advance on the first day of each calendar month during the 36th through 45th years (the third and fourth extension terms) of said lease.

H. The sum of Nineteen Thousand Two Hundred Dollars (\$19,200.00) per year, net rental, payable at the rate of One Thousand Six Hundred Dollars (\$1,600.00) per month in advance on the first day of each calendar month during the 46th through 55th years (the fifth and sixth extension terms) of said lease.

The term "year" or "lease year" as used herein shall be construed as meaning and referring to a period of one (1) year commencing on the first day of the twenty-five (25) year term of this lease or the anniversary of such date.

Rental not paid within ten (10) days from and after the due date thereof shall be payable together with a delinquency charge in the amount of five percent (5%) of the delinquent rental.

Notwithstanding the provisions of the proceeding subparagraphs F, G, and H with respect to the rental payable following the expiration of the initial twenty-five (25) year term hereof, Landlords at their option may request that the rental for each or any of said ten (10) year periods specified in said paragraphs F, G, and H be determined by a board of appraisers each of whom shall be realtors or real estate appraisers engaged in business in the City of Salt Lake, Utah. One of said appraisers shall be selected by Landlords, one by Tenant and the third by the two thus first selected. The cost of such appraisal shall be borne by Landlords. Following the rental determination by such board of appraisers, Tenant shall have the right at its option, for a period of thirty (30) days following the receipt of written notification of such rental determination, by written notice to Landlords to elect to terminate this lease regardless of whether the term thereof shall have been otherwise extended.

As additional consideration for this lease, Tenant undertakes and agrees to secure the release of Landlords and the above described real estate from any further liability under or by virtue of that certain mortgage indebtedness in favor of Valley Bank and Trust Company covering the above described premises, the unpaid principal balance of which is currently in the approximate amount of Forty-seven Thousand Dollars (\$47,000.00), and which said indebtedness is payable in monthly installments of Nine Hundred Dollars (\$900.00) per month. In furtherance thereof, Tenant covenants and agrees to pay, as rental, the sums required to amortize said mortgage indebtedness in accordance with its present terms and from the commencement date hereof until the due date of the last installment of said mortgage indebtedness on April 1, 1981, Landlords shall credit Tenant with the sum of Nine Hundred Dollars (\$900.00) per month against the monthly rental payments otherwise payable hereunder and the balance, if any, of said monthly rental payments shall be paid to Landlords.

As hereinafter more particularly provided, all ad valorem taxes due and payable commencing with the installment of taxes due November, 1977 with respect to the above described real estate, all ad valorem taxes payable with respect to the buildings and improvements erected or placed upon said real estate by Tenant, and all costs of insurance and repairs with respect to the demised premises and improvements, payable during the term of this lease shall be paid by Tenant and the aforesaid rentals payable to Landlords shall therefore be net rentals to Landlords.

## II.

### LANDLORDS' TITLE AND TENANT'S POSSESSION

Landlords represent and warrant unto Tenant that Landlords are the owners of a merchantable record title in fee simple to the demised premises subject only to existing easements, highways and rights of way, and the mortgagee indebtedness aforesaid, and the lien of current taxes, and that subject to the terms and provisions of this lease, Tenant shall have and enjoy the quiet and peaceful possession of the demised premises during the entire term of this lease. Landlords shall contemporaneously with the execution of this lease furnish to Tenant a standard policy of title insurance showing the demised premises to be free and clear of all liens and encumbrances except as aforesaid.

The right to possession of the demised premises is hereby vested in Tenant effective as of the date of execution hereof if, as of said date, Tenant shall have secured a release of Landlords and the demised premises from any liability under the real estate mortgage in favor of Valley Bank and Trust Company and Tenant has secured a commitment from the City of Salt Lake, Utah, that all permits necessary or required to construct the proposed improvements upon the demised premises will be issued and granted.

## III.

### TAXES AND ASSESSMENTS

Tenant shall pay before any fine, penalty, interest or cost may be added thereto for the nonpayment thereof, all real estate taxes, assessments, water charges, sewer charges, and other governmental levies and charges, general and special, ordinary and extraordinary, unforeseen as well as foreseen, of any kind and nature whatsoever which are assessed, levied, confirmed, imposed or become a lien upon the demised premises

or any part thereof, including, but not limited to, all ad valorem property taxes payable upon and with respect to the demised premises during the term of this lease, commencing with the ----- installment of 1977 taxes, due and payable in November, 1977, and all such ad valorem taxes payable during the term of this lease with respect to any buildings and improvements erected or placed upon said real estate by Tenant.

To the extent permitted by law and not inconsistent with the requirements of any existing or future mortgage affecting the demised premises, Tenant shall have the right to apply for the conversion of any special assessment for local improvements in order to cause the special assessment payable in installments. Tenant shall have the right to execute in the name of Landlords and as attorney in fact for Landlords (if Landlords after reasonable demand fail to do so) such agreement or agreements or other instruments as may be required or necessary to enable payment of any such special assessments in installments. In case any such assessments are payable and paid in installments as provided or permitted by law, then, Tenant shall not be liable for payment of any installments of such special assessments payable following the expiration of the term or extension of the term of this lease if such installments are on an equal or other periodic basis so that the total payment made by the respective parties toward such special assessment is proportionate to their respective periods of occupancy of the premises.

Tenant or Landlords shall have the right to contest or review by legal proceedings or in such other manner as may be deemed suitable in a tax assessment, rate or charge or other governmental imposition or charge herein previously mentioned. If the proceeding is instituted by Tenant, Tenant shall conduct the contest promptly at the Tenant's own expense. If required for the proceeding brought by Tenant, the contest may be brought in Landlords' name. Tenant may defer payment of a contested item upon condition that before instituting the proceeding Tenant shall furnish to Landlords and to any mortgagee, a surety company bond, cash deposit or other security reasonably satisfactory to Landlords and the mortgagee which is sufficient to cover the amount of the contested items together with interest and penalties for the period which such proceedings may be expected to take in securing payment of the contested items, interest and penalties and all costs in connection therewith. Notwithstanding the furnishing by Tenant of such bond or security other than a cash deposit, Tenant shall promptly pay the contested items if at any time all or any part of the demised premises are in danger of being sold, forfeited or otherwise lost. The



contest referred to shall include appropriate proceedings to review tax assessments, appeal from tax assessments, orders and appeals from any judgments, decrees or orders. All proceedings taken by Tenant shall be commenced as soon as possible after the imposition or assessment of the contested item and shall be prosecuted by Tenant to final adjudication with dispatch. If there is a refund with respect to any contested item based on the payment by Tenant, Tenant shall be entitled to the refund.

Nothing contained in this lease shall require that Tenant pay any inheritance, estate, succession, gift, franchise, gross receipts, income, profit, or excess profit, capital stock, corporate or other similar taxes or capital levy that may be imposed upon Landlords or upon the rent payable by Tenant hereunder, unless the taxes levied upon the rent reserved are in lieu of or as a substitute for a real estate tax upon the demised premises and then only to the extent that it relieves or reduces Tenant's obligation to pay real estate taxes; provided, however, that Tenant shall not be obligated to pay any amount greater than would have been payable by Landlords had the rent upon which the substitute tax was levied been the sole taxable income of Landlords for the relevant tax year in question.

#### IV.

##### BUILDING AND IMPROVEMENTS

Tenant shall have the right to remove from the demised premises all buildings and improvements now situated thereon; provided, however, that the removal or demolition of such buildings and improvements shall be at Tenant's sole cost and expense and Tenant shall indemnify and hold Landlords harmless of and from any and all cost, expense or liability incurred in connection with or arising in any manner out of the removal or demolition of said existing building and improvements; provided, however, that the exercise of said right shall be conditioned upon release of Landlords and the demised premises from the mortgage obligation aforesaid and the issuance by the City of Salt Lake of all necessary permits required for the construction of the improvements proposed by Tenant.

Within a reasonable time following the release of the aforesaid mortgage indebtedness and the issuance of all necessary permits by the City of Salt Lake, Tenant at its sole cost and expense and in compliance with all applicable laws, regulations and ordinances shall construct, erect and install upon the demised premises a restaurant building at a cost of not less than Eighty Thousand Dollars (\$80,000.00) and Tenant may, in like manner, remove or demolish any such building, structures or other improvements which Tenant determines to be delapidated, deteriorated, outmoded or otherwise inadequate, provided that in the event of any such removal or demolition Tenant shall promptly thereafter erect, construct

or install upon the demised premises a restaurant building or other similar improvements having a value substantially equal to the value (at the time of removal or demolition) of any such building, structure or other improvement which shall be removed or demolished. Prior to the commencement of the construction of any such buildings or improvements upon the demised premises, Tenant shall furnish Landlords with the plans and specifications for such proposed improvements and the estimated cost thereof. Tenant shall also have the right, at Tenant's cost and expense, to make alterations to and additions to such improvements, provided, however, that the making of such alterations or additions shall not cause any default in any then existing mortgage upon the premises. Prior to the commencement of construction of any such buildings or improvements upon the demised premises by Tenant, Tenant shall furnish to Landlords a good and sufficient corporate performance or surety bond naming both Landlords and Tenant as obligees conditioned that Tenant and/or Tenant's contractors will indemnify and save Landlords and the demised premises harmless of and from any claims for labor or materials furnished in the erection or construction of said building and improvements.

Neither Tenant nor any subtenant shall cause or permit any mechanic's lien to be suffered or imposed upon the title to the demised premises on account of or by reason of the erection, construction, installation, alteration, removal or demolition of any such building, structure or other improvement. In case of the filing of any such lien on account of any work, labor or material caused to be performed or furnished by Tenant, Tenant shall, promptly after receipt from Landlords of notice of such filing, either pay or sufficiently bond the same or procure the discharge thereof and Tenant shall also defend on behalf of Landlords and at Tenant's sole cost and expense any action, suit, or proceeding which may be brought for the enforcement of any such lien and Tenant shall pay any damage and discharge any judgment entered therein and save Landlords of and from any claim, loss, damage or expense on account thereof.

During the term of this lease Tenant shall own all improvements placed upon the demised premises. Upon the termination or expiration of this lease Tenant shall have no right to remove any of said buildings or improvements and all such buildings and improvements then located upon the demised premises shall thereupon be and become exclusively the property of Landlords. However, trade fixtures installed or located upon the demised premises by Tenant or any subtenant shall remain the property of Tenant or any subtenant and may be removed from the premises; provided, however, that any damage to the premises caused by such removal shall be promptly repaired at the cost and expense of Tenant or any such subtenant who caused such damage.

V.

EMINENT DOMAIN

In case the demised premises or any part thereof shall be appropriated by exercise of the power of eminent domain or conveyed under threat of condemnation by public authority, Landlords shall be entitled to receive, and shall be paid, such award as is provided by law with respect to the appropriation or such conveyance of the land (as distinguished from the buildings and improvements). The entire award with respect to buildings and improvements shall be made available to Tenant for the purpose of paying the cost of repairing, remodeling or altering existing buildings or improvements upon said land or constructing new buildings or improvements thereon, provided, however, that in case this lease is terminated on account of such condemnation or conveyance under threat of such condemnation or in case Tenant shall not expend such funds for one or more of said purposes with reasonable promptness following such taking or conveyance, the amount of such award or portion thereof not so expended shall be divided between Landlords and Tenant in such manner that Landlords shall receive that proportion of such funds equal to the portion of the period of the then current term or extended term of this lease remaining at the time construction of such buildings or improvements was completed which elapsed between the date of such completion and the date of such taking or conveyance and Tenant shall receive that proportion of such funds equal to the portion of such period of time which is subsequent to the date of such taking or conveyance.

