

2009

# Holladay Towne Center LLC, a Utah limited liability company v. Brown Family Holdings, LC a Utah limited company : Brief of Appellant

Utah Supreme Court

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**IN THE SUPREME COURT OF UTAH**

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HOLLADAY TOWNE CENTER, L.L.C., a  
Utah limited liability company,

Plaintiff/Petitioner,

vs.

BROWN FAMILY HOLDINGS, L.C., a Utah  
limited company,

Defendant/Respondent.

Case No. <sup>9005</sup>~~20070496~~ – SC

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**BRIEF OF APPELLANT**

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On Certiorari to the Utah Court of Appeals

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## **LIST OF PARTIES**

The following are parties to this appeal:

1. Plaintiff and Petitioner Holladay Towne Center, LLC (“HTC”).
2. Defendant and Respondent Brown Family Holdings, LC (“Brown”).



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### **STATEMENT OF JURISDICTION**

On April 23, 2009, the Utah Supreme Court granted HTC's Petition for Writ of Certiorari for review of the November 20, 2008 decision of the Utah Court of Appeals. Jurisdiction is proper in this case under Utah Code section 78A-3-102(3)(a). *See* Utah Code Ann. § 78A-3-102(3)(a).

### **STATEMENT OF ISSUES AND STANDARDS OF REVIEW**

ISSUE I: Did the Utah Court of Appeals err in interpreting a lease agreement to obligate the tenant to cure a previously undisclosed cloud on the landlord's title?

PRESERVATION OF ISSUE: HTC presented this issue in its Petition for Certiorari. (*See* Petition for Writ of Certiorari, on file with the Court, at 10-18.)

STANDARD OF REVIEW: Questions of contract interpretation are matters of law that the Utah Supreme Court reviews for correctness. *See Fairbourn Commercial, Inc. v. Am. Hous. Partners, Inc.*, 2004 UT 54, ¶ 6, 94 P.3d 292.

ISSUE II: Did the Utah Court of Appeals err in deciding that a landlord can lawfully confer standing to assert its property rights upon a tenant via a provision in a lease agreement?

PRESERVATION OF ISSUE: HTC presented this issue in its Petition for Certiorari. (*See* Petition for Writ of Certiorari, on file with the Court, at 19-20.)

STANDARD OF REVIEW: “[A] determination of standing is generally a question of law, [that the Court] review[s] for correctness.” *Mellor v. Wasatch Crest Mut. Ins. Co.*, 2009 UT 5, ¶ 7, 201 P.3d 1004.

### CONSTITUTIONAL OR STATUTORY PROVISIONS

There are no governing constitutional or statutory provisions.

### STATEMENT OF THE CASE

This case requires a careful analysis of the nature and quality of ownership interests provided by a landlord to a tenant, as well as the fundamental distinction between the quality of such ownership interests and the uses allowed by the landlord on property. The Utah Court of Appeals’ decision failed to recognize this distinction and, as a result, stands real property law on its head by ruling that HTC, as tenant, is responsible for a previously undisclosed cloud on landlord Brown’s title.

Additionally, this case involves a critical question of Utah standing law: Can parties confer legal standing via a contractual agreement? In holding that the language of the lease obligated HTC to assert a challenge to an encumbrance on the leased property, the Utah Court of Appeals effectively recognized that a landlord can confer standing to a tenant via a provision in a lease agreement. This recognition contravenes established law and public policy.



**1. Nature of the Case**

HTC initiated this action against Brown after Brown refused to address an undisclosed easement (the “Easement”) clouding title to the property that Brown leased to HTC (the “Property”). As known to Brown and stated in the parties’ lease agreement (the “Lease”), HTC’s sole purpose in leasing the Property was to develop the Property as a shopping center. Indeed, express provisions in the Lease even allowed HTC to finance the Property to obtain capital funding to develop the shopping center. As tenant of the Property, HTC sought to have Brown, as landlord and owner of the Property, remove the cloud of title caused by the Easement and thereby provide the promised unencumbered fee simple real estate for use by HTC and allow for the financing and development of the shopping center. HTC cannot obtain a title policy for the Property without listing the Easement as an exception to coverage, regardless of whether it is an owner's policy or a lender's policy of title insurance. Because of the Easement and its non-insurable status, HTC is hindered from obtaining financing for development of or construction of the shopping center on the Property in the manner contemplated by the Lease.

Rather than remove the Easement and thereby restore marketable title to the property for leasehold and purchase purposes, Brown argued below that the Easement was not a genuine cloud of title and that the Lease required HTC to either live with the Easement and whatever cloud on title it imposed or pay the significant legal fees and expend the considerable time necessary to remove the cloud itself.

## 2. Trial Court Decision

On August 9, 2006, HTC filed its Complaint against Brown, asserting claims for declaratory judgment, breach of contract, and specific performance. (R. at 1-40.) In response, Brown filed a motion to dismiss HTC's claims. (R. at 44-46.) Brown subsequently filed a counterclaim, alleging breach of contract, breach of good faith and fair dealing, waste of premises, and unjust enrichment. (R. at 393-99.) In December 2006, HTC moved to dismiss Brown's counterclaim and moved for summary judgment on HTC's claims for declaratory judgment and specific performance. (R. at 405-07.) In early 2007, Brown filed a cross-motion for summary judgment on, *inter alia*, its breach of contract claim. (R. at 497-99.) The court heard oral argument on the parties' motions to dismiss and motions for summary judgment on March 12, 2007. (R. at 928.)<sup>1</sup>

On May 1, 2007, the trial court issued its Findings of Fact, Conclusions of Law, and Order ("Order"). (R. at 825-29.) A copy of the Order is attached hereto as Addendum A. In the Order, the trial court concluded, in relevant part, that no actual Easement exists on the Property. The trial court reasoned that "[b]ecause there is no [E]asment affecting [the Property], there is no basis for [HTC's] claims against [Brown] and this action should not have been brought against the landlord, causing the landlord to incur costs." (R. 827-28.) The trial court further reasoned that even if the Easement does

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<sup>1</sup> Each of the parties also filed motions to strike affidavits as part of the briefing for their competing motions. The motions to strike are not relevant to this appeal.

“create[] legal requirements that interfere with [HTC’s] use of its leasehold, [HTC] has the right under the [L]ease and by virtue of its leasehold to contest those legal requirements by quiet title action or otherwise, but such action should be conducted in such a manner as to result in no cost to [Brown.]” (R. at 827-28.) The trial court also pointed out that the Lease “provides that it is a triple net lease and that rent would be paid without offset and without cost to the landlord.” (R. at 826.) Based on these conclusions, the trial court dismissed HTC’s Complaint against Brown and ordered HTC to pay all of Brown’s costs and attorney fees related to the action and to Brown’s collection of rent from HTC. (R. at 828-29.) The Order also granted HTC leave to amend its Complaint. (R. at 828.)<sup>2</sup>

### **3. Utah Court of Appeals Decision**

HTC appealed the trial court’s decision to dismiss HTC’s Complaint. On appeal, the Utah Court of Appeals affirmed the decision of the trial court. *See Holladay Towne Ctr., LLC v. Brown Family Holdings, LC*, 2008 UT App 420, ¶ 5, 198 P.3d 990. A copy of the court of appeals’ opinion is attached hereto as Addendum B. In so doing, the appellate court concluded that “the language of the Lease resolves the question [of whose

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<sup>2</sup> HTC filed a cross motion for summary judgment on Brown’s claim of unlawful detainer. In its Order, the trial court concluded that HTC had not materially breached the Lease because HTC had desisted making late payments at Brown’s request, HTC had made timely rent payments since Brown’s request, and any costs to Brown as a result of late rental payments could be remedied by HTC’s payment of Brown’s attorney fees and costs. The Utah Court of Appeals subsequently affirmed this decision. The court of appeals’ decision on this issue is not on certiorari before the Court.

obligation it was to take care of an easement discovered after the commencement of the Lease] as to these parties.” *Id.* at ¶ 9. Specifically, the court stated that “[i]n light of the language of the Lease, it is clear that the parties contracted so as to anticipate and resolve the very dispute presented in this appeal.” *Id.* at ¶ 10. Like the trial court, the Utah Court of Appeals emphasized that “the Lease was drafted as a triple-net lease to ensure that . . . Brown[] incurred no monetary obligations as a result of HTC leasing the Premises.” *Id.* But the court further relied on the Lease’s language that HTC shall either comply with all “Legal Requirements” in the use, occupation, control and enjoyment of the Property or HTC can exercise the “right, at its own cost and expense, to contest or review by appropriate legal or administrative proceeding the validity or legality of any such Legal Requirement.”” *Id.* at ¶ 11. Because the court determined that the defined term “Legal Requirements” included the Easement as a form of “covenants, restrictions, and conditions now or hereafter of record which may be applicable to [HTC] or to all or any portion of the [Property],” the court concluded that HTC had to either comply with the Easement or cure it at its own expense. *Id.* at ¶¶ 12-13.

Based on its conclusion that the Lease language specifically answered the question of which party—the landlord or the tenant—had the obligation to cure the Easement, the Utah Court of Appeals stated it was declining to address the question of standing. *See id.* at ¶ 13 n.3. This statement, however, belied the fact that in holding the Lease language required HTC to challenge the Easement, the court effectively recognized the legal

validity of a landlord contractually conferring legal standing to assert its property rights on its tenant.

**4. Petition for Writ of Certiorari**

In early 2009, HTC filed a petition for writ of certiorari of the Utah Court of Appeals' November 20, 2008 decision. On April 23, 2009, this Court granted HTC's petition on the issues of whether the Utah Court of Appeals erroneously concluded that the Lease assigned responsibility to the tenant to redress subsequently discovered encumbrances on the Property, such as the Easement, and whether a lease can confer legal standing on a tenant to challenge the property rights of the landlord. A copy of this Court's Order Granting HTC's Petition for Writ of Certiorari is attached hereto as Addendum C.

**STATEMENT OF FACTS**

1. Brown is the fee owner of the Property. The Property constitutes approximately .44 acres, along with all rights and interest, located on Lot 27 in Holladay, Utah. (R. at 9, 37.) A copy of the Lease is attached hereto as Addendum D.

2. On March 1, 2005, Brown and HTC entered into the Lease for the Property. (R. at 9.)

3. The Lease explicitly expresses the parties' understanding that HTC "may use the [Property] for a shopping center, retail store(s), office(s). . . [and] [HTC] may construct all the Improvements on the Land. . . ." (R. at 20.)

4. The Lease states that Brown agrees to

lease[] to [HTC] the [Property] . . . , together with all rights, privileges, easements, and appurtenances belonging to or in any way appertaining thereto, including but not limited to, any and all surface easements, rights, titles, and privileges of [Brown] now or hereafter existing in and to adjacent streets, sidewalks, and alleys for the [term of the Lease], at the rental, and upon all of the covenants and conditions set forth herein.

(R. at 13.)

5. Under the Lease, Brown agrees that it is delivering possession of the Property and all "rights, privileges, easements, and appurtenances" to HTC, subject only to the Permitted Exceptions expressly defined in the Lease. Permitted Exceptions are defined as "those matters described in Exhibit B attached hereto affecting Landlord's title to the Land all of which have been approved by Tenant." (R. at 11, 13, 38.)

6. The only Permitted Exceptions listed in the Lease are "Property taxes and Assessments accruing for the year 2005 and thereafter." (R. at 11, 38.)

7. Thus, the Permitted Exceptions expressly relate to the quality of title held by Brown, as landlord, and make no mention of any easement or other encumbrance on the Property. (R. at 38.)

8. At the time the parties entered into the Lease, neither party knew of the Easement. (R. at 827.)

9. The Lease explicitly defines “Tenant’s Estate” as “all of Tenant’s right, title and interest in its leasehold estate in the Premises, its fee estate in the Improvements, and its interest under this Lease.” (R. at 12.) In contrast, “Landlord’s Estate” is defined as “all of Landlord’s right, title, and interest in its fee estate in the Premises, its reversionary interest in the Improvements pursuant hereto, and all other Rent and benefits due Landlord hereunder.” (R. at 10-11.)

10. HTC bargained for its rights under the Lease on the representation that property taxes and assessments for 2005 and thereafter were the only Permitted Exceptions to Brown delivering full possession of the Property to HTC. (R. at 9.)

11. Brown’s representation in the Lease that there were no other encumbrances on the Property was a material and integral factor in HTC’s decision to enter into the Lease. (R. at 159, ¶ 14.)

12. To use the Property as HTC intended in entering into the Lease as a commercial shopping center, the Property must be free from encumbrances that prohibit the development or construction of improvements. (R. at 159, ¶ 13.)

13. In early 2006, HTC’s review of a survey map of the Property revealed a possible easement in favor of an adjoining parcel to the Property, lot 26. (R. at 159, ¶ 15.)

14. In a letter dated April 7, 2006, HTC, through counsel, informed Brown of the Easement. (R. at 160, ¶ 17, and 197.)

15. In response, Brown refused to take any action to address the Easement, arguing instead that the Easement was per se invalid. (R. at 160, ¶ 18.)

16. Around the same time that HTC was corresponding with Brown regarding the Easement, HTC hired Joseph Capilli of the Talon Group (a division of First American Title Insurance Company) to research the title of the Property. (R. at 99, ¶¶ 7, 8; 160, ¶ 19.)

17. Capilli's research revealed that prior to August 1980, lot 26 and lot 27 were owned by the same owner, and, in August 1980, lot 26 was transferred with an Easement on the Property (lot 27) for parking and ingress and egress. Capilli's research further revealed that the Easement remained on the transferring documents of lot 26's current owners. (R. at 99-101; 103, ¶¶ 10 -15, 27.)

18. Upon determining the existence of the Easement, Mr. Capilli met with HTC and Brown and explained that the title insurance company would be unable to issue a title insurance policy for the Property without excluding the Easement from coverage under such policy. (R. at 103, ¶ 28.)

19. Capilli subsequently prepared a Preliminary Title Report for the Property. This report lists the Easement as an exception to the proposed policy. (R. at 104, ¶ 29.)



20. First American instructed HTC that regardless of whether it is an owner's policy or a lender's policy of title insurance, the title company would only issue a title policy for the Property if the Easement is listed as an exception to the policy. (R. at 104, ¶ 30.)

21. Following this news, HTC again asked Brown to address the Easement. (R. at 160, ¶¶ 21, 23.)

22. Despite learning of the existence of the Easement from First American, Brown continued to reject HTC's request on grounds that the Easement is per se invalid. (R. at 160, ¶¶ 18, 21, 23.)

23. Pursuant to default notice provisions under the Lease, on April 7, 2007, HTC sent Brown a letter informing Brown that it was in default of the Lease for failing to address the Easement. (R. at 29; 209, ¶ 20.)

24. Because of the existence of the Easement, HTC cannot develop, construct, or obtain financing for the Improvements (defined in the Lease as "any structures hereafter constructed on and affixed to the [Property]" as it bargained for under the Lease. (R. at 10 (providing definition of "Improvements") ;161, ¶ 24.)

25. The Lease requires HTC to comply with "all Legal Requirements in the use, occupation, control and enjoyment of the [Property] and in the prosecution and conduct of its business thereon." (R. at 20; *see also* Lease at 12.)

26. The Lease defines Legal Requirements as

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

(R. at 11; *see also* Lease at 3.)

27. The Lease states that HTC has “the right at its own cost and expense, to contest or review by appropriate legal or administrative proceeding the validity or legality of any such Legal Requirement.” (R. at 20; *see also* Lease at 12.)

28. Paragraph 16 of the Lease provides to HTC an option to purchase the Property. Upon exercising such an option, HTC would acquire Landlord’s Estate “subject to only the matters described in Section 1.1 [the property taxes and assessments accruing for the year 2005 and thereafter, as listed on Exhibit B of the Lease and defined as “Permitted Exceptions”] and other matters reasonably approved by Tenant.” (R. at 31.)

29. Article 5 of the Lease contains detailed provisions expressly contemplating and allowing HTC the ability to mortgage the Property as part of obtaining funding for development of the shopping center. (R. at 15.)

### **SUMMARY OF ARGUMENT**

In interpreting the Lease to obligate HTC to cure the Easement affecting Brown's quality of title, the Utah Court of Appeals misapplied and disregarded established principles of contract interpretation. Specifically, the appellate court ignored the plain meaning of contractual terms, failed to harmonize and give effect to all terms, and adopted an interpretation that creates an absurd result when interpreted against established principles of real property jurisprudence.

Furthermore, the Utah Court of Appeals' interpretation of the Lease as providing HTC with the burden of challenging quality of title issues on behalf of Brown effectively recognizes and endorses contractual provisions that confer legal standing. Such a recognition contravenes established law and sound public policy.

