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Utah Court of Appeals

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IN THE SUPREME COURT OF UTAH

HOLLADAY TOWNE CENTER, L.L.C., a Utah limited liability company, Plaintiff/Petitioner, vs. BROWN FAMILY HOLDINGS, L.C., a Utah limited company, Defendant/Respondent.	Case No. 20090050 – SC

REPLY BRIEF OF PETITIONER

On Certiorari to the Utah Court of Appeals

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Petitioner Holladay Towne Center, LLC ("HTC" or "Holladay") submits the following reply in response to the Brief of Appellee submitted by Respondent Brown Family Holdings, L.C. ("Brown").

INTRODUCTION

Brown focuses most of its opposition brief on an aspect of the trial court decision – the validity/invalidity of the easement (the "Easement") that creates the cloud of title herein – that the Utah Court of Appeals expressly declined to address. In so doing, Brown fails to recognize that certiorari review is by its very nature a review of the court of appeals' decision, not the trial court's decision. Additionally, in focusing primarily on this aspect of the trial court's decision, Brown mischaracterizes HTC's arguments and misapprehends what should occur by way of remand in the event this Court corrects the errors in the underlying court of appeals' decision.

To be clear, the alleged invalidity, impotence, or weakness of the Easement that represents the cloud of title on the property leased by Brown from HTC is not the central issue of this case. It is also not the issue upon which this Court granted certiorari review. Instead, this case is about which party (landlord/owner or tenant) should be required to address a cloud on title once it has surfaced—regardless of whether that cloud is allegedly minor and/or easy to address.

Here, Brown, as landlord, expressly and clearly promised a leasehold estate that included "all rights" of the owner with the exception of "Permitted Exceptions" specified

in the lease (the "Lease"). The Easement was not listed as such a Permitted Exception. HTC never agreed to accept a leasehold interest that was subject to a cloud on title in any form let alone in the form of a possible easement. The Utah Court of Appeals failed to recognize the Easement as a cloud to be addressed by the landlord because it misinterpreted use-restriction language in the Lease as addressing matters of title. This interpretation was error. Brown's lengthy discussion of the alleged invalidity of the Easement is seemingly designed to steer the analysis away from the fundamental difference between quality/status of title versus use restrictions and thereby divert the Court's attention from the errors the Court of Appeals made related to such a distinction.

ARGUMENT

I. The Reviewable Issues Here Are the Court of Appeals' Interpretation of the Lease Language and Its Concomitant Effect on the Law of Standing

This Court has made clear that "[o]n certiorari, we review the decision of the court of appeals, not the trial court." *Lysenko v. Sawaya*, 2000 UT 58, ¶ 15, 7 P.3d 783; *see also* Utah Rule of Appellate Procedure 45 ("[T]he review of a judgment, an order, and a decree . . . of the Court of Appeals shall be initiated by a petition for a writ of certiorari to the Supreme Court of Utah."). Adhering to this black-letter mandate, HTC did not focus its arguments in its petition for certiorari on the trial court ruling regarding

the validity, weakness, or alleged impotence of the Easement in question because the court of appeals did not reach, much less decide, this issue.

Specifically, the Court of Appeals explained in a footnote:

> We see no need at this time to address HTC's standing concerns, or its argument that the district court erred in addressing the validity of the Easement as between the parties. In light of our determination that HTC may challenge the Easement regardless of its validity, the district court's determination that the Easement is invalid as between the parties is harmless even if it could be characterized as error.

Holladay Towne Center, LLC v. Brown Family Holdings, LC, 2008 UT App 420, ¶ 13 n. 3, 198 P.3d 990. Thus, the determination made by the Utah Court of Appeals was that the invalidity or validity of the Easement did not matter because even if the Easement was valid the parties had specifically contracted that HTC (the tenant) – not Brown (the landlord) – was required to address it.

