

1999

# Little Caesar Enterprises, Inc. v. Bell Canyon Shopping Center, L.C. : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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LITTLE CAESAR ENTERPRISES, INC., a	:	
Michigan corporation,	:	Case No. 990827-CA
	:	
Plaintiff/Appellee,	:	
	:	Priority No. 15
vs.	:	
	:	
BELL CANYON SHOPPING CENTER,	:	
L.C., a Utah limited liability company,	:	
	:	
Defendant/Appellant,	:	
	:	

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BRIEF OF APPELLANT

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Appeal from a Final Order of the Third Judicial District Court of  
Salt Lake County, Judge Homer F. Wilkinson

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**FILE**  
Utah Court of Appeals

MAR 10 2000

Julia D'Alesandro  
Clerk of the Court

Oral Argument and Published Decision Requested

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## STATEMENT OF JURISDICTION

The court of appeals has jurisdiction of this case, as transferred from the supreme court, pursuant to U.C.A. § 78-2a-3(2)(j).

## STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred by enforcing a lease renewal option in the absence of required mutual agreement on the rental rate for the option period.

Standard of Review: Correction of error in the interpretation of the option contract. *Brown's Shoe Fit Co. v. Olch*, 955 P.2d 357, 362 (Utah App. 1998).

Record Citation: This issue was raised in defendant's motion for summary judgment. (R. 99-103.)

2. Whether the district court erred in permitting extrinsic evidence without any allegation or finding that the lease renewal option was ambiguous.

Standard of Review: Correction of error. *Interwest Construction v. Palmer*, 923 P.2d 1350, 1358-59 (Utah 1996).

Record Citation: This issue was raised in defendant's motion to strike. (R. 216-20.)

## DETERMINATIVE LEGAL PROVISIONS

This case is governed by interpretation of the written lease and renewal option provision, which are set forth in the Addendum, hereafter "Add.," at 7, 29. The second issue is also governed by the statute of frauds, U.C.A. § 25-5-3, which is also set forth verbatim in the Addendum. (Add. 41.)

## **STATEMENT OF THE CASE**

This is a declaratory judgment action to determine the parties' rights under a renewal option provision of a commercial lease. (R. 1-3, 42-45.) The option provision requires that the rental rate for the option period be "mutually agreed upon" by the parties. (R. 29, ¶ 4.) The parties could not reach agreement. (R. 98, ¶ 9; 124, ¶ 4; 31, 161-65.) Defendant moved for summary judgment, arguing that, without agreement on the rental rate, the option is unenforceable. (R. 99-103.) Plaintiff filed a cross-motion for summary judgment, requesting that the district court set the rental rate at the "minimum rent" set forth in the option provision. (R. 121-22.) While both parties argued that the option provision is clear and unambiguous, and the district court made no finding of ambiguity, plaintiff filed a supporting affidavit that provided extrinsic evidence of plaintiff's interpretation of the provision. (R. 129, 166.) Defendant moved to strike the offending paragraphs of this affidavit. (R. 213-20.) The district court denied the motion to strike, denied defendant's motion for summary judgment, and granted plaintiff's motion for summary judgment, ordering that the lease be renewed for the option period at the "minimum rent" set forth in the option provision. (R. 250, 287-90.) Defendant filed this appeal. (R. 292.)

## **STATEMENT OF FACTS**

In December 1992, plaintiff, Little Caesar Enterprises, Inc. ("Little Caesar"), entered into a Shopping Center Lease ("Lease"), as tenant, with Wallace Associates Management as landlord. The purpose of the Lease was for Little Caesar to operate a



pizza shop at the Bell Canyon Shopping Center in Sandy, Utah. Defendant, Bell Canyon Shopping Center, L.C. ("Bell Canyon"), subsequently acquired title to the property and succeeded to the rights and interests of the landlord under the Lease. (Complaint, ¶¶ 1-4, R. 1-2; Lease, R. 7, Add. 7.)

The original term of the Lease was five years, commencing April 1, 1993 and expiring April 1, 1998. The "basic monthly rent" was set at \$1190, with "zero" "percentage rent" based on gross sales during the initial term. The percentage rent provision was marked "Deleted" for purposes of the initial term, but remained part of the Lease. The Lease was actually signed in February and March 1993. (Complaint, ¶ 5, R. 2; Lease pp. 1-2, Add. 7-8.)

At the time of signing the Lease, the parties also signed an "Addendum" to the Lease, providing two five-year options to extend the Lease. The option provision, contained in paragraph 4 of the Lease Addendum, requires the tenant to give written notice of intent to exercise the option. Regarding the rental rate, the provision states that "[t]he Minimum Rent for the first option period shall be at a market rate mutually agreed upon by Tenant and Landlord." Such "Minimum Rent shall not be higher than \$11.00 per square foot." The market rate was to be based on "the then prevailing market rates for similar space in similar shopping centers" in the area. The option provision concluded that "Landlord and Tenant shall mutually agree on the market rate within 30 days of Tenant's notification to Landlord that Tenant wishes to exercise an option period." (Lease Addendum, ¶ 4, Add. 29.)

In a letter dated November 25, 1997, Little Caesar notified Bell Canyon of its intent to exercise the first option for five-year extension of the Lease, commencing April 1, 1998. The letter acknowledges that "within thirty (30) days from Tenant providing this notice to Landlord, Landlord and Tenant shall mutually agree on the market rate for which the rental rate will be determined." However, the letter also states that "in no event shall the minimum rent be higher than \$11.00 per square foot." The letter concludes, "please contact me immediately so that we can finalize this lease renewal in accordance with the lease terms." (R. 31, Add. 31.)

In a letter dated December 8, 1997, Bell Canyon responded to the foregoing option notice. While expressing satisfaction with Little Caesar's desire to extend the lease, Bell Canyon disputed the apparent "perception that the option provisions [sic] of the lease limits the Basic Monthly Rent to be no higher than \$11.00 per square foot." The Bell Canyon response distinguishes the term "Basic Monthly Rent," as defined in the Lease, from the term "Minimum Rent," as used in the option provision of the Lease Addendum. The response explains that \$11.00 per square foot is "the minimum rent that the Landlord will accept on the exercise of the subject option . . . and that negotiations between Landlord and Tenant start at that floor for the subject 5 year period." The response letter notes that market rates approximate \$19.00 per square foot. The letter concludes, "Please advise in what manner you desire to proceed with negotiations on the option period lease rate." (R. 161, Add. 32.)

On March 16, 1998, Little Caesar sent a reply letter, asserting that "Minimum Rent" and "Basic Monthly Rent" mean the same thing, and that the option provision sets \$11.00 per square foot not as the "minimum rent," but as the "maximum amount" to be charged during the option period. Little Caesar then proposed an amendment to the Lease, setting the option rental rate at \$11.00 per square foot. However, Bell Canyon never agreed to that rental rate and never signed the proposed amendment. (R. 162-65, Add. 33-36.)

Little Caesar commenced this action one week later, seeking a declaratory judgment that the option provision sets a rental rate of \$11.00 per square foot. Little Caesar also sought injunctive relief against eviction. (Complaint, R. 1-6.) Bell Canyon answered and counterclaimed, seeking a declaration that the option provision contains no method of fixing a rental rate without agreement of the parties, and that the provision is therefore unenforceable and the Lease is expired. Bell Canyon also sought an injunction ordering Little Caesar to vacate the premises. (Answer and Counterclaim, R. 37, 42-47.)

Bell Canyon filed a motion for summary judgment, demonstrating under established Utah law that the option provision is void and unenforceable for lack of agreement on the essential term of rental rate, or any mechanism by which the rate can be determined. (R. 92-104.) Little Caesar filed a cross-motion for summary judgment, asserting that the option provision sets the maximum rent at \$11 per square foot, and that the court should order enforcement of the option at that rate. (R. 118-33.) While both parties asserted that the option provision was clear and unambiguous, Little Caesar

submitted the Affidavit of Mark Whittle, who offered his opinion that "Minimum Rent" in the option provision meant the same as "Basic Monthly Rent" in the Lease, and that the \$11 rate was intended as the maximum rent, without any additional percentage rent during the option period. (R. 166, Add. 37.) Bell Canyon moved to strike the affidavit as inadmissible extrinsic evidence because there had been no allegation by the parties or finding by the court that the option provision was ambiguous. (R. 213-20.) The district court denied the motion to strike, denied Bell Canyon's motion for summary judgment, and granted Little Caesar's motion for summary judgment, ordering enforcement of the option at the rental rate of \$11 per square foot. (R. 250, 287, Add. 1-3.)

### **SUMMARY OF ARGUMENT**

The lease renewal option is void and unenforceable because it lacks the essential term of rental rate. The option provision expressly required that the rental rate would be the market rate mutually agreed upon by the parties. The parties never agreed upon a market rate. In the absence of required mutual agreement, the district court erred by imposing on the parties a rate of \$11 per square foot, which the option provision designates as the "minimum rent," but which the court erroneously construed as the "maximum rent." Because the parties never agreed on a market rate for the option period, the lease expired of its own terms and cannot be renewed by judicial fiat.

The statute of frauds requires the essential terms of a lease to be in writing. The parol evidence rule precludes a court from considering extrinsic evidence in the interpretation of a contract, unless the contract is first found to be ambiguous without

regard to the extrinsic evidence. A court cannot properly consider extrinsic evidence in deciding whether a contract is ambiguous. The district court erred by considering extrinsic evidence from a Little Caesar affidavit without any finding, or even argument from the parties, that the option provision was ambiguous.

## **ARGUMENT**

### **POINT I: THE LEASE RENEWAL OPTION IS VOID AND UNENFORCEABLE BECAUSE THERE IS NO MUTUAL AGREEMENT ON THE RENTAL RATE AND NO DEFINITE MECHANISM FOR THE COURT TO IMPOSE A RATE.**

#### **A. Utah Case Law.**

Utah law is well established that a lease renewal option lacking an agreed rental rate, or a mechanism to determine the rate with certainty, is void and unenforceable. In the leading case of *Pingree v. Continental Group of Utah, Inc.*, 558 P.2d 1317 (Utah 1976), the parties entered a five-year restaurant lease, with two five-year options for renewal. Rental during the initial term was \$500 per month, plus a percentage of gross receipts. The renewal option provided for "the same terms and conditions" as the initial term, "except that the rental amount will be renegotiated; however, maximum total monthly rental shall not exceed \$900.00 per month." *Id.* at 1320. The lessee exercised the option to renew, but "[t]he parties were unable to agree on the rental rate for the renewal period." *Id.* at 1321. The lessor demanded the \$900-maximum, while the lessee offered only \$500. In a declaratory judgment action, the district court found that a "reasonable rental rate" was \$900 per month. *Id.* at 1320-21.

On appeal, the Utah Supreme Court held that the renewal option was void and unenforceable because there was no "meeting of the minds" on the rental rate for the option period. The court cited and adopted the "majority rule," as follows:

The majority rule, in essence, is that a provision for the extension or renewal of a lease must specify the time the lease is to extend *and the rate of rent to be paid with such a degree of certainty and definiteness that nothing is left to future determination*. If it falls short of this requirement, it is not enforceable. [*Id.* at 1321, emp. added.]

The court expressly rejected the "minority rule" by which "the court implies a mutual agreement for a reasonable rental." *Id.* The court concluded that even though the "implied" rental of \$900 was in fact reasonable, *id.* at 1322, "[t]he option to renew was too vague and indefinite to be enforceable and the lease terminated by its own terms" at the end of the initial term. *Id.* at 1321.

This Court expressly followed *Pingree* in the recent case of *Brown's Shoe Fit Co. v. Olch*, 955 P.2d 357 (Utah App. 1998). In *Brown's Shoe*, the lessee entered into a commercial lease for operation of a shoe store. The lease provided for an initial three-year term and two three-year options for renewal. The rental for the initial period and the option periods would be based on a square-foot rate, plus a percentage of "gross-volume" sales. The option provision set a square-foot "minimum" rent for the option periods, but provided that the parties "would agree on the gross volume figure from which to base additional rent during each year" of the option period. The term "gross volume" was not defined. *Id.* at 360.

This Court held that the renewal option was too vague and indefinite to be specifically enforced because, unlike the initial lease, the option left the percentage rental for future agreement of the parties, with no definite mechanism for determining that rental. A renewal option is a mere "agreement to agree" if it omits the material term of rental rate. *Id.* at 362-63. Citing *Pingree*, this Court stated the law as follows:

In Utah, the law is settled that an option to renew a lease is unenforceable unless the rent to be paid, or some mechanism for determining the amount of rent, is specified in the lease. [*Id.* at 364.]

The Court concluded that "the option periods of the [lease] were fatally defective as to price because . . . the option periods included no sufficiently certain 'agreement as to some formula or method for fixing [the rental price].'" *Id.* at 366 (citation omitted).

As this Court observed in *Brown's Shoe*, *id.* at 364, the Utah Supreme Court has twice upheld *Pingree* in the subsequent cases of *Cottonwood Mall Co. v. Sine*, 767 P.2d 499 (Utah 1988), and *Richard Barton Enterprises, Inc. v. Tsern*, 928 P.2d 368 (Utah 1996). In *Sine*, the tenant attempted to enforce an alleged oral agreement to renew a lease for bowling lanes "on reasonable terms." 767 P.2d at 500. The court refused, citing *Pingree* and its "majority rule" that a lease renewal option "must specify . . . the rate of rent to be paid with such a degree of certainty and definiteness that nothing is left to future determination." *Id.* at 502. The *Sine* court was unwilling "to find or make an agreement where the parties had themselves failed." *Id.* The court reasoned:

Courts simply are not equipped to make monetary decisions impacted by the fluctuating commercial world and are even less prepared to *impose paternalistic agreements on litigants*. We therefore conclude that the

written lease terminated by its own terms at its expiration date, was not renewed by the parties, and *cannot be renewed for them by the courts.* [*Id.*, emp. added.]

Similarly, in *Tsern, supra*, the parties to a commercial lease "'agreed in principle' to the 'concept' of a rent abatement," but they never agreed "to the amount of an abatement." 928 P.2d at 372. In a declaratory judgment action, the trial court reduced the rent from \$3,000 to \$2,000 per month, based on the parties' agreement in "concept." *Id.* The supreme court reversed, holding that a court may not supply the essential term of rent amount when the parties themselves had not agreed to a specific amount. *Id.* at 373. The court explained:

Courts may not impose a modification of a lease to which the parties have not agreed and, a fortiori, *may not do so when the parties have explicitly disagreed as to the essential terms* thereof. . . . Modification of such terms as the amount of rent must be agreed upon in a modification of a lease agreement. As Corbin notes, when parties have not agreed on a reasonable price or a method for determining one, "the agreement is too indefinite and uncertain for enforcement." [*Id.*, emp. added.]

The court expressly relied on its holding in *Pingree* that an "option to renew in [a] lease that provided for [the] rental amount to be negotiated but not to exceed [a] specified amount [is] 'too vague and indefinite to be enforceable.'" *Id.* at 374, *quoting Pingree*, 558 P.2d at 1321.

**B. Application to the Present Case.**

Here, the option provision in the Lease Addendum, paragraph 4, does *not* set a rental rate for the option periods. Rather, it expressly requires the rental rate to be set by agreement of the parties, based on then prevailing market rates. Specifically, the option



provision states that "[t]he Minimum Rent for the first option period shall be at a *market rate mutually agreed upon by Tenant and Landlord*. . . . Rent in the second option period shall also be at *market rates*." "Market rates" are specifically defined as "the then prevailing market rates for similar space in similar shopping centers within 5 miles of the Shopping Center." The option provision concludes by again specifically requiring the parties to "*mutually agree on the market rate* within 30 days of" the tenant's notice to exercise the option. (Add. 29.) Thus, like the option provisions in *Pingree and Brown's Shoe*, the rental rate for the option periods was expressly left open for subsequent negotiation and agreement of the parties. The obvious purpose of leaving the rental amount for future option periods open is that market rates fluctuate with the economy and inflation and cannot possibly be predicted with accuracy at the time the initial lease is entered.

The parties never did agree on a rental rate for the option periods. The Little Caesar notice of November 25, 1997 specifically acknowledges the need to "mutually agree on the market rate for which the rental will be determined." The letter requests a future contact "so that we can finalize this lease renewal." (Add. 31.) Obviously, Little Caesar did not believe that the option rental rate had been decided; rather, Little Caesar conceded that the rental needed to be based on a mutually agreed "market rate." Bell Canyon's response of December 8, 1997 reaffirms that the option rental rate must be negotiated by the parties, but suggests a market rate of \$19 per square foot. The letter invites further negotiations. (Add. 32.) Finally, Little Caesar's reply of March 16, 1998

proposes an option rental rate of \$11 per square foot, attaching a proposed amendment to the lease for Bell Canyon to sign. (Add. 33-36.) However, the proposed amendment was never signed, and no agreement was ever reached.

Accordingly, as in *Pingree and Brown's Shoe*, there was no "meeting of the minds" on the rental rate for the option period. Plainly, the rental rate was not set forth in the option provision "with such a degree of certainty and definiteness that nothing [was] left for future determination." *Pingree, supra*, at 1321. The option provision itself and the correspondence of the parties makes nothing more clear than that the rental rate was "left for future determination." As in *Tsern, supra*, not only had the parties not agreed, they had "explicitly disagreed" on the rental rate for the option period. 928 P.2d at 373. In the absence of required agreement between the parties on the rental rate, the district court was not authorized "to impose [its own] paternalistic agreement[] on [the] litigants." *Sine, supra*, 767 P.2d at 502. By so doing, the district court in this case actually followed the "minority rule" that was expressly rejected in *Pingree* and *Sine*. In the absence of any agreement on the "market rate" for rental during the option period, the option cannot be enforced, and the lease expired by its own terms on April 1, 1998. *See Pingree, supra*, at 1321; *Sine, supra*, at 502; *Brown's Shoe, supra*, at 365.

The district court here imposed an option rental of \$11 per square foot based on the sentence in the option provision that says "the Minimum Rent shall not be higher than \$11.00 per square foot." (Add. 29; *see* Order. ¶ 8, Add. 3.) The court reasoned that the term "Minimum Rent," as used in the option provision, is the same as "Basic Monthly

Rent," as used in the Lease. (Order, ¶ 2.) Because the Basic Monthly Rent during the initial term of the lease did not include an added percentage rent, the court concluded that no percentage rent could be added to the Minimum Rent during the option period.