On these grounds, HTC respectfully requests that this Court reverse the decision of the Utah Court of Appeals and remand with instructions for the trial court to enter a judgment determining the Easement to be an encumbrance on Brown's fee-simple ownership that Brown must address as part of providing the promised fee simple leasehold interest.

## ARGUMENT

### **I. THE COURT OF APPEALS ERRED IN INTERPRETING THE LEASE AS ASSIGNING RESPONSIBILITY TO HTC, AS TENANT, TO CURE THE PREVIOUSLY UNDISCLOSED CLOUD ON BROWN'S TITLE.**

In interpreting the Lease as requiring HTC to cure the previously undisclosed Easement, the Utah Court of Appeals erroneously disregarded several central principles of contract construction. Fundamentally, the court failed to interpret the Lease in accordance with its plain meaning. Additionally, the court failed to harmonize all terms and to construe like terms in the Lease similarly. The court's interpretation of the Lease also erroneously failed to give effect to all contract terms. Finally, the Utah Court of Appeal's interpretation leads to an absurd result as to Brown's quality of title in a leasehold transaction.

#### **A. The Court of Appeals' Decision Is Contrary to the Plain Meaning of the Lease**

Utah contract law requires that "[an] unambiguous contract term be given its plain meaning." *Level 3 Communications, LLC v. Pub. Serv. Comm'n*, 2007 UT App 127, ¶ 9, 163 P.3d 652; *see also Fairbourn Commercial, Inc. v. Am. Hous. Partners, Inc.*, 2004 UT 54, ¶ 10, 94 P.3d 292. Here, the court of appeals disregarded this principle by failing to recognize the well-established distinction between the meaning of the terms "easements" and "covenants, conditions, and restrictions."

Paragraph 6.3 of the Lease ascribes certain “Legal Requirements” that HTC must comply with or “at its own cost and expense, . . . contest or review by appropriate legal or administrative proceeding.” The Lease defines “Legal Requirements” as

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

(Emphasis added.) Based on this definition, the court of appeals erroneously concluded that “[t]he Easement, to the extent it may have any validity, is clearly a ‘covenant, restriction, or condition of record,’” and therefore, in light of Paragraph 6.3, HTC was obligated to either accept the Easement or to challenge it at its own expense and at no cost to Brown. *Holladay Towne Ctr., LLC v. Brown Family Holdings, L.C.*, 2008 UT App 420, ¶ 12, 198 P.3d 990.

This interpretation, however, ignores the ordinary and established difference between the encumbrance-based term easement and the contract-based nature of covenants, conditions, and restrictions. Specifically,

covenants are created by promises concerning the land, which may be enforceable by or binding upon successors to the estate for either party, while an easement is an interest in the land, created by grant or prescription. . . . [A]n easement is essentially an inherently legal interest in land, as distinct from a restrictive covenant, which has been described as but a creature of equity arising out of contract.

Jeffrey J. Shampo, 20 Am. Jur. 2d *Covenants* § 3. In harmony with such authority, “this [C]ourt has characterized easements as ‘interests in land.’” *Salt Lake City S. R.R. Co. v. Utah State Tax Comm’n*, 1999 UT 90, ¶ 10, 987 P.2d 594; *Wells v. Marcus*, 480 P.2d 129, 130 (Utah 1971) (“The right sought by the defendants to maintain a pipeline across the plaintiff’s land would be an easement, and thus an interest in land.”); *Warburton v. Virginia Beach Savings & Loan Ass’n*, 899 P.2d 779, 781 (Utah App. 1995) (“[A]n easement is an interest in land within the meaning of the statute of frauds and must, therefore, be evidenced by a writing.”). In contrast to easements, and similar to covenants, conditions and restrictions are contract based. *See, e.g., Black’s Law Dictionary* 335, 1429 (9th ed. 2009) (defining “restriction” as “[a] limitation (esp. in a deed) placed on the use or enjoyment of the property”).

Instead of following this well-established authority, the court essentially confuses use-restrictions—that do not affect quality of title—with encumbrances, like the

Easement, that undermine fee simple title. Accordingly, in incorrectly classifying the Easement as a covenant, condition, and restriction, the court of appeals erroneously determined that the Easement constituted a Legal Requirement that HTC was obligated to challenge at its own expense.

The Utah Court of Appeals also misinterpreted the plain meaning and nature of the term “triple-net lease” and, consequently, misconstrued the import of the Lease being a triple-net lease in deciding that HTC was obligated to cure the Easement. In its decision, the Utah Court of Appeals stressed that because the Lease is a triple-net lease, the parties did not intend for Brown to incur any costs related to HTC leasing the Property, including any costs associated with Brown’s quality of title, such as the Easement. *See Holladay*, 2008 UT App 420 at ¶ 11 (“[T]he Lease was drafted as a triple-net lease to ensure that . . . Brown[] incurred no monetary obligations as a result of HTC leasing the Premises.”). This conception of a triple-net lease fails to recognize that the expenses triple net leases intend to cover are only use-based expenses; triple-net leases are not, by their very nature, intended to include costs arising from challenges to the landlord’s underlying fee-simple title to the leased property.

By definition, a triple-net lease is a common legal form that allows the landlord to collect net rent, free from costs of maintenance, property taxes, insurance, and other similar property-related expenses associated with use of the property. *See, e.g., Cent. States, S.E. & S.W. Areas Pension Fund v. White*, 258 F.3d 636, 642 (7th Cir. 2001)

(defining a triple-net lease as “one in which the tenant incurs many of the obligations of rental such as maintenance, operating expenses, real estate taxes and insurance”); *Amalgamated Bank of Chicago v. Kalmus & Associates, Inc.*, 741 N.E.2d 1078, 1080 (Ill. Ct. App. 2000) (“[A] triple net lease requires the tenant to pay insurance, taxes and utilities in addition to rent.”); *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 798 P.2d 799, 803 (Wash. 1990) (“The lease at issue is a triple net lease, which means the tenant bears the operating expenses.”); *California Nat. Bank v. Woodbridge Plaza LLC*, 78 Cal.Rptr.3d 561, 563 (Cal. Ct. App. 2008) (“The lease called for triple net rent (meaning the tenant pays for property taxes and expenses.”)). That is, contrary to the court of appeals’ interpretation, triple-net leases are limited to only costs and expenses associated with ongoing use of the property by the recognized fee owner or its designated tenant, as opposed to fees and expenses associated with a third party challenging the fundamental ownership rights of the property owner.

Thus, the court of appeals’ interpretation of a triple-net lease confuses the type of monetary obligations allocated to a tenant under a triple-net lease. If a third party challenged Brown, or any landlords’ fee-simple ownership (the ownership status that provides an accompanying right to lease the use of the property to others), Brown invariably would incur monetary obligations defending its claim of ownership. But such a dispute would not be HTC’s, nor any tenant’s, issue to resolve. The Easement herein is no different conceptually: it represents a third party’s claim to the ownership rights of



Brown in contravention of the status of those rights as Brown had represented them to HTC.

**B. In Interpreting the Lease, the Court of Appeals Failed to Harmonize All Terms and Neglected to Construe Like Terms Similarly**

In its interpretation of the Lease, in particular Paragraph 6.3 and the definition of “Legal Requirements,” the Utah Court of Appeals disregarded the principle that the court must “attempt to harmonize all of the contract’s provisions and all of its terms.” *Alpha Partners, Inc. v. Transamerica Inv. Mgmt., LLC*, 2006 UT App 331, ¶ 19, 153 P.3d 714. Furthermore, the court of appeals neglected that “where general terms follow specific ones, the rules of construction, including *noscitur a sociis*, ‘it is known from its associates,’ and *ejusdem generis*, ‘of the same kind,’ require that the general terms be given a meaning that is restricted to a sense analogous to the preceding specific terms.” *Nephi City v. Hansen*, 779 P.2d 673, 675 (Utah 1989) (applying rules of construction in statutory context) (citation omitted); *see also Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶ 33, 199 P.3d 957 (stating that “a general term included within a list of more specific terms should be given a meaning that is analogous to the other terms within the list”).

Paragraph 6.3 of the Lease states as follows:

Subject to the provisions of Article 8 below, Tenant shall comply with all Legal Requirements in the use, occupation, control and enjoyment of the Premises and in the prosecution and conduct of its business thereon. Tenant shall have the

right, at its own cost and expense, to contest or review by appropriate legal or administrative proceeding the validity or legality of any such Legal Requirement, and during such contest Tenant may refrain from complying therewith provided that compliance therewith may legally be held in abeyance without subjecting Landlord to any liability, civil or criminal, of whatsoever nature for failure so to comply therewith and without the incurrence of a lien, charge or liability against the Premises or Landlord's Estate; and provided further that all such proceedings shall be prosecuted by Tenant with due diligence.

(Emphasis added.)

Similarly, the full text of the defined term “Legal Requirements” (as referenced in paragraph 6.3) states as follows:

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

(Emphasis added.)

When read together and in their entirety, Paragraph 6.3 and the definition of Legal Requirements do not, contrary to the court of appeals' opinion, include easements claimed by third parties that affect the quality and status of title to the leased property. Instead, the emphasized terms of "use, occupation, control and enjoyment of the Premises" in Paragraph 6.3 underscore the nature of Legal Requirements. None of these terms relate to ownership and quality of title, but rather they relate to the day-to-day use of the Property. Likewise, those emphasized terms in the definition of Legal Requirements reveal the concept of day-to-day use and enjoyment of the Property – not ownership and the quality of title. Also, the definition of Legal Requirements includes a laundry list of actions by governmental or quasi-governmental authorities related to the Property (i.e. zoning laws and similar enactments) as well as CC&Rs (similar private restrictions made by contract). These specified actions do not relate to the overall quality of title held by the property owner, but rather are use restrictions on the occupant of the Property, whether that occupant is the owner or the lessee. The Lease addressed title in Paragraph 1.1 (not in Paragraph 6.3) and the permitted exceptions referenced therein.

**C. The Utah Court of Appeals' Interpretation of the Lease Rendered Terms Meaningless**

A central tenet of Utah contract construction law is that courts must "consider[s] each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none." *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009

UT 7, ¶ 15, ---P.3d---. The court of appeals’ interpretation of the Lease discounted this key principle. For instance, based on the court of appeals’ interpretation, how does HTC “refrain from complying” with the Easement, or any encumbrance, as Paragraph 6.3 states it is entitled to do? Further, how can HTC challenge the Easement, or any easement, without it becoming a “lien, charge or liability against the Premises or Landlord’s Estate”? Such language from paragraph 6.3 makes no sense – and indeed must be ignored in an attempt to create any sense – under the court of appeals’ interpretation because an easement, by its nature, is a lien, charge or liability against Brown’s estate, and is nothing from which HTC, as tenant, has an option to refrain from complying with. Notably, however, this same Lease language is not effectively ignored and makes perfect sense if construed correctly to apply to government regulations such as zoning laws or private contract-based restrictions on use, such as CC&Rs.

In addition, the proper interpretation of Legal Requirements (as excluding the Easement) also gives meaning to Paragraphs 1.1 and 16 of the Lease. Tellingly, the Court of Appeals ignores Paragraph 1.1 altogether in its analysis. Seemingly, this is because there is no credible way to give meaning to Brown’s representations of “fee simple” ownership and the express recitation of the “Permitted Exceptions” that HTC agreed upon in paragraph 1.1 of the Lease (only the taxes and assessment expressly listed on Exhibit B of the Lease).

Similarly, there is no explanation in the court of appeals' analysis for why the purchase option provisions of Paragraph 16.5 make clear that the Landlord's Estate can be "subject to only the matters described in Section 1.1 [the taxes and assessments listed on Exhibit B] and other matters reasonably approved by Tenant." Further, there is no explanation by the court of appeals as to the inability of HTC to obtain title insurance on the Property upon purchasing it because of the Easement, despite the express requirement in paragraph 16.5(f) of the Lease that the Landlord would provide "at its sole expense a standard form of Owner's Title Insurance Policy issued by First American Title Insurance Company."<sup>3</sup>

In reality, a correct interpretation of the Lease makes clear that HTC bargained for Brown's conveyance of all fee-simple interest in the Property except for those permitted exceptions detailed in the Lease, i.e., potential encumbrances in the form of the taxes and assessments from 2005 forward, as expressly listed in Exhibit B of the Lease.

Accordingly, the Lease was supposed to give HTC the right to use of all ownership interest claimed by Brown that existed at the time the parties entered into the Lease. In entering into the Lease, HTC did not bargain for the Easement as consideration for lease payments.

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<sup>3</sup> As stated in the record, Joseph Capilli of The Talon Group, a division of First American Title Insurance Company, indicated that such a title insurance policy could not be provided unless the easement was removed from coverage. (R. at 104, ¶ 30.)

**D. The Utah Court of Appeals' Interpretation of the Lease Creates Absurd Results as to Brown's Quality of Title**

It is well settled that Utah courts will “not endorse . . . an absurd interpretation” of a contract. *See Okelberry v. W. Daniels Land Ass’n*, 2005 UT App 327, ¶ 24, 120 P.3d 34. However, that is precisely what the Utah Court of Appeals did by failing to fathom the core distinction between matters affecting quality of title (i.e. encumbrances that go to the heart of whether the landlord has provided the full bundle of property rights to the tenant in exchange for the rent paid and bargained for) and those affecting use of the premises (i.e., the manner in which the tenant occupies the premises after having received the full bundle of property rights from the landlord). Instead of recognizing this distinction, the Utah Court of Appeals has effectively rendered tenants everywhere the unwitting title insurers of their landlords. Such a result is absurd, particularly when a lease, like the Lease herein, expressly lists the encumbrances that affect title that have been agreed upon. *Cf. Lankford v. Tennefoss*, No. 97-12-053, 1998 WL 1557441, at \*2 (Del. Com. Pl. Oct. 20, 1998) (“It is not the duty of a lessee to clear title for the lessor.”); *see also Barfield v. Damon*, 245 P.2d 1032, 1034 (N.M. 1952) (“The law supposed that when a man makes a lease, he has a good title to the land.”).<sup>4</sup>

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<sup>4</sup> Owners of real property sometimes have easements or other encumbrances that burden some aspect of the use of their property and nevertheless still enter into a lease agreement. This is proper if the lease rights provided in the lease expressly carve out such encumbrances. This did not occur in the Lease with respect to the Easement. Absent such limiting representations, the presumption of every tenant is that they are

Furthermore, after reading the Utah Court of Appeals decision, crafty landlords undoubtedly will insert into their leases similar definitions of “Legal Requirements,” as used in the Lease and endorsed by the court of appeals, particularly given that, based on the court of appeals’ decision, such language will be deemed to trump even express representations made by the landlord as to the quality/status of title. The Court of Appeals opinion will therefore be fodder for landlord-oriented attorneys to argue that their clients need not have actual fee-simple title ownership in property that they lease. Such a result will literally dismantle real property leasehold law in Utah, unless corrected by this Court. *See Grand County v. Rogers*, 44 P.3d 734, 738 (Utah 2002) (“When the court of appeals renders a decision on an issue, that decision is automatically part of the law of this state, unless and until contravened by this court, the legislature, or the people through the processes authorized for the making of new law.”).

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leasing from the landlord the full bundle of fee-simple absolute property rights, as the cases cited above make clear. Here, not only did Brown fail to enumerate any exceptions to fee-simple ownership as part of the Lease, it expressly promised to lease the Property “together will all rights, privileged, easements, and appurtenances belonging to or in way appertaining thereto, including but not limited to, any and all surface easements, rights, titles, and privileges of [Brown] now or hereafter existing in and to adjacent streets, sidewalks and alleys for the Term, at the rental, and upon all covenants and conditions set forth herein.” (Emphasis added.)

## II. THE COURT OF APPEALS ERRED IN DECIDING THAT A LANDLORD MAY CONFER STANDING TO ASSERT ITS PROPERTY RIGHTS TO A TENANT VIA A PROVISION IN THE LEASE AGREEMENT.

In interpreting the Lease to require HTC to challenge the Easement, the Utah Court of Appeals effectively recognized the legal validity of contractual agreements to confer standing. This recognition contradicts established law holding that legal standing cannot be contractually conferred. Furthermore, this Court treats standing as a jurisdictional prerequisite and has made clear that parties cannot contractually agree to imbue a court with jurisdiction. This Court should hesitate to affirm a decision that runs contrary to law and sound public policy. *See Frailey v. McGarry*, 116 Utah 504, 211 P.2d 840, 847 (Utah 1949) (“If by any reasonable construction the contract can be declared lawful and not in contravention of public welfare, it is [the Court’s] duty to so interpret it.”).

