

2010

# Wolf Mountain Resorts, L.C., a Utah limited liability company v. ASC Utah, Inc., a Delaware corporation : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David M. Wahlquist; Rod N. Andreason; Ryan B. Frazier; Kirton & McConkie; Attorneys for Appellant.

John R. Lund; Kara L. Pettit; Snow, Christensen, and Martineau; John P. Ashton; Clark K. Taylor; Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Appellee.

---

## Recommended Citation

Brief of Appellant, *Wolf Mountain Resorts v. ASC Utah*, No. 20100342 (Utah Court of Appeals, 2010).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/2314](https://digitalcommons.law.byu.edu/byu_ca3/2314)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

WOLF MOUNTAIN RESORTS, L.C., a  
Utah limited liability company,

Plaintiff/Appellant,

v.

ASC UTAH, INC., a Delaware corporation,

Defendant/Appellee

:  
:  
:  
:  
: Appellate Case No. 20100342-CA  
:  
: Trial Court Case No. 070500485  
:  
:  
: (ORAL ARGUMENT REQUESTED)  
:  
:

---

**On Appeal from an Order Denying Wolf Mountain Resorts, L.C.'s Motion for  
Partial Summary Judgment and Granting ASC Utah, Inc.'s Cross-Motion for  
Summary Judgment by the Third Judicial District Court, Silver Summit District,  
The Honorable Bruce C. Lubeck**

---

**BRIEF OF APPELLANT**

---

John R. Lund  
Kara L. Pettit  
**Snow, Christensen & Martineau**  
P.O. Box 45000  
Salt Lake City, Utah 84145-5000

John P. Ashton  
Clark K. Taylor  
**VanCott, Bagley, Cornwall & McCarthy**  
P.O. Box 45340  
Salt Lake City, Utah 84145-0340

*Attorneys for Defendant/Appellee*

David M. Wahlquist (Bar No. 3349)  
Rod N. Andreason (Bar No. 8853)  
Ryan B. Frazier (Bar No. 9007)  
**KIRTON & McCONKIE**  
1800 Eagle Gate Tower  
60 East South Temple  
P.O. Box 45120  
Salt Lake City, UT 84145-0120  
Telephone: (801) 328-3600

*Attorneys for Plaintiff/Appellant*

FILED  
UTAH APPELLATE COURTS  
AUG 26 2010



## TABLE OF CONTENTS

INTRODUCTION .....	1
STATEMENT OF JURISDICTION.....	4
ISSUES PRESENTED.....	4
DETERMINATIVE LEGAL PROVISIONS .....	7
STATEMENT OF THE CASE.....	8
A. Nature of the Case.....	8
B. Course of Proceedings.....	9
C. Disposition in the Trial Court. ....	9
D. Statement of Facts.....	10
SUMMARY OF THE ARGUMENT .....	14
ARGUMENT .....	15
I. UNDER THE PLAIN TERMS OF THE LEASEHOLD MORTGAGE, THE TALISKER PURCHASE WAS AN UNEXCUSED EVENT OF DEFAULT. .....	15
II. THE TRIAL COURT ERRED IN APPLYING A “LACK OF CLARITY” STANDARD FOR REFORMATION. ....	16
III. THE TRIAL COURT IMPROPERLY REFORMED THE LEASEHOLD MORTGAGE. ....	18
A. The Trial Court Correctly Ruled that Unilateral Mistake Did Not Occur. .....	18
B. ASCU Failed to Plead Mistake, Let Alone “With Particularity.”.....	19
C. ASCU Failed to Prove Mutual Mistake, Let Alone by Clear and Convincing Evidence. ....	20
D. The Trial Court Erred in <i>Sua Sponte</i> Holding that Mutual Mistake Had Occurred.....	21
CONCLUSION.....	36
REQUEST FOR ORAL ARGUMENT .....	37
CERTIFICATE OF SERVICE .....	38

## TABLE OF AUTHORITIES

### Cases

<i>Am. Interstate Mortg. Corp. v. Edwards</i> , 2002 UT App 16 ¶ 12, 41 P.3d 1142 .....	6, 8
<i>Am. Towers Owners Ass’n, Inc. v. CCI Mechanical, Inc.</i> , 930 P.2d 1182 (Utah 1996).....	5
<i>Ashworth v. Charlesworth</i> , 231 P.2d 724, 727 (Utah 1951).....	19
<i>Bown v. Loveland</i> , 678 P.2d 292, 295 (Utah 1984) .....	19
<i>Briggs v. Liddell</i> , 699 P.2d 770, 772 (Utah 1985) .....	18, 19, 20, 22, 23, 37
<i>Chen v. Stewart</i> , 2004 UT 82, ¶ 19, 100 P.3d 1177 .....	4
<i>Colosimo v. Roman Catholic Bishop of Salt Lake City</i> , 2004 UT App 436, ¶ 7, 104 P.3d 646 .....	4
<i>Cunningham v. Cunningham</i> , 690 P.2d 549, 552 (Utah 1984).....	18, 27
<i>Dixon Bldg., LLC v. Jefferson</i> , 2010 UT App 34, ¶ 7, 227 P.3d 266 .....	7
<i>Embassy Group v. Hatch</i> , 865 P.2d 1366, 1369 (Utah Ct. App. 1993).....	6, 8
<i>England v. Horbach</i> , 944 P.2d 340, 343 (Utah 1997) .....	24
<i>Ervin v. Lowe’s Cos.</i> , 2005 UT App 463, ¶ 8, 128 P.3d 11 .....	8
<i>Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc.</i> , 2004 UT App 322 ¶¶ 8-9, 110 P.3d 710 .....	6
<i>Greener v. Greener</i> , 212 P.2d 194, 204 (Utah 1949) .....	20
<i>Guardian State Bank v. Stangl</i> , 778 P.2d 1, 5-6 (Utah 1989).....	19
<i>Hermansen v. Tasulis</i> , 2002 UT 52, ¶ 10, 48 P.3d 235 .....	7
<i>Holbrook Co. v. Adams</i> , 542 P.2d 191, 193 (Utah 1975) .....	28
<i>Jackson v. Dabney</i> , 645 P.2d 613, 615 (Utah 1982).....	28
<i>Janke v. Beckstead</i> , 332 P.2d 933, 934 (Utah 1950).....	28
<i>Jensen v. Manila Corp. of the Church of Jesus Christ of Latter-Day Saints</i> , 565 P.2d 63, 64 (Utah 1977).....	29
<i>Juricic v. Autozone, Inc.</i> , 2010 UT App 109, ¶ 5 n.1, 232 P.3d 1088 .....	23
<i>Klas v. Van Wagoner</i> , 829 P.2d 135, 138 (Utah Ct. App. 1992) .....	5
<i>Mabey v. Kay Peterson Const. Co.</i> , 682 P.2d 287, 289 .....	22
<i>Mack v. Utah Dept. of Commerce</i> , 2009 UT 47, ¶ 14, 221 P.3d 194 .....	21
<i>Neiderhauser Bldrs. &amp; Dev. Corp. v. Campbell</i> , 824 P.2d 1193, 1196 (Utah Ct. App. 1992).....	7
<i>R.A. McKell Excavating, Inc. v. Wells Fargo Bank, N.A.</i> , 2004 UT 48, ¶ 7, 100 P.3d 1159 .....	6
<i>Robert Langston, Ltd. v. McQuarrie</i> , 741 P.2d 554, 557 (Utah Ct. App. 1987) .....	25
<i>Sackler v. Savin</i> , 897 P.2d 1217, 1220 (Utah 1995) .....	8
<i>State v. Pena</i> , 869 P.2d 932, 936 (Utah 1994).....	4
<i>The Cantamar, L.L.C. v. Champagne</i> , 2006 UT App 321, ¶ 38, 142 P.3d 140.....	24
<i>Thompson v. Smith</i> , 620 P.2d 520, 523 (Utah 1980) .....	19
<i>Warner v. Sirstins</i> , 838 P.2d 666, 670 (Utah Ct. App. 1992) .....	18, 25, 29

## Statutes

Utah Code Ann. §78A-4-103 (2009).....	4
---------------------------------------	---

## Other Authorities

45 Am. Jur. Reformation of Instruments § 113 .....	28
--	----

## Rules

UTAH R. CIV. P. 12(b)(5) .....	21
UTAH R. CIV. P. 12(h) .....	21
UTAH R. CIV. P. 56(a)-(c).....	9
UTAH R. CIV. P. 56(c).....	3, 7, 26, 28
UTAH R. CIV. P. 8(c) .....	21
UTAH R. CIV. P. 9(b) .....	22

## INTRODUCTION

This is an appeal of the trial court's decision on cross-motions for summary judgment. Plaintiff Wolf Mountain Resorts, L.C. ("Wolf Mountain") moved for partial summary judgment, and Defendant ASC Utah, Inc. ("ASCU") filed its cross-motion. The trial court held, and the parties agreed, that: (1) the contract at issue, a Leasehold Mortgage, was unambiguous; (2) the sale of ASCU to a third party was an "event of default" under the Leasehold Mortgage's "due-on-sale clause," absent the application of an exception; and (3) the Due-On-Sale Clause states that it is to be "strictly construed."

The parties' dispute centers on the Second Exception to the Due-On-Sale Clause. That provision excludes from the "events of default"

any transfer of all or substantially all of Mortgagee's [Wolf Mountain's] rights in and to the development currently known as The Canyons (including, without limitation, all of Mortgagee's [Wolf Mountain's] interest as tenant under the Ground Lease and the Mortgaged Estate) whether effected by stock or asset sale, provided that such transfer shall be expressly subject to each and every one of the liens, rights and interests of the Mortgagee under this Leasehold Mortgage.

(Exh. B at ¶ 4.A). Wolf Mountain testified that it specifically negotiated this provision so that a sale of a controlling interest in ASCU was not an "event of default" when Wolf Mountain's rights in The Canyons were also concurrently sold, so long as such transfer was subject to all of Wolf Mountain's obligations and rights under the Leasehold Mortgage.

However, ASCU has argued that the text of the Second Exception should be altered to reflect what it asserted was the "only logical" way that the Second Exception

should have been written – i.e., to exclude from the “events of default” specific sales of ASCU’s interests, not Wolf Mountain’s.

Although it sought what was, in reality, a reformation of the Second Exception, ASCU did not meet the requirements for reformation. ASCU did not argue, let alone prove, by clear and convincing evidence, either “mutual mistake” by both parties or its own “unilateral mistake” and fraud or inequitable conduct by Wolf Mountain. In fact, ASCU did not even plead “mistake” as an affirmative defense in its Answer, let alone plead it with particularity, as required by Rule 9. Thus, under Rule 12(h), that defense is waived.

Nevertheless, the trial court held *sua sponte* that, under its new “lack of clarity” standard, the Second Exception should be reformed. (Exh. A at 16-19). In the alternative, the trial court held that “some type of equitable formation is allowed,” and that some type of “mutual mistake” must have occurred “to the extent that is necessary to accomplish this type of reformation.” (*Id.* at 20). Although the court conceded that such was “not a traditional ‘mutual mistake,’” it held that the terms of the Leasehold Mortgage showed that ASCU’s proposed reformation of the Second Exception was the writing that fit the purposes of most leasehold mortgages. (*See id.*).

However, Utah courts do not recognize a “lack of clarity” standard for reforming contracts. In fact, absent fraud, courts are extremely reluctant to intervene in a freely-negotiated, fully-executed written contract among sophisticated businesspersons and change that contract’s terms; they only do so under specific circumstances of “unilateral mistake” or “mutual mistake.” Parties seeking reformation must plead “mistake” with



particularity and prove such by clear and convincing evidence. But ASCU did not even refer to “mistake” in its summary judgment memoranda, let alone plead it in its Answer. The trial court did not identify how ASCU’s proposed reformation was agreed to by the parties, but then not memorialized in the Leasehold Mortgage. Thus, the Second Exception should not be changed to reflect what ASCU now claims to be that provision’s “true purpose.” Instead, it should be interpreted according to its plain terms, just as they were after the parties executed the Leasehold Mortgage after extensive negotiation and representation by competent legal counsel.

In addition, in deciding to reform the Leasehold Mortgage, the trial court stated that it was not reviewing extrinsic evidence; it was only considering the terms of the Leasehold Mortgage itself. However, the trial court repeatedly supported its decision to reform the Leasehold Mortgage by citing agreements, depositions, and other statements outside of the Leasehold Mortgage that ASCU had proposed – including its unsworn “declaration” – while simultaneously ignoring sworn statements and other evidence provided by Wolf Mountain. This was a failure to obey Rule 56(c)’s requirement to consider “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits” in rendering summary judgment, viewed in the light most favorable to the non-moving party. UTAH R. CIV. P. 56(c). Furthermore, extrinsic evidence must be considered in the context of reformation due to mistake, since by definition, the terms of the contract may not show what the parties actually intended.

In sum, ASCU has failed to plead or prove “mistake” – that the Second Exception did not reflect what the parties intended – and has in fact waived such defense. Thus, this

Court should hold that the trial court improperly reformed the Leasehold Mortgage, the sale of ASCU was an “event of default,” and Wolf Mountain’s motion for partial summary judgment should be granted. However, at a minimum, this Court should hold that the trial court erred in refusing to consider Wolf Mountain’s affidavit, deposition, and other evidence in determining whether “mistake” occurred warranting reformation, and thus reverse the trial court’s decision granting summary judgment to ASCU.

### **STATEMENT OF JURISDICTION**

This Court’s jurisdiction arises under Utah Code Ann. §78A-4-103 (2009).

### **ISSUES PRESENTED**

**Issue #1:** Whether the trial court erred in applying a “lack of clarity” standard for the reformation of the parties’ Leasehold Mortgage.

#### **Standard of Review.**

“[W]hether the trial court applied the proper legal standard is a question of law that is reviewed for correctness.” *Chen v. Stewart*, 2004 UT 82, ¶ 19, 100 P.3d 1177 (citing *State v. Pena*, 869 P.2d 932, 936 (Utah 1994)); *see also Colosimo v. Roman Catholic Bishop of Salt Lake City*, 2004 UT App 436, ¶ 7, 104 P.3d 646 (“The articulation of a proper legal standard is a question of law, which we review for correctness.”).

**Preservation in the Trial Court:** The standard for reformation was the subject of Wolf Mountain’s Motion for Summary Judgment (R. 254-257), and of the trial court’s decision below (*See* the trial court’s Ruling and Order dated March 26, 2010 at 16-17 and 19-20, a copy of which is attached hereto as Exhibit “A”; *see also* R. 299-321).

**Issue #2:** Whether the trial court erred in holding that a “mutual mistake” had occurred in the parties’ drafting of the Second Exception to the Leasehold Mortgage’s Due-On-Sale Clause.

**Standard of Review.** A trial court’s determination as to whether a “mutual mistake” has occurred is a “question[] of law that we will review for correctness.” *Am. Towers Owners Ass’n, Inc. v. CCI Mechanical, Inc.*, 930 P.2d 1182 (Utah 1996); *see also Klas v. Van Wagoner*, 829 P.2d 135, 138 (Utah Ct. App. 1992) (reviewing the court’s determination of “unilateral mistake” as a legal conclusion, which was “accorded no particular deference; we review them for correctness.”). In addition, “If a trial court interprets the plain language of a written contract as a matter of law, ‘we accord its construction no particular weight and review its actions under a correction-of-error standard.’ ” *Am. Interstate Mortg. Corp. v. Edwards*, 2002 UT App 16 ¶ 12, 41 P.3d 1142 (quoting *Embassy Group v. Hatch*, 865 P.2d 1366, 1369 (Utah Ct. App. 1993)).

