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Theodore E. Kanell; Ronald L. Poulton; Attorneys for Plaintiff-Respondent;
Joseph C. Rust; Antje F. Curry; Tanner, Kesler, Rust & Williams; Attorneys for Defendant-Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE CITIZENS BANK, a State chartered bank corporation, Plaintiff and Respondent, v. THE ELKS BUILDING, N.V., a Netherlands Antilles corporation, Defendant and Appellant.	:	Case No. 18185

APPELLANT'S REPLY BRIEF

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FILED

JUL 2 1 1982

Clerk, Supreme Court, Utah

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v.	:	
THE ELKS BUILDING, N.V., a Netherlands Antilles corporation,	:	
Defendant and Appellant.	:	

APPELLANT'S REPLY BRIEF

INTRODUCTION

This Reply Brief is directed to the Brief filed herein by the plaintiff-respondent (hereinafter called plaintiff) and will address the points raised therein in the same sequence, with emphasis only on those aspects of the case not argued by defendant in its Appellant's Brief.

ARGUMENT

POINT I

THE LOWER COURT ERRONEOUSLY SUBORDINATED DEFENDANT'S LANDLORD'S LIEN TO AN UNPERFECTED SECURITY INTEREST.

Article 9 of the Uniform Commercial Code specifically excludes landlord's liens from the provisions of its

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coverage,[1] thus relegating them to pre-code principles of law and equity.[2] Only to the extent that a landlord's lien is claimed against a perfected security interest does the latter receive preference over the former.[3] Plaintiff's claim that the issue of "first in time is irrelevant when all liens of one class are subordinated to all liens of another class" must still be considered under two aspects: (1) Did a perfected security interest exist at the time defendant claimed its landlord's lien and (2) If no perfected security interest then existed, does defendant prevail under common law principles in its claim of a rightful landlord's lien.

A. An Article 9 Security Interest Unperfected at the Time a Landlord's Lien Attaches is Subordinate to That Lien.

Plaintiff apparently is contending that in Utah all landlord's liens are subordinate to a perfected security interest, regardless of when perfection takes place. By definition under Article 9, however, a security interest is perfected when it has attached[4] and when all of the applicable steps required for perfection have been taken.[5] Attachment occurs when the collateral is in the possession of

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1 U.C.A. §70A-9-104 provides "This chapter does not apply (b) to a landlord's lien; . . ."

2 See U.C.A. §70A-1-103. See also U.C.A. §68-3-1.

3 See U.C.A. §38-3-2.

4 See Utah Code Annotated §70A-9-203(1).

5 See Utah Code Annotated §70A-9-303(1).

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the secured party pursuant to agreement or the debtor has signed a security agreement; value has been given; and the debtor has rights in the collateral.[6] Perfection for goods may be had by filing or by possession of collateral by the secured party.[7]

Utah's landlord's lien statute does not define a perfected security interest, nor does it contain anything inconsistent with the definition of a perfected security interest under Article 9. Plaintiff argues that as a class an Article 9 perfected security interest need not meet the requirements of time and priorities in order to prevail over a conflicting landlord's lien. That logic is specious and totally without merit. In order to obtain a perfected security interest under Article 9, one must adhere to the vigorous prerequisites therefor established by the legislature.[8] The landlord's lien statute, however, is merely a codification of long established common law, but no definition is provided therein of a perfected security interest. Since Utah Code Annotated §38-3-2 does not define the perfected security interest to which a landlord's lien is subordinate, that definition must be found in Article 9, and those two statutes must be read together. ". . . technical words and phrases, and such others

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6 See Footnote 4.

7 See Footnote 5.

8 See Footnotes 4 and 5.

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as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition."[9] Where the landlord's lien statute is silent on the definition of perfected security interest, and Article 9 of the Uniform Commercial Code is not, "the common law rules of construction dictate that the more specific of the two applicable provisions be utilized in a given situation."[10] "In arriving at the legislative intent in the enactment of a statute, it should be read in connection with all statutes relating to the same subject matter, and effect should be given to every word, phrase, sentence and section of all such statutes, if possible."[11]

The two key areas of inquiry, therefore, are the date of perfection of a security interest and the date of attachment of a landlord's lien. If a security interest is unperfected, it obviously cannot be a "perfected" security interest for the purposes of Utah Code Annotated §38-3-2. Conversely, if a landlord's lien has not attached, it cannot be preferred to all other liens enumerated in the landlord's lien statute.