Courts recognize that parties cannot confer standing by contractual agreement. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 95 (1998); *Rosen v. Tennessee Com’r of Finance & Admin.*, 288 F.3d 918, 931 (6th Cir. 2002); *see also Lacombe v. City of Cheyenne*, 733 P.2d 601, 603 (Wyo. 1987) (“We do not permit parties to confer standing by agreement.”).<sup>5</sup> This principle is in accord with Utah decisions holding that

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<sup>5</sup> This issue has been raised regularly in other legal contexts, such as patent cases. In the patent context, the U.S. Supreme Court has noted that unless a contract grants ownership rights in the patent (i.e., exclusivity), a contractual right to sue does not confer standing. *See Crown Die & Tool Co. v. Nye Tool & Machine Works*, 261 U.S. 24, 38-39 (1923).



“a party may generally assert only his or her own rights and cannot raise the claims of third parties who are not before the court.” *Provo City Corp. v. Thompson*, 2004 UT 14, ¶ 14, 86 P.3d 735.

Moreover, this Court has made clear that legal “standing is a jurisdictional requirement.” *Jones v. Barlow*, 2007 UT 20, ¶ 12, 154 P.3d 808; *see also Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, 148 P.3d 960 (“[S]tanding triggers the court’s . . . subject matter jurisdiction.”). As this Court has further expounded, “it is well settled that . . . parties . . . cannot, by agreement, confer jurisdiction upon the court.” *Phoenix Indemn. Ins. v. Smith*, 2002 UT 49, 48 P.3d 976; *see also A.J. Mackay Co. v. Okland Const. Co., Inc.*, 817 P.2d 323, 325 (Utah 1991) (“[A]cquiescence of the parties is insufficient to confer jurisdiction on the court. . . .”); *Hardy v. Meadows*, 264 P. 968, 974, 71 Utah 255 (Utah 1928) (“Jurisdiction over the subject-matter cannot be conferred by the consent of the parties.”). Other courts concur. *See, e.g., Wilson v. Glenwood Intermountain Props., Inc.*, 98 F.3d 590, 593 (10th Cir. 1996) (“Standing is a jurisdictional issue” and “parties cannot confer subject matter jurisdiction on the courts

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“Courts have continued to affirm the *Crown Die* decision in varying factual contexts, each reaching the conclusion that parties cannot create standing by agreement, and the mere contractual right to sue, without some beneficial proprietary interest in the patent, cannot confer standing under the patent laws.” *Nat’l Licensing Ass’n, LLC v. Inland Joseph Fruit Co.*, 361 F. Supp. 2d 1244, 1251 (E.D. Wash. 2004). Similarly, because the Lease grants a possessory interest, not an ownership interest, in the Property, it cannot create standing by simply providing HTC with the right to sue on Brown’s behalf.

by agreement.”); *In re Nasdaq Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102-03 (S.D.N.Y. 1997) (“Standing is a jurisdictional matter which must be resolved by the court; parties cannot either waive or confer standing by agreement.”).

Although parties are free to contract for many things, a court’s jurisdiction, and as a corollary, legal standing, should not be open to bartering. Utah law does “not give[] . . . [parties the] right to waive or contract away what concerns the state itself,” *Hardy*, 264 P. at 974. As this Court has noted, “what disorder would be created were parties permitted by agreement to confer jurisdiction” on a court. *Id.* If “Utah standing law ‘operates as gatekeeper to the courthouse,’ as this Court has emphasized, this Court should hesitate to affirm a decision that allows parties to contractually sidestep the gatekeeper altogether. *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶ 17, 148 P.3d 960.”<sup>6</sup>

Given that tenants do not have standing to address ownership interests (tenants accept whatever property “bundle of sticks” the landlord has to give), the public policy

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<sup>6</sup> The trial court’s decision seemingly engaged in analysis of the relative strength of the Easement. Whether it is a “strong” or “weak” easement is not the issue that is central to this case. In recognition of principles of standing articulated herein, HTC simply has sought to have Brown redress the Easement that has created a cloud on title and affected HTC’s ability to finance and develop a shopping center. It could be that the Easement is easily addressed by obtaining recordable documents from the beneficiary verifying its abandonment or by a relatively quick legal proceeding. HTC hopes this to be the case. The point, however, is that only the landlord who possesses ownership rights that have been promised to be leased by the tenant is in a position to remedy any adverse claims of this sort.

concerns surrounding recognition of lease terms that foist ownership challenges on tenants would be significant. Such provisions would force a tenant to assume all risk of any undiscovered encumbrances on the leased property without the legal ability to redress the same. Stated differently, recognition of such lease terms in the face of extant standing law thus would burden tenants with all costs and consequences of any previously undiscovered encumbrance on the leased property.

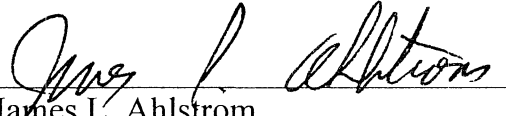
In short, this Court should reverse the Utah Court of Appeals' decision that HTC is obligated under the Lease to cure the Easement because that decision effectively recognizes, in contravention of law and sound public policy, that a landlord can contractually confer legal standing on a tenant to litigate the landlord's property rights.

### **CONCLUSION**

For the reasons set forth above, HTC respectfully requests that this Court reverse the decision of the Utah Court of Appeals and remand this matter with instructions for the trial court to enter a judgment determining the easement to be an encumbrance on Brown's fee simple ownership that Brown is required to remedy in order to comply with representations made in the Lease as to the quality of title held.

DATED this 10<sup>th</sup> day of July 2009.

PARR BROWN GEE & LOVELESS, P.C.

By:   
James L. Ahlstrom  
Robyn S. Wicks  
Attorneys for Petitioner  
Holladay Towne Center, L.L.C.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 16<sup>th</sup> day of July 2009, a true and correct copy of the foregoing **APPELLANT BRIEF** was mailed via first-class U.S. mail, postage prepaid, upon the following:

Blake S. Atkin, Esq.  
William O. Kimball, Esq.  
ATKIN LAW OFFICES, P.C.  
837 South 500 West, Suite 200  
Bountiful, Utah 84010  
Attorneys for defendant/respondent

  
\_\_\_\_\_

# ADDENDUM

Addendum A – Trial Court Order

Addendum B – Court of Appeals’ Decision

Addendum C - Order Granting Petition for Certiorari

Addendum D – Ground Lease

Tab A

Blake S. Atkin #4466  
William O. Kimball #9460  
Brennan H. Moss #10267  
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Salt Lake City, Utah 84101  
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**FILED DISTRICT COURT**  
Third Judicial District

MAY 01 2007

SALT LAKE COUNTY

By                       
Deputy Clerk

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE CITY, STATE OF UTAH

HOLLADAY TOWNE CENTER, L.L.C.,  Plaintiff,  vs.  BROWN FAMILY HOLDINGS, L.C., a Utah limited liability company,  Defendant.	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER</b>  Case No.: 060913167  Judge John Paul Kennedy
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This matter came on regularly for hearing on the parties' cross motions for summary judgment on March 12, 2007. Plaintiff was represented by Blake Miller, defendant was represented by Blake S. Atkin. Having read the written submissions of the parties, having heard the arguments of counsel and being fully advised in the premises, the Court enters the following Findings of Fact Conclusions of Law and Order.

**FINDINGS OF FACT**

1. The real property that is the subject of this dispute is in Salt Lake County, State of Utah.



2. Defendant is the fee owner of a parcel of real estate known as lot 27, Peony gardens.
3. In March of 2005, Plaintiff and Defendant entered into a Ground Lease with regard to lot 27. The Ground Lease provides that it is a triple net lease and that rent would be paid without offset and without cost to the landlord. The Ground Lease further authorizes the Tenant to contest, at its own expense, any legal requirements, defined as including any covenants restrictions or conditions of record. The Ground Lease also provides for attorney fees to the prevailing party in actions relating to the Ground Lease.
4. In about 1980, the owner of Lot 27, who also owned lot 26, Peony Gardens, recorded a notice of contract on lot 26 that described an easement across lot 27. That notice of contract was never recorded against lot 27.
5. Thereafter, lot 27 was conveyed to defendant's predecessor in title without any mention of the easement.
6. Through mesne conveyances, none of which mention the easement, the property came into the possession and ownership of defendant.
7. The easement was never recorded against lot 27.
8. There is no evidence of the easement on the ground. For at least the past 20 years, the path of the easement has been impassable because of the existence of a berm and for the past 10 years, permanent storage facilities have been built upon the path of the easement.
9. No one has ever made a claim to the easement or attempted to use the easement.

10. No one has ever tried to interfere with plaintiff's quiet enjoyment of its leasehold on account of the easement.

11. At the time they entered into the ground lease, neither party had any knowledge of the easement.

12. On August 9, 2006, Plaintiff filed a complaint against Defendant in Third District Court seeking declaratory relief, breach of contract, and specific performance, claiming that the easement is a violation of the lease.

13. In November, 2006, defendant filed a counterclaim for unlawful detainer pursuant to Utah Code Annotated, § 78-36-8 claiming that the suit and defendants prior pattern of not making rental payments until plaintiff had hired a lawyer to demand payment were in breach of the lease by violating the covenant of good faith and fair dealing and causing the Landlord to incur costs in connection with the collection of rents.

### CONCLUSIONS OF LAW

1. There is no easement on lot 27. There is no evidence of an easement on the ground and to the extent that an easement purporting to affect lot 27 is recorded against lot 26, that easement is void because it was not recorded against lot 27.

2. Because there is no easement affecting lot 27, there is no basis for the plaintiff's claims against the defendant and this action should not have been brought against the landlord, causing the landlord to incur costs.

3. If the easement anciently recorded against lot 26 creates legal requirements that interfere with plaintiff's use of its leasehold, plaintiff has the right under the lease and by virtue of its leasehold to contest those legal requirements by quiet title action or otherwise, but such action should be conducted in such a manner as to result in no cost to the Landlord.

4. The plaintiff's pattern of late rental payments, while not appropriate conduct, is not a material breach of the lease at this time where the conduct stopped at the demand of the Landlord and has been followed by consistent on time rental payments. The costs to the Landlord caused by that behavior can be remedied at this time by the payment of the Landlord's attorney fees and costs. The filing of this action, while not appropriate conduct under the lease, is not a material breach of the lease because the cost caused to the Landlord can be remedied at this time by the payment of the Landlord's attorney fees and costs.

#### ORDER

1. Plaintiff's complaint against defendant will be dismissed, no cause of action.

2. Defendant's counterclaim for unlawful detainer will be dismissed without prejudice, should the conduct of the Tenant be repeated in the future.

3. Leave is granted to the plaintiff to amend the complaint in this matter, so long as the *amended complaint, if any, is filed on or before May 21, 2007, and so long as the* allegations of the amended complaint require nothing on the part of the Landlord except to file a notice of no contest to any action to quiet title against the easement. *jk*

4. Plaintiff shall pay all of defendant's costs and attorney fees relating to this action and

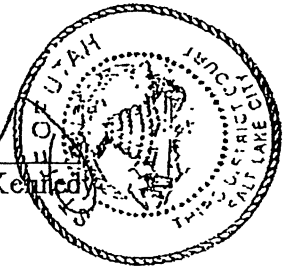
with the limitations described by the Court during  
the May 1, 2007, hearing *JPK*

to defendant's collection of rent. Such costs and attorney fees shall be established by affidavit.

DATED this 1 day of <sup>may</sup> March, 2007.

BY THE COURT:

*JPK*  
The Honorable John Paul Kennedy  
Third District Court Judge



Tab B

This opinion is subject to revision before  
publication in the Pacific Reporter.

FILED  
UTAH APPELLATE COURTS

NOV 20 2008

IN THE UTAH COURT OF APPEALS

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Holladay Towne Center, LLC, a	)	OPINION
Utah limited liability	)	(For Official Publication)
company,	)	
	)	Case No. 20070496-CA
Plaintiff, Appellant, and	)	
Cross-appellee,	)	
	)	F I L E D
v.	)	(November 20, 2008)
	)	
Brown Family Holdings, LC, a	)	2008 UT App 420
Utah limited liability	)	
company,	)	
	)	
Defendant, Appellee, and	)	
Cross-appellant.	)	

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Third District, Salt Lake Department, 060913167  
The Honorable John Paul Kennedy

Attorneys: Blake D. Miller, James W. Anderson, and Joel T.  
Zenger, Salt Lake City, for Appellant and Cross-  
appellee  
Blake S. Atkin and William O. Kimball, Bountiful, for  
Appellee and Cross-appellant

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Before Judges Thorne, Bench, and McHugh.

THORNE, Associate Presiding Judge:

¶1 Holladay Towne Center, LLC (HTC) appeals from the district court's judgment dismissing HTC's declaratory judgment, breach of contract, and specific performance claims against Brown Family Holdings, LC (the Browns). The Browns cross-appeal, challenging as error the district court's conclusion that certain actions taken by HTC did not constitute a material breach of contract, as was counterclaimed by the Browns. We affirm the district court's judgment as to both HTC's claims and the Browns' counterclaims, but reverse the award of attorney fees in favor of the Browns and remand that issue for further consideration in the district court.

## BACKGROUND

¶2 In March 2005, HTC and the Browns entered into a ground lease (the Lease) for a .44 acre parcel of property (the Premises). HTC intended to develop a large shopping center in the area, and the Lease specifically provided HTC with the ability to demolish existing buildings on the Premises and to construct new improvements. The Lease was structured as a triple-net lease to ensure that the Browns would have no expenses related to the Premises over the term of the Lease.<sup>1</sup>

¶3 In November 2005, HTC discovered an apparent easement (the Easement) across the Premises in favor of an adjoining landowner. The Easement was not identified in the Lease as a permitted exception to the Browns' delivery of possession of the Premises to HTC. HTC notified the Browns of the Easement and demanded that the Browns take steps to remove it, claiming that the Easement's existence was preventing HTC from obtaining financing for its development project. The Browns declined to take any action and informed HTC that they did not believe the Easement was valid.

¶4 In August 2006, HTC sued the Browns, asserting claims for declaratory judgment, breach of contract, and specific performance. The gravamen of HTC's suit was that the Lease required the Browns to provide HTC with possession of the Premises unencumbered by any easements not excepted and that the Browns' failure to take action to remove the Easement upon its discovery constituted a breach of their obligations under the Lease.<sup>2</sup> The Browns brought counterclaims for breach of contract and unlawful detainer, asserting that HTC had acted in bad faith by initiating this litigation and by repeatedly paying the rent late in an attempt to put pressure on the Browns to address the Easement. The Browns characterized HTC's actions as a default of the Lease.

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1. A triple-net lease, or net-net-net lease, is a "lease in which the lessee pays all the expenses, including mortgage interest and amortization, leaving the lessor with an amount free of all claims." Black's Law Dictionary 908 (8th ed. 2004). The Lease further clarified that HTC would "pay all impositions and costs relating to the [Premises] so that the [Browns will have] no cost or expense relating to the [Premises] during the term or any extension of the lease."

2. There is no suggestion that either party was aware of the Easement at the time the Lease was executed.

¶5 Both parties sought summary judgment. After a hearing on the parties' dueling motions, the district court dismissed both HTC's lawsuit and the Browns' counterclaim for unlawful detainer. In its May 1, 2007 Findings of Fact, Conclusions of Law, and Order, the district court determined that the Easement was invalid as between the parties; that because the Easement was invalid, there was no basis for HTC's claims; that HTC had the right to challenge the Easement against the adjoining landowner if it so desired but could only do so at no cost to the Browns; and that HTC's late rent payments, while inappropriate, did not constitute a material breach of the Lease. The district court granted HTC leave to amend its complaint to challenge the Easement against the adjoining landowner so long as the amendment required nothing of the Browns beyond the filing of notice that they did not contest the action. The district court also ordered HTC to pay all of the Browns' attorney fees and costs related to the action as a remedy for what it concluded was HTC's "[in]appropriate conduct" under the Lease. HTC appeals, and the Browns cross-appeal, from the district court's order.

#### ISSUES AND STANDARDS OF REVIEW

¶6 HTC argues that the district court erred by concluding that HTC had standing to challenge the Easement against the adjoining landowner, by ruling on the validity of the Easement as between the existing parties, and by interpreting the Lease to place the obligation of challenging the Easement on HTC rather than the Browns. "A district court's summary judgment decision presents a question of law that this court reviews for correctness." Superior Receivable Servs. v. Pett, 2008 UT App 225, ¶ 2, 191 P.3d 31. To the extent that HTC's arguments challenge the district court's interpretation of the Lease, these arguments also present legal questions that we review for correctness. See Richins Drilling, Inc. v. Golf Servs. Group, Inc., 2008 UT App 262, ¶ 2, 189 P.3d 1280, cert. denied, No. 20080660 (Utah Oct. 15, 2008).