**Preservation in the Trial Court:** This standard for reformation was the subject of Wolf Mountain’s Motion for Summary Judgment (R. 254-257), and of the trial court’s decision below (Exh. A at 16-20).

**Issue #3:** Whether the trial court erred in declining to consider extrinsic evidence provided by Wolf Mountain in rendering summary judgment against Wolf Mountain on the ground of mutual mistake.

**Standard of Review.** A trial court’s decision to exclude a certain type of evidence is reviewed for correctness, affording no deference to the trial court. *See Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc.*, 2004 UT App 322 ¶¶ 8-9, 110 P.3d 710.

Furthermore, “[i]n the context of a summary judgment motion, we likewise employ a correctness standard and ‘view the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party.’” *R.A. McKell Excavating, Inc. v. Wells Fargo Bank, N.A.*, 2004 UT 48, ¶ 7, 100 P.3d 1159 (quoting *Hermansen v. Tasulis*, 2002 UT 52, ¶ 10, 48 P.3d 235). Summary judgment shall be granted only if “there is no genuine issue as to any material fact and [if] the moving party is entitled to a judgment as a matter of law.” UTAH R. CIV. P. 56(c). In determining whether the trial court correctly found that there were no genuine issues of material fact, the Court reviews the trial court’s conclusions of law for correctness, including its conclusion that there are no material fact issues. *See Neiderhauser Bldrs. & Dev. Corp. v. Campbell*, 824 P.2d 1193, 1196 (Utah Ct. App. 1992).

Preservation in the Trial Court: The standard for reformation was the subject of Wolf Mountain’s Motion for Summary Judgment (R. 254-257). In its Ruling and Order, the trial court newly decided not to consider any extrinsic evidence (Exh. A at 20, 21).

**Issue #4**: Whether the trial court erred in reforming the Second Exception to the Due-On-Sale Clause in the parties’ Leasehold Mortgage.

Standard of Review.

This Court “review[s] a district court’s conclusions of law for correctness, affording the trial court no deference.” *Dixon Bldg., LLC v. Jefferson*, 2010 UT App 34, ¶ 7, 227 P.3d 266. This Court likewise accords no deference to the trial court regarding its “resolution of the legal issues presented[,] and [it] determines only whether the trial court erred in applying the governing law.” *Ervin v. Lowe’s Cos.*, 2005 UT App 463, ¶ 8,

128 P.3d 11 (internal quotation marks omitted). This Court also reviews a trial court's interpretation of a contract for correctness, giving no deference to the trial court. *See Sackler v. Savin*, 897 P.2d 1217, 1220 (Utah 1995). "If a trial court interprets the plain language of a written contract as a matter of law, 'we accord its construction no particular weight and review its actions under a correction-of-error standard.' " *Am. Interstate Mortg. Corp. v. Edwards*, 2002 UT App 16 ¶ 12, 41 P.3d 1142 (quoting *Embassy Group v. Hatch*, 865 P.2d 1366, 1369 (Utah Ct. App. 1993)).

Preservation in the Trial Court: This issue was the subject of Wolf Mountain's Motion (R. 254-257), and the trial court's decision below (Exh. A at 16-20).

### **DETERMINATIVE LEGAL PROVISIONS**

#### **Utah Rule of Civil Procedure 56(a)-(c):**

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

UTAH R. CIV. P. 56(a)-(c).

## STATEMENT OF THE CASE

### **A. Nature of the Case.**

Wolf Mountain leases real property located in Summit County to ASCU pursuant to a certain “Ground Lease.” The Ground Lease includes property on which The Canyons Resort is located. Among its obligations to Wolf Mountain, ASCU is required to deliver certain real property and development rights to Wolf Mountain (the “100 Unit Obligation”). To secure the 100 Unit Obligation, ASCU, as the “Mortgagee,” executed a Leasehold Mortgage in favor of Wolf Mountain, the “Mortgagor.” Paragraph 4.A of the Leasehold Mortgage provides that it is an “event of default” thereunder when a controlling ownership in ASCU is sold to a third party (the “Due-On-Sale Clause”).

A third party, Talisker Canyons Finance Co., LLC (“Talisker”), purchased a controlling interest in ASCU. Accordingly, Wolf Mountain declared a default under the Leasehold Mortgage and filed this litigation. ASCU asserts that the second-listed exception to the Due-On-Sale Clause (the “Second Exception”) applies to it, relieving it of any default under the Leasehold Mortgage. ASCU contends that it does not make sense for the Second Exception to be applied in favor of Wolf Mountain, despite the fact that the Second Exception specifically states that it refers to Wolf Mountain – not ASCU. Wolf Mountain asserts that the Second Exception was intended to mean exactly what it says, that it was intended to avoid a default if Wolf Mountain’s interest in The Canyons were sold, that it was extensively discussed and negotiated by the parties and their legal counsel, and that the parties agreed that the paragraph containing it would be strictly

construed. Both parties agree that the terms of the Leasehold Mortgage are unambiguous.

**B. Course of Proceedings.**

Following discovery, Wolf Mountain filed its Motion for Partial Summary Judgment, seeking an order declaring that (i) the Leasehold Mortgage that is the subject of this litigation is unambiguous and fully enforceable as written; and (ii) therefore, the sale of all of the outstanding stock of ASCU to Talisker constitutes an Event of Default pursuant to Paragraph 4(A). (R. 184-192). ASCU then filed its Cross-Motion for Summary Judgment. (R. 193-195). On March 22, 2010, the trial court held a hearing regarding those two motions. (Exh. A at 1).

**C. Disposition in the Trial Court.**

On March 26, 2010 the district court issued its Ruling and Order, denying Wolf Mountain's Motion for Summary Judgment and granting ASCU's Cross-Motion for Summary Judgment. (Exh. A at 21). The trial court held that the Leasehold Mortgage was an unambiguous, integrated contract. (*See id.* at 11-13). The court ordered that either under a "lack of clarity" standard or the law of reformation, the Second Exception to the Due-On-Sale Clause of the Leasehold Mortgage should be reformed to replace Wolf Mountain, the "Mortgagor," with ASCU, the "Mortgagee," on the ground that "some type of reformation" was required based on something that was "not a traditional 'mutual mistake.'" (*Id.* at 16-18) The trial court also held that the sale of ASCU to Talisker, after the Leasehold Mortgage was reformed, was no longer an "event of

default” under the Leasehold Mortgage. (*Id.* at 21). The trial court stated that it declined to consider extrinsic evidence in rendering its decision. (*See id.*)

**D. Statement of Facts.**

In 1997, pursuant to a certain “Ground Lease,” Wolf Mountain leased the real property (the “Property”) underlying what is now known as “The Canyons Ski Resort” to ASCU. (R. 218 at Exh. 5 at ¶ 4; R. 218 at Exh. 1). The Property includes both parcels that Wolf Mountain owns and parcels that Wolf Mountain leases – which Wolf Mountain then sub-leases to ASCU. (R. 218 at Exh. 5 at ¶ 4; R. 218 at Exh. 1 at § 1.02). One parcel leased by Wolf Mountain and then subleased to ASCU is a property called “Section 2,” which Wolf Mountain leased from the School Institutional Trust Lands Administration (“SITLA”) under the “SITLA Lease.” (R. 218 at Exh. 1 at § 1.02 and its Sch. A; R. 218 at Exh. 11). Under the Ground Lease, ASCU is required to pay Wolf Mountain annual rent payments of four percent (4%) of ASCU’s gross sales and lodging revenues at The Canyons Ski Resort, eleven percent (11%) of construction costs of certain development on the Property, and certain one-time payments when the Resort achieves specific numbers of paid skier visits in the year. (R. 218 at Exh. 5 at ¶ 4; R. 218 at Exh. 1 at §§ 3.01, 25.01, 25.04).

In 1999, Pursuant to a Second Amendment to the Ground Lease, ASCU became obligated to grant to Wolf Mountain fee simple title to particular land on which ASCU had obtained approval to develop one hundred (100) Hotel/Lodging Units (the “100 Unit Obligation”). (R. 218 at Exh. 5 at ¶¶ 5-6). ASCU was also obligated to secure this obligation by providing a mortgage to Wolf Mountain. (*See id.*). ASCU did not do so for



several years. (R. 218 at Exh. E at ¶¶ 7-8). After Wolf Mountain filed a Notice of Default due to this failure, on November 23, 2005, ASCU, as the “Mortgagor,” provided a certain Leasehold Mortgage to Wolf Mountain, the “Mortgagee.” (Id.; a copy of the Leasehold Mortgage is attached hereto as Exhibit “B”).

Subparagraph 4.A. of the Leasehold Mortgage states, in part:

**Any of the following shall be an event of default** (“Event of Default”):

. . . .

(iv) any sale, transfer, conveyance or assignment of all or any portion of, or any interest in, the Mortgaged Estate, or **the sale, transfer, conveyance or assignment of any controlling ownership interest in and to the Mortgagor** [ASCU] (which shall not include transfer of controlling ownership interest in the Mortgagor’s parent or shareholders).

(Exh. B at ¶ 4.A.) (emphasis added). This paragraph is referred to as the “Due-On-Sale Clause.” Subparagraph 4.A. of the Leasehold Mortgage further states: **“The terms of this Paragraph A. shall be strictly construed . . . .”** (Exh. B at ¶ 4.A.) (emphasis added).

On the date that ASCU executed the Leasehold Mortgage, American Skiing Company, Inc. (“ASC”) owned a controlling interest in ASCU. (R. 218 at Exh. E at ¶ 27). Subsequently, ASC entered into an agreement to sell to Talisker Canyons Finance Co., LLC (“Talisker”) its controlling interest in ASCU (the “Talisker Purchase”). (Id.). ASC has since closed the Talisker Purchase and no longer owns a controlling interest in ASCU. (Id.; Exh. A at 13 (“The default at issue here is whether ASCU sold its stock or assets. It did beyond dispute.”)).

Wolf Mountain asserted that the Talisker Purchase was an “event of default” under the Leasehold Mortgage. (Exh. B at ¶ 4.A.). ASCU responded by asserting that the

Talisker Purchase was not an “event of default” because it met the terms of the second listed exception in the Due-On-Sale Clause (the “Second Exception”). (*Id.*). However, the Second Exception states that the sale of a controlling interest in ASCU is not an “event of default” when Wolf Mountain’s rights in The Canyons are also concurrently sold. Specifically, that provision states that no “event of default” occurs upon:

(ii) any transfer of all or substantially all of Mortgagee’s [Wolf Mountain’s] rights in and to the development currently known as The Canyons (including, without limitation, all of Mortgagee’s [Wolf Mountain’s] interest as tenant under the Ground Lease and the Mortgaged Estate) whether effected by stock or asset sale, provided that such transfer shall be expressly subject to each and every one of the liens, rights and interests of the Mortgagee under this Leasehold Mortgage

(Exh. B at ¶ 4.A). Wolf Mountain is indisputably the “Mortgagee” in the Leasehold Mortgage. (Exh. B at 1). Thus, this provision explicitly states that the sale of a controlling interest in ASCU is not an “event of default” if it also concurrently transfers Wolf Mountain’s rights in The Canyons, as long as such transfer is subject to all of Wolf Mountain’s obligations and rights under the Leasehold Mortgage. (Exh. B at ¶ 4.A).

Wolf Mountain specifically negotiated for and received the Due-on-Sale Provision of the Leasehold Mortgage because it was critical to Wolf Mountain that ASCU be specifically obligated to provide the 100 Units, water and infrastructure to Wolf Mountain. (R. 218 at Exh. 5 at ¶¶ 16-17 and Exhs. 7-10). The Due-On-Sale Clause was particularly important to Wolf Mountain in light of the pending insolvency of ASCU’s then-parent company, ASC. (R. 218 at Exh. 5 at ¶ 17). In June 2007, American Skiing Company approved and announced a plan of dissolution and liquidation pursuant to

which the company would go out of business and liquidate all of its assets, including several ski resorts. (*See id.*).

Prior to the execution of the Leasehold Mortgage, ASCU's counsel sought to revise the terms of the Due-On-Sale Clause; however, Wolf Mountain did not agree to all of ASCU's revisions. (R. 218 at Exh. 5 at ¶¶ 14-15, 18-22 and Exhs. 7-10). Wolf Mountain rejected a change proposed by ASCU that would have broadly expanded the Second Exception. (*See id.*). Wolf Mountain's position was that it was entitled to a "due-on-sale" clause with only a limited exception wherein ASCU and Wolf Mountain entered into a joint transaction to sell both of their interests in the resort and its underlying lands to a third party. (*See id.*). Wolf Mountain's counsel testified that the Due-On-Sale Clause appeared in the executed Leasehold Mortgage as Wolf Mountain intended and the parties agreed. (R. 218 at Exh. 5 at ¶¶ 4-6)).

Nevertheless, ASCU has asserted that the term "Mortgagee" was really intended to mean "ASCU," the "Mortgagor," and that the Second Exception to the Leasehold Mortgage should be changed to state that it refers to the sale of ASCU's interests, not Wolf Mountain's. (R. 196 *et seq.*).

On March 26, 2010, the trial court denied Wolf Mountain's Motion for Partial Summary Judgment, granted ASCU's Cross-Motion for Summary Judgment, and held that the Leasehold Mortgage should be reformed according to ASCU's request on the ground of "mutual mistake," despite the fact that ASCU had never plead "mistake," had waived "mistake" as a defense, had not even argued "mistake" as a ground for reforming

the Leasehold Mortgage, and had not proven “mistake” by clear and convincing evidence.

### **SUMMARY OF THE ARGUMENT**

This Court should reverse the district court’s decision denying Wolf Mountain’s Motion for Partial Summary Judgment. The undisputed facts show that the Talisker Purchase was an “event of default,” as defined in the Leasehold Mortgage. ASCU has failed to plead, let alone prove, any “mistake” warranting reformation. The Leasehold Mortgage stands as it was written, negotiated extensively by competent counsel. The parties even agreed that the relevant provision would be “strictly construed.” Therefore, this Court should reverse the trial court’s decision and grant summary judgment on behalf of Wolf Mountain.

This Court should also reverse the trial court’s decision granting ASCU’s Cross-Motion for Summary Judgment and reforming the Leasehold Mortgage. The trial court erred in applying a “lack of clarity” standard for reformation. None such exists. The trial court alternatively held, *sua sponte*, that “mutual mistake” had occurred “to the extent it was necessary” to meet the prerequisites for reformation; but ASCU did not plead “mistake” as a defense, and therefore waived it, and did not even argue “mutual mistake,” let alone prove it by “clear and convincing evidence.”

The trial court held that the Leasehold Mortgage was integrated and unambiguous – which no party disputes. However, the trial court also held that as a result, it need not consider extrinsic evidence; it could determine whether reformation was proper by examining only the terms of the Leasehold Mortgage. However, despite that statement,

the trial court considered several items of extrinsic evidence and adopted ASCU's unsworn interpretation regarding them. Such was improper on summary judgment, and particularly where the trial court was attempting to determine whether the parties' actual intent was memorialized in the written agreement.

