

2016

**Sa Group Properties, Inc., a Minnesota Corporation, Plaintiff and Appellee, v. Highland Marketplace, l.c., a Utah Limited Liability Company; High Noon, l.c. A Utah Limited Liability Company; Solana Beach Holdings, l.c., a Utah Limited Liability Company, Cr v Main-Main, l.p., a Delaware Limited Liability Partnership; Thomas A. Hulbert, and Individual and Bret B. Fox, and Individual, Defendants and Appellants**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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**SA GROUP PROPERTIES, INC., a  
Minnesota corporation,**

**Plaintiff and Appellee,**

**v.**

**HIGHLAND MARKETPLACE, L.C.,  
a Utah limited liability company;  
HIGH NOON, L.C. a Utah limited  
liability company; SOLANA BEACH  
HOLDINGS, L.C., a Utah limited  
liability company, CR V MAIN-MAIN,  
L.P., a Delaware limited liability  
partnership; THOMAS A. HULBERT,  
an individual and BRET B. FOX, an  
individual,**

**Defendants and Appellants.**

OPENING BRIEF OF APPELLANTS  
HIGHLAND MARKETPLACE, L.C., *ET*  
*AL.*

**Case No. 20151046-CA**

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Appeal from the Fourth Judicial District Court, County of Utah, State of Utah  
Honorable James R. Taylor, Case No. 120401312

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Thomas A. Hulbert; and Bret B. Fox

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UTAH APPELLATE COURTS

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## **JURISDICTIONAL STATEMENT**

The Utah Supreme Court has jurisdiction pursuant to Utah Code section 78A-3-102(3)(j). *See* Utah Code Ann. § 78A-3-102(3)(j). However, the Utah Supreme Court has transferred this matter to the Utah Court of Appeals pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure.

## **STATEMENT OF ISSUES, PRESERVATION CITATIONS, AND REVIEW STANDARDS**

**Issue No. 1:** Whether the district court erred in denying Defendants' Motion for Leave to Amend ("Motion to Amend"), on the grounds that the proposed amendment was untimely and not justified, when the case had only been pending for approximately eighteen (18) months but ten (10) months of the delay was caused by the non-movant's delay in producing documents, the non-movant would not experience undue prejudice including because not trial was scheduled, and the amendment sought leave to add meritorious claims.

Standard of Review: "The standard of review of a denial to amend pleadings is abuse of discretion." *See Kasco Servs. Corp. v. Benson*, 831 P.2d 86, 92 (Utah 1992). The Issue was preserved. [R.1284-1378, 1673-1681].

**Issue No. 2:** Whether in this deficiency action case under Utah Code Ann. section 57-1-32, the district court erred in concluding that the fair market value of the subject property as of the foreclosure sale date of May 22, 2012, was no greater than \$10,568,000.00, by finding that Plaintiff and Appellee SA Group Properties, Inc. ("SA Group" or "Appellee") met its burden of proof and by entering findings of fact that were



unsupported, contradicted by other of the trial court's findings, or contrary to the evidence offered by SA Group's own expert witnesses (which experts also contradicted each other as to the proper valuation methodology).

Standard of Review: Utah's appellate courts "review the trial court's findings of fact for clear error, reversing only where the finding is against the clear weight of the evidence, or if [the court] otherwise reach[es] a firm conviction that a mistake has been made." *Covey v. Covey*, 2003 UT App 380, ¶ 17, 80 P.3d 553. "However, that deference is not absolute: [w]hether the findings were made by a judge or by a jury is an important distinction because an appellate court must indulge findings of fact made by a jury that support the verdict, while no such indulgence is required of findings made by a judge." *In re S.Y.T.*, 2011 UT App 407, ¶ 36, 267 P.3d 930 (internal alterations and quotations omitted). The issue was preserved. [R.3740-3764, 4168-4170].

### **DETERMINATIVE STATUTES AND RULES**

Whether an amended pleading should be allowed is determined by Rule 15(a) of the Utah Rules of Civil Procedure.

A deficiency action is determined based on Utah Code Ann. section 57-1-32, which requires the determination of the fair market value of the subject real property.