¶7 On cross-appeal, the Browns argue that the district court erred in its determination that HTC's actions, including intentionally withholding rent and initiating this unsuccessful litigation, did not constitute a material breach of the Lease. The Browns' cross-appeal of the district court's summary judgment ruling presents questions of law that we review for correctness. See Superior Receivable Servs., 2008 UT App 225, ¶ 2.

¶8 Finally, HTC challenges the district court's award of attorney fees and costs to the Browns, arguing that the Browns' affidavit in support of attorney fees was inadequate and that the district court erred in failing to reduce the fee award in



proportion to the parties' relative success in the litigation. We review the district court's calculation of an attorney fees award under an abuse of discretion standard. See Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988).

## ANALYSIS

### I. HTC's Appeal

¶9 We first address HTC's arguments regarding the district court's determination of the validity of the Easement and its rulings on HTC's ability and obligation to challenge the Easement as against the adjoining landowner. Early in its appellate brief, HTC characterizes its appeal as presenting a straightforward question about obligations incurred under the Lease: "Whose obligation is it to take care of an easement discovered after the commencement of a lease?" We agree with HTC that this is the central question presented by its appeal. However, we need not answer that question in abstract terms because here it is apparent that the language of the Lease resolves the question as to these parties.

¶10 The Lease is a contract, and in interpreting the Lease we "'first look[] to the contract's four corners to determine the parties' intentions, which are controlling.'" Baxter v. Saunders Outdoor Adver., Inc., 2007 UT App 340, ¶ 11, 171 P.3d 469 (alteration in original) (quoting Fairbourn Commercial, Inc. v. American Hous. Partners, Inc., 2004 UT 54, ¶ 10, 94 P.3d 292). In the absence of ambiguity, which no one argues here, we determine the parties' intentions as a matter of law under the plain contractual language. See id. In light of the language of the Lease, it is clear that the parties contracted so as to anticipate and resolve the very dispute presented in this appeal.

¶11 As previously noted, the Lease was drafted as a triple-net lease to ensure that the Browns incurred no monetary obligations as a result of HTC leasing the Premises. However, the Lease goes further and specifically addresses HTC's ability to challenge legal encumbrances affecting the Premises during the term of the Lease. Article 6.3 of the Lease requires HTC to comply with "Legal Requirements" as defined in the Lease and provides, in part, that HTC "shall have the right, at its own cost and expense, to contest or review by appropriate legal or administrative proceeding the validity or legality of any such Legal Requirement." The Lease defines Legal Requirements to include "all covenants, restrictions, and conditions now or hereafter of record which may be applicable to [HTC] or to all or any portion of the Premises," even if compliance with such

requirements "results in interference with the use or enjoyment of all or any portion of the Premises."

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

¶13 The district court's resolution of HTC's claims comports with the obligations incurred by the parties under the Lease. Because HTC contracted to either abide by restrictions such as the Easement or challenge them itself, the district court properly dismissed HTC's claims alleging that the Browns had breached the Lease by failing to address the Easement. At the same time, the district court allowed HTC to amend its complaint to name the adjoining landowner as a party defendant so long as HTC could do so at negligible cost to the Browns. This resolution enforces the Lease terms as drafted by the parties and comports with the parties' expressed intent that HTC bear all costs and expenses associated with the Lease. Accordingly, we affirm the district court's ruling dismissing HTC's claims.<sup>3</sup>

## II. The Browns' Cross-appeal

¶14 On cross-appeal, the Browns challenge the district court's conclusion that HTC did not materially breach the Lease. The Browns argue that HTC's undisputed actions in delaying rent payments and initiating this litigation constitute bad faith and establish HTC's default of the Lease as a matter of law. Again, we look to the language of the Lease and affirm the district court.

¶15 The Lease provides that rent was due from HTC to the Browns on the first day of each month. However, the Lease also expressly determines when the late payment of rent would constitute a default. Under the terms of the Lease, the late payment of rent constitutes a default when HTC "shall have failed

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

to pay the [r]ent within fifteen (15) days of when due and such failure shall not have been cured within ten (10) days after receipt of written notice from [the Browns] respecting such overdue [r]ent payment." The Lease also provides for default in the event that HTC fails to perform any term, covenant, or condition of the Lease and then fails to cure its lack of performance within thirty days of notice. Additionally, the Browns characterize HTC's initiation and maintenance of this action as a default under the Lease, arguing that HTC failed to dismiss the action within thirty days of written notice and demand that it do so.

¶16 Interpreting the parties' intentions under the plain language of the Lease, see Baxter v. Saunders Outdoor Adver., Inc., 2007 UT App 340, ¶ 11, 171 P.3d 469, we hold that HTC's actions pertaining to the payment of rent fell within the parties' expressed intention to allow a grace period for the late payment of rent. If it was intended that the repeated late payment of rent under the default provision would itself constitute a default, the parties could have so provided in the Lease. They did not. Accordingly, HTC was nominally within its rights under the Lease to withhold rent each month until the tenth day after notice of nonpayment by the Browns. Further, as noted by the district court, HTC's late payments ceased upon demand by the Browns.

¶17 Similarly, the Lease does not contemplate default merely because HTC sued the Browns for claims arising out of the Lease. Indeed, the Lease anticipates such litigation by including a reciprocal attorney fees clause. That same clause provides the penalty for unsuccessful litigation--the payment of the prevailing party's fees and costs by the losing party.<sup>4</sup> Here, the district court awarded attorney fees and costs to the Browns and expressly noted that such an award remedied the costs incurred by the Browns as a result of HTC's lawsuit. Because HTC's unsuccessful litigation was anticipated and its resulting costs remedied under the terms of the Lease, the district court

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4. In their appellate brief, the Browns characterize HTC's litigation as "frivolous." However, the Browns neither point to a district court finding that the suit was frivolous nor provide any substantive argument as to why we should treat it as such. Further, the Browns provide no argument as to why the payment of their attorney fees, as ordered by the district court, is not an adequate remedy for the bringing of frivolous, as well as merely unsuccessful, litigation. Accordingly, we do not address whether HTC's suit was frivolous or the effect, if any, if it was.

properly concluded that HTC's initiation of this action did not constitute a material breach of the Lease.<sup>5</sup>

### III. Attorney Fees

¶18 Both parties raise arguments as to the attorney fees awarded below, as well as the question of fees on appeal. We first address the district court's award of fees below, and we then turn to the question of fees on appeal.

#### A. Attorney Fees Awarded Below

¶19 HTC raises two arguments challenging the district court's award of attorney fees below. First, HTC argues that the affidavit the Browns submitted in support of their attorney fees request was insufficient to support an award of fees under rule 73 of the Utah Rules of Civil Procedure. See Utah R. Civ. P. 73. Second, HTC argues that the fee award "must be reduced proportionately to account for the degree of success the prevailing party has."<sup>6</sup>

¶20 Addressing HTC's proportionality argument first, we see no error in the district court's decision to award the Browns attorney fees for the entirety of the litigation below. Cf. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988) ("Calculation of reasonable attorney fees is in the sound discretion of the trial court and will not be overturned in the absence of a showing of a clear abuse of discretion." (citation omitted)). As to HTC's claims pertaining to the Easement, the Browns clearly prevailed and are entitled to fees under the terms of the Lease. HTC characterizes itself as the prevailing party on the Browns' counterclaims because the district court dismissed

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5. The district court also concluded that HTC's actions were "not appropriate conduct" under the Lease and that the proper remedy for this inappropriate conduct was HTC's payment of the Browns' attorney fees and costs. HTC does not challenge either of these conclusions, and we do not disturb them.

6. The Browns cursorily imply in their reply brief that the district court inappropriately limited its award of attorney fees and costs to them. However, the Browns provide no reasoned argument as to what those limitations were or why they may have been inappropriate. Accordingly, we do not address this issue. See Smith v. Four Corners Mental Health Ctr., Inc., 2003 UT 23, ¶ 46, 70 P.3d 904 (noting that we may decline to review an argument imposing the burden of argument and research on the court); see also Utah R. App. P. 24(c) (limiting reply briefs to answering any new matter set forth in the opposing brief).

the Browns' unlawful detainer action and declined to find that HTC's actions constituted a material breach of the Lease. However, HTC does not challenge or address the district court's conclusion that HTC's actions were "not appropriate" under the Lease and that those actions warranted a remedy in the form of paying the Browns their attorney fees and costs. These unchallenged conclusions by the district court, together with the Browns' complete success in defending against HTC's claims, clearly support the district court's decision that the Browns were the overall prevailing party below and are entitled to an award of reasonable attorney fees and costs under the terms of the Lease.

¶21 Although we affirm the district court's decision to award the Browns their attorney fees below, we nevertheless agree with HTC that the Browns' affidavit evidencing the amount of those fees is insufficient to allow the district court to have determined the reasonableness of the claimed fees. See generally Utah R. Civ. P. 73; Dixie State Bank, 764 P.2d at 990 (identifying questions to be answered under rule 73, including the total work performed, the necessity of the work, and the reasonableness of counsel's hourly rate); EDSA/Cloward, LLC v. Klibanoff, 2008 UT App 284, ¶ 17, 192 P.3d 296 (holding affidavit adequate where it "substantially answer[ed]" the questions identified in Dixie State Bank). Although the Browns' affidavit generally listed a number of services provided by their attorneys and identified each attorney's hourly rate, there was no breakdown as to which attorney performed which services, the hours spent on each service, or even the total number of hours expended on the litigation. The Browns' affidavit fails to substantially answer the questions identified in Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988), and we accordingly reverse the district court's order determining the amount of the fee and cost award and remand this issue for further consideration.

#### B. Attorney Fees on Appeal

¶22 Both parties also request attorney fees incurred on appeal to the extent that today's opinion renders them successful parties below and on appeal. See generally Valcarce v. Fitzgerald, 961 P.2d 305, 319 (Utah 1998) ("[W]hen a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." (internal quotation marks omitted)). For the reasons expressed herein, we award reasonable attorney fees only to the Browns, and only for fees incurred as the appellee and not as the cross-appellant.

¶23 We first note that there may be situations where an appeal and cross-appeal raise such interrelated issues that it is proper to evaluate prevailing party status based on the overall result

of the appeal and cross-appeal. See, e.g., Stonecreek Landscaping, LLC v. Bell, 2008 UT App 144U, para. 15 (mem.) (determining, where the parties raised related issues on appeal and cross-appeal, that there was no prevailing party in light of the appellate court's "across the board" affirmance of the trial court). This is not the case here, where the appeal and cross-appeal address different issues arising from entirely different claims below. Accordingly, we treat the appeal and cross-appeal separately for purposes of determining the parties' entitlement to attorney fees on appeal. Cf. ProMax Dev. Corp. v. Raile, 2000 UT 4, ¶ 32, 998 P.2d 254 (awarding fees to a prevailing appellee in part but denying fees incurred by the appellee in pursuing an unsuccessful motion to dismiss).

¶24 As to the issues raised in HTC's appeal, we award reasonable appellate attorney fees to the Browns. The district court awarded fees to the Browns on HTC's failed claims, and the Browns have substantially prevailed against HTC's appeal of those claims. Accordingly, despite our remand for further consideration of the amount of the Browns' attorney fees award below, the Browns are entitled to an award of reasonable attorney fees incurred in defending against HTC's appeal. Cf. id. (awarding statutorily allowed attorney fees to "a party which successfully defends an appeal"); Pack v. Case, 2001 UT App 232, ¶¶ 39-41, 30 P.3d 436 (awarding attorney fees to appellee who "prevailed on the majority of issues on appeal, including the most substantial issue").

¶25 As to the separate and independent issues raised in the Browns' cross-appeal, we determine that neither party is entitled to an award of attorney fees. The Browns are not entitled to an award of fees because, although they were awarded fees below,<sup>7</sup> they have not prevailed on their cross-appeal. See Valcarce, 961 P.2d at 319; see also ProMax Dev. Corp., 2000 UT 4, ¶ 32 (denying fees for unsuccessful motion to dismiss despite award of fees for prevailing on remainder of appeal). Conversely, HTC is not entitled to an award of fees for successfully defending against the Browns' cross-appeal because HTC did not "receive[] attorney fees below" on the Browns' counterclaims, see Valcarce, 961 P.2d at 319, and, as explained above, we have affirmed the district

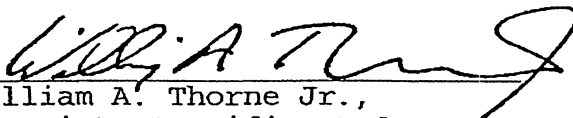
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7. We further note that, to the extent the district court awarded the Browns attorney fees as breach of contract damages rather than under the Lease's fee provision, the Browns provide no authority for the proposition that such damages constitute "receiv[ing] attorney fees below" for purposes of an award of fees on appeal. See Valcarce v. Fitzgerald, 961 P.2d 305, 319 (Utah 1998). We need not address this issue today in light of the Browns' lack of success in prosecuting their cross-appeal.

court's award of fees to the Browns below. An award of fees on appeal requires both a fee award below and success in the appellate court. See id. Because neither party completely satisfies the test for an award of attorney fees arising out of the Browns' cross-appeal, neither party is entitled to an award of such fees.

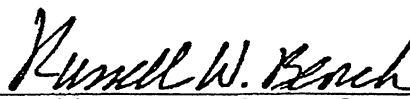
#### CONCLUSION

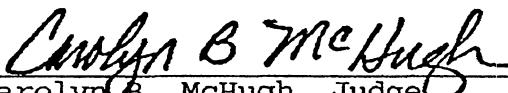
¶26 We conclude that the trial court properly dismissed both HTC's claims and the Browns' counterclaim for unlawful detainer and properly determined that HTC had not materially breached the Lease. Thus, we affirm the district court on those issues. We also affirm the district court's decision to award attorney fees to the Browns below, but we reverse the district court's determination of the amount of those fees due to the insufficiency of the Browns' rule 73 affidavit. Finally, we award the Browns their reasonable attorney fees incurred in successfully defending against HTC's appeal but decline to award fees to either party in regards to the Browns' cross-appeal. The matter is remanded to the district court for further proceedings consistent with this opinion.

  
William A. Thorne Jr.,  
Associate Presiding Judge

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¶27 WE CONCUR:

  
Russell W. Bench, Judge

  
Carolyn B. McHugh, Judge

CERTIFICATE OF MAILING


I hereby certify that on the 20th day of November, 2008, a true and correct copy of the attached DECISION was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

BLAKE D. MILLER  
JOEL T. ZENGER  
JAMES W ANDERSON  
MILLER GUYMON PC  
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THIRD DISTRICT, SALT LAKE  
ATTN: MARINA DAVIS & LYN MACLEOD  
450 S STATE ST  
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Judicial Secretary

TRIAL COURT: THIRD DISTRICT, SALT LAKE, 060913167  
APPEALS CASE NO.: 20070496-CA



Tab C

FILED  
UTAH APPELLATE COURTS  
APR 23 2009

IN THE SUPREME COURT OF THE STATE OF UTAH

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Holladay Towne Center, LLC,

Plaintiff and Petitioner,

v.

Case No. 20090050-SC

20070496-CA

Brown Family Holdings, LC,

Defendant and Respondent.

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ORDER

This matter is before the court upon the State's Petition for Writ of Certiorari, filed on January 20, 2009.

IT IS HEREBY ORDERED, pursuant to Rule 51 of the Utah Rules of Appellate Procedure, that the States' Petition for Writ of Certiorari is granted as to the following issues:

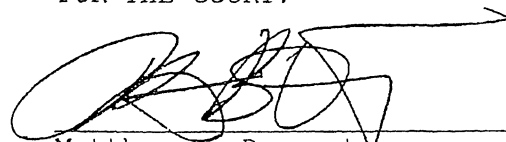
1. Whether the court of appeals erred in holding the lease at issue in this case encompassed any subsequently-discovered potential encumbrances and assigned the responsibility for legally resolving them to the tenant Petitioner.
2. Whether a lease may confer legal standing on a tenant to litigate property rights originally possessed by a landlord.