(Order, ¶¶ 3-4.) Therefore, the court concluded that the \$11 rate was not a "Minimum Rent," as that term is commonly understood, but a "maximum rent," or "cap on monthly rent." (Order, ¶ 8.) Because Little Caesar theoretically offered the "maximum rent" specified in the option provision, the court assumed that the parties "agreed" on that rate. (*Id.*)

However, the court's analysis is both illogical and immaterial, in that it focuses on the wrong term. The term "Minimum Rent" in the option provision, in both its common and commercial contexts, means "the least quantity . . . possible in a given case and is opposed to maximum." Black's Law Dictionary 995 (6<sup>th</sup> ed.) Minimum rent in commercial leases is commonly understood to mean the base or guaranteed rent to which a percentage rent may be added. *See* Annot., "Calculation of Rental Under Commercial Percentage Lease," 58 A.L.R.3d 384, 398 n.53 (1974). Thus, the term "minimum" plainly implies a beginning amount to which another amount, such as percentage rent, may be added. The fact that Percentage Rent was not added to the Basic Monthly Rent during the initial term does not preclude its addition to the Minimum Rent during the option periods. *See Brown's Shoe, supra*, at 364 ("unlike for the initial period, the [lease] did not specify the percentage rental that *Brown's Shoe* would have to pay . . . for the option periods").

Accordingly, the court could not logically interpret the term "minimum" to mean "maximum."

In any event, the semantic dispute over the meaning of "Minimum Rent" actually misses and ignores the more relevant terms of the option provision *explicitly requiring mutual agreement on a "market rate"* for rent during the option period. The meaning of "Minimum Rent" cannot be determined with reference to "Basic Monthly Rent" because the option provision expressly requires that Minimum Rent *"shall be at a market rate mutually agreed upon by"* the parties. The provision then defines "market rate" as "the then prevailing market rate[] for similar space" in the area. Plainly, the rate of \$11 per square foot, listed in the option provision as the "Minimum Rent," is not the "market rate," and the parties never agreed to that rate. If the parties had intended \$11 to be the actual rental rate, they could have omitted all reference to later mutual agreement on a market rate. There would have been no need for future agreement. As made clear in *Pingree and Brown's Shoe*, the district court cannot simply adopt the "maximum" or "minimum" rental contained in the option provision, *even if that rate is found to be reasonable*. *Pingree, supra*, at 1320-21; *Brown's Shoe, supra*, at 360. Rather, if the option requires agreement of the parties, the parties must agree, and the court cannot impose its own rental in the absence of the required agreement. *Sine, supra*, at 520; *Tsern, supra*, at 373-74, citing *Pingree* (lease renewal option that provides for rent to be negotiated, but not to exceed a specified amount, is "too vague and indefinite to be enforceable").

In short, the option rental rate was not specified "with such a degree of certainty and definiteness that nothing [was] left for future determination." *Pingree, supra*, at 1321. The option provision expressly required future agreement on a market rate, and the parties never agreed on a market rate. Therefore, the district court erred in imposing the arbitrary rate of \$11 per square foot, whether that rate is viewed as a minimum or a maximum. Absent mutual agreement on the essential term of rental rate for the option period, the lease expired on its own terms. *Id.*

**POINT II: THE DISTRICT COURT ERRED IN PERMITTING EXTRINSIC EVIDENCE WITHOUT ANY ALLEGATION OR PRIOR FINDING THAT THE OPTION PROVISION WAS AMBIGUOUS.**

The statute of frauds states that a lease of real property is void unless it is set forth in a writing that includes all essential terms, including rental amount. U.C.A. § 25-5-3 (Add. 41); *see Brown's Shoe, supra*, 955 P.2d at 363. Where such a contract is integrated, the parol evidence rule precludes evidence of its terms in addition to those found in the contract. The intentions of the parties must be determined only from the words of the contract. A court may consider extrinsic evidence of the parties' intent only if the contract language is found to be ambiguous. *See, e.g., Lee v. Barnes*, 1999 UT App 126, ¶ 9, 977 P.2d 550. Consideration of extrinsic evidence without a prior finding of ambiguity defeats the long-standing salutary purpose of the statute of frauds, which is to prevent parties from attempting to alter or augment their agreements through subsequent attestations of side agreements, oral promises, or personal understandings that may not be

true. *See Abba v. Smyth*, 59 P. 756, 758 (Utah 1899); 72 Am. Jur. 2d Statute of Frauds §§ 2-3, 44, 274, 289, 296 (1974).

Utah law is well established that, in interpreting a contract, a court must "first look to the four corners of the agreement to determine the intent of the parties." *U.P.C., Inc. v. R.O.A. General, Inc.*, 1999 UT App 303, ¶ 39, 990 P.2d 945. The parties' intentions must be "determined from the plain meaning of the [contract] language." *Dixon v. Pro Image Inc.*, 1999 UT 89, ¶ 13, 987 P.2d 48. Only if the language is ambiguous can the court resort to extrinsic evidence of intent. Moreover, "whether an ambiguity exists is also a question of law to be decided by the trial court *before considering extrinsic evidence.*" *SLW/Utah, L.C. v. Griffiths*, 967 P.2d 534, 535 (Utah App. 1998) (emp. added). Thus, "whether a contract is ambiguous presents a threshold question of law," which is reviewed for correctness. *Interwest Construction v. Palmer*, 923 P.2d 1350, 1358 (Utah 1996). A court must "*first look to the four corners of the contract itself to determine whether it is ambiguous.*" *Id.* at 1359. Accordingly, a court may *not* receive and consider extrinsic evidence in deciding whether a contract is ambiguous. The issue of ambiguity must be decided *before and without* resort to extrinsic evidence. *Id.*

Here, the Lease and the Lease Addendum constitute an integrated contract: "This Lease and the exhibits, riders and addenda, if any, attached, constitute the entire agreement between the parties." (¶ 22.15, Add. 21.) Moreover, Little Caesar consistently argued that the option provision was clear and unambiguous. (R. 129, "clear and unequivocal"; "no ambiguity or uncertainty"; R. 238, "lease clearly provides for an option

period with a monthly rent of no more than \$11.00 per square foot.") Yet, Little Caesar presented the Affidavit of Mark Whittle in support of its cross-motion for summary judgment. (R. 166, Add. 37.) Whittle states that "it was understood and agreed during the lease negotiations that percentage rent would not apply to Little Caesar for any lease extension." (§ 5.) He states that the undefined term "minimum rent" was intended to mean the same thing as the defined term "basic monthly rent," without the addition of any other component of rent. (§§ 8-9.) Finally, he provides his understanding that rent for the first option period would not be higher than \$11 per square foot. (§ 11.) Obviously, these assertions are intended to alter the plain language of the option provision requiring *future mutual agreement on a market rate for the option period*.

Bell Canyon promptly moved to strike the offending paragraphs of the Whittle Affidavit, demonstrating that they constituted extrinsic evidence without any finding of ambiguity. (R. 213-21.) Little Caesar argued, contrary to the foregoing case law, that the court could consider extrinsic evidence in deciding *whether the option provision is ambiguous*. (R. 228-29.) The district court apparently accepted that legally erroneous argument, denying the motion to strike, again without any finding of ambiguity. (R. 250.) The final Order prepared by counsel for Little Caesar hedges the argument by asserting that the Whittle Affidavit is admissible "[t]o the extent that defendant's interpretation of the [option provision] creates an ambiguity." (§ 5, Add. 2, emp. added.) Accordingly, even in the final Order there is no specific, unconditional finding that the option provision is ambiguous. However, the Order goes on to rest its legal conclusion on the extrinsic

evidence of the challenged affidavit. (Order, ¶¶ 6-8.) Paragraph 6 of the Order refers to the Whittle Affidavit as "unrefuted," but Bell Canyon provided no contrary affidavit because both parties agreed and argued that the option provision was clear and unambiguous, and the district court made no finding that it was ambiguous. Not until the final Order was there any hint of a finding of ambiguity, and even then, only a tentative, conditional hint.

In summary, the district court erred in permitting, and apparently considering, extrinsic evidence in its interpretation of the option provision.

### CONCLUSION

Based on the foregoing, this Court should reverse the district court's order and direct that judgment be entered for Bell Canyon, declaring that the option provision is unenforceable; that the lease expired on its own terms; that Bell Canyon is entitled to recover the premises; that Bell Canyon is entitled to additional rent, according to the terms of the Lease, from the date of expiration; and that Bell Canyon is entitled to its attorney fees and costs incurred in this action, both in the district court and on appeal.

Respectfully submitted this 10<sup>th</sup> day of March, 2000.

KIRTON & McCONKIE

By: Merrill F. Nelson  
Charles W. Dahlquist, II  
Merrill F. Nelson  
Attorneys for Defendant/Appellant



**CERTIFICATE OF SERVICE**

I hereby certify that I caused two true and correct copies of the foregoing  
**Brief of Appellant** to be mailed through United States mail, postage prepaid, this 10<sup>th</sup>  
day of March, 2000, to the following:

Ronald G. Russell  
PARR, WADDOUPS, BROWN, GEE & LOVELESS  
185 South State, Suite 1300  
Salt Lake City, UT 84147  
Attorneys for Plaintiff/Appellee

Wendell E. Nelson

## ADDENDUM

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IMAGED

Ronald G Russell, Esq. (4134)  
 PARR WADDOUPS BROWN GEE & LOVELESS  
 Attorneys for Plaintiff  
 185 South State Street, Suite 1300  
 Post Office Box 11019  
 Salt Lake City, Utah 84147-0019  
 Telephone (801) 532-7840

**FILED DISTRICT COURT**  
 Third Judicial District

AUG 24 1999

By [Signature] SALT LAKE COUNTY  
 Deputy Clerk

**ENTERED IN RECISTRY  
 OF JUDGMENTS**

DATE 8/26/99

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

LITTLE CAESAR ENTERPRISES, INC , a	)	
Michigan corporation,	)	
	)	ORDER AND JUDGMENT
Plaintiff,	)	
	)	
vs.	)	
	)	
BELL CANYON SHOPPING CENTER,	)	Civil No 980903087CN
L C a Utah limited liability company,	)	Judge Homer F Wilkinson
	)	
Defendant	)	

This matter came before the court on Defendant's Motion for Summary Judgment, Plaintiff's Motion for Summary Judgment, and Defendant's Motion to Strike the Affidavit of Mark Whittle. Ronald G Russell appeared for plaintiff. Eric C Olson appeared for defendant. Based on the record herein, the arguments of counsel, and for good cause appearing, the court concludes and rules as follows.

1 The renewal option contained in the Addendum to the Shopping Center Lease having plaintiff, as tenant, and Wallace Associates Management - Receiver, as landlord,

dated December 11, 1992 (the "Lease") is not too vague and indefinite to be enforced as argued by defendant.

2. The term "minimum rent" is used in the Addendum to refer to the monthly rent defined in the body of the Lease as "basic monthly rent."

3. The parties specifically deleted the Lease provisions relating to percentage rent and there is nothing in the Addendum indicating that percentage rent would be added back into the Lease during the renewal periods.

4. Because the renewal option does not specify a change regarding the deletion of percentage rent from the Lease, the renewal lease continues on the same terms and conditions as the original Lease.

5. To the extent that defendant's interpretation of the Addendum's use of the words "minimum rent" creates an ambiguity, the Affidavit of Mark Whittle is admissible regarding the parties' intent.

6. Mr. Whittle's affidavit is unrefuted and establishes that "minimum rent" is a commonly used term in commercial leasing that is understood to mean the base rent paid by the tenant and that "minimum rent" as used in the Addendum was intended to refer to base monthly rent.

7. Mr. Whittle's affidavit also confirms that use of the term "minimum rent" was not intended to make percentage rent apply during the renewal period, but that the

deletion of the percentage rent provisions was intended to make percentage rent inapplicable to the Lease.

8. This case is distinguishable from Brown's Shoe Fit Co. v. Olch, 955 P.2d 357 (Utah App. 1998), and Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317 (Utah 1976). Unlike Brown's Shoe, there is no uncertainty regarding the calculation of percentage rent that would apply during the option period since the percentage rent provisions are specifically deleted from the Lease. In contrast to Pingree where the landlord and tenant disputed the formula for calculating rent during the option period, plaintiff here has accepted the \$11 per square foot cap on monthly rent.

For the foregoing reasons and based on the matters set forth in plaintiff's memoranda,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Defendant's motions for summary judgment and to strike the Affidavit of Mark Whittle are denied.
2. Plaintiff's Motion for Summary Judgment is granted.
3. The court hereby grants judgment in favor of plaintiff and against defendant as prayed in plaintiff's Complaint and declares that (i) plaintiff has properly exercised its option to extend the Lease for the first renewal period of five (5) years; (ii) under paragraph 4 of the Addendum to the Lease, the monthly rent for the first option period is \$11 per square foot, which is \$1,636.25 per month; and (iii) the general terms and

conditions of the Lease including the deletion of the percentage rent provisions continue during the renewal option period.

4. Plaintiff is awarded judgment against defendant in the amount of its costs totaling \$ 120.00.

5. Plaintiff is awarded judgment against defendant in the amount of its reasonable attorney's fees totaling \$ 12,591.25 as the prevailing party, pursuant to paragraph 22.13 of the Lease.

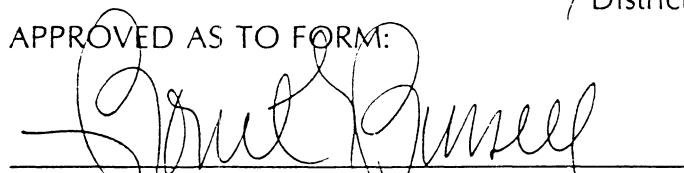
6. Defendant's Counterclaim is dismissed with prejudice.

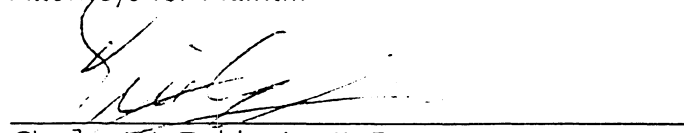
DATED this 24 day of Aug, 1999.

BY THE COURT:

  
 Honorable Homer F. Wilkinson  
 District Court Judge

APPROVED AS TO FORM:

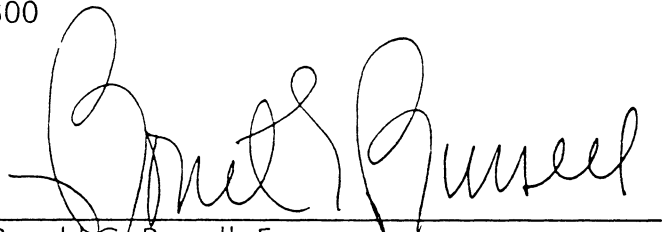
  
 Ronald G. Russell, Esq. on  
 PARR WADDOUPS BROWN GEE & LOVELESS  
 Attorneys for Plaintiff

  
 Charles W. Dahlquist, II, Esq.  
 Eric C. Olson, Esq.  
 Bryan H. Booth, Esq. of  
 KIRTON & McCONKIE  
 Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 5<sup>th</sup> day of August, 1999 a true and correct copy of the foregoing ORDER AND JUDGMENT was hand-delivered to:

Eric C. Olson, Esq..  
KIRTON & McCONKIE  
60 East South Temple, Suite 1800  
Salt Lake City, Utah 84111

  
\_\_\_\_\_  
Ronald G. Russell, Esq.

THIRD DISTRICT COURT - SLC COURT  
SALT LAKE COUNTY, STATE OF UTAH

---

LITTLE CAESAR ENTERPRISES INC,	:	MINUTES
Plaintiff,	:	SUMMARY JUDGMENT
	:	
vs.	:	Case No: 980903087 CN
	:	
BELL CANYON SHOPPING CENTER L,	:	Judge: HOMER WILKINSON
Defendant.	:	Date: July 21, 1999

---

Clerk: deborahw

PRESENT

Plaintiff's Attorney(s): RONALD G RUSSELL  
Defendant's Attorney(s): ERIC C. OLSON  
Video

---

HEARING

This case came before the Court for summary judgment. The Court denies Defendant's motion to strike and denies Defendant's summary judgment. The Court grants the Plaintiff's motion for summary judgment. Mr. Russell to prepare order.



SHOPPING CENTER LEASE  
[BELL CANYON SHOPPING CENTER]

THIS SHOPPING CENTER LEASE (this "Lease") is entered into as of the 11th day of December, 1992, between Wallace Associates Management - Receiver ("Landlord"), whose address is 165 South Main Street, Salt Lake City, UT 84111, and Little Caesar Enterprises, Inc. ("Tenant"), whose address is Fox Office Centre, 2211 Woodward Ave., Detroit MI 48201-3400 ATTN: National Ops.

FOR THE SUM OF TEN DOLLARS (10.00) and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, Landlord and Tenant agree as follows:

1. Definitions. Each of the following words and phrases shall have the meaning set forth:

"Adjustment Date" (for purposes of Paragraph 4.2.1) means N/A, 19\_\_\_\_ and each subsequent \_\_\_\_\_ 1st.

"Basic Monthly Rent" means the following amount(s) per calendar month for the period(s) indicated, subject to Paragraph 4.2:

<u>Period(s)</u>	<u>Basic Monthly Rent</u>
Years 1-5	\$1,190.00

"Commencement Date" means (i) April 1, 1993.

"Common Areas" means the parking areas, roadways, pedestrian sidewalks, mall areas (whether open or closed), delivery areas, trash storage and removal areas, landscaped areas, security areas, public washrooms and all other areas or improvements that may be provided by Landlord for the common use of the tenants in the Shopping Center.

"Expiration Date" means the date which is 5 years after the Commencement Date, plus any partial calendar month occurring between the Commencement Date and the first day of the first full calendar month following the Commencement Date.

"Identified Items" (for purposes of Paragraph 4.3.2) means, collectively, the following: N/A

"Occupants" means, collectively, any assignee, subtenant, employee, agent, licensee or invitee of Tenant.

"Percentage Rent" means, during each full or partial calendar year during the Term, zero percent (0%) of the amount by which "Gross Sales," as defined in Paragraph 4.3, exceeds the Basic Monthly Rent actually paid by Tenant for such full or partial calendar year. Each such full or partial calendar year shall be considered as an independent accounting period for the purpose of computing the amount of Percentage Rent due.