### **STATEMENT OF CASE**

#### **I. NATURE OF THE CASE**

This case involves two issues, the trial court's finding of the fair market value of certain property, and whether Defendants should have been allowed to amend the pleadings to bring a counterclaim based upon the failure of the lender First Community

Bank (“FCB”) to honor certain construction draws.

## **II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW**

On August 20, 2012, SA Group, a company affiliated with US Bank, filed its Complaint against Defendants, seeking money damages based on an alleged deficiency. [R.1-54].

A two day bench trial took place on May 26-27, 2015. On August 12, 2015, the final day of the bench trial took place. On August 24, 2015, the Trial Court issued its Findings and Order. [R. 3740-3764]. The Trial Court entered the Judgment Against Defendants on December 2, 2015. [R.4150-4152].

Appellants filed their Notice of Appeal on December 10, 2015. [R. 4168-4170].

### **STATEMENT OF THE FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW**

Pursuant to Rule 24(a)(7), Appellants set forth their Statement of Facts, including where appropriate under Rule 24(a)(9), a marshalling of all record evidence that supports any challenged finding.

#### **I. THE LOAN**

This case arises out of a September 5, 2007 loan made by FCB to Defendants and Appellants Highland Marketplace, L.C. (“Highland”), High Noon, L.C. (“High Noon”), and Solana Beach Holdings, L.C. (“Solana”) (collectively the “Highland Entities”), in relation to a \$28,000,000 line of credit (the “Loan”) secured by real property located in Highland, Utah (the “Highland Marketplace” or “Property”). [R. 10-18]. In connection with the Loan, the Highland Entities executed a Promissory Note, dated September 5,

2007, in favor of First Community and in the principal amount of \$28,000,000 (the “Note”) and Appellants Thomas A. Hulbert (“Mr. Hulbert”) and Bret B. Fox (“Mr. Fox”) also entered into commercial guaranties with FCB. [R. 20-22, 24-26, 28-30].

The Highland Entities used the Loan to develop the project, including by constructing a number of buildings, obtaining multiple leases with local and regional tenants, and a build to suit lease from the Walgreen Co. (“Walgreen’s”), a \$34.5 billion market cap company as of 2012. [R.3743-44, R.3673]. The Property is located at the northwest corner of the intersection of the Alpine Highway and Timpanogos Highway in Highland, Utah. [R. 3743]. Its location has good visibility and good linkage to I-15 on the Timpanogos Highway and the Alpine Highway runs into American Fork. [R.3743-3744].

The Highland Marketplace was fully entitled for retail and commercial use as of May 2012 and contained the following horizontal improvements: utilities, water, sewer, gas, power, curbing and gutters, sidewalks, and roadways. [R.3744]. The Highland Marketplace also had various vertical improvements, including completed buildings on Lots 3, 7, 8, 9, & 10. [R.3744]. The buildings in the Highland Marketplace are good quality buildings, were new construction built between 2008 and 2010, are architecturally pleasing, and typical of what is built today for good quality retail and office type buildings. [R.3744, 4187 at 18.17]. The construction quality of the buildings is good and the condition of the buildings is also good. [R.3744]. By comparison to the 2008-2012 brand new construction in Highland Marketplace, properties used by SA Group’s expert were 20, 30, or even 50 years old. [R.3454-3457, 3530-3536, 3554, 3275-3303].



The Highland Marketplace is uniquely located, as it is at the only commercial intersection in Highland City. [R.3744-3745]. Although there is competition from a Kohler's across the street, and Highland has Sunday closing laws, if someone wants to do business in Highland, they have to be at the Highland Marketplace. [R.3744].

## **II. THE ECONOMIC DOWNTURN, DEFAULT AND TRUSTEE'S SALE**

In 2008 the economic downturn struck. FCB failed to fund certain draw requests which FCB had previously approved.<sup>1</sup> As a result of FCB's failure to fund the draw requests, mechanic's liens were filed against the property, the second-position lender declared a default, Defendants were unable to complete a workout agreement and make payments on the Loan and – ultimately – the Property was lost. [R.1320-21].