As further discussed by HTC, and as requested by this Court to be addressed, even if the Lease could be interpreted to require HTC to address Brown's cloud on title, such a ruling clashes with the law of standing. Standing, unlike the validity of the Easement issue, *was* decided de facto by the court of appeals because of how intertwined that issue is with its erroneous interpretation of the lease. In upholding the Lease's purported contractual conferment of standing to HTC, the court of appeals effectively decided as a matter of law that Brown can contractually confer standing to HTC via a lease provision. The court of appeals' interpretation of the Lease – not the alleged invalidity of the

Easement – and the impact of the same on the law of standing are the issues HTC understood this Court allowed and requested be addressed via this cert review.[1]

In focusing on the trial court's determination concerning the existence and/or validity of the easement—a determination not upheld by the court of appeals—Brown seemingly loses sight of the issues before this Court. Brown wants this Court to believe that the trial court's determination as to the validity or strength of the Easement resolves the case regardless of what this Court determines here and regardless of the fact that the Utah Court of Appeals did not uphold that determination. Brown's belief simply is not accurate. Reversal of the court of appeals' decision changes the entire outcome of the case. HTC explains in greater detail below (section IV herein) the nature of remand that should occur upon correcting the court of appeals' error.[2]

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[1] Brown has accused HTC's undersigned counsel of dishonesty, stating specifically that "Petitioner should have been more honest in its petition for Writ of Certiorari and asked this Court to review the issue of whether there was an easement across Lot 27 rather than trying to get the Trial Court's decision on this central issue reversed through the back door." Far from any attempt to mislead the Court, HTC addressed what it believed was the core holding and determination of the Utah Court of Appeals. Moreover, as discussed in Section IV below, the trial court's determination as to the validity of the Easement becomes irrelevant after the Lease is interpreted properly. Further, the trial court's determination of the validity of the Easement, is an issue that can be deemed to be "fairly included" within the scope of the instant cert review pursuant to Rule 49(a)(4) of the Utah Rules of Appellate Procedure, particularly given that the court of appeals failed to address that determination.

[2] As part of its deflected focus on the trial court determination ignored by the court of appeals, Brown incorrectly asserts that "HTC has never challenged the trial court's finding that Lot 27 is not subject to an easement." Brown's Brief at 7; *See also id.* at 4 (asserting there is an "unchallenged finding by the Trial Court that there is no easement

II. Lease Language Concerning Use Restrictions Was Confused with Lease Language Concerning the Quality of Landlord's Title

As a consequence of erroneously focusing on a trial court determination that was ignored by the Utah Court of Appeals, Brown barely addresses the primary issue on review before this court – whether Lease language addressing use restrictions imposed on HTC also obligates HTC to cure clouds of title associated with the leased property. Brown also mischaracterizes HTC's argument.

HTC is not arguing for any strained or stretched interpretation of the terms "covenants, restrictions, and conditions" found in the Lease. Instead, HTC is arguing that paragraph 6.3 of the Lease (and its incorporation of the words "covenants, restrictions, and conditions" as part of the definition of Legal Requirements) does not address matters of title under the Lease and therefore has nothing to do with whose obligation it is – as between landlord or tenant – to cure a cloud on title that surfaces during the term of the

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affecting the property in this case"). This statement is flatly false. In reality, and in contrast to Brown's assertions on this point, the trial court's error in granting summary judgment where a disputed fact issue existed as to the validity of the Easement was challenged by HTC on appeal. In fact, HTC focused on the fact that neither party sought such a determination. Indeed, HTC devoted an entire section of argument to the error of deciding such a factual issue that was not part of the claims of either party and was decided without the beneficiary of the easement present in the lawsuit to be bound by such a determination. *See* HTC's Court of Appeals Brief at 15-17. Further, the court of appeals expressly and repeatedly noted that HTC challenged the trial court "ruling on the validity of the Easement as between the existing parties." *Holladay Towne Center, LLC v. Brown Family Holdings, LC*, 2008 UT App 420, ¶ 6, 198 P.3d 990; *see also id.* at ¶ 9.

Lease. In contrast, paragraph 1.1 of the Lease contains the relevant promise by landlord Brown to provide property free from potential encumbrances like the Easement. Specifically, under the heading of "demise,"[3] the Lease states that the landlord "hereby leases to Tenant the Premises, together with all rights, privileges, easements, and appurtenances belonging to or in any way appertaining thereto. . . ."[4] HTC Brief of Petitioner, Appendix D.

