

1997

Montford-Apollo Sugarhouse, L.P. v. The Brown Bear International Corporation, Michael Brown, Guy L. Thomas : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MONTFORD-APOLLO SUGARHOUSE
L.P.,

Plaintiff/Interlocutory Appellee,

v.

THE BROWN BEAR INTERNATIONAL
CORPORATION, a Utah corporation, and
MICHAEL BROWN, an individual,

Defendants,

and GUY L. THOMAS, an individual,

Defendant/Interlocutory Appellant.

Court of Appeals No: 97-0388-CA

Trial Court No. 960902088 CN

Judge Glenn K. Iwasaki

Priority No. 10

BRIEF OF PLAINTIFF AND INTERLOCUTORY APPELLEE

Interlocutory Appeal from the Third Judicial District Court
of Salt Lake County
Honorable Glenn K. Iwasaki, District Judge

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I. LIST OF ALL PARTIES TO THE PROCEEDING IN THE TRIAL COURT

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

MONTFORD-APOLLO SUGAR HOUSE,
L.P.,

Plaintiff,

v.

THE BROWN BEAR INTERNATIONAL
CORPORATION, a Utah corporation,
MICHAEL BROWN, an individual, and
GUY L. THOMAS, an individual,

Defendants.

Case No. 960902088 CN

Judge Glenn K. Iwasaki

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IV. STATEMENT OF JURISDICTION

On December 26, 1996, the Honorable Glenn K. Iwasaki, District Judge, Third Judicial District Court of Salt Lake County, entered his ORDER ON MONTFORD-APOLLO'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT GUY L. THOMAS AND MR. THOMAS' MOTION FOR LEAVE TO AMEND HIS ANSWER. A true and correct copy of that order, as docketed in the Third District Court, appears as Exhibit "A" of the addendum.

Among other things, the order denied Montford-Apollo's Motion for Summary Judgment and granted Mr. Thomas' Motion for Leave to Amend his Answer. However, the court:

. . . condition[ed] its grant of Mr. Thomas' Request for Leave to Amend upon Mr. Thomas' payment, to Montford-Apollo, of the sum of Three Hundred Fifty Dollars (\$350.00) attorneys' fees incurred by Montford-Apollo in responding to Mr. Thomas' Request for Leave to Amend, and the additional sum of Five Thousand Four Hundred Eighty-Eight Dollars (\$5,488.00) attorneys' fees incurred by Montford-Apollo in preparing, briefing, filing, and arguing the Motion for Summary Judgment, including the fees incurred in preparing [the] order and the affidavit of Robert S. Young with respect thereto. The foregoing represents the amounts identified in the Affidavit of Robert S. Young, by this reference incorporated herein, which would not have been incurred by Montford-Apollo had Mr. Thomas raised the issue of the implied covenant of good faith and fair dealing prior to Montford-Apollo's filing of the Motion for Summary Judgment.

See Exhibit "A" of the addendum at page 4.

By petition dated January 15, 1997, Mr. Thomas, through counsel, sought permission from this court to appeal the foregoing order on an interlocutory basis. On its

own motion, this court, by order dated February 25, 1997, transferred Mr. Thomas' Petition for Permission to Appeal on an Interlocutory Basis to the Utah Supreme Court under the provisions of Rule 44 of the Utah R.Civ.P.. In its order, the Court of Appeals noted the original appellate jurisdiction of the Utah Supreme Court under the provisions of Section 78-2-2(3)(j)(Supp. 1996).

In June 1997, the Utah Supreme Court granted Mr. Thomas' Petition for Interlocutory Appeal and poured-over the appeal to the Utah Court of Appeals for disposition.

**V. STATEMENT OF ISSUES PRESENTED FOR REVIEW
AND THE APPLICABLE STANDARD OF
APPELLATE REVIEW**

Montford-Apollo agrees with issues number 1 and 2 of Mr. Thomas' Statement of Issues on Review. However, Mr. Thomas raises issue No. 3 for the first time on appeal and does not cite any portion of the record establishing that issue No. 3 was properly preserved for appeal. "Issues not raised [in the trial court] cannot be raised on appeal. This general rule applies equally to constitutional issues, with the limited exception of where a person's liberty is at stake." *Pratt v. City Council of City of Riverton*, 639 P.2d 172, 173-4 (Utah 1981). Accordingly, since Mr. Thomas' liberty is not at stake, Montford-Apollo respectfully asks this court to reject his arguments asserting a denial of the equal protection of the laws since they are raised for the first time on this appeal.

The standard of review is set forth in several decisions of the Utah Supreme Court. In *Sears v. Riemersma*, 655 P.2d 1105 (Utah 1982), the Utah Supreme Court noted that an

"award of attorneys' fees is in the sound discretion of the trial court and will not be overturned in the absence of a showing of a clear abuse of that discretion." *Id.* at 1110. Moreover, as recently as 1993, the Utah Supreme Court reaffirmed the fact that "when reviewing an award of attorneys' fees, we will affirm the trial court's ruling absent an abuse of discretion." *Baldwin v. Burton*, 850 P.2d 1188, 1198 (Utah 1993). Accordingly, Montford-Apollo disputes Mr. Thomas' contention that the standard of review herein is *de novo*.

VI. STATEMENT OF THE CASE

The issues herein are narrowly confined to whether the trial court abused its discretion in awarding Montford-Apollo its attorneys' fees incurred in preparing, briefing, filing and arguing a Motion for Summary Judgment and whether the amount awarded was reasonable. Montford-Apollo respectfully suggests the following facts are essential to an understanding of the context from which the court rendered its decision.

1. On June 9, 1996, Montford-Apollo served its First Requests for Admission, Interrogatories and Requests for Production of Documents upon Mr. Thomas' counsel.

2. As of August 15, 1996, Mr. Thomas had failed to respond to the discovery request and counsel for Montford-Apollo, as noted in Exhibit "C" of the addendum, reminded Mr. Thomas, through counsel, of the belated response and of Montford-Apollo's intent to seek "summary judgment, based upon the admission of each of the Requests for Admission contained in [the] July 9 discovery request, if [Mr. Thomas did] not respond to the discovery within the next ten days."

3. Despite the reminder¹, Mr. Thomas did not respond and by Motion dated September 26, 1996, Montford-Apollo sought the trial court's Order granting summary judgment against him due, in part, to his failure to respond to the July 9, 1996 discovery.

4. In his October 9, 1996 Memorandum Opposing the Motion, Mr. Thomas contended for the first time, "[a] material fact exists as to whether [Montford-Apollo] breached its duty of good faith and fair dealing when [Montford-Apollo] allowed Moxie [an alleged competitor] to rent the space next to the space occupied by [Mr. Thomas]."

5. In its October 23, 1996 Reply Memorandum, Montford-Apollo argued, among other things, under Rule 12(h) Utah R.Civ.P., "Mr. Thomas' failure to raise the issue of the implied covenant of good faith and fair dealing until the time of responding to a Motion for Summary Judgment amounts to a waiver of that defense."

6. Thereafter, by pleading dated November 26, 1996, Mr. Thomas "request[ed] leave to amend his answer to the Complaint pursuant to Rule 15 Utah R.Civ.P.," to allege Montford-Apollo's breach of the implied covenant of good faith and fair dealing.

7. On the same date, November 26, 1996, approximately four and one-half months after they were served, Mr. Thomas first responded to Montford-Apollo's Requests for Admission, Interrogatories, and Requests for Production of Documents.