Ultimately FCB failed, the FDIC took over the assets of FCB (including the Loan), and US Bank made a bulk purchase of FCB's assets. [R.3741-42]. US Bank assigned the Loan to a related company, SA Group. [R.3741-3742].

On May 22, 2012, the Trustee of the Highland Marketplace sold the Property to a third party at a foreclosure sale for \$8,650,000. [R.3742]. At the time of the foreclosure sale, the amount owing to SA Group by Defendants under the Loan Documents was \$14,685,370.37. [R.3742-3743].

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<sup>1</sup> These facts are taken from the Amended Answer, Counterclaim and Jury Demand submitted in conjunction with Defendants Motion to Amend, [R.1284, 1314-20], which are taken as true for purposes of the motion to amend. *See Arnett v. Arnett*, No. 2:13-CV-01121-DN, 2014 WL 2573291, at \*1 (D. Utah June 9, 2014); *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 3, 108 P.3d 741. Notably, the trial court never found that these facts were insufficient to state a claim, unsupported, or that the resulting claims would have been futile.

### III. DEFENDANTS' MOTION TO AMEND.

On March 10, 2014, Defendants filed their second<sup>2</sup> Motion for Leave to Amend ("Motion to Amend"), which sought to add three counterclaims against SA Group and related affirmative defenses. [R.1280-1284]. Specifically, Defendants sought to add three claims for breach of contract, breach of the covenant of good faith and fair dealing, and declaratory judgment based on the failure of SA Group's predecessor in interest to fund certain draw requests which FCB had previously approved.<sup>3</sup> [R.1313-1324].

As explained to the trial court – in great detail – the timing was caused by SA Group's delay of ten (10) months, to produce approximately 29,000 pages of documents.

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<sup>2</sup> Defendants filed their first motion to amend on December 23, 2013, but, after taking the deposition of SA Group's 30(b)(6) witness and Darrin Liddell, one of SA Group's experts, and receiving additional productions from SA Group, Defendants determined that they had mistakenly identified the wrong draw requests in their first proposed counterclaim. As a result, Defendants voluntarily withdrew their first motion to amend. [R.1180-1182].

<sup>3</sup> Typically, the Highland Entities would submit the draw requests after work had been performed and receive the requested funds to pay the contractors. However, with Draw Request 23, FCB reorganized the allocation of funds and, although the Highland Entities requested \$402,058.53, FCB only authorized \$376,063.39. [R.1314-1315]. However, after authorizing \$376,063.39, First Community refused to fund the entire amount and instead funded only \$250,211.63. [R.1316]. First Community's failure to fund the entire amount of Draw Request 23 left contractors unpaid, who then filed mechanic's liens against Property, and also forced the use of funds to pay property taxes. [R.1317-1320]. The failure to fund damaged the Highland Entities because it interfered with their ability to negotiate with the second-position lender and prevented the Highland Entities from securing take-out financing in order to save the Property. [R.1320-1321]. This interference caused the Highland Entities to default on the Loan, because they were unable to work out an arrangement with the second-position lender or obtain funding to prevent foreclosure. [R.1320-1321]. Thus, if the Highland Entities had been able to proceed with and prevailed upon these claims, the impact on the case could have been significant.

[R.1287-90<sup>4</sup>]. Almost one year earlier on March 13, 2013, Defendants served their first set of requests for production of documents on SA Group. [R.429-430]. After serving the requests, SA Group began to slowly trickle out its document productions. Between April 9, 2013 and February 20, 2014, SA Group produced over 29,000 pages of documents in nine separate productions. [R.1287-1290].

Although the Motion to Amend was filed after the expiration of fact discovery under the then-existing schedule, [R.899-902], Defendants requested a short extension of fact discovery until June 30, 2014 (“Motion to Extend”), based upon the delays in SA Group’s document production. [R.1185-1188].