A landlord's lien which has attached is inferior only to a security interest that is perfected at the time the landlord lien attaches, not, as plaintiff would believe,

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9 Utah Code Annotated §68-3-11.

10 Holder v. State, 556 P.2d 1049, 1053 (Okl. 1976).

11 In re Holmlund's Estate, 374 P.2d 393, 401 (Oregon 1962).

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irrespective of whether that perfected security interest was created *in futuro* or *in praesenti*. In the case at bar, the landlord's lien attached prior to the time the plaintiff perfected its security interest; therefore, the landlord's lien has priority.

B. Defendant's Landlord's Lien Priority is Governed by Common Law Principles.

It is conceded that a statute created in derogation of the common law cannot be interpreted in harmony with common law principles. No such concession is in order in the interpretation of the Utah landlord statute. Quite the contrary, treatises and case law alike show that it is a mere codification of the common law.

> A lien statute that is merely declaratory of the common law must be interpreted in accordance with common law principles. 51 Am.Jur. 2d, Liens §36 (1970).
>
> Statutes giving the landlord a lien for rent on the property of his tenant are considered to be to some extent the outgrowth of the common law right of distress, and the principles controlling in cases of distress are often resorted to in determining the rights of the parties under such statutes. 49 Am.Jur. 2d, Landlord and Tenant, §687 (1970).
>
> The statutory lien of a landlord for rent attaches at the beginning of the tenancy, or when the chattels are brought upon the premises . . . regardless of whether the rent is then due. Sucha lien does not depend upon a levy, and exists independently of the institution of any proceeding for its enforcement. The remedy by levy, distress, or attachment, when available, is simply to enforce a lien already existing. Id. at §688.

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Utah case law is in harmony with that interpretation. In Olsen v. Kidman,[12] the Court enumerates, inter alia, "Lessor's lien, 52-3-1, (on furniture and effects of tenant for rent due upon the premises); . . . and others" and specifically states: "These liens are codifications of the common law liens."

The priority of secured transactions vis-a-vis landlord's lien has always been determined under non- or pre-code law, inasmuch as landlord's liens are excluded from Uniform Commercial Code coverage.[13] The American Law Reports in their summary and comment interpret the determination of priorities as follows:

> Thus, among such jurisdictions where there existed a rule of absolute preference for either the security interest or the landlord's lien the courts have held that the interests which have preference under the non or pre-code law still retain that preference.
>
> On the other hand, jurisdictions which have no such rule of absolute preference have generally held that the first interest to be secured or perfected has priority. Thus, where the security interest was perfected before the landlord's lien arose or was secured, its holder has been held prior, and where the landlord's lien has arisen or been secured first in time, it has been held prior. Annot., 99 A.L.R. 3rd 1006, 1008 (1980) (emphasis added).

In the case at bar, it has been proven that the landlord's lien attached in December of 1980, some four months

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12 120 Utah 443, 235 P.2d 510, 511 (1951)

13 See Footnote 1, supra.

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prior to plaintiff's attempt to perfect its security interest, and that the landlord's lien should therefore be held prior.

C. Defendant's Landlord's Lien Did Not Have to be Perfected by Judicial Proceedings.

Plaintiff continues to insist that a landlord's lien must first attach and then be perfected by filing a complaint and obtaining a writ of attachment. The issue that defendant failed to perfect its landlord's lien within thirty days after its tenant (hereinafter "Pouches") left the premises is raised first on appeal and should therefore not be addressed by this Court. However, even if that issue were to be decided by this Court, plaintiff's argument is totally without merit. Defendant did perfect its landlord's lien within thirty days after Pouches left the premises, by taking possession of the premises and changing the locks on the door. This is exactly on point with Eason v. Wheelock,[14] more specifically referred to infra. Plaintiff relies on Freeway Park Building, Inc. v. Western States Wholesale Supply,[15] to show failure to perfect by defendant. Freeway addresses the procedural requirements for a writ of attachment to issue; it does not address the issue of perfection of a landlord's lien, a term of art not known under common law and thus not applicable to render it prior. Case law shows that a valid landlord's lien exists

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14 101 Utah 162, 120 P.2d 319 (1941).

