

2010

Geonan Properties, LLC, a Utah limited liability company v. Park-Ro-She, Inc., a Utah corporation, BVP Holdings Limited, a Nevada limited liability company, Blaine Van Patten, and individual, and Norm Van Patten, an individual : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GEONAN PROPERTIES, LLC, a Utah
limited liability company,

Plaintiff and Appellee,

vs.

PARK-RO-SHE, INC., a Utah
corporation, BVP HOLDINGS,
LIMITED, a Nevada limited liability
company, BLAINE VAN PATTEN, an
individual, and NORM VAN PATTEN,
an individual,

Defendants and Appellants.

APPELLANT'S BRIEF

Court of Appeals Case No. 20100338-CA

District Court No. 080403433

APPELLANTS' BRIEF

**APPEAL FROM ORDER BY THE FOURTH JUDICIAL DISTRICT COURT,
HONORABLE JUDGE FRED D. HOWARD**

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<p>GEONAN PROPERTIES, LLC, a Utah limited liability company,</p> <p style="text-align: center;">Plaintiff and Appellee,</p> <p>vs.</p> <p>PARK-RO-SHE, INC., a Utah corporation, BVP HOLDINGS, LIMITED, a Nevada limited liability company, BLAINE VAN PATTEN, an individual, and NORM VAN PATTEN, an individual,</p> <p style="text-align: center;">Defendants and Appellants.</p>	<p style="text-align: center;">APPELLANT’S BRIEF</p> <p>Court of Appeals Case No. 20100338-CA</p> <p style="text-align: center;">District Court No. 080403433</p>
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STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal by virtue of the provisions of Utah Code Ann. § 78A-4-103(j).

STATEMENT OF ISSUES

1. Whether the trial court committed error in granting the Plaintiff's Cross-Motion for Partial Summary Judgment, and denying the Defendants' Motion for Partial Summary Judgment, where the Amended Agreement was an unenforceable agreement to agree.

2. Whether the trial court committed error in granting the Plaintiff's Cross-Motion for Partial Summary Judgment, and denying the Defendant's Motion for Partial Summary Judgment, where the Amended Agreement was vague and ambiguous.

3. Whether the trial court committed error in granting the Plaintiff's Cross-Motion for Partial Summary Judgment, and denying the Defendants' Motion for Partial Summary Judgment, where the Amended Agreement was based on a mutual mistake.

4. Whether the trial court committed error in granting the Plaintiff's Cross-Motion for Partial Summary Judgment, and denying the Defendant's Motion for Partial Summary Judgment, where the Amended Agreement failed by its own terms.

5. Whether the trial court committed error in granting the Plaintiff's Cross-Motion for Partial Summary Judgment, and denying the Defendants' Motion for Partial Summary Judgment, where the damages awarded were unforeseeable, unreasonable, and unnecessary.

6. Whether the trial court committed error in granting the Plaintiff's Cross-

Motion for Partial Summary Judgment, and denying the Defendants' Motion for Partial Summary Judgment, where the Plaintiff breached the Amended Agreement when it failed to make a requisite advanced payment.

STANDARD OF REVIEW

Appellate review for a summary judgment is one of correctness, with no deference afforded to the trial court. *Winegar v. Froerer Corp.*, 813 P.2d 104, 107 (Utah 1991).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

UTAH R. CIV. P. 9(g)

(g) Special damage. When items of special damage are claimed, they shall be specifically stated.

UTAH CODE ANN. § 25-5-4.

Certain agreements void unless written and signed

(1) The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

(a) every agreement that by its terms is not to be performed within one year from the making of the agreement

Springville City Municipal Code § 11-4-501, *et seq.*

See Addendum.

STATEMENT OF THE CASE

Nature of the Case

The Court is being asked to reverse the decision of the trial court which granted Plaintiff's Cross-Motion for Summary Judgment, and denied the Defendants' Motion for Partial Summary Judgment. In June of 2008, the parties signed agreements in which the parties agreed to later enter into a written lease related to a water bottling plant located in Springville, Utah. Defendants were the owners of the plant and agreed to lease the plant to Plaintiff upon terms and conditions reasonably acceptable to all parties. The signed agreements contained some of the terms to be included in the written lease, but not all. Despite both parties providing written drafts of the lease to the other party, the parties could not agree upon the specific language of the lease, and ultimately no lease agreement has been signed by the parties. The signed agreements also required certain payments to be made by Plaintiff, which payments Plaintiff failed to make. R. x-y [page numbers of our statement of fact for our Memorandum in Support of MSJ]

Course Proceedings and Disposition in the Lower Courts

On October 23, 2008, Plaintiff filed its Complaint. On November 17, 2008, Defendants filed their Answer, and later filed their First Amended Answer and Counterclaim on April 13, 2009. The case was brought before the Fourth Judicial District Court of Utah, the Honorable Fred D. Howard presiding.

On July 1, 2009, Defendants filed their Motion for Partial Summary Judgment and accompanying Memorandum ("Defendants' Motion"). Plaintiff then filed its Cross-Motion for Partial Summary Judgment, and accompanying Memorandum, on August 4,

2009 (“Plaintiff’s Cross-Motion”). Oral argument was held for both motions on November 16, 2009, in which the trial court granted the Plaintiff’s Cross-Motion and denied the Defendants’ Motion.

Defendants/Appellants filed a Notice of Appeal, and now request that this Court find that the trial court erred in granting Plaintiff’s Cross-Motion for Partial Summary Judgment, and denying Defendants’ Motion for Partial Summary Judgment.

STATEMENT OF FACTS

1. On or about June 4, 2008, the parties signed a document titled Agreement Regarding Park-Ro-She Bottling Plant (hereinafter the “Agreement”). R. 162-170; also included as part of the Addendum hereto.

2. On or about June 30, 2008, the parties signed a document titled First Amendment to Agreement Regarding Park-Ro-She Bottling Plant (“Amendment”). R. 153-160; also included as part of the Addendum hereto. (The Agreement as amended by the Amendment shall hereafter be referred to as the “Amended Agreement.”)

3. Pursuant to the Amended Agreement, Plaintiff agreed that the parties “shall enter into a written lease...which shall be upon terms and conditions reasonably acceptable to all parties.” R. 170.

4. Pursuant to the Amended Agreement, Plaintiff agreed “that the parties shall execute the Lease not later than ten (10) days after the date Springville City certifies in writing that the ‘Permit Conditions’...have been satisfied.” R. 160, 175.

5. On or about August 12, 2008, Plaintiff delivered to Defendants a proposed Lease Agreement With Option to Purchase (hereinafter “GeoNan Lease”). R. 121-151.

6. On or about September 23, 2008, Defendants delivered to Plaintiff a proposed Lease Agreement With Option to Purchase (hereinafter “PRS Lease”). R. 92-119.

7. On or about September 29, 2008, Springville City issued a Permanent Certificate of Occupancy for the bottling plant (“Certificate of Occupancy”). R. 90, 175.

8. The issuance of the Certificate of Occupancy by Springville City was the evidence that the “Permit Conditions” as defined in the Amended Agreement were satisfied. R. 175.

9. No lease agreement has been signed by the parties. R. 52, 67.

10. Pursuant to the Amended Agreement, Plaintiff agreed that upon the occurrence of the issuance of the Certificate of Occupancy by Springville City, Plaintiff “shall make an additional payment of Advance Rent...notwithstanding the fact that the Lease may not then be signed.” R. 159.

11. Plaintiff has made no payment of advanced rent following the issuance of the Certificate of Occupancy by Springville City. R. 52, 67.

12. The bottling plant is located on property located at 965 North Main Street, Springville, Utah, and is more specifically described as “Lot 1, Plat ‘A’, Park-Ro-She Subdivision, Springville City, Utah County, Utah, according to the official plat thereof on file and of record in the Utah County Recorder’s Office,” and is referenced in the Utah County Recorder’s Office as serial number 496240001 (“Lot 1”). R. 87-88.

13. Pursuant to the Amended Agreement, the “primary term of the Lease shall be for a period of five (5) years.” R. 169.

14. Pursuant to the Amended Agreement, “[t]ime is of the essence of this [Amended] Agreement. R. 163.

15. Pursuant to the Amended Agreement, the potential lease was to include all of Lot 1. R. 169-170.

16. Pursuant to the Amended Agreement, the potential lease was to include an option whereby Plaintiff could purchase Lot 1 and the related improvements and equipment. R. 166-167, 169-170.

17. In addition to the option to purchase referenced in the paragraph above, pursuant to the Amended Agreement, the potential lease was also to include a right of first refusal for Plaintiff to purchase two additional properties referenced as the “Additional Property,” which was described as “(i) the real property known as the ‘house property’ located on the north of the existing lot, and (iii) [sic] the free standing parcel located to the southeast of the building currently located on the Land.” R. 164-165.

18. The parcel referred to as the “house property” is a legally separate parcel, identified as serial number 230110041. R. 87-88, 126.

19. Pursuant to the GeoNan Lease, Plaintiff was to lease a portion of Lot 1, which portion was more particularly described and represented in the GeoNan Lease. R. 126-127, 147-148.

20. Pursuant to the GeoNan Lease, the “Land” to be leased, as described in the GeoNan Lease, excluded the southeast portion of Lot 1 (the “Southeast Parcel”). R. 126-127, 147-148.

21. Pursuant to the GeoNan Lease, Plaintiff had an option to purchase and a

right of first refusal to purchase the “Additional Property.” R. 139-141, 124-127.

22. Pursuant to the PRS Lease, Plaintiff was to lease all of Lot 1. R. 93, 114-115.

23. Pursuant to the PRS Lease, Plaintiff had an option to purchase the “Additional Property”, which as described in the PRS Lease, only included “the parcel of real property known as the ‘House Property’ located north of the Leased Property.” R. 92, 109.

24. Pursuant to Springville City Zoning Classifications, Lot 1 is designated as Highway Commercial (HC). R. 84-85; this can also be obtained at the Springville City website: http://www.springville.org/about/maps/Springville_Zoning_11X17.pdf. (R. 84-85 includes two copies of the map—the second copy has an X marking the approximate location of Lot 1.)