### **ARGUMENT**

#### **I. UNDER THE PLAIN TERMS OF THE LEASEHOLD MORTGAGE, THE TALISKER PURCHASE WAS AN UNEXCUSED EVENT OF DEFAULT.**

As the trial court held, and ASCU has not appealed, the Talisker Purchase of ASCU was an "event of default" under the Due-On-Sale Clause of the Leasehold Mortgage unless ASCU meets an exception under Paragraph 4.A of that agreement:

The default at issue here is whether ASCU sold its stock or assets. It did beyond dispute. **That is an event of default, unless one of the exceptions applies.**

(Exh. A at 13) (emphasis added).

In addition, there is no dispute that ASCU did not meet the first exception to the Due-On-Sale Clause. (Exh. B at ¶ 4.A(iv)(i)). Furthermore, ASCU does not meet the plain terms of the Second Exception to the Due-On-Sale Clause because the Talisker Sale did not "transfer all or substantially all of Wolf Mountain's rights in and to the development currently known as The Canyons." (Exh. B at ¶ 4.A(iv)(ii)).

Furthermore, the Due-On-Sale Clause specifically states that "[t]he terms of this Paragraph A. shall be strictly construed." (Exh. B at ¶ 4.A). This raises the level of proof that ASCU is required to provide even higher. There is no evidence that the parties did not fully and fairly negotiate this provision.

Therefore, *unless ASCU has pleaded and proven by clear and convincing evidence* that a “mutual mistake” occurred requiring that the Second Exception be reformed, this Court should “strictly construe” the Due-On-Sale Clause and hold that the Talisker Purchase is an unexcused “event of default” under the Leasehold Mortgage and reverse the trial court’s decision denying Wolf Mountain’s motion for summary judgment.

## **II. THE TRIAL COURT ERRED IN APPLYING A “LACK OF CLARITY” STANDARD FOR REFORMATION.**

The trial court ruled that, using its equitable powers, it could change the terms of the Leasehold Mortgage under a “lack of clarity” standard. The court stated:

**The court does not believe that it is indeed involved in a reformation as that concept is normally meant.** The court finds and concludes, FROM THE ENTIRETY OF THE CONTRACT ON ITS FACE, that such was intended and **the error . . . was the product of confusion or a scrivener’s error.**

**Whether this error is couched in terms of mistake and reformation or *simply couched in terms of clarity* of the contract with a minor typographical error the result is the same to the court.**

Where the contract as written expresses an unintended meaning or creates an un contemplated right, **equity provides that it can be made to conform to the parties [sic] intent . . . .**

**. . . . The court recognizes that perhaps this is a type of reformation, as ASCU argued, but it is in equity *simply stating the contract as the document itself clearly intended.***

**. . . .**

***Some type of equitable reformation is thus allowed and required.***

**. . . .**

**[T]here is no ambiguity on the face of the document except as created by a scrivener’s error, and it *created not ambiguity but lack of clarity* . . . .**

(Exh. A at 16-17, 19-20) (allcaps emphasis in original, bold and italics emphasis added).

Trial courts certainly have equitable powers. However, even under such powers, courts cannot change the terms of a contract simply because they believe the contract “lacks clarity.” (*Id.*). As the Utah Supreme Court held in *Briggs v. Liddell*:

**[A] court’s equitable powers are narrowly bounded. “A court does not have carte blanche to reform any transaction to include terms that it believes are fair.”**

*Briggs v. Liddell*, 699 P.2d 770, 772 (Utah 1985) (emphasis added) (quoting *Cunningham v. Cunningham*, 690 P.2d 549, 552 (Utah 1984)). In addition, “[a]lthough a court, sitting in equity, exercises discretion in granting or denying relief, it does not have the authority to ignore existing principles of law in favor of its view of the equities.” *Warner v. Sirstins*, 838 P.2d 666, 670 (Utah Ct. App. 1992) (citations omitted).

In fact, there are only two narrow circumstances under which a court may reform the terms of a written contract:

**First**, if the instrument does not embody the intentions of both parties to the contract, a mutual mistake has occurred, and reformation is appropriate. **Second**, if one party is laboring under a mistake about a contract term and that mistake either has been induced by the other party or is known by and conceded to by the other party, then the inequitable nature of the other party’s conduct will have the same operable effect as a mistake, and reformation is permissible.

*Briggs*, 699 P.2d at 772 (citing *Thompson v. Smith*, 620 P.2d 520, 523 (Utah 1980)); see also *Guardian State Bank v. Stangl*, 778 P.2d 1, 5-6 (Utah 1989); *Cunningham*, 690 P.2d at 552 (“Reformation may be appropriate where both parties were mistaken as to a term of the contract, or where one party is mistaken and the other party is guilty of inequitable conduct, but it is not available to rewrite a contract to include terms never contemplated by the parties.”); *Bown v. Loveland*, 678 P.2d 292, 295 (Utah 1984) (“the plaintiff must

show mutual mistake of the parties or mistake on the part of one and fraud or inequitable conduct on the part of the other, as a result of which the instrument reflects something neither party had intended or agreed to.”); *Ashworth v. Charlesworth*, 231 P.2d 724, 727 (Utah 1951) (same).

Furthermore, “because courts are reluctant to change contractual obligations and rights . . . , the party seeking reformation must establish the mistake **by clear and convincing proof** that ‘clinches what might otherwise be only probable to the mind.’” *Briggs*, 699 P.2d at 772 (quoting *Greener v. Greener*, 212 P.2d 194, 204 (Utah 1949) (citing *Bown*, 678 P.2d at 295) (emphasis added).

Therefore, this Court should hold that the trial court erred to the extent it applied a “lack of clarity” standard for reforming the Leasehold Mortgage.

### **III. THE TRIAL COURT IMPROPERLY REFORMED THE LEASEHOLD MORTGAGE.**

In addition, the trial court erred because it reformed the Leasehold Mortgage without meeting either of the above two circumstances where reformation is permitted.

#### **A. The Trial Court Correctly Ruled that Unilateral Mistake Did Not Occur.**

First, the trial court plainly rejected the notion that a “unilateral mistake” had occurred in this case sufficient to warrant reformation. The Court held:

This is not a unilateral mistake situation. Even if it is viewed as such, Wolf did not engage in fraud nor remain silent after knowing of ASCU’s “mistake.”

(Exh. A at 19).



Likewise, ASCU has presented no evidence, nor has it even argued, that it had been mistaken as to the terms of the Leasehold Mortgage due to Wolf Mountain's fraud or with Wolf Mountain's silent knowledge. Accordingly, the only method by which the trial court could have reformed the Contract is by determining that the Contract as executed constituted a "mutual mistake" by both parties.

**B. ASCU Failed to Plead Mistake, Let Alone "With Particularity."**

However, in its Answer to the Complaint in this case, ASCU failed to plead "mutual mistake," or even "mistake," as an affirmative defense. (*See* R. 138-144). Under Rule 12(b)(5): "Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, *shall* be asserted in the responsive pleading thereto if one is required." UTAH R. CIV. P. 12(b)(5) (emphasis added). In addition, under Rule 8(c): "In pleading to a preceding pleading, a party *shall set forth* affirmatively . . . any other matter constituting an avoidance or affirmative defense." UTAH R. CIV. P. 8(c). Thus, pursuant to Utah Rule of Civil Procedure 12(h), ASCU has waived "mistake" as an affirmative defense. *See* UTAH R. CIV. P. 12(h) ("A party waives all defenses and objections not presented either by motion or by answer or reply . . . .") (noting inapplicable exceptions); *Mack v. Utah Dept. of Commerce*, 2009 UT 47, ¶ 14, 221 P.3d 194 ("Normally, a party waives all defenses not raised in a responsive pleading, such as an answer or reply."). Under such circumstances, this Court "does not address" claims of mistake. *The Cantamar*, 2006 UT App at ¶ 38 n.8 (noting that Rule 12(h) "deem[s] as waived almost all "defenses ... not presented either by motion or by answer or reply").

Moreover, Rule 9(b) states:

(b) *Fraud, mistake, condition of the mind.* In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

UTAH R. CIV. P. 9(b). The Supreme Court has mandated that parties follow this “plead with particularity” rule when they seek to prove reformation due to mistake. *See Briggs*, 699 P.2d at 772 (“[B]ecause courts are reluctant to change contractual obligations and rights, the party seeking reformation must plead the circumstances constituting the mistake with particularity.”); *Mabey v. Kay Peterson Const. Co.*, 682 P.2d 287, 289 (Utah 1984) (“Rule 9(b) requires that in all averments of mistake, the circumstances constituting mistake shall be stated with particularity.”).

ASCU did not plead “mistake” at all, let alone with particularity. Thus, ASCU has waived any defense of a “mistake” to Wolf Mountain’s claim for breach of the Leasehold Mortgage.

**C. ASCU Failed to Prove Mutual Mistake, Let Alone by Clear and Convincing Evidence.**

In addition, as set forth above, “because courts are reluctant to change contractual obligations and rights . . . , the party seeking reformation must establish the mistake **by clear and convincing proof** that ‘clinches what might otherwise be only probable to the mind.’” *Briggs*, 699 P.2d at 772.

However, in its memoranda regarding the parties’ cross-motions for summary judgment, ASCU did not even argue that a “mutual mistake” had occurred, permitting reformation. (*See* R. 196-216, 272-294); *see also Juricic v. Autozone, Inc.*, 2010 UT App

109, ¶ 5 n.1, 232 P.3d 1088 (holding that affirmative defenses not raised before the trial court are waived on appeal). Therefore, ASCU plainly failed to prove “mutual mistake” by clear and convincing evidence. It did not even attempt to do so.

**D. The Trial Court Erred in *Sua Sponte* Holding that Mutual Mistake Had Occurred.**

Notwithstanding ASCU’s failure to plead “mistake,” its waiver of the right to do so, and its failure to even argue such in its summary judgment memoranda, in the trial court’s Ruling and Order, the court declared *sua sponte* that, “to the extent that [it] is necessary to accomplish this type of reformation,” it could hold that a form of “mutual mistake” had occurred in this case:

**The court concludes that there was not unilateral mistake here, but a mutual mistake, to the extent that is necessary to accomplish this type of reformation. The mistake was in not drafting in later drafts that “ee” was used rather than “or,” that is, mortgagee rather than mortgagor. The fundamental agreement of the parties shows clearly their intent. This is not a traditional “mutual mistake” case but is what the court in *Stangl III* calls “a mistake in recordation or memorialization of an agreement....”**

(Exh. A at 18 (emphasis added)).

**1. *Stangl* Did Not Create a New Form of “Mutual Mistake.”**

However, the Supreme Court in *Stangl* did not create a new form of “non-traditional mutual mistake” based upon “mistakes in recordation or memorialization of an agreement.” Instead, the Court there held:

A few of our own opinions may have contributed to some misunderstanding of the law of mistake by stating without qualification that the law affords relief only for a mutual mistake. Indeed, this Court has, on occasion, declared that a unilateral mistake provides no basis for relief.

*Stangl*, 778 P.2d at 5. The Court went on to hold that unilateral mistake can be the basis for reformation when “the claiming party was mistaken as to its actual content and the other party, knowing of this mistake, kept silent [or] the claiming party was mistaken as to actual content because of fraudulent affirmative behavior.” *Id.* at 6.

As the trial court held in this case, however,

This is not a unilateral mistake situation. Even if it is viewed as such, Wolf did not engage in fraud nor remain silent after knowing of ASCU’s “mistake.”

(Exh. A at 19). Moreover, both before and after *Stangl*, the Supreme Court and this Court have reiterated the same standard for finding a mutual mistake: “A mutual mistake occurs when both parties, at the time of contracting, share a misconception about a basic assumption or vital fact upon which they based their bargain.” *England v. Horbach*, 944 P.2d 340, 343 (Utah 1997); *The Cantamar, L.L.C. v. Champagne*, 2006 UT App 321, ¶ 38, 142 P.3d 140; *Warner v. Sirstins*, 838 P.2d 666, 669 (Utah Ct. App. 1992); *Robert Langston, Ltd. v. McQuarrie*, 741 P.2d 554, 557 (Utah Ct. App. 1987).<sup>1</sup>

Ultimately, to reform an agreement based upon “mutual mistake,” a party “must prove that the minds of both parties had been in agreement on a term which they mutually

---

<sup>1</sup> Similarly, the Restatement of Contracts allows reformation by mutual mistake only where a party proves the identical intentions by both parties:

[w]here both parties have an identical intention as to the terms to be embodied in a proposed written...contract...and a writing executed by them is materially at variance with that intention, either party can get a decree that the writing shall be reformed so that it shall express the intention of the parties, if innocent third persons will not be unfairly affected thereby.

failed to incorporate into writing.” *The Cantamar*, 2006 UT App at ¶ 38 n.9 (quoting *Warner*, 838 P.2d at 669) (citations and quotation marks omitted).

Since ASCU did not argue that mutual mistake occurred at all, the trial court sought to do so on its own, based on evidence that ASCU had presented. *Crucially*, however, neither the trial court nor ASCU proved, by clear and convincing evidence, that Wolf Mountain’s “mind . . . had been in agreement” with ASCU that the Second Exception should refer to a sale of ASCU’s interests in The Canyons, not Wolf Mountain’s. Instead, ASCU presented a single, unsworn declaration stating its contention as to what it believed was the true intention of the parties in drafting the Second Exception, in opposition to Wolf Mountain’s affidavits and evidence. (R. 196 at Exh. C; R. 218 at Exhs. 1-12). Notably, this was not an “affidavit” that the trial court was entitled to consider under Rule 56(c). *See* Utah R. Civ. P. 56(c) (holding that in determining summary judgment, the trial court examines sworn testimony, such as “the affidavits, if any,” with no reference to declarations).

The trial court’s decision was particularly erroneous considering its acknowledgement that the Due-on-Sale Clause and its Second Exception, which received repeated and particularized attention by capable legal counsel, was a “negotiated result.” (Exh. A at 14). Both the parties and their attorneys had ample opportunity to review, reconsider, and revise the Second Exception before executing the Leasehold Mortgage.

**2. The Trial Court Misapplied Summary Judgment Standards by Excluding Extrinsic Evidence Submitted by Wolf Mountain Evidence that Raised Genuine Issues of Material Fact.**

In addition, reformation due to mutual mistake “is **not available to rewrite a contract to include terms never contemplated by the parties.**” *Cunningham v. Cunningham*, 690 P.2d 549, 552 (Utah 1984) (emphasis added). Furthermore, “[a]lthough a court, sitting in equity, exercises discretion in granting or denying relief, it does not have the authority to ignore existing principles of law in favor of its view of the equities.” *Warner v. Sirstins*, 838 P.2d 666, 670 (Utah Ct. App. 1992) (citations omitted).

In this case, the trial court examined several provisions of the Leasehold Mortgage and held that “the NATURE and PURPOSE of the document itself shows the true intent of the parties, despite the mistaken language.” (Exh. A at 14 (emphasis in original)). In rendering its decision, however, the court excluded Wolf Mountain’s affidavit evidence that raised genuine issues of material fact as to the meaning of the Due-On-Sale Clause and its Second Exception. (Exh. A at 20-21). Having excluded Wolf Mountain’s evidence, it became a simple matter for the court to conclude that Wolf Mountain “has not demonstrated that there are specific facts showing that there is a genuine issue for trial.” (Exh. A at 21). This was improper.