15 22 Utah 2d 266, 451 P.2d 778 (1969)

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independent of whether or not legal proceedings are instituted. "The right to a common law lien is based directly on the idea of possession, and it is indispensible that the one claiming it have an independent and exclusive possession of the property."[16]

D. History of Utah Landlord's Lien Statute.

For the State of Utah the case at bar is a case of first impression. Nonetheless, the guidelines are clear. Inasmuch as landlord's lien statutes are excluded from Uniform Commercial Code coverage, non-code law applies, and stare decisis needs to be adhered to for an adjudication of the subject priorities.

The evolution of the landlord's lien statute in Utah has been consistent and minimal over the years. R.S. 1898, §1408, the first statutory law on the subject in the state of Utah, gave liens for rent priority over all other liens, excepting, inter alia, mortgages for purchase money; Utah Code Annotated 1953 §38-3-2[17] continued, with slight changes, that

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16 Murray v. Eisenberg, 627 P.2d 146, 148 (Wash. 1981). See also defendant's argument in appellant's brief, pp. 12, 13.

17 U.C.A 1943 §52-3-1 is the precursor of U.C.A §38-3-2, before its amendment in 1977, with identical language. It may be safely assumed that Senate Bill 191, was sponsored in 1977 by Senator Fred Finlinson to reflect the ascending power of Uniform Commercial Code provisions in all commercial dealings. The change from "mortgages for purchase money" to "perfected security interests" in the landlord's lien statute brought that category in line with the broad scope of perfected security interests of Article 9.

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codified common law, again excepting mortgages for purchase money. In 1977 the Utah legislature removed "mortgages for purchase money" from the statute and amended it to read "perfected security interests" in its stead. In all other respects the landlord's lien statute has remained virtually the same for some 84 years.

Against that historical background case law becomes definitive for purposes of adjudicating the case at bar. Eason, supra, is on all fours with the case at bar. There the tenant sued the landlord for conversion of equipment, as the landlord had changed the locks on the door of the premises after the expiration of the tenant's lease and had taken possession of certain equipment within thirty days after the lease expired. The tenant claimed "that they possess a purchase money mortgage on the equipment and that this mortgage had priority over the lien of the [landlord]." Id. at 320. The court found that the tenant had not relied on the purchase money lien, but stated in dictum that "even if we hold such evidence [that a mortgage had been given] sufficient to establish the mortgage, there is no evidence that such had been properly filed as required by our statutes [Citation omitted] in order to give notice to the lessor." Id. at 320.

The parallels to the case at bar are striking. Plaintiff here claims priority on a perfected security interest in the nature of a chattel mortgage on equipment owned by Pouches. Defendant claims that it repossessed the premises and

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changed the locks on the door of its tenant, so that the equipment could not be removed. Defendant did not have notice of the security interest at the time its lien attached for the simple reason that the security interest had not even been created at that time. Thus, the holding of Eason, supra, should, under principles of stare decisis be made applicable to the case at bar. "The lessor, as far as the record shows, was a party without notice whose lien attached at the granting of the lease and was superior to the prior unfiled mortgage of the [tenant]." Id. at 321. It is respectfully requested that this court so find in the case at bar.

POINT II

THE LEASE WAS A CONSENSUAL CONTRACT PERMITTING THE INTERPRETATION THAT POSSESSION OF THE EQUIPMENT CONSTITUTED PERFECTION UNDER ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE.

Defendant has heretofore argued this point at length in its apppellant's brief under Point IA, to which the attention of the court is respectfully directed. However, because of the many inaccuracies stated in respondent's brief under its Point II, a step by step reply is in order to alert the court to the proper facts.

A. Defendant Was a Party Without Notice at the Time Its Landlord's Lien Attached.

Plaintiff asserts that "the conduct of the parties illustrates that the landlord did not assume it had a security interest until after learning of the secured party status of

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the plaintiff respondent."[18] In fact, defendant did not learn of plaintiff's security interest until some time in June of 1981. Attached as Exhibits "A", "B", and "C": are (a) the letter of Ronald L. Poulton, attorney for plaintiff, to defendant, curiously undated; (b) a response by defendant's counsel dated June 23, 1981 that they are not aware of any perfected security interest; and (c) Poulton's subsequent advice dated July 2, 1981 that a financing statement had been filed on April 7, 1981.