A briefing schedule will be established hereafter. Pursuant to rule 2, the court suspends the provision of rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

FOR THE COURT:

Date

4-23-09

  
Matthew B. Durrant,  
Associate Chief Justice

Tab D

## GROUND LEASE

THIS GROUND LEASE (this "Lease"), dated as of March 1, 2005 (the "Effective Date"), is made by and between the BROWN FAMILY HOLDINGS, , L.C., a Utah limited liability company ("Landlord"), and HOLLADAY TOWNE CENTER, L.L.C., a Utah limited liability company ("Tenant"), with respect to the following facts:

### RECITALS

A. Landlord is the fee owner of that certain real property situated in the City of Holladay, Salt Lake County, State of Utah, which real property is legally described on Exhibit "A" attached hereto, together with all rights and interest, if any, of Landlord in and to the land lying in the streets and roads in front thereof and adjoining thereto and in and to any easements or other rights appurtenant thereto (the "Landlord Property" or "Land").

NOW, THEREFORE, in consideration of the above recitals, and the representations, warranties, covenants and conditions contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, Landlord and Tenant agree as follows:

### DEFINITIONS

As used in this Lease, the following capitalized terms shall have the meanings set forth below:

"Affiliate" means any Person which (1) directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, the Tenant or Landlord or (2) owns twenty-five percent (25%) or more of the equity interest of which is held beneficially or of record by the Tenant or Landlord, as the context may require. "Control" means the possession, directly or indirectly, of the power to cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract, family relationship or otherwise.

"Anniversary Date" means the date exactly one (1) year after the date on which an event occurred in a previous calendar year.

"CPI" means the increase in the Consumer Price Index from the same date in the preceding year.

"Commencement Date" is the first day of the first full month beginning after the Effective Date.

**"Default Rate"** means two percentage points in excess of the **"Prime Rate"**. The interest rate ascertained as the Default Rate under this Agreement shall change as often as, and when, the Prime Rate changes or changes in the law occur, as the case may be.

**"Effective Date"** means the date first written above, which is the effective date upon which each party has caused to be delivered to the other party this Lease, Landlord's exclusive right to use the Premises has terminated and the Landlord has actually vacated the Premises.

**"Hazardous Substances"** means any hazardous or toxic substances, materials or wastes, including, but not limited to, those substances, materials, and wastes listed in the United States Department of Transportation Hazardous Materials Table (49 CFR 172.101) or by the Environmental Protection Agency as hazardous substances (40 CFR Part 302); Hazardous Chemicals as defined in the OSHA Hazard Communication Standard; Hazardous Substances as defined in the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, et. seq.; Hazardous Substances as defined in the Toxic Substances Control Act, 15 U.S.C. § 2601-2671; and all substances now or hereafter designated as "hazardous substances," "hazardous materials" or "toxic substances" under any other federal, state or local laws or in any regulations adopted and publications promulgated pursuant to said laws, and amendments to all such laws and regulations thereto, or such substances, materials, and wastes which are or become regulated under any applicable local, state or federal law.

**"Imposition"** means all taxes (including possessory interest, real property, ad valorem, and personal property taxes), assessments, charges, license fees, municipal liens, levies, excise taxes, impact fees, or imposts, whether general or special, ordinary or extraordinary imposed by any governmental or quasi-governmental authority pursuant to law directly as a result of Tenant's leasehold ownership of the Premises or ownership of the Improvements located thereon which may be levied, assessed, charged or imposed, or may be or become a lien or charge upon the Premises, or any part thereof, or upon the leasehold estate hereby created.

**"Improvements"** means any structures hereafter constructed on and affixed to the Land.

**"Indebtedness"** means the amount which is outstanding at any given time under a Permitted Mortgage.

**"Indemnified Parties"** means either the Landlord Indemnified Parties or the Tenant Indemnified Parties, as applicable; an "Indemnified Party" means any individual within either such group, as applicable.

**"Insurance Proceeds"** means any amount received by Tenant from an insurance carrier, after deducting therefrom the reasonable fees and expenses of collection, including but not limited to reasonable attorneys' fees and experts' fees.

**"Landlord's Estate"** means all of Landlord's right, title, and interest in its fee estate in the Premises, its reversionary interest in the Improvements pursuant hereto, and all other

Rent and benefits due Landlord hereunder.

**"Lease Expiration Date"** means the earlier to occur of the following dates:  
(a) that date which is twenty (20) years following the Commencement Date or (b) that date upon which this Lease is sooner terminated pursuant to the provisions of this Lease or the mutual agreement of the parties hereto.

**"Leased Property"** means the Landlord Property that is leased by the Tenant as legally described in the attached Exhibit "A".

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

**"Mortgagee"** means any one or more holders of the beneficial interest and secured position under any Permitted Mortgage.

**"Official Records"** means the Official Records of Salt Lake County, Utah.

**"Partial Taking"** is defined in Section 11.2.

**"Permitted Exceptions"** means those matters described in Exhibit "B" attached hereto affecting Landlord's title to the Land all of which have been approved by Tenant.

**"Permitted Mortgage"** means collectively (a) any deed(s) of trust and other collateral security instruments (including, without limitation, financing statements, security agreements and other documentation required pursuant to the Utah Uniform Commercial Code, and any absolute or conditional assignments of rents and subleases) serving as security for one or more construction loans and/or permanent loans (otherwise permitted to be incurred hereunder) which encumber Tenant's Estate, together with any modification, substitution, amendment, extension, increase, refinancing, replacement or recasting (otherwise permitted to be incurred hereunder) thereof and (b) any instruments required in connection with an assignment-subleaseback transaction involving Tenant's Estate; provided, however, in no event shall any such Permitted Mortgage encumber Landlord's Estate.

**"Premises"** shall mean the Leased Property and the Improvements now or hereafter located thereon.

**"Prime Rate"** means the Key Bank Reference Rate as announced from time to time, or if there is no Key Bank Reference Rate, then the Prime Rate shall be the prime rate announced from time to time by the banking institution in the State of Utah having the greatest dollar volume of deposits.

**"Purchase Option"** is defined in Article 16.

**"Rent"** means all sums due and payable to Landlord by Tenant hereunder.

**"Sublease"** means any present or future ground sublease, space sublease, use, or occupancy agreement, entered into in accordance with Article 14 below, and any modification, extension or termination of any of the foregoing entered into in accordance with Article 14 below. Subleases shall also include any ground lease, space lease, use or occupancy agreement between Tenant, as lessor thereunder, and a lessee, the demised premises under which are partially situated within the Premises and partially situated within other portions of Tenant's Project.

**"Subtenant"** means any person or entity entitled to the use of all or any portion of the Premises under any Sublease. Subtenants shall also include each lessee under any ground lease, space lease, use or occupancy agreement between Tenant, as lessor thereunder, and such lessee, the demised premises under which are partially situated within the Premises and partially situated within other portions of Tenant's Project.

**"Tenant's Estate"** means all of Tenant's right, title and interest in its leasehold estate in the Premises, its fee estate in the Improvements, and its interest under this Lease.

**"Tenant's Project"** means the Leased Property and any adjacent land and improvements owned or controlled by Tenant.

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## ARTICLE 1: DEMISE OF PREMISES

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1.1 Demise. Landlord hereby leases to Tenant the Premises, together with all rights, privileges, easements, and appurtenances belonging to or in any way appertaining thereto, including but not limited to, any and all surface easements, rights, titles, and privileges of Landlord now or hereafter existing in and to adjacent streets, sidewalks and alleys for the Term, at the rental, and upon all of the covenants and conditions set forth herein.

Concurrently with the Effective Date, Landlord has delivered possession of the Premises to Tenant, subject to the following matters to the extent that they affect the Premises:

(a) The Permitted Exceptions to the extent valid and subsisting and affecting the Premises as of the Effective Date;

(b) The effect of all present building restrictions and regulations and present and future zoning laws, ordinances, resolutions, and regulations of the City of Sandy (the "City") which are of general application in the City and the County of Salt Lake and all present ordinances, regulations and orders of all boards, bureaus, commissions and bodies of the City (which are of general application in the City) and any county, state or federal agency, now having, or hereafter having acquired, jurisdiction of the Premises and the use and improvement thereof;

(c) The condition and state of repair of the Premises on the Effective Date;

(d) All taxes, duties, assessments, special assessments, water charges and sewer rents, and any other Impositions, accrued or unaccrued, fixed or not fixed, prorated as hereinafter more fully provided; and

(e) Present violations of law, ordinances, orders or requirements that might be disclosed by an examination and inspection or search of the Premises by any federal, state, county or municipal department or authority having jurisdiction, as the same may exist on the Effective Date.

1.2 Memorandum of Lease. This Lease shall not be recorded; however, to establish the status of Tenant's title, to establish the priority of this Lease as a condition of title, Landlord and Tenant agree to execute and acknowledge a short form Memorandum of this Lease which Tenant may record in the Official Records on or after the Effective Date. In the event of a discrepancy between the provisions of such Memorandum and this Lease, the provisions of this Lease shall prevail. Recordation of such Memoranda shall be at the expense of Tenant.



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## ARTICLE 2: TERM

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2.1 Term. The term of this Lease shall commence on the Commencement Date and shall expire on the date which is (20) years after the Commencement Date, unless sooner terminated .

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## ARTICLE 3: RENT.

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3.1 Payment of Rent. Tenant shall pay Rent during the term of this Ground Lease to Landlord as follows:

(a) Annual Rent. As annual rent ("Annual Rent") the sum of \$58,200.00, payable in advance in equal monthly installments of \$4,850.00 beginning on the first day of the calendar month after the Commencement Date and thereafter on the first day of each calendar month and is subject to adjustment as provided in subsection (b) below. This is a triple net lease, tenant agrees that the amount of annual rent will be paid without offset and that tenant will pay all impositions and costs relating to the property so that the Landlord has no cost or expense relating to the property during the term or any extension of the lease.

(b) Adjustment to Annual Rent. On the sixth (6<sup>th</sup>) anniversary of the Commencement Date, the Annual Rent shall be increased to \$64,200.00 payable in monthly installments of \$5,350.00. On the eleventh (11<sup>th</sup>) anniversary of the Commencement Date, the Annual Rent shall be increased to \$70,800.00 payable in monthly installments of \$5,900.00. On the sixteenth (16<sup>th</sup>) anniversary of the commencement Date, the Annual Rent shall be increased to \$78,060.00 payable in monthly installments of \$6,505.00..

3.2 Manner of Payment. Rent to be paid to Landlord shall be paid in legal tender for the payment of public and private debts to Landlord at such address as Landlord may from time to time designate in writing. For any period of less than a full month, quarter or year for which Rent is payable, the applicable Rent shall be prorated.

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## ARTICLE 4: PAYMENT OF TAXES AND OTHER CHARGES

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4.1 Payment of Impositions. Commencing on the Effective Date and continuing for the entire Initial Term and the Primary Term (collectively, the "Term") of this Lease and any extension thereof, Tenant covenants and agrees (except as specifically otherwise provided in Sections 4.2 and 4.4 below) to pay and discharge or cause to be paid and discharged all Impositions promptly before delinquency and before any fine, interest or penalty shall be assessed by reason of its nonpayment. If, at any time during the Term or any extension thereof the methods of taxation prevailing at the Effective Date shall be so altered so that in lieu of any Imposition described in this Section 4.1 there shall be levied, assessed or imposed an alternate tax, however designated, such alternate tax shall be deemed an Imposition for the purpose of this Article and Tenant shall pay and discharge such Imposition as provided by this Article. If the Effective Date is a day other than the first day of a "tax" or "fiscal" year, i.e., July 1 (a "Tax

Year"), all such Impositions shall be prorated such that Tenant shall be responsible only for those Impositions payable in connection with the Premises following the Effective Date, such pro-ration to be based on the ratio that the number of days in such fractional Tax Year bears to 365. Payment of Impositions with respect to the final Tax Year within the Term shall be similarly prorated. Notwithstanding the foregoing, if prior to the Effective Date or after the expiration or earlier termination of this Lease, any Imposition is not payable with respect to the Premises because Tenant is exempt under applicable law from paying such Imposition, then such Imposition shall not be prorated, and Tenant shall be responsible for 100% of such Imposition attributable to the period following the Effective Date or prior to the expiration or earlier termination of this Lease, as the case may be.

4.2 Contesting Impositions. In the event that Tenant shall desire to contest or otherwise review by appropriate legal or administrative proceeding any Imposition, Tenant shall give Landlord written notice of its intention to so contest same; after giving such notice to Landlord, Tenant shall not be in default hereunder by reason of the non-payment of such Imposition if Tenant shall have (a) obtained and furnished to the applicable taxing authority (other than Landlord) a bond or other security to the extent required by applicable law, and (b) established reserves reasonably sufficient to pay such contested Imposition and the penalties and interest that may be reasonably payable in connection therewith. Any such contest or other proceeding shall be conducted solely at Tenant's expense and free of expense to Landlord. Tenant shall pay the amount so determined to be due, together with all costs, expenses, interest, and penalties related thereto.

4.3 Utilities. All water, gas, electricity, or other public utilities used upon or furnished to the Premises during the Term hereof shall be promptly paid by Tenant as billed and prior to delinquency.

4.4 Payment by Landlord. Unless Tenant is contesting any Impositions as provided in Section 4.2 above, Landlord may, at any time after the date any Imposition is delinquent, give written notice to Tenant specifying same, and if Tenant continues to fail to pay or contest such Imposition, then at any time after ten (10) days from Tenant's receipt of such written notice, Landlord may pay the Imposition specified in said notice. Tenant covenants to reimburse and pay Landlord any amount so paid or expended in the payment of such Imposition upon demand therefor, with interest thereon at the Default Rate from the date of such payment by Landlord until repaid by Tenant.

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## ARTICLE 5: ENCUMBRANCE OF TENANT'S ESTATE; MORTGAGEE PROTECTION

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5.1 Encumbrance of Tenant's Estate. Tenant shall have the right to encumber Tenant's Estate or any portion thereof or interest therein or any Sublease pursuant to one or more Permitted Mortgages, provided Tenant shall refrain from encumbering or purporting to encumber, by means of a Permitted Mortgage or otherwise any portion of the Landlord Property other than Tenant's interest in easements and covenants. Tenant shall, promptly following its receipt of any notice of default or other notice of the acceleration of the maturity of a Permitted

Mortgage from a Mortgagee, deliver a true and correct copy thereof to Landlord.

5.2 Mortgagee Protections. Provided that any Mortgagee provides Landlord with a conformed copy of each Permitted Mortgage which contains the name and address of such Mortgagee, and provided such Permitted Mortgage was executed in compliance with the terms hereof, Landlord hereby covenants and agrees to faithfully perform and comply with the following provisions with respect to such Permitted Mortgage:

(a) No Termination. No action by Tenant or Landlord to cancel, surrender, or materially modify the terms of this Lease or the provisions of this Article 5 shall be binding upon a Mortgagee without its prior written consent.

(b) Notices. If Landlord shall give any notice, demand, election or other communication which may adversely affect the security for a Permitted Mortgage, including without limitation a notice of an Event of Default hereunder (hereinafter collectively "Notices") to Tenant, Landlord shall simultaneously give a copy of each such Notice to the Mortgagee at the address theretofore designated by it. Such copies of Notices shall be sent by Landlord and deemed received as described in Article 17 below. No Notice given by Landlord to Tenant shall be binding upon or affect said Mortgagee unless a copy of said Notice shall be given to Mortgagee pursuant to this Section. In the case of an assignment of such Permitted Mortgage or change in address of such Mortgagee, said assignee or Mortgagee, by written notice to Landlord, may change the address to which such copies of Notices are to be sent. Landlord shall not be bound to recognize any assignment of such Permitted Mortgage unless and until Landlord shall be given written notice thereof, a copy of the executed assignment, and the name and address of the assignee. Thereafter, such assignee shall be deemed to be the Mortgagee hereunder with respect to the Permitted Mortgage being assigned.

(c) Performance of Covenants. The Mortgagee shall have the right to perform any term, covenant or condition and to remedy any default by Tenant hereunder within the time periods specified herein, and Landlord shall accept such performance with the same force and effect as if furnished by Tenant; provided, however, that said Mortgagee shall not thereby or hereby be subrogated to the rights of Landlord.

(d) Delegation to Mortgagee. Tenant may delegate irrevocably to the Mortgagee the non-exclusive authority to exercise any or all of Tenant's rights hereunder, but no such delegation shall be binding upon Landlord unless and until either Tenant or the Mortgagee shall give to Landlord a true copy of a written instrument effecting such delegation. Such delegation of authority may be effected by the terms of the Permitted Mortgage itself, in which case service upon Landlord of an executed counterpart or conformed copy of said Permitted Mortgage in accordance with this Article 5, together with written notice specifying the provisions therein which delegate such authority to said Mortgagee, shall be sufficient to give Landlord notice of such delegation.