"Permitted Use" means Tenant shall be entitled to use and occupy the Premises for the retail sales of food and beverages and related promotional items which shall include, but not be limited to, pizza, Italian specialties, bread products, salads, sandwiches and any other items generally sold by Little Caesar stores only (provided that Landlord makes no representation or warranty that such use is permitted under applicable law), and no other purpose.

"Premises" means Store space #1341, consisting of 1,785 net usable square feet, shown as the crosshatched area on the attached Exhibit A, located in Bell Canyon Shopping Center (the "Shopping Center"), situated at 1300 East 10600 South, Sandy, Utah, County of Salt Lake, State of Utah. The Premises do not include, and Landlord reserves, the exterior walls and roof of the Premises, and the land beneath the floor of the Premises and the pipes, ducts, conduits, wires, fixtures and equipment above the suspended ceiling and structural elements that serve the

Premises or the Shopping Center. Landlord's reservation includes the right to install, inspect, maintain, use, repair, alter and replace those areas and items and to enter the Premises in order to do so, so long as same does not materially interfere with Tenant's business.

"Security Deposit" means \$ N/A.

"Tenant" means each person executing this Lease as a Tenant under this Lease. If more than one person is set forth on the signature line as Tenant, their liability under this Lease shall be joint and several. If more than one Tenant exists, any notice required or permitted by the terms of this Lease may be given by or to any one Tenant, and shall have the same force and effect as if given by or to all persons comprising Tenant.

"Tenant's Percentage of Operating Expenses" means 2.9% percent, which is the result obtained by dividing the net usable square feet of the Premises by the net usable square feet of all premises within the Shopping Center, as reasonably determined by Landlord.

"Tenant's Trade Name" means Little Caesars Pizza.

"Term" means the period commencing on 12:01 a.m. of the Commencement Date and expiring on midnight of the Expiration Date

2. Agreement of Lease; Improvement. Deleted

3. Term; Commencement Date. Tenant's obligation to pay rent under this Lease shall commence on the Commencement date and shall be for the Term.

4. Rent.

4.1 Basic Monthly Rent. Tenant covenants to pay to Landlord without abatement, deduction, offset, prior notice or demand the Basic Monthly Rent in lawful money of the United States in consecutive monthly installments at such place as Landlord may designate, in advance on or before the first day of each calendar month during the Term, commencing on the Commencement Date. If the Commencement Date occurs on a day other than the first day of a calendar month, on the Commencement date the Basic Monthly Rent shall be paid for the initial fractional calendar month prorated on a per-diem basis and for the first full calendar month occurring after the Commencement Date. If this Lease expires or terminates on a day other than the last day of a calendar month, the Basic Monthly Rent for such fractional month shall be prorated on a daily basis.

4.2 Consumer Price Index Escalation. Deleted

4.2.1 Escalation. Deleted

4.2.2 Index. Deleted

4.3 Percentage Rent. Deleted

4.3.1 Calculation and Payment of Percentage Rent. Deleted

4.3.2 Definition of Gross Sales. Deleted

4.3.3 Deductions and Exclusion From Gross Sales. Deleted

4.3.4 Recordkeeping. Deleted

4.3.5 Landlord's Right to Audit. Deleted

5. Operating Expenses.

5.1 Definitions. Each of the following words and phrases shall have the meaning set forth:

5.1.1 "Estimated Operating Expenses" means the projected amount of Operating Expenses for any given Operating Year as estimated by Landlord, in Landlord's reasonable discretion.

5.1.4 "Tenant's Estimated Share of Operating Expenses" means the result obtained by multiplying Tenant's Percentage of Operating Expenses by the Estimated Operating Expenses. Tenant's Estimated Share of Operating Expenses for any fractional Operating Year shall be calculated by determining Tenant's Estimated Share of Operating Expenses for the relevant Operating Year and then prorating such amount over such fractional Operating Year.

5.2 Payment of Operating Expenses In addition to the Basic Monthly Rent and the Percentage Rent, Tenant covenants to pay to Landlord without abatement, deduction, offset, prior notice (except as provided in this Paragraph 5) or demand Tenant's Share of Operating Expenses in lawful money of the United States at such place as Landlord may designate, in accordance with the provisions of this Paragraph 5, in advance on or before the first day of each calendar month during the Term, commencing on the Commencement Date and prior to each Operating Year after the Commencement Date, if reasonably practicable, Landlord shall furnish Tenant with a written statement (the "Estimated Operating Expenses Statement") showing in reasonable detail the computation of Tenant's Estimated Share of Operating Expenses. On or prior to the Commencement Date, and on the first day of each month following the Commencement Date, Tenant shall pay to Landlord one-twelfth (1/12th) of Tenant's Estimated Share of Operating Expenses as specified in the Estimated Operating Expenses as specified in the Estimated Operating Expenses Statement for such Operating Year. If Landlord fails to give Tenant an Estimated Operating Expenses Statement prior to any Operating Year, Tenant shall continue to pay on the basis of the Estimated Operating Expenses Statement for the prior Operating Year until the Estimated Operating Expenses Statement for the current Operating Year is received. If at any time it appears

to Landlord that the Operating Expenses will vary from Landlord's original estimate, Landlord may deliver to Tenant a revised Estimated Operating Expenses Statement for such Operating Year, and subsequent payments by Tenant for such Operating Year shall be based on such revised statement. Within a reasonable time after the expiration of any Operating Year, and subsequent payments by Tenant for such Operating Year shall be based on such revised statement. Within a reasonable time after the expiration of any Operating Year, Landlord shall furnish Tenant with a written statement (the "Actual Operating Expenses Statement") showing in reasonable detail the computation of Tenant's Share of Operating Expenses for such Operating Year and the amount by which such amount exceeds or is less than the amounts paid by Tenant during such Operating Year. If the Actual Operating Expenses Statement indicates that the amount actually paid by Tenant for the relevant Operating Year is less than Tenant's Share of Operating Expenses for such Operating Year, Tenant shall pay to Landlord such deficit within thirty (30) days after delivery of the Actual Operating Expenses Statement. Such payments by Tenant shall be made notwithstanding that the Actual Operating Expenses Statement is furnished to Tenant after the expiration of the Term or sooner termination of this Lease. If the Actual Operating Expenses Statement indicates that the amount actually paid by Tenant for the relevant Operating Year exceeds Tenant's of Operating Expenses for such Operating Year, such excess shall be applied against any amount then payable or to become payable by Tenant under this Lease. No failure by Landlord to require the payment of Tenant's Share of Operating Expenses for any period shall constitute a waiver of Landlord's right to collect such amount for such period or for any subsequent period. Nothing contained in this Paragraph 5 shall be construed so as to reduce the Basic Monthly Rent. Landlord shall supply Tenant with copies of actual bills and paid receipts upon Tenant's request for same.

5.3 Resolution of Disagreement. Every statement given to Tenant by Landlord under this Lease, including, without limitation, any statement given to Tenant pursuant to Paragraph 5.2, shall be conclusive and binding on Tenant unless within thirty (30) days after the receipt of such statement Tenant notifies Landlord that Tenant disputes the correctness of such statement, specifying the particular respects in which the statement is claimed to be incorrect. Pending the determination of such dispute by agreement between Landlord and Tenant, Tenant shall, within thirty (30) days after receipt of such statement, pay the amounts set forth in such statement in accordance with such statement, and such payment shall be without prejudice to Tenant's position. If such dispute exists and it is subsequently determined that Tenant has paid amounts in excess of those then due and payable under this Lease, Landlord, at Landlord's option, shall either apply such excess to an amount to become payable under this Lease or return such excess to Tenant. Landlord shall grant to an independent certified public accountant retained by Tenant reasonable access to Landlord's books and records for the purpose of Verifying Operating Expenses incurred by Landlord, at Tenant's expense.

6. Security Deposit. Deleted

7. Use and Operation.

7.1 Use. Tenant shall not use or occupy or permit the Premises to be used or occupied for any purpose other than for the Permitted Use, and shall not do or permit anything to be done by Tenant's Occupants which may (a) increase the existing rate or violate the provisions of any insurance carried with respect to the Shopping Center; (b) create a public or private nuisance, commit waste or interfere with, annoy or disturb any other tenant or occupant of the Shopping Center or Landlord in the operation of the Shopping Center; (c) overload the floors or otherwise damage the structure of the Shopping Center; (d) constitute an improper, immoral or objectionable purpose; (e) violate any present or future governmental or quasi-governmental laws, ordinances, regulations or requirements or any covenants, conditions, and restrictions existing with respect to the Shopping Center; (f) subject Landlord or any other tenant to any liability to any third party; or (g) lower the first-class character of the Shopping Center. Tenant shall, at Tenant's sole cost, (u) operating Tenant's business on the Premises under Tenant's Trade Name only; (v) use the Premises in a careful, safe and proper manner; (w) comply with all present and future governmental or quasi-governmental laws, ordinances, regulations and requirements and any covenants, conditions and restrictions existing with respect to the Shopping Center, including, without limitation, those relating to hazardous substances, hazardous wastes, pollutants or contaminants; (x) comply with the requirements of any board

or fire underwriters or other similar body relating to the Premises: (y) keep the Premises free of objectionable noises and odors; and (z) not store, use or dispose of any hazardous substances, hazardous wastes, pollutants or contaminants on the Premise. Except as set forth in this Lease, no representation or warranty has been made to, or relied on by, Tenant concerning the Premises, including, without limitation, the fitness or suitability of the Premise for the conduct of Tenant's business, nor has Landlord agreed to undertake any modification, alteration or improvement of the Premises. Tenant shall not do or permit the doing of anything in connection with Tenant's business or advertising, which in the reasonable judgement of Landlord may reflect unfavorably on Landlord or the Shopping Center, or confuse or mislead the public as to any relationship between Landlord and Tenant.

7.2 Covenant of Continuous Operation. Tenant shall open the Premises for business on or before the Commencement Date. Tenant's hours of business shall be the same of those of the other Little Caesar carry-out stores in the greater Salt Lake City area. Tenant shall not (a) use or permit the use of any portion of the Premises for the conduct in or on the Premises of what is commonly known in the retail trade as an outlet store or second-hand store, or an army, navy, or governmental surplus store; (b) advertise or conduct any distress, fire, bankruptcy, liquidation, relocation, closing or going out of business sale unless such advertisement is true and Landlord gives prior written consent, which may be withheld by Landlord in Landlord's sole discretion for any reason or for no reason; (c) warehouse and stock within the Premises any goods, wares or merchandise other than that which Tenant intends to offer for sale from the Premise; or (d) use or permit the use on the Premises of any pinball machines, video games or other devices or equipment for amusement or recreation, or any vending machines, newspaper racks, pay telephone or other coin-operated devices. Tenant may have one amusement game in the lobby.

7.3 Radius Restriction. Deleted.

8. Utilities and Services. Commencing on the date of this Lease, Tenant shall pay all initial utility deposits and fees and monthly service charges for water, electricity, sewage, gas, telephone and other utility services furnished to the Premises. If any such service is not separately metered or billed to Tenant, but rather is billed to and paid by Landlord, Tenant shall pay to Landlord Tenant's pro rata share of the cost of such service, as reasonably determined by Landlord. Landlord shall not be liable for any loss or damage resulting from an interruption of any such service unless such interruption is caused by the negligence of the Landlord, its agents, or employees.

9. Maintenance and Repairs; Alteration; Access to Premises; Reserved Rights in Common Area.

9.1 Maintenance and Repairs. Tenant, at Tenant's sole cost and expense, shall maintain the Premises and every party of the Premises (including, without limitation, all floors, walls and ceilings and their coverings, doors and locks, window casements and frames, glass and plate glass, furnishings, trade fixtures, signage, leasehold improvements, equipment and other personal property from time to time situated in or on the Premises) in good order, condition and repair and in a clean and sanitary condition. The Basic Monthly Rent and all other amounts payable by Tenant to Landlord are absolutely net to Landlord, and Tenant shall, except as provided in this Lease, pay (either directly or by payment of Tenant's Share of Operating Expenses pursuant to Paragraph 5) for all insurance, taxes, utilities, repairs, maintenance and all other services and costs relating to the Premises and to Tenant's use of the Premises. Landlord shall, at its sole cost and expense maintain the roof and structural members of the space, the foundations, outer walls, and structural soundness of the building unless Tenant, through Tenant's negligence causes damage to any of these items. Then Tenant becomes responsible for their repair or replacement.

9.2 Alterations. Tenant shall not make any change, addition or improvement to the Premises (including, without limitation, the attachment of any fixture or equipment), unless such change is non-structural, less than a cost of \$3,000 and: (a) equals or exceeds the then-current standard for the Shopping Center and utilizes only new and first-grade materials; (b) is in conformity with all applicable governmental and quasi-governmental laws, ordinances, regulations and requirements, and is made after obtaining any required permits and licenses; (c) is made pursuant to plans and specifications approved in writing in advance

by Landlord; (e) is carried out by persons approved in writing by Landlord, who, if required by Landlord, deliver to Landlord before commencement of their work proof of such insurance coverage as Landlord may require, with Landlord named as an additional insured. Any such change, addition or improvement shall immediately become the property of Landlord. Tenant shall promptly pay the entire cost of any such change, addition or improvement. Tenant shall indemnify, defend and hold harmless Landlord from and against all liens, claims, damages, losses, liabilities and expenses, including attorneys' fees, which may arise out of, or be connected in any way with such change, addition or improvement. Within thirty (30) days following the imposition of any lien resulting from any such change, addition improvement, Tenant shall cause such lien to be released of record by payment of money or posting of a proper bond.

9.3 Access to Premises. Landlord and Landlord's agents, employees and contractors may enter the Premises at reasonable times and upon 24 hours notice to Tenant for the purpose of cleaning, inspecting, altering and repairing the Premises and ascertaining compliance with the provisions of this Lease by Tenant. Landlord shall have free access to the Premises in an emergency. Landlord may also show the Premises to prospective purchasers, tenants or mortgagees at reasonable times and after 24 hours notice. Tenant waives any claim for any damages, injury or inconvenience to, or interference with, Tenant's business, loss of occupancy or quiet enjoyment of the Premises and other loss occasioned by such entry, unless caused by Landlord's willful misconduct or gross negligence. Tenant alone will have a key to unlock all doors in the Premises and if Landlord or Landlord's agents need to gain entry, ~~as in~~ emergencies, Landlord may gain entrance to the Premises by force.

9.4 Reserved Rights in Common Area. Landlord reserves the right, at any time or from time to time, to: (a) establish reasonable rules and regulations for the use of the Common Areas (including, without limitation, the delivery of goods and the disposal of trash); (b) use or permit the use of the Common Areas by persons to whom Landlord may grant or may have granted such rights in such manner as Landlord may from time to time designate, including, without limitation, truck and trailer sales and special promotional events; (c) close all or any portion of the Common Areas to make repairs or changes to, to prevent a dedication of, to prevent the accrual of any rights of any person or the public in, or to discourage noncustomer use of or parking on, the Common Areas; (d) construct additional buildings in, or expand existing buildings into, the Common Areas and to change the layout of the Common Areas, including, without limitation, enlarging or reducing the shape and size of the Common Areas, whether by the Addition of buildings, other improvements or any other manner; (e) enter into operating agreements relating to the Common Areas with persons selected by Landlord; and (f) do such other acts in and to the Common Areas as in Landlord's judgment may be desirable. If the Common Areas are diminished, Landlord shall not be subject to any liability, Tenant shall not be entitled to any compensation or diminution of rent and such diminishment shall not be deemed to be an actual or constructive eviction. Any changes the Landlord makes to the Common Area of the Shopping Center should not unreasonably interfere with Tenant's ability to conduct its business. Landlord shall not build or permit any structures or obstructions of any kind to remain in or on the common areas for an extended period of time which would materially interfere with Tenant's business or use and enjoyment of the Premises, or obstruct the visibility or access to the Premises. However, landlord may build additional structures, pads, etc. to expand the center which would not be considered as interfering with Tenant's business.

#### 10. Assignment.

10.1 Prohibition. Tenant shall not, either voluntarily or by operation of law, assign, transfer, mortgage, encumber, pledge or hypothecate this Lease or Tenant's interest in this Lease, in whole or in part, permit the use of the Premises or any part of the Premises by any persons other than Tenant or Tenant's employees, or sublease the Premises or any part of the Premises, without the prior written consent of Landlord, which may not be unreasonably withheld by Landlord. Any transfer of this Lease from Tenant by merger, consolidation, liquidation or transfer of assets shall constitute as assignment for the purposes of this Lease. If Tenant is a corporation, an unincorporated association or a partnership, the assignment, transfer, mortgage, encumbrance, pledge or hypothecation of any stock or interest in such corporation, association or partnership in the aggregate in excess of forty-nine percent (49%) shall be deemed an assignment within the meaning of this Paragraph. Consent to any

assignment or subleasing shall not operate as a waiver of the necessity for consent to any subsequent assignment or subleasing and the terms of such consent shall be binding on any person holding by, under or through Tenant. At Landlord's option, any assignment or sublease without Landlord's prior written consent shall be void. Tenant shall have the right to assign this Lease without Landlord's consent and without payment of any assignment fees to a corporation the outstanding stock of which is fifty (50%) percent or more owned by Michael or Marian Ilitch, or to Tenant's wholly owned subsidiary, or to Tenant's parent corporation, or, if Tenant merges or consolidates, then to the surviving entity or to any approved franchisee of the Tenant as long as Tenant remains as a guarantee to the lease.

**10.2 Termination.** If Tenant requests Landlord's consent to an assignment of this Lease or to a subleasing of the whole or any part of the Premises, Tenant shall submit to Landlord the terms or such assignment or subleasing, the name and address of the proposed assignee or subtenant, such information relating to the nature of such assignee's or subtenant's business and finances as Landlord may reasonably require and the proposed effective date (the "Effective Date") of the proposed assignment or subleasing (which Effective Date shall be neither less than thirty (30) nor more than ninety (90) days following the date of Tenant's submission of such information).