On May 20, 2014, the trial court issued its Ruling on Motion for Leave to Amend and Motion to Extend Fact Discovery (“Motion to Amend Ruling”) and denied Defendants’ request to amend and extend fact discovery. [R.1673-1681]. In denying leave to amend, the trial court relied on the timeliness and justification prongs, finding that the Defendants were aware of the bases for the proposed counterclaims “as early as 2010” and that Defendants “acted with unreasonable neglect” when they did not assert their counterclaim in an earlier pleading. [R.1677, 1680].<sup>5</sup> However, the trial court did not find the proposed amendments defective or futile. [R.1673-1681].

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<sup>4</sup> It took four pages just to *summarize* the repeated delays by SA Group in producing documents.

<sup>5</sup> The trial court recognized that SA Group would not suffer undue prejudice if leave to amend was granted. [R.1678-1679]. This was born out, when trial was not scheduled until over a year later.



#### **IV. TRIAL**

On February 25, 2015, the trial court scheduled a two-day bench trial to take place on May 26-27, 2015. [R.3116-3117].

The first day of trial took place on May 26, 2015. [R.3159]. Although trial had been scheduled for three months, one of SA Group's expert witnesses, Kerry Jorgensen ("Jorgensen") indicated with no advance notice (to Defendants, anyway) that he would have to leave at 3:00 p.m. on the then-final day of trial. [R.3186-3187]. Jorgensen did in fact leave the trial early, requiring a third day of trial to be scheduled months later, on August 12, 2015. [R.3653; R.3739].

The final day of trial took place on August 12, 2015. [R.3765].

##### **A. SA GROUPS EXPERT WITNESSES**

SA Group called two expert witnesses, Jorgensen and Darrin Liddell ("Liddell"), to testify on the single, disputed issue at trial: the fair market of the Highland Marketplace. [R.3161].

##### **1. Kerry Jorgensen**

Jorgensen is the principal of Jorgensen Appraisal, Inc. and has a bachelor's degree from the University of Utah in finance with a real estate emphasis. He is also MAI certified and is a Certified General Appraiser in the State of Utah. [R.3187-3188]. Jorgensen has been an appraiser for approximately 36 years. [R.3189].

Jorgensen initially submitted an expert report opining that the fair market value of the Highland Marketplace was \$9,800,000. [R.3761]. However, Jorgensen subsequently changed his opinion of the Highland Marketplace's fair market value to \$10,568,000 after

he discovered SA Group failed to provide him with information regarding an executed Walgreen's lease. [R.3760-3761].

Despite finding that Jorgensen used older shopping centers that were inferior in appearance, the trial court adopted Jorgensen's second valuation of the Highland Marketplace at \$10,568,000, which included the additional value for the Walgreen's lease on Pad D, as the fair market value of the Property. [R.3760-3761].

## **2. Darrin Liddell**

Liddell is the owner of the Integra Realty Resources franchise in Salt Lake City, Utah and has a bachelor's degree in finance and a master's degree in business administration, both of which come from the University of Utah. [R.3338-3340].

Liddell opined that the fair market value of the Highland Marketplace was \$9,240,000. [R.3745]. However, during trial, Liddell admitted and the evidence established that Liddell's valuation was not reliable because he had followed the client's instructions, and thus had not applied his own, independent judgment on how to value the property, and if he had done so the valuation would have been higher (the "Client's Instruction Flaw"). [R.3688-94]. The trial court found additional flaws, including his failure to give value to a signed 'Jack in the Box' Letter of Intent ("JIB LOI"), use of the wrong capitalization rate, failing to conduct a sales comparison approach on income producing properties, and improperly applying a bulk sale discount to the Property. [R.3751-3755]. The trial court also concluded:

70. The Court finds that each of Mr. Liddell's judgments regarding the property were conservatively made resulting in an appraised value that is not credible. [See Trial Transcript, at 299:17-300:12 (Mr. Cook)].

[R.3751 (emphasis added)].

**B. DEFENDANTS' EXPERT WITNESS**

Defendants called Philip Cook ("Cook") as an expert witness to testify regarding the fair market value of the Highland Marketplace. Cook is a commercial real estate appraiser with approximately 35 years of experience and is the principal of J. Philip Cook and Associates, LLC. [R.3755-3756, 3438]. Cook obtained his bachelor's degree in finance from the University of Utah in 1980. Cook completed an MBA in 1982 at the University of Utah. [R.3756].