(e) Default by Tenant. In the event of an Event of Default by Tenant in the payment of any monetary obligation hereunder, Landlord agrees not to terminate this Lease

unless and until Landlord provides written notice of such Event of Default to any Mortgagee and such Mortgagee shall have failed to cure such Event of Default within thirty (30) business days following delivery of such notice. In the event of an Event of Default by Tenant in the performance or observance of any non-monetary term, covenant, or condition to be performed by it hereunder, Landlord agrees not to terminate this Lease unless and until Landlord provides written notice of such Event of Default to any Mortgagee and such Mortgagee shall have failed to cure such Event of Default within thirty (30) days following the expiration of any grace or cure periods granted Tenant herein; provided, however, if such Event of Default cannot practicably be cured by the Mortgagee without taking possession of the Premises, or if such Event of Default is not susceptible of being cured by the Mortgagee, then Landlord shall not terminate this Lease if and as long as:

(i) In the case of an Event of Default which cannot practicably be cured by the Mortgagee without taking possession of the Premises, the Mortgagee has delivered to Landlord, prior to the date on which Landlord shall be entitled to give notice of lease termination, a written undertaking wherein the Mortgagee agrees that it will cure such Event of Default;

(ii) In the case of an Event of Default which cannot practicably be cured by the Mortgagee without taking possession of the Premises, said Mortgagee shall proceed diligently to obtain possession of the Premises as Mortgagee (including possession by receiver), and, upon obtaining such possession, shall proceed diligently to cure such Event of Default in accordance with the undertaking delivered pursuant to Subsection (i) above but in no event later than 180 days after obtaining possession; and

(iii) In the case of an Event of Default which is not susceptible to being cured by the Mortgagee (for example, the insolvency of Tenant), the Mortgagee shall institute foreclosure proceedings and diligently prosecute the same to completion (unless in the meantime it shall acquire Tenant's Estate hereunder, either in its own name or through a nominee, by assignment in lieu of foreclosure) and, upon such completion of foreclosure or acquisition, such Event of Default shall be deemed to have been cured.

The Mortgagee shall not be required to obtain possession or to continue in possession as Mortgagee of the Premises pursuant to Subsection (ii) above, or to continue to prosecute foreclosure proceedings pursuant to Subsection (iii) above, if and when such Event of Default shall be cured. Nothing herein shall preclude Landlord from exercising any of its rights or remedies with respect to any other Event of Default by Tenant during any period of such forbearance, but in such event the Mortgagee shall have all of its rights provided for herein. If the Mortgagee, its nominee, or a purchaser in a foreclosure sale, shall acquire title to Tenant's Estate hereunder and shall cure all Events of Default which are susceptible of being cured by the Mortgagee or by said purchaser, as the case may be, then prior Events of Default which are not susceptible to being cured by the Mortgagee or by said purchaser shall no longer be deemed Events of Default hereunder.

(f) Foreclosure. Foreclosure of any Permitted Mortgage, or any sale thereunder, whether by judicial proceedings or by virtue of any power contained in the Permitted Mortgage, or any conveyance of the leasehold estate hereunder from Tenant to any Mortgagee or its

designee through, or in lieu of, foreclosure or other appropriate proceedings in the nature thereof, shall not require the consent of Landlord or constitute a breach of any provision of or a default under this Lease, and upon such foreclosure, sale or conveyance Landlord shall recognize the Mortgagee or such designee as the Tenant hereunder. If any Mortgagee or other third party shall acquire Tenant's Estate as a result of a judicial or non-judicial foreclosure under any Permitted Mortgage, or by means of a deed in lieu of foreclosure, or through settlement of or arising out of any pending or contemplated foreclosure action, such Mortgagee or such other third party purchaser shall thereafter have the right to further assign or transfer Tenant's Estate to an assignee upon obtaining Landlord's consent with respect thereto, which consent shall not be unreasonably withheld or delayed, and subject to all of the other provisions of Article 15 below. Upon such acquisition of Tenant's Estate as described in the preceding sentence by Mortgagee or its designee, Landlord shall immediately execute and deliver a new ground lease of the Premises to such Mortgagee, upon the written request therefor by such Mortgagee given not later than one hundred twenty (120) days after such party's acquisition of the Tenant's Estate. Such new ground lease shall be substantially similar in form and content to the provisions of this Lease, except with respect to the parties thereto, the term thereof (which shall be co-extensive with the remaining term hereof), and the elimination of any requirements which have been fulfilled by Tenant prior thereto, and such new ground lease shall have priority equal to the priority of this Lease. Upon execution and delivery of such new ground lease, Landlord shall cooperate with the new Tenant, at the sole expense of said new Tenant, in taking such action as may be necessary to cancel and discharge this Lease and to remove Tenant named herein from the Premises.

(g) Mortgagee Loss Payable. Landlord agrees that the names of each Mortgagee shall be added to the "Loss Payable Endorsement" of any and all insurance policies required to be carried by Tenant under this Lease on condition that the insurance proceeds are to be applied in the manner specified herein.

(h) New Lease. Landlord agrees that in the event of termination of this Lease by reason of any Event of Default by Tenant, or by reason of the disaffirmance hereof by a receiver, liquidator or trustee for Tenant or its property, Landlord will enter into a new lease of the Premises with the most senior Mortgagee requesting a new lease for the remainder of the Lease Term, effective as of the date of such termination, at the rent, and upon the terms, provisions, covenants and agreements as herein contained and subject to the rights, if any, of any parties then in possession of any part of the Premises, provided:

(i) Mortgagee agrees to pay Landlord's reasonable attorney fees in connection with such new lease.

(i) The senior Mortgagee shall make written request upon Landlord for the new lease within sixty (60) days after the date of termination:

(ii) The senior Mortgagee shall pay to Landlord at the time of the execution and delivery of the new lease any and all sums which would, at the time of the execution and delivery thereof, be due and unpaid pursuant to this Lease but for its termination, and in addition thereto any expenses, including reasonable attorneys' fees, to which Landlord shall have been subjected by reason of the Event of Default;

(iii) The senior Mortgagee shall perform and observe all covenants herein contained on Tenant's part to be performed which are susceptible to being performed by the senior Mortgagee, and shall further remedy any other conditions which Tenant under the terminated Lease was obligated to perform under its terms, to the extent the same are curable or may be performed by the senior Mortgagee; and

(iv) The tenant under the new lease shall have the same right, title and interest in and to all improvements located on the Premises as Tenant had under the terminated Lease immediately prior to its termination.

(v) Notwithstanding anything to the contrary expressed or implied elsewhere in this Lease, any new lease made pursuant to this Section 5.2 (h), shall be prior to any Permitted Mortgage or other lien, charge or encumbrance on the Premises, to the same extent as the terminated Lease, and shall be accompanied by a conveyance of title to the existing improvements (free of any mortgage, deed of trust, lien, charge, or encumbrance created by Landlord) for a term of years equal to the term of the new lease, subject to the reversion in favor of Landlord upon expiration or sooner termination of the new lease. The rights granted any Mortgagee to a new lease shall survive any termination of this Lease.

(vi) If a Mortgagee shall elect to demand a new lease under this Section 5.2(h), Landlord agrees, at the request of, on behalf of and at the sole cost and expense of the Mortgagee, to institute and pursue diligently to conclusion any appropriate legal remedy or remedies to oust or remove the original Tenant from the Premises, and those Subtenants actually occupying the Premises, or any part thereof, as designated by the Mortgagee subject to any non-disturbance or attornment agreements with such Subtenants. Such Mortgagee shall indemnify, defend and hold harmless Landlord for any losses, claims, costs and expenses (including, without limitation, reasonable attorneys' fees) arising out of Landlord's compliance with the provisions of this subparagraph (vi).

(vii) Unless and until Landlord has received notice from all Mortgagees that the Mortgagees elect not to demand a new lease as provided in Section 5.2(h), or until the period therefore has expired, Landlord shall not cancel or agree to the termination or surrender of any existing Subleases nor enter into any new subleases hereunder without the prior written consent of the Mortgagee.

(i) No Obligation to Cure. Nothing herein contained shall require any Mortgagee to enter into a new lease pursuant to Section 5.2(h) above, or to cure any default of Tenant referred to above.

(j) No Personal Liability. In the event any Mortgagee or its designee becomes the Tenant under this Lease or under any new lease obtained pursuant to either Section 5.2(f) or 5.2(h) above, the Mortgagee or its designee shall be personally liable for the obligations of Tenant under this Lease or a new lease. (k) Insurance Proceeds. The proceeds from any insurance policies or arising from a condemnation shall be paid to and held by the senior Mortgagee and distributed pursuant to the provisions of this Lease.

(l) Material Notices. The parties hereto shall give all Mortgagees notice of any arbitration, litigation, or condemnation proceedings, or of any pending adjustment of insurance claims as each may relate to the Premises, and any Mortgagee shall have the right to intervene therein and shall be made a party to such proceedings. The parties hereto do hereby consent to such intervention. In the event that any Mortgagee shall not elect to intervene or become a party to the proceedings, such Mortgagee shall receive notice and a copy of any award or decision made in connection therewith.

(m) Separate Agreement. Landlord shall, upon request, execute, acknowledge and deliver to each Mortgagee, an agreement prepared at the sole cost and expense of Tenant, in form satisfactory to each Mortgagee, between Landlord, Tenant and the Mortgagees, agreeing to all of the provisions hereof., provided that Tenant shall pay Landlord's reasonable attorney fees for review of any such agreement.

(n) Further Amendments. Landlord hereby agrees to cooperate with Tenant in including in this Lease by suitable amendment from time to time any provision which Tenant may reasonably request as being from any proposed Mortgagee for the purpose of implementing the Mortgagee protection provisions contained in this Lease and allowing such Mortgagee reasonable means to protect or preserve the lien of the Permitted Mortgage, as well as such other documents containing terms and provisions customarily required by Mortgagees (taking into account the customary requirements of their participants, syndication partners or ratings agencies) in connection with any such financing. Landlord agrees to execute and deliver (and to acknowledge, if necessary, for recording purposes) any agreement necessary to effectuate any such amendment as well as such other documents containing terms and provisions customarily required by Lenders in connection with any such financing; provided, however, that any such amendment shall not in any way affect the term or Rent under this Lease, nor otherwise in any material respect adversely affect any rights of Landlord under this Lease. Tenant agrees to pay Landlord's reasonable attorney fees in connection with any such amendments or documents.

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## ARTICLE 6: POSSESSION, USE, COMPLIANCE WITH LAWS, MAINTENANCE AND REPAIRS

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6.1 Possession. Tenant acknowledges that as of the Effective Date it shall accept possession of the Land.

6.2 Use. Subject to the provisions of this Article 6, Tenant may use the Premises for a shopping center, retail store(s), office(s), or any other purpose permitted under Utah law. Tenant may construct all the Improvements on the Land as part of Tenant's Project.

6.3 Compliance With Laws. Subject to the provisions of Article 8 below, Tenant shall comply with all Legal Requirements in the use, occupation, control and enjoyment of the Premises and in the prosecution and conduct of its business thereon. Tenant shall have the right, at its own cost and expense, to contest or review by appropriate legal or administrative proceeding the validity or legality of any such Legal Requirement, and during such contest

Tenant may refrain from complying therewith provided that compliance therewith may legally be held in abeyance without subjecting Landlord to any liability, civil or criminal, of whatsoever nature for failure so to comply therewith and without the incurrence of a lien, charge or liability against the Premises or Landlord's Estate; and provided further that all such proceedings shall be prosecuted by Tenant with due diligence.

6.4 Maintenance. Tenant shall, during the term hereof, keep and maintain the Premises in compliance with all Legal Requirements and all appurtenances thereto in good order and repair, and shall allow no nuisance to exist or be maintained therein. Landlord shall not be obligated to make any repairs, replacements, or renewals of any kind, nature, or description whatsoever to the Premises.

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## ARTICLE 7: CHANGES, ALTERATIONS AND NEW CONSTRUCTION

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7.1 Generally. Tenant shall have the right to alter, repair, restore, replace or reconstruct any of the Improvements located on the Land (which right shall necessarily include the right to demolish any of the Improvements), provided that all such work shall be performed by Tenant in compliance with this Article 7.

7.2 Notice of Completion. Upon completion of any work of Improvement upon the Premises, Tenant shall file or cause to be filed, if required by applicable law, a valid Notice of Completion in a timely fashion.

7.3 Title to Improvements. All Improvements constructed or installed upon the Premises by Tenant at any time prior to the Lease Expiration Date shall be and thereafter remain real property, and are and shall be the property of Tenant; provided, however, that upon the Lease Expiration Date, title to such Improvements shall vest in Landlord and the same shall become the property of Landlord. Notwithstanding anything to the contrary contained in this Section, Tenant hereby covenants and agrees to promptly execute and acknowledge (at no cost or expense to Tenant) a quitclaim deed or any other documentation reasonably required by Landlord to effectuate the provisions of this Section; Tenant's covenant to do so shall survive the Lease Expiration Date.

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## ARTICLE 8: ENVIRONMENTAL MATTERS

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8.1 Environmental Compliance. Commencing on the Effective Date, Tenant shall at all times comply with applicable Environmental Laws affecting the Premises. Tenant shall at its own expense maintain in effect any permits, license or other governmental approvals relating to Hazardous Substances, if any, required for Tenant's use, and cause each Subtenant to maintain in effect any such permits, license or other governmental approvals, if any, required for such Subtenant's use, of the Premises. Tenant shall make all disclosures required of Tenant by any such Environmental Laws, and shall comply with all orders, with respect to Tenant's and its employees', agents', contractors' and invitees' use of the Premises, issued by any governmental authority having jurisdiction over the Premises and take all action required by such governmental authorities to bring Tenant's and its employees', agents', contractors' and invitees' activities on the



Premises into compliance with all Environmental Laws affecting the Premises

8.2 Notices If at any time Tenant or Landlord shall become aware, or have reasonable cause to believe, that any actionable level of Hazardous Substance has been released or has otherwise come to be located on or beneath the Premises, such party shall immediately upon discovering the release or the presence or suspected presence of the Hazardous Substance, give written notice of that condition to the other party. In addition, the party first learning of the release or presence of an actionable level of Hazardous Substance on or beneath the Premises, shall immediately notify the other party in writing of (i) any enforcement, cleanup, removal, or other governmental or regulatory action instituted, completed, or threatened pursuant to any Environmental Laws, (ii) any claim made or threatened by any person against Landlord, Tenant or the Premises arising out of or resulting from any actionable level of Hazardous Substances, and (iii) any reports made to any local, state, or federal environmental agency arising out of or in connection with any actionable level of Hazardous Substance.

### 8.3 Indemnity

(a) By Landlord Landlord shall indemnify, defend (by counsel acceptable to Tenant), protect, and hold harmless Tenant, Tenant's Affiliates and their respective partners, members, shareholders, trustees, beneficiaries, officers, directors, employees, attorneys, agents, heirs, representatives, successors and assigns ("**Tenant Indemnified Parties**"), from any and all claims, liabilities, penalties, fines, judgments, forfeitures, losses, costs, or expenses (including reasonable attorneys', consultants', and expert fees) (collectively, "**Claims**") arising from, related to, or in connection with the death of or injury to any person or damage to any property whatsoever, arising from or caused in whole or in part, directly or indirectly, by the presence in, on, under, or about the Land, or any discharge or release in or from the Land of any Hazardous Substance, to the extent that any such presence, discharge, or release is caused by Landlord's activities or the activities of any of Landlord's employees, agents, contractors or invitees prior to the Effective Date.

(b) Tenant Tenant shall indemnify, defend (by counsel acceptable to Landlord), protect, and hold harmless Landlord, Landlord's Affiliates and their respective commissioners, directors, trustees, beneficiaries, officers, partners, member, directors, employees, attorneys, agents, successors and assigns ("**Landlord Indemnified Parties**"), from and against any and all Claims arising from, related to, or in connection with the death of or injury to any person or damage to any property whatsoever, arising from or caused in whole or in part, directly or indirectly, by (i) the presence in, on, under, or about the Premises or any discharge or release in or from the Premises of any Hazardous Substance, to the extent that any such presence, discharge, or release is caused by Tenant's activities, or the activities of any of Tenant's Subtenants, employees, agents, contractors or invitees, or (ii) Tenant's failure to comply with its covenants under Section 8.1 and occurs after the Effective Date.

(c) Costs Included, Survival The indemnity obligations created hereunder shall include, without limitation, whether foreseeable or unforeseeable, any and all costs incurred in connection with any site investigation, and any and all costs for repair, cleanup, detoxification or decontamination, or other remedial action of the Premises. The obligations of the parties

hereunder shall survive the expiration or earlier termination of this Lease.