8. Following a hearing on the matter, the trial court granted that portion of Montford-Apollo's Motion for Summary Judgment, seeking a ruling that Montford-Apollo's

¹No Rule of Civil Procedure requires the reminder and Montford-Apollo did so only as a courtesy to Mr. Thomas and his counsel.

Requests for Admission were deemed admitted, in accordance with the decision of the Utah Supreme Court in *Jensen v. Pioneer Dodge Center, Inc.*, 702 P.2d 98, 100 (Utah 1985).

9. The trial court also granted Mr. Thomas' request for leave to amend his Answer to the Complaint, permitting him to raise the issue of the implied covenant of good faith and fair dealing. However, as noted above, the trial court:

. . . condition[ed] its grant of Mr. Thomas' request . . . upon Mr. Thomas' payment, to Montford-Apollo, of the sum of \$350 attorneys' fees incurred by Montford-Apollo in responding to Mr. Thomas' request for leave to amend, and the additional sum of \$5,488 attorneys' fees incurred by Montford-Apollo in preparing, briefing, filing, and arguing the Motion for Summary Judgment, including the fees incurred in preparing [the] Order and the Affidavit of Robert S. Young with respect thereto.

Judge Iwasaki further explained his decision noting "[t]he foregoing represents the amounts identified in the affidavit of Robert S. Young . . . which would not have been incurred by Montford-Apollo had Mr. Thomas raised the issue of the implied covenant of good faith and fair dealing prior to Montford-Apollo's filing of the Motion for Summary Judgment."

10. Conditioned on the foregoing, the court denied Montford-Apollo's Motion for Summary Judgment.

VII. SUMMARY OF ARGUMENT

With this brief Montford-Apollo seeks affirmation of the trial court's order awarding it partial attorneys' fees in connection with the Motion for Summary Judgment. Absent Mr. Thomas' belated response to discovery (establishing the admission of certain

critical facts) and his failure to assert a breach of the implied covenant of good faith and fair dealing until he responded to the motion for summary judgment, Montford-Apollo would never have incurred the attorneys' fees associated with the motion.

Montford-Apollo's argument also focuses on Utah law providing that an award of attorneys' fees is within the sound discretion of the trial court. In this instance, the trial court's discretion could have resulted in a ruling, at one extreme, granting Montford-Apollo's Motion for Summary Judgment. The court could have granted the motion based upon the facts deemed admitted due to Mr. Thomas' failure to respond to discovery and his waiver of the defense of the implied covenant of good faith and fair dealing by failing to raise it in his answer. At the other extreme, the trial court could have allowed Mr. Thomas to amend his Complaint (to assert the defense of a breach of the implied covenant of good faith and fair dealing) and simply denied Montford-Apollo's Motion for Summary Judgment. In so ordering, the court would have rendered all for naught the attorneys' fees incurred by Montford-Apollo with respect to the motion.

In ruling as it did, the trial court appears to have endeavored to reach a middle ground. That middle ground allowed Mr. Thomas to amend his answer to assert the new affirmative defense, but conditioned the assertion of the new defense on Mr. Thomas' payment of the attorneys' fees incurred by Montford-Apollo in preparing a Motion for Summary Judgment that the court was probably compelled to grant, in the absence of the new defense.

VIII. ARGUMENT

POINT I

THIS COURT MAY, AND SHOULD, AFFIRM THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES ON ANY PROPER GROUND.

Neither in the order that is the subject of this appeal, nor in the minute entry,² did the trial court clearly delineate the basis for its award of attorneys' fees. Thus, the trial court's reasoning in allowing the award is not precisely clear. Irrespective of the reasoning, and regardless of whether the trial court's reasoning may be right or wrong, this court may affirm the award on any proper ground. As this court has observed, "we may affirm the trial court's determination on any proper ground, notwithstanding the trial court's having based its ruling on another reason." *Mountain America Credit Union v. McClellan*, 854 P.2d 590, 592 (Utah App. 1993), citing *Buehner Block Co. v. UWC Assocs.* 752 P.2d 892, 895 (Utah 1988).

Montford-Apollo agrees generally with the arguments and authority of Mr. Thomas' brief, wherein he contends that Utah law allows recovery of attorneys' fees only by statute or contract. *Estate of Quinn*, 830 P.2d 282, 284 (Utah App. 1992). In addition to the general rule, however, Utah courts have long been authorized, if not required, under Rule 37 Utah R.Civ.P., to sanction a party's failure to make or cooperate in discovery by, among other things, awarding attorneys' fees.

Rule 37(b)(2) allows the court, as a sanction for failure to make or cooperate in discovery, to enter orders including:

²True and correct copies of each are attached as Exhibits "A" and "B" of the addendum.

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. . . .

In lieu of any of the foregoing orders or in addition thereto, the court *shall* require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, *including attorney fees*, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Rule 37(b)(2), Utah R.Civ.P., (emphasis supplied).

Accordingly, in this proceeding, there are at least two bases upon which the court could have awarded attorneys fees. First, the agreement between Montford-Apollo and Mr. Thomas contemplated the recovery of attorneys' fees by the successful party in any litigation.

Page 28 of the Lease Agreement contains the following provision:³

In the event that either the Landlord or the Tenant shall institute any action or proceeding against the other relating to the provisions of this Lease, or any default hereunder, then, and in that event, the unsuccessful party in such action or proceeding agrees to reimburse the successful party for the reasonable expenses of such action including reasonable attorneys' fees and disbursements incurred therein by the successful party.

In his appeal brief, Mr. Thomas contends an award of attorneys' fees under the lease provision is inappropriate because "until this matter is brought to a final disposition in the lower court, any determination of attorneys' fees . . . would be premature and contrary to

³A copy of the Attorneys' Fee provision is attached as Exhibit "D" of the addendum.

the terms of the Lease Agreement. . . ." Brief at 8. As noted above, however, Rule 37 contemplates attorneys' fee awards before final disposition. Hence, the trial court was within its legal authority in ordering Mr. Thomas to "pay the reasonable expenses, *including attorney fees*, caused by the failure . . ." to respond to discovery.

In *W.W. & W.B. Gardner, Inc. v. Park W. Vil.*, 568 P.2d 734 (Utah 1977), the trial court proceeded similarly to the trial court herein. "The trial court ruled that pursuant to Rule 37(d), Utah R.Civ.P., a judgment by default should be entered against defendant on the ground of defendant's persistent failure to respond timely or properly to discovery requests." *Id.* at 736. "The [trial] court also entered a summary judgment against defendant, because the pleadings, *admissions*,⁴ affidavits on file showed there to be no genuine issue of any material facts; [sic] and plaintiff was entitled to judgment as a matter of law." *Id.* (Emphasis supplied). In *W.W. & W.B. Gardner*, the Utah Supreme Court affirmed the trial court's actions. Montford-Apollo asks this court to do the same herein.

POINT II

THE MIDDLE GROUND THE TRIAL COURT ATTEMPTED TO ACHIEVE CANNOT AMOUNT TO AN ABUSE OF ITS DISCRETION.