Pursuant to Rule 56(c):

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered **if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact** and that the moving party is entitled to a judgment as a matter of law. . . .

UTAH R. CIV. P. 56(c) (emphasis added). A genuine issue of fact exists where, on the basis of the facts in the record, reasonable minds could differ on whether a party's conduct meets the required standard. *See Jackson v. Dabney*, 645 P.2d 613,615 (Utah 1982). One sworn statement is sufficient to dispute averments on the other side of controversy and create an issue of fact, thus precluding summary judgment. *See Holbrook Co. v. Adams*, 542 P.2d 191, 193 (Utah 1975).

In addition, the Utah Supreme Court has specifically held that where a party seeks to reform a written contract on the ground of mutual mistake, parol evidence should be considered to determine what the parties truly intended:

**It is practically a universal rule that in suits to reform written instruments on the ground of fraud or mutual mistake, parol evidence is admissible to establish the fact of fraud or of a mistake and in what it consisted, and to show how the writing should be corrected in order to conform to the agreement or intention which the parties actually made or had, and this, even though the instrument in question is within the statute of frauds.**

*Janke v. Beckstead*, 332 P.2d 933, 934 (Utah 1950) (quoting 45 Am. Jur. Reformation of Instruments § 113 (emphasis added)). Thus, both this Court and the Supreme Court have repeated the rule that, in determining whether a “mutual mistake” occurred, “[p]arol evidence is admissible to show the writing did not conform to the intent of the parties.” *Warner*, 838 P.2d at 669 (citing *Jensen v. Manila Corp. of the Church of Jesus Christ of Latter-Day Saints*, 565 P.2d 63, 64 (Utah 1977)).

In this case, there is no dispute that in opposition to ASCU's cross-motion for summary judgment, Wolf Mountain submitted the sworn affidavit of Bradley Rauch, Wolf Mountain's legal counsel who negotiated the Leasehold Mortgage. (R. 218 at Exh.

5). In addition, there is no dispute that Wolf Mountain also submitted, and Mr. Rauch's Affidavit testified regarding, the parties' Ground Lease Agreement, the parties' Second Amendment to Ground Lease Agreement, the parties' "SPA Agreement," Mr. Rauch's September 29, 2005 letter to ASCU, Mr. Rauch's November 17, 2005 email to ASCU, various drafts of the Leasehold Mortgage, the parties' Reconveyance Agreement, Wolf Mountain's SITLA Lease, and the transcript of Mr. Rauch's July 25, 2009 deposition. (R. 218 at Exhs. 1-4, 6-12).

However, in rendering its decision, the trial court stated that it did not consider any of the evidence that the parties presented outside of the Leasehold Mortgage itself:

While the court has noted the concepts of mutual and unilateral mistake, the court has not based those comments on the extrinsic evidence provided by the parties in the form of their later declarations and affidavits, nor on the deposition testimony of Wolf's witness. . . .

. . . .

The court has not considered the extrinsic evidence offered by each party but has relied on the Leasehold Mortgage itself.

(Exh. A at 20, 21). Under the "universal rule" identified in *Janke* and reiterated since, this was improper. In addition, this statement plainly makes the trial court's conclusion that Wolf Mountain "has not demonstrated that there are specific facts showing that there is a genuine issue for trial" ring hollow. (Exh. A at 21).

If this Court holds that ASCU failed to plead and/or prove "mutual mistake" by clear and convincing evidence, this Court need not address this argument. The Leasehold Mortgage remains unmarred, and should be enforced precisely as the parties wrote it. However, if this Court does not so determine, then it should remand this case to the trial court for consideration of the parties' extrinsic evidence regarding the meaning of the



Due-On-Sale Clause and its Second Exception.

**3. The Trial Court Particularly Erred in Declining to Consider Wolf Mountain's Extrinsic Evidence While Adopting ASCU's Extrinsic Evidence.**

Furthermore, although the trial court asserted that it was only considering the Leasehold Mortgage itself – not the extrinsic evidence provided by either party – the court in reality rendered its decision based largely on extrinsic evidence, including *evidence provided solely by ASCU*. The trial court did so despite the fact that the only sworn statement that ASCU cited in support of its cross-motion for summary judgment was the deposition testimony of Wolf Mountain's counsel. In addition, the trial court did so despite the fact that ASCU's evidence was contradicted by Mr. Rauch's affidavit and other extrinsic evidence that Wolf Mountain submitted.

*a. Wolf Mountain Disputed ASCU's Assertion of Wolf Mountain's Status as a Tenant Under Part of the Ground Lease.*

For example, the trial court identified several Leasehold Mortgage provisions that it held only make sense if the Leasehold Mortgage were reformed.

First, the Second Exception to the Due-On-Sale Clause states that it is not an "event of default" upon:

(ii) any transfer of all or substantially all of Mortgagee's rights in and to the development currently known as The Canyons (including, without limitation, all of Mortgagee's interest as tenant under the Ground Lease and the Mortgaged Estate) whether effected by stock or asset sale, provided that such transfer shall be expressly subject to each and every one of the liens, rights and interests of the Mortgagee under this Leasehold Mortgage

(Exh. B at ¶ 4.A). Regarding this provision, ASCU asserted that the term “Mortgagee” was really intended to mean “ASCU,” the Morgagor, because ASCU was the only person referred to under the Ground Lease as a “tenant.” (R. 209-210).

Following ASCU’s direction, the trial court held:

[I]t is clear from that entire exception that the assets are defined as belonging to mortgagor, ASCU. Further the transfer discusses the mortgagee as the tenant under the Ground Lease. While Wolf argues it maintains the status as tenant under some provisions of various documents, **it is clear that Wolf is not the tenant under the Ground Lease but ASCU is the tenant under the Ground Lease.**

(Ex. A at 16 (emphasis added)). Thus, in its Ruling and Order, the trial court admitted that in rendering the decision, it had examined the Ground Lease (and/or ASCU’s extrinsic evidence regarding such) and determined that Wolf Mountain was not a “tenant” under the Ground Lease. (*See id.*). However, the Ground Lease is plainly “extrinsic” to the Leasehold Mortgage. Thus, the trial court was incorrect when it stated, in its Ruling: “The court has not considered the extrinsic evidence offered by each party but has relied on the Leasehold Mortgage itself.” (Exh. A at 21).

In addition, Wolf Mountain disputed this assertion by ASCU via citations to the Ground Lease and ASCU’s own admissions. First, Wolf Mountain pointed out ASCU’s admission in its statement of facts that: “One of the tracts of land governed by the Ground Lease was the so-called “Section 2,” which Wolf Mountain leased from the State of Utah through its School and Institutional Trust Lands Administration (the ‘SITLA

Lease’).” (R. 198). Thus, ASCU admitted that in the Ground Lease, Wolf Mountain was designated as a “tenant” as to the SITLA Lease. (*Id.*).

Furthermore, in response to ASCU’s Statement of Facts, Wolf Mountain stated:

**Response to ASCU’s ¶1:** Disputed that Wolf Mountain was not a “tenant” of certain real property included in the Ground Lease. As set forth in §1.02 and Exhibit A to the Ground Lease, Wolf Mountain acted as “tenant” regarding certain real property defined as the “Leased Land,” which it subleased to ASCU. (*See* Ground Lease Agreement dated July 3, 1997 at S1.02 and Exh. A).

(R. 221). This evidence further demonstrates that, at a minimum, there is a genuine issue of material fact as to whether Wolf Mountain is a tenant under the Ground Lease for purposes of the description in the Second Exception to the Due-On-Sale Clause in the Leasehold Mortgage.

b. *Wolf Mountain Disputed ASCU’s Assertion Regarding The Meaning of the “Mortgaged Estate.”*

Furthermore, in rendering its Ruling and Order, the trial court, adopting ASCU’s argument, held:

In addition, Wolf has no interest in the Mortgaged Estate as that term is defined in the Leasehold Mortgage. “Mortgaged Estate” means ASCU’s interest in the SITLA lease. **Wolf’s counsel in deposition** admitted that was the reasonable meaning of “Mortgaged Estate.”

(Exh. A at 15 (emphasis added)).

However, the trial court’s own statement concedes that it considered extrinsic evidence – i.e., a portion of the deposition of Wolf Mountain’s counsel. (*See id.*). On summary judgment, the trial court cannot pick and choose which extrinsic evidence it will consider.

Moreover, the trial court's above finding was disputed by facts both admitted by ASCU and further presented by Wolf Mountain. In its statement of facts, ASCU acknowledged that "Mortgaged Estate," as defined in the Leasehold Mortgage, is the land subject to the SITLA Lease – not "ASCU's interest in the SITLA lease." (R. 202). In addition, Wolf Mountain presented evidence that it owns the majority of the land surrounding the SITLA Lease. (R. 218 at Exh. 5 at ¶ 4 and Exh. 1).

Furthermore, Wolf Mountain provided significant evidence that the Second Exception provides protection for Wolf Mountain because it owns "rights in and to the development currently known as The Canyons." (Exh. B at ¶ 4.A). Such rights include the right to receive four percent of the gross sales and lodging revenues earned by The Canyons, eleven percent (11%) of the construction costs of land developed at The Canyons, and additional lump-sum payments based on The Canyons' achievement of certain levels of paid skier visits. (R. 218 at Exh. 5 at ¶4; R. 218 at Exh. 1 at §§ 3.01, 25.01, 25.04).

In reality, it cannot seriously be argued that Wolf Mountain has "no interest in the Mortgaged Estate." Wolf Mountain insisted on the Leasehold Mortgage because it had such an interest. At a minimum, the evidence admitted or submitted by both parties, especially when viewed in a light most favorable to Wolf Mountain, raises genuine issues of material fact as to whether Wolf Mountain has an interest in the Mortgaged Estate.

c. *Wolf Mountain Disputed ASCU's Assertion Regarding Wolf Mountain's Ownership of "Stock."*

Next, the trial court, adopting ASCU's argument, held that Wolf Mountain had no "stock," and thus could not have been entitled to benefits under the Second Exception. The trial court wrote: "As a limited liability [Wolf Mountain] owns no stock of course" (Exh. A at 14) and later, "Wolf as a limited liability of course has no stock..." (*id.* at 15). However, this finding is directly disputed in Mr. Rauch's affidavit, in which Mr. Rauch stated not only that this provision was intended to protect Wolf Mountain, but also that: "Membership interests in a limited liability company such as Wolf Mountain are commonly referred to as 'capital stock' or 'stock.'" (R. 218 at Exh. 5 at ¶ 2). The trial court ignored this evidence. When viewed in a light most favorable to Wolf Mountain, there is at least a genuine issue of material fact as to whether the beneficiary in the Second Exception is truly Wolf Mountain, just as the parties explicitly agreed.

d. *Wolf Mountain Disputed ASCU's Assertion Regarding Wolf Mountain's Interests Under the Talisker Sale Agreement.*

Finally, the district court opined that its ruling was equitable because "the transfer [of ASCU assets to Talisker] was expressly subject to each and all of the rights and interests of Wolf under the Leasehold Mortgage." (Exh. A at 20-21). In reaching this decision, the trial court examined not just the terms of the Leasehold Mortgage, but also the Talisker Sale Agreement. (*See id.*). Thus, once again, the trial court selectively examined extrinsic evidence to support its determinations but ignored the opposing evidence submitted by Wolf Mountain. For example, in its disputed facts, Wolf Mountain states:

Section 9.16 of the Talisker Sale Agreement contains only the buyers' acknowledgement of such obligations and does not comply with the first exception to the Due-on-Sale clause which permits a sale to a third party if the obligations are taken on and provide a mechanism for Wolf Mountain's enforcement of such liens, rights, and interests.

(R. 239-240). Specifically, Section 9.16 of the Talisker Sale Agreement states:

9.16. Leasehold Mortgage. The Buyers acknowledge that pursuant to that certain Leasehold Mortgage by and between [ASCU], as mortgagor, and Wolf, as mortgagee, dated as of November 23, 2005 (the "Leasehold Mortgage"), the transfer of title to Buyer is subject to each and every one of the liens, rights and interests of Wolf under the Leasehold Mortgage and each and every one of the liens, rights and interests of Wolf under the Leasehold Mortgage shall survive Closing.

(R. 196 at Exh. E at § 9.16.) Thus, Wolf Mountain presented evidence that Talisker's mere acknowledgement of the Leasehold Mortgage places Wolf Mountain in a weaker position than it was in with ASCU and denies Wolf Mountain the benefit of its bargain. When viewed in a light most favorable to Wolf Mountain, genuine issues of material facts exist as to whether Wolf Mountain's interests are adequately protected.

**4. The Second Exception Does Not Give Wolf Mountain a "Unilateral Right to Terminate" the Leasehold Mortgage.**

The trial court seemed most troubled by ASCU's argument that if the Second Exception were interpreted on its plain terms as executed by the parties, such

would allow Wolf to default in some fashion, then foreclose the mortgage as the defaulting party or accelerate the benefits due to Wolf from ASCU under the mortgage. That is an absurdity and grants Wolf the right to absolutely and arbitrarily terminate the contract. That is a construction that is to be avoided under Utah law.

(Exh. A at 14). However, the trial court's review of the Due-On-Sale Clause was erroneous, viewing a part of the Second Exception while forgetting the main portion of

the Due-On-Sale Clause itself. That Clause does not provide that Wolf Mountain could cause sell its interests and then cause ASCU to default. Instead, the fourth provision of the Clause (the only provision at issue) states:

**Any of the following shall be an event of default (“Event of Default”): . .**

(iv) any sale, transfer, conveyance or assignment of all or any portion of, or any interest in, the Mortgaged Estate, or **the sale, transfer, conveyance or assignment of any controlling ownership interest in and to the Mortgagor [ASCU]** (which shall not include transfer of controlling ownership interest in the Mortgagor’s parent or shareholders).

(Exh. B at ¶ 4.A.) (emphasis added). The Second Exception (the only exception at issue) then states that the foregoing is not an event of default when it is Wolf Mountain’s interest in The Canyons or the Mortgaged Estate that is transferred:

(ii) any transfer of all or substantially all of Mortgagee’s [Wolf Mountain’s] rights in and to the development currently known as The Canyons (including, without limitation, all of Mortgagee’s interest as tenant under the Ground Lease and the Mortgaged Estate) whether effected by stock or asset sale, provided that such transfer shall be expressly subject to each and every one of the liens, rights and interests of the Mortgagee under this Leasehold Mortgage.

(*Id.*). Thus, default will be triggered by the sale of either (1) any interest in the Mortgaged Estate or (2) a controlling interest in ASCU, *unless* such involves the transfer of *all* of Wolf Mountain’s rights in The Canyons. Even if, hypothetically, Wolf Mountain’s interest in the Mortgaged Estate were sold, the Second Exception makes such not a default. However, *the only trigger at issue in this case is the sale of ASCU*. ASCU cannot evade the plain terms of the Due-On-Sale Clause by speculative stretches of what might happen in hypothetical circumstances.