This is not a new argument to these proceedings. In arguing its summary judgment and dismissal motions to the trial court, HTC asserted repeatedly that paragraph 1.1 of the Lease addressed matters of title and represented a promise by the landlord to deliver the property free from potential encumbrances. [*See* R. at 202 (referencing section 1.1 of the Lease as providing the landlord's covenant against potential encumbrances like the easement); R. at 207, ¶ 12 (taxes listed on Exhibit B were the only potential encumbrances contractually agreed upon by the parties [pursuant to section 1.1 and its reference to Permitted Exceptions]); R. at 208, ¶ 17 (representation by landlord

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[3] *Black's Law Dictionary* provides the following definition of the term "Demise": "A conveyance of an estate to another for life, for years, or at will (most commonly for years); a lease. Originally a posthumous grant. Commonly a lease or conveyance for a term of years; sometimes applied to any conveyance in fee, for life, or for years. 'Demise' is synonymous with 'lease' or 'let.' The use of the term in a lease imports a covenant for quiet enjoyment, and implies a covenant by lessor of <u>good right and title</u> to make the lease." *Black's Law Dictionary* 431 (6th ed. 1990) (Emphasis added.)

[4] This reference to easements is of course a reference to easements as to which the landlord is a beneficiary, not ones likes the Easement that gave rise to this lawsuit that would burden the landlord's property.

that the property was free from encumbrances except the taxes was material to the lease transaction); R. at 211 ("[I]t cannot be denied that the Lease required Brown to deliver the Property free of encumbrances, except the Permitted Encumbrances [taxes]."); R. at 214 ("Holladay asserts that the Lease gives it a right to use and occupy the Property free of encumbrances, except for the Permitted Exceptions. The Easement was never disclosed or listed as a Permitted Exception under the Lease, and therefore Holladay has a right to require Brown to remove the Easement."); R. at 216 ("Section 1.1 requires Brown to deliver the Property subject only to the Permitted Exceptions."); R. at 415 (same); 417, ¶ 6 ("Brown was obligated to deliver possession of the Property on March 1, 2005, subject only to the Permitted Exception."); R. at 420 (same); R. at 423 (same); R. at 629 (same)].

Moreover, HTC directly addressed the use-based aspects of the covenants, conditions, and restrictions language of paragraph 6.3 as part of its appellate brief to the Utah Court of Appeals. Specifically, HTC argued that paragraph 6.3 did not apply to the Easement:

> [Brown's] reliance on Article 6.3 of the Lease in support of this argument [that the Lease grants standing to HTC to challenge the easement] is simply misplaced. Article 6.3 provides that "[t]he tenant shall have the right, at its own expense, to contest or review by appropriate legal or administrative proceedings the validity or legality of any such Legal Requirement." [Brown] notes that the Lease defines "Legal Requirement" as "all covenants, restrictions, and conditions now or hereafter of record which may be

applicable to Tenant or to all or any portion of the Premises, or to the use, occupancy, possession, operation, maintenance, alteration, repair or restoration of any of the Premises." However, a reading of the entire definition of Legal Requirements makes it clear that it is not referring to title issues, such as easements. Rather, it is referring to:

> [A]ll present and future laws, statutes, requirements, ordinances, orders, judgments, regulations, administrative or judicial determinations, even if unforeseen or extraordinary, of every governmental or quasi-governmental authority, court or agency claiming jurisdiction over the Premises now or hereafter enacted or in effect (including, but not limited to, Environment Laws and those relating to accessibility to, usability by, and discrimination against, disabled individuals),[5] and all covenants, restrictions, and conditions now or hereafter of record which may be applicable to Tenant or to all or any portion of the Premises, or to the use, occupancy, possession, operation, maintenance, alteration, repair or restoration of any of the Premises, even if compliance therewith necessitates structural changes to the Improvements or the making of Improvements, or results in interference with the use or enjoyment of all or any portion of the Premises.

In other words, Holladay does have the right under the Lease to challenge the legality of any laws, ordinances, codes, restrictions, etc., that affect its use of, but not the title to the property.

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[5] The quotation of the definition of "Legal Requirements" contained in HTC's brief to the Utah Court of Appeals inadvertently excludes some of this parenthetical language. It is included herein as contained in the Lease for accuracy.

HTC Court of Appeals Reply Brief at 15-16 (emphasis added). HTC also raised the interpretive interplay between paragraphs 1.1 and 6.3 of the Lease as part of its Petition for Writ of Certiorari. *See* HTC's Petition for Certiorari at 10-19. Thus, HTC consistently has argued the same dichotomy of quality/status of title versus restrictions on use that is now before the Court.