Cook has taught appraisal classes on Real Estate Appraisal Principles and Uniform Standards of Professional Appraisal Practice for the Appraisal Institute, which promulgates education and standards for appraisers and sponsors the MAI designation. [R.3756]. Cook has served in all the local office positions for the Appraisal Institute, including as the President of the Utah Chapter of the Appraisal Institute. Cook has also served as a regional representative and sat on the National Board of Directors for the Appraisal Institute. [R.3756]. Cook has served as a board member and as Chairman of the Utah State Appraiser Board, which works with the Utah Division of Real Estate to oversee the licensing and professional oversight of appraisers in the State of Utah. [R.3756]. Cook has been qualified as an expert witness on real estate appraisal related issues in both federal and state courts, and has appraised such shopping centers as Provo



Towne Center, University Mall, the Riverwoods development, Fashion Place Mall, the City Creek project in downtown Salt Lake City, the Gateway mall, and numerous other big box, neighborhood, and strip centers. [R.3756].

Cook opined that the fair market value of the Highland Marketplace was \$14,710,000. [R.3757]. Despite Cook's extensive qualifications and experience as an appraiser, his inclusion and analysis of all the relevant leases and letters of intent, the trial court rejected Cook's opinion. [R.3757-3759].

### **SUMMARY OF ARGUMENT**

The trial court abused its discretion when it denied Defendants' Motion to Amend because the Motion to Amend was timely and justified.

Although the trial court found that the Motion to Amend was not timely filed, in reaching this conclusion the trial court improperly ignored the fact that it took SA Group nearly a year to produce over 29,000 pages of documents requested by Defendants. This involved nine separate productions over approximately a one-year period, with the final production coming only eight days before the end of fact discovery. These delays caused the filing of Defendants Motion to Amend after the close of fact discovery. However, at the time the Motion to Amend was filed the case was not yet in the advanced procedural stages. In fact, Defendants also filed a motion to extend the fact discovery deadline by a few months to accommodate for the proposed counterclaim. Additionally, the Motion to Amend was timely because it was not filed years into the case but was instead filed a mere eighteen months into the case, ten (10) months of which were spent waiting for SA Group to comply with its discovery obligations.

The trial court also committed clear error in concluding the fair market value of the Property was no more than \$10,568,000 by making numerous findings of fact that are not only unsupported by the record but are, in many cases, directly contradicted by the testimony of both Defendants' expert witness and SA Group's expert witnesses.

## ARGUMENT

### **I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANTS' MOTION TO AMEND.**

#### **A. LEAVE TO AMEND SHOULD BE FREELY GIVEN**

Although perhaps glossed over because it is so familiar, it is important to note that the general purpose of Rule 15(a) is to enable a party to assert new matters and to allow parties to have their claims fully adjudicated on the merits. *See Timm v. Dewsnap*, 851 P.2d 1178, 1183 (1993); *Cheney v. Rucker*, 14 Utah 2d 205, 211, 381 P.2d 86 (1963). In determining whether to grant or deny a motion for leave to amend, the Utah appellate courts have considered several factors, but in particular whether there was (a) undue delay, (b) prejudice to the opposing party, and (c) whether the amendment is justified. *See Swan Creek Vill. Homeowners Ass'n v. Warne*, 2006 UT 22, ¶ 20, 134 P.3d 1122; *Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 464 (Utah 1983).

The Utah Supreme Court explained the liberal policy of allowing amendments in *Timm*, holding that

rule 15 should be interpreted liberally so as to allow parties to have their claims fully adjudicated: “[The rules of civil procedure] must all be looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute.”

*Id.* at 1183 (emphasis added).