In this case, it is rather apparent that Montford-Apollo was in a position to bring this matter to a final conclusion unless the trial court granted Mr. Thomas' Motion for Leave

⁴The Supreme Court acknowledged Defendant's contention, on appeal, that "there were material issues of fact in dispute which would preclude summary judgment." *Id.* Nevertheless, the Supreme Court also noted "through a series of requests for admissions plaintiff established the requisite facts. . . . Defendant belatedly responded to the admissions but under Rule 36(a), U.R.C.P., the matters were deemed admitted when defendant failed to answer or object within 30 days after service."

to Amend. As in *W.W. & W.B. Gardner*, in this case, absent leave to amend Mr. Thomas' Answer, "the pleadings, admissions, affidavits on file showed there to be no genuine issue of any material facts and [Montford-Apollo] was entitled to judgment as a matter of law." The requests for admission, and the facts deemed admitted under Rule 36(a) Utah R.Civ.P. due to Mr. Thomas' failure to respond, include the following:

Request for Admission No. 1: Admit that Exhibit "A" attached is a true and correct copy of the Lease Assignment/Lease Extension Agreement, dated April 26, 1994, by, between and among Sugarhouse Development Partnership, The Brown Bear International Corporation and you.

Request for Admission No. 2: Admit your signature appears on Exhibit "A" attached.

Request for Admission No. 3: Admit that Exhibit "B" attached is a true and correct copy of the Lease Agreement, dated January 21, 1993, by and between Sugarhouse Development Partnership and The Brown Bear International Corporation and to which reference is made in Exhibit "A" attached, the Lease Assignment/Lease Extension Agreement.

Request for Admission No. 4: Admit that Exhibit "C" attached, titled "Exhibit 'A' Guarantee of Lease," is a true and correct copy of the Guarantee you signed at the time of signing the Lease Assignment/Lease Extension Agreement, dated April 26, 1994, by, between and among Sugarhouse Development Partnership, The Brown Bear International Corporation and you.

Request for Admission No. 5: Admit your signature appears on Exhibit "C" attached.

Request for Admission No. 6: Admit that Exhibit "D" attached is a true and correct copy of the Lease Amendment, dated October 25, 1994, between Montford-Apollo and you.

Request for Admission No. 7: Admit your signature appears on Exhibit "D" attached.

Request for Admission No. 8: Admit you have failed to pay rent and other obligations due Montford-Apollo, under the Lease Agreement, since July 1995.

Request for Admission No. 9: Admit you received the original of Exhibit "E" attached, the David Broadbent letter of March 4, 1996, on or about March 4, 1996.

Request for Admission No. 10: Admit, despite your failure to pay rent since July 1995, you did not vacate the premises, at the Sugarhouse Shopping Center, until after receiving a copy of Exhibit "E" attached, the David Broadbent letter of March 4, 1996.

Request for Admission No. 11: Admit you never requested, nor discussed with Montford-Apollo, an exclusive right to sell espresso in the Sugarhouse Shopping Center.

Request for Admission No. 12: Admit that among Exhibits "A" through "D" attached, there is no provision purporting to give you an exclusive right to sell, or to prevent others from selling, espresso in the Sugarhouse Shopping Center.

Mr. Thomas' failure to respond to the foregoing requests for admission established at least the following: (1) the true and correct nature of the lease documents on which Montford-Apollo relied in asserting a breach of contract; (2) Mr. Thomas' signature on each of those documents; (3) Mr. Thomas' failure to pay rent and other obligations due Montford-Apollo, under the Lease Agreement, since July 1995; (4) Mr. Thomas failure to vacate the premises until after March 4, 1996; and (5) Mr. Thomas' lack of any exclusive right to sell espresso coffee in the Sugarhouse Shopping Center. With the foregoing facts established, Montford-Apollo was certainly entitled to summary judgment absent the court's willingness to allow Mr. Thomas to amend his Complaint to assert a breach of the implied covenant of good faith and fair dealing as an affirmative defense.

Apparently recognizing the difficulty of his situation, Mr. Thomas argued that Montford-Apollo had violated a covenant of good faith and fair dealing by allowing an alleged

competitor, Moxie Java, to rent the space next door.⁵ In its reply memorandum, Montford-Apollo contended Mr. Thomas' prior failure to allege Montford-Apollo's violation of the covenant of good faith and fair dealing amounted to a waiver of that defense under Rule 12(h) Utah R.Civ.P. Those arguments having been made, it is evident the trial court could have ruled, at one extreme, that Mr. Thomas had waived any defense alleging Montford-Apollo's violation of a covenant of good faith and fair dealing and entered summary judgment against Mr. Thomas for the full amount of all obligations unpaid under the lease.

At the other extreme, the trial court could have ruled that Mr. Thomas was entitled to amend his answer to allege Montford-Apollo's violation of the implied covenant of good faith and fair dealing. In so ruling, the trial court would have rendered all for naught, Montford-Apollo's efforts in researching, preparing, filing, arguing and preparing orders with respect to its Motion for Summary Judgment. Clearly, Montford-Apollo's Motion for Summary Judgment was well-taken in the absence of Mr. Thomas' allegation that Montford-Apollo had breached a covenant of good faith and fair dealing. Thus, at one extreme Montford-Apollo would have been entitled to summary judgment against Mr. Thomas, and the litigation as to him would have come to an end. At the other extreme, Mr. Thomas would have been entitled to simply amend his answer, rendering all for naught the efforts of Montford-Apollo in bringing the Motion for Summary Judgment.

⁵Since Mr. Thomas first raised the issue of an alleged breach of the implied covenant of good faith and fair dealing after the filing of Montford-Apollo's Motion for Summary Judgment, Montford-Apollo found itself somewhat ill-prepared to respond. Montford-Apollo has since informed counsel the lease with Moxie Java was entered with Sugar House Development Partnership, the owner of the shopping center prior to Montford-Apollo's acquisition. Accordingly, Mr. Thomas' claims of breach of the implied covenant of good faith and fair dealing, irrespective of their merit, lie against Sugar House Development Partnership, not Montford-Apollo.

Undoubtedly, the court attempted to strike a balance between the two extremes, granting Mr. Thomas leave to amend his answer to assert Montford-Apollo's alleged violation of the covenant of good faith and fair dealing, but conditioning that ruling on Mr. Thomas' payment to Montford-Apollo of the attorneys' fees incurred in preparing, arguing and filing its Motion for Summary Judgment. In ruling as it did, the trial court permitted Mr. Thomas to assert his new defense without rendering all for naught Montford-Apollo's efforts to pursue a Motion for Summary Judgment that was clearly well-taken. The trial court's attempts to strike a balance between two extremes, in terms of the rulings it could have made, simply do not amount to an abuse of discretion. Based upon the foregoing, Montford-Apollo respectfully submits the trial court did not abuse its discretion in awarding the attorneys' fees it did and seeks this court's order affirming the award.

POINT III

THE ATTORNEYS' FEES AWARDED BY THE TRIAL COURT WERE REASONABLE UNDER THE CIRCUMSTANCES.

As noted in Exhibit "A" to the addendum, the trial court determined the reasonableness of the attorneys' fees award, at least in part, based upon the Affidavit of Robert S. Young. The court incorporated the affidavit, by reference, in its order. That Affidavit, included in Exhibit "A" of the addendum to this brief, reveals, among other things, that Mr. Young specifically reviewed the billing records of Prince, Yeates & Geldzahler to determine that he devoted 39.2 hours to all aspects of the Motion for Summary Judgment. At Mr. Young's then billing rate of \$140 per hour, the amount Prince, Yeates & Geldzahler

charged Montford-Apollo, for services rendered in connection with the Motion for Summary Judgment, was \$5,488

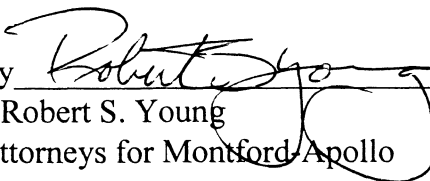
Mr. Thomas offers no explanation, and certainly no expert testimony, as to why the foregoing amount is unreasonable. He merely declares it to be so. Montford-Apollo submits the amount awarded is the amount it paid, in accordance with the time devoted by its counsel to bring the motion, and there is nothing unreasonable about the time devoted to the matter in the context of this proceeding as outlined in the Affidavit of Mr. Young.