In case all of the demised premises shall be appropriated by the exercise of the power of eminent domain or conveyance by reason of threat of condemnation, this lease and the respective obligations of the parties shall terminate except that Tenant shall thereupon be entitled to a pro rata refund of any prepaid rental as of the date of such taking of said premises pursuant to the power of eminent domain.

In case a part of the demised premises shall be appropriated by the exercise of the power of eminent domain and by reason of such appropriation the use thereof shall be materially, substantially and adversely affected, Tenant shall have the right to terminate this lease by the giving of notice to that effect to Landlords; but if Tenant does not exercise such right of termination within six (6) months following the date of such partial appropriation this lease shall continue in full force and effect as to all of the real estate covered hereby which has not been appropriated, and following such taking fixed rental payable hereunder shall be reduced in proportion to the area so appropriated.

Landlords and Tenant each acknowledge that amounts received or receivable on account of or by reason of condemnation of all or any part of the demised premises shall be subject to the prior rights of any mortgage of the premises in accordance with the terms and provisions of the mortgage held by any such mortgagee.

## VI.

### DEFAULT

In case Tenant defaults in respect to its covenants to pay rent or in respect to any other of its obligations hereunder and if Tenant fails to cure such default within sixty (60) days after written notice of the existence of such default has been given in writing by Landlords, Landlords may thereupon take possession of the demised premises and terminate this lease; provided, however, that if such default is of a character or kind that it would not be possible for Tenant to cure the same within a period of sixty (60) days this lease shall not be terminated if Tenant shall within said sixty (60) day period of time commence in good faith to cure such default and shall thereafter prosecute the matter of curing such default with reasonable diligence; and provided further, that if at the time of any such default the leasehold estate hereby created is subject to a mortgage lien of record in Salt Lake County, Utah, of which Landlords shall have been notified, or if at the time of any such default the premises are subject to one or more subleases of which Landlords have been notified, Landlords shall not have the right to and may not exercise such option or privilege of termination unless and until like notice of such default shall have been given and afforded to such mortgagee or subtenant or subtenants, which notice may be given at the same time as notice to Tenant.

In the event Tenant shall fail to cure any such default or to commence in good faith to cure such default within the period specified above, and Landlords shall give notice of intent to terminate, then any leasehold mortgagee or subtenant shall have an additional period of sixty (60) days following the expiration of the aforesaid initial sixty (60) day period within which to notify Landlords that it elects to remedy the default and to void the election of Landlords to terminate.

In the event of termination by Landlords, any leasehold mortgagee shall have a period of six (6) months following termination within which to elect to obtain a new lease upon all of the same terms and condition of the original lease upon payment to Landlords of the full amount of all unpaid rental pursuant to the terms of the original lease. In the event of such election by any leasehold mortgagee, Landlords covenant and agree to enter into a new lease with said lease-

hold mortgagee upon written request therefor and the payment of unpaid back rental as aforesaid, which such lease shall have equal priority with the original lease. In addition, Landlords agree to modify said lease upon request by any leasehold mortgagee, provided that any such modifications shall not result in any decrease in rentals or of the Tenant's obligations, nor any decrease in Landlords rights.

Any leasehold mortgagee shall not be required to cure any default resulting from any act of bankruptcy, insolvency or similar act on the part of Tenant.

The failure of Landlords to exercise any such option or privilege of termination at any time shall not be deemed a waiver of the right of termination in the event of any subsequent default.

If Tenant shall be in default in performance of any of the terms or provisions of this lease (other than the payment of rental) Landlords, after thirty (30) days' written notice to Tenant may at any time thereafter perform the same for the account of Tenant at the cost and expense of Tenant, and Tenant shall pay to Landlords on demand any amount properly paid by Landlords in connection with the curing of such default.

Notwithstanding any termination of this lease by reason of Tenant's default or otherwise, if at the time of such termination the premises are occupied by one or more subtenants, and if such subtenant or subtenants shall, after notice, fail to remedy such default, such subtenant or subtenants and each of them shall be entitled to continue in the exercise of all rights and privileges granted them by their respective subleases in accordance with the terms and tenor thereof (including, without limitation, any and all rights or privileges to renew or extend the terms of said sublease or subleases), so long as they shall keep and perform their respective obligations thereunder. Any such sublease or subleases effected by Tenant prior to termination of this lease shall survive termination and shall continue in full force and effect subject to the terms and provisions thereof and after such termination Landlords shall be substituted for Tenant in such subleases and shall be entitled to exercise all rights of Tenant in and under said subleases and to collect all rentals and other payments falling due under such subleases. Any and all such subleases shall continue to be binding upon Landlords and said sublessees, respectively, as though Landlords herein had been the lessors in each of such subleases.

VII.

LANDLORDS' RIGHT TO MORTGAGE DEMISED PREMISES

Landlords reserve the right to mortgage the demised premises; provided, however, that the monthly installment payments required to amortize any such mortgage indebtedness shall in no event exceed the rental payable pursuant to the terms and provisions hereof and provided further that Landlords shall secure and deliver to Tenant from any such mortgagee a written non-disturbance agreement providing that the holder of such mortgage will recognize Tenant or any subtenant's lease of the demised premises and will not disturb the Tenant or any subtenant's quiet possession of the premises for so long as Tenant or any subtenant is not in default of any of the terms and provisions of this lease.

VIII.

ADDITIONAL COVENANTS OF TENANT

Tenant agrees that Landlords shall have no obligation of any kind or character to maintain or repair any of the buildings or other improvements which Tenant shall cause to be constructed upon the demised premises.

Tenant further agrees that Landlords shall have no obligation to pay for or furnish gas, electricity, water or other utility services furnished during the principal term hereof in connection with the demised premises and Tenant covenants and agrees to hold Landlords harmless of and from any and all claims on account of charges for such utility services.

Tenant covenants and agrees to pay when due all mortgage payments required to be paid in connection with any mortgage loan upon the leasehold estate and any buildings or improvements constructed by Tenant. If Tenant shall fail to pay any such mortgage payments, Landlords may pay, but shall not be obligated to pay the same; and Tenant shall repay to Landlords upon demand the full amount of any such payments made by Landlords, together with interest at the rate hereinafter specified.

IX.

LIABILITY INSURANCE

Tenant covenants and agrees that it will, at its sole cost and expense, during the entire term of this lease, keep and maintain in full force and effect public liability insurance with respect to the use and occupancy of the above described premises, providing insurance with respect to such claims for injuries to or death of persons or damage or destruction of property arising out of or by reason of the use and occupancy of the premises and with limits of not less than Fifty Thousand Dollars (\$50,000.00) with respect to claims for to property, Three Hundred Thousand Dollars (\$300,000.00) with respect to claims on account of injuries

or death of more than one person arising out of any one accident or occurrence and which insurance shall name and designate Tenant or assigns and Landlords or their successors as insureds. In case Tenant shall at any time fail to procure such insurance Landlords, after thirty (30) days' written notice to Tenant, may procure the same and any and all sums paid for such insurance by Landlords shall be and become immediately due and payable by Tenant upon demand. Tenant agrees that the amounts and limits of the above described liability insurance shall be reviewed with Landlords at least once each five (5) years during the term or extension of the term of this lease, and that upon review the amounts of such limits shall be increased or decreased, in the light of then existing circumstances, to amounts and limits which are comparable to amounts and limits of such insurance then being maintained by reasonably prudent owners of comparable premises.

X.

NOTICES

Any notice required or permitted pursuant to the terms and provisions of this lease shall be deemed fully given or served if transmitted by registered or certified mail with return receipt requested, addressed to Tenant at 4300 East Morgan Avenue, Evansville, Indiana 47715, and to Landlords at the address then fixed by Landlords for the payment of rent. Either party may by like written notice at any time and from time to time designate a different address to which notices shall subsequently be transmitted to him, her or it.

XI.

DESTRUCTION OF IMPROVEMENTS -  
MAINTENANCE OF HAZARD INSURANCE

During the term of this lease, Tenant at its sole cost and expense shall keep and maintain in full force and effect fire and extended coverage insurance with respect to the improvements situated upon the above described premises in an amount not less than the value, from time to time, of the destructible improvements situated upon the demised premises; and Tenant shall furnish to Landlords copies of policies or certificates with respect thereto evidencing the procurement and maintenance of such insurance. Any such fire and extended coverage insurance shall name any leasehold mortgagee as an additional insured and Tenant shall furnish to any such leasehold mortgagee similar copies of policies or certificates with respect thereto evidencing the procurement and maintenance of such insurance.

In case of damage to or destruction of any improvements, the proceeds of such insurance shall be used and applied to repair, restore or rebuild (subject to Tenant's option to terminate as set forth below), as the case may require, such improvements.

The occurrence of damage to such improvements by fire or other casualty shall not be cause for termination of this lease (subject to Tenant's option to terminate as set forth below in the event of total or substantial destruction) nor shall there be any abatement of rent on account of any such damage. In case such improvements are totally or substantially destroyed by fire or other casualty, and if the leasehold estate shall be subject to no unpaid mortgage indebtedness, Tenant at its option may terminate this lease by notice in writing given within sixty (60) days following the occurrence of such destruction and in such case Tenant shall be released and discharged of and from any and all liability with respect to the payment of rental or other obligations hereunder accruing subsequent to such destruction; provided, however, that in case of such termination (by reason of Tenant's exercise of its option so to do) all proceeds of hazard insurance with respect to the improvements upon said premises which shall have been constructed or installed by Tenant shall be payable to and be the sole property of Landlords.

## XII.

### ASSIGNMENT, SUBLETTING AND ATTORNMEN

Tenant shall have the right to sublet any part or parts or all of the demised premises for use and occupancy for any lawful purpose; but the term or terms of any such sublease or subleases shall not extend beyond the term of this lease. The interest and estate of any such sublessee shall not terminate by reason of Tenant's default hereunder.

The leasehold estate hereby created shall be freely assignable by Tenant and its assigns and no holder of the leasehold estate hereby created shall be liable for payment of rent or performance of any other obligation hereunder which accrues after the period of time during which such holder was vested with title to the leasehold estate hereby created. Tenant may from time to time without consent of Landlords assign its interest hereunder, either in whole or in part, by way of mortgage to any bank, insurance company or any other lending institution as mortgagee or otherwise. Any mortgagee acquiring the leasehold estate as provided above shall be liable for the performance of the obligation imposed upon Tenant by this lease only during the periods such mortgagee has ownership of the leasehold estate or possession of the premises subject thereto. Nothing contained in any such mortgage shall release or be deemed to release Tenant from the full and faithful observance or performance of any covenant and condition in this lease contained and on its part to be observed and performed or from any liability for the nonobservance or nonperformance thereof or be deemed to constitute the waiver of any rights of Landlords hereunder.



Landlords agree that their fee title in the premises shall be subject and subordinate to any subleases made between Tenant and subtenants occupying space in the demised premises and to any renewals, modifications, replacements and extensions of said subleases with said subtenants. Landlords agree to execute any further documents necessary to ratify the said subordination.

XIII.

OPTIONS TO EXTEND

So long as Tenant is not in default hereunder, Tenant shall have and is hereby granted options to extend the term of this lease for six (6) additional periods of five (5) years each, upon the terms, provisions and conditions contained and set forth in this lease. The first of said extended terms shall commence on the day following the expiration of the initial twenty-five (25) year term of this lease. Said options to extend shall be automatically exercised and the term extended without notice to Landlords from Tenant. In the event Tenant does not desire to extend this lease after the initial term or any extended term, Tenant shall give written notice to Landlords of its election not to extend this lease, which notice shall be given not less than one hundred eighty (180) days prior to the expiration of the initial term or the then extended term.