Moreover, as set forth above, even if the Due-On-Sale Clause appeared odd or unfair – which it should not – such is *never* the basis for reformation. *See Briggs*, 699 P.2d at 772 (“A court does not have carte blanche to reform any transaction to include terms that it believes are fair.”) (quoting *Cunningham*, 690 P.2d at 552); *Warner*, 838 P.2d at 670 (“Although a court, sitting in equity, exercises discretion in granting or denying relief, it *does not have the authority* to ignore existing principles of law in favor of its view of the equities.”) (citations omitted, emphasis added).

**E. The Trial Court Erred in Failing to Strictly Construe the Due-On-Sale Clause.**

In addition, throughout its activities in examining the Leasehold Mortgage, the trial court failed to adhere to the terms of the Due-On-Sale Clause itself. Near its conclusion, that Clause specifically states that “[t]he **terms of this Paragraph A. shall be strictly construed.**” (Exh. B at ¶ 4.A) (emphasis added). There is no evidence that the parties did not fully and fairly negotiate this provision, nor were they unsophisticated or unrepresented parties. This provision put all parties on notice that they should carefully review and construe that Paragraph. This is the exact Paragraph that Wolf Mountain seeks to enforce, but the trial court nevertheless chose to reform to state something entirely different than the wording as the parties executed it. A strict construction does not permit the “reformed” construction adopted by the trial court, particularly in light of the trial court’s holding that the Leasehold Mortgage was unambiguous. (*See* Exh. A at 12).



Particularly in light of the trial court's assertion that it was "examin[ing] the entire document" and construing it "on its face," (Exh. A at 11, 12), the trial court's failure to strictly construe the very Due-On-Sale Clause that demands such construction was reversible error.

In summary, the trial court reformed the Second Exception without adhering to the law of reformation, finding neither "unilateral mistake" nor "mutual mistake." ASCU did not even plead "mistake" in its Answer, let alone with particularity, and certainly did not prove such by "clear and convincing evidence." Instead of strictly construing the Due-On-Sale Clause, as that Clause requires, to mean exactly what it says, the trial court went out of its way to adopt extrinsic evidence in favor of ASCU and ignore affidavits and other evidence presented by Wolf Mountain. By reforming the Second Exception, the trial court overstepped its equitable bounds and vitiated the Due-on-Sale clause by redefining what constituted an Event of Default. In short, the trial court's change denied Wolf Mountain the benefit of its bargain with ASCU.

Therefore, this Court should reverse the trial court's decision granting summary judgment in favor of ASCU and dismissing Wolf Mountain's Complaint.

**IV. IN THE ALTERNATIVE, IF THIS COURT DETERMINES *SUA SPONTE* THAT THE LEASEHOLD MORTGAGE IS AMBIGUOUS, THEN THIS CASE SHOULD BE REMANDED TO THE TRIAL COURT TO REVIEW THE PARTIES' EXTRINSIC EVIDENCE.**

As set forth above, in its Ruling and Order, the trial court held that the Leasehold Mortgage was not ambiguous. (Exh. A at 12). Both parties have agreed that the Leasehold Mortgage is unambiguous. (R. 184-188, 291-292). Wolf Mountain has not

appealed the trial court's ruling that the Leasehold Mortgage is unambiguous because it believes that it truly is so – the trial court simply reformed it by an incorrect legal standard and improper selective review of extrinsic evidence. (R. 184-188). In addition, ASCU has asserted that the Leasehold Mortgage is unambiguous and has not filed a cross-appeal in this case. (R. 291-292). Therefore, the trial court's holding that the Leasehold Mortgage is unambiguous is not at issue in this appeal.

However, in the alternative, if this Court determines *sua sponte* that the Leasehold Mortgage is ambiguous, then this Court should remand this case to the trial court for consideration of all of the extrinsic evidence presented by the parties, including the sworn affidavit of Bradley Rauch, Wolf Mountain's legal counsel who negotiated the Leasehold Mortgage.

### **CONCLUSION**

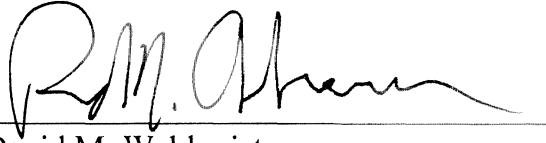
For the foregoing reasons, this Court should reverse the trial court's decision denying Wolf Mountain's Motion for Summary Judgment and ASCU's Cross-Motion for Summary Judgment and hold that (1) the trial court improperly reformed the Leasehold Mortgage and (2) the Talisker Purchase constituted an "event of default" under the Leasehold Mortgage. In the alternative, Wolf Mountain requests that this Court reverse the trial court's decision granting summary judgment in favor of ASCU and remand this case to the trial court to consider the parties' extrinsic evidence regarding the meaning of the Leasehold Mortgage's Due-On-Sale Clause, including its Second Exception.

**REQUEST FOR ORAL ARGUMENT**

Wolf Mountain hereby requests oral argument regarding this Appeal because it will materially assist this Court in resolving the issues in this case.

DATED this 26th day of August, 2010.

KIRTON & McCONKIE

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

David M. Wahlquist

Rod N. Andreason

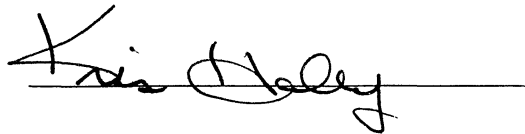
Ryan B. Frazier

*Attorneys for Appellant/Plaintiff Wolf Mountain  
Resorts, L.C.*

### CERTIFICATE OF SERVICE

I hereby certify that on the 26<sup>th</sup> day of August, 2010, I mailed a true and correct copy of the foregoing **BRIEF OF APPELLANT**, to the following persons in the following manner:

<input type="checkbox"/>	FEDERAL	John R. Lund
<input type="checkbox"/>	EXPRESS	Kara L. Pettit
<input checked="" type="checkbox"/>	U.S. MAIL	Snow, Christensen & Martineau
<input type="checkbox"/>	HAND DELIVERY	10 Exchange Place, Eleventh Floor
<input type="checkbox"/>	FAX	P.O. Box 45000
<input checked="" type="checkbox"/>	E-MAIL	Salt Lake City, Utah 84145-5000
		Telephone: 801-521-9000
<input type="checkbox"/>	FEDERAL	John P. Ashton
<input type="checkbox"/>	EXPRESS	Clark K. Taylor
<input checked="" type="checkbox"/>	U.S. MAIL	VanCott, Bagley, Cornwall & McCarthy
<input type="checkbox"/>	HAND DELIVERY	36 South State Street, Suite 1900
<input type="checkbox"/>	FAX	P.O. Box 45340
<input checked="" type="checkbox"/>	E-MAIL	Salt Lake City, Utah 84145-0340
		Telephone: 801-532-3333



# EXHIBIT A

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

<p>WOLF MOUNTAIN RESORTS, LC,</p> <p>Plaintiff,</p> <p>vs.</p> <p>ASC UTAH INC; GENERAL ELECTRIC CAPITAL COMPANY; ENOCH RICHARD SMITH, as personal representative of the ESTATE OF ENOCH SMITH, JR; CULP CONSTRUCTION CO; RICHARD BRANDE DRYWALL INC; DESIGN TEAM, INC; and STF ELECTRICAL SERVICES INC,</p> <p>Defendants.</p>	<p><b>RULING and ORDER</b></p> <p>Case No. 07050485</p> <p>Judge BRUCE C. LUBECK</p> <p>DATE: March 26, 2010</p>
---	--

The above matter came before the court on March 22, 2010 for oral argument on summary judgment motions of the parties.

Plaintiff was present through Rod N. Andreason and defendant ASCU was present through John R. Lund and Kara L. Pettit.

Wolf filed a motion for partial summary judgment on December 9, 2009. ASCU filed a cross motion for partial summary judgment and an opposition to Wolf's motion on December 21, 2009. Wolf filed a reply in support of its motion and an opposition to ASCU's motion on February 10, 2010. ASCU filed a request to submit February 10, 2010, asserting no response had been filed, obviously "crossing in the mail" with Wolf's response. Based thereon the court set oral argument. ASCU then filed a reply on

March 8, 2010, after obtaining an extension from the court to March 4, 2010.

Oral argument was held and the court took the issues under advisement. Before the hearing the court carefully considered the memoranda and other materials submitted by the parties. Since taking the issues under advisement, the court has further considered the law and facts relating to the issues. Now being fully advised, the court renders the following Ruling and Order.

#### **CROSS MOTIONS FOR SUMMARY JUDGMENT.**

##### **ARGUMENTS**

The background of this case is set forth in this court's Ruling and Order of September 5, 2008, wherein the court considered ASCU's motion to dismiss concerning this provision of the agreements between the parties.

In this motion by Wolf, Wolf argues that the sale of ASCU stock to Talisker is an event of default under the leasehold mortgage.

As claimed undisputed facts Wolf argues that it and ASCU executed a leasehold mortgage on November 23, 2005. Under that, para 4A, the sale or transfer of any controlling ownership interest in and to ASCU is defined as an event of default, the

Due on Sale Clause. It entitled Wolf to bring an action to foreclose the mortgage and ASCU was to pay all fees and costs thereof. On July 15, 2007, ASCU sold its controlling interest to Talisker Canyons Finance Co and Talisker Corp.

From these facts Wolf argues that Wolf is entitled to foreclose because of this event of default.

ASCU also moves for summary judgment arguing there is an exception to the Due on Sale Clause for the circumstances of this case, as discussed by this court in its earlier ruling of September 5, 2008.

Factually, ASCU argues that the leasehold mortgage states the interest of Wolf to the mortgaged estate is subject to the terms of that leasehold mortgage and the matters of record. One of the tracts of land under the 1997 Ground Lease was Section 2, which Wolf leased from the State of Utah, the SITLA Lease. ASCU became the tenant under the SITLA Lease under the July 1, 1998 lease between ASCU and SITLA. The Second Amendment to the Ground Lease allows Wolf to develop units on this Section 2 and ASCU grants Wolf a mortgage to secure its obligation to present Wolf fee simple title to the land in Red Pine Village if and when ASCU receives all approvals. That concluded with this Leasehold Mortgage on November 23, 2005. Attorneys for both parties negotiated the terms. The Ground Lease provides ASCU with the



ability to sell its assets without that being a default and ASCU wanted to retain that ability. The second exception to the Leasehold Mortgage was negotiated and provides that ASCU can transfer its controlling interest, subject to Wolf's liens, rights and interests under the Leasehold Mortgage. The negotiated terms are not precisely reflected in the final Leasehold Mortgage. Read literally it would allow the Mortgagee (Wolf) to transfer its rights. It is clear that the intent was for the interests of ASCU to be transferred subject to Wolf's interests, not the other way around. The term Mortgagor was used in defining "substantially all" of the assets as used in the mortgage. Wolf has no capital stock as a limited liability company and ASCU does have capital stock, further clarifying the intent of the parties in this provision. ASCU is the tenant under the SITLA lease. The sale of ASCU was in the form of outstanding capital stock from ASC to Talisker Canyons. It binds Talisker to each of the rights and liens and interests of Wolf under the Leasehold Mortgage.

Wolf alleges in its complaint that the transfer of stock entitled Wolf to foreclose on the mortgage and become tenant under the SITLA lease. The second exception modifies the mortgage so the sale of stock is not an event of default. The literal language is nonsensical as the word Mortgagee in the first two phrases of 4A(ii) is an error and the only reasonable

construction is that the second exception applies to the transfer of ASCU's rights, not the transfer of Wolf's interests. The court is to avoid an unreasonable interpretation. If the sale of ASCU's stock is an event of default creating an exception to the sale of Wolf's stock (there is no Wolf stock) makes no sense. Wolf had no interest in the rights to development that Wolf could transfer, only ASCU had such rights. Wolf has no interest as tenant, only ASCU has such tenant rights. It makes even less sense to say Wolf's transfer of rights is subject to Wolf's rights. But, making an exception for ASCU does make sense.

Moreover, the extrinsic evidence shows without real dispute that such was the intent of the parties. ASCU did not want to have less than the Ground Lease gave them and this would do so as interpreted by Wolf.

The Talisker sale specifically indicates that now Talisker is subject to the liens, rights and interests of Wolf under the mortgage, further evidencing that such an interpretation makes sense.

In opposition and reply Wolf argues that the claimed exception is not ambiguous on its face and thus there can be no extrinsic evidence. The Mortgage states that Wolf, as mortgagee, can transfer its rights without triggering the Due On Sale clause. It is sensible that Wolf can sell its interests without

triggering the Due On Sale clause. Wolf's counsel so testified. ASCU's position would render the rule (Due on Sale) meaningless and the exception would consume the rule and would leave Wolf powerless to invoke the Due on Sale clause.

Wolf disputes some of the facts ASCU asserts. Wolf claims that others besides counsel were involved in the negotiations over the mortgage. Wolf disputes the course of negotiations and asserts the provision at issue was meant to say what it says and was meant to preserve to Wolf some right to sell Wolf's interests without negating the mortgage. Wolf disputes some conversations between the parties. In short Wolf claims that the current provision was just what Wolf wanted, and is not an error, and that the discussions between the parties show that, though the positions are in dispute.

Wolf asserts that ASCU does not challenge that the sale would violate the mortgage but for the second exception. That is not ambiguous and does not protect ASCU as ASCU argues it does.

In reply ASCU argues the Wolf's position cannot prevail. The due-on-sale provision at issue has two exceptions. The second exception is clearly an error and should be reformed to apply to the transfer of mortgagor/ASCU's rights in certain circumstances, and not to the transfer of Wolf/mortgagee's interests. If read literally it would require Wolf to demonstrate

its own default.

The interpretation Wolf seeks makes no sense for several reasons:

(1) a transfer by Wolf of any of its interest cannot create a default. Under the definitions a transfer by Wolf is not a default. The due on sale provision sets out two circumstances where there is an event of default; sale of all the mortgaged estate of ASCU or sale of controlling ownership interest of ASCU. These clearly apply to ASCU's actions, but Wolf argues the exceptions are that Wolf cannot transfer Wolf's interests in the Mortgaged Estate. The purpose of a due on sale provision is intended to protect the interests of the mortgagee (Wolf) by conditioning the ability of the mortgagor (ASCU) to sell or otherwise transfer the real estate subject to the mortgage.

The remedies section of the Leasehold Mortgage, which provides relief for Wolf, and if read as Wolf claims would allow Wolf to default, then foreclose the mortgage as the defaulting party or accelerate the benefits due under the mortgage. That is an absurdity and thus the court can reform it.

(2) Wolf has no interest in the mortgaged estate because the mortgage defines "mortgaged estate" as ASCU's interest in the SITLA lease. Wolf's counsel admitted that was the meaning of mortgaged estate.

Further, Wolf's rights under the reconveyance agreement are

not what Wolf claims if ASCU defaults. That agreement allows Wolf the option to purchase from ASCU at fair value the assets and property subject to the reconveyance agreement. The SITLA lease does not allow Wolf to take over ASCU's tenancy or development rights in the SITLA property.

(3) Wolf has no interest in the Canyons under the second exception. Read as Wolf contends, a default by Wolf would entitle Wolf to its rights under the Ground Lease. Wolf has no tenancy interests under the Ground lease or the mortgaged estate.

(4) Wolf's reading ignores parts of the second exception. It defines "substantially all" as being substantially all of the assets of ASCU, not Wolf. The court so recognized in its September 2008 ruling.