In its briefing before this Court, HTC necessarily has focused on the specific words "covenants, conditions, and restrictions" from paragraph 6.3 (and its incorporation of the definition of "Legal Requirements") because those were the words focused on by the court of appeals. Specifically, the court of appeals stated:

> The Easement, to the extent it may have any validity, is clearly a <u>covenant, restriction, or condition</u> of record that affects both the Premises and HTC's use and enjoyment thereof. As such, HTC is either obligated to comply with the Easement under the terms of the Lease, <u>or</u> it may challenge the Easement at its own expense and at no cost to the Browns.

Holladay Towne Center, LLC v. Brown Family Holdings, LC, 2008 UT App 420, ¶ 12, 198 P.3d 990 (second emphasis in original).

To decry HTC's current focus on the misinterpretation of the words "covenant, restriction, or condition," as Brown does, is to ignore again the reality of the court of appeals' opinion. The general argument made below by HTC, and again made herein, is that paragraph 6.3 and its reference to "Legal Requirements" is a laundry list of use-

based restrictions that have nothing to do with the quality of title that was promised as part of paragraph 1.1 of the Lease.

After spending most of its energy focusing on the trial court determination that was side-stepped by the court of appeals, Brown does finally turn to the substantive meaning of the words "covenants, restrictions, and conditions" in the Lease. However, Brown offers the novel and ultimately unsupportable argument that the words "covenants, restrictions, and conditions" in the Lease are entirely different than the words "covenants, conditions, and restrictions" in case law because they are ordered differently (despite being the exact same words). None of the cases cited by Brown stand for such a proposition—a proposition that is baffling at best. Instead, the cases of *Moler*, *Peters*, and *Dansie*, cited in Brown's brief, contain standard definitions of such terms, all of which address potential use restrictions on property, not title-oriented matters related to the quality of title provided by the owner of real property.[6] Such cases do nothing to

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[6] *Moler v. CW Management Corp.*, 2008 UT 46, 190 P.3d 1250, was a case addressing whether the buyer's daughter should be considered their attorney for communication purposes at issue therein. The particular "covenants, conditions, and restrictions" mentioned in *Moler* "limited occupancy to households with at least one person fifty-five years of age or older." In *Peters v. Pine Meadow Ranch Home Association*, 2007 UT 2, 151 P.3d 962, the Court addressed a challenge to the enforceability of CC&Rs that governed use of the property involved therein. And in *Dansie v. Hi-Country Estates Homeowners Association*, 2004 UT App 149, 92 P.3d 162, the reference to CC&Rs simply was that the defendant was willing to resolve the easement dispute (the plaintiff claimed an easement on defendant's property) by granting the easement if the plaintiff would adhere to the CC&Rs on the property when it used the easement for access. *See id.* at ¶ 9. The reference in *Dansie* to CC&Rs, which were

challenge the use-oriented nature of the terms covenants, conditions, and restrictions. Similarly, the fact that courts sometimes may confuse the meaning of these terms – as articulated by Brown at pages 18 and 19 of its brief – does nothing to change the legally proper meaning given to such terms, as HTC articulated in its opening brief. Brown has provided no credible legal authority to support its position that the words "covenants, conditions, and restrictions" as commonly used in homeowners' association documents or other documents similarly limiting use of property should be construed differently than the words "covenants, restrictions, and conditions" as used in paragraph 6.3's use-based restrictions.

Furthermore, HTC's argument does not even rely on this Court determining that the terms "covenants, restrictions, and conditions" in the Lease were an attempt to incorporate "covenants, conditions, and restrictions" or CC&Rs referenced in the real estate arena. To the contrary, these terms should be understood in the context in which they are used in the Lease. Specifically, these terms can be seen as use restrictions based on both a full reading of the "Legal Requirements" definition and the fact that the other matters listed there relate to use, not title. Similarly, the Court should interpret the terms "covenants, restrictions, and conditions" in a way that does not render other terms of the

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restrictions on use of the land, as different from the easement involved therein actually supports the distinction argued by HTC herein. In all of these cases, the wording of covenants, conditions, and restrictions at issue therein was deemed exclusively related to use, not status or quality of title (i.e. fee simple absolute ownership or something less).

Lease (i.e., paragraph 1.1 and its promises of title made by landlord to tenant) superfluous. Indeed, the future option possessed by HTC to purchase the property and its current ability to finance the property to fund improvements are rendered meaningless by the court of appeals' interpretation. Reading paragraph 6.3's use-based restrictions as instead related to title, as the Utah Court of Appeals did, derogates paragraph 1.1's "demise" of the leasehold estate to HTC in contravention of the full title promised by Brown.