XIV.

OPTION TO PURCHASE  
AND RIGHT TO FIRST REFUSAL

At any time following the expiration of the initial twenty-five (25) year term hereof, and so long as Tenant is not in default in performance hereunder, Tenant shall have and Landlords do hereby grant unto Tenant, an option to purchase the above described premises upon the terms and conditions herein set forth. In the event Tenant shall notify Landlords of its intent to exercise such option to purchase, and if Landlords and Tenant shall be unable to agree upon a purchase price, then the fair market value of the above described real estate hereby demised shall be determined by a board of three (3) appraisers, each of whom shall be licensed realtors or real estate appraisers engaged in business in Salt Lake City, Utah. One of said appraisers shall be selected by Landlords, one by Tenant and the third by the two so selected. The decision of a majority of any such board of appraisers shall be binding and conclusive upon the parties and the cost of such appraisal shall be borne equally by Landlords and Tenant. Following the determination of the fair market value of the demised premises as aforesaid, Tenant shall have the option for a period of sixty (60) days by written notice to Landlords following the determination of the fair market value to elect to purchase

the above described premises. In the event of the exercise of such option, the purchase price shall be an amount equal to the appraised fair market value of the above described real estate hereby demised. Said purchase price shall be payable in cash on the closing date as hereinafter set forth. In the event of the exercise of said option by Tenant, the closing of the purchase and sale shall be consummated with reasonable promptness thereafter by the payment of the purchase price to Landlords and the conveyance by Landlords of said real estate to Tenant by good and sufficient warranty deed whereby said real estate shall be conveyed to Tenant free and clear of and from any and all liens and encumbrances except building and use restrictions of record, roadways, easements and rights of way, if any, affecting title to said real estate, all nondelinquent real estate taxes which shall be a lien as of the date of closing, which said taxes Tenant shall assume and agree to pay and any liens and encumbrances suffered or imposed by Tenant. In the event of the exercise of such option and consummation of a sale of said premises pursuant thereto, rental hereunder shall be payable to the date of closing of said sale and any prepaid rental referable to the period of time following the date of the consummation of such sale shall be refunded by Landlords to Tenant.

Landlords further covenant and agree that in case Landlords shall at any time during the term of this lease as the same may be extended intend or desire to sell Landlords' estate in the demised premises, or if Landlords shall receive a bona fide offer to purchase said demised premises, Landlords shall first notify Tenant of such desire and intent or of such offer and the price at which and the terms upon which Landlords are willing to sell such estate. Thereupon, Tenant shall have the option, to be exercised within ninety (90) days after receipt by Tenant of written notice from the Landlords to elect to purchase the demised premises and all of Landlords' right, title and interest therein for such price and upon such stated terms and conditions. If Tenant exercises said option within said ninety (90) day period of time, the closing of the purchase and sale shall be consummated with reasonable promptness thereafter. If Tenant shall not exercise said option Landlords shall have the right to conclude a sale of their interest in the demised premises for a price not less than and upon terms not more favorable than the price and terms stated in such notice; provided, however, notwithstanding the failure of the Tenant to exercise such option after notice from the Landlords or any subsequent owner or owners of the demised premises, the Tenant's option to purchase aforesaid and Tenant's right of first refusal as herein contained shall remain in force and be binding upon any subsequent owner or owners of the demised premises to the same extent as if said subsequent owner or owners were the Landlords named herein.

XV.

ZONING AND PERMITS

Landlords further covenant and agree that in the event Tenant is unable to secure all necessary permits required for the construction of the buildings and improvements proposed by Tenant within thirty (30) days following execution hereof, Tenant shall have the absolute right at its discretion to elect to terminate this lease in which event Tenant shall be released from any and all liability hereunder.

XVI.

SUPPLEMENTARY AGREEMENTS

Tenant agrees that at any time and from time to time upon not less than ten (10) days' prior written request by Landlords it will execute, acknowledge and deliver to Landlords, and Landlords agree that at any time and from time to time upon not less than ten (10) days' prior written request by Tenant they will execute, acknowledge and deliver to Tenant a statement in writing certifying that this lease is unmodified and in full force and effect (or if there have been modifications that the same is in full force and effect as modified and stating the modifications), and the dates to which the fixed rent and other charges have been paid in advance, if any, and whether or not there is any existing default by Tenant with respect to any sums of money required to be paid by Tenant under the terms of this lease, or notice of default served by Landlords, it being intended that any such statement delivered pursuant to this paragraph may be relied upon by any prospective purchaser of the fee or leasehold estate or by any prospective or existing mortgagee or assignee of any mortgagee of the leasehold estate. If any such certification by Landlords shall allege nonperformance by Tenant, the nature and extent of such nonperformance shall be summarized therein. In case either party shall fail to execute, acknowledge and deliver to the other such statement within ten (10) days after such request is made in writing it shall be conclusively presumed a certification that this lease is unmodified and in full force and effect and that all rental has been paid and that there is no existing default.

Landlords covenant and agree they they will execute any and all instruments which may be required of Landlords

in connection with the granting of easements (affecting the demised premises or any street adjacent thereto) in favor of utility companies for purposes of the installation of water, gas, steam, electricity, telephone, sewage or storm drainage serving or for the benefit of the demised premises.

XVII.

MISCELLANEOUS PROVISIONS

Landlords and Tenant each hereby agree to execute and deliver upon demand any and all instruments which may be reasonably required or necessary to give further assurance of the covenants and agreements herein contained and set forth.

Notwithstanding any of the provisions hereof which might be construed to the contrary, this lease shall not be cancelled, surrendered, or any of the provisions thereof modified without the express written consent of any mortgagee of the leasehold estate of Tenant.

In case Tenant shall hold over after the expiration of the term of this lease such tenancy shall be deemed to be from month to month only but otherwise upon and subject to the terms, covenants and conditions herein contained.

The time or times herein specified within which Tenant is required to perform any act or to do any thing shall be and they are hereby extended for periods of time equal to the period of time during which performance is delayed directly by reason of strikes, lockouts, riots or insurrection, acts of God or other causes or conditions beyond Tenant's control.

Landlords shall have and are hereby given and granted the right to enter upon the demised premises at all reasonable times for the purposes of inspecting the condition thereof.

The parties agree that promptly following the execution and delivery of this agreement they will make and enter into a short form of lease for purposes of recording wherein there shall be set forth the legal description of the demised premises, the term of this lease and such other provisions hereof as shall be agreed upon by the parties.

In case of termination of this lease for any reason, Tenant covenants and agrees that it will promptly execute,

in recordable form, a release of this lease so as to provide to Landlords record evidence of such termination.


In case Landlords or Tenant shall be required to resort to litigation on account of any breach or default in performance hereunder and shall be successful in such litigation the judgment in such litigation shall include an allowance to the successful party or parties for all costs and expenses including reasonable attorneys' fees paid or incurred by such party or parties in connection with such litigation.

XVIII.

SUCCESSORS AND ASSIGNS

The terms and provisions hereof shall be and constitute covenants running with the title to the real estate described above, and shall inure to the benefit of and be binding upon the respective successors and assigns of the parties. Any party hereto shall have the right at any time to sell, transfer, assign, or convey his, her or its interest (whether fee, leasehold, or otherwise) in the demised premises (but subject to the option to purchase and rights of first refusal hereinabove set forth) to any person, firm or corporation; and upon the making of any such sale, transfer, assignment or conveyance such party shall cease to be liable hereunder on account of any liability or obligation which would otherwise have accrued following the date of such sale, transfer, assignment, or conveyance; provided, however, that any such sale, transfer, assignment or conveyance shall be subject to the terms and provisions of this agreement which shall be binding upon any purchaser, transferee or assignee.

IN WITNESS WHEREOF, Landlords have hereunto set their hands and seals and Tenant has caused the execution hereof and the affixing hereto of its corporate seal by its duly authorized officers pursuant to authority of its Board of Directors as of the day and date first above written.

 (SEAL)  
Toula K. Leventis

\_\_\_\_\_  
(SEAL)

"Landlords"

By A. Guagenti  
its President

ATTEST:

Robert E. Griffin  
Its Secretary

"Tenant"

STATE OF UTAH                    )  
  )SS:  
COUNTY OF SALT LAKE        )

Before me, the undersigned, a Notary Public, in and for said County and State, personally appeared the within named TOULA K. LEVENTIS and acknowledged the execution of the above and foregoing instrument.

WITNESS my hand and Notarial Seal this 9th day of September, 1976.

My Commission Expires:  
October 5, 1979.

[Signature]  
Notary Public  
Residing in Salt Lake City, Utah.

STATE OF INDIANA                )  
  )SS:  
COUNTY OF VANDERBURGH        )

Before me, the undersigned, a Notary Public, in and for said County and State, personally appeared the within named G.G.A., Inc., an Indiana corporation by Andrew Guagenti, its President and Robert E. Griffin, its Secretary who acknowledged the execution of the above and foregoing instrument pursuant to authority of its Board of Directors.

WITNESS my hand and Notarial Seal this 13th day of September, 1976.

My Commission Expires:  
March 18, 1979

[Signature]  
Notary Public

**EXHIBIT "C"**

# EARNEST MONEY SALES AGREEMENT

## EARNEST MONEY RECEIPT

Legend Yes(X) No(O)

DATE Sept. 9, 1986

The undersigned Buyer JIMMY P. BROWN hereby deposits with as EARNEST MONEY, the amount of Five Thousand Dollars Dollars (\$ 5,000) in the form of a check which shall be deposited in accordance with applicable

Brokerage

Phone Number

Received by

### OFFER TO PURCHASE

1. PROPERTY DESCRIPTION The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 572 East Fourth South in the City of Salt Lake City County of Salt Lake subject to any restrictive covenants, zoning regulations, utility or other easements or rights of way, government patents or state deeds of record approved in accordance with Section G. Said property is more particularly described as A parcel of land about 43,208 sq. ft. or 0.99 acres on which a Wendy's fast food restaurant has been built. See attached Exhibit "A" for CHECK APPLICABLE BOXES description.

☐ UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other

☒ IMPROVED REAL PROPERTY ☒ Commercial ☐ Residential ☐ Condo ☐ Other

(a) Included items. Unless excluded below, this sale shall include all fixtures and any of the items shown in Section A if presently attached to the property. The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title:

(b) Excluded items. The following items are specifically excluded from this sale: No exclusions. Buyer acknowledges Real Estate Ground Lease dated September 9, 1976 by and between Seller and C.C.A., Inc. an

(c) ~~CONVEYANCE OF REAL ESTATE AND OTHER RIGHTS~~ Seller represents that the property includes the following improvements in the purchase:

<input checked="" type="checkbox"/> public sewer <input checked="" type="checkbox"/> connected	<input checked="" type="checkbox"/> well <input checked="" type="checkbox"/> connected <input checked="" type="checkbox"/> other	<input checked="" type="checkbox"/> electricity <input checked="" type="checkbox"/> connected
<input type="checkbox"/> septic tank <input type="checkbox"/> connected	<input type="checkbox"/> irrigation water <input type="checkbox"/> secondary system	<input type="checkbox"/> ingress & egress by private easement
<input type="checkbox"/> other sanitary system	<input type="checkbox"/> of shares <input type="checkbox"/> Company	<input checked="" type="checkbox"/> dedicated road <input checked="" type="checkbox"/> paved
<input type="checkbox"/> public water <input checked="" type="checkbox"/> connected	<input type="checkbox"/> TV antenna <input type="checkbox"/> master antenna <input type="checkbox"/> prewired	<input checked="" type="checkbox"/> curb and gutter
<input type="checkbox"/> private water <input type="checkbox"/> connected	<input checked="" type="checkbox"/> natural gas <input checked="" type="checkbox"/> connected	<input type="checkbox"/> other rights

(d) Survey. A certified survey shall be furnished at the expense of prior to closing. shall not be

(e) Buyer Inspection. Buyer has made a visual inspection of the property and subject to Section 1 (c) above and 6 below, accepts it in its present condition, except:

2. PURCHASE PRICE AND FINANCING The total purchase price for the property is Two Hundred Ten and No/100

Dollars (\$ 210,000.00 ) which shall be paid as follows: \$ 5,000.00 which represents the aforesaid EARNEST MONEY DEPOSIT.