#### **B. THE TRIAL COURT ABUSED ITS DISCRETION, DEPRIVING DEFENDANTS OF MERITORIOUS COUNTERCLAIMS AND DEFENSES TO MILLIONS OF DOLLARS IN CLAIMS**

In this case, the trial court abused its discretion because the Motion to Amend was

timely filed in light of SA Group's untimely document productions, the procedural posture of the case (including no trial date), and the uncontested fact that the amendment was justified (i.e., not futile).<sup>6</sup>

### **1. The Motion to Amend Was Timely Filed**

The trial court abused its discretion when it found that Defendants' Motion to Amend was not timely filed. In denying leave to amend, the trial court identified two bases for finding that the motion was untimely: that Defendants had "knowledge of the failed draw requests and the completion of significant procedural stages in the case." [R.1677].

However, in making these findings, the trial court ignored SA Group's failure to timely produce documents, failed to acknowledge the complicated nature of the issue, and failed to recognize that Defendants were entitled to vet their claims through the documents before alleging a counterclaim. Indeed, such is the responsible course of action, and counsel and client should not be punished for seeking discovery before filing, instead of a "shoot [file] first, ask questions later" approach.

Despite being served with Defendants first set of requests for production of document on March 13, 2013, SA Group took nearly a year to produce more than 29,000 pages of documents, by way of nine separate productions. [R.1192-1195, 1677]. The final production was not until February 20, 2014, only eight days before the close of fact discovery. [R.1195]. In reviewing all this information and in taking the deposition of SA

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<sup>6</sup> The trial court properly found that SA Group would not suffer prejudice. [R.1678-1679].

Group's Rule 30(b)(6) witness, Defendants were expeditious and did all within their power to act timely.

Furthermore, the Motion to Amend was filed less than two years into the litigation process and the case was not yet in the advanced procedural stages of the litigation process. It is well-recognized that "Utah appellate courts have consistently refused the invitation to establish a bright line rule regarding how far into the litigation process a motion to amend must be filed in order to be deemed untimely." *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, ¶ 28, 87 P.3d 734. Instead, motions to amend are deemed untimely in only two circumstances: "when they are filed in the advanced procedural stages of the litigation process, such as after the completion of discovery, on the eve of a scheduled trial date, or after an order of dismissal has already been entered . . . [or] when they were filed several years into the litigation." *Id.* ¶¶ 29-30 (emphasis added).

In this case, neither circumstance was present and thus, it was an abuse of discretion for the trial court to deny Defendants' Motion to Amend.

First, the Motion to Amend was not untimely because it was not filed "several years" into the litigation process. In *Kelly*, this Court compiled a list of cases holding that motions to amend filed between three and twelve years into the litigation process were deemed "untimely." *See Kelly*, 2004 UT App 44, ¶ 30. *But see Swan Creek*, 2006 UT 22, ¶¶ 22-23 (affirming the trial court's decision to grant leave to amend where the motion came three years after the start of litigation and on the eve of trial). In contrast, this case had only been pending for a little over eighteen months, of which ten (10)

months were consumed with SA Group's document production, and no trial date had been set at the time the Motion to Amend was filed.

Second, the trial court's decision to deny leave to amend was an abuse of discretion because the delay in the case up to that point had been caused by SA Group's failure to promptly produce documents. In fact, to illustrate this point, SA Group's final document production came on February 20, 2014, only eight days before the end of fact discovery, and after Defendants had already deposed SA Group's 30(b)(6) witness on the issues relevant to the Motion to Amend. Thus, any delay caused in bringing the Motion to Amend was caused by SA Group.

Finally, the motion was timely because it was not filed in the advanced procedural stages of the litigation process. Although fact discovery had recently expired and expert discovery had already begun, it was only in its initial phases and could have easily been postponed for the four months requested in the motion to extend fact discovery. [R.1195-1200]. Moreover, Defendants concurrently moved for a short extension of fact discovery based on SA Group's failure to timely provide requested documents, which extension would have allowed for more than sufficient time to address the new counterclaim. [R.1185-1279]. Indeed, in light of SA Group's failure to produce relevant documents until the eve of the close of fact discovery, combined with the fact that this case was not tried until almost a year after the Motion to Amend was denied, the trial court's refusal to grant leave to amend – and to grant the short extension of fact discovery – was an abuse of discretion. The trial court could have easily allowed for the requested extension, which would have provided Defendants with the opportunity to have their claims tried on



the merits and not be summarily dismissed on a procedural technicality. *See Richards v. Baum*, 914 P.2d 719, 723 (Utah 1996) (noting that Utah has a “strong policy in [the] rules of civil procedure in favor of deciding cases on their merits rather than on procedural technicalities.”). In light of these facts, the trial court’s finding that the Motion to Amend was not timely was an abuse of discretion.