IX. CONCLUSION

The trial court's award of attorneys' fees finds support both in the facts and the law relevant to this dispute. In rendering that award, the trial court sought merely to achieve a medium ground and did not abuse its discretion in that effort. The award is reasonable, under the circumstances of this proceeding, and should be affirmed. Montford-Apollo respectfully requests this court's decision so ordering.

Dated this 13th day of May 1998.

PRINCE, YEATES & GELDZAHLER

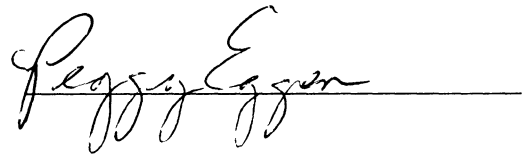
By 
Robert S. Young
Attorneys for Montford-Apollo

X. CERTIFICATE OF SERVICE

I certify that on the 13th day of May 1998, I delivered for filing with the Utah Court of Appeals, as required by Rule 26(b) Utah R.App.P., an original and seven copies, and mailed to the individuals noted below, by first-class mail postage prepaid, one copy, of the foregoing BRIEF OF PLAINTIFF AND INTERLOCUTORY APPELLEE.

Robert L. Booker, Esq.
Booker & Associates
New England Plaza, Suite 550
349 South Second East
Salt Lake City, UT 84111

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P.O. Box 11643
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A handwritten signature in cursive script, reading "Peggy Eggen", is written over a horizontal line.

XI. ADDENDUM

1. Exhibit "A" - The December 26, 1996 ORDER ON MONTFORD-APOLLO'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT GUY L. THOMAS AND MR. THOMAS' MOTION FOR LEAVE TO AMEND HIS ANSWER as docketed in the Third Judicial District Court, including a copy of the Affidavit of Robert S. Young, incorporated therein by reference and filed in support of the reasonableness of the attorneys' fee award.

2. Exhibit "B" - The Court's December 9, 1996 MINUTE ENTRY as docketed in the Third Judicial District Court following the hearing on the Motion.

3. Exhibit "C" - A copy of the letter from counsel for Montford-Apollo to counsel for Mr. Thomas, dated August 15, 1996, warning that Mr. Thomas' response to Montford-Apollo's First Requests for Admission, Interrogatories and Requests for Production of Documents, served July 9, 1996, was past due and advising of Montford-Apollo's intent "to move for summary judgment, based upon the admission of each of the Requests for Admission contained in [Montford-Apollo's] July 9 discovery request, if [Mr. Thomas did] not respond to the discovery within the next ten days."

4. Exhibit "D" - A copy of the Attorneys' fees provision of page 28 of the Lease.

FILED DISTRICT COURT
Third Judicial District

DEC 26 1996

SALT LAKE COUNTY

By B. Smith
Deputy Clerk

PRINCE, YEATES & GELDZAHLER
Robert S. Young, USB #4174
David K. Broadbent, USB #0442
City Centre I, Suite 900
175 East 400 South
Salt Lake City, UT 84111
Telephone: (801) 524-1000

Attorneys for Plaintiff

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

MONTFORD-APOLLO SUGARHOUSE L.P.,

Plaintiff,

v.

THE BROWN BEAR INTERNATIONAL
CORPORATION, a Utah corporation,
MICHAEL BROWN, an individual, and
GUY L. THOMAS, an individual,

Defendants.

ORDER ON MONTFORD-APOLLO'S
MOTION FOR SUMMARY JUDGMENT
AGAINST DEFENDANT GUY L.
THOMAS AND MR. THOMAS'
MOTION FOR LEAVE TO AMEND
HIS ANSWER

Case No. 960902088 CN

Judge Glenn K. Iwasaki

By motion dated September 26, 1996, Montford-Apollo Sugarhouse L.P. ("Montford-Apollo"), moved the court for Summary Judgment against defendant Guy L. Thomas ("Mr. Thomas"). In response to the motion, Mr. Thomas, among other things, by pleading dated November 26, 1996, requested "leave to amend his answer to the complaint pursuant to Rule 15 of the Utah Rules of Civil Procedure" to assert a defense not

previously asserted - a defense alleging that Montford-Apollo had breached an implied covenant of good faith and fair dealing.

The parties appeared before the court on December 9, 1996, at 11:00 a.m., for oral argument. Montford-Apollo appeared through its counsel, Robert S. Young. Mr. Thomas appeared through his counsel J. Kent Holland. Robert L. Booker, counsel for Michael Brown and the Brown Bear International Corporation, also attended though his clients did not participate in the proceedings. The court, having considered the motions, having reviewed the memoranda filed and considered the arguments made by counsel, and being otherwise fully advised in the premises, hereby:

ORDERS, ADJUDGES AND DECREES

1. By motion dated September 26, 1996, Montford-Apollo sought this court's order granting summary judgment against Mr. Thomas due, in part, to Mr. Thomas' failure to respond to certain Requests for Admission dated July 9, 1996 and placed in the mail, for service upon Mr. Thomas' counsel, on that date.

2. Mr. Thomas defends against the motion for summary judgment contending, for the first time in his October 9, 1996 Memorandum in Support of Defendant's Motion in Opposition to Plaintiff's Motion for Summary Judgment [sic], "[a] material fact exists as to whether Plaintiff breached its duty of good faith and fair dealing when Plaintiff allowed Moxie to rent the space next to the space occupied by [Mr. Thomas]."

3. By Reply Memorandum, dated October 23, 1996, Montford-Apollo contends, among other things, under Rule 12(h) of the Utah Rules of Civil Procedure, "Mr. Thomas' failure to raise the issue of the implied covenant of good faith and fair dealing until the time of responding to a motion for summary judgment amounts to a waiver of that defense."

4. By pleading dated November 26, 1996, Mr. Thomas "requests leave to amend his answer to the complaint pursuant to Rule 15 of the Utah Rules of Civil Procedure," to raise the issue of the implied covenant of good faith and fair dealing.

5. On the same date, November 26, 1996, approximately four and one-half months after they were served, Mr. Thomas first responded to Montford-Apollo's Requests for Admission, Interrogatories, and Requests for Production of Documents.

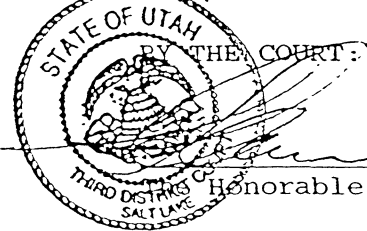
6. The court grants that portion of Montford-Apollo's Motion for Summary Judgment, seeking a ruling that Montford-Apollo's Requests for Admission are deemed admitted, in accordance with the decision of the Utah Supreme Court in *Jensen v. Pioneer Dodge Center, Inc.*, 702 P.2d 98, 100 (Utah 1985). Accordingly, for purposes of this proceeding, the truth of each matter that is the subject of Montford-Apollo's Requests for Admission is conclusively established and deemed admitted, irrespective of Mr. Thomas' responses thereto.