(5) Wolf's construction also conflicts with its counsel's affidavit as to the intent of this language.

This affidavit of counsel cannot create a factual dispute as it is inconsistent with his deposition, wherein he stated a different interpretation of this provision. Further, the affidavit is evidence only of Wolf's subjective intent. It is not a fact but a conclusion. Mutual assent is to be judged and determined by overt acts and not subjective or hidden intent of the parties. That intent was never expressed to ASCU.

ASCU's construction does not render the second exception meaningless and overwhelm or render meaningless the due on sale

provision. The second exception means that the due on sale provision is triggered by a transfer of controlling interest only if the transfer is subject to each and all of the rights and interest of Wolf. Any transfer that does not protect Wolf's interests in the 100 units of Red Pine is still a default. Talisker is bound by each of the liens and rights and interests of Wolf, under 9.16 of the Sales Agreement.

The court's prior ruling indicated a dismissal was not required as the document was not so facially unambiguous to warrant dismissal. ASCU has provided the extrinsic evidence needed to show a transfer of the stock was not an event of default. Wolf's proffered explanation is not plausible or reasonable in view of the language used.

#### DISCUSSION

There are cross motions for summary judgment in this case. Plaintiff bears the burden of proof on its sole claim in the complaint, that Wolf is entitled to foreclose. Wolf seeks judgment on that claim. ASCU seeks through its motion to dismiss the claim.

Thus, on Wolf's motion for summary judgment, it has the affirmative duty to provide the court with facts that demonstrate both that the Wolf is entitled to judgment as a matter of law and that there are no material issues of fact that would require

resolution at trial.

On ASCU's motion, ASCU as the moving party without the burden of proof at trial, must show there is no genuine issue of material fact. Upon such a showing, Wolf then as the nonmoving party but the party bearing the burden of proof at trial, must set forth specific facts showing that there is a genuine issue for trial. *Orvis v. Johnson*, 177 P.3d 600 (UT 2008).

Where there are cross motions for summary judgment, the court need not necessarily grant one or the other. *Amjacks Investment v. Design Assoc*, 635 P.2d 53 (UT 1981).

The parties claims are such that this case is indeed a difficult question for the court. ASCU argues that its motion is not really a request for reformation, but asserts the request is for a type of reformation. ASCU then argues the court can examine the entirety of the document and find the meaning clear, that it means just as ASCU claims it means. Wolf, on the other hand, argues this is a pure reformation case and ASCU cannot show the elements needed for reformation and the contract as written entitled Wolf to summary judgment.

The court interprets this contract in accord with Utah law.

Whether this contract is an integrated contract is a question of fact. Even though there appears to be no integration clause, the court finds and concludes that neither party has

generated a legitimate factual dispute that this contract was not meant to be a final and complete expression of their bargain. It is thus an integrated contract. *Tangren Family Trust v. Tangren*, 2008 UT 20.

Thus, extrinsic evidence is admissible only if the contract is the result of a forgery, lacks consideration, or is voidable for fraud, duress, mistake, or illegality, or if there is ambiguity. See *Tangren*.

Then the court examines the agreement to determine if it is ambiguous. *Daines v. Vincent*, 2008 UT 51. In *Daines* the court discussed *Ward v. Intermountain Farmers Ass's*, 907 P.2d 264 (UT 1995). Of course there may be facial ambiguity or ambiguity with regard to the intent of the contracting parties. The court must first make a legal determination whether there is facial ambiguity before turning to extrinsic evidence. To determine facial ambiguity, the court may consider extrinsic evidence which is relevant because otherwise the determination is based on the judge's own experience. Moreover, the judge must ensure that "the interpretations contended for are reasonably supported by the language of the contract," (Emphasis added). The court may not, however, consider circumstances to create ambiguity where the language of the contract would not otherwise permit. A finding of facial ambiguity, if extrinsic evidence is examined, must be "reasonably supported by the language of the contract."



(Emphasis added).

Courts are to "endeavor to construct contracts so as not to grant one of the parties an absolute and arbitrary right to terminate a contract. [citation omitted] In addition, we interpret the terms of a contract in light of the reasonable expectations of the parties, looking to the agreement as a whole and to the circumstances, nature and purpose of the contract." [citations omitted]. Moreover, where there is a doubt about the interpretation of a contract, a fair and equitable result will be preferred over a harsh and unreasonable one. And an interpretation that will produce an inequitable result will be adopted only where the contract is so expressly and unequivocally so provides that there is no other reasonable interpretation to be given it." *Peirce v. Peirce*, 994 P.2d 193 (UT 2000).

Taking these basic principles into consideration, and recognizing that the court in September 2008 indicated this agreement "appeared to be" ambiguous. (Ruling and Order, p. 8), the court now finds and concludes, based on the face of the document, that it is not ambiguous. It is not ambiguous for several reasons. As noted, the court looks at the language of the contract, what it is attempting to accomplish and the nature of the agreement and its purpose.

First, as the court examines the entire document and its purpose and intent, it is a leasehold mortgage which gives the

mortgagee (Wolf) rights if the mortgagor (ASCU) defaults. The default at issue here is whether ASCU sold its stock or assets. It did beyond dispute. That is an event of default, unless one of the exceptions applies. On its face, the document then attempts to create an exception to that Due on Sale clause. That exception is where the issues of this case arrive. ASCU claims that this is simply a "typo" or scrivener's error where "mortgagee" was mistakenly written when "mortgagor" should have been written. If the document did not have those errors, it would certainly be unambiguous, ASCU claims. The court agrees.

The court examines all of the contract, not just the disputed portions. The remainder of the contract language leaves NO DOUBT, on its face, apart from the "mortgagee" - "mortgagor" conflict, what was intended. This was intended to secure Wolf against defaults by ASCU, and to protect ASCU from a foreclosure unless it made a transfer that did not protect Wolf's rights and interests.

Being too simplistic, to illustrate the court's thoughts on the matter, an analogy to a promissory note is helpful to the court. The simple and straightforward purpose of a promissory note is for a lender to lend money and the borrower to repay it under certain conditions. Thus, if that note stated "Lender shall lend to borrower the sum of \$1,000. Lender agrees to repay borrower that sum plus 10% simple interest by June 1, 2011" that

note's language would obviously be in error. It is the borrower who will repay the lender, not the lender who repays the borrower. Whether that is called a mutual mistake, unilateral mistake, or anything else, the NATURE and PURPOSE of the document itself shows the true intent of the parties, despite the mistaken language.

This document is, of course, much more complex and it was a negotiated result. The defaults possible by ASCU are defined by ASCU's actions, not the actions of Wolf. Wolf transferring its assets, and as a limited liability it owns no stock of course) cannot be a default under such a Leasehold Mortgage. A Due on Sale clause, of course, is designed to protect the interests of the mortgagee (Wolf) by giving the mortgagee a remedy if the mortgagor transfers its interests. Thus, the entire purpose of the entire document on its face is clear.

Further, the remedies section of the Leasehold Mortgage provides relief for Wolf as mortgagee. If read as Wolf argues, the remedies section would allow Wolf to default in some fashion, then foreclose the mortgage as the defaulting party or accelerate the benefits due to Wolf from ASCU under the mortgage. That is an absurdity and grants Wolf the right to absolutely and arbitrarily terminate the contract. See *Peirce v. Peirce*. That is a construction that is to be avoided under Utah law.

In addition, Wolf has no interest in the Mortgaged Estate as

that term is defined in the Leasehold Mortgage. "Mortgaged Estate" means ASCU's interest in the SITLA lease. Wolf's counsel in deposition admitted that was the reasonable meaning of "Mortgaged Estate."

Wolf's reading, which it claims the court should adopt, ignores parts of the second exception. It defines "substantially all" as being substantially all of the assets of ASCU, not Wolf. It also, again, defines that "substantially all" as being stock or assets. Wolf as a limited liability of course has no stock but ASCU as a corporation does have stock.

Section 4(A)(iv) the Leasehold Mortgage defines the following as an event of default:

(iv) . . . the sale, transfer, conveyance or assignment of any controlling ownership interest in and to the Mortgagor (which shall not include transfer of controlling ownership interest in the Mortgagor's [ASCU] parent or shareholders). . .

This section explicitly excepts the following from actions that constitute an event of default:

[E]xcept for . . . (ii) any transfer of all or substantially all of Mortgagee's [Wolf's] rights in and to the development currently known as The Canyons (including without limitation, all of Mortgagee's [Wolf's] interest as tenant under the Ground Lease and the Mortgaged Estate) whether effected by stock or asset sale, provided that such transfer shall be expressly subject to each and every one of the liens, rights and interests of the Mortgagee [Wolf] under this Leasehold Mortgage. For purposes of the foregoing sentence "substantially all" shall include all of the assets held by Mortgagor [ASCU] which are necessary for unimpeded operation and development of the Canyons resort as it currently exists or may be improved. The

terms of this Paragraph A shall be strictly construed, and if any collateral assignment hereunder does not include the specific language of agreement and acknowledgment in favor of Mortgagee [Wolf] as required under this paragraph, such collateral assignment shall be null and void.

The court has inserted the brackets [ ] indicating ASCU or Wolf for clarity. In the lease Wolf and ASCU are not, of course, set forth in this provision other than by reference to mortgagee or mortgagor. Thus, it is clear from that entire exception that the assets are defined as belonging to mortgagor, ASCU. Further, the transfer discusses the mortgagee as the tenant under the Ground Lease. While Wolf argues it maintains the status as tenant under some provisions of various documents, it is clear that Wolf is not the tenant under the Ground Lease but ASCU is the tenant under the Ground Lease. Given that provision alone, the court can discern the intent of the parties that ASCU, as mortgagor, may transfer its assets without being in default but only if Wolf's rights are preserved.

The court thus determines that the document is not ambiguous on its face, it intended that ASCU be in default upon sale but not if Wolf's interests and rights were protected.

The court does not believe it is indeed involved in a reformation as that concept is normally meant. The court finds and concludes, FROM THE ENTIRELY OF THE CONTRACT ON ITS FACE, that such was intended and the error of placing "ee" rather than

"or" was the product of confusion or a scrivener's error.

Whether this error is couched in terms of mistake and reformation or simply couched in terms of clarity of the contract with a minor typographical error the result is the same to the court.

Where the contract as written expresses an unintended meaning or creates an un contemplated right, equity provides that it can be made to conform to the parties intent. There is no evidence from the document itself that Wolf would have the right to default and claim any rights.

Wolf argues in terms of the elements of reformation and asserts they are lacking, by reference to the extrinsic evidence as well. The court recognizes that perhaps this is a type of reformation, as ASCU argued, but it is in equity simply stating the contract as the document itself clearly intended. The court is NOT considering the extrinsic evidence of the parties, but merely reading the agreement as the parties obviously intended from the nature of the agreement itself.

There was indeed a mistake here, and that mistake was that each party twice left in the document the word "mortgagee" and did not note that it should have stated "mortgagor" right after 4A(ii) (*any transfer of all or substantially all of Mortgagee's rights . . . ., all of Mortgagee's interest as tenant . . .*). Both of those instances should have stated "mortgagor" to

accomplish what the rest of the document and agreement most certainly and clearly intended. It is just as if in a promissory note the lender agreed to repay the borrower.

As stated by the court in *Guardian State Bank v. Stangl III*, 778 P.2d 1 (UT 1989), "Whether a mistake is a mutual mistake or a unilateral mistake may have significance, but it is not true, as is sometimes stated, that the law affords a remedy only for a mutual mistake of fact but not for a unilateral mistake of fact."

The court concludes there was not a unilateral mistake here, but a mutual mistake, to the extent that is necessary to accomplish this type of reformation. The mistake was in not noting in later drafts that "ee" was used rather than "or, " that is, mortgagee rather than mortgagor. The fundamental agreement of the parties shows clearly their intent. This is not a traditional "mutual mistake" case but is what the court in *Stangl III* calls "a mistake in recordation or memorialization of an agreement . . . ." The court stated that such "may not be exploited by one party to take advantage of the other. Principles of common honesty are not foreign to law and equity." As noted in that case, even apart from an incorrect memorialization, if a unilateral mistake of fact is the basis of the agreement, a court may still afford relief. Here, however, this was not a unilateral mistake on the part of ASCU. *Stangl III* was later said to stand for the proposition that if a contract as

written does not conform to what both parties intended, reformation or rescission is available where either a mutual or unilateral mistake occurred in the memorialization of the agreement. *Neiderhauser Builders v. Campbell*, 824 P.12d 1193, 1197 (UT App 1992).

This is not a unilateral mistake situation. Even if it is viewed as such, Wolf did not engage in fraud nor remain silent after knowing of ASCU's "mistake." The agreement as written simply failed to state the agreement of the parties AS EVIDENCED BY THE AGREEMENT ITSELF in all other phrases and clauses. Some type of equitable reformation is thus allowed and required.

Wolf argues that each party has later, with respect to this motion, sought to demonstrate a contrary intent. That is true, each party has attempted by later declarations to reconstruct the negotiations and show that their position is supported by that background.

Of course the court cannot weigh the credibility of the claims of the parties in their later affidavits. Each party claims, now many years after the agreement, to have intended a certain thing. ASCU claims, of course, that it intended as they argue for. Wolf claims Wolf intended the agreement to read just as it reads. It is certainly clear that the court cannot and it does not weigh the credibility of those affidavits. In fact, the court does not consider them.



The court, as noted, FROM THE DOCUMENT ITSELF, because as a legal matter there is no facial ambiguity, makes the determinations it has made. The court has not relied on the extrinsic evidence but on the language in the document and the nature of the agreement and its purposes.

While the court has noted the concepts of mutual and unilateral mistake, the court has not based those comments on the extrinsic evidence provided by the parties in the form of their later declarations and affidavits, nor on the deposition testimony of Wolf's witness. The court rules that because there is no ambiguity on the face of the document except as created by a scrivener's error, and it created not ambiguity but lack of clarity, the court need not and does not consider extrinsic evidence. The mistake made is again ascertained from the document itself, not from extrinsic evidence. Thus, while the court is entitled to examine extrinsic evidence if there is a mistake, the court does not need to in this case and has not and does not consider the evidence provided by way of deposition or affidavits of the "drafters" or others. Neither party's extrinsic evidence is considered in this ruling.

There is no ambiguity in what the parties intended, and that is that ASCU was not in default for the sale of all or substantially all of its assets, stock or otherwise, because the

transfer was expressly subject to each and all of the rights and interests of Wolf under the Leasehold Mortgage. The later transfer documents between ASCU and Talisker show that as well.

Thus, Wolf has not succeeded in demonstrating both that Wolf is entitled to judgment as a matter of law and that there are no material issues of fact. There are no issues of fact for trial but Wolf has not shown as a matter of law that it is entitled to judgment. The facts are undisputed about the sale and the content of the language of the agreement.

On ASCU's motion, ASCU has as the moving party without the burden of proof at trial, shown there is no genuine issue of material fact for trial. Wolf then as the nonmoving party but the party bearing the burden of proof at trial has not demonstrated that there are specific facts showing that there is a genuine issue for trial.


The court has not considered the extrinsic evidence offered by each party but has relied on the Leasehold Mortgage itself. Wolf's claim for foreclosure is thus dismissed on summary judgment.

This Ruling and Order is the Order of the court and no other

order is required.