\$ 205,000.00 representing the approximate balance of CASH DOWN PAYMENT at closing.

\$ ----- representing the approximate balance of an existing mortgage, trust deed note, real estate contract or other encumbrance to be assumed by buyer, which obligation bears interest at N/A % per annum with monthly payments of \$ N/A which include: ☐ principal, ☐ interest, ☐ taxes, ☐ insurance, ☐ condo fees, ☐ other

\$ ----- representing the approximate balance of an additional existing mortgage, trust deed note, real estate contract or other encumbrance assumed by Buyer, which obligation bears interest at N/A % per annum with monthly payments of \$ ----- which include: ☐ principal, ☐ interest, ☐ taxes, ☐ insurance, ☐ condo fees, ☐ other

\$ ----- representing balance, if any, including proceeds from a new N/A loan, to be paid as follows as directed by Seller and approved by Buyer

\$ ----- Other N/A

\$ 210,000.00 TOTAL PURCHASE PRICE

If Buyer is required to assume an underlying obligation and/or obtain outside financing, Buyer agrees to use best efforts to assume and/or procure same. This offer is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing. Buyer agrees to make application within 15 days after Seller's acceptance of this Agreement to assume the underlying obligation and/or obtain the new financing at an interest rate not to exceed N/A. If Buyer does not qualify for the assumption and/or financing within N/A days after Seller's acceptance of this Agreement, this Agreement shall be terminated at the option of the Buyer or Seller upon written notice.

Seller agrees to pay \$ N/A towards Buyer's total financing and closing costs, including, but not limited to, loan discount points.

If this Agreement involves the assumption of an existing loan or obligation on the property, Section F shall apply.

EXHIBIT "C"



of title brought current, with an attorney's opinion (See Section H)

4. **INSPECTION OF TITLE.** In accordance with Section G, Buyer shall have the opportunity to inspect the title to the subject property prior to closing. Buyer shall take title subject to any existing restrictive covenants, including condominium restrictions (CC & R's). Buyer ☐ has ☐ has not reviewed minimum CC & R's prior to signing this Agreement.

5. **VESTING OF TITLE.** Title shall vest in Buyer as follows: Jimmy P. Brown or affiliate designated at closing

6. **SELLER WARRANTIES.** In addition to warranties contained in Section C, the following items are also warranted: 2 2 None

Exceptions to the above and Section C shall be limited to the following: \_\_\_\_\_

7. **SPECIAL CONSIDERATIONS AND CONTINGENCIES.** This offer is made subject to the following special conditions and/or contingencies to be satisfied prior to closing: Both parties shall be responsible for paying their own legal, consulting, other fees in connection with this transaction. Also buyer shall pay real estate brokerage commission typically paid by seller.

8. **CLOSING OF SALE.** This Agreement shall be closed on or before \*\*, 19       , at a reasonable location to be determined by Seller, subject to Section G. Upon demand, Buyer shall deposit with the Escrow Closing Office all documents necessary to complete the purchase in accordance with this Agreement. Prorations set forth in Section R shall be made as of ☐ date of possession ☒ date of closing ☐ other \*\* as mutually agreed or before December 10, 1986. Closing to be done by Utah Title Company - 629 east 400 south

9. **POSSESSION.** Seller shall deliver possession to Buyer on closing, unless extended by written agreement of parties slc

10. **GENERAL PROVISIONS.** Unless otherwise indicated above, the General Provision Sections on the reverse side hereof are incorporated by reference.

11. **AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE.** Buyer offers to purchase the property on the above terms and conditions shall have until \_\_\_\_\_ (AM / PM) \_\_\_\_\_, 19 \_\_\_\_\_, to accept this offer. Unless accepted, this offer shall lapse and the Agent shall return EARNEST MONEY to the Buyer.

Signature of Buyer

Date

Signature of Buyer Jimmy P. Brown

**CHECK ONE**

☐ **ACCEPTANCE OF OFFER TO PURCHASE.** Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

☐ **REJECTION.** Seller hereby REJECTS the foregoing offer \_\_\_\_\_ (Seller's Initials)

☐ **COUNTER OFFER.** Seller hereby accepts the foregoing offer SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum. Seller presents said COUNTER OFFER for Buyer's acceptance. Buyer shall have until \_\_\_\_\_ (A.M. / P.M.) \_\_\_\_\_, 19 \_\_\_\_\_ to accept or reject. If accepted, the terms shall be as specified below.

Date \_\_\_\_\_

Time \_\_\_\_\_ (AM / PM)

Signature of Seller

Toula K. Leventis

Signature of Seller

**CHECK ONE**

☐ Buyer accepts the counter offer.

☐ Buyer accepts with modifications on attached addendum.

Date \_\_\_\_\_

Time \_\_\_\_\_ (AM / PM)

Signature of Buyer

Signature of Buyer

**COMMISSION.** The undersigned hereby agrees to pay to \_\_\_\_\_ as consideration for the efforts in procuring a buyer a commission of \_\_\_\_\_.

Signature of Seller

Date

Signature of Seller

**DOCUMENT RECEIPT**

State Law requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures (One of the following alternatives must be completed):

A. ☐ I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures.

**SIGNATURE OF SELLER**

**SIGNATURE OF BUYER**

Date

Date

Date

Date

B. ☐ I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on \_\_\_\_\_, 19 \_\_\_\_\_. Certified Mail and return receipt attached hereto to the ☐ Seller ☐ Buyer. Sent by \_\_\_\_\_.

Touka

EXHIBIT "A"

PARCEL 1:

Commencing at the NE corner of Lot 7, Block 33, Plat B, SLC Survey, thence West 2.5 Rods; thence South 20 Rods; thence East 2.5 Rods; thence North 198 feet; thence East 165 feet; thence North 79.25 feet; thence West 114.25 feet; thence North 52.75 feet; thence West 50.75 feet to beginning.

PARCEL 2:

Commencing 8 Rods from the Northeast Corner of Lot 8, Block 33, Plat B, SLC Survey; thence South 45.5 feet; thence West 10 Rods; thence North 45.5 feet; thence East 10 Rods to beginning.

**EXHIBIT "D"**

TOULA K. LEVENTIS  
2875 Crestview Drive  
Salt Lake City, Utah 84108

September 15, 1986

Mr. Phil Arlt  
G.G.A. Incorporated  
Wendy's Old Fashioned Hamburgers  
232 South Main Street  
Salt Lake City, Utah 84101

Re: Property located at 550 East 400 South and 418 South 600 East,  
Salt Lake City, Utah 84102.

Dear Phil:

In compliance with the terms set forth in Article XIV of the "Real Estate Gound Lease" made and entered into on September 9, 1976, by and between G.G.A., Inc. as Tenant and Toula K. Leventis as Landlord, covering real property located at 550 East 400 South and 418 South 600 East, Salt Lake City, Utah, I am writing this to inform you that I have received a bona fide offer for the purchase of the above captioned property. Mr. Jimmy P. Brown, a reputable Salt Lake City businessman and close personal friend, has made an offer to purchase the property for \$210,000.00. I am enclosing a copy of the Earnest Money Agreement together with a copy of Mr. Brown's check for \$5,000.00 for your information.

Since a considerable amount of time has elapsed since we first discussed your interest in purchasing the above mentioned property, I would be most appreciative if you would kindly respond to this communication as soon as possible.

Thank you for your anticipated cooperation.

With kindest personal regards,

Sincerely yours,



Toula K. Leventis

cc: Mr. Andy Guagenti, Secretary, G.G.A., Inc.  
Mr. Robert E. Griffin, Treasurer, G.G.A., Inc.

000000

EXHIBIT "D"

**EXHIBIT "E"**

TOULA K. LEVENTIS

2875 Crestview Drive  
Salt Lake City, Utah 84108

October 28, 1986

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Mr. Phil Arlt  
G.G.A. Incorporated  
Wendy's Old Fashioned Hamburgers  
232 South Main Street  
Salt Lake City, Utah 84101

Re: Rescission of offer to purchase the property located at 550 East 400 South  
and 418 South 600 East, Salt Lake City, Utah 84102

Dear Phil:

I have been informed by Mr. Jimmy Brown, the prospective buyer of the property at 572 East 400 South, Salt Lake City, Utah (see my earlier letter of September 15, 1986), that his offer has been rescinded and withdrawn; accordingly I have returned the earnest money deposit to Mr. Brown.

I do want to sell my property and will entertain new offer(s) to sell it; accordingly I do not consider myself bound to sell at the price of \$210,000.00. Thank you for your consideration.

Sincerely yours,

Toula K. Leventis

cc: Mr. Andy Guagenti, Secretary, G.G.A., Inc.  
Mr. Robert E. Griffin, Treasurer, G.G.A., Inc.

EXHIBIT "E"

**EXHIBIT "F"**

DATE November 20, 1986

The undersigned Buyer Janus Associates hereby deposits with B  
 EARNEST MONEY the amount of Six Thousand and No/100 Dollars (\$ 6,000)  
 in the form of check which shall be deposited in accordance with applicable S  
Four Star Realty 363-9284 Received by J. Rees Jensen, Principal Broker  
 Brokerage Phone Number

## OFFER TO PURCHASE

1. **PROPERTY DESCRIPTION** The above stated EARNEST MONEY is given to secure and apply on the purchase of the property situated at 562  
Fourth South in the City of Salt Lake County of Salt Lake  
 subject to any restrictive covenants, zoning regulations, utility or other easements or rights of way, government patents or state deeds of record approved  
 accordance with Section G. Said property is more particularly described as An "L" shaped parcel of land approximately 1  
acre in size fronting on both Sixth East Street and Fourth South Street on which is located  
Wendy's Old Fashioned Hamburgers.

CHECK APPLICABLE BOXES ☐ UNIMPROVED REAL PROPERTY ☐ Vacant Lot ☐ Vacant Acreage ☐ Other \_\_\_\_\_  
☒ IMPROVED REAL PROPERTY ☒ Commercial ☐ Residential ☐ Condo ☐ Other \_\_\_\_\_  
 (a) Included items Unless excluded below, this sale shall include all fixtures and any of the items shown in Section A if presently attached to the  
 The following personal property shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title \_\_\_\_\_

(b) Excluded items The following items are specifically excluded from this sale No exclusions, but subject to leasehold  
interest of G.G.A., Inc. dba Wendy's as tenant under lease with Seller.