7. The court further grants Mr. Thomas' request for leave to amend his answer to the complaint, pursuant to Rule 15 of the Utah

Rules of Civil Procedure, to raise the issue of the implied covenant of good faith and fair dealing. The court, however, conditions its grant of Mr. Thomas' request for leave to amend upon Mr. Thomas' payment, to Montford-Apollo, of the sum of \$350 attorneys' fees incurred by Montford-Apollo in responding to Mr. Thomas' request for leave to amend, and the additional sum of \$5,488 attorneys' fees incurred by Montford-Apollo in preparing, briefing, filing, and arguing the Motion for Summary Judgment, including the fees incurred in preparing this Order and the Affidavit of Robert S. Young with respect thereto. The foregoing represents the amounts identified in the affidavit of Robert S. Young, by this reference incorporated herein, which would not have been incurred by Montford-Apollo had Mr. Thomas raised the issue of the implied covenant of good faith and fair dealing prior to Montford-Apollo's filing of the Motion for Summary Judgment.

8. Except as expressly noted above, the court denies the motions of the parties.

DATED this 26 day of December, 1996.



Honorable Glenn K. Iwasaki

G:\DIANE\RSY\MONTFORD 396\ORDRSUMJ.D09
11653-6

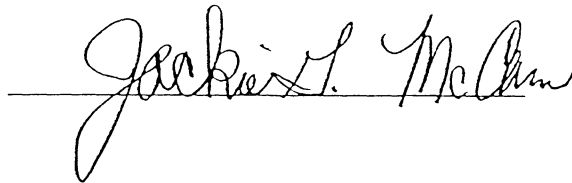
MAILING CERTIFICATE

I certify that on the 13 day of December, 1996, I mailed to the individual noted below, by first-class mail, postage prepaid, a true and correct copy of the foregoing ORDER ON MONTFORD-APOLLO'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT GUY L. THOMAS AND MR. THOMAS' MOTION FOR LEAVE TO AMEND HIS ANSWER:

Robert L. Booker, Esq.
Booker & Associates
New England Plaza, Suite 550
349 South Second East
Salt Lake City, UT 84111

and by hand-delivery to the individual noted below:

J. Kent Holland, Esq.
Anderson & Holland
623 East First South
P.O. Box 11643
Salt Lake City, UT 84147-0643



G:\DIANE\RSY\MONTFORD.396\ORDRSUMJ.D09
11653-6

PRINCE, YEATES & GELDZAHLER
Robert S. Young, USB #4174
David K. Broadbent, USB #0442
City Centre I, Suite 900
175 East 400 South
Salt Lake City, UT 84111
Telephone: (801) 524-1000

Attorneys for Plaintiff

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

MONTFORD-APOLLO SUGARHOUSE L.P.,

Plaintiff,

v.

THE BROWN BEAR INTERNATIONAL
CORPORATION, a Utah corporation,
MICHAEL BROWN, an individual, and
GUY L. THOMAS, an individual,

Defendants.

AFFIDAVIT OF ROBERT S. YOUNG
IN SUPPORT OF THE COURT'S
ORDER AWARDING ATTORNEYS'
FEES TO MONTFORD-APOLLO ON
ITS MOTION FOR SUMMARY
JUDGMENT

Case No. 960902088CN

Judge Glenn K. Iwasaki

Robert S. Young, being duly sworn upon his oath, deposes and
states as follows:

1. I am an attorney licensed to practice law in the state of
Utah.
2. I currently practice with the firm of Prince, Yeates &
Geldzahler, who Montford-Apollo has retained to represent its interest
in this proceeding.
3. Following the Court's recent Order, awarding Montford-Apollo
its attorney's fees incurred in connection with the preparation,
filing, and argument related to its Motion for Summary Judgment against

Guy L. Thomas, I have reviewed the monthly statements supplied by Prince, Yeates & Geldzahler to Montford-Apollo, for the months of August through November 1996. True and correct copies of those statements are attached hereto as Exhibit "A."

4. In reviewing the monthly statements supplied to Montford-Apollo, I have reviewed each entry to determine whether the services rendered were related to the Motion for Summary Judgment.

5. I have marked those entries related to the Motion for Summary Judgment with either the letter "A" or "P." The letter "A" identifies those time entries where all of the efforts listed in the entry relate to the Motion for Summary Judgment. The letter "P" identifies those time entries where only a part of the entry relates to the Motion for Summary Judgment. I made no mark on those entries unrelated to the Motion for Summary Judgment.

6. My review of the records reveals that the time entries, wherein all of the work related to the Motion for Summary Judgment, total 29.2 hours. The time entries where part of the work related to the Motion for Summary Judgment total eight hours.

7. I believe that a fair adjustment for the time entries, wherein only part of the services relates to the Motion for Summary Judgment, would be a 50% reduction. Therefore, I have included four of the eight hours partially related to the Motion for Summary Judgment in my calculation of fees.

8. Accordingly, I have concluded that I devoted approximately 33.2 hours to research, drafting, review and revision, and all other matters related to the Motion for Summary Judgment. Moreover, since the November statement, I have devoted approximately six hours to preparing for and arguing the Motion for Summary Judgment, preparing the Court's Order with respect to the Motion for Summary Judgment, reviewing the Prince, Yeates & Geldzahler billing statements and preparing the Affidavit of Robert S. Young related to the Motion for Summary Judgment.

9. Thus, the total time I have devoted to Montford-Apollo's Motion for Summary Judgment against Guy Thomas is 39.2 hours. At my billing rate of \$140 per hour, the amount we have charged, or will charge, Montford-Apollo for services rendered in connection with the Motion for Summary Judgment, is \$5,488, excluding costs incurred in connection therewith.

10. In view of our efforts and the hours spent to file both initial and reply memoranda in support of the Motion, to research the application of Utah law under the circumstances of this case, to review and revise the memoranda before filing with the court, and to prepare the Order and Affidavit applicable to the Motion, I affirm the reasonableness of the fees charged our client to obtain comparable legal services in this community.

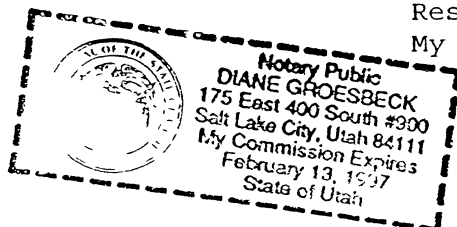
Dated this 13 day of December, 1996.

Robert S. Young
Robert S. Young

STATE OF UTAH)
 :
COUNTY OF SALT LAKE)

Subscribed and sworn to before me this 13 day of December, 1996.

Diane Groesbeck
NOTARY PUBLIC
Residing at: Bountiful, UT
My Commission Expires: 2-13-97



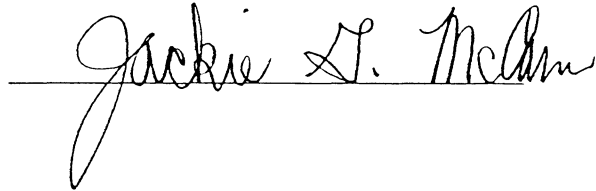
MAILING CERTIFICATE

I certify that on the 13th day of December, 1996, I mailed to the individual noted below, by first-class mail, postage prepaid, a true and correct copy of the foregoing AFFIDAVIT OF ROBERT S. YOUNG IN SUPPORT OF THE COURT'S ORDER AWARDING ATTORNEYS' FEES TO MONTFORD-APOLLO ON ITS MOTION FOR SUMMARY JUDGMENT.