25. Pursuant to Springville City Municipal Code § 11-4-504, a lot zoned for Highway Commercial (HC) must have minimum lot frontage of 200 feet along a public right-of-way. R. 81-82.

26. With regards to subdividing Lot 1, the Southeast Parcel lacks the requisite minimum lot frontage of 200 feet along both Main Street and 900 North, and therefore could not be subdivided as a free-standing lot. R. 87-88.

27. The Agreement and the Amendment were not drafted by the Defendants. R. 78.

28. Defendants were not assisted by legal counsel during the negotiation or execution of the Agreement or the Amendment. R. 78.

29. It was not until sometime after the execution of the Agreement and the Amendment that we the Defendants learned that Lot 1 could not be subdivided according to current Springville City zoning classifications and regulations. R. 78.

30. Plaintiff has a duty of good faith and fair dealing towards the Defendants. R. 175.

SUMMARY OF ARGUMENT

The trial court committed error in granting the Plaintiff's Cross-Motion for Partial Summary Judgment, and denying the Defendants' Motion for Partial Summary Judgment. Specifically, the trial court erred in failing to find that the Amended Agreement was an unenforceable agreement to agree, based on a mutual mistake. The Amended Agreement was built upon multiple assumptions which later proved to be inaccurate, and therefore reformation is not appropriate, because in order to reform, the trial court necessarily had to assume what the respective parties' intent would have been in light of the change of underlying assumptions.

The trial court further erred in granting Plaintiff its damages which were not specifically pled, and which were unforeseeable, unreasonable, and unnecessary.

Finally, the trial court erred in not finding Plaintiff to be in breach for failure to make a required payment.

For the reasons stated above, and more fully described herein, the trial court erred in granting the Plaintiff's Cross-Motion for Partial Summary Judgment, and denying the Defendants' Motion for Partial Summary Judgment.

ARGUMENT

I. THE AMENDED AGREEMENT IS AN UNENFORCEABLE AGREEMENT TO AGREE.

The performance contemplated by the Amended Agreement was that the parties would enter into a lease agreement. They agreed that they would enter into an agreement—which is an agreement to agree. “An agreement to agree at a later date is unenforceable as a matter of law.” *David Early Group, Inc. v. BFS Retail & Commer. Operations, LLC*, 2008 U.S. Dist. LEXIS 5694 (D. Utah Jan. 25, 2008) (citing *Prince, Yeates & Geldzahler v. Young*, 2004 UT 26, ¶ P17. “So long as there is any uncertainty or indefiniteness, or future negotiations or considerations to be had between the parties, there is not a completed contract. In fact, there is no contract at all.” *Id.*

Pursuant to Utah’s Statute of Frauds, “every agreement that by its terms is not to be performed within one year from the making of the agreement” must be in writing. UTAH CODE ANN. § 25-5-4. The Amended Agreement contemplated that the parties would enter into a lease agreement, which would have a primary term of five years, and thus subject to the Statute of Frauds. “The essential parts of a lease to establish validity under the statute of frauds are: (1) the identity of the property, (2) the agreed term, i.e., time period, and (3) the rental amount (rate) and time and manner of payment.” *Brown’s Shoe Fit Co. v. Olch*, 955 P.2d 357, 363 (Utah Ct. App. 1998) (citations omitted).

The bottling facility is located on Lot 1. Pursuant to the Amended Agreement, Plaintiff would have the right to lease to Lot 1 (including improvement and equipment thereon), an option to purchase Lot 1, and right of first refusal to purchase the

“Additional Property.” R. 164-170. The “Additional Property” included “the free standing parcel located to the southeast of the building currently located on the Land”—the Southeast Parcel. Thus, according to the breakdown of these rights, the Land to be leased and potentially purchased by Plaintiff was Lot 1, and the Southeast Parcel was a “free standing parcel” and could be purchased pursuant to a right of first refusal.

Exhibit G attached to Defendants’ Motion shows the parcel map of Lot 1 according to the Utah County Recorder. R. 87-88. Exhibit D attached to Defendants’ Motion (the GeoNan Lease) contains an Exhibit B, which illustrates the Southeast Parcel’s location compared to Lot 1. R. 126. In actuality, the Southeast Parcel *is a part of* Lot 1—it is not a free standing parcel, despite the language in the Amended Agreement to the contrary.

The plain language of the Amended Agreement reads that the Amended Agreement construed the Southeast Parcel as a separate, free standing parcel. In the section of the Amended Agreement related to the “Additional Property”, the Amended Agreement does not provide a legal description for either the “house property” or the Southeast Parcel, it merely provides a very general description of the two parcels, and provides Plaintiff with a “right of first refusal to purchase one or both of the described parcels of property.” R. 164-165. The “house property” is a legally separate parcel, and the Amended Agreement treats both parcels of the “Additional Property” similarly. Although reality may differ, the language in the Amended Agreement treats the Southeast Parcel as a separate parcel. “If the language within the four corners of the contract is unambiguous we determine the parties’ intentions from the plain meaning of the

contractual language as a matter of law." *Baxter v. Saunders Outdoor Adver., Inc.*, 2007 UT App 340, ¶11 (Utah Ct. App. 2007)(citation omitted).

The trial court should have found as a matter of law that the Amended Agreement construed the Southeast Parcel as a free standing legal parcel, separate from Lot 1. Where the Southeast Parcel is not actually a free standing legal parcel, and since the “identity of the property” is one of the “essential parts of a lease,” as discussed in *Brown’s Shoe*, the Amended Agreement an unenforceable agreement to agree based upon an incorrect understanding of a material term, and thus the Amended Agreement is void, and therefore the trial court erred.

However, if the Court looks to the Amended Agreement and concludes that the identity of the property, particularly the Southeast Parcel, is vague or ambiguous, the Amended Agreement is void because a court cannot impose an interpretation of a vague term on an agreement to agree.

In many instances of contract interpretation, if a term is considered vague or ambiguous, a court can look to extrinsic evidence to determine the meaning of the term. Not so with agreements to agree. An agreement to agree is interpreted with a heightened scrutiny. “So long as there is any uncertainty or indefiniteness, or future negotiations or considerations to be had between the parties, there is not a completed contract. In fact, there is no contract at all.” *Id.* See also *Carr Office Park, LLC v. Charles Schwab & Co.*, 291 Fed. Appx. 178, 182 (10th Cir. Colo. 2008) (Discussing agreements to agree: “[i]f the writing leaves the agreement of the parties vague and indefinite as to an essential element thereof, it is no contract and cannot be made one by parol.”); *Utah Golf Ass’n v.*

City of N. Salt Lake, 2003 UT 38, ¶13 (Utah 2003) (citations omitted) (“An unenforceable agreement to agree occurs when parties to a contract fail to agree on material terms of the contract ‘with sufficient definiteness to be enforced.’”)

If the Court finds that the language of the Amended Agreement with regards to the identity of the property is clear, accuracy notwithstanding, then the Amended Agreement is an unenforceable agreement to agree. If this Court finds that the language of the Amended Agreement with regards to the identity of the property is vague, ambiguous, indefinite, unclear or incomplete, the analysis need go no further. There is no need or ability to interpret the intended meaning of the parties. The very existence of vagueness of a material term renders the Amended Agreement to be an unenforceable agreement to agree, and therefore it should be declared void and unenforceable.

II. IT IS UNDISPUTED THAT THERE WERE MUTUAL MISTAKES AS TO A MATERIAL TERM, AND THEREFORE THE AMENDED AGREEMENT IS VOID.

Plaintiff’s Memorandum in Opposition states that “it is true that the parties made a mistake in their legal description of the property subject to the lease....” R. 369. Thus, there is no dispute that there was a mutual mistake. The trial court should have found the Amended Agreement void and unenforceable because we are not dealing with a typographical error, rather we are dealing with a misunderstanding as to an underlying assumption of the contract.

In Plaintiff’s Memorandum in Opposition, Plaintiff argues that “the description of the real property subject to the lease (‘all of Lot 1’) is in error and *does not reflect the intent of the parties.*” R. 368. (emphasis added). However, this argument is inconsistent

with the factual statements and affidavits of the Plaintiff. In Plaintiff's Memorandum in Opposition (and accompanying affidavits), Plaintiff states that "at the time the parties signed the Agreement and later the Amended Agreement, they thought that Lot 1 did not include the Southeast Parcel and did not intend to make the Southeast Parcel part of the leased property," and further "[t]he parties understood that the property which was subject to the lease was what they now understand to be Lot 1 less the Southeast Parcel." R. 376. *The Amended Agreement as drafted was entirely consistent with this understanding.* There was no typographical error, no drafter's mistakes. The parties understood Lot 1 to not include the Southeast Parcel. That is how the Amended Agreement reads.

There was no inconsistency between the understanding of the parties and the Amended Agreement. There was an inconsistency between the understanding of the parties and *reality*. It is the Utah County Recorder's Office that "did not reflect the intent of the parties." Mr. Hellewell, the admitted drafter of the Amended Agreement, did not make any scrivener's errors in transcribing the agreement of the parties into a written document; rather, the parties' understanding and the written agreement was based on a misunderstanding of an underlying assumption—that Lot 1 did not included the Southeast Parcel.

The second mistake of the parties is that the parties were unaware that Lot 1 could not be subdivided. Plaintiff did not dispute that it was after execution of the Amended

Agreement that Defendants first learned that Lot 1 could not be subdivided. R. 375¹ Lot 1 is zoned as Highway Commercial (HC). R. 84-85. Pursuant to Springville City Municipal Code § 11-4-504, a lot zoned for Highway Commercial (HC) must have minimum lot frontage of 200 feet along a public right-of-way. Rule 81-82. Lot 1 does not have that requisite frontage. R. 87-88.