**10.3 Landlord's Rights.** If this Lease is assigned or if all or any portion of the Premises is subleased or occupied by any person other than Tenant without obtaining Landlord's consent, Landlord may collect rent and other charges from such assignee or other party, and apply the amount collected to the rent and other charges reserved under this Lease, but such collection shall not constitute consent or waiver of the necessity of consent to such assignment or subleasing, nor shall such collection constitute the recognition of such assignee or subtenant as Tenant under this Lease or a release of Tenant from the further performance of all of the covenants and obligations of Tenant contained in this Lease. No consent by Landlord to any assignment or subleasing by Tenant shall relieve Tenant of any obligation to be paid or performed by Tenant under this Lease, whether occurring before or after such consent, assignment or subleasing, but rather Tenant and Tenant's assignee or subtenant, as the case may be, shall be jointly and severally primarily liable for such payment and performance. No assignment or subleasing under this Lease shall be effective unless and until Tenant provides the Landlord an executed counterpart of the assignment or sublease agreement, which shall specifically state that (a) such agreement is subject to all of the provisions of this Lease; (b) in the case of an assignment, the assignee assumes and agrees to perform all of Tenant's obligations under the Lease; (c) the assignee or subtenant, as the case may be, may not further assign such agreement, or allow the Premises to be used by others, without the prior written consent of Landlord in each instance; (d) a consent by Landlord to such assignment or subleasing shall not be deemed or construed to modify, amend or affect the provisions of this Lease or Tenant's obligations under this Lease, which shall continue to apply to the Premises and the occupants of the Premises as if the assignment or sublease had not been made; (e) if Tenant defaults in the payment of any amounts due under this Lease, Landlord is authorized to collect any rents or other amounts due from any assignee, subtenant or other occupant of the Premises and to apply the net amounts collected to the sums reserved in this Lease; and (f) the receipt by Landlord of any amounts from an assignee, subtenant or other occupant of any part of the Premises shall not be deemed or construed as releasing Tenant from Tenant's obligations under this Lease or the acceptance of that party as a direct tenant. If all or any portion of the Premises is assigned or subleased and the compensation to be received by Tenant exceeds the Basic Monthly Rent (or pro rata portion of the Basic Monthly Rent, as the case may be) applicable to the portion being assigned or subleased, Tenant shall pay half of such excess to Landlord on the first day of each calendar month.

## **11. Indemnity; Waiver and Release.**

**11.1 Indemnity.** Tenant shall indemnify, defend and hold harmless Landlord and Landlord's employees and agents from and against all demands, claims, causes of action, judgments, losses, damages (including consequential damages), liabilities, fines, penalties, costs and expenses, including attorneys' fees, arising from the occupancy or use of the Shopping Center by Tenant or Tenant's Occupants, any hazardous substances, hazardous wastes, pollutants or contaminants deposited, released or stored by Tenant or Tenant's Occupants on the Property, the conduct of Tenant's business in the Shopping Center, any act or

omission done, permitted or suffered by Tenant or any of Tenant's Occupants, any default or nonperformance by Tenant under this Lease, any injury or damage to the person, property or business of Tenant or Tenant's Occupants or any litigation commenced by or against Tenant to which Landlord is made a party without fault on the part of Landlord. If any action or proceeding is brought against Landlord, Landlord's employees or Landlord's agents by reason of any such claim, Tenant, on notice from counsel reasonably satisfactory to Landlord. Landlord shall indemnify Tenant from damages which arise out of the willful negligence, acts or omissions of Landlord, its' agents, employees, or contractors. The provisions of this Paragraph 11.1 shall survive the expiration of the Term or sooner termination of this Lease.

11.2 Waiver and Release. Tenant waives and releases all claims against Landlord and Landlord's employees and agents with respect to all matters for which Landlord has disclaimed liability pursuant to the provisions of this Lease. In addition, Landlord and Landlord's employees and agents shall not be liable for any loss, injury, death or damage (including any consequential damage) to persons, property or Tenant's business resulting from any theft, act of God, public enemy, injunction, riot, strike, insurrection, war, court order, requisition, order of governmental body or authority, fire, explosion, falling object, steam, water, rain, snow, breakage, leakage, obstruction or other defects of pipes, sprinklers, wires, appliances, plumbing, air conditioning or lighting fixtures, construction, repair or alteration of the Premises or other cause beyond Landlord's control.

12. Insurance. On or before the date of this Lease, Tenant shall, at Tenant's sole cost, procure and continue in force the following insurance coverage: (a) commercial general liability insurance with a combined single limit for bodily injury and property damage or not less than \$1,000,000 per occurrence, including, without limitation, contractual liability coverage for the performance by Tenant of the indemnity agreements set forth in Paragraph 11; (b) fire and extended coverage insurance, including vandalism, malicious mischief, special cause of loss including theft, in an amount equal to the full replacement cost (without deduction for depreciation) of all furnishings, trade fixtures, leasehold improvements, equipment, merchandise and other personal property from time to time situated in or on the Premises; and (c) workmen's compensation insurance satisfying Tenant's obligations under the workmen's compensation laws of the State of Utah. Such minimum limits shall in no event limit the liability of Tenant under this Lease. Such liability insurance shall name Landlord and any other person specified from time to time by Landlord as an additional insured, such property insurance shall name Landlord as a loss payee as Landlord's interests may appear, and both such liability and property insurance shall be with companies licensed to do business in the State of Utah and reasonably rated to be able to handle losses for which Tenant is insured. All liability policies maintained by Tenant shall contain a provision that Landlord and any other additional insured, although named as an insured, shall nevertheless be entitled to recover under such policies for any loss sustained by Landlord and Landlord's agents and employees as a result of the acts or omissions of Tenant. Tenant shall furnish Landlord certificates of coverage. No such policy shall be cancelable or subject to reduction of coverage or other modification except after thirty (30) days' prior written notice to Landlord by the insurer. All such policies shall be written as primary policies, not contributing with and not in excess of the coverage which Landlord may carry, and shall only be subject to such deductibles as may be approved in writing in advance by Landlord. Tenant shall, at least ten (10) days prior to the expiration of such policies, furnish Landlord with renewals of, or binders for, such policies. Landlord and Tenant waive all rights to recover against each other, against any other tenant or occupant of the Shopping Center and against the officers, directors, shareholders, partners, joint venturers, employees, agents, customers, invitees or business visitors of each other or of any other tenant or occupant of the Shopping Center, for any loss or damage arising from any cause covered by any insurance carried by the waiving party. Landlord and Tenant shall cause their respective insurance carriers to issue appropriate waivers of subrogation rights endorsements to all policies of insurance carried in connection with the Premises or the contents of the Premises. Tenant shall cause all other occupants of the Premises claiming by, through or under Tenant to execute and deliver to Landlord a waiver of claims similar to the waiver of subrogation rights endorsements. Any mortgage lender interested in any part of the Shopping Center may, at Landlord's option, be afforded coverage under any policy required to be secured by Tenant under this Lease by use of a mortgagee's endorsement to the policy concerned.



13. Damage or Destruction. If the Premises are partially damaged or destroyed by any casualty insured against under any insurance policy maintained by Landlord, Landlord shall, on receipt of the insurance proceeds, repair the Premises to substantially the condition in which the Premises were immediately prior to such destruction. Landlord's obligation under the preceding sentence shall not exceed the lesser of the cost of the standard improvements installed by Landlord in the Premises, or the proceeds received by Landlord from any insurance policy maintained by Landlord. Until such repair is complete, the Basic Monthly Rent shall be abated proportionately commencing on the date of such damage or destruction as to that portion of the Premises rendered untenable, if any. If (a) the Premises are damaged as a result of a risk not covered by Insurance; (b) the Premises are damaged in whole or in part during the last twelve (12) months of the Term, or (c) insurance proceeds adequate to repair the Shopping Center are not available to Landlord for any reason, or (d) the cost to repair the Premises is greater than the market value of the Premises, Landlord may either elect to repair the damage or cancel this Lease by notice of cancellation within sixty (60) days after such event, and on such notice Tenant shall vacate and surrender the Premises to Landlord. If Landlord elects to repair any such damage, any abatement of Basic Monthly Rent shall end on notice given by Landlord to Tenant that the Premises have been repaired. If the damage is caused by the negligence of Tenant or Tenant's Occupants, Basic Monthly Rent shall not abate. Except for abatement of Basic Monthly Rent, if any, Tenant shall have no claim against Landlord for any loss suffered by reason of any such damage, destruction, repair or restoration, nor may Tenant terminate this Lease as the result of any statutory provision in effect on or after the date of this Lease pertaining to the damage and destruction of the Premises or the Shopping Center. The proceeds of all insurance carried by Tenant on Tenant's furnishings, trade fixtures, leasehold improvements, equipment, merchandise and other personal property shall be held in trust by Tenant for the purpose of the repair and replacement of the same. Landlord shall not be required to repair any damage or to make any restoration or replacement of any furnishings, trade fixtures, leasehold improvements, equipment, merchandise and other personal property installed in the Premises by Tenant or at the direct or indirect expense of Tenant. Unless this Lease is terminated by Landlord pursuant to this Paragraph, Tenant shall be required to restore or replace such furnishings, trade fixtures, leasehold improvements, equipment, merchandise and other personal property on damage or destruction in at least a condition equal to that existing prior to such event. Tenant shall not be required to commence any reconstruction of the Premises or to open the Premises for business unless and until stores comprising fifty (50%) percent of the leasable square footage of the Shopping Center give Landlord written commitments that they intend to reopen their stores within one hundred eighty (180) days of the casualty. If the Landlord cannot produce such commitments within ninety (90) days after the date of the casualty, Tenant may have the option to terminate this Lease within thirty (30) days of the end of such sixty (60) day period.

In addition, in the event of a casualty in which the Lease is not terminated the Landlord shall commence restoration of the premises within 120 days of the date of the casualty and complete the restoration within 240 days of the date of casualty.

14. Condemnation. As used in this Paragraph the term "Condemnation Proceedings" means any actions or proceedings in which any interest in the Shopping Center is taken for any public or quasi-public purpose by any lawful authority through exercise of the power of eminent domain or by purchase or otherwise in lieu of such exercise. If the whole of the Premises is taken through Condemnation Proceedings, this Lease shall automatically terminate as of the date of the taking. The phrase "as of the date of the taking" means the date of taking actual physical possession by the condemning authority of such earlier date as the condemning authority gives notice that it is deemed to have taken possession. If part, but not all, of the Premises is taken, Landlord may terminate this Lease. Landlord may terminate this Lease if any portion of the Shopping Center (whether or not including the Premises) is taken which, in Landlord's judgment, substantially interferes with Landlord's ability to operate or use the Shopping Center for the purposes for which the Shopping Center was intended. Any such termination must be accomplished through written notice given no later than sixty (60) days after, and shall be effective as of, the date of such taking. In all other cases, or if neither Landlord nor Tenant exercises its right to terminate, this Lease shall remain in effect. If a portion of the Premises is taken and this Lease is not terminated, the Basic Monthly Rent shall

be reduced in the proportion that the floor area taken bears to the total floor area of the Premises immediately prior to the taking. Whether or not this Lease is terminated as a consequence of Condemnation Proceedings, all damages or compensation awarded for a partial or total taking, including any award for severance damage and any sums compensating for diminution in the value of or deprivation of the leasehold estate under this Lease, shall be the sole and exclusive property of Landlord, provided that Tenant shall be entitled to any award for the loss of or damage to Tenant's trade fixtures or loss of business, provided that a separate award is actually made to Tenant and that the same will not reduce Landlord's award. Tenant shall have no claim against Landlord for the occurrence of any Condemnation Proceedings, or for the termination of this Lease or a reduction in the Premises as a result of any Condemnation Proceedings. If any taking of the Premises, parking area of Shopping Center will unreasonably and materially interfere with the successful operation of Tenant's business, Tenant may terminate this Lease upon sixty (60) days written notice to Landlord. If requested by Landlord, Tenant must be prepared to show that the taking has unreasonably and materially effected Tenant's business.

15. Landlord's Financing. This Lease shall be subordinate to any existing or future first mortgage, first deed of trust, ground lease, declaration of covenants, conditions, easements and restrictions, declaration of planned unit development or declaration of condominium, and all renewals, modifications, amendments, consolidations, replacements and extensions of any such instruments. No documentation other than this Lease shall be required to evidence such subordination. If the holder of any mortgage or deed of trust elects to have this Lease superior to the lien of its mortgage or deed of trust and gives written notice of such election to Tenant, this Lease shall be deemed prior to such mortgage or deed of trust. Tenant shall execute such documents which may be required by Landlord to confirm such subordination or priority within thirty (30) days after request. Any sale, assignment or transfer of Landlord's interest under this Lease or in the Premises, including any such disposition resulting to this Lease and Tenant shall attach to Landlord's successors and assigns and shall recognize such successors or assigns as Landlord under this Lease, regardless of any rule of law to the contrary or absence of privity of contract.

#### 16. Default

16.1 Default by Tenant. The occurrence of any of the following events shall constitute a default by Tenant under this Lease: (a) Tenant fails to timely pay any installment of Basic Monthly Rent, Tenant's Share of Operating Expenses or any other sum due under this Lease within fifteen (15) days after written notice is given to Tenant that the same is past due; (b) Tenant fails to timely observe or perform any other term, covenant or condition to be observed or performed by Tenant under this Lease within thirty (30) days after written notice is given to Tenant of such failure; provided, however, that if more than thirty (30) days is reasonably required to cure such failure, Tenant shall not be in default if Tenant commences such cure within such thirty (30) day period and diligently prosecutes such cure to completion; (c) Tenant or any guarantor of this Lease dies (if an individual), files a petition in bankruptcy or insolvency or for reorganization or appointment of a receiver or trustee, petitions for or enters into an arrangement for the benefit of creditors or suffers this Lease to become subject to a writ of execution and such receiver or trustee is not discharged within sixty (60) days; (d) Tenant vacates or abandons the Premises.

16.2 Remedies. On any default by Tenant under this Lease, Landlord may at any time, without waiving or limiting any other right or remedy available to Landlord, (a) perform in Tenant's stead any obligation that Tenant has failed to perform, and Landlord shall be reimbursed promptly for any cost incurred by Landlord with interest from the date of such expenditure until paid in full at the rate of 15% per annum (the "Interest Rate"); (b) terminate Tenant's rights under this Lease by written notice; (c) reenter and take possession of the Premises by any lawful means (with or without terminating this Lease); or (d) pursue any other remedy allowed by law. Tenant shall pay to Landlord the cost of including reasonable renovation, remodeling and alteration of the Premises, the amount of any commissions paid by Landlord in connection with such reletting, and all other costs and damages arising out of Tenant's default, including attorneys' fees and costs. Notwithstanding any termination or reentry, the liability of Tenant for the rent reserved in this Lease shall not be extinguished for the balance of the Term, and Tenant agrees to compensate Landlord on demand for any

deficiency arising from reletting the Premises at a lesser rent that applies under this Lease. Landlord shall use reasonable efforts to mitigate its damages in the event of an uncured default by Tenant.

16.3 Past Due Amounts; Obligations Independent. If Tenant fails to pay within ten (10) days following the date due any amount required to be paid by Tenant under this Lease, such unpaid amount shall bear interest at the Interest Rate from the due date of such amount to the date of payment in full, with interest. In addition, Landlord may also charge a sum of five percent (5%) of such unpaid amount as a service fee. This late payment charge is intended to compensate Landlord for Landlord's additional administrative costs resulting from Tenant's failure to timely perform Tenant's obligations under this Lease, and has been agreed on by Landlord and tenant after negotiation as a reasonable estimate of the additional administrative costs which will be incurred by Landlord as a result of such failure. The actual cost in each instance is extremely difficult, if not impossible, to determine. This late payment charge shall constitute liquidated damages and shall be paid to Landlord together with such unpaid amount. The payment of this late payment charge shall not constitute a waiver by Landlord of any default by Tenant under this Lease. All amounts due under this Lease are and shall be deemed to be rent or additional rent, and shall be paid without abatement, deduction, offset, prior notice or demand (unless provided by the terms of this Lease). Landlord shall have the same remedies for a default in the payment of any amount due under this Lease as Landlord has for a default in the payment of Basic Monthly Rent and all other amounts due and to perform all of Landlord's obligations under this Lease are severable from and independent of any obligation of Landlord under this Lease.

16.4 Default by Landlord. Landlord shall not be in default under this Lease unless Landlord or the holder of <sup>any</sup> ~~any~~ mortgage or deed of trust covering the Shopping Center whose name and address have been furnished to Tenant in writing fails to perform an obligation required of Landlord under this Lease within thirty (30) days after written notice by Tenant to Landlord has failed to perform such obligation. If the nature of Landlord's obligation is such that more than thirty (30) days are reasonably required for performance or cure, Landlord shall not be in default if Landlord or such holder commences performance within such thirty (30) days period and after such commencement diligently prosecutes the same to completion. ~~In no event may Tenant terminate this Lease or withhold the payment of rent or other charges provided for in this Lease as a result of Landlord's default.~~ If the Landlord fails to perform any of its obligations under this Lease and the same shall continue for thirty (30) days with respect to any repairs required to be made by the Landlord or for thirty (30) days with respect to other matters to be done or performed by the Landlord after Tenant's written notice of same, except in the case of an emergency, then Tenant may, but shall not be required to, undertake to do anything required to be done by the Landlord at Landlord's cost and expense.

## 17. Expiration or Termination.

17.1 Surrender of Premises. On the expiration of the Term or sooner termination of this Lease, Tenant shall, at Tenant's own cost, (a) promptly and peaceably surrender the Premises to Landlord "broom clean," in good order and condition; (b) repair any damage to the Shopping Center caused by or in connection with the removal of any property from the Premise by or at the direction of Tenant; and (c) deliver all keys to the Premises to Landlord. Before surrendering the Premises, Tenant shall, at Tenant's sole cost, remove Tenant's movable personal property and trade fixtures (including signage) and any other items which are unique and customarily found in a Little Caesar Store. Landlord may require Tenant to remove any personal property, trade fixtures, other property, alterations, additions and improvements made to the Premises by Tenant or by Landlord for Tenant, and to restore the Premises to their condition on the date of this Lease. All personal property, trade fixtures and other property of Tenant not removed from the Premises on the abandonment of the Premises or on the expiration of the Term or sooner termination of this Lease for any cause shall conclusively be deemed to have been abandoned and may be appropriated, sold, stored, destroyed or otherwise disposed of by Landlord without notice to, and without any obligation to account to, Tenant or any other person. Tenant shall pay to Landlord all expenses incurred in connection with the disposition of such property in excess of any amount received by Landlord from such disposition. No surrender of Premises shall be effected by Landlord's acceptance of the keys or of the rent or by any other means without Landlord's

written acknowledgement of such acceptance as a surrender. Tenant shall not be released from Tenant's obligations under this Lease in connection with surrender of the Premises until Landlord has inspected the Premises and delivered to Tenant a written release.