Robert L. Booker, Esq.
Booker & Associates
New England Plaza, Suite 550
349 South Second East
Salt Lake City, UT 84111

and by hand-delivery to the individual noted below:

J. Kent Holland, Esq.
Anderson & Holland
623 East First South
P.O. Box 11643
Salt Lake City, UT 84147-0643



G \DIANE\RSY\MONTFORD 396\AFFIDRSY D12
11653-6

EXHIBIT A

Page 11 of 18

PRINCE, YEATES & GELDZAHLER
175 EAST 400 SOUTH - SUITE 900
SALT LAKE CITY UT 84111
Telephone-801/524-1000

Page 1
Inv# -043610
Date 8/31/96
011653.000006-DKB

MONTFORD-APOLLO SUGAR HOUSE LP
% WESTFIELD PROPERTIES INC
2681 E PARLEYS WAY
SALT LAKE CITY UT 84109

Re: THOMAS, GUY L

	HOURS	AMOUNT
8/08/96 RSY TELE CONF WITH KRAIG ERICKSON RE STATUS OF LITIGATION. REVIEW FILE TO DETERMINE RESPONSE TO DISCOVERY DUE ON AUGUST 12, 1996. REVISE RESPONSE TO REQUEST FOR ADMISSION NO. 8 RE AGENCY RELATIONSHIP. TELE CONF WITH PHILIP MONTGOMERY RE SIGNATURE.	2.20	308.00
8/09/96 RSY REVISE REQUEST FOR ADMISSION NO. 8. PREPARE LETTERS TO PHILIPMONTGOMERY AND KENT HOLLAND RE SAME. TELE CONF WITH TO JANET BANKS RE POTENTIAL TO RESCHEDULE SEPTEMBER 9 HEARING. RECEIVE AND REVIEW MIKE BROWN'S REPLY MEMORANDUM SUPPORTING MOTION TO SET ASIDE DEFAULT.	1.50	210.00
8/12/96 RSY TELE CONF WITH JANET BANKS RE CHANGE IN HEARING DATE TO SEPTEMBER 23. TELE CONF WITH ROBERT BOOKER'S OFFICE RE SAME.	.50	70.00
8/13/96 RSY TELE CONFS WITH JANET BANKS AND WITH HILDA OF ROBERT BOOKER'S OFFICE RE RESCHEDULED HEARING ON MOTION TO SET ASIDE DEFAULT. PREPARE AMENDED NOTICE OF HEARING.	.50	70.00
A 8/15/96 RSY PREPARE LETTER TO KENT HOLLAND RE DISCOVERY RESPONSE DUE FROM GUY THOMAS. REVIEW AND REVISE SAME.	1.00	140.00
P 8/30/96 RSY CONF WITH DAVID BROADBENT RE CONTINUED LACK OF RESPONSE FROM GUY THOMAS AND	.70	98.00

EXHIBIT A

Page 1 of 8

(Continued on page 2)

EXHIBIT A

Page 12 of 18

Page 2
Inv# -043610
Date 8/31/96
011653.000006-DKB
HOURS AMOUNT

WHETHER WE SHOULD INITIATE MOTION FOR
SUMMARY JUDGMENT OR JUDGMENT ON THE
PLEADINGS. RECEIVE SUPPLEMENTAL
RESPONSE SIGNED BY PHILIP MONTGOMERY.
PREPARE CERTIFICATE OF SERVICE ETC.

1.20 168.00

Total Services 7.60 \$1064.00

R S YOUNG - 7.60 x 140.00 = 1064.00

PHOTOCOPIES 7.60

LONG DISTANCE CHARGES .40

Total Expenses \$8.00

TOTAL THIS INVOICE \$1072.00
=====

EXHIBIT A

Page 2 of 8

PRINCE, YEATES & GELDZAHLER
175 EAST 400 SOUTH - SUITE 900
SALT LAKE CITY UT 84111
Telephone-801/524-1000

Page 1
Inv# -044159
Date 9/30/96
011653.000006-DKB

MONTFORD-APOLLO SUGAR HOUSE LP
% WESTFIELD PROPERTIES INC
2681 E PARLEYS WAY
SALT LAKE CITY UT 84109

Re: THOMAS, GUY L

		HOURS	AMOUNT
A	9/12/96 RSY BEGIN INITIAL DRAFT OF MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.	3.80	438.37
P	9/13/96 RSY PREPARE LETTER TO JUDGE IWASAKI RE MOTION TO SET ASIDE DEFAULT AND ENCLOSE COURTESY COPY OF MEMORANDUM OPPOSING MOTION. RESEARCH RE EFFECT OF UTAH LAW ON FAILURE TO RESPOND TO REQUESTS FOR ADMISSION. DICTATE POINT I OF ARGUMENT SECTION OF MEMORANDUM RE EFFECT OF FAILURE TO RESPOND TO REQUESTS FOR ADMISSION.	3.80	438.33
P	9/16/96 RSY FINALIZE LETTER TO JUDGE IWASAKI WITH COURTESY COPY OF MEMORANDUM OPPOSING MOTION TO SET ASIDE DEFAULT. WORK ON MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.	.80	92.28
A	9/18/96 RSY REVIEW LEASE AGREEMENT, LEASE ASSIGNMENT, LEASE EXTENSION AGREEMENT, GUARANTY AND OTHER DOCUMENTS RE MOTION FOR SUMMARY JUDGMENT. INITIAL DRAFT OF POINT II RE AMOUNTS DUE AND SUBJECT TO SUMMARY JUDGMENT.	3.20	369.12
A	9/19/96 RSY REVIEW AND REVISE MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT. TELE CONF WITH BRIGHAM BLACK OF WESTFIELD PROPERTIES RE CALCULATION OF RENT AND OTHER AMOUNTS DUE. DICTATE POINT II OF ARGUMENT SECTION	2.90	334.52
	9/23/96 RSY PREPARE FOR AND ATTEND HEARING IN JUDGE		

EXHIBIT 4Page 14 of 18

Page	2
Inv#	-044159
Date	9/30/96
	011653.000006-DKB
HOURS	AMOUNT

	IWASAKI'S COURT ON MOTION TO SET ASIDE DEFAULT.	2.00	230.70
A	REVIEW AND REVISE MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT. TELE CONFS WITH WESTFIELD PROPERTIES PERSONNEL, INCLUDING BRIGHAM BLACK RE SAME.	3.50	403.73
A 9/24/96 RSY	REVIEW AND REVISE MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT. DRAFT AFFIDAVITS OF KRAIG ERICKSON AND BRIGHAM BLACK. PREPARE FAX TO KRAIG ERICKSON AND BRIGHAM BLACK RE SAME.	2.50	288.38
A 9/25/96 RSY	TELE CONFS WITH KRAIG ERICKSON AND BRIGHAM BLACK RE REVISIONS TO AFFIDAVITS. CONF WITH DAVID BROADBENT RE SAME. REVISE AFFIDAVITS. PREPARE FAX TO WESTFIELD PROPERTIES.	2.20	253.77
A 9/26/96 RSY	FINALIZE FAX TO KRAIG ERICKSON AND BRIGHAM BLACK RE AFFIDAVITS. MAKE FINAL REVISIONS TO MEMORANDUM AND AFFIDAVITS. TELE CONF WITH BRIGHAM BLACK TO OBTAIN OKAY ON FORM OF AFFIDAVITS. PREPARE MOTION ITSELF, LETTERS TO KRAIG ERICKSON, BRIGHAM BLACK AND KENT HOLLAND. FINALIZE EVERYTHING FOR FILING.	3.50	403.73
A 9/30/96 RSY	TELE CONF WITH KENT HOLLAND RE GUY THOMAS SITUATION. RETURN CALL.		