If the parties attempted to subdivide the Southeast Parcel, the Southeast Parcel would have between 123.16 and 145.14 feet of frontage along 900 North, which is insufficient. The Southeast Parcel would not have sufficient frontage along Main Street either. Pursuant to Exhibit B of the GeoNan Lease, the Southeast Parcel would cut along the same horizontal line as the unrelated lot already cut out of Lot 1 (which unrelated lot is serial number 496240002; R. 87-88), which as can be seen does not contain at least 200 feet of frontage along Main Street. R. 121-151. Finally, Exhibits A and D of the GeoNan Lease, contain legal descriptions of the proposed Southeast Parcel. R. 121-151. Although Defendants cannot expertly state which corner of the proposed Southeast Parcel is the starting point for the legal description, it is undisputed that none of the measurements contain a distance longer than 200 feet—the longest distance is 138.11 feet. There would not be sufficient frontage along the public rights of way if the parties attempted to subdivide Lot 1 as indicated.

The parties cannot subdivide Lot 1 without a zoning amendment or approval for a variance, the likelihood of which is unknown. Thus, even if the Amended Agreement

¹ Plaintiff argued that Lot 1 could be subdivided through hypothetical variances or amendments, but Plaintiff did not dispute that as a matter of Springville law, Lot 1 cannot be subdivided without some change or exception to the law, or purchase of additional property. R. 378.

had an implied understanding that Lot 1 would be subdivided, that was a misunderstanding. As discussed above, a mutual mistake of fact as to a material term renders the contract voidable, and therefore the trial court erred.

III. THE AMENDED AGREEMENT IS VOID AND UNENFORCEABLE, AND THEREFORE REFORMATION IS INAPPROPRIATE.

Where the issue is a mistake, or mistakes, as to an underlying assumption, and not a mistake in drafting, reformation of the Amended Agreement is not appropriate, rather it should be voided. Plaintiff relied on two Utah cases for its argument for reformation: *Hottinger v. Jensen*, 684 P.2d 1271 (Utah 1984), and *Grahn v. Gregory*, 800 P.2d 320 (Utah App. 1990) R. 366-368. In *Hottinger*, the Court found that it was “due to a mistake made by the drafter of the deed as to the metes and bounds description that the deed did not conform to the intent of the parties.” *Hottinger*, 684 P.2d at 1273. In *Grahn*, the situation was similar: “When the surveyor prepared the legal description of parcel two, he made a four-degree error in describing a turn. Thus, the legal description of parcel two mistakenly included a part of the private drive which the Trusts and the surveyor intended to be included in parcel one.” *Grahn*, 800 P.2d at 323.

The two cases share two important similarities: they both deal with draftsman errors, and they both deal with deeds where the mistake was discovered after the fact. “Reformation is clearly appropriate where there is a variance between the written deed and the true agreement of the parties caused by a draftsman.” *Hottinger* at 1273. The present case is different. We are not dealing with a deed. A deed is the finalization of a previous agreement to buy/sell property. In *Hottinger* and *Grahn*, money had been

exchanged and the buyer had taken possession, and later a mistake is discovered. At the time our mistake was discovered by the parties, we still were only dealing with an agreement to agree; the lease had not even be drafted, let alone executed. More importantly, in our case, the agreement and the writing are consistent, but the agreement and the writing are inconsistent with reality.

“At the simplest level, reformation is the mechanism for the correction of typographical and other similar inadvertent errors in reducing an agreement to writing.” CORBIN ON CONTRACTS, *Avoidance and Reformation*, vol. 7, § 28.45 at 284 (2002). And even then, there are certain criteria that must be met. The fundamental elements of reformation are as follows:

The requisites for reformation on grounds of mistake are three, although four are often stated. First, there must have been an agreement between the parties. Second, there must have been an agreement to put the agreement into writing. Third, there must be a variance between the prior agreement and the writing. The often-stated fourth requisite is that the mistake be mutual.

Id. at 283.² In our case, there is no variance between the prior agreement and the writing. There was no typo. Based upon the Plaintiff’s own affidavits, the way the Amended Agreement was drafted is entirely consistent with the understanding of the parties. The issue in our case is that the understanding of the parties was based on a misunderstanding of the true facts—a mistake—and therefore, reformation is not appropriate. To put it in explanatory terms, rather than formulaic,

² See also *Warner v. Sirstins*, 838 P.2d 666, 670 (Utah Ct. App. 1992) (holding that the power to reform for mutual mistake exists when “the instrument as made failed to conform to what both parties intended.”)

[c]ontracts are not reformed for mistake; writings are. The distinction is crucial. With rare exceptions, courts have been tenacious in refusing to remake a bargain entered into because of a mistake. A court will, however rewrite a writing that does not express the bargain. Stated another way, courts give effect to the expressed wills of the parties. They will not second-guess what the parties would have agreed to if they were not dealing under a mistake.

Id. at 282. The parties' understandings were based on the belief that Lot 1 was subdivided and/or subdividable. According to the Plaintiff, at the time the Amended Agreement was drafted and executed, the parties "thought that Lot 1 did not include the Southeast Parcel." R. 376. Furthermore, Plaintiff does not dispute that it was after execution of the Amended Agreement that Defendants first learned that Lot 1 could not be subdivided. R. 375.

If the Court were to reform the Amended Agreement, the Court would have to assume the intents of the parties. The parties' intent, as evidenced by the signed Amended Agreement, was to lease only a portion of Lot 1. But that decision was not made in a vacuum. That decision was based upon the underlying assumption that Lot 1 was subdivided and/or subdividable. If both parties understood that Lot 1 was not subdivided and/or not subdividable, the decision would have been different. The Court would have to "second-guess what the parties would have agreed to if they were not dealing under a mistake." Reformation will require more than just correcting the legal description of the property to be leased.³

³ As a practical example, if the potential lease language were to be reformed such that the parties understood that Lot 1 was not subdivided and the parties still wanted to exclude the Southeast Parcel from the leased property, the Court would also have to reform the purchase options. Under the options to purchase as currently constituted in the Amended Agreement, Plaintiff has the right to purchase the property to be leased, and a separate option to purchase the Southeast Parcel. But what if the Southeast Parcel could not be subdivided according to Plaintiff's hypothetical

“When both parties, at the time of entering into a contract, share a mutual mistake about an assumption or a fact upon which they based the contract, and such assumption or fact has a material effect on the agreed performance, the contract is voidable.” MODEL UTAH JURY INSTRUCTIONS, Civil 26.18. The actual dimensions of Lot 1 and the Southeast Parcel are recorded with the Utah County Recorder, and therefore both parties had constructive notice, and it is thus a mutual mistake. This agreement to agree is based upon a misunderstanding of a material term, and therefore the Amended Agreement is an unenforceable agreement to agree.

This returns us to the central theme the Defendants. We are dealing with an agreement to agree. Each time we analyze the terms of the Amended Agreement, we must first analyze it as a normal contract, and then subsequently include the added layer of scrutiny applied to agreements to agree. “So long as there is any uncertainty or indefiniteness, or future negotiations or considerations to be had between the parties, there is not a completed contract. In fact, there is no contract at all.” *David Early Group*, 2008 U.S. Dist. LEXIS 5694, (citing *Prince, Yeates & Geldzahler v. Young*, 2004 UT 26, ¶ P17.⁴ The Amended Agreement is based on a mistake, and is therefore an unenforceable agreement to agree.

solutions (variance, amendment, etc.)? Plaintiff would be required to purchase not only the leased property, but also the Southeast Parcel. The same holds true if Plaintiff wanted to exercise its option to purchase the Southeast Parcel, but only lease the leased property—the purchase could never occur based on current Springville zoning laws. Under either of these examples, the parties would have to rework the lease, or litigate. At the very least, if the parties had been aware of the actual condition of Lot 1, the parties would have contractually provided for the contingencies of variances, amendments, or failure to procure the same. Thus, the Court would be doing more than just correcting a legal description, the Court would have to assume what the parties would have agreed to absent the mistake.

⁴ The court in the *David Early Group* case was dealing with an agreement to agree which omitted material terms. There has been some previous case law suggesting if an agreement to agree “contains provisions otherwise capable

If this Court views the language of the Amended Agreement to be plain and unambiguous that the Southeast Parcel was understood to be separate, the parties were mistaken as to a material term, and the Amended Agreement is void and unenforceable. If the Court views the language of the Amended Agreement to be vague and ambiguous as to the Southeast Parcel, the Amended Agreement is void and unenforceable. If the Court views that the language of the Amended Agreement included an implied understanding that the Southeast Parcel could later be subdivided, that was a mutual mistake as to a material term, and the Amended Agreement is void and unenforceable. The trial court erred when it failed to conclude that the Amended Agreement was void and unenforceable, and the trial court erred by reforming the Amended Agreement.

IV. THE AMENDED AGREEMENT FAILS BECAUSE NO LEASE WAS FINALIZED BY THE DEADLINE PROVIDED IN THE AMENDED AGREEMENT.

In the event that this Court rules that the Amended Agreement is valid and enforceable, the Amended Agreement still fails because a lease was never executed. Pursuant to the Amended Agreement, the parties were to execute a lease not later than ten (10) days after Certificate of Occupancy issued. It is undisputed that the Certificate of Occupancy issued on September 29, 2008, and it is undisputed that no lease has been entered into by the parties.

On or about August 12, 2008, Plaintiff delivered their proposed version of the lease, and on or about September 23, 2008, Defendants delivered their proposed version

of enforcement, the fact that the parties contemplate incorporating those provisions into a subsequent agreement does not necessarily render the agreement to agree unenforceable.” *Brown's Shoe Fit Co. v. Olch*, 955 P.2d 357, 363 (Utah Ct. App. 1998) (citations omitted).

of the lease. Both parties tendered performance. Although the specific details of the tendered performance will be examined below, the undisputed facts are that despite the fact that both parties provided a proposed lease prior to the deadline, no lease was executed by the deadline. The Amended Agreement fails by its own terms.

Pursuant to the Amended Agreement, the parties were to “enter into a written lease...which shall be upon terms and conditions reasonably acceptable to all parties.” R. 169. Although many terms of the eventual lease were included in the Amended Agreement, not all of the terms were included—thus the remaining terms must be reasonably acceptable to all parties. “Where an indefinite condition depends upon the satisfaction of one or more parties, the duty to deal in good faith is sufficient to render the condition enforceable. *Utah Golf Ass'n v. City of N. Salt Lake*, 2003 UT 38, ¶13 (Utah 2003).