## **2. The Motion to Amend was Justified**

The trial court abused its discretion in denying Defendants’ Motion to Amend because the motion to amend was not the product of dilatory motive, bad faith<sup>7</sup> or unreasonable neglect. This Court has recognized that

a party can establish justification for the delay in bringing a motion to amend pleadings where the party can demonstrate that the delay was not due to a dilatory motive, a bad faith effort, or unreasonable neglect in terms of pleading preparation, or that the party had minimal prior knowledge of the events prompting the desired amendment.

*Jenkins v. Jenkins*, 2008 UT App 454, ¶ 3 (citing *Kelly*, 2004 UT App 44, ¶ 38).

While the trial court found that Defendants had knowledge of the draw requests as early as 2010 and that Defendants unreasonably neglected to bring their counterclaims based on this knowledge,<sup>8</sup> this finding fails to acknowledge that a “party’s decision to hold off on pleading those allegations until reliable confirmation could be obtained should not serve as grounds for procedural default.” *Swan Creek*, 2006 UT 22, ¶ 22. What the trial court failed to properly consider is that Defendants were entitled to obtain

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<sup>7</sup> The trial court correctly found that the Motion to Amend was not brought with dilatory motive or in bad faith. [R.1680].

<sup>8</sup> [R.1676-1677, 1679-1680].

the relevant discovery regarding the unfunded draw requests before seeking leave to amend and add a counterclaim. While Defendants *believed* that certain draw requests had not been funded, whether the failure to fund those requests was in violation of the Loan – or was somehow justified by FCB’s accounting or other reason – was not confirmed to Defendants until late 2013 and early 2014, after SA Group finally completed producing documents in response to the March 2013 document request from nearly a year prior. The trial court’s refusal to grant leave to amend was, in effect, a punishment for Defendants’ decision to exercise caution in seeking to vet its claims before asserting them against SA Group.

Defendants’ decision to wait to file a counterclaim is further explained – and justified – by the events regarding the first motion to amend. Defendants initially moved to amend and add counterclaims against SA Group on December 23, 2013, approximately two months before the close of fact discovery, based upon information contained in the documents and reflecting the failure of US Bank to fund certain “August Draw Requests.” [R.0907-0921, 0934-0935]. However, it was only during the deposition of SA Group’s Rule 30(b)(6) representative<sup>9</sup> that Defendants discovered that their first motion to amend was based on incorrect facts and needed to be withdrawn. [R.1180-1182]. Simply put, there were a lot of documents, and a good deal of resulting confusion; so much so that during the deposition of SA Group’s Rule 30(b)(6) witness, counsel had to – literally – point out information to the witness showing that the draw requests had

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<sup>9</sup> The Rule 30(b)(6) witness was deposed on February 11, 2014. [R.1480-1482, 1496].

been paid:

Q. (BY MR. MAGLEBY) Mr. Waterman has pointed something out to you on a document. Can you tell me what you are looking at there?

[R.1497-1500]. Until then, SA Group's representative himself had believed the August Draw Requests had not been paid. [R.1500-1501].

Notably, after the deposition, Defendants returned to the documents and identified that the unfunded draw request was Draw Request 23, not the August Draw Requests, and filed the new Motion to Amend. [R.1280-1283]. SA Group did not contend in opposing the motion to amend that these draw requests had been paid. [R.1381-1411]. Notably, if SA Group had timely produced documents and the Rule 30(b)(6) deposition could have taken place earlier, then Defendants could and would have amended sooner. Stated otherwise, if SA Group had timely provided Defendants with a complete production of documents, including those relating to the failure to fund draw requests, Defendants would have been spared the needless exercise of filing and withdrawing their first motion to amend, and Defendants could have confirmed their counterclaims at a much earlier stage in the litigation and could have easily avoided the exact arguments made in opposition to Defendants' motion.