(c) **CONNECTIONS, UTILITIES AND OTHER RIGHTS** Seller represents that the property includes the following improvements in the purchase  
☒ Water ☐ Sewer ☐ Connected ☒ Well ☒ Connected ☒ Other \_\_\_\_\_ ☒ Electricity ☒ Connected  
☐ Septic tank ☐ Connected ☐ Irrigation water/secondary system ☐ Ingress & egress by private easement  
☐ Other sanitary system \_\_\_\_\_ = of shares \_\_\_\_\_ Company \_\_\_\_\_ ☒ Dedicated road ☒ Paved  
☒ Public water ☒ Connected ☐ TV antenna ☐ Master antenna ☐ Prewired ☒ Curb and gutter  
☐ Private water ☐ Connected ☒ Natural gas ☒ Connected ☐ Other rights \_\_\_\_\_

(d) Survey A certified survey ☐ shall be furnished at the expense of \_\_\_\_\_ prior to closing ☒ shall not be furnished  
 (e) Buyer Inspection Buyer has made a visual inspection of the property and subject to Section 1 (c) above and 6 below, accepts it in its present  
 condition, except No EXCEPTIONS

2. **PURCHASE PRICE AND FINANCING** The total purchase price for the property is Two Hundred Fifty Thousand and No/1  
00 Dollars (\$ 250,000.00 ) which shall be paid as

6,000.00 which represents the aforescribed EARNEST MONEY DEPOSIT  
244,000.00 representing the approximate balance of CASH DOWN PAYMENT at closing  
 \_\_\_\_\_ representing the approximate balance of an existing mortgage, trust deed, note, real estate contract or other encumbrance to be  
 by buyer, which obligation bears interest at \_\_\_\_\_ % per annum with monthly payments of \$ \_\_\_\_\_  
 which include ☐ principal ☐ interest ☐ taxes ☐ insurance ☐ condo fees ☐ other \_\_\_\_\_  
-0- representing the approximate balance of an additional existing mortgage, trust deed, note, real estate contract or other encumbrance  
 assumed by Buyer, which obligation bears interest at \_\_\_\_\_ % per annum with monthly payments of \$ \_\_\_\_\_  
 which include ☐ principal ☐ interest ☐ taxes ☐ insurance ☐ condo fees ☐ other \_\_\_\_\_  
-0- representing balance, if any, including proceeds from a new \_\_\_\_\_ loan, to be paid as follows \_\_\_\_\_  
 \_\_\_\_\_  
-0- Other \_\_\_\_\_  
50,000.00 TOTAL PURCHASE PRICE

If Buyer is required to assume an underlying obligation and/or obtain outside financing, Buyer agrees to use best efforts to assume and/or procure same  
 it is made subject to Buyer qualifying for and lending institution granting said assumption and/or financing. Buyer agrees to make application within \_\_\_\_\_  
 days after Seller's acceptance of this Agreement to assume the underlying obligation and/or obtain the new financing at an interest rate not to exceed \_\_\_\_\_  
 If Buyer does not qualify for the assumption and/or financing within \_\_\_\_\_ days after Seller's acceptance of this Agreement, this Agreement shall be  
 terminated at the option of the Buyer or Seller upon written notice.

Seller agrees to pay \$ -0- towards Buyer's total financing and closing costs, including, but not limited to, loan discount points.  
 If this Agreement involves the assumption of an existing loan or obligation on the property, Section F shall apply.

go two of a four page form Seller's Initials ( ) ( ) Date \_\_\_\_\_ Buyer's Initials ( ) ( ) Date \_\_\_\_\_

EXHIBIT "F"



Right current with an attorney's opinion (Section 17)

4 INSPECTION OF TITLE. In accordance with Section G Buyer shall have the opportunity to inspect the title to the subject property prior to closing. Buyer shall take title subject to any existing restrictive covenants, including condominium restrictions (CC & R's). Buyer ☐ has ☐ has not reviewed any CC & R's prior to signing this Agreement.

5 VESTING OF TITLE. Title shall vest in Buyer as follows Janus Associates or its assigns as designated at closing.

6 SELLER WARRANTIES. In addition to warranties contained in Section C, the following items are also warranted None

Exceptions to the above and Section C shall be limited to the following \_\_\_\_\_

7 SPECIAL CONSIDERATIONS AND CONTINGENCIES. This offer is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing: Buyer acknowledges that this Earnest Money Sales Agreement is subject to first right of refusal by G.G.A., Inc. Seller agrees at closing to assign the lease to buyer.

8 CLOSING OF SALE. This Agreement shall be closed on or before 12/30 19 86 at a reasonable location to be designated by the Seller. Upon demand Buyer shall deposit with the Escrow Closing Office all documents necessary to complete the purchase in accordance with the provisions set forth in Section R. shall be made as of ☐ date of possession ☒ date of closing ☐ other on or before December 30, 1986

9 POSSESSION. Seller shall deliver possession to Buyer on closing unless extended by written agreement of parties.

10 GENERAL PROVISIONS. Unless otherwise indicated above, the General Provision Sections on the reverse side hereof are incorporated by reference.

11 AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE. Buyer offers to purchase the property on the above terms and conditions and shall have until \_\_\_\_\_ (AM/PM) \_\_\_\_\_ 19 \_\_\_\_\_ to accept this offer. Unless accepted, this offer shall lapse and the Seller shall retain the EARNST MONEY to the Buyer.

Signature of Buyer \_\_\_\_\_ Date \_\_\_\_\_ Signature of Buyer Janus Assoc. Dr. James P. Papp

CHECK ONE  
ACCEPTANCE OF OFFER TO PURCHASE. Seller hereby ACCEPTS the foregoing offer on the terms and conditions specified above.  
REJECTION. Seller hereby REJECTS the foregoing offer \_\_\_\_\_ (Seller's Initials)  
COUNTER OFFER. Seller hereby accepts the foregoing offer SUBJECT TO the exceptions or modifications as specified below or in the attached Addendum. Seller presents said COUNTER OFFER for Buyer's acceptance. Buyer shall have until \_\_\_\_\_ (AM/PM) \_\_\_\_\_ 19 \_\_\_\_\_ to accept it. If accepted, the terms shall be as specified below.

Signature of Seller \_\_\_\_\_ (AM/PM) \_\_\_\_\_  
Signature of Seller Toula K. Leventis Signature of Seller \_\_\_\_\_

CHECK ONE  
Buyer accepts the counter offer.  
Buyer accepts with modifications on attached addendum.  
Signature of Buyer \_\_\_\_\_ (AM/PM) \_\_\_\_\_  
Signature of Buyer \_\_\_\_\_

COMMISSION. The undersigned hereby agrees to pay to Four Star Realty (B) commission of eight percent (8%) as consideration for the efforts in procuring a buyer.

Signature of Seller Toula K. Leventis Date 11/20/86 Signature of Seller \_\_\_\_\_

DOCUMENT RECEIPT

State Law requires Broker to furnish Buyer and Seller with copies of this Agreement bearing all signatures. (One of the following alternatives must be completed)

A ☐ I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures.

SIGNATURE OF SELLER \_\_\_\_\_ SIGNATURE OF BUYER \_\_\_\_\_  
Date \_\_\_\_\_ Date \_\_\_\_\_  
Date \_\_\_\_\_ Date \_\_\_\_\_

B ☒ I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on 11/22 19 86 by Certified Mail and return receipt attached hereto to the ☐ Seller ☐ Buyer. Sent by Four Star Realty

Page three of a four page form. Seller's Initials ( ) ( ) Date \_\_\_\_\_ Buyer's Initials ( ) ( ) Date \_\_\_\_\_

**EXHIBIT "G"**

2875 Crestview Drive  
Salt Lake City, Utah 84108

November 21, 1986

Mr. Phil Arlt  
G.G.A., Incorporated  
Wendy's Old Fashioned Hamburgers  
232 South Main Street  
Salt Lake City, Utah 84101

CERTIFIED - RETURN RECEIPT REQUESTED

Re: Property located at 550 East 400 South and 418 South 600 East, Salt Lake City, Utah 84102 -- Receipt of \$250,000 offer to purchase this property

Dear Phil:

In compliance with the terms set forth in Article XIV of the "Real Estate Ground Lease" made and entered into on September 9, 1976 by and between G.G.A., Inc. as Tenant and Toula K. Leventis as Landlord, covering real property located at 550 East 400 South and 418 South 600 East, Salt Lake City, Utah, I am writing this letter to inform you that I have received a bona fide cash offer of \$250,000 for the purchase of the above-captioned property. Janus Associates is a Salt Lake City based investment group headed by Dr. James P. Pappas and I have been assured that the transaction can be closed on a cash basis before the end of this year which is important to me because of the change in the tax laws covering capital gains which I understand will be in effect as of January 1, 1987. Enclosed is a copy of the Earnest Money Agreement covering this transaction for your information.

My advisers tell me the buyers understand your continuing rights as lessees of the property and your interest in the improvements thereon as well as your option to purchase detailed in Article XIV of our lease. The nominal \$1,100 per month rent you are now paying me under the lease underscores the importance to me and my family of closing this transaction at the earliest possible date that we might benefit from much needed improved financial circumstances from this property.

As you know, I have been desirous of selling this property for a long time and know that you and your associates, Mr. Guagenti and Mr. Griffin, have discussed your possible interest in purchasing the subject property on various occasions in the past. Because of previous evaluations by you, I would hope that you could make your decision within two or three weeks. It would be a real courtesy to me and greatly appreciated if you could respond to this communication within a maximum of thirty days rather than the ninety days provided for in Article XIV of our Lease Agreement.

Thank you in advance for your anticipated cooperation in this matter.

Sincerely yours,

Toula K. Leventis

cc: Mr. Andy Guagenti, Secretary, G.G.A., Inc.  
Mr. Robert E. Griffin, Treasurer, G.G.A., Inc.

EXHIBIT "G"

**EXHIBIT "H"**

LAW OFFICES OF

BAMBERGER, FOREMAN, OSWALD AND HAHN

708 HULMAN BUILDING

P. O. BOX 887

EVANSVILLE, INDIANA 47704

December 6, 1986

TELEPHONE (812) 425-1591  
TELECOPIER (812) 465-4041

FREDERICK P. BAMBERGER  
(1902-1983)  
WILLIAM F. FOREMAN  
C. E. OSWALD JR.  
ROBERT W. HAHN  
JOHN B. BURRILL JR.  
JEFFREY B. WINNEY  
GEORGE A. PORCH  
ROBERT W. BECKER  
FRED B. WHITE  
ROBERT T. BODAN  
GEORGE MONTGOMERY  
TERRY S. FARMER  
CAROL A. BROOKS  
MARK E. MILLER  
RODERICK W. CLOUTYER JR.  
KEVIN J. HESSNER

Toula K. Leventis  
2875 Crestview Drive  
Salt Lake City, UT 84108

Re: Real Estate Situated at 550 East 400 South and  
418 South 600 East, Salt Lake City, Utah

Dear Mrs. Leventis:

At the request of our client, the tenant under the Lease Agreement with you dated September 9, 1976, we have reviewed the applicable provisions of the Lease Agreement, particularly the provisions of Article XIV thereof, and your correspondence of September 15, 1986; October 28, 1986; and November 21, 1986.

As you are aware and indicated in your September 15, 1986, letter, that Article of the Lease Agreement specifically provides, in the event of your intent or desire to sell your interest in the above-described real estate or the receipt of an offer to purchase the same upon terms acceptable to you, that you are required to first notify the tenant of such intent and such offer and, thereupon, the tenant has the option, exercisable within ninety (90) days after receipt of such written notice from you, to elect to purchase the premises and all of your interest therein upon the terms set forth in such offer.