Pursuant to the GeoNan Lease provided by Plaintiff to Defendants on August 12, 2008, Plaintiff was to lease a portion of Lot 1, which excluded the “Southeast Parcel”. R. 126-127, 147-148.

Pursuant to the PRS Lease provided by Defendants to Plaintiff on September 23, 2008, Plaintiff was to lease all of Lot 1—the Southeast Parcel was not excluded. The option to purchase applied only to the ‘house property’ located north of Lot 1. R. 92-93, 109, 114-115.

The financial terms as set forth in the PRS Lease are higher than that of the Amended Agreement. In general, this increase reflects the difference in the amount of property being leased by Plaintiff. Whereas the Amended Agreement contemplated that

Plaintiff would lease part of Lot 1 and would have the right to purchase the Southeast Parcel later (thus demonstratively showing that the Southeast Parcel has value in and of itself to Plaintiff), the PRS Lease allowed Plaintiff to lease *all* of Lot 1, and preserved the option to purchase all of Lot 1. An increase in financial terms was natural and appropriate.

The difference in the two proposed leases reinforces the argument made above: there was a mutual mistake of fact as to the property that was to be leased and potentially purchased. Although Plaintiff argued a lack of good faith and fair dealing on the part of Defendants by not signing Plaintiff's lease, the bottom line is that the Defendants could not in good faith simply give away all of Lot 1 for the same financial terms as only part of Lot 1.

Plaintiff argued a lack of good faith and fair dealing, however the Plaintiff comes before the Court with unclean hands. It is undisputed that the Amended Agreement required that the parties execute a lease within ten days after the issuance of the Certificate of Occupancy, that the Certificate issued on September 29, 2008, that both parties provided lease drafts prior to that date, and that no lease has been signed by the parties. Plaintiff argues that Defendants submitted a lease draft that was inconsistent with the Amended Agreement, and that Defendants did not sign Plaintiff's lease draft which allegedly "contained all...terms of the lease agreed to by the parties in the Amended Agreement," (R. 205-206, 211) and that therefore Defendants have breached the covenant of good faith and fair dealing. In both the Opposition Memorandum and the Memorandum in Support of their Cross-Motion, Plaintiff relies heavily on these

allegations that the GeoNan Lease was consistent with the Amended Agreement. Unfortunately for Plaintiff, those sworn statements overlook the plain fact that the GeoNan Lease omitted certain terms and altered certain terms as found in the Amended Agreement. The GeoNan Lease is **not** consistent with the Amended Agreement.

Pursuant to the Amended Agreement, as specifically found in paragraph 8.e. of the First Amendment, GeoNan was to pay a monthly payment of Percentage Rent based on gross revenue “commencing on the effective date of the Lease.” R. 158. The GeoNan Lease altered this price term. In paragraph 9.2 of the GeoNan Lease, the Percentage Rent was not to begin until “the first day of the next full calendar month following the expiration of the Initial Operating Period.” R. 143. The “Initial Operating Period” was defined in the GeoNan Lease in paragraph 9.1.1 as “the ninety (90) day period immediately following commencement of operations.” R. 144. Plaintiff altered the terms such that Defendants would not receive the Percentage Rent payments for at least three months after the effective date of the lease, even though the plant would be operating and receiving revenue.

In the Amended Agreement, Plaintiff was allowed time to conduct investigations on the property to determine if conditions on the property were acceptable. Such investigations were to be at Plaintiff’s sole expense. If Plaintiff found any condition unacceptable, they could terminate the Amended Agreement. R. 165-166. In paragraph 4.1 of the GeoNan Lease, Plaintiff references that there were buried swimming pools on the property (the plant and related well were the site of a prior swimming pool), and indicates that if Plaintiff elected to remedy the pool condition or any other condition, the

Landlord would reimburse Tenant for all costs within 10 days following the receipt of invoice, and if Landlord fails to pay within 10 days, Tenant could offset the costs against rent. R. 146. Furthermore, if there were still unpaid remediation costs at the time of closing if Plaintiff exercised their option to purchase, Plaintiff could offset those costs against the Option Price. R. 141. Thus, Plaintiff substantially changed the lease in two ways—converted investigation into remediation, and altered price terms on rent and/or the option price. If Plaintiff found the existence of the pools unacceptable, Plaintiff was to terminate the Amended Agreement, not require Defendants to pay for their removal.

Finally, the Amended Agreement required Plaintiff to employ Don Van Patten. R. 165. This term is completely absent from the GeoNan Lease. R. 121-151.

As shown, the GeoNan Lease altered the terms of the Amended Agreement such that Defendants would not receive the Percentage Rent payments for at least three months after the effective date of the lease, Plaintiff altered price terms on rent and/or the option price by converting investigation into remediation, and Plaintiff removed the term of Don Van Patten's employment. In two separate memoranda, Plaintiff has relied on their allegations that the GeoNan Lease is consistent with the Amended Agreement. It is not, and the Court can review the two documents and make the legal determination that they are not consistent. The GeoNan Lease altered price terms, which are material terms, and deleted the term of employment for Don Van Patten, which was an important term to the Defendants.

Plaintiff may attempt to compare the GeoNan Lease to the PRS Lease, and argue that the PRS Lease makes bigger changes, and that the GeoNan Lease deviations are only

minor. Defendants would counter that their changes were based on the fact that underlying assumptions upon which the Amended Agreement were based were discovered to be misunderstood, thus the need to alter the terms. It is not clear why Plaintiff altered its terms. Nonetheless, neither lease was consistent with the Amended Agreement, and where the Amended Agreement could not be “modified without the parties’ express written consent...”(R. 162-163), none of the changes proposed by either party was authorized.

The Court is thus left with the following undisputed facts: (a) the parties were to execute a lease by October 9, 2008, (b) both parties provided lease drafts prior to that date that were both inconsistent with the terms as agreed to in the Amended Agreement, and (c) no lease has been signed by the parties. The Amended Agreement fails by its own terms. The trial court erred in finding otherwise.

V. PLAINTIFF IS NOT ENTITLED TO THE REQUESTED DAMAGES, AND THE CLAIMED DAMAGES ARE UNFORSEEABLE, UNREASONABLE, AND UNNECESSARY

Plaintiff’s Complaint, which initiated this action, claims relief for alleged breach of contract and breach of good faith and fair dealing. The relief requested was for specific performance and actual damages. R. 4. Now, in its Memorandum in Support of Cross-Motion for Summary Judgment, Plaintiff informs the Court that it has “made other arrangements to accommodate its need for expanded production facilities,” R. 395, and is seeking nearly \$500,000 in special damages claimed to have been incurred in reliance upon the Amended Agreement. R. 392. Plaintiff has made no request for relief for the special damages they now claim, and therefore such damages should not be awarded.

Furthermore, Rule 9(g) of the Utah Rules of Civil Procedure requires that “when items of special damages are claimed, they shall be specifically stated.” Plaintiff’s Complaint made no claim or reference to special damages incurred in reliance, and therefore such damages should not be awarded.

In addition to the arguments for voiding the Amended Agreement made above (which would void Plaintiff’s claims for damages), Plaintiff should not be entitled to their claimed damages because it was unforeseeable, unreasonable, and unnecessary to expend the amount of money that they did, and on the items that they did.

In *Ranch Homes v. Greater Park City Corp.*, 592 P.2d 620 (Utah 1979), the plaintiff presented evidence at trial related to “items of special damage claimed to have been incurred in reliance upon the contract.” *Id.* at 622. The original facts of *Ranch Homes* were that the plaintiff paid defendant for a seven-month option to purchase 30 acres in Park City. Prior to exercising the option, plaintiff spent nearly \$30,000 on efforts to obtain zoning and financing approval, as well as final architectural and engineering plans. *See id.*

The *Ranch Homes* court first examined the damages being claimed, stating that the only damages recoverable are those that could be reasonably foreseen and anticipated by the parties at the time the contract was entered into. Mere knowledge of possible harm is not enough; the defendant must have reason to foresee, as a probable result of the breach, the damages claimed. Furthermore, before reliance damages may be awarded, the amount of the expenditures must be found to have been *reasonably made*.

Id see also Brown's Shoe Fit Co. v. Olch, 955 P.2d 357 (Utah Ct. App. 1998).

Further,

[t]he particular nature of an option requires that the parties incur no more expenses than are absolutely necessary and that those expenses reflect only what is required to be done before the option can be exercised. If a breach occurs, the party at fault is liable only for those expenditures that could reasonably have been foreseen as a consequence of the breach and which were reasonably incurred by the innocent party. It is only reasonable to keep costs at a minimum during the option period because until the option is exercised, no contract is in existence, even though liability may lie for breach of the option agreement.

Id. at 625. The present case is analogous. The parties signed an agreement to agree. They did not sign a lease. Just like the option to purchase required the defendant in *Ranch Homes* to sell the property if the option was exercised, the Amended Agreement required both parties to enter into lease. But until the lease was signed, there was no lease. Plaintiff should have limited the amount of money spent in anticipation of the lease. In 1979, the Utah Supreme Court found that \$30,000 in reliance damages was unforeseeable. Before the Court today the Plaintiff is requesting \$500,000 in reliance damages, which were made prior the signing of the lease, which as a matter of law this Court can find to be unforeseeable, unreasonable, and unnecessary.

Specifically, the *Ranch Homes* court found that as to the preparation of *final* architectural and engineering plans, “not only were such unforeseeable, but totally unnecessary for any purpose *prior* to the time the option was exercised and would only become necessary if and when the property was purchased and actual construction of improvements begun.” *Id.* (emphasis in original). In this case, Plaintiff hired a brand new contractor, and paid for final architectural and engineering plans,⁵ prior to the lease being

⁵ See subparagraphs a., b., d., e., n., o., and v. of Affidavit of George Hansen ¶¶22. R. 201-204. Furthermore, there are plenty of general contractors in Utah County and Springville who would not need to pay for a new contractor’s license and liability insurance, and who would not necessitate paying for mileage. The fact that Kevin Bowers could

signed. Plaintiff actually purchased equipment for the plant prior to the lease being entered, including \$197,200 for one piece of equipment.⁶ Plaintiff is also claiming damages for its investigations.⁷ As discussed *supra*, Plaintiff was to conduct investigations at their own expense, and their exclusive remedy was to terminate the contract if they found the site unacceptable. Plaintiff is not entitled to their claimed damages because they were not specifically pled, and they were unforeseeable, unreasonable, and unnecessary.