Stated plainly and simply, both the trial court and court of appeals erred by failing to recognize the use versus title distinction in the underlying Lease. The court of appeals did so by reading the terms covenants, restrictions, and conditions, regardless of order, broader than those words allow in the context of describing aspects of leased property. By so doing, the court of appeals erroneously concluded that an Easement is a "Legal Requirement"—a Lease term that notably incorporates covenants, restrictions, and conditions, but does not incorporate easements. Yet a cloud on title in the form of a potential easement is not a covenant or condition or restriction on the tenant's use of property. Instead, it is a fundamental cloud on the fee simple absolute ownership that Brown promised to provide in the Lease. The distinction is not trivial, and the Utah Court of Appeals' decision truly will create myriad problems in the area of landlord/tenant law unless and until it is corrected.

III. Requiring a Tenant to Cure a Landlord's Title Deficiencies Runs Afoul of Standing Law

In its Opposition, Brown argues that HTC has legal standing to challenge the Easement in essence because the Lease terms state the same. As discussed above, the Lease, as properly interpreted, does not actually mandate that HTC challenge clouds on title. But, even if this were not the case, Brown's argument that standing can be conferred via a provision in a lease agreement simply because that is what in fact occurred here is not only circuitous in light of the question this Court has asked the parties to address, it is incorrect as a matter of law.

Brown's standing argument effectively ends where it begins—i.e., something can occur as a matter of law simply because it may have occurred in fact. This non-sequitur is similarly reflected in the court of appeals' decision that it was unnecessary for it to consider whether HTC had standing to challenge the Easement as a matter of law because the Lease language provides HTC with the right to challenge the Easement.

In support of its unique and ultimately failed brand of standing, Brown relies on the case of *In re E.H.*, 2006 UT 36, 137 P.3d 809, in which this Court considered whether the trial court erred in denying standing to a biological mother to contest the adoptive parents' petition to adopt her child and to intervene in the adoption proceedings. *See id.* at ¶¶ 40-63. The stipulation at issue in *In re E.H.* involved the "interest" requirement of Utah Rule of Civil Procedure 24; it did not, as here, involve a conferment of traditional

standing requisites. Moreover, as a biological parent, the mother in *In re E.H.* originally had standing prior to contractually relinquishing her parental rights. Accordingly, the stipulation in that case essentially did nothing more than return a right that had legally—and undoubtedly—belonged to the mother. In contrast, Brown is not simply asking this Court to recognize an agreed-upon return of legal standing. Instead, Brown is asking this Court to recognize a conferment of standing that, but for a lease provision, would otherwise not have originally existed.

In other words, despite Brown's conclusory assertions, *In re E.H.* does not stand for the proposition that parties can categorically confer standing by contractual agreement and that where such agreement exists, the courts' jurisdictional power and authority must capitulate to the parties' bargain. Indeed, this Court has repeatedly held that, "'acquiescence of the parties is insufficient to confer jurisdiction on the court.'" *Anderson v. Wilshire Investments, L.L.C.*, 2005 UT 59, ¶ 22 n.4, 123 P.3d 393 (quoting *Bradbury v. Valencia,* 2000 UT 50, ¶ 8, 5 P.3d 649); *A.J. Mackay Co. v. Okland Constr. Co.*, 817 P.2d 323, 325 (Utah 1991) (same)); *see also Bailey v. Sound Lab, Inc.*, 694 P.2d 1043, 1044 (Utah 1984) ("Jurisdiction cannot be conferred upon this Court by stipulation."). Thus, Brown's assertion that a landlord can confer legal standing—and the right to appear before the court—to a tenant merely by means of a lease provision is contrary to Utah law.

Any doubt concerning the continued viability of standing law limitation after *In re E.H.* is eradicated by this Court's affirmation post-*In re E.H.* that "standing is jurisdictional." *Hogs R Us v. Town of Fairfield*, 2009 UT 21, ¶ 7, 207 P.3d 1221; *see also Jones v. Barlow*, 2007 UT 20, ¶ 12, 154 P.3d 808 ("[S]tanding is a jurisdictional requirement that must be satisfied before a court may entertain a controversy between two parties."). Since *In re E.H.*, this Court has also reaffirmed the long-standing rule that issues of standing are primarily questions of law. *See Angel Investors, LLC v. Garrity*, 2009 UT 40, ¶ 14, ---P.3d---. And this Court has long made clear that courts do not honor stipulations involving issues of law. *See Bradshaw v. Wilkinson Water Co.*, 2004 UT 38, ¶ 33, 94 P.3d 242; *First of Denver Mortgage Investors v. C.N. Zundel & Assocs.*, 600 P.2d 521, 527 (Utah 1979).