B. Defendant Retained Possession of the Equipment Throughout the Period at Issue Herein.

Plaintiff claims that the interest of the lessor "existed only so long as the property did remain on the premises, which is exactly the interest recognized by the statutory lessor's lien."[19] The court is apprised that the property remained on the premises throughout the period at issue herein and was only released to plaintiff upon order of the lower court that plaintiff's interest was prior to defendant's.

C. Defendant's Action Against Pouches Was Consistent With Its Contractual Rights Under the Lease.

Plaintiff's allegation that the landlord's right to take possession of the property is coupled with the landlord's

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18 Respondent's Brief, p. 7, bottom of last paragraph.

19 Respondent's Brief, p. 8, last paragraph.

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obligation to relet the premises is totally repudiated by the language of the lease which states that the landlord "may . . . without limiting landlord in the exercise of any other right or remedy" relet the premises. Equally unsupported by the lease language cited immediately supra is plaintiff's allegation that landlord did not have the right to make a public or private sale without legal process. Plaintiff also attempts to place the burden of proving that the personal property of Pouches was free of encumbrances upon the defendant, when it is clearly its own burden to show that it was not.[20]

Plaintiff alleges that defendant did not reenter the premises, take possession of the personal property and relet the premises for the account of the tenant.[21] (Emphasis added). As the lease with Pouches terminated on February 15, 1981 and contact with Pouches had not been accomplished, the only statement made by plaintiff that is supported by the facts is that defendant did not relet the premises for the account of the tenant.

D. Defendant's Chosen Procedure to Recover Rent From Pouches Was Not Inconsistent With Its Contractual Rights And the Provisions of Article 9 of the Uniform Commercial Code.

Plaintiff's allegation that defendant should have perfected its security interest by filing a financing statement

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20 Respondent's Brief, p. 9, top paragraph.

21 Respondent's Brief, p. 9, second paragraph.

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totally ignores the alternate method of taking possession allowed by the Uniform Commercial Code.[22]

In reply to the many inaccurate statements made under plaintiff's Point II of respondent's brief, it is admitted that under the provisions of Article 9 of the Uniform Commercial Code defendant would have had the right to conduct a public or private sale of the personal property of Pouches without judicial proceedings. However, defendant also had the right to "reduce his claim to judgment"[23], at which point its lien upon the subject property related "back to the date of the perfection of the security interest in such collateral."[24] Defendant did secure a judgment and its lien therefore related back to the date defendant changed the locks and took possession of the personal property in December of 1980.

E. The Date of Perfection of Defendant's Contractual, Ergo Consensual, Lien is Set by the Language of the Lease.

"In order that a lien may be created by a contract, express or implied, it is generally necessary that the language of the contract or the attendant circumstances should clearly

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22 Utah Code Annotated §70A-9-302(1) provides "A financing statement must be filed to perfect all security interests except the following:

(a) A security interest in collateral in possession of the secured party under §70A-9-305." [referring to goods] (emphasis added)

23 Utah Code Annotated §70A-9-501(1).

24 Utah Code Annotated §70A-9-501(5).

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indicate an intention of the parties to create a lien on the specific property, and should show a specific charge on, or appropriation of, that property; . . ."[25]

Defendant's lease with Pouches in the case at bar expressly provided that defendant could take possession of the equipment in the event of Pouches' default in payment. Therefore, the intent of the parties was clear that at the very latest defendant's lien became perfected at the time of Pouches' default in December of 1980 when it retook the premises and changed the locks in order to prevent removal of the equipment. It is respectfully requested that the court so find.

POINT III

DEFENDANT WAS NOT REQUIRED UNDER THE FACTS OF THIS CASE TO ELECT ITS REMEDY.

Plaintiff would persuade this court that the case at issue is subject to the doctrine of election of remedies and that defendant's sole remedy must be governed by the statutory lessor's lien. Plaintiff ignores both the express language of defendant's lease with Pouches as well as the absence of the three necessary elements of the doctrine of election of remedies.