VI. PLAINTIFF BREACHED THE AMENDED AGREEMENT WHEN IT FAILED TO MAKE THE REQUIRED RENT PAYMENT⁸

The Amended Agreement required that upon the issuance of the Certificate of Occupancy, Plaintiff was to make an advanced rent payment. R. 159. Thus, an advanced rent payment was due from Plaintiff to Defendants on September 29, 2008. The deadline for the lease agreement to be finalized would not be for another ten (10) days. Plaintiff cannot argue that Defendants failed to comply with a term of the Amended Agreement (sign a lease), when the Plaintiff itself failed to comply with a term of the Amended Agreement ten days earlier (advanced rent).

In Defendants first Memorandum, Statement of Fact No. 11 stated that “Plaintiff has made no payment of advanced rent following the issuance of the Certificate of Occupancy by Springville City.” R. 192-193. Plaintiff, in its Response to No. 11

be paid \$58,200 “for the sole purpose of overseeing the build out of the property” and yet no build out ever occurred should be viewed as unreasonable and unnecessary as a matter of law.

⁶ See subparagraphs c., s., t., and u. of Affidavit of George Hansen ¶22. R. 201-204.

⁷ See subparagraphs f., g., i., of Affidavit of George Hansen ¶22. R. 201-204.

⁸ At the oral argument, Plaintiff argued that Defendants had not raised the issue of breach prior to the hearing, but then Plaintiff conceded that “I would guess his motion would be amended at this point to not excuse the obligation to pay those amounts in any event.” Transcript, 21:7-10.

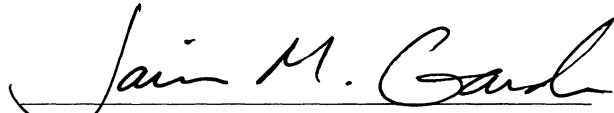
contained in Plaintiff's Memorandum in Opposition, states that "Defendants' statement is technically correct." R. 378. However, despite this admission, Plaintiff then goes on to argue that a separate \$30,000 loan made by Plaintiff to Defendants was in fact made with the intent to satisfy the advanced rent payment requirement, and that Defendants agreed to that arrangement. R. 377-378. Defendants dispute any such arrangement. R. 410. The separate \$30,000 loan was just that, a loan. The advanced rent payment, on the other hand, was never expected to be a loan, it was a payment that Plaintiff was required to make pursuant to the Amended Agreement, and that payment was required to be made prior to the deadline upon which the lease was required to be finalized. Further, for the \$30,000 loan to be considered the advanced rent payment, a written modification of the Amended Agreement would have been required, and there was no such written modification. As a matter of law, there was no payment of Advanced Rent as required by the Amended Agreement. At the very minimum, there is a dispute of fact on this issue because Plaintiff and Defendant dispute the underlying fact of whether the \$30,000 loan was intended to satisfy the advanced rent payment requirement. Such a dispute of fact should have precluded granting of Plaintiff's Cross-Motion. The trial court erred in not finding Plaintiff in breach, and/or for granting Plaintiff's Cross-Motion despite a dispute of fact.

CONCLUSION

Based on the foregoing analysis, this Court should find that the trial court erred in granting the Plaintiff's Cross-Motion for Partial Summary Judgment, and denying the Defendants' Motion for Partial Summary Judgment.

RESPECTFULLY SUBMITTED this 20th day of September, 2010.

ROBINSON, SEILER & ANDERSON, LC

A handwritten signature in black ink, reading "Jamis M. Gardner". The signature is written in a cursive style with a large, sweeping initial "J".

THOMAS W. SEILER

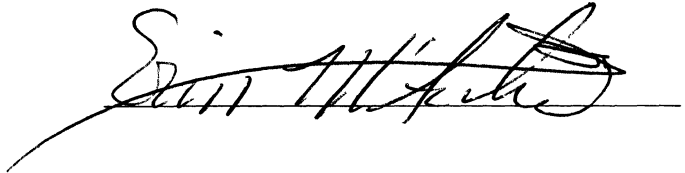
JAMIS GARDNER

Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was provided to the following by placing a copy thereof in the U.S. mail, first class postage prepaid, this ²¹~~20~~th day of September, 2010, addressed as follows:

David M. Wahlquist
Read R. Hellewell
KIRTON & McCONKIE
60 E. South Temple, Suite 1800
Salt Lake City, UT 84145-0120

A handwritten signature in black ink, appearing to read "David M. Wahlquist", written over a horizontal line.

ADDENDUM

1. Springville City Municipal Code § 11-4-501, *et seq.*
2. Agreement Regarding Park-Ro-She Bottling Plant (“Agreement”).
3. First Amendment to Agreement Regarding Park-Ro-She Bottling Plant (“Amendment”).

Addendum Item No. 1

Springville City Municipal Code § 11-4-501, *et seq.*

11-4-407 Size of Dwellings.

- (1) The minimum size of a dwelling unit shall be:

DWELLING SIZE (In Square Feet of Living Area)	A-1	R1-15	R1-10	R1-8	R1-5	R-2	RMF-1	RMF-2
Dwelling Unit Size	1000	1000	1000	900	800	800	600	600

Article 5 – COMMERCIAL AND INDUSTRIAL SITE DEVELOPMENT STANDARDS**11-4-501 Commercial and Industrial Site Development Standards.**

The following development standards apply within commercial and industrial zones. These are “base” standards, not entitlements. Other regulations and ordinances may impose other development standards and requirements.

All multi-family residential development shall meet the development regulation requirements of the R-MF2 zoning district.

11-4-502 Lot Area.

- (1) Minimum area requirements of a zoning lot shall be as follows:

LOT SIZE (In square feet)	PO	BP	VC	TC	NC	CC	RC	HC	LIM	HIM
Non-residential uses	10,000	15,000	None	None	20,000	20,000	20,000	20,000	None	None
Residential Uses	See RMF-2		See RMF-2	See RMF-2						
Utility Uses	3,500	3,500	3,500	3,500	3,500	3,500	3,500	3,500	3,500	3,500

(Amended by Ord. No. 28-2007, 07/17/2007)

11-4-503 Location Requirements.

- (1) Buildings and structures on lots with-in commercial and industrial zones shall be located as follows:
(All setbacks are measured from the property line)

CONFIGURATIONS	PO	BP	VC	TC	NC	CC	RC	HC	LIM	HIM
Primary Use Minimum Setbacks	In Feet from the Property Line									
Front Yard	25	30	0/5 ¹⁰	0	0/5 25 ¹¹	0/5 25 ¹²	25	25	25	25
Side Yard (Interior)	10	5	0	0	0	0	0	0	0	0
Side Yard (Street)	20	20	0	0	0/5 ¹³ 20	0/5 ¹⁴ 20	20	20	20	20
Rear Yard	0	10	0	0	0	0	0	0	0	0
Between Bldgs on Same Lot	0	20	0	0	0	0	0	0	0	0
Adjacent to Residential Zones										
Rear ¹⁵	35+	35+	35+	35+	35+	35+	35+	35+	35+	35+
Side	20+	20+	20+	20+	20+	20+	20+	20+	20+	20+

10. Buildings setbacks must be located within the first five feet of the property line.

11. Buildings must be built within the first five feet of the property line. Any building set back more than five feet from a street frontage must be setback at least 25 feet. The landscape border requirements are required for any building set back more than five feet or street front not occupied by a building.

12. Buildings may be built to the front property line and be setback up to five feet. Any building set back more than five feet from a street frontage must be setback at least 25 feet. The landscape border requirements are required for any building set back more than five feet or street front not occupied by a building.

13. Any building set back more than five feet from the street frontage must be set back at least 20 feet. The landscape border requirements are required for any building set back more than five feet or street frontage not occupied by a building.

14. Any building set back more than five feet from the street frontage must be set back at least 20 feet. The landscape border requirements are required for any building set back more than five feet or street frontage not occupied by a building.

15. Numbers followed by a plus (+) sign indicate that for every foot of height above 35 feet on principal use structures and above 20 feet on accessory structures, an additional one foot of setback is required.

11-4-504 Lot Configurations.

(1) Each lot or parcel of land in commercial and industrial zones shall have configurations as follows:

CONFIGURATIONS (For non-residential uses)	PO	BP	VC	TC	NC	CC	RC	HC	LIM	HIM
Minimum Lot Frontage (in feet along public right-of-way)	70	100	-	-	70	50	120	200	100	200
Minimum Lot Frontage for utility uses (in feet along public right-of-way)	40	40	40	40	40	40	40	40	40	40

(2) Driveway Coverage: No more than 50% of the front lot line may be used for driveway access as measured at the neck of the driveway.

(Amended by Ord. No. 28-2007, 07/17/2007)

11-4-505 Height of Buildings.

(1) The maximum height of any building in the commercial and industrial zones measured from finished grade to the highest point on the roof shall be as follows:

HEIGHT	PO	BP	VC	TC	NC	CC	RC	HC	LIM	HIM
All non-residential uses except as set forth herein (Maximum in feet)	35	75	35	45	35	45	75	75	75	100

Addendum Item No. 2

Agreement Regarding Park-Ro-She Bottling Plant (“Agreement”).

AGREEMENT REGARDING
PARK-RO-SHE-BOTTLING PLANT

This Agreement Regarding Park-Ro-She Bottling Plant (the "Agreement") is made and entered in to this 14th day of June, 2008, by and between GeoNan Properties, LLC, a Utah limited liability company, 2323 West Directors Row, Suite 200, P.O. Box 27233, Salt Lake City, Utah 84127 (hereinafter referred to as "GeoNan"), and Park-Ro-She, Inc., 965 North Main Street, Springville, Utah 84663, BVP Holdings, Limited, a Nevada limited liability company, 965 North Main Street, Springville, Utah 84663, Norm Van Patten, 584 South 100 East, Springville, Utah 84663, and Blaine Van Patten, 16 LaVista Verde, Rancho Palos Verdes, California 90275 (hereinafter collectively referred to as "Owners") in contemplation of the following facts and circumstances:

A. Owners are collectively the owners and/operators of certain real property and improvements located at 965 North Main Street, Springville, Utah and the personal property and equipment used or formerly used in commercial bottling business which is or has been operated on such property.