17.2 Holding Over. Tenant shall indemnify, defend and hold harmless Landlord from and against all claims, liabilities and expenses, including attorneys' fees, resulting from delay by Tenant in surrendering the Premises in accordance with the provisions of this Lease. If Tenant remains in possession of the Premises or any part of the Premises after the expiration of the Term or sooner termination of this Lease with the written consent of Landlord, such occupancy shall be a tenancy from month to month at a rental (and not as a penalty) in the amount of one hundred twenty-five percent (125%) of the last monthly rental, plus all other charges payable under this Lease, and on all of the terms of this Lease applicable to a month to month tenancy.

17.3 Survival. The provisions of this Paragraph 17 shall survive the expiration of the Term or sooner termination of this Lease.

18. Estoppel Certificate. Tenant shall, within thirty (30) days after Landlord's request, execute and deliver to Landlord an estoppel certificate in favor of Landlord and other persons as Landlord shall request setting forth the following: (a) a ratification of this Lease; (b) the Commencement Date and Expiration Date; (c) that this Lease is in full force and effect and has not been assigned, modified, supplemented or amended (except by such writing as shall be stated); (d) that all conditions under this Lease to be performed by Landlord have been satisfied, or, in the alternative, those claimed by Tenant to be unsatisfied; (e) that no defenses or offsets exist against the enforcement of this Lease by Landlord, or, in the alternative, those claimed by Tenant; (f) the amount of advance rent, if any (or none if such is the case), paid by Tenant; (g) the date to which rent has been paid; and (h) such other information as Landlord may request. Landlord's mortgage lenders and purchasers shall be entitled to rely on any estoppel certificate within such thirty (30) day period, Landlord may provide the requested information to the mortgage lenders and purchasers and it will be accepted as correct by Tenant.

#### 19. Parking; Signage.

19.1 Parking. Automobiles of Tenant and Tenant's Occupants shall be parked only within parking areas not otherwise reserved by landlord or specifically designated for use by any other tenant or Occupants associated with any other tenant. Landlord may from time to time designate parking space for Tenant and make such other rules and regulations as Landlord reasonably determines to be necessary or appropriate. Landlord and Landlord's representatives may, without any liability to Tenant or Tenant's Occupants, cause to be removed any automobile of Tenant or Tenant's Occupants that may be parked wrongfully in a prohibited or reserved parking area, and Tenant agrees to indemnify, defend and hold harmless Landlord from and against all claims, liabilities and expenses, including attorney's fees, arising in connection with such removal.

19.2 Signage. Subject to the prior written approval of Landlord, Tenant shall purchase and erect one sign on the front of the Premises not later than the date on which Tenant opens for business or thirty (30) days after the Commencement Date, whichever is sooner. Tenant shall have the right to maintain window banners, placards, neon signage and other advertising materials within the Premises which are used in other Little Caesar stores without obtaining Landlord's consent. Tenant shall not place or suffer to be placed on any exterior door, wall or window of the Premises, on any part of the inside of the Premises which is visible from outside of the Premises or elsewhere in the Shopping Center, any sign, decoration, lettering, attachment, advertising matter or other thing of any kind, without first obtaining Landlord's written approval. Landlord may, at Tenant's cost, and without notice or liability to Tenant, enter the Premises and remove any item erected in violation of this Paragraph. Landlord may establish rules and regulations governing the size, type and design of all such items and Tenant shall abide by such rules and regulations. All approved signs or letterings on doors shall be printed, painted and affixed at the sole cost of Tenant by a person approved by landlord, and shall comply with the requirements of the governmental authorities having jurisdiction over the Shopping Center. At Tenant's sole expense, Tenant shall maintain all permitted

signs and shall, on the expiration of the Term or sooner termination of this Lease, remove all such permitted signs and repair any damage caused by such removal. Landlord and Tenant acknowledge that Tenant is currently operating in the Premises and that Tenant's sign is currently accepted as being in conformance with center's established sign criteria. Should Tenant wish to modify or change its exterior signage Tenant must obtain Landlord's consent prior to doing so. However, Tenant's standard national signage will be considered as being in conformance to the center's sign criteria as it relates to exterior signage.

20. Substitution. Deleted

21. Rules. Tenant and Tenant's Occupants shall faithfully observe and comply with all of the rules set forth on the attached Exhibit D, and Landlord may from time to time amend, modify or make additions to or deletions from such rules so long as said rules do not unreasonably interfere with Tenant's business. Such amendments, modifications, additions and deletions shall be effective on notice to Tenant. On any breach of any of such rules, Landlord may exercise any or all of the remedies provided in this Lease on a default by Tenant under this Lease and may, in addition, exercise any remedies available at law or in equity including the right to enjoin any breach of such rules. Landlord shall not be responsible to Tenant for the failure by any other tenant or person to observe such rules.

22. General Provisions.

22.1 No Partnership. Landlord does not by this Lease, in any way or for any purpose, become a partner or joint venturer of Tenant in the conduct of Tenant's business or otherwise.

22.2 Force Majeure. If either Landlord or Tenant is delayed or hindered in or prevented from the performance of any act required under this lease by reason of acts of God, strikes, lockouts, other labor troubles, inability to procure labor or materials, fire, accident, failure of power, restrictive governmental laws, ordinances, regulations or requirements of general applicability, riots, civil commotion, insurrection, war or other reason no the fault of the party delayed, hindered or prevented and beyond the control of such party (financial inability excepted), performance of the action in question shall be excused for the period of delay and the period for the performance of such act shall be extended for the period equivalent to the period of such delay. The provisions of this Paragraph shall not, however, operate to excuse Tenant from the prompt payment of rent or any other amounts required to be paid under this Lease.

22.3 Notices. Any notice or demand to be given by Landlord or Tenant to the other shall be given in writing by personal service, telegram, express mail, Federal Express, DHL or any other similar form of courier or delivery service, or mailing in the United States mail, postage prepaid, certified, return receipt requested and addressed to such party as follows:

If to Landlord:

Wallace Associates Management/Receiver  
165 South Main Street  
Salt Lake City, UT 84111

If to Tenant:

Little Caesar Enterprises, Inc.  
Fox Office Centre  
2211 Woodward Avenue  
Detroit, MI 48201-3400  
ATTN: National Ops.

Either Landlord or Tenant may change the address at which such party desires to receive notice on written notice of such change to the other party. Any such notice shall be deemed to have been given, and shall be effective, on delivery to the notice address then applicable for the party to which the notice is directed; provided, however, that refusal to accept delivery of a notice or the inability to deliver a notice because of an address change which was not properly communicated shall not defeat or delay the giving of a notice.

22.4 Severability. If any provision of this Lease or the application of any provision of this Lease to any person or circumstance shall to any extent be invalid, the remainder of this Lease or the application of such provision to persons or circumstances other than those as to which such provision is held invalid shall not be affected by such invalidity. Each provision of this Lease shall be valid and enforceable to the fullest extent permitted by law.

22.5 Broker Commissions. Except as agreed in writing by Landlord, Tenant represents and warrants that no claims exist for brokerage commissions or finder's fees in connection with this Lease and agrees to indemnify, defend and hold harmless Landlord from and against all claims, liabilities and expenses, including attorney's fees, arising from any such brokerage commissions or finder's fees.

22.6 Use of Pronouns. The use of the neuter singular pronoun to refer to Landlord or Tenant shall be deemed a proper reference even though Landlord or Tenant may be an individual, partnership, association, corporation or a group of two or more individuals, partnerships, associations or corporations. The necessary grammatical changes required to make the provisions of this Lease apply in the plural sense where more than one Landlord or Tenant exists and to corporations, associations, partnerships, individuals, males or females, shall in all instances be assumed as though in each case fully expressed.

22.7 Successors. Except as otherwise provided in this Lease, all provisions contained in this Lease shall be binding on and shall inure to the benefit of Landlord and tenant and their respective heirs, devisees, successors, assigns and legal representative. On any sale or assignment (except for purposes of security or collateral) by Landlord of the Premises or this Lease, Landlord shall, on and after such sale or assignment, be relieved entirely of all of Landlord's obligations under this Lease and such obligations shall, as of the time of such sale or assignment, automatically pass to Landlord's successor in interest.

22.8 Recourse by Tenant. Anything in this Lease to the contrary notwithstanding, Tenant shall look solely to the equity of Landlord in the Premise, subject to prior rights of the holder of any mortgage or deed of trust, for the collection of any judgment (or other judicial process) requiring the payment of money by Landlord on any default or breach by Landlord with respect to any of the terms, covenants and conditions of this Lease to be observed or performed by Landlord, and no other assets of Landlord or any other person shall be subject to levy, execution or other procedures for the satisfaction of Tenant's remedies.

22.9 Quiet Enjoyment. On Tenant paying the rent reserved under this Lease and observing and performing all of the terms, covenants and conditions on Tenant's part to be observed and performed under this lease, Tenant shall have quiet enjoyment of the Premises for the Term without interference from Landlord, or anyone claiming by, through or under Landlord, subject to all of the provisions of this Lease.

22.10 Waiver. No failure by any party to insist on the strict performance of any covenant, duty or condition of this Lease or to exercise any right or remedy consequent on a breach of this Lease shall constitute a waiver of any such breach or of such or any other covenant, duty or condition. Any party may, by notice delivered in the manner provided in this Lease, but shall be under no obligation to, waive any of its rights or any conditions to its obligations under this Lease, or any covenant or duty of any other party. Nonwaiver shall affect or alter the remainder of this Lease but each other covenant, duty and condition of this Lease shall continue in full force and effect with respect to any other then existing or subsequently occurring breach.

22.11 Rights and Remedies. The rights and remedies of Landlord and Tenant shall not be mutually exclusive and the exercise of one or more of the provisions of this Lease shall not preclude the exercise of any other provisions. The parties confirm that damages at law may be an inadequate remedy for a breach or threatened breach by any party of any of the provisions of this Lease. The parties' respective rights and obligations under this Lease shall be enforceable by specific performance, injunction or any other equitable remedy.

22.12 Authorization. Each individual executing this Lease does represent and warrant to each other so signing (and each other entity for which another person may be signing) that he has been duly authorized to deliver this Lease in the capacity and for the entity set forth where he signs.

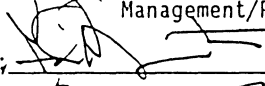
22.13 Attorney's Fees. If any action is brought to recover any rent or other amount under this Lease because of any default under this Lease to enforce or interpret any of the provisions of this Lease, or for recovery of possession of the Premises, the party prevailing in such action shall be entitled to recover from the other reasonable attorney's fees (including those incurred in connection with any appeal), the amount of which shall be fixed by the court and made a part of any judgment rendered. Tenant shall be responsible for all expenses incurred by Landlord, including, without limitation, attorney's fees, that Landlord incurs in any case or proceeding involving Tenant under or related to any bankruptcy or insolvency law.

22.14 Merger. The surrender of this Lease by Tenant, the cancellation of this Lease by agreement of Landlord and Tenant or the termination of this Lease on account of Tenant's default shall not work a merger, and shall, at Landlord's option, either terminate any subleases or part or all of the Premises or operate as an assignment to Landlord of any of this subleases. Landlord's option under this paragraph 22.14 may be exercised by notice to Tenant and all known subtenants in the Premises.

22.15 Miscellaneous. The captions to the Paragraphs of this Lease are for convenience of reference only and shall not be deemed relevant in resolving questions of construction or interpretation under this Lease. Exhibits referred to in this Lease and any addendums, riders and schedules attached to this Lease shall be deemed to be incorporated in this Lease as though a party of this Lease. Tenant shall not record this Lease or a memorandum or notice of this Lease without the prior written consent of Landlord. This Lease and the exhibits, riders and addenda, if any, attached, constitute the entire agreement between the parties. Any guaranty delivered in connection with this Lease is an integral part of this Lease and constitutes consideration given to Landlord to enter into this Lease. No amendment to this Lease shall be binding on Landlord or Tenant unless reduced to writing and signed. Unless otherwise set forth in this Lease, all references to Paragraphs are to Paragraphs in this Lease. Each provisions to be performed by Tenant shall be construed to be both a covenant and a condition. This Lease shall be governed by and construed and interpreted in accordance with the laws of the State of Utah. Venue on any action arising out of this Lease shall be property only in the District Court on the county in which the Premises are located, in the State of Utah, Landlord and Tenant waive trial by jury in any action, proceeding or counterclaim brought by either of them against the other on all matters arising out of this Lease or the use and occupancy of the Premises. Time is of the essence of each provision of this Lease. The submission of this Lease to Tenant is not an offer to lease the Premises or an agreement by Landlord to reserve the Premises for Tenant. Landlord shall not be bound to Tenant until Tenant has duly executed and delivered duplicate original copies of this Lease to Landlord, and Landlord has duly executed and delivered one of those duplicate original copies to Tenant.

LANDLORD AND TENANT have executed this Lease on the respective dates set forth below, to be effective as of the date first set forth above.

LANDLORD: Wallace Associates  
Management/Receiver

By:  \_\_\_\_\_

Its: PRESIDENT \_\_\_\_\_

Date: 3/1/93 \_\_\_\_\_

TENANT: Little Caesar  
Enterprises, Inc.

By:  \_\_\_\_\_  
MARIAN TICHEN

Its: SECRETARY/TREASURER \_\_\_\_\_

Date: February 3, 1993 \_\_\_\_\_

EXHIBIT A

to

SHOPPING CENTER LEASE

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DESCRIPTION OF PREMISES

The Premises referred to in the foregoing instrument are located on the crosshatched area shown on the attached diagram.



## SITE PLAN

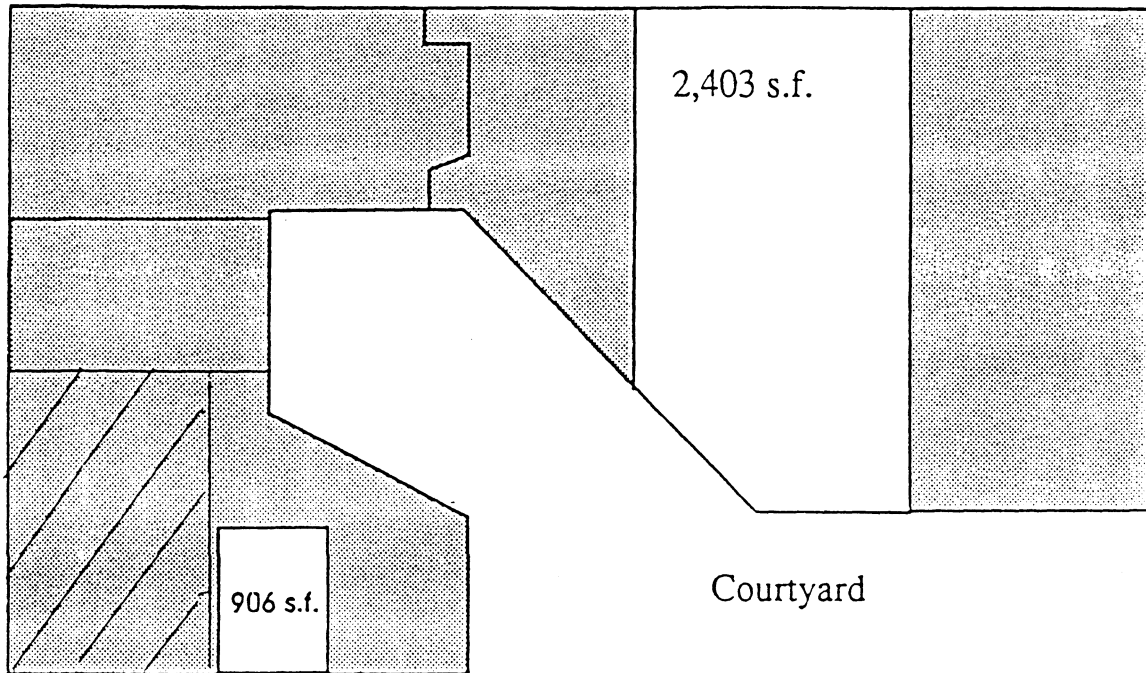


EXHIBIT B

to

SHOPPING CENTER LEASE

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PREPARATION OF PREMISES FOR OCCUPANCY

The respective obligations (if any) of Landlord and Tenant to prepare the Premises referred to in the foregoing instrument for occupancy are set forth on the attachments. (If neither Landlord nor Tenant have any obligations to prepare the Premises for occupancy, type "None" below on this page.)

"None"

## EXHIBIT C

## SIGN CRITERIA

The following sign criteria has been established to assist tenants in complying with their lease. These basic standards have been made to govern the design, fabrication, and installation of tenant signs and are intended to afford all tenants with good visual identification day and night and to protect against poorly designed and badly proportioned signage. It will also assure the tenants that the center will maintain its high quality image.

1. Submission of Design and Approval

Tenant agrees, at Tenant's expense, to furnish Landlord, within reasonable time from the execution of the lease, a detailed drawing in duplicate of Tenant's proposed sign using the following signage criteria. After being submitted, Landlord shall have twenty (20) days from receipt of said drawings to approve or reject said drawings. Landlord approval shall be in writing to Tenant within the aforementioned twenty (20) days. Should Landlord reject said drawings, Tenant shall have twenty (20) additional days from date of rejection to correct and resubmit the revised drawing to Landlord for Landlord's approval. Tenant agrees that it will not install its sign until receipt of written approval from Landlord.

2. Sign Band

- A. Type of Construction: All lettering shall be internally illuminated, "pan channel" type construction, individual letter with plexiglass front.
- B. "Channelume" type letters will not be allowed.
- C. Mounting: All individual letters shall be raceway mounted on a metal raceway not to exceed 6" high and 6" deep. No visible fasteners to be allowed. Raceway shall be primed and painted with an automotive grade acrylic enamel color to Landlord's specifications.
- D. Wording of signs shall not include the product sold except as part of Tenant's trade name. Logos or insignia will be permitted on a case-by-case basis.
- E. No exposed crossovers, conductors, or conduit between letters will be allowed.
- F. No animated, flashing, or audible signage will be permitted.
- G. No box or can signs allowed.
- H. Signage colors should be conservative to avoid detracting from the image of the center.