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25 Wellbro Building Company v. McConnico, 421 P.2d 837,839(Okl. 1966).

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A. Plaintiff is Raising the Issue of Election of Remedies for the First Time on Appeal.

"The defense of election of remedies is an affirmative one and must be raised by way of answer, [citation omitted] motion, [citation omitted], or demand [citation omitted] so as to put the issue before the trial court, and is not to be raised for the first time on appeal. Also, the defense may be waived, or a litigant may be estopped to assert such defense."[26] The record on appeal is clear that the issue of election of remedies was never raised in the court below, and the court should therefore not address that issue.

B. Defendant Was Not Contractually Bound to Elect Its Remedy.

"In the absence of a contractual provision expressly limiting the remedy or remedies available, a party may pursue any remedy which law or equity affords, as well as the remedy or remedies specified in the contract.[27]

Defendant's lease expressly provides that defendant shall not be limited in its remedies.[28]

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26 Royal Resources v. Gibralter Fin. Corp., 603 P.2d 793, 796 (Utah 1979).

27 Glacier Campground v. Wild Rivers, Inc., 597 P.2d 689, 696 (Montana 1978).

28 . . . "without limiting landlord in the exercise of any other right or remedy which landlord may have by reason of such default or breach." Paragraph 25 of defendant's lease which is part of the record on appeal.

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C. The Doctrine of Election of Remedies Requires Elements Missing in the Case at Bar.

"The doctrine of election of remedies is a technical rule of procedure and its purpose is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. [Citations omitted]. Said doctrine presupposes a choice between inconsistent remedies, a knowledgeable selection of one thereof, free of fraud or imposition, and a resort to the chosen remedy evincing a purpose to forego all others." [Citations omitted]. (Emphasis in the original).[29]

Defendant's remedies in the case at bar were not multiple. It had a right to enforce the payment of rent, no more. Defendant's remedies, whether statutorily or contractually enforced, would not have been inconsistent. It would have received the amount of its rent. An election of remedies was therefore not required in the case at bar.

D. Plaintiff's Cases Cited in Support of Its Allegations Are Irrelevant to the Case at Bar.

Plaintiff cites cases that are completely irrelevant to the case at bar. In Royal Resources, supra, the choice was between corporate and individual liability, and the court stated that the doctrine was created to prevent double redress for a single wrong. In Brigham City Sand v. Machinery Center,[30] the choice was between the return of the property

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29 See Footnote 26, supra.

30 613 P.2d 510 (Utah 1980)

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or a claim for damages, and the plaintiff was prevented from asking the return of the property from one defendant and suing the second defendant for damages.

In Cook v. Covey-Ballard Motors Co.,[31] the court found that the plaintiff's claim of ownership of the Studebaker automobile and the repudiation of the contract for the purchase of the same were inconsistent and hostile and that plaintiff had to choose whether to affirm the contract and to sue for damages or to rescind the contract and to have the consideration given returned.

Defendant in the case at bar was not contractually bound to elect its remedy. It chose to defend its action against plaintiff under both contractual and statutory theories. Under either theory, its lien on the equipment at issue herein should be found prior in time and in right. It is respectfully requested that the court so find.

CONCLUSION

The issue in the case at bar is a simple one: Did plaintiff have a perfected security interest at the time defendant's landlord's lien attached? A perfected security interest is defined under Article 9 of the Uniform Commercial Code. A landlord's lien is a statutory lien codifying common law principles under which a landlord's lien attaches at the time the tenant brings the personal property onto the premises, and in

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31 69 Utah 161, 253 P.196 (Utah 1927)

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no event later than at the time that the tenant defaults in the payment of the rent. Plaintiff's security interest was not perfected at the time defendant's landlord's lien attached. Defendant's landlord's lien was therefore superior both in time and in right, and the court should find that defendant is entitled to the proceeds of the sale of the equipment heretofore erroneously ordered sold by the court below.

Respectfully submitted,

KESLER & RUST

By Antje F. Curry
Joseph C. Rust/Antje F. Curry
Attorneys for Defendant-Appellant The Elks Building, N.V.

CERTIFICATE OF DELIVERY

I hereby declare that I caused to be delivered two (2) true and correct copies of the foregoing Appellant's Brief in Case No. 18185, this 20th day of July, 1982, to Theodore E. Kanell and Ronald L. Poulton, Attorneys for Respondent, 9 Exchange Place, Salt Lake City, Utah 84111.