B. GeoNan is willing to lease said business property from Owners, upon the terms and conditions set forth in this Agreement, for a period of time to determine if the business property can be utilized in business to be conducted by GeoNan or affiliated companies which it is expected will become sufficiently profitable to permit GeoNan to acquire the business property.

C. GeoNan requires that it hold an option to purchase the business property upon the terms and conditions set forth in this Agreement, so that it can enjoy the benefit of its efforts to run the business profitably during the term of the lease.

D. The parties have not clearly determined which Owner owns which part of the business property and Owners have agreed to enter into this Agreement to ensure that all components of the business property shall be leased and optioned to GeoNan.

E. The parties desire to set forth the terms and conditions upon which the real and personal property described herein shall be leased and optioned to GeoNan in this Agreement intending that this Agreement shall be binding upon the parties pending the preparation and execution of documents required to actually lease the agreed property and with the grant of an option to purchase.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties do hereby execute this Agreement fully intending to be bound by the provisions here, and do hereby agree as follows:

1. Lease. GeoNan shall, upon terms and conditions set forth below, lease from Owners, the real property described in this section, any and all equipment and improvements which constitute the Park-Ro-She bottling facilities located at 965 North Main Street, Springville, Utah (the "Plant"), water rights and all other facilities and rights associated with the

Plant, which shall hereinafter collectively be referred to herein as the "Leased Property," and shall include:

a. The real property described as Lot 1, Park-Ro-She Subdivision, according to the official subdivision plat thereof, which real property is located at the address described above (the "Land");

b. Any and all buildings and improvements located upon the Land, including, without limitation, the building in which the Park Ro-She bottling facility is operated (the Land and improvements shall be collectively referred to herein as the "Property");

c. Any and personal property and equipment used in the operation of the bottling facility located upon the Property, including, without limitation, (i) all bottling, labeling and packing equipment used in the operation of the bottling plant and (ii) any and all pumps, pipes, valves, housing, pump house and other improvements and equipment used in connection with the ownership, operation and control of the underground water well located on the Land (collectively, the Equipment);

d. Any and all water rights appurtenant to the Land, including, without limitation, water rights evidenced by Change Application No. a26914 approved April 9, 2003 ("Water Rights"); and

e. Any and all general intangibles used in or associated with the Park-Ro-She bottling plant, including without limitation, licenses, permits, trademarks, tradenames, trade secrets, operating procedures and other similar or dissimilar intangible rights associated with the business of Owners conducted on the Land..

2. Lease. Owners and GeoNan shall enter into a written lease (the "Lease") which shall be upon terms and conditions reasonably acceptable to all parties. The rights and incidences associated with the use and option to purchase all of the Leased Property may require more than one document in order to properly address and document the various rights of individual Owners. In every instance the Lease, whether one or more, shall provide GeoNan the exclusive right to the use and/or occupancy of all of the Leased Property, including without limitation the exclusive right to the use of all water represented by the Water Rights. Within fifteen (15) business days of the execution of this Agreement, the parties shall execute a lease/option agreement (the "Lease") which, in addition to terms and conditions customarily included in a lease of real and personal property, shall include the specific terms and conditions set forth in this section.

2.1 Term; Extension Right. The primary term of the Lease shall be for a period of five (5) years. GeoNan shall have the right to extend the Lease term for an additional five (5) years upon delivery of written notice to Owners.

2.2 Rent. Consideration to be paid to Owners for the rental of the Leased Property (herein, collectively, the "Rent") shall consist of:

a. monthly rental in the amount of Thirty Thousand Dollars (\$30,000) which shall be paid in advance on the first day of each month for the first three (3) months of the term of the Lease;

b. commencing on the first day of the fourth (4th) month of the term of the Lease, monthly rental in the amount of Forty Thousand Dollars (\$40,000) shall be paid in advance on the first day of each month for the next three (3) months of the term of the Lease;

c. commencing on the first day of the seventh (7th) month of the term of the Lease, monthly rental in the amount of Fifty Thousand Dollars (\$50,000) shall be paid in advance on the first day of each month until the "Adjustment Date," as defined below;

d. commencing on the "Adjustment Date," which is the first day of first full calendar month following the "Performance Date," as that term is defined below, monthly rental in the amount of Fifty-One Thousand Dollars (\$51,000) shall be paid in advance on the first day of each month for the remainder of the term of the Lease; and

e. a monthly payment of "Percentage Rent" which shall be an amount equal to the greater of (i) one-half of one percent (0.5%) of the gross revenue actually received by GeoNan, or the entity operating the Plant, from the sale of juices or other specialty drinks (but specifically excluding water) bottled at the Plant, including all private or proprietary juices or drinks, or (ii) one percent (1.0%) of the gross revenue actually received by GeoNan, or the entity operating the bottling of water in the Plant, from the sale of water bottled at the Plant, including all private or proprietary labeled water, with such payment to be on the first day of the first month following the end of the month in which the gross revenue was received by GeoNan or its affiliated entity.

The "Performance Date" shall be the first day of the first calendar month following the last to occur of (i) the first day of the tenth (10th) month of the term of the Lease, or (ii) last day of any three (3) consecutive months in which the gross revenue received by GeoNan, or any affiliated entities operating on all or part of the Leased Property, shall, in the aggregate, be greater than Four Hundred Thousand Dollars (\$400,000) for each of said consecutive three (3) months.

All monthly Rent paid pursuant to subparagraphs a through d above shall be referred to herein as the "Monthly Rent" and shall be paid in advance on the first day of each month. All Rent paid pursuant to subparagraph e above shall be referred to herein as the "Percentage Rent." All Rent shall be paid to an escrow account with irrevocable instructions that Rent payments received in the escrow account shall be disbursed monthly (i) First, in payment of amounts then due and payable on existing loans which encumber the Leased Property or any portion thereof, and (ii) Second, to such parties as the Owners shall designate in writing to the escrow agent responsible for such collection and disbursement. Owners shall be responsible for the tax implications of any instructions given to escrow agent regarding the disbursement of proceeds held in escrow to individual Owners and shall indemnify and hold GeoNan harmless from any and all costs and expenses incurred by GeoNan by reason of such allocation.

2.3 Maintenance, Taxes, etc. GeoNan shall be responsible to maintain the Leased Property at its sole cost and expense, including all structural components of the building located upon the Land and the well components. GeoNan shall maintain commercially reasonable insurance upon the Leased Property at its cost. To the extent the proceeds of insurance are insufficient, GeoNan shall have the right, but not the duty, to rebuild the Leased Property in the event of fire or other casualty. GeoNan shall pay prior to delinquency, any and all real and personal property taxes and other governmental assessments which may be levied upon the Leased Property.

2.4 Improvements to Leased Property. GeoNan shall have the right to construct such improvements on the Land and to remodel such existing improvements as GeoNan may elect in its sole and absolute discretion. GeoNan shall pay any and all costs incurred in constructing or remodeling such improvements and shall keep the Leased Property free and clear of any mechanics liens for non-payment of same. Upon any termination of the Lease, GeoNan shall have the right to remove any and all Equipment that has been placed upon the Land and all other improvements made during the term of the Lease that are not fixtures, provided, however, that GeoNan shall be required to repair any damage to the Leased Property caused by such removal.

2.5 Option to Purchase. The Lease shall provide that GeoNan shall have an exclusive option to purchase the Leased Property (the "Purchase Option") upon the terms and conditions set forth in the Lease. In addition to provisions customarily included in an option to purchase real and personal property, the Lease shall specifically provide that:

a. The Purchase Option may be exercised by GeoNan at anytime the Lease shall be in effect by delivery of a written notice of exercise to Owners. The acquisition of the Leased Property (the "Closing") shall then be completed not later than sixty (60) days after the delivery of the notice of exercise;

b. The purchase price for the Leased Property shall be Seven Million Dollars (\$7,000,000) which shall be paid as set forth in the following subparagraphs; provided, however, that any and all Rent paid under the Lease through the Closing shall be credited as a partial prepayment of the purchase price;

c. Four Million Six Hundred Twenty Thousand Dollars (\$4,620,000) of the purchase price, less any credit for Rent paid through the date of the Closing, shall be at the Closing, either in cash, or as a offset in an amount equal to the principal balance of any existing loan which encumbers the Leased Property which is formally assumed by and shall thereafter be paid by GeoNan; and

d. The remaining Two Million Three Hundred Eighty Thousand Dollars (\$2,380,000) balance of the purchase price shall be paid monthly by a monthly payment which shall be an amount equal to the greater of (i) one-half of one percent (0.5%) of the gross revenue actually received by GeoNan, or the entity operating the Plant, from the sale of juices or other specialty drinks (but specifically excluding water) bottled at the Plant, including all private or proprietary juices or drinks, or (ii) one percent (1.0%) of the gross revenue actually received

by GeoNan, or the entity operating the bottling of water in the Plant, from the sale of water bottled at the Plant, including all private or proprietary labeled water, with such payment to be on the first day of the first month following the end of the month in which the gross revenue was received by GeoNan or its affiliated entity. Payments required by this subsection shall be made until the Owners shall have been paid the total purchase price set forth in subparagraph (b) above, pursuant to subparagraph (c) and this subparagraph (d).

e. Of that portion of the purchase price to be paid at the Closing of the Purchase Option, the parties have agreed that Three Hundred Thousand Dollars (\$300,000) shall be the portion of the purchase price paid for the purchase of equipment located on the Land and acquired by GeoNan.

f. The Lease shall terminate as of the date of the Closing.