DATED this 26 day of May, 2010.

BY THE COURT:

  
BRUCE C. LUBECK  
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 070500485 by the method and on the date specified.

MAIL: ROD N ANDREASON 60 E SOUTH TEMPLE STE 1800 P O BOX 45120  
SALT LAKE CITY, UT 84111-1004

MAIL: VICTORIA C FITLOW 591 SUMMIT DRIVE PARK CITY UT 84098-5315

MAIL: JASON W HARDIN 215 S STATE ST STE 1200 SALT LAKE CITY UT  
84111-2323

MAIL: JOHN R LUND 10 EXCHANGE PLACE 11TH FLR POB 45000 SALT LAKE  
CITY UT 84145-5000

MAIL: PAUL H PETERS 459 HANA HIGHWAY PAIA HI 96779

MAIL: KARA L PETTIT 10 EXCHANGE PLACE 11TH FLR POB 45000 SALT LAKE  
CITY UT 84145-5000

MAIL: RACHEL G TERRY 215 SOUTH STATE ST STE 1200 SALT LAKE CITY  
UT 84111-2323

MAIL: DAVID M WAHLQUIST 60 E S TEMPLE STE 1800 POB 45120 SALT LAKE  
CITY UT 84145-0120

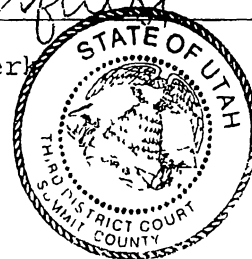
MAIL: HARDIN A WHITNEY CITY CENTER 1 STE 900 175 E 400 S SALT LAKE  
CITY UT 84111

MAIL: ROBERT G WING 175 E 400 SOUTH STE 900 SALT LAKE CITY UT  
84111

Date:

3/24/10

B. B. Langmuir  
Deputy Court Clerk



# EXHIBIT B

When Recorded, Return To:

Bradley E. Rauch  
Hirsch & Westheimer, P.C.  
700 Louisiana, 25th Floor  
Houston, Texas 77002-2728

## LEASEHOLD MORTGAGE

THIS LEASEHOLD MORTGAGE ("Mortgage") is made as of November 23, 2005 by ASC Utah, Inc., a Maine corporation, whose address is 4000 The Canyons Resort Drive, Park City, Utah 84098 ("Mortgagor"), in favor of Wolf Mountain Resorts, L.C., a Utah limited liability company ("Mortgagee").

1. Mortgaged Estate.

For good and valuable consideration, the receipt of which is hereby acknowledged, Mortgagor hereby irrevocably and unconditionally grants, transfers, assigns, conveys, warrants, mortgages, and assigns to Mortgagee, subject only to the terms and conditions of this Mortgage and those matters of record referenced on Exhibit A attached hereto, all of Mortgagor's right, title and interest in and to that certain Amenuueu and Restated Lease Agreement Number 419, by and between the State of Utah, School and Institutional Trust Lands Administration, as landlord, and Mortgagor, as tenant, dated July 1, 1998, as amended (the "Lease") as evidenced by that Notice of Lease, dated December 11, 2001, and recorded on December 12, 2001, as Entry No. 605787, in Book 1419, beginning at Page 419, with the Summit County, Utah Recorder with respect to the real property located in Summit County, Utah and more particularly described on Exhibit B attached hereto and made a part hereof (such mortgaged interest being hereinafter referred to as the "Mortgaged Estate").

2. Secured Obligation.

This Mortgage is given solely for the purpose of securing Mortgagor's obligation set forth in Article 12 of the Second Amendment to Ground Lease Agreement ("Second Amendment"), dated November 12, 1999, by and between Mortgagor, as tenant, and Mortgagee, as landlord to:

(i) grant to Mortgagee by warranty deed fee simple title to the land on which Mortgagor has obtained approval from Summit County for the 100 Units (as defined in the Second Amendment), free and clear of all liens and encumbrances, except for (A) the Village Management Agreement for the Canyons Resort Village recorded on December 15, 1999 as Entry No. 555285 in Book 1300 at Page 1 of the Official Records of Summit County, as amended (however, it being understood and agreed that by accepting such interest the same shall not constitute a ratification, affirmation, consent or agreement to the enforceability of any of

such amendments against Mortgagee); (B) the Development Agreement for The Canyons Specially Planned Area, recorded July 28, 1998 as Entry No. 513500 in Book 1168 at Page 82 of the Official Records of Summit County; and (C) an Amended and Restated Development Agreement for The Canyons Specially Planned Area, recorded November 24, 1999 as Entry No. 553911 in Book 1297 at page 405 of the Official Records, as amended (however, it being understood and agreed that accepting any interest shall not constitute a ratification, affirmation, consent or agreement to the enforceability of any of such amendments against Mortgagee); and provide to Mortgagee, at Mortgagor's sole cost and expense, water rights, exchange rights, certificates, prepaid connections and entitlement to immediate connection to a then currently operating water system for the 100 Units;

(ii) deliver to Mortgagee, at Mortgagor's sole cost and expense, the final recorded plat for the 100 Units, including, without limitation, all related permits, approvals, all planning, engineering, design and architecture associated therewith;

(iii) to the extent provided in the development approvals and supporting materials submitted by Mortgagor to and approved by Summit County provide to Mortgagee, at Mortgagor's sole cost and expense, roads and utilities to the boundary(s) of the lot(s) on which the 100 Units are located, including, without limitation, the design, engineering, approval, surveying, permitting and construction by Mortgagor of all roads, medians, pavement, drainage ditches, sidewalks, culverts, retaining walls, pedestrian or recreation tunnels directional and informational signs, street lights; utility lines, including wires, cables, conduits, pipes, mains, poles, guys, anchors, fixtures, supports and terminals, repeaters, pumps, pressure reduction valves, and such other appurtenances of every nature and description including without limitation those for water, electricity, telecommunications, gas, sanitary sewer, septic, and drainage that will connect the Lower Village Base Area up the mountain whatever distance to the boundaries of the 100 Units;

(all of the foregoing being hereinafter collectively, the "Secured Obligation"). The Secured Obligation shall include the grant by Mortgagor to Mortgagee of any easements, rights of way and licenses required for access, development and construction of the 100 Units.

### 3. Rights and Duties of the Parties.

A. Mortgagor shall comply with the terms and conditions of this Mortgage and the Lcase and perform its obligations hereunder and thereunder.

B. Mortgagor shall appear in and defend any action or proceeding purporting to affect the security hereof, the title to the Mortgaged Estate, or the rights or powers of Mortgagee; and should Mortgagee elect to also appear in or defend any such action or proceeding, to pay all costs and expenses, including cost of evidence of title and attorneys' fees in a reasonable sum incurred by Mortgagee.

C. Mortgagor shall pay: (i) at least ten days before delinquency all taxes and assessments affecting the Mortgaged Estate, including all assessments upon water company

stock, if any, and all rents, assessments and charges for water, appurtenant to or used in connection with the Mortgaged Estate; (ii) when due, all encumbrances, charges, and liens with interest, on the Mortgaged Estate or any part thereof, which at any time appear to be prior or superior hereto; and (iii) all costs, fees, and expenses of this Mortgage.

D. Should Mortgagor fail to make any payment or to do any act required by this Mortgage, then Mortgagee, but without obligation so to do and without notice to or demand upon Mortgagor and without releasing Mortgagor from any obligation hereof, may: (i) make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Mortgagee being authorized to enter upon the Leased Premises for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights of powers of Mortgagee; (ii) pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and (iii) in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title and legal counsel.

#### 4. Default and Remedies.

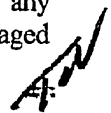
A. Any of the following shall be an event of default ("Event of Default"): (i) Mortgagor's failure to comply with the requirements of the Secured Obligation, which failure has not been resolved or remedied completely within sixty (60) days after the Mortgagee gives written notice thereof to Mortgagor or (ii) Mortgagor's failure to perform or observe any other covenant or agreement contained in this Mortgage, and such failure shall remain uncured for a period of sixty (60) days after written notice thereof; or (iii) if (a) Mortgagor then having the title to the leasehold estate created by that certain Ground Lease Agreement dated as of July 3, 1997, between Mortgagee, as landlord, and Mortgagor, as tenant, as amended ("Ground Lease"), while having such title be adjudicated a bankrupt or adjudged to be insolvent; (b) a receiver or trustee shall be appointed for the aforesaid Mortgagor's property and affairs; (c) the aforesaid Mortgagor shall make an assignment for the benefit of creditors or shall file a petition in bankruptcy or insolvency or for reorganization or shall make application for the appointment of a receiver; or (d) any execution or attachment shall be issued against the aforesaid Mortgagor or any of the aforesaid Mortgagor's property, whereby the Mortgaged Estate or any building or buildings or any improvements thereon shall be taken or occupied or attempted to be taken or occupied by someone other than the aforesaid Mortgagor, except as may be otherwise permitted under the terms of the Ground Lease, and such adjudication, appointment, assignment, petition, execution or attachment shall not be set aside, vacated, discharged or bonded within ninety (90) days after the issuance of the same; or (iv) any sale, transfer, conveyance or assignment of all or any portion of, or any interest in, the Mortgaged Estate, or the sale, transfer, conveyance or assignment of any controlling ownership interest in and to the Mortgagor (which shall not include transfer of controlling ownership interest in the Mortgagor's parent or shareholders), except for (i) any collateral assignment of the Mortgaged Estate to a bona fide third party lender for consideration provided that such collateral assignment specifically provides for the benefit of the Mortgagee that the rights acquired under such collateral assignment shall be subject to (A) each and every one of the covenants, conditions and restrictions set forth in the Ground Lease,



including, without limitation, the obligation to pay Rent on the Leased Premises as provided in Article III of the Ground Lease, and pay Mortgagee the Option Payments for development of the Leased Premises as provided in Article XXV of the Ground Lease, and to construct the infrastructure as provided herein in Paragraph 2(iii) above, and to acknowledge and agree for the benefit of the Mortgagee that the rights under the Ground Lease are subject to reconveyance obligations (described below) and to any and all other rights and interests of the Mortgagee, as landlord, provided in the Ground Lease, none of which covenants, conditions or restrictions shall be deemed to be waived by Mortgagee, as landlord, by reason of the right given to so grant a collateral assignment of the Mortgaged Estate and (B) each and every one of the liens, rights and interests of the Mortgagee under this Leasehold Mortgage and (ii) any transfer of all or substantially all of Mortgagee's rights in and to the development currently known as The Canyons (including, without limitation, all of Mortgagee's interest as tenant under the Ground Lease and the Mortgaged Estate) whether effected by stock or asset sale, provided that such transfer shall be expressly subject to each and every one of the liens, rights and interests of the Mortgagee under this Leasehold Mortgage. For purposes of the foregoing sentence, "substantially all" shall include all of the assets held by Mortgagor which are necessary for unimpeded operation and development of The Canyons resort as it currently exists or may be improved. The terms of this Paragraph A. shall be strictly construed, and if any collateral assignment hereunder does not include the specific language of agreement and acknowledgement in favor of Mortgagee required by this paragraph, such collateral assignment shall be null and void.

The parties agree that the reconveyance rights mentioned above shall be those set forth in that certain Reconveyance Agreement between Mortgagor and Mortgagee dated July 2, 1997, as the same may be amended from time to time in the future, except that as to any collateral assignee that may acquire the Mortgaged Estate the Reconveyance Agreement shall not expire as otherwise provided in Section 11 thereof, but shall only terminate upon the full performance of the Secured Obligations above, and that notwithstanding the provisions of Section 3 thereof, no consideration shall be paid for such reconveyance of the Mortgaged Estate.

B. In each such Event of Default, with or without foreclosure, the Mortgagee shall have the immediate right to receive and collect all rents, income and profits from the Mortgaged Estate whether then due or accrued or to become due without liability for any loss which may arise uncollectible rents so long as the Mortgagee acts with ordinary prudence, and all rents income and profits are hereby assigned to the Mortgagee absolutely and not as security for so long as this mortgage remains in effect, provided that the Mortgagor may collect the rents, income and profits so long as there is no Event of Default then existing. The Mortgagee may, in the sole discretion of the Mortgagee, foreclose this mortgage either by civil action, with the immediate right to the appointment of a receiver on ex parte order without bond and with the power to collect all rents, income and profits or enter into or terminate leases and otherwise manage and operate the mortgaged property pending foreclosure. Any foreclosure sale shall not impair or affect the lien of this mortgage on any portion of the Mortgaged Estate remaining or any other remedy of the Mortgagee for the recovery of the Secured Obligation. Out of the proceeds of any foreclosure sale, the Mortgagee may deduct all costs and expenses of any remedy pursued, including attorneys' fees, and may pay and discharge any lien on the Mortgaged



Estate, either prior or junior to this mortgage, and retain or be awarded all sums necessary to repay advances authorized hereunder and to satisfy the Secured Obligation. This Mortgage shall not prevent nor be deemed to prevent the Mortgagee from pursuing any remedy whatsoever that Mortgagee may have against the Mortgagor for the collection or enforcement of the Secured Obligation, and the Mortgagee may at its option pursue any other course, successively or concurrently, to collect or enforce such Secured Obligation and may resort to any other assets of the Mortgagor without first resorting to, and without prejudice to the right to later resort to the mortgaged property pursuant to this mortgage.

C. At any time after an Event of Default, Mortgagee may, in addition to the rights and remedies set forth in Ground Lease, bring an action in any court of competent jurisdiction to foreclose this Mortgage or to enforce any of the covenants hereof.

D. The remedies listed herein are illustrative only and Mortgagee shall also have any and all other rights in law or equity, whatever they may be. No remedy herein conferred upon or reserved to Mortgagee is intended to be exclusive of any other remedy herein or by law provided or permitted, but each shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute.

E. Any failure by Mortgagee to insist, or any election by Mortgagee not to insist, upon strict performance by Mortgagor of any of the terms, provisions or conditions of this Mortgage shall not be deemed to be a waiver of same or of any other term, provision or condition thereof, and Mortgagee shall have the right at any time or times thereafter to insist upon strict performance by Mortgagor of any and all of such terms, provisions and conditions.

F. In the event that Mortgagee incurs any expenses (including reasonable attorneys' fees whether or not the attorney is a salaried employee of Mortgagee and court costs) to collect and enforce Mortgagor's obligations hereunder, Mortgagor shall, upon demand by Mortgagee, immediately reimburse Mortgagee therefor, from the date incurred by Mortgagee, including, without limitation, reasonable attorneys' fees incurred in any litigation, bankruptcy, insolvency, administrative and arbitration proceedings and appeals therefrom.

5. Proceeds from Condemnation or Destruction.

Should the Mortgaged Estate or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Mortgagee shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement, in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of fire and other insurance affecting the Mortgaged Estate, are hereby assigned to Mortgagee, who may, after deducting therefrom all its expenses, including attorneys' fees, apply the same on any indebtedness secured hereby. Mortgagor agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Mortgagee may require.



6. Further Assurances/Satisfaction.

Mortgagee covenants to execute and deliver to Mortgagor any and all easements, licenses and plats necessary in conjunction with the 100 Units and required under the Development Agreement for The Canyons Specially Planned Area, recorded July 28, 1998 as Entry No. 513500 in Book 1,108 at Page 82 of Official Records, as the same may be amended. Mortgagee further covenants to release this Mortgage upon the full and complete satisfaction and discharge of the Secured Obligations.