As you know, the provisions of Article XIV of the lease in question were specifically negotiated for and constituted a material part of the consideration for the execution of said lease by our client.

In your letter of September 15, 1986, you offered to sell the real estate in question to our client for a purchase price of \$210,000.00.

By your subsequent letter of October 28, 1986, you purported to rescind that offer, and by your subsequent letter of November 21, 1986, you purported to make a new and different offer to our client, as tenant.

Based upon our research, and after consultation with our local counsel, McKay, Burton and Thurman of Salt Lake City, it is our opinion that the making of the initial offer by you on September 15, 1986, created in our client a valid and effective option

EXHIBIT "H"

Toula K. Leventis  
Re: G.G.A. II, Inc.  
Page 2

to purchase, supported by a good and valuable consideration, the real estate in question at the price specified in that offer, which would remain in effect for the contractually stipulated period of ninety (90) days and would not be subject in any way to rescission, revocation or alteration by you during the option period.

Consequently, it is our further opinion that the purported rescissions set forth in your letters of October 28, 1986, and November 21, 1986, are not legally effective and would not deprive our client of the right to exercise its contractual option rights to purchase upon the terms initially offered.

Consequently, you are hereby notified and advised, on behalf of our client, G.G.A. Incorporated, d/b/a Wendy's Old-Fashioned Hamburgers, of its election to exercise its option, which option is hereby exercised, to purchase the above-described premises and all of your right, title and interest therein in accordance with the provisions of Article XIV of the Lease Agreement of September 9 1976, for the purchase price of \$210,000.00 set forth in your initial offer of September 15, 1986.

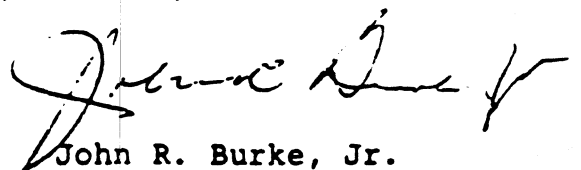
As an accommodation to you, I have been authorized to advise you, on behalf of my client, that since it apparently would be to your benefit for income tax purposes, that it is agreeable to concluding its purchase of the subject real estate on a cash basis prior to the year-end.

To that end, the purchase of the real estate in question will be handled by our local counsel, McKay, Burton and Thurman, to expedite the matter.

As noted, our client intends to enforce its contractual rights under the terms of the Lease Agreement and to take any action required in connection therewith, and should any such action be necessary, it will, similarly, be handled by McKay, Burton and Thurman.

Yours very truly,

BAMBERGER, FOREMAN, OSWALD AND HAHN



John R. Burke, Jr.

JRB:kol

cc: Phillip M. Arlt  
Andrew Guagenti  
Robert E. Griffin  
Barrie G. McKay, Esq.

CERTIFIED MAIL NO. P 261 314 870  
Return Receipt Requested

EXHIBIT "I"

**MCKAY, BURTON & THURMAN**

A PROFESSIONAL CORPORATION

ATTORNEYS AND COUNSELORS AT LAW  
SUITE 1200 KENNEDY BUILDING  
10 EAST SOUTH TEMPLE STREET

SALT LAKE CITY, UTAH 84133

(801) 521-4135

December 29, 1986

Janus Associates  
c/o Dr. James P. Pappas  
2449 Russell Circle  
Holladay, Utah 84117

Four Star Realty  
455 East 500 South  
Salt Lake City, Utah 84111  
Attn: J. Rees Jensen, Principal Broker

Toula K. Leventis  
2875 Crestview Drive  
Salt Lake City, Utah 84108

HAND DELIVERED and  
CERTIFIED MAIL

Re: 562 East 400 South Property

Dear Sirs and Madam:

This firm represents G.G.A., Inc. doing business as Wendy's Old Fashioned Hamburgers at 562 East 4th South, pursuant to a Real Estate Ground Lease ("Lease") dated September 9, 1976 by and between Toula K. Leventis as Lessor and G.G.A., Inc. as Lessee. Article XIV of that certain Lease contains an Option to Purchase and Right of First Refusal granted to Lessee, G.G.A., Inc., by the Lessor.

By letter dated September 15, 1986, Toula K. Leventis, the Lessor, advised G.G.A., Inc. of an offer which she had received to purchase the real property. Thereafter, by letter dated December 6, 1986 from John R. Burke, Jr. of Bamberger, Foreman, Oswald and Hahn, General Counsel for G.G.A., Inc., in full compliance with the provisions of Article XIV of the Lease, G.G.A., Inc. notified Toula K. Leventis of its election to exercise its option and the exercise of its option to purchase the real property for the purchase price contained in the September 15, 1986 offer of \$210,000.00.

Notwithstanding G.G.A., Inc.'s contractually agreed upon option to purchase and its timely exercise of that option, our

EXHIBIT "I"

0000



Janus Associates, et al.  
December 29, 1986  
Page 2

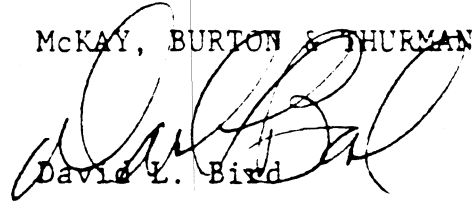
client is advised by Toula K. Leventis that she now proposes to sell to a third party, Janus Associates, in complete dereliction of the rights of G.G.A., Inc.

Notice is hereby given to each of the parties to this contemplated transaction, of G.G.A., Inc.'s contractual interest in the above- described property and its intention to purchase the property pursuant to its existing option. As local counsel for G.G.A., Inc., this firm will vigorously enforce all rights and remedies of G.G.A., Inc. under the Real Estate Ground Lease, including but not limited to G.G.A., Inc.'s right to specific performance of its Option to Purchase and recovery of any damages occasioned by breach of the Real Estate Ground Lease..

Please govern yourselves accordingly.

Sincerely,

McKAY, BURTON & THURMAN



David L. Bird

DLB05:ls  
CC: Phil Arlt  
John R. Burke, Jr.

EXHIBIT "J"

**MCKAY, BURTON & THURMAN**

A PROFESSIONAL CORPORATION

ATTORNEYS AND COUNSELORS AT LAW

SUITE 1800 KENNECOTT BUILDING

10 EAST SOUTH TEMPLE STREET

SALT LAKE CITY, UTAH 84133

(801) 521-4133

WILFORD H. BURTON  
BARRIE G. MCKAY  
WILLIAM T. THURMAN  
DAVID P. BROWN  
WILLIAM THOMAS THURMAN  
PETER STIRBA  
DAVID L. BIRD  
REID YATECKA  
STEPHEN W. RUPP  
SCOTT C. PIERCE  
JOEL T. MARKER  
BENSON L. HATHAWAY JR.

OF COUNSEL  
DAVID L. MCKAY

January 14, 1987

Toula K. Leventis  
2875 Crestview Drive  
Salt Lake City, Utah 84108

Re: G.G.A. Inc. Offer to Purchase

Dear Ms. Leventis:

As you have previously been advised by letter dated December 6, 1986 from John R. Burke, Jr. and by letter dated December 29, 1986 from the undersigned, G.G.A. Inc. doing business as Wendy's Old Fashioned Hamburgers remains ready, willing and able to close the purchase of the property located at 562 East 400 South pursuant to the Right of First Refusal and Option to Purchase granted to G.G.A. Inc. under the terms of that certain Real Estate Ground Lease dated September 9, 1976 by and between yourself as Lessor and G.G.A. Inc. as Lessee.

We had previously advised you that G.G.A. Inc. was prepared to close on this transaction before year end in order to provide you with the beneficial tax treatment which you sought. Depending upon how the transaction is structured, it may still be possible for you to obtain that favorable tax treatment if this matter were consummated in the immediate future. Your tax counsel could, of course, advise you in this regard.

G.G.A. Inc. is very desirous of concluding this purchase and is somewhat concerned about your failure to communicate with them regarding a closing date. This law firm stands ready to prepare all of the necessary documentation to complete the purchase and will do so upon being notified by you of a closing date. We would appreciate your cooperation in this regard.

G.G.A. Inc. has no desire to become embroiled in a legal dispute with you over this option to purchase. However, we must insist upon your compliance with the terms of the Real Estate Ground Lease and specifically the Right of First Refusal and Option to Purchase notwithstanding the fact that this may require the filing of a Complaint against you for specific performance. Please feel free to contact either Phillip Arlt or the

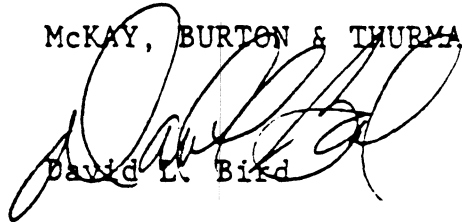
EXHIBIT 'J'

Toula K. Leventis  
January 14, 1987  
Page 2

undersigned to discuss this matter. Your failure to notify us prior to January 23, 1986 of your response may entail the filing of the above-referenced lawsuit.

Sincerely,

McKAY, BURTON & THURMAN



David L. Bird

DLB05:ls  
CC: Phil Arlt

**EXHIBIT "K"**

LAW OFFICES  
**NICK J. COLESSIDES**  
400 SOUTH 400 EAST  
SALT LAKE CITY, UTAH 84111  
801 521-4441

January 19, 1987

Mr. David L. Bird  
Attorney at Law  
Suite 1200, Kennecott Building  
10 East South Temple Street  
Salt Lake City, Utah 84133

Re: Mrs. Toula Leventis - owner of 562 East 400 South,  
Salt Lake City, Utah

Dear Mr. Bird,

The undersigned represents Mrs. Toula K. Leventis, Landlord under the terms of that certain Lease dated September 9, 1976, and owner of the parcel of land described in the above referred to lease. Your previous correspondence relating to the purported exercise of Tenant's Right of First Refusal for the purchase of the real property owned by Mrs. Leventis, have been referred to me for a reply. I apologize for not being able to respond to you earlier but due to a family emergency it was necessary for me to be out of the country from December 22, 1986, to last week, and having thus returned recently, I am responding to Tenant's claims now.

The chronology of events as I understand them are as follows:

(i) On September 15, 1986, your client, G.G.A. Incorporated, is notified in writing by Mrs. Leventis of the offer by Mr. Brown to purchase the real property.

(ii) On October 28, 1986, your client is notified in writing by Mrs. Leventis that the offer heretofore made by Mr. Brown has been rescinded and Mrs. Leventis has refunded to Mr. Brown the earnest money deposit of \$5,000.00.

(iii) On or about December 10, 1986, Mrs. Leventis receives a letter dated December 6, 1986, from Bamberger, Foreman, Oswald and Holm, attorneys for Lessee, purporting to exercise Lessee's right under the terms and provisions of Article XIV of the Lease.

EXHIBIT 'K'

Mr. David L. Bird  
January 19, 1987  
Page Two

(iv) Subsequently, Mrs. Leventis has received the correspondence from your office dated December 29, 1986, and January 14, 1987.