3. Ownership and Title to Leased Property. Owners collectively represent and warrant that they are the owners of the Leased Property and the individual components thereof. After the execution of this Agreement and prior to the execution of the Lease, GeoNan shall have the right to make any and all inquiries it deems to be reasonable and necessary to determine the ownership of the Leased Property and the status of title to the Land. Prior to the execution of the Lease, the parties shall determine which matters which encumber the Land shall be permitted to continue to so encumber the Land after the Closing with such matters to be identified in the Lease as "Permitted Encumbrances" shall not include any mechanics lien or matters related thereto, any existing leases among any of the Owners or any financial encumbrances other than non-delinquent real property taxes (except to the extent existing financing is assumed by GeoNan).

3.1 Encumbrances at Closing. At the Closing, title to the Land shall be conveyed by the applicable Owner to GeoNan by warranty deed subject only to the Permitted Encumbrances. At the Closing, Owners shall purchase a standard title insurance policy in the amount of the purchase price set forth in Section 2.5c above insuring GeoNan's title to the Land in the condition described herein.

3.2 Encumbrances During Lease Term. During the term of the Lease, Owners shall be responsible to maintain title to the Land as is on the date of the Lease and shall indemnify and hold GeoNan harmless from any and all costs and expenses, including attorneys fees and costs, incurred by GeoNan by reason of the existence of any matter as an exception to or encumbrance upon title to the Land which is not a Permitted Encumbrance, as defined in the Lease. The Permitted Encumbrances as of the date of the Lease shall not include any mechanics liens or other matters related thereto and all such matters shall be released prior to the execution of the Lease. During the term of the Lease, Permitted Encumbrances may include the Existing Loans; provided, however, that Owners responsibility set forth in Section 6 shall be applicable.

4. Investigations. GeoNan's obligation to execute the Lease shall be subject to GeoNan's determination that conditions related to the Leased Property are acceptable. GeoNan shall make such determination not later than 5:00 p.m., Salt Lake City time, on June 19, 2008 (the "Approval Deadline"). GeoNan shall have the sole and absolute responsibility, at its sole

expense, to conduct such studies, evaluations, assessments, inquiries and other investigations of the condition of the Leased Property as GeoNan shall determine to be prudent and necessary prior to its execution of the Lease. All such investigations shall be conducted at the sole cost and expense of GeoNan and shall be completed prior to the Approval Deadline. So long as this Agreement shall remain in effect, GeoNan shall have the right to enter at reasonable times upon the Land and Plant to conduct its investigations. In the event GeoNan shall determine, in the exercise of its sole and absolute discretion, that any condition related to the Leased Property shall be unacceptable to GeoNan, GeoNan shall have the right to terminate this Agreement by delivery prior to the Approval Deadline of written notice of such termination to Owners,

5. Agreement to Employ. GeoNan, or the operator of the bottling plant to be located upon the Land, shall employ Don Van Patten as an employee-at-will with such employment to be conditioned upon such party's fulfillment of his duties of employment,

6. Additional Property Purchase Rights. The Owners who hold title to (i) the real property known as the "house property" located on the north of the existing lot, and (iii) the free standing parcel located to the southeast of the building currently located on the Land (collectively, the "Additional Property") do hereby grant to GeoNan, the right of first refusal to purchase one or both of the described parcels of property (the "Right of First Refusal") and the right to acquire the Additional Property for fair market value. The provisions of this section shall apply to each of the parcels of real property which comprise the Additional Property.

6.1 Application of Right. The Right of First Refusal shall be applicable and may be exercised by GeoNan in the event that the applicable Owners shall have received an offer to purchase all or part of the Additional Property upon terms and conditions upon which Owners are willing to sell the Property (an "Acceptable Offer"), Owners shall provide written notice ("Owner's Notice") of the Acceptable Offer to GeoNan together with complete copy of such Acceptable Offer. For fifteen (15) business days following GeoNan's receipt of the Owner's Notice (the "Election Period"), GeoNan shall have the right to review and evaluate whether or not to elect to purchase the Additional Property under the terms set forth in the Acceptable Offer. Prior to the expiration of the Election Period, GeoNan shall send written notice of its election to Owners. If GeoNan fails to timely provide notice to Owners of its election, then GeoNan shall be deemed to have waived its right to purchase the Additional Property.

6.2 Closing of Purchase. If GeoNan elects to purchase the Additional Property upon the terms set forth in the Acceptable Offer, the closing shall occur as set forth in the Acceptable Offer. In the event that GeoNan has elected not to purchase the Additional Property based on an Acceptable Offer and Owners shall then fail to close the sale of the Additional Property in accordance with the provisions of and by the deadline set forth in the Acceptable Offer reviewed and rejected by GeoNan, then the Right of First Refusal herein granted shall again be applicable to any subsequent offer received by and acceptable to Owners. If GeoNan elects to not exercise its Right of First Refusal to purchase upon the terms of an Acceptable Offer, then any modification of any term of the Acceptable Offer which GeoNan rejected (such as the purchase price, closing date, credits at closing, etc.) shall require that the such modified terms be again submitted to GeoNan and subject to GeoNan's right to purchase the Additional Property upon the modified terms. It is provided, however, that GeoNan shall have

only five (5) business days to review and evaluate whether or not to elect to purchase the Additional Property under the modified terms of the Acceptable Offer previously rejected.

6.3 Right to Purchase. GeoNan shall have the right to acquire one or both of the Additional Parcels in the event that GeoNan needs such property to expand facilities to be used in the conduct of its business upon the Land. The purchase price of the Additional Property, or one of the parcels, as applicable, shall be the fair market value at the time GeoNan elects to purchase the Additional Property. The agreement between the parties described in the next section shall set forth a procedure for the determination of the then existing fair market value and the conditions of closing. Any and all monetary encumbrances which is secured by the Additional Property shall be paid in full at the closing.

6.4 Agreement; Memorandum of Agreement. Concurrently with the execution of the Lease, GeoNan and the applicable Owners shall execute an agreement setting forth the terms and conditions of GeoNan's right to acquire the Additional Property. Such parties shall also execute a Memorandum of Agreement which shall set forth the essential terms of such agreement and be recorded in the office of the Utah County Recorder against the Additional Property to provide notice of the existence of the rights set forth in this Agreement.

7. Existing Encumbrances. The Land, or portions thereof, is encumbered by existing long-term financing (collectively, the "Existing Loans"). Owners represent and warrant as of the date of this Agreement, which representation and warranty shall also be true as of the date of the execution of the Lease, that all such Existing Loans are paid current. Owners covenant and warrant that they shall perform any and all obligations required by them to be performed under the Existing Loans and that Rents shall be paid first to amounts then due on the Existing Loans. Rent in excess of amounts due to keep the Existing Loans current shall be disbursed to Owners and Owners shall have no duty to prepay amounts due on the Existing Loans from such Rents. At Closing, Owners shall pay in full any and all amounts due on the Existing Loans unless GeoNan, in the exercise of its sole and absolute discretion, shall elect to formally assume any Existing Loan.

8. Additional Actions; Execution of Documents. Prior to the Approval Deadline, the parties shall determine the form and content of agreements that shall be required to document the leasing of and the option to purchase of the Leased Property and each Owner shall sign such agreements as shall be so required. Each party shall take such additional actions and execute such additional documents as shall be required to implement the provisions of this Agreement. Owners shall cooperate with GeoNan in taking any and all actions requested by GeoNan to facilitate the conduct and expansion of its operations at the Leased Property, including, without limitation, requests for building permits, granting of easements, obtaining city approval or applying or expansion of the existing Water Rights or the procurement of additional water rights.

9. Attorneys Fees. If either party defaults in the performance of any obligation under this Agreement or any obligation undertaking which forms a part thereof, the defaulting party shall reimburse the non-defaulting party for all costs and attorneys' fees incurred arising out or resulting from such default, both before and after judgment, on appeal or in any bankruptcy, state receivership or other similar proceeding.

10. Non-Waiver. No delay or failure by any party to exercise any of rights hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided in writing at the time of such act or omissions.

11. Headings. Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

12. Entire Agreement. This Agreement is the entire Agreement between the parties and supercedes any and all prior agreements, discussions and negotiations. This Agreement shall survive the real estate closing as contemplated herein and the execution and delivery of the Lease.

13. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

14. Time is of the Essence. Time is of the essence of this Agreement.

15. Notices. Notices hereunder shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties as follows:

Park-Ro-She, Inc.
965 North Main Street
Springville, UT 84663

BVP Holdings, Ltd.
965 North Main Street
Springville, UT 84663

Norm Van Patten
584 South 100 East
Springville, UT 84663

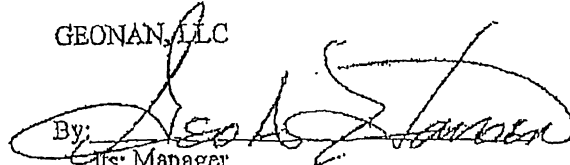
Blaine Van Patten
16 LaVista Verde
Rancho Palos Verdes, CA 90275

GeoNam, LLC,
Attn: George Hansen
2323 West Directors Row, Suite 200
P. O. Box 27233
Salt Lake City, UT 84127

16. Binding Effect. This Agreement shall be binding upon the parties and inure to the benefit of their respective legal representatives, successors and assigns. This Agreement shall not


be assigned or modified without the parties' express written consent except that it may pass to entities or individuals as part of a party's estate planning program.

GeoNan:


GEONAN, LLC
By: 
Its: Manager

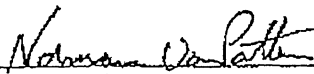
Owners:

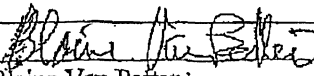
Park-Ro-She, Inc.

By:  x

BVP Holdings, Ltd., a Utah Limited Liability
Company

By:  x
Its:


Norm Van Patten

 x
Blaine Van Patten

Addendum Item No. 3

First Amendment to Agreement Regarding Park-Ro-She Bottling Plant (“Amendment”).