3. Location on Sign Band

- A. Tenant signage shall only be located in a specified zone in front of Tenant's space except end Tenants and corner Tenants who will be approved on a case-by-case basis by Landlord.
- B. Signage shall be horizontally centered in allowed space and shall not exceed 80% of store front.
- C. All letters shall line up along the imaginary base reference lines, 4" above the bottom of sign band.
- D. No lettering will be allowed to extend either above or below said sign band.

4. Letter Size and Type

- A. Maximum letter height: 24 inches
- B. Minimum letter height: 6 inches
- C. All letters and logos will be a standard 5 inches in depth.

5. Attachment Provisions

6. Secondary Signs

To maintain a high quality look for the center, the following requirements must be met for all display windows and exterior doors.

- A. No secondary exterior signs will be allowed on the building.
- B. No sandwich, easel, portable, or temporary box signs are allowed.
- C. Window signs to be allowed only on a temporary promotional basis as approved by the Merchant's Association. Signs not to exceed 25% of window. Neon, flashing, or animated signage will not be allowed.
- D. Tenant Window or Display Signage:
  - 1. Lighted, interior box signs will not be allowed.
  - 2. No temporary or permanent paper signs shall be permitted to be applied to the interior exterior faces of store front glass.
  - 3. All temporary promotional signs and displays in the store front shall be of professional quality.
  - 4. Window or door signage shall be printed letters no larger than 6 inches in height.
- E. No signage will be allowed on the rear of the buildings except a 12" x 12" plastic, engraved sign stating tenant's name or "No Deliveries" or "Exit" only. Letters shall be white with a black background.

7. General Guidelines

- A. Tenant Responsibility: All signs, permits, and related or resulting construction, shall be Tenant's responsibility, and all signs shall be installed under supervision of Landlord.
- B. No sign makers' identification, tabs, or stickers shall be permitted on the sign or sign band.
- C. Sign contractor shall repair any damage to work caused by his work. All signs must conform to local building and electrical codes and EPA requirements.

8. Summary

This criteria should be given to the Tenant's sign company to serve as a guide in preparing their design and cost estimates. In the event of any conflict in interpretation between Tenant and Landlord as to the application of this criteria, the decision of the Landlord shall be final and binding upon the Tenant.

EXHIBIT D

to

## SHOPPING CENTER LEASE

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RULES

The rules set forth in this Exhibit are a part of the foregoing Shopping Center Lease (the "Lease"). Whenever the term "Tenant" is used in these rules, such term shall be deemed to include Tenant and Tenant's Occupants. The following rules may from time to time be modified by Landlord in the manner set forth in the Lease. The terms capitalized in this Exhibit shall have the same meaning as set forth in the Lease.

1. Obstruction. Any sidewalks, entries, exits, passages, corridors, halls, lobbies, stairways elevators or other common facilities of the Shopping Center shall not be obstructed by Tenant or used for any purpose other than ingress or egress to and from the Premises. Tenant shall not place any item in any of such locations, whether or not such item constitutes an obstruction, without the prior written consent of Landlord. Landlord may remove any obstruction or any such time without notice to Tenant and at the expense of Tenant. Any sidewalks, entries, exits, passages, corridors, halls, lobbies, stairways, elevators or other common facilities of the Shopping Center are not for the general public, and Landlord shall in all cases retain the right to control and prevent access to them by all persons whose presence, in the judgement of Landlord, would prejudicial to the safety, character, reputation or interests of the Shopping Center or Landlord's tenants. Tenant shall not go on the roof of the Shopping Center.

2. Deliveries. All deliveries and pickups of merchandise, supplies, materials, garbage and refuse to or from the Premises shall be made only through such access as may be designated by Landlord for deliveries and only during the ordinary business hours of the Shopping Center. Tenant shall be liable for the acts or omissions of any persons making such deliveries or pickups. Tenant shall not obstruct or permit the obstruction of such access.

3. Moving. Furniture and equipment shall be moved in or out of the Shopping Center only through such access as may be designated by Landlord for deliveries and then only during such hours and in such manner as may be prescribed by Landlord. If Tenant's movers damage any part of the Shopping Center, Tenant shall pay to Landlord on demand the amount required to repair such damage.

4. Heavy Articles. No safe or article, the weight of which may, in the reasonable opinion of Landlord, constitute a hazard of damage to the Shopping Center, shall be moved into the Premises. Other safes and heavy articles shall be moved into, from or about the Shopping Center only during such hours and in such manner as shall be prescribed by Landlord in Landlord's reasonable discretion, and Landlord may designate the location of such safes and articles.

5. Shopping Center Security. Landlord may from time to time adopt appropriate systems and procedures for the security or safety of the Shopping Center. Landlord shall in no case be liable for damages for any error with regard to the admission to or exclusion from the Shopping Center of any person. In the event of an invasion, mob, riot, public excitement or other commotion, Landlord reserves the right to prevent access to the Shopping Center during the continuance of the same by closing the entrances to the Shopping Center or any other reasonable method, for the safety of the tenants and protection of the Shopping Center and property in the Shopping Center.

7. Use of Water Fixtures. Water closets and other water fixtures shall not be used for any purpose other than that for which the same are intended. No foreign substances of any kind shall be placed in them, and any damage resulting to the same from use on the part of Tenant shall be paid for by Tenant. No persons shall waste water by tying back or wedging the faucets or in any other manner. On leaving the Premises, Tenant shall shut off all water faucets and major electrical apparatus located within the Premises.

8. No Animals; Excessive Noise. No animals shall be allowed in the Shopping Center. Tenant shall not place or permit the placement of any radio or television antenna, loudspeaker, sound amplifier, phonograph, searchlight, flashing light or other advertising media or device of any nature on the roof or outside of the boundaries of the Premises (except for Tenant's approved identification sign) or at any place where the same may be seen or heard outside of the Premises.

9. Bicycles. Bicycles and other vehicles shall not be permitted anywhere inside or on the sidewalks outside of the Shopping Center, except in those areas designated by Landlord for bicycle parking.

10. Trash. Tenant shall not allow any trash or refuse to be placed on the outside of the Shopping Center, nor shall any trash or refuse be thrown by Tenant out of the windows or doors, or down the corridors or ventilating ducts or shafts, of the Shopping Center. All trash and refuse shall be placed in receptacles provided by Landlord for the Shopping Center or by Tenant for the Premises.

11. Exterior Windows, Walls and Doors. No window shades, blinds, curtains, shutters, screens or draperies shall be attached or detached by Tenant and no awnings shall be placed over the windows without Landlord's prior written consent. Tenant shall keep the display windows and signs of the Premises well lighted until 11:00 p.m. each night or such shorter period as may be prescribed by any applicable policies or regulations adopted by any utility or governmental agency, and shall maintain adequate night lights after that hour or period.

12. Hazardous Operations and Items. Tenant shall not install or operate any steam or gas engine or boiler, or carry on any mechanical business in the Premises without Landlord's prior written consent. Tenant shall not use or keep in the Premises or the Shopping Center any kerosene, gasoline or other inflammable or combustible fluid or material, or use any method of heating or air conditioning other than that supplied by Landlord. Explosives or other articles deemed extra hazardous shall not be brought into the Shopping Center.

## ADDENDUM

1. ●Agency Disclosure: At the signing of this agreement, Wallace Associates Business Properties Group's agent Al Belt represents Landlord, and Tenant represents themselves. Tenant and Landlord confirm that prior to signing this agreement written disclosure of the agency relationship(s) was provided.
2. ✕Hazardous Materials Disclaimer: The real estate salespersons and brokers in this transaction have no expertise with respect to toxic wastes, hazardous materials or undesirable substances. Unless the Landlord can provide definitive representation regarding the existence or nonexistence of toxic wastes, hazardous materials or undesirable substances on the Property then inspections of the Property by qualified experts alone can determine whether or not there are any current or potentially toxic wastes, hazardous materials or undesirable substances in or on the Property. Landlord and Tenant warrant that the real estate salespersons and brokers in this transaction have not made any representations, either express or implied, regarding the existence or nonexistence of toxic wastes, hazardous materials, or undesirable substances in or on the Property. If deemed necessary, it is the responsibility of Landlord and Tenant to retain qualified experts to deal with the detection and correction of such matters. Both the Tenant and the Landlord will hold the real estate sales persons and brokers harmless.
3. Tenant's minimum rent payable for the remainder of the existing Lease term shall be reduced as of January 1, 1993, from \$1,350.65 to \$1,190.00 per month.
4. Tenant shall have two (2) options to extend this Lease for a period of five (5) years for each option. Tenant shall give Landlord written notice of its intent to exercise or not exercise said options one hundred and twenty (120) days prior to the expiration of the lease term or first option period. The Minimum Rent for the first option period shall be at a market rate mutually agreed upon by Tenant and Landlord. In the first option period, the Minimum Rent shall not be higher than \$11.00 per square foot. Rent in the second option period shall also be at market rates. Market rates shall be at the then prevailing market rates for similar space in similar shopping centers within 5 miles of the Shopping Center. Landlord and Tenant shall mutually agree on the market rate within 30 days of Tenant's notification to Landlord that Tenant wishes to exercise an option period.
5. If the anchor space in the center is still vacant after the first two (2) years of the Lease Term then the Tenant shall have the right to terminate the Lease upon 90 days notice to Landlord. If requested by Landlord, Tenant must be prepared to show that the vacancy of the anchor space has materially affected Tenant's business. Tenant shall have the right to terminate the Lease only between the twenty fourth (24th) and thirtieth (30th) months of the Lease Term.
6. Tenant will accept premises in "as is, where is" condition.
7. Tenant's CAM charges are currently \$1.61 per square foot per year. During the initial term of the Lease, these charges may vary, however, if they go to \$2.00 square foot, then they may not increase by more than 5% per year.
8. Notwithstanding anything contained in the Lease to the contrary, Landlord shall not permit, during the Lease Term or Option Period, in this Shopping Center or on any adjacent or contiguous property now owned or hereafter acquired by the Landlord, its successors and assigns or any entity with which Landlord is associated, the operation or maintenance, other than by Tenant, of a facility whose business is more than 10% sales from pizza. Also, Landlord shall not grant any existing or future tenant any exclusive right to sell any food or beverage which would in any way prohibit Tenant from selling any item allowed in the Use clause in, this Lease. Landlord shall not lease space to an "adult" type bookstores, a billiard hall, cocktail bar, lounge or other type of business which would lower the reputation or character of the Shopping Center.

9. It is understood that the Tenant is currently occupying the Premises and conducting business and that Landlord and Tenant currently are operating under that Lease dated February 23, 1987, and amended January 10, 1990. Upon commencement of this Lease that Lease dated February 23, 1987, shall become null and void and of no further force and effect.

LESSOR

BY: TITLE: ReceiverDATE: 3/1/93

TENANT

BY: TITLE: SECRETARY / TREASURERDATE: February 3, 1993





Little Caesars

November 25, 1997

VIA CERTIFIED MAIL

Mr. D.E. Williams  
BELL CANYON SHOPPING CENTER  
P.O. Box 56  
Salt Lake City, UT 84110

RE: Little Caesars #4416  
10600 South 1300 East - Sandy City, UT

Dear Mr. Williams:

Pursuant to a lease dated December 11, 1992 between, Wallace Associates Management-Receiver and subsequently assigned to Bell Canyon Shopping Center L.C. ("Landlord") and Little Caesar Enterprises, Inc. ("Tenant"), Addendum, item #4, Tenant must provide Landlord with written notice of its exercise of its option.

Please consider this formal notice that we hereby exercise our option to extend the lease for five (5) years commencing April 1, 1998 and expiring on March 31, 2003.

It is also indicated in the Addendum, item #4, that within thirty (30) days from Tenant providing this notice to Landlord, Landlord and Tenant shall mutually agree on the market rate for which the rental rate will be determined. However, in no event shall the minimum rent be higher than \$11.00 per square foot.

Therefore, please contact me immediately so that we can finalize this lease renewal in accordance with the lease terms. Thank you for your cooperation.

Sincerely,

Michael Atwell  
Vice President  
Real Estate

cc: C. Freels

**ROY B. MOORE, P.C. & ASSOCIATES**

A Professional Corporation  
505 East 200 South, Suite 400  
Salt Lake City, Utah 84102-2007  
Telephone (801) 359-0800  
E-mail RBMooreLaw@aol.com  
Fax (801) 531-7271

Roy B. Moore, Esq.

December 8, 1997

Michael Atwell V.P. Real Estate  
Little Caesar Enterprises Inc.  
Fox Office Center  
2211 Woodward Ave.  
Detroit, Michigan 48201-3400

Re: Renewal of Lease at Bell Canyon Shopping Center - space 1341, Sandy, Utah

Dear Mr. Atwell:

Bell Canyon Shopping Center, L.C., the successor in interest as "Landlord" in the above referenced lease, has asked this firm to respond to some of the remarks in your letter of November 25, 1997 with respect to the above referenced matter. First of all, it is our impression that Bell Canyon is pleased that you are interested in remaining in the shopping center for an additional period of time. They are concerned however that your letter indicates there is a perception that the option provisions of the lease limits the Basic Monthly Rent to be no higher than \$11.00 per square foot.

The term "Basic Monthly Rent" is a defined term in the subject lease. "Minimum rent", on the other hand, is not a defined term in the subject lease, and therefore that phrase takes on the plain meaning of that combination of words, i.e. that the minimum rent that the Landlord will accept on the exercise of the subject option is \$11.00 per square foot and that negotiations between Landlord and Tenant start at that floor for the subject 5 year period. A survey of comparable rents for like space shows that the fair market rental value of that space in fact exceeds \$19.00 per square foot.

Please advise in what manner you desire to proceed with negotiations on the option period lease rate.

Very truly yours,  
ROY B. MOORE P.C. & ASSOCIATES

Roy B. Moore

cc D.E. Williams

# PARR WADDOUPS BROWN GEE & LOVELESS

*A Professional Corporation*

*Attorneys at Law*

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CLARK WADDOUPS  
RICHARD G. BROWN  
DAVID E. GEE  
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CAROLYN B. MCHUGH

STEVEN J. CHRISTIANSEN  
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BRETT J. SWANSON  
STEVEN E. HUGIE

OF COUNSEL  
CHARLES L. MAAK  
BRUCE A. MAAK  
BRENT M. STEVENSON

March 16, 1998

VIA TELECOPIER AND CERTIFIED  
MAIL, RETURN RECEIPT REQUESTED

Roy B. Moore, Esq.  
Roy B. Moore, P.C. & Associates  
505 East 200 South, Suite 400  
Salt Lake City, Utah 84102-2007

Re: Shopping Center Lease (the "Lease"), dated December 11, 1992, entered into between Wallace Associates Management-Receiver, the predecessor in interest to Bell Canyon Shopping Center, L.C. (the "Landlord"), and Little Caesar Enterprises, Inc. (the "Tenant")

Dear Mr. Moore:

We represent the Tenant in connection with the Lease. This letter is written in response to your letter dated December 8, 1997.

As you know, the options to extend the term of the Lease are contained in paragraph 4 of the Addendum to the Lease, which provides (in part): "In the first option period, the Minimum Rent shall not be higher than \$11.00 per square foot." (emphasis supplied) This provision clearly establishes a cap on the "Minimum Rent." We are unable to find any support in the Lease for your argument that this provision somehow establishes a floor for negotiations between the Landlord and the Tenant.

Admittedly, the term "Minimum Rent" does not appear to actually be defined as such in the Addendum or in the Lease. However, it always has been the Tenant's clear understanding that "Minimum Rent" does, in fact, refer to the "Basic Monthly Rent." (We note that you have not pointed us to any other component of rent in the Lease to which such term could apply.) The Tenant's understanding is confirmed by the provision set forth in the immediately preceding paragraph of the Addendum which provides: "Tenant's minimum rent payable for the remainder of the existing Lease term shall be reduced as of January 1, 1993, from \$1,350.65 to \$1,190.00 per month." It is undeniable that in this paragraph the term "minimum rent" refers to the Basic Monthly Rent because the Basic Monthly Rent being paid by the Tenant on execution of the Lease in the

PARR WADDOUPS BROWN GEE & LOVELESS

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Roy B. Moore, Esq.  
March 16, 1998  
Page -2-

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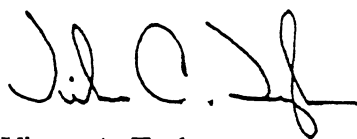
amount of \$1,350.65 per month was, in fact, reduced as of January 1, 1993 to \$1,190.00. (This is also the current Basic Monthly Rent being paid under the Lease.) We do not believe that it can successfully be argued by the Landlord that although the term "minimum rent" in paragraph 3 refers to the Basic Monthly Rent, the term "Minimum Rent" in paragraph 4, the immediately following paragraph, refers to something different.

This brings us back to paragraph 4 of the Addendum, which provides that the Basic Monthly Rent shall be at a market rate mutually agreed on between the Landlord and the Tenant, not to exceed \$11.00 per square foot. We assume from your letter that the Landlord is proposing that the maximum amount of \$11.00 per square foot (or \$19,635 per year/\$1,636.25 per month) be used. Although that is a 37.5% increase over the current rent (or 7.5% per year) which seems quite aggressive to the Tenant, in order to resolve the matter the Tenant is willing to accept such amount.

Therefore, enclosed are two (2) original copies of an amendment to the Lease, both of which have been executed by the Tenant. Please have the Landlord execute one of the enclosures and return the same to me on or before March 23, 1998. If we have not received one of the enclosed amendments, executed by the Landlord, by close of business on March 23, 1998, we have been instructed by the Tenant to immediately file a declaratory action to resolve this matter. Because of the extended period of communication between the Landlord and the Tenant regarding this matter which already has occurred and the proximity of the expiration date of the initial term, such filing will necessarily take place without any additional prior communication with you or the Landlord.

Please feel free to contact me or Ron Russell of our office with any questions.

Sincerely,



Victor A. Taylor

cc: Martin I. Caruso, Esq. (via telecopier; w/enc.)  
Ronald G. Russell, Esq. (w/enc.)

FIRST AMENDMENT TO SHOPPING CENTER LEASE  
[Bell Canvon Shopping Center, L.C./Little Caesar Enterprises, Inc.]

THIS AMENDMENT (this "Amendment") is entered into as of the 2nd day of March, 1998, between BELL CANYON SHOPPING CENTER, L.C., a Utah limited liability company ("Landlord"), whose address is 1365 East 10600 South, Sandy, Utah 84093, and LITTLE CAESAR ENTERPRISES, INC., a Michigan corporation ("Tenant"), whose address is 2211 Woodward Avenue, Detroit, Michigan 48201-3400.