TOTAL SERVICES REFLECTS A \$700.00
DISCOUNT.

.20	23.07
-----	-------

Total Services

28.40	\$3276.00
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R S YOUNG

- 28.40 x 115.35 = 3275.94

PHOTOCOPIES

38.20

POSTAGE/SHIPPING COSTS

6.00

TELECOPIER

9.00

Total Expenses

\$53.20

TOTAL THIS INVOICE

\$3329.20

=====

EXHIBIT

APage 4 of 8

PRINCE, YEATES & GELDZAHLER
175 EAST 400 SOUTH - SUITE 900
SALT LAKE CITY UT 84111
Telephone-801/524-1000

Page 1
Inv# -044752
Date 10/31/96
011653.000006-DKB

MONTFORD-APOLLO SUGAR HOUSE LP
% WESTFIELD PROPERTIES INC
2681 E PARLEYS WAY
SALT LAKE CITY UT 84109

Re: THOMAS, GUY L

		HOURS	AMOUNT
A	10/01/96 RSY		
	TELE CONF WITH KENT HOLLAND RE VARIOUS ISSUES, INCLUDING HIS REQUEST FOR ADDITIONAL TIME TO RESPOND TO MOTION FOR SUMMARY JUDGMENT. AGREE ON ADDITIONAL SEVEN DAYS. PREPARE LETTER TO KENT HOLLAND RE SAME.	1.20	168.00
P	10/03/96 RSY		
	RECEIVE AND REVIEW SIGNED AFFIDAVITS FROM KRAIG ERICKSON AND BRIGHAM BLACK. PREPARE LETTER TO KENT HOLLAND RE SAME. RECEIVE AND REVIEW PROPOSED ORDER SETTING ASIDE DEFAULT. PREPARE LETTER TO ROBERT BOOKER RE SAME.	2.20	308.00
	10/04/96 RSY		
	INITIAL DRAFT OF FIRST DISCOVERY REQUEST TO MIKE BROWN AND THE BROWN BEAR INTERNATIONAL CORPORATION.	2.50	350.00
	10/08/96 RSY		
	TELE CONF WITH ROBERT BOOKER RE DIFFICULTIES LOCATING MIKE BROWN IN ITALY. REVIEW FILE MATERIALS RE TIME FOR \$200 PAYMENT.	.50	70.00
	10/09/96 RSY		
	TELE CONF WITH ROBERT BOOKER RE SCHEDULE FOR DELIVERING \$200 FROM MIKE BROWN. RETURN CALL TO DISCUSS MATTER AND TIME FOR FILING ANSWER TO COMPLAINT.	.20	28.00
A	10/18/96 RSY		
	INITIAL REVIEW OF CASE LAW ON THE ISSUES OF PARTIAL SUMMARY JUDGMENT AND RAISING A DEFENSE FOR THE FIRST TIME IN A MEMORANDUM OPPOSING MOTION FOR SUMMARY JUDGMENT. DICTATE INITIAL		

Page 2
Inv# -044752
Date 10/31/96
011653.000006-DKB
HOURS AMOUNT

A 10/21/96 RSY	DRAFT OF REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.	2.50	350.00
A 10/22/96 RSY	REVIEW AND REVISE INITIAL DRAFT OF REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.	1.30	182.00
A 10/23/96 RSY	REVIEW AND MAKE FINAL REVISIONS TO INITIAL DRAFT OF REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.	1.10	154.00
10/29/96 RSY	PREPARE NOTICE TO SUBMIT FOR DECISION.	.30	42.00
	CONF WITH DAVID BROADBENT RE STATUS OF CASE AND DESIRES OF CLIENT RE SAME.		
	PREPARE LETTER TO ROBERT BOOKER RE PAYMENT OF \$200 AND ANSWER TO COMPLAINT.	.80	112.00
	Total Services	12.60	\$1764.00
R S YOUNG	- 12.60 x 140.00 =		1764.00
PHOTOCOPIES			28.80
TELECOPIER			3.00
	Total Expenses		\$31.80
	TOTAL THIS INVOICE		\$1795.80
			=====

PRINCE, YEATES & GELDZAHLER
175 EAST 400 SOUTH - SUITE 900
SALT LAKE CITY UT 84111
Telephone-801/524-1000

Page 1
Inv# -045056
Date 11/30/96
011653.000006-DKB

MONTFORD-APOLLO SUGAR HOUSE LP
% WESTFIELD PROPERTIES INC
2681 E PARLEYS WAY
SALT LAKE CITY UT 84109

Re: THOMAS. GUY L

	HOURS	AMOUNT
11/04/96 RSY TELE CONF WITH BRIGHAM BLACK TO DISCUSS STATUS OF LITIGATION AGAINST MICHAEL BROWN, THE BROWN BEAR INTERNATIONAL CORPORATION AND GUY THOMAS. ALSO DISCUSSED POTENTIAL EVICTION OF ANOTHER TENANT.	.20	28.00
11/08/96 RSY RECEIVE AND REVIEW LETTER FROM ROBERT BOOKER CONTAINING CHECK FOR \$200 AND REQUESTING ADDITIONAL TIME TO ANSWER COMPLAINT. PREPARE LETTER TO ROBERT BOOKER RE SAME.	.80	112.00
11/19/96 RSY TELE CONF WITH LUANN, JUDGE IWASAKI'S ASSISTANT, TO CONFIRM THAT AS OF THIS MORNING NO ANSWER FILED BY MIKE BROWN OR THE BROWN BEAR INTERNATIONAL CORPORATION. BEGIN INITIAL DRAFT OF REVISED DEFAULT JUDGEMENTS AGAINST MIKE BROWN AND THE BROWN BEAR INTERNATIONAL CORPORATION IN ANTICIPATION OF FILING MOTION TO REINSTATE DEFAULT. RECEIVE AND REVIEW ANSWER, COUNTERCLAIM AND CROSSCLAIM OF MIKE BROWN AND BROWN BEAR INTERNATIONAL CORPORATION. PREPARE LETTER TO KRAIG ERICKSON AND BRIGHAM BLACK RE RECEIPT OF THE ANSWER AND REQUESTING THEIR ASSISTANCE IN RESPONDING TO THE INDIVIDUAL ALLEGATIONS THEREOF.	3.50	490.00

Page 2
Inv# -045056
Date 11/30/96
011653.000006-DKB
HOURS AMOUNT

Total Services 4.50 \$630.00

R S YOUNG

- 4.50 x 140.00 = 630.00

PHOTOCOPIES

.20

Total Expenses \$.20

TOTAL THIS INVOICE \$630.20
=====

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

MONTFORD APOLLO SUGARHOUSE	:	MINUTE ENTRY
PLAINTIFF	:	CASE NUMBER 960902088 CN
	:	DATE 12/09/96
VS	:	HONORABLE GLENN K IWASAKI
	:	COURT REPORTER VIDEO TAPE
BROWN BEAR INTERNATIONAL	:	COURT CLERK JMB
DEFENDANT	:	

TYPE OF HEARING: ORAL ARGUMENTS
PRESENT:

P. ATTY. YOUNG, ROBERT
D. ATTY. HOLLAND, J. KENT

THIS CASE COMES BEFORE THE COURT ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT. APPEARANCES AS SHOWN ABOVE.