FIRST AMENDMENT TO AGREEMENT
REGARDING PARK-RO-SHE BOTTLING PLANT

THIS FIRST AMENDMENT TO AGREEMENT (this "Amendment") is made to be effective as of the 30th day of June, 2008 (the "Effective Date"), by and between GeoNan Properties, LLC., a Utah limited liability company ("GeoNan"), and Park-Ro-She, Inc., 965 North Main Street, Springville, Utah 84663, BVP Holdings, Limited, a Nevada limited liability company, 965 North Main Street, Springville, Utah 84663, Norm Van Patten, 584 South 100 East, Springville, Utah 84663, and Blaine Van Patten, 16 La Vista Verde, Rancho Palos Verdes, California 90275 (hereinafter collectively referred to as "Owners"), in contemplation of the following facts and circumstances:

A. GeoNan and the Owners are parties to that certain Agreement Regarding Park-Ro-She Bottling Plant dated June 4, 2008 (as amended, the "Agreement"), concerning certain real property located in Springville, Utah as more particularly described in the Agreement (the "Property").

B. Subsequent to the execution of the Agreement, circumstances have been discovered which have caused the parties to agree to amend the Agreement.

NOW, THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. Definitions. Any term in quotation marks not otherwise specifically defined herein shall carry the definition set forth for such term in the Agreement.

2. Contract Effective. The Agreement remains in full force and effect as modified herein.

3. Amendment to Section 2. Section 2 of the Agreement is hereby amended to provide that the parties shall execute the Lease not later than ten (10) days after the date Springville City (the "City") certifies in writing that the "Permit Conditions," as that term is defined in this Amendment, have been satisfied.

4. City Conditions to Occupancy. As a condition of the approval of the construction of the building located on the Property by Owners, the City established certain requirements which must be satisfied in order for the City to issue a permanent certificate of occupancy for the Plant. Certain of those requirements remain unsatisfied as of the date of this Amendment (the "Permit Conditions"). Without cost or expense to GeoNan, the Owners shall cause all Permit Conditions to be satisfied. The Owners shall be responsible to cause any and all requirements of the City as a condition to the issuance of a permanent certificate of occupancy for the Plant, as it is configured as of the date of this Amendment, to be satisfied as a Permit Condition.

5. Satisfaction of Permit Conditions. The Owners shall undertake to cause the Permit Conditions to be satisfied and a permanent certificate of occupancy to be issued by the City on or before July 11, 2008 (the "Completion Date"). In the event that a certificate of occupancy has not been issued by the City by the close of business on the Completion Date, GeoNan may elect to either (i) terminate this Agreement and obtain repayment of any "Advance Rent" paid, as that term is defined herein, or (ii) to undertake to cure the Permit Conditions. In the event GeoNan shall undertake to cause the Permit Conditions to be satisfied, GeoNan shall receive a credit against Rent due under the Lease in an amount equal to one hundred twenty-five percent (125%) of any and all costs and expenses incurred by GeoNan to cause the Permit Conditions to be satisfied.

6. Deferral of Permit Conditions. It is understood that the City may permit the deferral of the planting of some trees and shrubs to permit planting in the fall. GeoNan agrees to such deferral provided that the City will issue a certificate of occupancy sufficient to permit GeoNan to occupy the Plant upon completion of all other Permit Conditions. The Owners shall complete all deferred items not later than September 30, 2008. In the event such matters are not complete, GeoNan shall have the right to complete such items and the provisions of Section 5 shall be applicable to any and all costs and expenses incurred by GeoNan to complete such items.

7. Advance Rent Payments. At the request of Owners, in June, 2008, GeoNan made a payment which was applied to the outstanding mortgages which encumber the Leased Property (the "Advance Rent"). No further payments shall be made until the Permit Conditions are satisfied and the City has issued a certificate of occupancy to permit GeoNan to occupy the Plant. Upon such occurrence, GeoNan shall make an additional payment of Advance Rent upon the same terms and conditions as the June payment notwithstanding the fact that the Lease may not then be signed.

8. Amendment to Section 2.2. Section 2.2a through Section 2.2e are hereby deleted from the Agreement in their entirety and the following are inserted in the place thereof such that the Rent to be paid under the Lease shall now consist of:

a. monthly rental in the amount of Thirty Thousand Dollars (\$30,000) which shall be paid in advance commencing as of the effective date of the Lease, and continuing until the first day of the month which shall be ninety (90) days or more after the date that GeoNan is issued a building permit by the City for the construction of GeoNan's proposed improvements to the Leased Property (the "Renovation Date");

b. commencing on the first day of the next full calendar month following, the monthly rental shall be in the amount of Forty Thousand Dollars (\$40,000), which amount shall be paid in advance for the next three (3) months of the term of the Lease;

c. commencing on the first day of the third (3rd) month of Rent paid pursuant to subparagraph (b) above, the monthly rental shall be in the amount of Fifty Thousand Dollars (\$50,000), which amount shall be paid until the "Adjustment Date," as defined below;

d. commencing on the "Adjustment Date," which is the first day of first full calendar month following the "Performance Date," as that term is defined below, monthly rental shall be in the amount of Sixty Thousand Dollars (\$60,000) for the remainder of the term of the Lease; and

e. commencing on the effective date of the Lease, GeoNan shall also pay a monthly payment of "Percentage Rent" which shall be an amount equal to the greater of (i) one-half of one percent (0.5%) of the gross revenue actually received by GeoNan, or the entity operating the Plant, from the sale of juices or other specialty drinks (but specifically excluding water) bottled at the Plant, including all private or proprietary juices or drinks, OR (ii) one percent (1.0%) of the gross revenue actually received by GeoNan, or the entity operating the bottling of water in the Plant, from the sale of water bottled at the Plant, including all private or proprietary labeled water, with such payment to be on the tenth (10th) day of the first month following the end of the month in which the gross revenue was received by GeoNan or its affiliated entity.

9. Rent Due Date. Section 2.2 is hereby amended to provide that, except as provided in subparagraph (e) above, Rent required to be paid under the Lease shall be due and payable on the fourth (4th) day of each month.

10. Purchase Price. Section 2.5b of the Agreement is hereby amended to provide that the Purchase Price of the Leased Property shall be the sum of (i) Four Million Six Hundred Twenty Thousand Dollars (\$4,620,000) plus (ii) the total of the "Production Payments" made pursuant to Section 9 of this Amendment.

11. Production Payments. Section 2.5d is hereby deleted in its entirety and the following provision is substituted in place thereof:

a. That portion of the Purchase Price for the Leased Property which constitutes the "Production Payment" shall be the amount equal to the greater of (i) one-half of one percent (0.5%) of the gross revenue actually received by GeoNan, or the entity operating the Plant, from the sale of juices or other specialty drinks (but specifically excluding water) bottled at the Plant, including all private or proprietary juices or drinks, OR (ii) one percent (1.0%) of the gross revenue actually received by GeoNan, or the entity operating the bottling of water in the Plant, from the sale of water bottled at the Plant, including all private or proprietary labeled water. Such amounts shall be paid commencing as of the date of the Closing and continue through May 31, 2018. The Production Payment shall be calculated for each month and shall be due and payable on the tenth (10th)

day of the first month following the end of the month in which the gross revenue was received by GeoNan or its affiliated entity.

12. Approval Deadline. Section 4 of the Agreement is hereby amended to provide that the Approval Deadline shall be July 11, 2008.

13. Governing Law. This Amendment shall be construed in accordance with the laws of the State of Utah.

14. Effective Date. The parties hereby specifically agree that upon execution by both/each of the parties below, this Amendment shall be effective and binding on the parties as of the Effective Date without regard to the date that this Amendment is actually executed by each/such party.

15. Miscellaneous. This Amendment contains all of the representations, understandings and agreements of the parties with respect to matters contained herein. In the event of any legal proceedings related to this Amendment, the prevailing party shall be entitled to reasonable attorneys' fees and costs by the non-prevailing party. Time is of the essence as to each of the terms and conditions stated in this Amendment. Each of the individuals who have executed this Amendment represents and warrants that such person is duly authorized to execute this Amendment; that all corporate, partnership, trust or other action necessary for such party to execute and perform the terms of this Amendment have been duly taken by such party; and that no other signature or authorization is necessary for such party to enter into and perform the terms of this Amendment. This Amendment may be executed in one or more counterparts, each of which shall constitute an original and all of which together shall constitute one and the same Amendment. The delivery of a facsimile signature of this Amendment shall have the same legally binding effect as the delivery of an original signature.

IN WITNESS whereof, the parties have executed this Amendment to be binding upon such parties as of the Effective Date.

GeoNan: GEONAN, LLC

By: 
Its: Manager

Owners: Park-Ro-She, Inc.

By: _____
Its: _____

day of the first month following the end of the month in which the gross revenue was received by GeoNan or its affiliated entity.

12. Approval Deadline. Section 4 of the Agreement is hereby amended to provide that the Approval Deadline shall be July 11, 2008.

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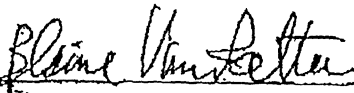
15. Miscellaneous. This Amendment contains all of the representations, understandings and agreements of the parties with respect to matters contained herein. In the event of any legal proceedings related to this Amendment, the prevailing party shall be entitled to reasonable attorneys' fees and costs by the non-prevailing party. Time is of the essence as to each of the terms and conditions stated in this Amendment. Each of the individuals who have executed this Amendment represents and warrants that such person is duly authorized to execute this Amendment; that all corporate, partnership, trust or other action necessary for such party to execute and perform the terms of this Amendment have been duly taken by such party; and that no other signature or authorization is necessary for such party to enter into and perform the terms of this Amendment. This Amendment may be executed in one or more counterparts, each of which shall constitute an original and all of which together shall constitute one and the same Amendment. The delivery of a facsimile signature of this Amendment shall have the same legally binding effect as the delivery of an original signature.

IN WITNESS whereof, the parties have executed this Amendment to be binding upon such parties as of the Effective Date.

GeoNan: GEONAN, LLC

By: 
Its: Manager

Owners: Park-Ro-She, Inc.

By: 
Its: _____

BVP Holdings, Ltd..
a Utah Limited Liability Company

By: _____
Its: _____

Norm Van Patten

Blaine Van Patten

BVP Holdings, Ltd..
a Utah Limited Liability Company

By: Blaine Van Patten
Its: _____

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Blaine Van Patten
Blaine Van Patten

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Its: _____

Norman Van Patten
Norm Van Patten

Blaine Van Patten