7. Miscellaneous Provisions.

A. The rights accorded Mortgagee by this Mortgage are in addition to, and not in substitution or limitation of any right, remedy, power or authority of Mortgagee under any other agreement or under now existing or hereafter arising applicable law. By accepting this Mortgage, the Mortgagee does not in any way waive, release or relinquish any right, title or interest or claim thereto that the Mortgagee has or may assert in connection with the Mortgaged Estate.

B. All obligations contained in this Mortgage are intended by the parties to be, and shall be construed as, covenants running with the land.

C. This Mortgage shall apply to, inure to the benefit of, and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. The term "Mortgagee" shall mean the owner and holder, including any pledgee, of the Secured Obligation. In this Mortgage, whenever the context requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

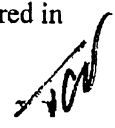
D. The interpretation, construction and enforcement of this Mortgage shall be governed by the laws of the State of Utah.

E. Mortgagor and Mortgagee covenant and agree (a) upon the request of the other party, to furnish such further information as is reasonably required to document or perform their obligations under this Mortgage, and (b) to execute and deliver to each other such further documents and instruments, and to do such further acts and things, all as the other party may reasonably request for the purpose of carrying out the intent of, and obligations under, this Mortgage and the documents referred to in this Mortgage.

F. The invalidity of any one or more covenants, phrases, clauses, sentences or paragraphs of this Mortgage shall not affect the remaining portions of this Mortgage or any part thereof, and this Mortgage shall be construed as if such invalid covenants, phrases, clauses, sentences or paragraphs, if any, had not been inserted herein.

G. Time is of the essence under this Mortgage.

H. Any notice required or permitted under this Mortgage shall be delivered in accordance with the notice provisions set forth in the Ground Lease.



**EXHIBIT A**  
**TO LEASEHOLD MORTGAGE**  
(see attached)

**EXHIBIT B**

**TO LEASEHOLD MORTGAGE**

All of Section 2, Township 2 South, Range 3 East, Salt Lake Base and Meridian.

Mortgagor has executed this Leasehold Mortgage as of the date first written above.

**MORTGAGOR:**

ASC Utah, Inc. a Maine corporation

By: Timothy Vetter

Print Name: Timothy Vetter

Title: Vice President

STATE OF Utah  
COUNTY OF Summit : ss.

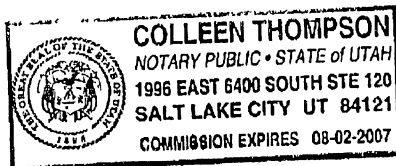
The foregoing LEASEHOLD MORTGAGE was acknowledged before me this 23  
day of November, 2005, by V.P., the ASC Utah of ASC Utah, Inc., a Maine  
corporation. Timothy Vetter Vice President

My Commission Expires:

Aug 2, 07

NOTARY PUBLIC

Residing at: SI County





November 21, 2005

Wolf Mountain Resorts, L.C.  
c/o Hirsch & Westheimer, P.C.  
25th Floor NationsBank Center  
700 Louisiana  
Houston, Texas 77002-2728  
Attention: Bradley E. Rauch

**ASC Utah, Inc.  
Section 2/Second Amendment to Ground Lease Transaction**

Dear Michael and Kenny:

ASC Utah, Inc. has simultaneously herewith executed and delivered to Wolf Mountain Resorts, L.C. that certain Leasehold Mortgage ("Mortgage") of even date herewith, covering that certain real property described on Exhibit "B" to the Mortgage. ASC Utah, Inc. and Wolf Mountain Resorts, L.C. acknowledge and agree that ASC Utah, Inc.'s execution and delivery of the Mortgage does not constitute a ratification, affirmation, consent or agreement of ASC Utah, Inc. to the matters set forth in Section 4(A)(iv)(i)(A) of the Mortgage.

Please acknowledge the terms of this letter agreement by executing this letter agreement in the space provided below.

Sincerely,

Timothy Vetter  
Vice President of Community Affairs  
The Canyons

**ACKNOWLEDGED AND AGREED:**

Wolf Mountain Resorts, L.C.

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Date: \_\_\_\_\_

ASC0075512

**When Recorded Return To:**

Bradley E. Rauch  
Hirsch & Westheimer, P.C.  
700 Louisiana, 25<sup>th</sup> Floor  
Houston, Texas 77002-2728

[PARCEL I.D. # \_\_\_\_\_]

**CONSENT AND SUBORDINATION**

**GENERAL ELECTRIC CAPITAL CORPORATION**, as Collateral Agent for the Lenders ("Beneficiary"), is the beneficiary under the following deeds of trusts encumbering certain real property more particularly described in **Exhibit A** attached hereto and incorporated herein by reference, in which **ASC UTAH, INC.**, a Maine corporation ("Grantor") has a leasehold interest pursuant to that certain Amended and Restated Lease Agreement Number 419, by and between the State of Utah, School and Institutional Trust Lands Administration, as landlord, and Grantor, as tenant, dated July 1, 1998, as evidenced by that certain Memorandum of Lease recorded under Book 1419, Page 419 with the Summit County, Utah Recorder:

1. First Lien Deed of Trust, Assignment of Leases, Rents and Revenues and Fixture Filing, dated November 24, 2004, by and between Grantor, Beneficiary and First American Title Insurance Company, as Trustee, recorded with the Summit County, Utah Recorder on November 24, 2004, as Entry No. 718022, in Book 1662, beginning at Page 889; and
2. Second Lien Deed of Trust, Assignment of Leases, Rents and Revenues and Fixture Filing, dated November 24, 2004, by and between Grantor, Beneficiary and First American Title Insurance Company, as Trustee, recorded with the Summit County, Utah Recorder on November 24, 2004, as Entry No. 718023, in Book 1662, beginning at Page 958.

(collectively, the "Deeds of Trust")

In consideration of one dollar and other valuable consideration, Beneficiary hereby consents to that certain Leasehold Mortgage, dated November \_\_\_\_, 2005 by and between Wolf Mountain Resorts, L.C., a Utah limited liability company, as mortgagee, and ASC Utah, Inc. a Maine corporation, as mortgagor, to be recorded simultaneously herewith with the Summit County, Utah Recorder (the "Leasehold Mortgage"), and Beneficiary hereby subjects to and subordinates and shall remain in all respects and for all purposes subject, subordinate and junior to the lien of the Leasehold Mortgage, and to the rights and interests of the from time to time of



the mortgagee under the Leasehold Mortgage, as fully and with the same effect as if the Leasehold Mortgage had been duly executed, acknowledged and recorded prior to the Deeds of Trust.

The Deeds of Trust shall otherwise remain in full force and effect.

[SIGNATURE BLOCK IS ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF the parties hereto have caused this Consent and Subordination to be duly executed this 15th day of November, 2005.

**GENERAL ELECTRIC CAPITAL CORPORATION**, as Collateral Agent for the Lenders

By: Jennifer Lane  
Name: Jennifer Lane  
Its: Duly Authorized Signatory

STATE OF Connecticut )  
: ss.  
COUNTY OF Fairfield )

The foregoing instrument was acknowledged before me this 15th day of November, 2005, by Jennifer Lane, the Duly Authorized Signatory of General Electric Capital Corporation.

Patricia O'Brien  
NOTARY PUBLIC  
Residing at: 401 Merritt Seven, Norwalk, CT 06851

My Commission Expires:  
7/31/07

**EXHIBIT A  
TO  
CONSENT AND SUBORDINATION**

---

All of Section 2, Township 2 South, Range 3 East, Salt Lake Base and Meridian.

LESS AND EXCEPTING THEREFROM:

Beginning at the Northwest corner of Government Lot 12, Section 2, Township 1 South, Range 3 East, Salt Lake Base and Meridian; thence Southwesterly to the Southwest corner of Section 2, Township 2 South, Range 3 East, Salt Lake Base and Meridian; thence Easterly along the South line of said Section 2, to the South Quarter corner of said Section 2; thence Easterly along the said South line of said Section 2 to the Southeast corner of said Section 2; thence Northerly along the East line of said Section 2 to the East Quarter corner of said Section 2; thence Northerly along the East line of Section 2 to the said Northwest corner of Government Lot 12, the point of beginning.

When Recorded, Please Mail To:  
Bradley E. Rauch  
Hirsch & Westheimer P.C.  
700 Louisiana, 25<sup>th</sup> Floor  
Houston, Texas 77002-2728

Please Mail Tax Notice to Grantee at:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Tax Parcel Nos.: PP-75-H-6, PP-75-H-5, PP-75-J and  
PP-75-A-2.

### **SPECIAL WARRANTY DEED**

For the sum of \$10.00 and other good and valuable consideration, ASC UTAH, INC., a Maine corporation, Grantor, hereby conveys and warrants against all claiming by, through or under it to WOLF MOUNTAIN RESORTS, L.C., a Utah limited liability company, Grantee, the following described tract of land in Summit County, State of Utah:

See Exhibit A attached hereto  
and made a part hereof

Subject only to all non-delinquent taxes and assessments, zoning and other governmental restrictions, those items listed in Exhibit B attached hereto and made a part hereof and all matters that a physical inspection or accurate survey of the property would disclose.

This Special Warranty Deed is executed by Grantor to be effective as of November 14,  
2005.

#### **GRANTOR:**

ASC Utah, Inc.  
a Maine corporation

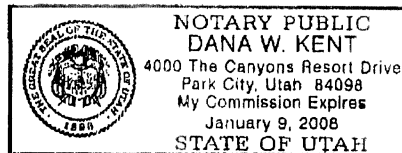
By: [Signature]  
Title: Vice President

STATE OF Utah )  
 ) ss.  
COUNTY OF Summit )

The foregoing instrument was acknowledged before me this 14 day of Oct,  
2005, by Timothy Wether, the Vice President of ASC Utah, Inc., a Maine  
corporation.

My commission expires:

Dana W. Kent  
Notary Public  
Address:



**EXHIBIT A  
TO  
SPECIAL WARRANTY DEED**

---

**Real Property**

The property referenced in the foregoing instrument is located in Summit County, State of Utah, and is more particularly described as follows:

**Parcel #1:**

The North 10 rods of the Northeast quarter of the Northeast quarter of the Southwest quarter of Section 36, Township 1 South, Range 3 East, Salt Lake Base and Meridian.

**Parcel #2:**

The South 10 rods of the North 20 rods of the Northeast quarter of the Northeast quarter of the Southwest quarter of Section 36, Township 1 South, Range 3 East, Salt Lake Base and Meridian.

**Parcel #3:**

The South 10 rods of the North 30 rods of the Northeast quarter of the Northeast quarter of the Southwest quarter of Section 36, Township 1 South, Range 3 East, Salt Lake Base and Meridian.

**Parcel #4:**

The South 10 rods of the Northeast quarter of the Northeast quarter of the Southwest quarter of Section 36, Township 1 South, Range 3 East, Salt Lake Base and Meridian.

**Parcel #5:**

The South one-half of the Northwest quarter of the Northwest quarter of the Southeast quarter of Section 36, Township 1 South, Range 3 East, Salt Lake Base and Meridian.



**EXHIBIT B  
TO  
SPECIAL WARRANTY DEED**

---

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.
2. Any facts, rights, interests or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession thereof.
3. Discrepancies, conflicts in boundary line, shortage in area, encroachments or any other facts which a correct survey would disclose, and which are not shown by the public records.
4. Unpatented mining claims; reservations or exceptions in patents or in acts authorizing the issuance thereof; water rights, claims, or title to water.
5. General property taxes for the year 2005 now due and payable, but will not become delinquent until November 30. Tax ID No. PP-75-H-6, PP-75-H-5, PP-75-J and PP-75-A-2.
6. The property described herein is located within the boundaries of Weber Basin Water Conservancy District, and is subject to any and all charges and assessments thereof.
7. The property described herein is located within the boundaries of Snyderville Basin Water Reclamation District, and is subject to any and all charges and assessments thereof.
8. The property described herein is located within the boundaries of Snyderville Basin Special Recreation District, and is subject to any and all charges and assessments thereof.
9. The property described herein is located within the boundaries of Summit County Special Service District No. 1, and is subject to any and all charges and assessments thereof.
10. The property described herein is located within the bounds of Summit County Special Service District No. 7 and is subject to the charges as assessments thereof.
11. The property described herein is located within the bounds of Kimball Area Transportation Special Service District and is subject to the charges and assessments thereof.
12. Subject to the rights of Weber Basin Water Conservancy District under any outstanding contract and/or agreement therein
13. Notice of Easement Rights wherein Partnership Investments of Colorado, Inc. and Park West Water Association hereby give notice of certain easement rights for water collection, transmission and storage, recorded July 3, 1979 as Entry No. 157302 in Book M-136 at page 348 of Official Record. The exact location of any such easements are not disclosed.

Park West Water Association relinquished all rights under said Notice of Easement Rights in that certain document recorded September 6, 1994 as Entry No. 414241 in Book 834 at page 777 of Official Records.

14. Development Agreement for The Canyons Specially Planned Area, recorded July 28, 1998 as Entry No. 513500 in Book 1168 at Page 82 of Official Records, but deleting any covenant, conditions or restrictions indicating a preference, limitation or discrimination based upon race, color, religion, sex, handicap, familial status or national origin to the extent such covenants, conditions or restrictions violate 42 USC 3604 (c).

An Ordinance Amending The Canyons SPA Rezone Ordinance and Development Agreement was recorded November 24, 1999 as Entry No. 553911 in Book 1297 at page 405 of the Official Records.

An Amended and Restated Development Agreement for The Canyons Specially Planned Area, recorded November 24, 1999 as Entry No. 553911 in Book 1297 at page 405 of the Official Records.

15. The limitations, covenants, conditions, restrictions, exceptions, easements, terms and liens contained within that certain Management Agreement for The Canyons Resort Village recorded December 15, 1999 as Entry No. 555285 in Book 1300 at Page 1 of Official Records, but deleting any covenant, conditions or restrictions indicating a preference, limitation or discrimination based upon race, color, religion, sex, handicap, familial status or national origin, to the extent such covenants, conditions or restrictions violate 42 USC 3604 (c).

First Amendment to the Management Agreement for The Canyons Resort Village, recorded December 17, 1999 as Entry No. 555434 in Book 1300 at Page 668 of Official Records.

Second Amendment to The Canyons Resort Village, recorded January 11, 2000 as Entry No. 556961 in Book 1303 at Page 296 of Official Records.

Third Amendment to the Management Agreement for The Canyons Resort Village, recorded January 31, 2000 as Entry No. 558232 in Book 1305 at Page 719 of Official Records.

16. The effect, if any, of that certain Warranty Deed, recorded June 3, 2005 as Entry No. 738409 in Book 1705 at page 763 of Official Records; wherein Michael Baker and Wasatch Capital Corporation appear as Grantors and Tod Griswold, Trustee of the Griswold-Kim 2005 Irrevocable Trust appears as Grantee.
17. The effect, if any, of that certain Warranty Deed, recorded June 3, 2005 as Entry No. 738410 in Book 1705 at page 765 of Official Records; wherein Michael Baker and Wasatch Capital Corporation appear as Grantors and Greenwich Holdings, L.C. appears as Grantee.