It appears, from the above referred to facts, that Lessee's failure to affirmatively act prior to the date of the notice of the rescission as communicated to your client (October 28, 1986) voids any purported exercise by the Tenant of its right of first refusal. It is noteworthy, that Tenant attempted to "exercise" the right of first refusal by its letter of December 6, 1986, some six (6) weeks after the fact that the underlying "offer to purchase" had been rescinded by the Buyer, thus leaving nothing to be exercised. I cannot agree with the legal conclusion reached by Mr. Burke in his letter of December 6, 1986, that your client's right of first refusal was "...not subject in any way to rescission..." It is our position that the offer to purchase dated September 9, 1986, having been validly rescinded, was not subject to a valid "exercise" by your client and created no valid option inuring to the benefit of your client.

Should it become necessary that you wish to communicate further with Mrs. Leventis, please direct such correspondence to me and if you have any questions relative to the foregoing please feel free to communicate directly with the undersigned.

Sincerely,

/s/

NICK J. COLESSIDES

NJC:ssc

cc: Mrs. Toula Leventis

**EXHIBIT "L"**



**MCKAY, BURTON & THURMAN**

A PROFESSIONAL CORPORATION

ATTORNEYS AND COUNSELORS AT LAW

SUITE 1200 KENNECOTT BUILDING  
10 EAST SOUTH TEMPLE STREET

SALT LAKE CITY, UTAH 84133

(801) 521-4135

OF COUNSEL:  
DAVID L. MCKAY

WILFORD M. BURTON  
BARNIE G. MCKAY  
WILLIAM T. THURMAN  
DAVID H. BROWN  
WILLIAM THOMAS THURMAN  
PETER STUBBS  
DAVID L. MCKAY  
REID TATELKA  
STEPHEN A. RUFF  
SCOTT C. KIMBLE  
JULIE T. MARRER  
BENJAMIN HATHAWAY JR.

February 17, 1987

Toula K. Leventis  
2875 Crestview Drive  
Salt Lake City, Utah 84108

Nick J. Colessides, Esq.  
466 South 400 East  
Salt Lake City, Utah 84111

HAND DELIVERED AND  
CERTIFIED MAIL

Re: Property located at 550 East 400 South and 418 South  
600 East, Salt Lake City, Utah 84102

Dear Ms. Leventis and Mr. Colessides:

As you are both aware, this firm represents GGA, Inc. ("GGA") doing business as Wendy's Old Fashioned Hamburgers, the lessee under that certain Real Estate Ground Lease dated September 9, 1976 by and between Toula K. Leventis as Landlord and GGA as Tenant. GGA is in receipt of your letter dated November 21, 1986 addressed to Mr. Phil Arlt advising GGA of an offer to purchase the above described property for the amount of \$250,000.00. This, notwithstanding your previous notification on September 15, 1986 of an option to purchase the property for the amount of \$210,000.00, which option was timely exercised by GGA.

You are hereby notified on behalf of our client, GGA of its election to exercise its Option to Purchase the above described property as set forth in Article XIV of the Real Estate Ground Lease in response to the Notice in your November 21, 1986 letter. This notification constitutes an unequivocal exercise of GGA's Option to Purchase the demised premises and all of your right, title and interest therein, for the price and upon the stated terms and conditions contained in your notice. This letter will further advise you that GGA is ready, willing and able to close the purchase and sell of the above described property with reasonable promptness at a date, place and time acceptable to both parties.

You are further notified that GGA hereby specifically reserves all of its rights and remedies under the terms of that certain Real Estate Ground Lease and specifically, but not by way of limitation to, the rights and remedies provided for in Article

EXHIBIT "L"

Page 1 of 2


1002

Toula K. Leventis  
Nick J. Colessides  
February 17, 1987  
Page 2

XIV and further reserves all of its rights and remedies under the September 15, 1986 option and GGA's timely exercise thereof. Please advise this office at your earliest convenience of date, time and place for the closing of this transaction.

Sincerely,

McKAY, BURTON & THURMAN

  
David L. Biff  
Attorneys for GGA, Inc.

DLB05:ls  
CC: Phil Arlt  
Andrew Guagenti  
Robert E. Griffith  
John R. Burke, Jr.

EXHIBIT "L"  
Page 2 of 2

00002

EXHIBIT "M"

WHEN RECORDED, MAIL TO:  
GGA, INC.  
4300 East Morgan Avenue  
Evansville, Indiana 47715

WARRANTY DEED

TOULA K. LEVENTIS, 2875 Crestview Drive, Salt Lake City, Utah 84108, grantor, hereby CONVEYS and WARRANTS to:

GGA, INC., a Indiana Corporation  
4300 East Morgan Avenue  
Evansville, Indiana 47715

of Evansville, Vanderburgh County, State of Indiana, for the sum of TEN Dollars and other good and valuable consideration the following described tract of land in Salt Lake County, State of Utah, to-wit:

PARCEL No. 1: Commencing at a point 114.25 feet West of the Northeast corner of Lot 8, Block 33, Plat "B", Salt Lake City Survey, and running thence South 52.75 feet; thence East 114.25 feet; thence South 79.25 feet; thence West 165 feet; thence South 198 feet; thence West 41.25 feet; thence North 330 feet; thence East 92 feet to the place of beginning.

PARCEL NO. 2: Commencing at a point 8 rods South from the Northeast corner of Lot 8, Block 33, Plat "B", Salt Lake City Survey, and running thence South 45 1/2 feet; thence West 10 rods; thence North 45 1/2 feet; thence East 10 rods to the place of beginning.

Both parcels 1 and 2 being subject to current general taxes, other assessments, easements, restrictions and rights of way of record or enforceable in law or equity.

EXHIBIT "M"

Page 1 of 2

WITNESS the hand of said grantor, this 20<sup>th</sup> day of February, 1987.

Toula K. Leventis  
TOULA K. LEVENTIS

STATE OF UTAH                    )  
  : ss  
COUNTY OF SALT LAKE    )

On the 20<sup>th</sup> day of February, 1987, personally appeared before me TOULA K. LEVENTIS, the signer of the above instrument, who duly acknowledged to me that she executed the same.

My Commission Expires:

2-23-87

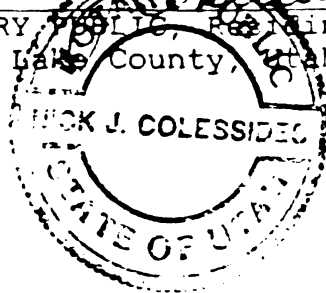
Nick J. Colessides  
NOTARY PUBLIC, Residing in  
Salt Lake County, Utah  
A circular notary seal for Nick J. Colessides, Notary Public, State of Utah. The seal is stamped over the signature and the text "NOTARY PUBLIC, Residing in Salt Lake County, Utah".

EXHIBIT "M"

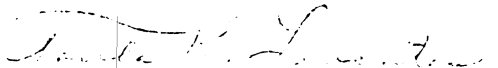
Page 2 of 2

**EXHIBIT "N"**

ASSIGNMENT OF LEASE

As part of the sale of the fee title to property covered by a lease, the undersigned, Toula K. Leventis, hereby assigns and transfers to G.G.A., Inc., an Indiana Corporation, all of her right, title and interest as of February 27, 1987, and thereafter, under that certain Real Estate Ground Lease dated the 9th of September 1976, between Toula K. Leventis as Landlord and G.G.A., Inc., as Tenant, covering the premises at 550 East 400 South and 418 South 600 East, Salt Lake City, Utah, more particularly described in said lease.

DATED this 28th day of February, 1987.

  
\_\_\_\_\_  
TOULA K. LEVENTIS

EXHIBIT

"N"

**EXHIBIT "O"**





# Western States Title Company

## SELLERS SETTLEMENT STATEMENT

Toula K. Leventis

GGH <sup>He GRH</sup> Inc., a Indiana Corporation

Sellers		Buyers	
Property Address: 550 East 400 St. & 418 South 600 East		Order Number: 79805	
		CHARGES	CREDITS
Sales Price		XXXXXX	250,000.00
Down Payment - Paid To			XXXXXX
Expenses:			
Abstracting			XXXXXX
Title Insurance Premiums - Owners Policy		980.00	XXXXXX
Recording Fees - Reconveyance		40.00	XXXXXX
Revenue Stamps			XXXXXX
Escrow Closing Fee		100.00	XXXXXX
Survey			XXXXXX
			XXXXXX
Prorations: As of No Prorations, 19			
Taxes for 19 months @			
Fire Insurance months @ No Prorations			
Amt. \$ Exp. Prem. \$			
Subject to charges and assessments to Salt Lake City			
Other:			
Sales Commission - to Four Star Realty			
Total Commission \$ Less Down Payment \$		20,000.00	XXXXXX
Existing Indebtedness With			
Princ. & Interest As Of 3/2/87		71,850.42	XXXXXX
Interest to			
Reserve Account			
Prepaid taxes for 12/1/87 and 1/28/87		79.36	
Sub-Totals		93,048.78	250,000.00
Balance Due to Sellers		156,951.22	XXXXXX
Totals		250,000.00	250,000.00

Date:

February 26th, 1987

Approved:

Toula K. Leventis  
Toula K. Leventis

Sellers

Seller's Mailing Address

Prepared by:

WESTERN STATES TITLE CO.

By:

Michelle Lichty

EXHIBIT

"0"

0000

**EXHIBIT "P"**

**FILMED**

FILED IN CLERK'S OFFICE  
SALT LAKE COUNTY, UTAH

JUL 17 5 30 AM '87

*Linda Singer*

NICK J. COLESSIDES (#696)  
Attorney for Defendant  
466 South 400 East  
Salt Lake City, Utah 84111-3303  
Tele: (801) 521-4441

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

G. G. A., INC., an Indiana corporation,	:	
	:	ANSWER TO AMENDED COMPLAINT
Plaintiff,	:	
	:	
vs.	:	Civil No. C87-943
	:	
TOULA K. LEVENTIS,	:	
	:	Judge Frederick
Defendant.	:	

---

Defendant TOULA K. LEVENTIS, by and through her attorney of record Nick J. Colessides, in answer to plaintiff's amended complaint admits, denies and alleges as follows:

1. In answering paragraph 1, plaintiff is without sufficient information to form a belief as to the truth of the allegations stated therein and therefore denies the same.
2. Admits paragraph 2.
3. Admits paragraph 3 and affirmatively alleges

EXHIBIT "P"

000177

that said Lease speaks for itself.

4. Admits paragraph 4.

5. In answering paragraph 5, answering defendant admits the payment of rents required under the Lease and for lack of information denies all other allegations therein.

6. In answering paragraph 6, answering defendant admits provision XIV of the Lease and affirmatively alleges that said provision speaks for itself.

7. Admits paragraph 7, and affirmatively alleges that the said Exhibit B and C speak for themselves.

8. In answering paragraph 8, answering defendant admits that a telephone conversation occurred in early October 1986, and affirmatively alleges that the said Philip M. Artl, stated that a written notice verifying the exercise of the right of first refusal would be mailed to the answering defendant within one week; answering defendant further affirmatively alleges that on an occasion prior to September 15, 1986, the same Philip M. Artl orally informed answering defendant that plaintiff would purchase the said Premises for \$ 130,000.00; answering defendant denies all other allegations of paragraph 8.

9. Except as to the phrase "Notwithstanding this conversation" defendant admits the balance of the allegations asserted in paragraph 10 of the complaint and

affirmatively alleges that said Exhibit "D" speaks for itself.

10. In answering paragraph 10, defendant admits that she had advised on November 21, 1986, plaintiff of the offer of Janus Associates for \$ 250,000.00 to purchase the Premises and further admits Exhibit "E", and affirmatively alleges that said Exhibit "E" speaks for itself and denies all other allegations therein.