BASED UPON THE REPRESENTATION OF RESPECTIVE COUNSEL, COURT ORDERS THE FOLLOWING:

- 1) THE REQUEST FOR ADMISSIONS, EVEN THOUGH FILED BELATELY IS DEEMED TO BE ADMITTED;
- 2) MOTION TO AMEND THE ANSWER IS ALLOWED;
- 3) MR HOLLAND IS TO FILE THE AMENDED ANSWER WITHIN 10 DAYS;
- 4) MR YOUNG IS AWARDED ADDITIONAL ATTORNEY FEES IN THE AMOUNT OF \$350.00 AND ANY ATTORNEY FEES APPROPRIATE ON FILING THE MOTION FOR SUMMARY JUDGMENT;
- 5) MR YOUNG IS DIRECTED TO PREPARE THE APPROPRIATE ORDER.

EXHIBIT

B

Page 1 of 1

PRINCE, YEATES & GELDZAHLER

A PROFESSIONAL CORPORATION

LAWYERS

CITY CENTRE I, SUITE 900
175 EAST 400 SOUTH
SALT LAKE CITY, UTAH 84111
TELEPHONE (801) 524-1000
FAX (801) 524-1098

PARK CITY OFFICE
614 MAIN STREET
PARK CITY, UTAH 84060
(801) 649-7440

OF COUNSEL

LYLE M. WARD
KENNETH A. OKAZAKI, P.C.
VICTOR A. POLLAK
MARK D. VAN WAGONER

OF COUNSEL

MOYLE & DRAPER, P.C.
HARDIN A. WHITNEY
JOSEPH J. PALMER
O. WOOD MOYLE III
WAYNE G. PETTY
ROYAL I. HANSEN

F. S. PRINCE (1910-1991)
DAVID S. GELDZAHLER (1932-1994)

ROBERT M. YEATES
JON C. HEATON
JOHN P. ASHTON
RICHARD L. BLANCK
JOHN M. BRADLEY
D. JAY GAMBLE
C. CRAIG LILJENQUIST
J. RANDALL CALL
JOHN B. CHINDLUND
GEOFFREY W. MANGUM
JAMES A. BOEVERS
DAVID K. BROADBENT

THOMAS J. ERBIN
M. DAVID ECKERSLEY
ROBERT G. WING
CARL W. BARTON
GREGORY E. LINDLEY
BALLY BUCK McMINIMEE
ROGER J. McCONKIE
ROBERT S. YOUNG
MICHAEL D. McCULLY†
ELIZABETH M. PECK
THOMAS R. BARTON
LISA D. CURTIN

† REGISTERED PATENT ATTORNEY

August 15, 1996

J. Kent Holland, Esq.
Anderson & Holland
623 East First South
P.O. Box 11643
Salt Lake City, UT 84147-0643

Re: *Montford-Apollo Sugarhouse v. Thomas, et al.*

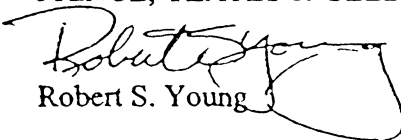
Dear Kent:

My file indicates we served your client with a first set of Requests for Admission, Interrogatories and Requests for Production of Documents on July 9, 1996. Even with a few days for service by mail, your client's response is overdue.

As you know, Rule 36, pertaining to Requests for Admission, provides "the matters shall be deemed admitted unless said request is responded to within 30 days of service" Please be advised that we intend to move for summary judgment, based upon the admission of each of the Requests for Admission contained in our July 9 discovery request, if your client does not respond to the discovery within the next ten days. If there is any misunderstanding about this or you would otherwise like to discuss the matter, please call.

Sincerely,

PRINCE, YEATES & GELDZAHLER


Robert S. Young

RSY/dg
cc: Kraig Erickson
David Broadbent

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EXHIBIT C
Page 1 of 1

take the exclusive possession of the same and to use the same, rent or charge free, until all defaults are cured or, at its option, at any time during the term of this Lease, to require Tenant to forthwith remove the same. Notwithstanding the foregoing, Landlord agrees to execute a reasonable subordination agreement as may be required by a lender providing a fixture, improvement, or operational loan to Tenant.

18.06 Impracticality of Curing Default. Notwithstanding any other provisions of this Article, the Landlord agrees that if the default complained of, other than for the payment of money or the events of default referred to in Section 18.01 (b), is of such a nature that the same cannot be cured within the thirty (30) day period requiring such curing as specified in the written notice relating thereto, then such default shall be deemed to be cured if the Tenant within such period of thirty (30) days shall have commenced the curing thereof and shall continue thereafter with all due diligence to cause such curing and does so complete the same with the use of such diligence as aforesaid.

18.07 Waiver of Trial by Jury. Tenant hereby waives any and all right to a trial by jury in any suit or suits brought to enforce any provisions of this lease or arising out of or concerning the provisions of this Lease.

18.08 Payment of Expenses. Upon the occurrence of an event of default, Tenant shall pay all costs and expenses, including reasonable attorneys fees and legal expenses, incurred by Landlord in enforcing or exercising any remedies under this Lease.

18.09 Additional Remedies. The remedies given to the Landlord in this Article shall be in addition and supplemental to all other rights or remedies which the Landlord may have under the laws then in force.

XIX. MISCELLANEOUS

19.01 Notices. Any notice, demand, request or other instrument which may be or is required to be given under this Lease shall be delivered in person, sent by facsimile transmission with a copy by regular mail, or sent by United States certified mail postage prepaid and shall be addressed (a) if to Landlord at the address first hereinabove given or at such other address as Landlord may designate by written notice and (b) if to Tenant at the Premises or at such other address as Tenant shall designate by written notice (c) if to Lender at such address as referenced in Article I or at such other address as Landlord or Lender may designate by written notice to Tenant.

19.02 Attorney's Fees. In the event that either the Landlord or the Tenant shall institute any action or proceeding against the other relating to the provisions of this Lease, or any default hereunder, then, and in that event, the unsuccessful party in such action or proceeding agrees to reimburse the successful party for the reasonable expenses of such action including reasonable attorneys' fees and disbursements incurred therein by the successful party.

19.03 Binding on Successors. All rights and liabilities herein given to, or imposed upon, the respective parties hereto shall extend to and bind the several respective heirs, executors, administrators, assigns and successors of the said parties; and if there shall be more than one tenant, they shall all be bound jointly and severally by the terms, covenants and agreements herein. No rights, however, shall inure to the benefit of any assignee of Tenant unless the assignment to such assignee has been approved by Landlord in writing as provided in Article VIII hereof.

19.04 No Partnership. Landlord does not, in any way or for any purpose, become a partner of Tenant in the conduct of its business, or otherwise, or joint venturer, or a member of a joint enterprise with Tenant. The provisions of this Lease relating to the percentage rent payable hereunder are included solely for

Tenant's Initials: MB

Landlord's Initials: LM

EXHIBIT D