FOR THE SUM OF TEN DOLLARS (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, Landlord and Tenant agree as follows:

1. Definition--Lease. As used in this Amendment, "Lease" means the Shopping Center Lease, dated December 11, 1992, entered into between Landlord, as landlord, and Tenant, as tenant.

2. Purpose. Tenant has exercised the first option to extend the Term (as defined in the Lease). This Amendment is intended to memorialize such extension. (Tenant's second option to extend the Term has not yet been exercised, but may be exercised in the future in accordance with its terms.)

3. Basic Monthly Rent. The definition of "Basic Monthly Rent" set forth in Paragraph 1 of the Lease is deleted in its entirety and is replaced with the following new definition:

"Basic Monthly Rent" means \$1,636.25 per month.

4. Expiration Date. The definition of "Expiration Date" set forth in Paragraph 1 of the Lease is deleted in its entirety and is replaced with the following new definition:

"Expiration Date" means March 31, 2003.

5. General Provisions. Except as set forth in this Amendment, the Lease is ratified and affirmed in its entirety. This Amendment shall inure to the benefit of, and be binding on, Landlord and Tenant and their respective successors and assigns. This Amendment shall be governed by, and construed and interpreted in accordance with, the laws (excluding the choice of laws rules) of the State of Utah. This Amendment may be executed in any number of duplicate originals or counterparts, each of which when so executed shall constitute in the aggregate but one and the same document. Each individual executing this Amendment represents and warrants that such individual has been duly authorized to execute and deliver this Amendment in the capacity and for the entity set forth where such individual signs.

LANDLORD AND TENANT have executed this Amendment on the respective dates set forth below, to be effective as of the date first set forth above.

LANDLORD:

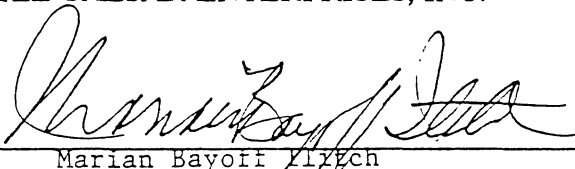
BELL CANYON SHOPPING CENTER, L.C.

By \_\_\_\_\_  
D. E. Williams  
Managing Member

Date \_\_\_\_\_

TENANT:

LITTLE CAESAR ENTERPRISES, INC.

By  \_\_\_\_\_  
Marian Bayoff, Vicech  
Its Secretary/Treasurer

Date March 12, 1998

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

Mark Whittle, being first duly sworn, deposes and states as follows:

1. I am over the age of twenty-one years and I have personal knowledge of the matters stated herein. If called as a witness, I would testify to the matters stated in this affidavit.

2. At all relevant times, I was employed by Little Caesar Enterprises, Inc. as the Director of Company Development. In that position, I was responsible for negotiating leases for Little Caesar locations throughout the country. Consequently, I am familiar with lease forms used in shopping center leases and the terms commonly used in those leases.

3. Little Caesar Enterprises, Inc. was a tenant at the Bell Canyon Shopping Center in Salt Lake City, Utah and its lease in the shopping center was scheduled to expire. I acted on behalf of Little Caesar in negotiating the terms of the extension for that lease.

4. Attached hereto marked Exhibit "1" is a copy of the extension lease that I negotiated on behalf of Little Caesar with Wallace Associates Management (the "Little Caesar Lease"). The lease form is typical of other shopping center leases.

5. The lease form used for the Little Caesar Lease is set up to permit both a base monthly rent as well as a percentage rent. Little Caesar had only been paying base rent under its prior lease at the shopping center and it was understood and agreed during the lease negotiations that percentage rent would not apply to Little Caesar for any lease extension.



6. As indicated by the Little Caesar Lease, the base rent for years 1 through 5 of the new lease was \$1,190 per month. The provisions regarding the calculation and payment of percentage rent were intentionally deleted.

7. Paragraph 3 of said Addendum provided that the base or minimum rent that was payable for the remainder of the then existing lease term would be reduced from \$1,350.65 to \$1,190 per month as of January 1, 1993.

8. The terms "minimum rent," "basic monthly rent," and "base rent" are commonly used terms in commercial leasing and are generally understood to mean the monthly base rent paid by a tenant without regard to a sales volume. "Percentage rent" is an amount added to the base rent and varies based on a percentage of the tenant's sales volume.

9. It is my understanding that the term "minimum rent" used in both paragraphs 3 and 4 of the Little Caesar Lease Addendum refer to the "Basic Monthly Rent" defined in paragraph 1 of the lease itself and was not intended to refer to any other type or component of rent.

10. As reflected by paragraph 4 of the Little Caesar Lease Addendum, we negotiated with Wallace Associates two options to extend the lease for a period of 5 years for each option.

11. It was my understanding of the agreement as reflected by the language used in paragraph 4 of the Little Caesar Lease Addendum that in the first option period the base rent or minimum monthly rent would not be higher than \$11 per square foot. It was also my understanding that percentage rent would not apply during the option terms because the provisions dealing with percentage rent had been intentionally deleted from the lease form.

DATED this 3<sup>RD</sup> day of MAY, 1999.

Mark Whittle  
Mark Whittle

SUBSCRIBED AND SWORN TO before me this 3 day of MAY, 1999.

Marcia Sexton  
NOTARY PUBLIC  
Residing In Georgia

My Commission Expires:

09-28-02



25-5-2

FRAUD

## 25-5-2. Wills and implied trusts excepted.

Section 25-5-1 shall not be construed to affect the power of a testator in the disposition of his real estate by last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law

**History:** R.S. 1898 & C.L. 1901, § 2462; C.L. 1917, § 5812, R.S. 1933 & C. 1943, 33-5-2; L. 1995, ch. 20, § 41.

**Amendment Notes.** — The 1995 amend-

ment, effective May 1, 1995, substituted "Section 25-5-1" for "The next preceding section" at the beginning of the section

some note or memorial  
whom the lease or sale  
authorized in writing

**History:** R.S. 1898 & C  
C.L. 1917, § 5813; R.S. 19  
5-3.

### NOTES TO DECISIONS

#### ANALYSIS

Constructive trust  
Trusts  
— Evidence  
Wills

#### Constructive trust.

Equity imposes a constructive trust to prevent one from unjustly profiting through fraud or the violation of a duty imposed under a fiduciary or confidential relationship *Hawkins v Perry* 123 Utah 16, 253 P2d 372 (1953)

After defendant altered a certificate of sale of land by inserting his own name as purchaser, so that the land was not included in the decedent's estate, there was a constructive trust for the benefit of the decedent's heirs, and the estate could be reopened *Perry v McConkie* 1 Utah 2d 189, 264 P2d 852 (1953)

Constructive trust to prevent unjust enrichment is not within the statute of frauds *Carnesecca v Carnesecca*, 572 P2d 708 (Utah 1977)

#### Trusts.

Trusts arising by implication or operation of law are expressly excluded from the effects of the statute, and a deed of conveyance, though absolute in form, if given to secure a debt, is in equity treated as a mortgage — a trust by operation of law *Wasatch Mining Co v Jennings*, 5 Utah 243, 15 P 65 (1887)

Where defendant verbally agreed with the owner of real estate which was subject to a mortgage to bid the property in at foreclosure sale, and to convey title to plaintiff for a sum certain after he obtained the sheriff's deed, and plaintiff relied on such agreement and paid the specified amount to defendant who asserted ownership to the property and refused to convey, it was held that a trust *ex maleficio* arose, and was enforceable though the contract was

not in writing *Chadwick v Arnold*, 34 Utah 48, 95 P 527 (1908)

A deed given to secure a debt, though absolute in form, was in equity a mortgage, so that a trust was created by operation of law and, under the express language of this section, was not prevented by § 25-5-1 *Taylor v Turner*, 27 Utah 2d 39, 492 P2d 1343 (1972)

#### —Evidence.

One seeking to have rights declared and enforced, founded upon or growing out of trust or a confidential relation is required to show, with at least reasonable certainty, the terms of agreement and the character and extent of the trust or confidential relation *Coray v Holbrook*, 40 Utah 325, 121 P 572 (1912)

Parol evidence is admissible to show a trust relationship by operation of law *Barrett v Vickers*, 100 Utah 534, 116 P2d 772 (1941)

In an action to impress a trust upon real property, evidence supported a finding that grantor's daughter took the property by warranty deed subject to "oral trust" whereby daughter was to maintain the property as a family home to be used by grantor and her children and grandchildren for as long as any of said persons needed a home, with complete discretion in the daughter as to the time and as to which of said persons should use property *Haws v Jensen*, 116 Utah 212, 209 P2d 229 (1949)

Parol evidence may be introduced to prove a constructive trust or resulting trust since they arise by operation of law and are expressly excluded from the statute of frauds by this section *In re Estate of Hock*, 655 P2d 1111 (Utah 1982)

#### Wills.

When a will is sought to be maintained also as a contract, it must satisfy this and succeeding sections of the statute of frauds *Ward v Ward*, 96 Utah 263, 85 P2d 635 (1938)

#### ANALYSIS

Agent's authority  
Contents of writing  
Contract for future lease  
Description of land  
Executed agreements  
Execution of contract  
Improvements on land  
Interest in real estate  
Leases  
— Elements  
— Option to renew  
— Oral extension of lease  
Lease with option to lease  
Note or memorandum  
Option to purchase realty  
Oral adjustment of rental rate  
Oral renewal of written offer  
Part performance of oral contract  
— Evidence  
Privity of contract  
Promissory estoppel  
Quantum meruit or unjust enrichment  
Sale defined  
Settling of accounts  
Subscription  
Surrender, release or discharge  
Termination or rescission of  
Cited

#### Agent's authority.

In an action for specific contract for the sale of real estate, absence of evidence showing was authorized in writing to or equities taking the case out of the statute of frauds, the trial court proper for dismissal of the action *Le* Utah 401, 195 P 201 (1921)

Where real estate agents implied authority under list execute contract of sale of real estate of vendors, latter were not bound by an earnest money agreement *Gerstner*, 26 Utah 2d 180, 48 P2d 100 (1937)

Introduction of parol evidence to show that agent who made contract was acting for corporation, the proof did not contradict the proof that the transaction was merely explained the transaction *Siegel*, 534 P2d 85 (Utah 1975)

## 25-5-3. Leases and contracts for interest in lands.

Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or

r of a testator in the  
nor to prevent any  
r operation of law.

, 1995, substituted "Sec-  
text preceding section" at  
ection.

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Utah 212, 209 P2d 229

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satisfy this and succeed-  
atute of frauds Ward v  
5 P2d 635 (1938).

## n lands.

one year, or for the  
less the contract, or

some note or memorandum thereof, is in writing subscribed by the party by  
whom the lease or sale is to be made, or by his lawful agent thereunto  
authorized in writing.

History: R.S. 1898 & C.L. 1907, § 2463;  
C.L. 1917, § 5813; R.S. 1933 & C. 1943, 33-  
5-3.

## NOTES TO DECISIONS

### ANALYSIS

Agent's authority  
Contents of writing  
Contract for future lease  
Description of land  
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Quantum meruit or unjust enrichment  
Sale defined  
Settling of accounts  
Subscription  
Surrender, release or discharge  
Termination or rescission of contract  
Cited

### Agent's authority.

In an action for specific performance of a  
contract for the sale of real property in the  
absence of evidence showing defendant's agent  
was authorized in writing to sell real property  
or equities taking the case out of the statute of  
frauds, the trial court properly granted motion  
for dismissal of the action. Lee v Polyhrones, 57  
Utah 401, 195 P 201 (1921)

Where real estate agents had no express or  
implied authority under listing agreement to  
execute contract of sale of real estate on behalf  
of vendors, latter were not bound by the terms  
of an earnest money agreement. Frandsen v  
Gerstner, 26 Utah 2d 180, 487 P2d 697 (1971)

Introduction of parol evidence was proper to  
show that agent who made contract in his own  
name was acting for corporate principal, since  
the proof did not contradict the writing but  
merely explained the transaction. Zeese v Es-  
tate of Siegel, 534 P2d 85 (Utah 1975)

This section requires that any agent execut-  
ing an agreement conveying an interest in land  
on behalf of his principal must be authorized in  
writing, since written authorization is required  
to clothe the agent initially with authority to  
contract, principal's ratification of an unautho-  
rized act of the agent must be in writing.  
Bradshaw v McBride, 649 P2d 74 (Utah 1982)

### Contents of writing.

A letter which lacks an acknowledgement or  
recognition that a contract has been entered  
into by the parties, and which is relied upon as  
a memorandum written after an oral accep-  
tance of an oral offer of a lease, and not as a  
written and signed offer of a lease, is not an  
adequate memorandum. Birdzell v Utah Oil  
Ref Co, 121 Utah 412, 242 P2d 578 (1952)

In an oral contract to execute a lease for a  
period longer than one year, the amount of the  
rent is one of the essential terms that must  
appear in a memorandum. Birdzell v Utah Oil  
Ref Co, 121 Utah 412, 242 P2d 578 (1952)

### Contract for future lease.

An agreement to enter into a future agree-  
ment to lease real estate for a period longer  
than a year is within the statute of frauds, and  
must be in writing to be enforceable. SCM Land  
Co v Watkins & Faber, 732 P2d 105 (Utah  
1986)

### Description of land.

A contract which provided that the purchaser  
of land was to make the selection of the land  
from a larger tract which was described was  
sufficient so that there could be a valid con-  
tract. Calder v Third Judicial Dist Court, 2  
Utah 2d 309, 273 P2d 168, 46 A L R 2d 887  
(1954)

Where the parties left the description of  
Parcel 1 open and "to be approved by all the  
parties in writing," the identity and location of  
the land to be conveyed was subject to their  
subsequent agreement, and no contract was  
formed. The buyers were entitled to the return  
of their payment, since the document was not a  
contract that could be enforced under this sec-  
tion. Vasels v LoGuidice, 740 P2d 1375 (Utah  
Ct App 1987)

### Executed agreements.

This section has no application to agree-

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff/Appellee,

v.

KEVIN WRIGHT KILLIAN,

Defendant/Appellant.

**BRIEF OF APPELLANT**

APPELLANT IN CUSTODY  
PRIORITY 2

**Case # 20020455-CA**

---

BRIEF OF APPELLANT

---

AN APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT, JURY  
CONVICTION OF ONE COUNT OF OPERATION OF A MOTOR  
VEHICLE UNDER THE INFLUENCE OF ALCOHOL , A THIRD DEGREE  
FELONY, IN VIOLATION OF UTAH CODE ANN. § 41-6-44, IN AND FOR  
DUCHESNE COUNTY, STATE OF UTAH, THE HONORABLE A. LYNN  
PAYNE PRESIDING.

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MARK SHURTLEFF  
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Utah Attorney General's Office  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854

**FILED**  
Utah Court of

**DEC**

Paulette Stagg  
Clerk of the Court

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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IN THE UTAH COURT OF APPEALS

---

STATE OF UTAH,

Plaintiff/Appellee,

v.

KEVIN WRIGHT KILLIAN,

Defendant/Appellant.

**BRIEF OF APPELLANT**

APPELLANT IN CUSTODY  
PRIORITY 2

**Case # 20020455-CA**

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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IN THE UTAH COURT OF APPEALS	
STATE OF UTAH,  Plaintiff/Appellee,  v.  KEVIN WRIGHT KILLIAN,  Defendant/Appellant.	<b>BRIEF OF APPELLANT</b>   PRIORITY 2  Case # 20020455-CA

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a Final Judgement and Commitment in the Eighth Judicial District Court, Duchesne, County, for jury conviction of one count of Operation of a Motor Vehicle Under the Influence of Alcohol, a Third Degree Felony.

Mr. Killian was sentenced to probation on May 13, 2002. Mr. Killian's probation was later revoked and he was sentenced to one year in jail with review after nine months for possible placement in an in-patient treatment program. Both the original sentence and the revocation were issued by the Honorable Judge A. Lynn Payne, Eighth District Court.

This appeal is filed pursuant to Rule 4 of the Utah Rules of Appellate Procedure. This Court has jurisdiction to review the conviction pursuant to §78-2a-3.

No post trial motions were filed either by trial or appellate counsel. Mr. Killian is currently incarcerated in the Duchesne County Jail and is awaiting court review of his jail sentence.

STATEMENT OF ISSUE PRESENTED ON APPEAL  
AND STANDARD OF APPELLATE REVIEW

There is one issue raised for appellate review: Mr. Killian asserts that his trial counsel was ineffective for not pursuing a theory of defense in which the jury could have found him guilty of public intoxication rather than DUI. Mr. Killian alleges that although his trial counsel filed a suppression motion on the issue and raised the issue in the preliminary hearing, she did not present the theory to the jury nor did she request a theory of defense instruction that would have allowed the jury to find him guilty of public intoxication rather than DUI.

The standard of review for ineffective assistance of counsel claims, specifically in a DUI case was again stated in State v. Wallace, \_\_\_ P.3d \_\_\_ (Utah App. 2002), in which this Court found that it is a question of law—citing State v. Maestas, 984 P.2d 376 (Utah 1999).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Any relevant text of constitutions, statutory provisions, or rules referenced in this brief and pertinent to the issues now before the court on appeal are contained herein or attached to this brief.

STATEMENT OF THE CASE

Kevin Wright Killian was charged with one count of Driving Under the Influence of Alcohol (DUI) in violation of Utah Code Ann. §41-6-44 on September 1, 2002 (Record of Trial Court (hereafter referred to as “R.”, page 1). Herbert Gillespie filed a one count Information on September 5, 2001 alleging that Mr. Killian had four prior DUI convictions within the last ten years and therefore this case was enhanced to a Third Degree Felony (R. 2).

Mr. Killian appeared in court on September 4, 2001 and pled not guilty to the charge (R. 7). Trial Attorney Karen Allen was appointed to represent Mr. Killian and on October 15, 2001

waived the Preliminary Hearing (R. 21). On December 13, 2001 Karen Allen filed a Suppression/Pretrial Motion asserting that the case should be dismissed on the basis that the police knowingly allowed Mr. Killian—a suspected intoxicated person—to get in his motor vehicle in order to get him with a felony DUI rather than to arrest him for public intoxication when they first encountered him (R. 27).