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## ARTICLE 9: INSURANCE

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9.1 All Risk Insurance. Tenant, at its sole cost and expense, from the Effective Date forward shall throughout the entire Term keep the Insured Property insured against loss or damage by fire, windstorm, tornado, hail, water damage, lightning, vandalism and malicious mischief and against loss or damage by such other, further and additional risks as now are or hereafter may be embraced by the standard "all risk" forms or endorsements, and any coverage available under the so-called "installation floater", in each case in the full amount of the replacement value of the Insured Property and 100% of the replacement value of the rental receipts of the Insured Property on an actual loss-sustained basis (the "Full Insurable Value"). Likewise, any new Improvements constructed on the premises shall be insured as described above as of the Date of Substantial Completion. For purposes of the immediately preceding sentence, any building or structure and the Improvements related thereto or contained therein shall be deemed to be substantially completed when such building or structure and its related Improvements, taken as a whole, are substantially completed.

9.2 Additional Insurance. Tenant, at its sole cost and expense, shall throughout the entire Term procure and maintain:

(a) Liability Insurance. Liability insurance against claims for bodily injury, death or property damage occurring upon, in or about the Insured Property, including the public areas adjacent thereto, including, in a form no less than a commercial general liability policy, explosion, collapse and underground coverage, such insurance to afford immediate protection at the Effective Date for not less than \$1,000,000 per occurrence/aggregate and \$1,000,000 complete operations per occurrence/aggregate. Such insurance shall, among other things, provide broad form contractual liability coverage (including without limitation indemnification or hold harmless obligations of Tenant under this Lease) and personal injury (including without limitation coverage for assault and battery not committed by or at the direction of the insured). Such insurance for the Insured Property shall also provide so-called "cross -liability" coverage for all of the insureds in respect of the employees of each insured. Landlord shall be named an additional insured under such policy.

9.3 Builder's Risk Insurance. During the construction of any Improvements the insurance required by Section 9.1 shall, as to such Improvements which are part of the Insured Property, be in the form commonly known as "Builder's Risk" on an "all risk" basis including without limitation coverage against fire, lightning, wind damage, hail and collapse and coverage under the so-called "installation floater". The policy shall be secured and maintained by Tenant in a form and amount as may from time to time be determined by Tenant. Coverage shall include all materials, supplies and equipment that are intended for specific installation in the Insured Property while such materials, supplies and equipment are located in or on the Insured Property, in transit and while temporarily located away from the Insured Property for the purpose of repair, adjustment or storage at the risk of one of the insured parties.

9.4 Named Insureds and Insurance Trustee. All policies of insurance required

under Section 9.2 to be furnished under this Lease shall include as named insureds Landlord, Tenant, any Leasehold Mortgagee, Tenant's managers, and their respective officers, directors, trustees, partners, employees and agents, as their respective interests may appear. All policies of insurance required under Sections 9.1 and 9.3 to be furnished under this Lease shall include as named insureds Tenant, any Leasehold Mortgagee, Tenant's general partners, and their respective officers, directors, trustees, partners, employees and agents, as their respective interests may appear, and Landlord as an additional insured as its interest may appear. All such policies of insurance shall provide that the loss, if any, shall be payable to the Insurance Trustee, provided that payments may be made directly to the third-party claimants under liability policies. Promptly upon the Insurance Trustee's receipt of any payments under any such policy, the Insurance Trustee shall (a) reimburse Landlord, Tenant, any Leasehold Mortgagee and the Insurance Trustee for their reasonable expenses incurred in the collection of the insurance proceeds and (b) pay to Landlord, Tenant and any Leasehold Mortgagee their respective shares of the proceeds paid under any such policy.

9.5 Insurance in General (a) Each policy of insurance required under this Lease shall include provisions that the holder of such policy shall not cancel or terminate such policy, or cause such policy to expire, due to non-renewal by Tenant, and that coverages under such policy shall not be materially reduced, unless at least 7 days notice of such proposed expiration or reduction has been provided to all the insureds named in such policy by such holder.

(b) To the extent allowed by Tenant's Lenders, all proceeds of such policies shall be used for the restoration or repair of the Insured Property.

(c) Each policy of insurance required under this Lease shall include a provision for a waiver of subrogation in favor of Landlord, Tenant and all other insureds.

9.6 Copies to Landlord Upon the execution and delivery of this Lease and thereafter not less than ten days prior to the expiration date of any insurance policy delivered pursuant to this Article, Tenant shall deliver to Landlord certified copies (or certified extracts approved by Landlord) of to be furnished hereunder all policies of insurance required. Pending issuance of such policies, Tenant may deliver to Landlord a commitment evidencing the coverages required under this Lease, provided that Tenant shall replace such commitment with certified copies (or extracts, as permitted herein) prior to the expiration date of such commitment.

9.7 Adjustment of Loss Any loss under any policy of insurance required to be furnished under this Lease shall be adjusted solely by Tenant.

9.8 Unearned Premiums The unearned premiums on all insurance policies in force at the end of the Term which Landlord desires to keep in effect shall be reimbursed by Landlord to Tenant and, upon such reimbursement, Tenant shall transfer to Landlord all of Tenant's interest in such insurance policies, unless a New Lease is entered into by Landlord, in which case Tenant shall transfer to the new lessee under such New Lease all of Tenant's interest in such insurance policies.

9.9 Blanket Insurance. Nothing in this Article shall prevent Tenant from taking out insurance of the kind and in the amounts provided for under this Article under any blanket insurance policy which covers other properties owned or operated by Tenant or its Affiliates as well as the Insured Property, provided that any such policy of insurance (a) shall specify therein, or Tenant shall furnish Landlord with a written statement from the insurers under such policy specifying, the amount of the total insurance allocated to the Insured Property, which amount shall be not less than the amount required by this Article to be carried, and (b) shall not contain any clause which would result in the insured thereunder being required to carry insurance with respect to the Insured Property in an amount equal to a minimum specified percentage of the Full Insurable Value of such Insured Property in order to prevent the named insured therein from becoming a co-insurer of any loss with the insurer under such policy. Tenant shall furnish to Landlord, within 30 days after the filing thereof with any insurance ratemaking body, copies of the schedule or make-up of all property covered by any such policy of blanket insurance.

9.10 Primary and Excess Coverages. Limits of liability for insurance required hereunder may be provided by primary insurance or a combination of both primary and excess insurance coverages.

9.11 Insurance Non-Contributory. Neither Tenant nor Landlord shall carry separate insurance, concurrent in form and contributing, in the event of loss, for any insurance required under the provisions of this Article unless, in conformity with the requirements of this Article, all the named insureds listed in Section 9.4 are included therein as the named insureds. Tenant and Landlord shall each promptly notify of and deliver to the other each such separate insurance policy.

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## ARTICLE 10: DAMAGE OR DESTRUCTION

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10.1 Damage. If, during the Term, there occurs any material or substantial damage to or destruction of the Premises or any part thereof resulting from any cause whatsoever (except for any damage or destruction caused by Landlord, its invitees or permittees), Tenant shall give prompt notice thereof to Landlord and the Mortgagee, and Tenant shall take such action as is reasonably necessary to assure that neither the Premises nor the Improvements constitutes a nuisance or otherwise presents a health or safety hazard, such work to be accomplished at Tenant's sole cost and expense. The foregoing obligation shall not be contingent upon the availability of any Insurance Proceeds; however, Tenant shall be reimbursed out of the Insurance Proceeds for such work to the extent available.

10.2 Cancellation. Tenant shall have the right, under any circumstance that would excuse the obligation of Tenant to restore the Premises, to terminate this Lease, by notifying Landlord within sixty (60) days after such date of damage or destruction. If the Premises shall be damaged so that Tenant reasonably determines that the cost would make restoration thereof unfeasible, notwithstanding the availability of Insurance Proceeds therefor, Tenant may terminate this Lease within sixty (60) days after such damage. Within 360 days after such termination, Tenant shall raze the then existing Improvements on the Land and clear the Land of debris and rubble.

10.3 Restoration. If this Lease is not terminated as provided in Section 10.2 above, Tenant shall, subject to the terms of any Permitted Mortgage, proceed with the repair or restoration of the damaged Premises within ninety (90) days following such damage or destruction or, if greater than eighty percent (80%) of the estimated cost of such restoration is covered by insurance, then such later date as the Insurance Proceeds are available therefor, and once commenced such restoration shall be diligently prosecuted to completion. Landlord agrees to make available to Tenant any Insurance Proceeds (subject to the rights of any Mortgagee) payable to Landlord attributable and to be used for the restoration and repair of the Premises as herein provided. Landlord shall have no liability to Tenant, and Tenant shall not be entitled to terminate this Lease by virtue of any delays in completion of repairs and restoration, except to the extent caused by Landlord.

10.4 Insurance Proceeds. All Insurance Proceeds shall be collected, held and disbursed in accordance with the terms of the applicable Permitted Mortgage. All Insurance Proceeds payable as a result of any damage or destruction which are to be used by Tenant for such repairs and restoration shall be payable to Tenant and used by Tenant to the extent necessary for payment of the cost of repairs and restoration required hereby. Any unused proceeds may be retained by Tenant (subject to the requirements of the applicable Permitted Mortgage).

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#### ARTICLE 11: EMINENT DOMAIN

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11.1 Substantial Taking. If forty percent (40%) or more of the Premises shall be taken for a public or quasi-public use by the exercise of the power of eminent domain or by purchase under threat of condemnation by any governmental agency, this Lease shall terminate in its entirety on the date the condemning authority actually consummates such taking of the Premises, and the Rent required to be paid by Tenant hereunder shall be appropriately prorated and paid to such date of taking or reduced as provided hereinbelow. In the event of any such taking, Landlord and Tenant shall together make one claim for an award for their combined interests in the Premises including an award for severance damages if less than the whole shall be so taken. The Condemnation Proceeds shall be distributed to Tenant (subject to the rights of the applicable Mortgagee under its Permitted Mortgage) to the extent that it is attributable to Tenant's Estate, or Tenant's personal property or the Improvements (or that of its invitees, agents or Subtenants) and to Landlord to the extent that it is attributable to the Landlord's Estate.

11.2 Partial Taking. If less than forty percent (40%) of the Premises shall be taken for any public or quasi-public use under the power of eminent domain or by purchase under threat of condemnation by any governmental agency, or if any appurtenances of the Premises or any vaults or areas outside the boundaries of the Premises or rights in, under or above the streets adjoining the Premises or the rights and benefits of light, air or access from or to such streets, shall be so taken, or the grade of any such streets shall be changed, in any such case in a manner that the remaining portion of the Premises can be adapted and economically operated for the purposes and in substantially the same manner as it was operated prior thereto in Tenant's good faith business judgment, Tenant shall give prompt notice thereof to Landlord, this Lease shall continue in full force and effect and Base Rent shall be equitably abated. Tenant shall proceed, with reasonable diligence, to perform any necessary repairs and to restore the Premises to an

economically viable unit in strict accordance with all Legal Requirements and the requirements of Article 7 above, and as nearly as possible to the condition the Premises was in immediately prior to such taking. The Condemnation Proceeds shall be paid to Tenant (subject to the rights of any Mortgagee) to the extent that it is attributable to Tenant's Estate, or Tenant's personal property or the Improvements (or that of its invitees, agents or Subtenants) and to Landlord to the extent that it is attributable to the Landlord's Estate.

11.3 Temporary Taking. If the temporary use (but not leasehold title) of the whole or any part of the Premises shall be taken as aforesaid for less than ten (10) days in any calendar year, this Lease shall not be affected in any way and Tenant shall continue to pay all Rent due hereunder. All Condemnation Proceeds as a result of such temporary use shall be paid to Tenant.

11.4 Proceedings. In any condemnation proceeding affecting the Premises which may affect Landlord's Estate and Tenant's Estate, both parties shall have the right to appear in and defend against such action as they deem proper in accordance with their own interests. To the extent possible, the parties shall cooperate to maximize the Condemnation Proceeds payable by reason of the condemnation. Issues between Landlord and Tenant required to be resolved pursuant to this Article shall be joined in any such condemnation proceeding to the extent permissible under then applicable procedural rules of such court of law or equity for the purpose of avoiding multiplicity of actions and minimizing the expenses of the parties.

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## ARTICLE 12: DEFAULT

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12.1 Events of Default. A breach of this Lease by Tenant shall exist if any of the following events (individually an "Event of Default" and collectively "Events of Default") shall occur:

(a) Tenant shall have failed to pay the Rent within fifteen (15) days of when due and such failure shall not have been cured within ten (10) days after receipt of written notice from Landlord respecting such overdue Rent payment; or

(b) Tenant shall have failed to pay any other charge, or any obligation of Tenant requiring the payment of money under the terms of this Lease (other than the payment of Rent) within thirty (30) days of when due and such failure shall not have been cured within thirty (30) days after receipt of written notice from Landlord respecting such overdue payment; or

(c) Tenant shall have failed to perform any term, covenant, or condition of this Lease to be performed by Tenant, except those requiring the payment of money, and Tenant shall have failed to cure same within thirty (30) days after written notice from Landlord, delivered in accordance with the provisions of this Lease, where such failure could reasonably be cured within said thirty (30) day period (subject to the occurrence of a Force Majeure Event); provided, however, that where such failure could not reasonably be cured within said thirty (30) day period, that Tenant shall not be in default unless it has failed to promptly commence and thereafter be continuing to make diligent and reasonable efforts to cure such failure as soon as practicable and

in no event later than one hundred eighty (180) days (subject to extension based on the occurrence of a Force Majeure Event as provided in Section 22.3).

(d) Abandonment of the Premises, Improvements or of the leasehold estate, except in accordance with Article 13 hereof; or

(e) The subjection of any right or interest of Tenant under this Lease to attachment, execution, or other levy, or to seizure under legal process, if not released or appropriately bonded within ninety (90) days after receipt of written notice by Landlord; or

(f) The appointment of a receiver to take possession of the Premises and/or Improvements or of Tenant's Estate or of Tenant's operations for any reason if not discharged within ninety (90) days of such appointment, including but not limited to, assignment for the benefit of creditors or voluntary or involuntary bankruptcy proceedings, but not including receivership (i) pursuant to administration of the estate of any deceased or incompetent Tenant or of any deceased or incompetent individual partner of Tenant, or (ii) pursuant to a Permitted Mortgage, or (iii) instituted by Landlord, the event of default being not the appointment of a receiver at Landlord's instance but the event justifying the receivership, if any; or

(g) An assignment by Tenant for the benefit of creditors or the filing of a voluntary or involuntary petition by or against Tenant under any law for the purpose of adjudicating Tenant as bankrupt; or for extending time for payment, adjustment or satisfaction of Tenant's liabilities to creditors generally; or for reorganization, dissolution, or arrangement on account of or to prevent bankruptcy or insolvency; unless the assignment or proceeding, and all consequent orders, adjudications, custodies, and supervisions are dismissed, vacated, or otherwise permanently stayed or terminated within ninety (90) days after the assignment, filing, or other initial event.

12.2 Notice to Certain Persons. Landlord shall, before pursuing any remedy, give notice of any Event of Default to Tenant, to all Mortgagees whose names and mailing addresses were previously given to Landlord in the manner provided in this Lease. In addition, Landlord shall use its reasonable good faith efforts to give such notice to all Subtenants who have requested the same. Each notice of an Event of Default shall specify the Event of Default and shall describe any damage resulting from any such act.

12.3 Landlord's Remedies. If any Event of Default by Tenant shall continue uncured, following notice of default as required by this Lease, for the period applicable to the default under the applicable provision of this Lease, subject to the rights of any Mortgagee under Article 5 hereof, Landlord shall have the following remedy in addition to all other rights and remedies provided by law or equity, to which Landlord may resort cumulatively or in the alternative:

(a) Termination. If Landlord elects to terminate this Lease, then it shall give Tenant written notice of such termination and all of Tenant's rights in the Premises and in the Improvements shall terminate upon its receipt of such notice. Promptly after notice of termination, Tenant shall surrender and vacate the Premises and the Improvements in broom-

clean condition, and Landlord may reenter and take possession of the Premises and the Improvements and eject all parties in possession or eject some and not others or eject none; provided that no Subtenant provided with a Nondisturbance Agreement shall be ejected and provided Landlord shall not eject a Mortgagee in possession that is then in compliance with the provisions of this Lease. Termination shall not relieve Tenant from the payment of any sums due to Landlord hereunder plus interest thereon from the date due at the Default Rate, or from any claim for damages previously accrued or then accruing against Tenant up to the date of termination.