11. In answering paragraph 11, answering defendant admits the receipt of the letter dated December 6, 1986, from plaintiff's counsel and affirmatively alleges that said Exhibit "F" speaks for itself and denies all other allegations therein.

12. In answering paragraph 12, defendant admits that certain offers were made both before and after the filing of this action and denies all other allegations therein.

13. In answering paragraph 13, defendant admits receipt of Exhibit G, affirmatively alleges that said Exhibit speaks for itself and denies all other allegations contained therein.

14. In answering paragraph 14, defendant affirmatively alleges that the letter dated February 17, 1987, speaks for itself and denies all other allegations

therein.

15. In answering paragraph 15, defendant admits the allegations contained therein and affirmatively alleges that said Exhibit H speaks for itself.

16. In answering paragraph 16, with the exception of the allegation "... \$40,000.00 of which was paid under protest ..." which allegation is denied, defendant admits paragraph 16.

17. Answering defendant incorporates herein by reference the answers contained in paragraphs 1 through 16 above, the same as if each such paragraphs were set forth here in its entirety.

18. Denies paragraph 18.

19. Denies paragraph 19.

20. Denies paragraph 20.

21. Denies paragraph 21.

22. Denies paragraph 22.

23. Denies paragraph 23.

24. Denies paragraph 24.

25. Denies paragraph 25.

26. Defendant denies each and every allegation contained in the Complaint that is not specifically admitted herein.

27. Plaintiff's complaint fails to state a cause

of action against defendant upon which relief may be granted.

28. Plaintiff is in material breach under the terms of the agreements made between the parties and the documents entered into, to-wit the Lease, and as result some or all of plaintiff's claims and remedies are barred or diminished.

29. Some or all of plaintiff's claims are barred by plaintiff's failure to give required notices to defendant.

30. Any notices claimed to have been given by plaintiff to defendant were defectively submitted.

31. Defendant affirmatively alleges that plaintiff had a duty to deal with defendant fairly and in good faith, and plaintiff had breached that duty, and is precluded from maintaining this action.

32. Some or all of plaintiff's claims are barred by plaintiff's failure to comply with requirements of applicable law relating to transacting business under an assumed name and/or accomplishing filings regarding the use of the name GGA, Inc..

33. Some or all of plaintiff's claims are barred by the doctrine of unclean hands.

34. Plaintiff has waived and/or is estopped to assert and maintain its claims asserted in the Complaint.

35. Plaintiff has elected to exercise its right of

first refusal under the terms of the Lease and in fact purchased the Premises for the sum of \$ 250,000.00.

36. Defendant conveyed the Premises to Plaintiff by a good and sufficient Warranty Deed in accordance with paragraph XIV of the Lease.

37. Plaintiff's election to purchase the Premises by exercising its right of first refusal and answering defendant's conveyance of the Premises is accord and satisfaction of any claims which plaintiff may have.

38. Plaintiff's claims are barred by the doctrine of waiver in that plaintiff elected to exercise its right of first refusal and consummated the purchase of the Premises, thus waiving any claims it may have had.

39. By Plaintiff electing to exercise its right of first refusal under the terms of the Lease and to purchase the Premises, Plaintiff consented to abandon its claims asserted in the Complaint.

40. By Plaintiff electing to exercise its right of first refusal under the terms of the Lease and to purchase the Premises, plaintiff released defendant from defendant's obligations, and thus plaintiff can not assert or maintain its claims in the Complaint.

41. Plaintiff and defendant have closed the transaction subject matter of the complaint herein, and



answering defendant passed title of the real property subject matter of this action, and the closing constitutes accord and satisfaction of all issues in this action.

42. Answering defendant having passed title of the real property to plaintiff on February 27, 1987, and plaintiff having accepted title of the same precludes any relief to plaintiff.

43. Any damages suffered by plaintiff if any, were the result of plaintiff's own conduct over which defendant had no control.

44. Plaintiff has failed to mitigate its damages.

45. Plaintiff's claims are barred in that plaintiff had nothing to exercise when it purported to exercise its right of first refusal on December 6, 1986 relating to the offer to purchase dated September 26, 1987, for the reason that said offer to purchase was rescinded on October 28, 1986, and notice thereof was given to plaintiff.

46. Plaintiff's action as filed herein is retaliatory in nature and its purpose is to force and coerce defendant to submit to the demands of the plaintiff and to accept a lower price from plaintiff.

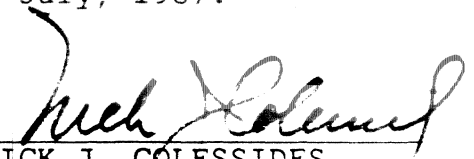
47. Defendant expressly reserves her right pursuant to Rule 12 of the Utah Rules of Civil Procedure and requests that plaintiff be required to furnish security for

costs in accordance with and pursuant to the said rule.

48. Plaintiff's complaint is without merit and is not brought and asserted in good faith and defendant is entitled, pursuant to § 78-27-56 Utah Code Annotated, 1953 as amended, to an award of his attorney's fees in connection with the defense of Plaintiff's Complaint.

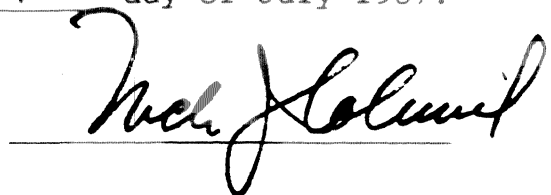
WHEREFORE, defendant having answered plaintiff's complaint herein, prays that the same be dismissed, no cause of action, and that defendant recovers her costs and attorney's fees and for such other and further relief as the Court deems proper in the premises.

DATED this 16<sup>th</sup> day of July, 1987.

  
NICK J. COLESSIDES  
Attorney for Defendant  
Toula K. Leventis

MAILING CERTIFICATE

Mailed a copy of the foregoing Answer of Defendant Toula K. Leventis, to Bryan A. Larson, attorney for Plaintiff, 1200 Kennecott Building, Salt Lake City, Utah 84133, postage prepaid, this 16<sup>th</sup> day of July 1987.



**EXHIBIT "Q"**

*Earlene Mathison*

NICK J. COLESSIDES (#696)  
Attorney for Defendant  
466 South 400 East  
Salt Lake City, Utah 84111-3303  
Tele: (801) 521-4441

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

G. G. A., INC., an Indiana corporation,	:	OBJECTION TO AND MOTION TO STRIKE CERTAIN PORTIONS OF THE AFFIDAVIT OF PHILLIP M. ARLT
Plaintiff,	:	
vs.	:	
TOULA K. LEVENTIS,	:	Civil No. C87-943
Defendant.	:	Judge Frederick

---

Defendant by and through her attorney of record hereby objects to and moves to strike certain portions of the Affidavit of Phillip M. Arlt on the basis and for the reason that the portions of the affidavit objected to, do not conform to the requirements of Rule 56 of the Utah Rules of Civil Procedure, and would not be admissible in Court.

Specifically, defendant objects to:

a) Paragraph 6 and the "factual" allegations therein, on the basis that Exhibit "A" is the best evidence;

EXHIBIT G

it was executed on behalf of plaintiff by " ... Andrew Guagenti, its President and Robert E. Griffin, its Secretary ..."; see the Notarial attestation on page 19 of the Lease. Affiant Arlt's signature does not appear therein, nor is there any evidence that affiant participated in the negotiations for the Lease; his proposed testimony, as per the affidavit would not be admissible in Court, absent some other foundational requirements.

b) As it relates to paragraph 10 the words "Notwithstanding this oral notification ..." and "... [Brown had] allegedly [withdrawn] ..." are not evidence, but merely characterize certain acts. The best evidence is plaintiff's Exhibit "D" which speaks for itself.


c) The "facts" asserted in paragraph 12 can not be testified to by Affiant, in that the letter identified as dated December 6, 1986, is a letter from a firm of attorneys purporting to represent the plaintiff; the letter expresses the legal opinion of the drafter of the instrument obviously the best evidence is the letter itself.

d) Paragraph 14 contains no facts but merely asserts conclusions of law, which are within the province of the Court.

e) Paragraph 15 essentially contains conclusions of law especially as it relates to payment under protest and

the purported reservation of rights. The best evidence are the letters identified as Exhibits "G" and "H" which are communications between the attorneys for the parties and in the present state of the record can not be admitted in the Court because of lack of foundation; in any event the legal significance of those letters together with plaintiff's Exhibits "J", "N", and "O" go to the ultimate issues which will be decided by this Court.

Dated this 3rd day of August, 1987.

  
NICK J. COLESSIDES  
Attorney at Law

**EXHIBIT "R"**

LAW OFFICES  
**NICK J. COLESSIDES**  
486 SOUTH 400 EAST  
SALT LAKE CITY, UTAH 84111  
801 521-4441

February 17, 1987

Mr. David L. Bird  
Attorney at Law  
Suite 1200 Kennecott Building  
10 East South Temple Street  
Salt Lake City, Utah 84133

GGA, Inc.  
4300 East Morgan Avenue  
Evansville, Indiana 47715

HAND DELIVERED AND  
CERTIFIED MAIL

Re: Notice of exercise of Right of First Refusal dated  
February 17, 1987 of the real property located at  
550 East 400 South and 418 South 600 East, Salt Lake  
City, Utah, by David L. Bird, Attorney for GGA, Inc..

Gentlemen:

I am in receipt of your notice of your election to exercise  
your right of first refusal and purchase the above referenced  
real property as per my client's notice to you dated November  
21, 1986, for the purchase price of \$250,000.00.

In connection therewith and in accordance with the applicable  
provisions of the lease, I have instructed Western States  
Title, 370 East 500 South, Salt Lake City, Utah 84111,  
Attention Michael Jensen, to act as the closing agent; I have  
also instructed the closing agent to make a determination as  
to any amounts which are due and payable as an encumbrance  
upon the property, and to pay any and all amounts due to any  
third parties from the proceeds to be received from the  
buyer, so that seller may deliver to you title free and clear  
of any financial encumbrance and subject only to standard  
exceptions. At my request a preliminary title report is  
being prepared and will be delivered to your local counsel on  
or before Thursday, February 19, 1987; a standard policy of  
title insurance will be issued to the buyer.

Accordingly, I have instructed Western States Title to  
prepare a Warranty Deed together with a closing statement and

EXHIBIT "R"

Page 1 of 2



Mr. David L. Bird  
GGA, Inc.  
February 17, 1987  
page two

requested that the closing take place on Thursday, February 26, 1987, at the hour of 2:00 o'clock p.m., at the offices of Western States Title at the within shown address.

You are requested to supply to Western States Title Company Bankable funds in the sum of \$ 250,000.00, on or before Thursday February 26, 1987, but in any event prior to the time of closing.

If you fail to deliver bankable funds to the closing agent as requested herein, it shall be deemed to be and shall be a material breach of your election to purchase, and my client will be free to consummate the transaction with JANUS ASSOCIATES. Time is of the essence in the performance of your obligation to pay the funds to the closing agent.

Sincerely,

NICK J. COLESSIDES

NJC:SSC

cc: Toula K. Leventis

PS Form 3800, June 1985

U.S.G.F.C. 1985-480-794

[illegible]

**RECEIPT FOR CERTIFIED MAIL**

THE PRESIDENT GOVERNMENT PROVINCE  
AND THE INTERNATIONAL MAIL  
Office, Havana

P 242 527 800

P 242 521 891  
RECEIPT FOR CERTIFIED MAIL

CALL 1-800-646-2111 LIVE HAUL PROVIDED

EXHIBIT "R"  
Page 2 of 2