The County Attorney filed an amended Information on December 18, 2001 alleging essentially the same conduct and factual basis as the original Information (R. 32). On January 22, 2002 Mr. Killian and counsel argued the suppression motion before the trial court and the trial court denied the motion (R. 39).

Mr. Killian and counsel then requested and were granted a preliminary hearing on the amended Information on March 18, 2002 (R. 45) and the case was bound over for trial.

Trial was held on March 26, 2002 and Mr. Killian was convicted in the one day jury trial of the DUI charge (R. 100-102). On May 16, 2002 Mr. Killian was sentenced to zero to five years in the Utah State Prison and a five thousand dollar fine. The sentence was stayed and Mr. Killian was placed on probation with the condition that during the three years probation he was to be on Adult Probation and Parole supervision, pay a one thousand dollar fine or complete community service and serve one year in the Duchesne County Jail. The Court granted a review of the sentence after nine months to see if there was an in-patient alcohol treatment program available for Mr. Killian to enter into in lie of the remaining jail time (R. 108-109).

The Notice of Appeal was timely filed on May 30, 2002 (R. 119). Appellate counsel has sought and was granted extensions up to and including December 18, 2002 in which to file the opening brief and such is now timely filed.

### STATEMENT OF THE FACTS

Officer Ammon Manning of the Roosevelt City Police Department has been employed as a city police officer and for six years prior was employed as a Duchesne County Sheriff's Deputy (Transcript of Trial, page 71). On September 1, 2001 Manning was eating lunch at Pinn Willies—a convenience store and restaurant—with a deputy Travis Tucker and Highway Patrol officer Stradinger (T. 72). Mr. Killian came into the store area and purchased beer. Manning could smell the odor of alcohol in the area where Mr. Killian had been and he was concerned (T. 73). Manning not only smelled the odor of alcohol coming from Mr. Killian but he seemed under the influence of alcohol because his eyes were glassy (T. 80) and “everything that accompanied him” (T. 81) indicated he was intoxicated.

Manning watched Mr. Killian go into the bathroom, exit the bathroom, pick up a six pack of beer, pay for it and exit the store—all the while believing he was under the influence of alcohol (T. 83).

Manning did not stop Mr. Killian to investigate whether or not he was intoxicated—in fact he did not make contact with him inside or outside the store in an attempt to determine if Mr. Killian was under the influence of alcohol (T. 73).

Manning went back to the table and told trooper Stradinger to watch and see if Mr. Killian got into a vehicle and if he did, to stop him (T. 73). At no time did Manning or Stradinger investigate if the store had sold beer to an intoxicated person, if Mr. Killian was impaired to the point that it was a crime to purchase beer or if the public would be in danger if Mr. Killian drove a vehicle away from the store (T. 71-74).

Stradinger went outside and got into his patrol car to follow Mr. Killian and pull him over.

However, Manning's car was blocking Stradingers and there was a delay while Manning moved his police car (T. 73). Stradinger followed Mr. Killian out onto the highway and off on a dirt road (T. 73). Manning followed Stradinger (T. 73).

Manning arrived at the residence of Ray and Joann Pollard's where Stradinger had Mr. Killian out of his car and was performing field sobriety tests (T. 74). Manning asked Stradinger if his police video camera was on to catch the field sobriety tests and then went into Stradinger's car to turn on the video when Manning discovered it was not turned on up to that point (T. 74-75).

Manning admitted on cross-examination that he knew Mr. Killian drank and that he was under..." (T. 88) although the sentence was cut off it is clear that Manning knew some of Mr. Killian's history (T. 86-89).

Trooper Stradinger testified that he was in Pinn Willies restaurant on September 1, 2001 when he saw Mr. Killian come into the store area and purchase a 12 pack of beer (T. 93). Stradinger was told by Manning to watch to see if Mr. Killian got into a car because Manning was sure he smelled alcohol on Mr. Killian (T. 94). Stradinger left the restaurant and got into his patrol car. He was blocked in by Manning's patrol car but quickly was able to pursue Mr. Killian out onto the highway and then onto a dirt road (T. 94-95).

Stradinger activated his lights on the dirt road and Mr. Killian pulled over and exited the car at which point Stradinger smelled the odor of alcohol on him (T. 97-98). Stradinger made Mr. Killian perform field sobriety tests which Mr. Killian failed (T. 98-108) and then Stradinger arrested him and took him to jail where he performed a chemical breathalyser test on Mr. Killian (T. 108).

Stradinger stated that it took Mr. Killian 2 tenths of a mile to pull over (T. 97-98) but he

also testified that Mr. Killian was on a dirt road and his truck was kicking up a dirt cloud behind it (T. 128). Stradinger did not testify to a driving pattern that indicated an impaired driver, he did not testify that Mr. Killian's failure to immediately pull over on the private drive was an indicator of intoxication—in fact no driving pattern or probable cause for the stop was given other than Manning's statement that Mr. Killian smelled of alcohol and was intoxicated in the store (T. 131-140).

Mr. Killian failed the field sobriety tests and was arrested for the DUI . The factual statements about the field sobriety tests are not included here as Mr. Killian is not arguing that he was not intoxicated or that the tests were inappropriate in any way.

The jury found Mr. Killian guilty of the charge of driving under the influence of alcohol (T. 203) and that Mr. Killian had prior offenses and therefore the conviction was a felony (T. 204). A pre-sentence investigation report was completed and Mr. Killian was subsequently sentenced to one year in jail with early release after nine months to an in-patient treatment program. Mr. Killian does not contest aspects of the sentence or revocation hearing.

#### SUMMARY OF ARGUMENTS

Mr. Killian asserts that with four prior DUI convictions he was known to law enforcement as a "drinker." Furthermore, he asserts that the police were anxious to see him charged with a felony. It is for that reason that the police officers at the store—who could smell alcohol on Mr. Killian and were under the belief that he was intoxicated—did not stop him at the store to inquire further. The police did not approach him, ask him to answer their questions or investigate any further while Mr. Killian was at the store. The police waited until Mr. Killian left the store and got into a motor vehicle and drove off before they even tried to pursue him.

If the officers did not have enough probable cause to stop Mr. Killian in the store to investigate if he was intoxicated, how did they have enough probable cause to stop him on the road?

The theory of defense that Mr. Killian wanted presented was that the police knew him as “drinker” and they purposely did not stop in the store so that they could stop him later on in his car and get him with a felony DUI rather than a public intoxication misdemeanor.

Although trial counsel raised the Motion to Suppress in the trial court prior to trial and it was denied, Mr. Killian asserts that she should have raised it before the jury and requested a theory of defense instruction that would have allowed the jury to find him guilty of public intoxication. By failing to assert this defense at trial and failing to ask for the special jury instruction Mr. Killian now alleges that his trial attorney was ineffective in her representation of him.<sup>1</sup>

### ARGUMENT

Mr. Killian asserts on appeal that his trial attorney was ineffective in not pursuing his theory of defense at trial and requesting a special jury instruction. Trial counsel raised the issue at the suppression hearing and she pursued it at a preliminary hearing. However, Mr. Killian asserts that had she pursued the theory before the jury and requested a public intoxication jury instruction that the outcome of his trial would have been different.

In State v. Wallace, \_\_\_ P.3d \_\_\_ (Utah App. 2002), at issue was the state’s request for a lesser included offense instruction. Mr. Wallace argued that the state should not have been

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<sup>1</sup>Despite requests from appellate counsel, to date Mr. Killian has not responded to inquiries as to his desire to pursue any 23B remand or other issues on appeal.

afforded the right to submit the instruction. However, in that case, as in this case, the defendant did not preserve an objection on the record. When the defendant does not preserve the claim it can only be addressed on appeal if it one of plain error or if the trial counsel was ineffective in representation.

In regard to plain error, the issue here is different. In this case the issue is one of the lack of defense theory and the requisite instruction to support the theory—not the erroneous inclusion of an instruction. Here Mr. Killian cannot support a claim of plain error in that he cannot show that the court should have proposed a theory of defense and the requisite instructions. Such a claim would be without merit.

To establish plain error, Mr. Killian would have to show a) an error exists; b) the error should have been obvious to the trial court; and c) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant. As set forth above, Mr. Killian cannot argue the trial judge should have developed a theory of defense instruction for him.

However, Mr. Killian does assert that the doctrine of ineffective assistance of counsel should apply in his case to allow this Court to review his claim—as it did in Wallace.

Mr. Killian asserts that his trial counsel knew there was a claim to be raised regarding the officer's conduct. She had raised it in pre-trial motions. However, she failed to pursue that theory of defense in an in-depth manner at trial. It is touched on in closing argument and no specific jury instructions were given to support the theory. Mr. Killian asserts it was a very viable defense. There was no way in a small town that the group of police at the store did not know of Mr. Killian's prior four DUI convictions. Moreover, if he had a strong odor of alcohol and the police had probable cause to stop him—the stop should have occurred at the store. The police



never should have allowed Mr. Killian to get in the car and drive. If they did not have probable cause to stop him at the store—they did not have probable cause to stop him on the road. Mr. Killian believed then and does now that the police were setting him up.

Although trial counsel touched briefly on this theory—it was not pursued adequately at trial. Furthermore, she did not request a public intoxication jury instruction as a theory of defense or lesser included offense instruction.

In Wallace, this Court provided “The Utah Supreme Court has explained that “when the prosecution seeks instruction on a proposed lesser included offense, both the legal elements and the actual evidence or inferences needed to demonstrate those elements must necessarily be included within the original offense charged.” citations omitted. Here, Mr. Killian asserts that the instruction should have been given—if not as a lesser included offense—then at least as a theory of defense instruction.

“ In pertinent part, Utah Code Ann. § 41-6-44 states, “A person may not operate . . . a vehicle within this state if the person: . . . (ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle.” Id. § 41-6-44(2)(a)(ii)”

Utah Code Ann. §76-9-701. Intoxication - provides that a person is guilty of public intoxication when:

(1) A person is guilty of intoxication if he is under the influence of alcohol, a controlled substance, or any substance having the property of releasing toxic vapors, to a degree that the person may endanger himself or another, in a public place or in a private place where he unreasonably disturbs other persons.

Mr. Killian asserts that public intoxication should be a lesser included offense or at the minimum a theory of defense jury instruction and that his trial counsel should have pursued his defense theory with vigor and then submitted the requisite instruction to support his defense argument. Both require intoxication to a point that dangerousness to self or others becomes an issue. Mr. Killian asserts that the police should have stopped him in the store and charged him with public intoxication rather than to set him up for the DUI. He believes that if that theory was proposed in a more effective way to the jury and if they had the option to convict him of public intoxication rather than DUI that they would have.

Mr. Killian asserts that by failing to assert the defense theory and failing to submit the instruction that his trial counsel's actions fell below the standard necessary for effective representation. Again, in Wallace, the defendant raised the issue and this Court held:

"To prevail on a claim of ineffective assistance of counsel, [Wallace] must establish (1) that his trial counsel's performance was 'deficient,' and (2) that he was 'prejudiced' by the ineffective assistance." citations omitted.

To establish ineffective assistance of counsel, Mr. Killian must show that defense counsel's representation "fell below an objective standard of reasonableness," and that, but for the deficient representation, there is a "reasonable probability" that the result would have been different. . . . "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984).

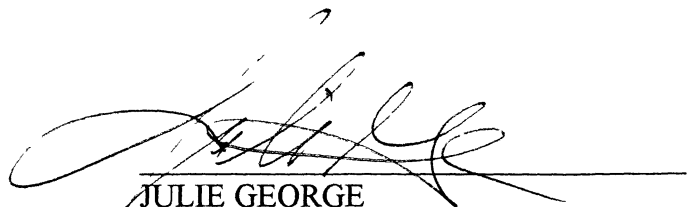
Mr. Killian asserts that to raise his theory of defense in pretrial motions and then to all but abandon them at trial in front of the jury was ineffective assistance of counsel. Further, he asserts

that failure to submit a jury instruction on public intoxication fell below the objective standard of reasonableness. Finally, he argues that but for the failures on the behalf of trial counsel the result in his jury trial would have been different. Mr. Killian is sure that he would have been found guilty of public intoxication and the jury would have seen through the set up by the police officers had defense counsel been more vigilant.

### CONCLUSION

Mr. Killian respectfully requests that this Court to vacate his conviction for a Third Degree Felony on the basis that at most the jury should have convicted him public intoxication but due to the ineffective assistance of his trial counsel the jury was never presented with the appropriate defense or applicable jury instruction.

RESPECTFULLY SUBMITTED this 18 day of December, 2002.

  
JULIE GEORGE  
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that I hand-delivered or mailed, first class postage prepaid, a true and correct copy of the foregoing Brief to:

LAURA DUPAIX  
ASSISTANT UTAH ATTORNEY GENERAL  
CRIMINAL APPEALS DIVISION  
P.O. BOX 140854  
SALT LAKE CITY, UTAH 84114-0854

DATED THIS 18 DAY OF December 2002.

A handwritten signature in black ink, appearing to read "Laura Dupaix", written over a horizontal line.

## ADDENDA A

HERBERT Wm. GILLESPIE #1191  
DUCESNE COUNTY ATTORNEY  
DAVID K. CUNNINGHAM #7497  
DEPUTY DUCESNE COUNTY ATTORNEY  
Attorney for Plaintiff  
P.O. Box 206  
Duchesne, Utah 84021  
(435) 738-0184

FILED  
DISTRICT COURT  
DUCESNE COUNTY, UTAH

JUN 6 2002

JOANNE MCKEE CLERK  
BY ME DEPUTY

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF UTAH  
DUCESNE COUNTY, DUCESNE DEPARTMENT

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STATE OF UTAH,	:	<b>JUDGMENT AND</b>
	:	<b>ORDER</b>
Plaintiff,	:	
vs.	:	Criminal No. 011800098
	:	
	:	Judge John R. Anderson
<b>KEVIN WRIGHT KILLIAN,</b>	:	
	:	
Defendant.	:	

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**DRIVING UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS (WITH PRIORS) - A THIRD DEGREE FELONY**

The above-entitled case came before the Court for Sentencing on Monday, May 13, 2002, the Honorable Judge John R. Anderson, presiding. The defendant was present and was represented by his attorney, Karen Allen. The State of Utah was represented by Herbert Wm. Gillespie, Duchesne County Attorney. The Court had received the Pre-Sentence Investigation Report prepared by Adult Probation and Parole. Statements were made by counsel for the parties.

NOW THEREFORE, based upon the file and record herein, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

That the defendant has been convicted by a Jury of the offenses of **Driving Under the**

**Influence of Alcohol and/or Drugs (With Priors), a Third Degree Felony**, in violation of Section 41-6-44 UCA (1953) as amended.

That for the offense of **Driving Under the Influence of Alcohol and/or Drugs (With Priors), a Third Degree Felony**, it is hereby ordered that the defendant is sentenced to serve an indeterminate term of not to exceed five (5) years in the Utah State Prison, and to pay a fine in the sum of \$1,000.

The foregoing prison sentence is suspended and the defendant is placed on supervised probation through for a period of three (3) years upon the following terms and conditions:

1. The defendant shall serve one (1) year in the Duchesne County Jail, with a review of this sentence in 180 days to determine if the defendant has arranged to enter into an in-house alcohol/drug treatment program. The defendant shall report to the Duchesne County Jail no later than 2:00 p.m. on Monday, May 20, 2002, to begin this period of incarceration.
2. The defendant shall pay the fine in this matter on terms set forth by Adult Probation and Parole or shall perform 200 hours of community service at the direction of Adult Probation and Parole.
3. The defendant shall not possess or consume alcohol or be where alcohol is being possessed or consumed or frequent any establishment where alcohol is the chief item of order.
4. The defendant shall successfully complete a substance abuse treatment program to include AA/NA meetings, as recommended by his probation officer.
5. The defendant shall install an Interlock Device, at his own expense, on any vehicle that he operates.
6. The defendant shall not associate with or remain at any residence where alcohol or drugs are being used.

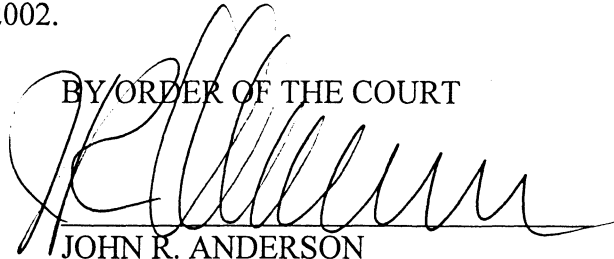
7. The defendant shall be subject to warrantless searches by any law enforcement officer to ensure compliance with the terms of his probation agreement.

8. The defendant shall carry with him at all times the offender identification card provided to him by Adult Probation and Parole and present the identification card to any law enforcement officer with whom he comes in contact.

9. The defendant shall take Antibuse as directed by Adult Probation and Parole if it is cleared by a doctor.

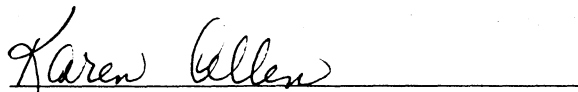
DATED this 28 day of May, 2002.

BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "John R. Anderson", written over a horizontal line.

JOHN R. ANDERSON  
DISTRICT COURT JUDGE

Approved as to form:

A handwritten signature in black ink, appearing to read "Karen Allen", written over a horizontal line.

Karen Allen  
Attorney for Defendant



State of Utah vs **Kevin Wright Killian**  
Case No. 011800098

**CERTIFICATE OF DELIVERY**

I hereby certify that on the 14<sup>th</sup> day of May, 2002, I delivered a true and correct copy of the foregoing Judgment and Order to the attorney for the defendant, at:

Karen Allen  
Attorney at Law  
PO Box 409  
Duchesne UT 84021

by depositing in her box at the Duchesne County Justice Center, Duchesne, Utah.

Debbie Mitchell  
Legal Assistant

State of Utah vs **Kevin Wright Killian**  
Case No. 011800098

**CERTIFICATE OF DELIVERY/MAILING**

I hereby certify that on the \_\_\_\_\_ day of May, 2002, I delivered/mailed a true and correct copy of the foregoing Judgment and Order to the attorney for the defendant, at:

Karen Allen  
Attorney at Law  
PO Box 409  
Duchesne UT 84021

by depositing in her box at the Duchesne County Justice Center, Duchesne, Utah,

and to

Adult Probation and Parole  
PO Box 1823  
Roosevelt UT 84066

by depositing in the U. S. Mail, Duchesne, Utah.

---

Legal Assistant