12.4 Cumulative Remedies. The remedies given to Landlord herein shall not be exclusive but shall be cumulative with and in addition to all remedies now or hereafter allowed by law and elsewhere provided in this Lease.

12.5 Waiver of Breach. No waiver by a party of any default by the other shall constitute a waiver of any other breach or default by the other, whether of the same or any other covenant or condition. No waiver, benefit, privilege, or service voluntarily given or performed by a party shall give the other any contractual right by custom, estoppel, or otherwise.

12.6 Tenant Remedies. In the event Landlord shall neglect or fail to perform or observe any of the covenants, provisions or conditions contained in this Lease on its part to be performed or observed within thirty (30) days after written notice of default, then in that event Landlord shall be liable to Tenant for any and all actual damages sustained by Tenant as a result of Landlord's breach. In addition to and together with any monetary or other damages or remedies Tenant may receive at law or equity, Tenant may terminate this Lease if Landlord's breach of this Lease persists past such thirty (30) day period and Landlord is not actively and diligently engaged in curing the same (which cure shall be completed within a reasonable period of time).

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### ARTICLE 13: SURRENDER OF THE PREMISES

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On the Lease Expiration Date or earlier termination of this Lease pursuant to the provisions hereof, Tenant shall quit and surrender the Premises to Landlord without delay, and in reasonable good order, condition and repair, ordinary wear and tear (and damage and destruction or condemnation if this Lease is terminated pursuant to either Article 10 or 11) excepted. Such surrender of the Premises shall be accomplished without the necessity for any payment therefor by Landlord. Upon such event, title to the Improvements shall automatically vest in Landlord without the execution of any further instrument; provided, however, Tenant covenants and agrees, upon either such event, to execute (at no cost or expense to Tenant) such appropriate documentation as may be reasonably requested by Landlord to transfer title to the Improvements to Landlord. Notwithstanding anything to the contrary contained in Article 14 below, no such surrender shall cause or be deemed to cause a merger of Landlord's Estate and Tenant's Estate, unless Landlord, and any Mortgagee holding a Permitted Mortgage, the lien of which was not reconveyed upon such surrender, expressly so agree in writing.



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## ARTICLE 14: PERMITTED SUBLEASES

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14.1 Tenant's Right to Sublease. Tenant may sub-ground lease or sub-space lease portions of the Premises during the Term of this Lease pursuant to Subleases with Subtenants who will occupy all or any portion of the Premises for the conduct of business consistent with the uses permitted herein, subject to the requirements set forth in this Article 14.

14.2 Required Sublease Terms. Each Sublease shall contain the following terms and conditions:

(a) The Sublease shall state that it is subject and subordinate to this Lease and to any extension, modifications or amendments of, this Lease, unless Landlord specifically requires that such Sublease be prior and superior to this Lease;

(b) That in the event of the cancellation or termination of this Lease prior to the Lease Expiration Date, the Subtenant under such Sublease shall make full and complete attornment to Landlord for the balance of the term of such Sublease with the same force and effect as though said Sublease were originally made directly from Landlord to the Subtenant; provided that such Subtenant has received a non-disturbance agreement from Landlord, as provided below.

14.3 Non-Disturbance Agreements. Landlord shall issue a commercially reasonable subordination, non-disturbance, and attornment agreement (each, a "**Non-Disturbance Agreement**"), to each Subtenant requesting same, which Non-Disturbance Agreement shall require such Subtenant to acknowledge in writing to the effect that this Lease is prior to and paramount to the Sublease, and providing that Landlord shall recognize the Sublease and not disturb the Subtenant's possession thereunder so long as Subtenant is not in default under its Sublease (subject to the following sentence) and agrees to attorn to Landlord for the balance of the term of such Sublease with the same force and effect as though said Sublease were originally made directly from Landlord to the Subtenant. Any such Non-Disturbance Agreement may condition the Subtenant's right to non-disturbance on Landlord's continued receipt of Rent in the amount provided herein. In addition, such Non-Disturbance Agreement shall not prohibit the right of the Landlord to (or to require Tenant to) demolish Improvements on the Property other than (i) the premises under Sublease to which such Non-Disturbance Agreement relates and (ii) means of reasonable access thereto.

14.4 Obligations under Lease. Landlord acknowledges and agrees that Tenant may assign any obligation or obligations under this Lease to any Subtenants without Landlord's prior consent; provided, that Tenant shall not be released from any such obligations in the event such Subtenant fails to perform same.

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## ARTICLE 15: TRANSFER

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Landlord may not assign, convey and transfer its rights, interests and titles, or delegate any and all of its duties under this Lease. Tenant shall not transfer this Lease or its interest herein or in the Land, either directly or indirectly, by operation of law or otherwise,

without Landlord's prior written consent, which Landlord will not unreasonably refuse. A transfer will not affect tenant's liability under this lease agreement.

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## ARTICLE 16: TENANT'S OPTION TO PURCHASE PREMISES

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Landlord hereby grants to Tenant an option exercisable in Tenant's sole and absolute discretion to purchase Landlord's Estate ("**Purchase Option**"), on the following terms and conditions:

16.1 Exercise Period. The Purchase Option may be exercised during the period commencing on the first day of the sixty-first (61<sup>st</sup>) month of the Term and ending on the Lease Expiration Date..

16.2 Condition Precedent. It shall be a condition precedent to Tenant's right to exercise the Purchase Option that (i) this Lease shall, at the time of delivery of Tenant's exercise notice, be in full force and effect, and (ii) there shall not then exist any Event of Default by Tenant as of the date of delivery of Tenant's exercise notice that Tenant has not begun diligently to cure in accordance herewith as of such date

16.3 Exercise. Tenant shall exercise its Purchase Option by giving written notice thereof ("**Purchase Option Notice**") to Landlord within the option exercise period described in Section 16.1 above. The "**Option Purchase Price**" (herein so called), shall be as set forth in Section 16.4 below.

16.4 Option Purchase Price and Terms.

(a) Option Purchase Price. The purchase price shall be \$750,000.00.

(b) Purchase Terms. The Option Purchase Price shall be paid in cash at Purchase Closing.

16.5 Closing of Option. Following the exercise by Tenant of the Purchase Option, the "**Purchase Closing**" (herein so called) shall occur within sixty (60) days of the date on which Landlord receives Tenant's Purchase Option Notice. Upon the Purchase Closing, (a) the Purchase Option Price for Landlord's Estate shall be paid to the Landlord or its successor as described in Section 16.4, (b) Landlord's Estate shall be conveyed to Tenant by grant deed, bill of sale, general assignment and other appropriate transfer instruments, all in form reasonably acceptable to both Tenant and Landlord; (c) Landlord's Estate shall be subject to only the matters described in Section 1.1 and other matters reasonably approved by Tenant; (d) Landlord's Estate shall be conveyed using a general warranty deed; (e) Tenant and Landlord shall each be responsible for their own attorneys' fees; (f) Landlord shall provide at its sole expense a standard form Owner's Title Insurance Policy issued by First American Title Insurance Company, and (g) Tenant shall be responsible for all property taxes and cost of closing.

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## ARTICLE 17: NOTICES

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17.1 Any notice, approval, demand or other communication required or desired to be given pursuant to this Lease shall be in writing and shall be personally served (including by means of professional messenger service or air express service using receipts) or in lieu of personal service, deposited in the United States mail, postage prepaid, certified or registered mail, return receipt requested, and unless sooner received, each notice shall be deemed received seventy-two (72) hours after same shall have been so deposited in the United States mail addressed as set forth below:

If to Landlord: Brown Family Holdings, L.C.  
c/o Rand D. Brown  
1434 E. 9400 S., Ste. 204  
Sandy, UT 84093

If to Tenant: Holladay Towne Center, L.L.C.  
515 West Pickett Cir., Suite 400  
Salt Lake City, UT 84115  
Attention: Tom Hulbert

Either Landlord or Tenant may change its respective address by giving written notice to the other in accordance with the provisions of this Section.

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## ARTICLE 18: ESTOPPEL CERTIFICATES

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18.1 Estoppel Certificates. Tenant agrees within thirty (30) days following request by Landlord or the holder of any deed of trust, mortgage or other encumbrance on Landlord's Estate to execute and deliver an Estoppel Certificate to whichever of them has requested the same. Landlord agrees promptly following request by Tenant or a Mortgagee to execute and deliver an Estoppel Certificate to whichever of them has requested the same. The term "Estoppel Certificate" shall mean an estoppel certificate, certifying (a) that this Lease is unmodified and in full force and effect, or, if modified, stating the nature of such modification and certifying that this Lease, as so modified, is in full force and effect and the date to which the Rent and other charges are paid in advance, if any, (b) that there are no uncured defaults on the part of Landlord and Tenant hereunder, or if there exist any uncured defaults on the part of Landlord and/or Tenant hereunder stating the nature of such uncured defaults on the part of Landlord and/or Tenant, and (c) the correctness of such other information respecting the status of this Lease as may be reasonably required by the party hereto requesting execution of such Estoppel Certificate. A party's failure to so execute and deliver an Estoppel Certificate following written request as required above, shall be conclusive upon such party that as of the date of said request for the same (a) that this Lease is in full force and effect, without modification except as may be represented by the party hereto requesting execution of such Estoppel Certificate, (b) that there are no uncured Events of Default in Landlord's or Tenant's obligations under this Lease except as may be represented by the party hereto requesting execution of such Estoppel Certificate, and (c) that no Rent has been paid in advance except as may be represented by the party hereto requesting execution of such Estoppel Certificate.

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**ARTICLE 19: ENFORCEMENT AND ATTORNEYS' FEES**

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19.1 In any proceeding or controversy associated with or arising out of this Lease or a claimed or actual breach hereof, the prevailing party shall be entitled to recover from the other party as a part of the prevailing party's costs, such party's actual and reasonable attorneys' fees and court costs.

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**ARTICLE 20: NO MERGER**

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20.1 No Merger; Subleases. The voluntary or other surrender of this Lease by Tenant, or a mutual cancellation thereof, shall not work a merger and shall, at the option of Landlord, operate as an assignment to Landlord of any or all Subleases of Subtenants.

20.2 Permitted Mortgages. Landlord agrees that neither the surrender, cancellation, expiration or termination of this Lease, nor Landlord's acquisition of Tenant's Estate by any means contemplated hereunder, shall, either by the election of Landlord or by operation of law, work a merger of Landlord's Estate and Tenant's Estate unless and until all indebtedness under any Permitted Mortgage has been repaid pursuant to the terms thereof. The lien of such Permitted Mortgage shall remain unaffected and in full force and effect upon and following the occurrence of any of the events described in the preceding sentence, and Landlord shall be subject to, and bound by, the provisions of such Permitted Mortgage as the successor tenant hereunder following the occurrence of any of such events.

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**ARTICLE 21: QUIET ENJOYMENT - LANDLORD'S RIGHT TO INSPECT**

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21.1 Landlord covenants that, provided no Event of Default has occurred under the terms of the Lease and has continued beyond all applicable cure periods set forth in this Lease or any other written agreement between Landlord and any Mortgagee, Tenant shall have quiet and peaceful possession of the Premises as against Landlord and any person claiming the same by, through or under Landlord. Landlord reserves the right to enter the Premises and the Improvements during normal business hours upon reasonable prior written notice for purposes of conducting normal and periodic inspections of the Premises, provided such inspections shall be subject to the terms of, and shall not interfere with, the rights of any Subtenant under any Sublease.

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**ARTICLE 22: GENERAL**

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22.1 Captions. The captions used in this Lease are for the purpose of convenience only and shall not be construed to limit or extend the meaning of any part of this Lease.

22.2 Counterparts. Any executed copy of this Lease shall be deemed an original for all purposes. This Lease may be executed in one or more counterparts, each of which shall be an original, and all of which together shall constitute a single instrument.

22.3 Time of Essence. Time is of the essence for the performance of each covenant and term of this Lease. Notwithstanding the foregoing, any non-monetary obligation of Tenant or Landlord which cannot be satisfied due to war, strikes, acts of God or other events which are beyond the reasonable control of Tenant or Landlord, as the case may be (each, a "Force Majeure Event"), shall be excused until the cessation of such Force Majeure Event. In addition, Tenant's Rent obligations hereunder, and all dates for the performance of any of Tenant's other obligations hereunder, shall be automatically extended on a day for day basis in the event of any act of Landlord in violation of this Lease which actually delays Tenant's performance, as hereinabove set forth in this Lease, provided that (a) Tenant has previously notified Landlord of such fact in writing and Landlord has not cured the cause of such delay within three (3) days of the receipt of said notice and (b) in no event shall any Force Majeure Event excuse any obligation for longer than a 24 month period from the occurrence of such Force Majeure Event.

22.4 Severability. If any one or more of the provisions contained herein shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Lease, but this Lease shall be construed as if such invalid, illegal or unenforceable provision had not been contained herein.

22.5 Interpretation. This Lease shall be construed and enforced in accordance with the laws of the State of Utah. The language in all parts of this Lease shall in all cases be construed as a whole according to its fair meaning, and not strictly for or against either Landlord or Tenant. When the context of this Lease requires, the neuter gender includes the masculine, the feminine, a partnership or corporation or joint venture or other entity, and the singular includes the plural.

22.6 Successors and Assigns. The covenants and agreements contained in this Lease shall be binding upon and shall inure to the benefit of the parties hereto and their respective permitted heirs, successors, and assigns (to the extent this Lease is assignable).

22.7 Waivers. The waiver of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained.

22.8 Remedies. All remedies herein conferred shall be deemed cumulative and no one remedy shall be exclusive of any other remedy herein conferred or created by law.

22.9 Good Faith. Except where a party hereto is specifically permitted to act in its sole and absolute discretion, each party hereto agrees to act reasonably and in good faith with respect to the performance and fulfillment of the terms of each and every covenant and condition contained in this Lease.

22.10 No Partnership. The parties hereto agree that nothing contained in this Lease shall be deemed or construed as creating a partnership, joint venture, or association between Landlord and Tenant, or cause either party to be responsible in any way for the debts or

obligations of the other party, and neither the method of computing Rent nor any other provision contained in this Lease nor any acts of the parties hereto shall be deemed to create any relationship between Landlord and Tenant other than the relationship of landlord and tenant

22.11 Integration. This Lease, and the Exhibits and addenda, if any, attached hereto, constitute the entire agreement between the parties, and there are no agreements or representations between the parties except as expressed herein. The recitals set forth above are incorporated herein and made a part of this Lease. All prior negotiations and agreements between Landlord and Tenant with respect to the subject matter hereof are superseded by this Lease. Except as otherwise provided herein, no subsequent change or addition to this Lease shall be binding unless in writing and signed by the parties hereto.

22.12 Commissions. Landlord and Tenant each represent and warrant to the other that they have employed no broker, finder or other person in connection with the transactions contemplated under this Lease which might result in the other party being held liable for all or any portion of a commission hereunder. Landlord and Tenant each hereby agree to indemnify and hold the other free and harmless from and against all claims and liability arising by reason of the incorrectness of the representations and warranties made by such party in this Section, including, without limitation, reasonable attorneys' fees and litigation costs.

22.13 Survival. Notwithstanding anything to the contrary contained in this Lease, the provisions (including, without limitation, covenants, agreements, representations, warranties, obligations, and liabilities described therein) of this Lease which from their sense and context are intended to survive the expiration or earlier termination of this Lease (whether or not such provision expressly provides as such) shall survive such expiration or earlier termination of this Lease and continue to be binding upon the applicable party.


[SIGNATURES ON NEXT PAGE]

LANDLORD AND TENANT hereby enter into and execute this Lease as of the date first set forth above.

LANDLORD

BROWN FAMILY HOLDING, L.C.  
a Utah limited liability company

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

  
Rand Brown  
It's Manager

TENANT

HOLLADAY TOWNE CENTER, L.L.C.,  
a Utah limited liability company

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

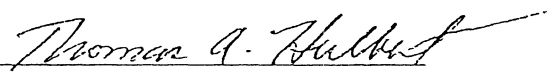
  
Thomas A. Hulbert  
It's Manager

EXHIBIT "A"

LANDLORD PROPERTY

Known as 2240 E. Laney Avenue, Holladay, Salt Lake County, Utah and Legally Described as  
Lot 27 , Peony Gardens; containing .44 acres.



*EXHIBIT "B"*

PERMITTED EXCEPTIONS

- 1 Property Taxes and Assessments accruing for the year 2005 and thereafter. Landlord Warrants that all previous property Taxes for any year prior to the year 2005 tax year have been paid