Here, interpreting standing as a matter of law to hold that Brown can contractually confer its traditional standing rights would put HTC in the awkward position of seeking to quiet title to the Easement so that it can obtain a title policy, when the title restored at the end of such action would belong to Brown, not HTC. This cannot be squared with prior Utah case law that limits standing to bring a quiet title action "to parties who could acquire an interest in the property created by the court's judgment." *Elder v. Nephi City*, 2007 UT 46, ¶ 20, 164 P.3d 1238.[7]

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[7] This doctrine is designed to ensure that any court order in a quiet title action actually awards title to one of the parties participating in the lawsuit. To read *Elder* any

Further, although the issue is not before the Court, Brown seemingly suggests that, irrespective of whether a lease can confer standing as a matter of law, here HTC has sufficient interest in the Property to challenge the Easement because the Lease includes an option to purchase term. But an option to purchase at some point in the future is not a present legal interest. *See, e.g.*, *Collier Stone Co. v. Township of Collier Bd. of Com'rs*, 735 A.2d 768, 771 (Pa. Cmwlth. 1999) ("An agreement for a future interest in the subject property is insufficient to confer standing as a landowner." Traditional standing prerequisites will be hollow and ineffective in safeguarding the doors to the court if they can be skirted by simply showing that the parties agreed by contract that standing exists in circumstances such as those presently before this Court.

IV. Correcting the Court of Appeals' Error Should Result in a Remand that Will Remedy Brown's Breach of the Lease

Brown misapprehends the conclusion statement in HTC's opening brief as it relates to the relief sought herein. To the extent HTC was not as artful as it could have been in that portion of its opening brief, this section is intended to clarify and expound upon what relief would be proper in the event the Court corrects what HTC believes was an erroneous interpretation of the Lease rendered by the Utah Court of Appeals. It simply is not accurate that correcting the court of appeals' errors will have no impact on the trial court decision, as Brown seemingly suggests. Reversing the Utah Court of

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other way would lead to a myriad of cases where the actual property owner is not before the court.

Appeals' failure to distinguish between use restrictions and core title matters will definitively resolve that it is Brown, not HTC (as the tenant), that is required under the Lease to address the cloud of title created by the Easement in accordance with the Lease.

Further, Brown's failure to have redressed the Easement earlier should be deemed to amount to a breach of paragraph 12.6 of the Lease: "In the event Landlord shall neglect or fail to perform or observe any of the covenants, provisions or conditions in this Lease on its part to be performed or observed . . . Landlord shall be liable to Tenant for any and all actual damages sustained by Tenant as a result of Landlord's breach." Specifically, HTC should be found to be justified in seeking to have the Easement addressed as a cloud on title of the property that negatively affects the ability to obtain financing and pursue improvements expressly contemplated by the Lease for the property, regardless of its potential invalidity.

Stated another way, the manner of remand that would be appropriate, assuming reversal of the court of appeals' opinion, is to include in the remand order the instruction to the trial court to remedy Brown's breach of the Lease. Since such a reversal would mean that Brown is required to address the cloud of title caused by the Easement regardless of the validity or invalidity of the same, the trial court's determination as to the validity or invalidity of the Easement is of no moment to the current cert review.

CONCLUSION

For the foregoing reasons, and those set forth in HTC's opening brief to this Court, Brown respectfully requests that the Court of Appeals decision in this case be reversed.

DATED this 14th day of September 2009.

PARR BROWN GEE & LOVELESS, P.C.

By:

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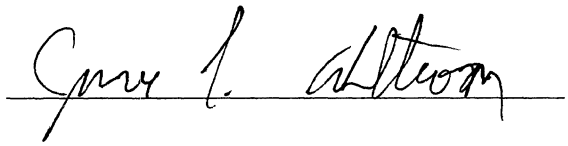
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of September 2009, a true and correct copy of the foregoing **REPLY BRIEF OF PETITIONER** was mailed via first-class U.S. mail, postage prepaid, upon the following:

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