Donna L. Wade

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A P P E N D I X

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EXHIBIT "A"

LAW OFFICE
OF
RONALD L. POULTON

#9 EXCHANGE PLACE
SUITE #520
SALT LAKE CITY, UTAH 841

TELEPHONE 801 - 355-1341

Elks Building NV
139 East South Temple Suite 1000
Salt Lake City, Utah 84111

Attn: Mrs. Brand

CERTIFIED: Return Receipt Requested

Re: The lease arrangement with Food Innovations Systems d/b/a Pouches, Inc.

Dear Mrs. Brand:

This office represents The Citizens Bank. As you should be aware, Food Innovations Systems leased space in the Elks Building to operate a business under the name of Pouches, Inc. The furniture, fixtures, and equipment used to operate the business were pledged as collateral to secure a business loan obtained from The Citizens Bank.

Presently, Food Innovations Systems is in default on the Note and Security Agreement with the Bank. The Bank has attempted to notify Howard Buckner of Food Innovations Systems regarding the deficiency but to date has been unable to locate him.

Our information indicates that the furniture, fixtures, and equipment on the premises may be lost or damaged if action is not taken to prevent such harm from taking place.

This letter is to inform you of the Bank's interest and to request your acknowledgement and consent to secure the premises and equipment contained therein. Your immediate attention to this matter would be appreciated.

If you have any questions, you may notify this office directly.

Very truly yours,

Ronald L. Poulton
Attorney at Law

RLP/jl

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EXHIBIT "B"

LAW OFFICES OF

TANNER, KESLER, RUST & WILLIAMS

A PROFESSIONAL CORPORATION

2000 BENEFICIAL LIFE TOWER

36 SOUTH STATE STREET

SALT LAKE CITY, UTAH 84111 U.S.A.

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FRANCIS M. GIBBONS
OF COUNSEL

June 23, 1981

Mr. Ronald L. Poulton
#9 Exchange Place
Suite 520
Salt Lake City, Utah 84111

Re: Food Innovation Systems, d/b/a Pouches, Inc.

Dear Mr. Poulton:

I have been asked to respond to your letter directed to Mrs. Brand, manager of the Elks Building, N.V., regarding your claim to an interest in the furniture and other items in the Pouches Restaurant in the Elks Building.

We are in litigation with Pouches and in fact are seeking to execute on that property to satisfy claims for past rent. In our research we checked with the Secretary of State's office and found no financing statement or other security interest evidenced. If you do have such a document, I would appreciate receiving a copy from you.

Sincerely,

TANNER, KESLER, RUST & WILLIAMS

Joseph C. Rust ac

Joseph C. Rust

JCR:drw

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EXHIBIT "C"

LAW OFFICE
OF
RONALD L. POULTON

#9 EXCHANGE PLACE
SUITE #520
SALT LAKE CITY, UTAH 84111

TELEPHONE 801 - 355-1341

July 2, 1981

Joseph Rust
TANNER, KESSLER, RUST & WILLIAMS
36 South State, Suite 2000
Salt Lake City, Utah 84111

Re: Security Interest of The Citizens Bank of Property Owned by Food Innovation Systems Inc.

Dear Mr. Rust:

This letter will respond to your letter wherein you indicated The Citizens Bank had no perfected security interest in the property of Food Innovation Systems located in the Elks Buildng in Salt Lake City, Utah. This letter will inform you that The Citizens Bank holds a perfected purchase money security interest in all machinery, equipment, furniture and fixtures owned by Food Innovation Systems Inc., d/b/a Pouches pursuant to Security Agreement and Financing Statement #822848 filed April 7, 1981, with the Secretary of State.

You are hereby placed on notice that it is the intent of The Citizens Bank to maintain its security interest in the property described in the Financing Statement and Security Agreement and any conduct by your clients contrary to the interest of The Citizens Bank will be deemed a conversion of such property.

I hope we will be able to resolve this matter without further problem but will expect your actions to recognize the secured status of the Bank.

Very truly yours,,

Ronald L. Poulton
Attorney at Law

RLP:sd

cc: The Citizens Bank

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