Nor does the trial court's rejection of the proposed amendment based on Defendants' prior knowledge of the denied draw request adequately address the justification prong standard set forth by this Court in *Kelly*. This Court established the proper analytical framework for trial courts to address the justification prong, noting that

“although the extent to which the moving party had prior knowledge of the proposed amendment should be a relevant factor in the court's analysis, the analytic thrust should actually be focused on the reasons offered by the moving party for not including the facts or allegations in the original complaint.” *Kelly*, 2004 UT App 44, ¶ 38 (emphasis added).

The trial court's analysis plainly misapplied this guidance, focusing only on Defendants' *belief*<sup>10</sup> that draw requests had been improperly unfunded in 2010, without properly considering the legitimate reasons for the delay.

In light of these circumstances, Defendants' decision to seek confirmation from the documents was not, as the trial court incorrectly found, unreasonable neglect. To the contrary, rather than make broad and conclusory allegations in the counterclaim, Defendants properly chose to investigate and seek documents, to establish which specific draw request had not been funded, and confirmation that FCB's refusal to fund was improper (and not an accounting mistake or misunderstanding by Defendants). Simply put, Defendants' decision to exercise caution in alleging its counterclaims by obtaining confirmation from the documents regarding which draw request(s) was not funded by FCB was not an appropriate basis upon which the trial court could find that Defendants had unreasonably neglected to plead a counterclaim.

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<sup>10</sup> Indeed, at oral argument counsel for Defendants explained that Defendants did the right thing by waiting to bring the second Motion to Amend until SA Group produced all the documents relevant to the unfunded draw requests. [R.1621-1623, 1630-1631, 1666-1667]. Obviously, this was done to avoid another scenario where Defendants would have to withdraw the request to amend, as they were required to do based on the discovery obtained only eight days before the end of fact discovery.

Accordingly, the trial court abused its discretion when it incorrectly found that Defendants' Motion to Amend was untimely and was not justified.

## **II. THE TRIAL COURT COMMITTED CLEAR ERROR IN REJECTING COOK'S FAIR MARKET VALUE OF THE HIGHLAND MARKETPLACE**

### **A. INTRODUCTION**

It is a tall order for an appellant to challenge a trial court's findings of fact under any circumstances. It is particularly difficult in this appeal from a deficiency judgment, not because the evidence (or lack of evidence) does not establish that the trial court clearly erred, but rather because the record is dense and it is difficult to explain the numerous mistakes made by the trial court in a few written pages. Indeed, a comprehensive review of the details can come only from reading the trial transcript.

Nonetheless, Appellants attempt to detail the many errors in the trial court's factual findings, starting with "big picture" flaws, and then getting into the minutia. Taken in isolation, one or two of the individual errors might not justify a finding "against the clear weight of the evidence" or lead to the "firm conviction that a mistake has been made." *Covey*, 2003 UT App 380, ¶ 17. But, even in isolation, mistakes such as the big-picture, obvious and improper failure of the trial court to consider the third day of trial, the reliance upon the foreclosure sale price or the conclusion created-from-whole-cloth by SA Group's lawyers and adopted by the trial court that Cook did not do an "as is" appraisal, demonstrate error. When combined with the details, showing that the trial court's findings were without any support, were internally inconsistent, and were contradicted by SA Group's own experts, the evidence commands a reversal. Simply put,

SA Group failed to carry its burden of establishing the fair market value of the Property.

**B. THE DEFICIENCY STATUTE AND PUBLIC POLICY**

Under the Deficiency Action Statute the trial court was charged with finding the “fair market value of the [Highland Marketplace] at the date of sale.” Utah Code Ann. § 57-1-32. The fair market value of property is defined as “the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.” *Mallinckrodt v. Salt Lake Cnty.*, 1999 UT 66, ¶ 10, 983 P.2d 566. In making this determination, the Uniform Standards of Professional Appraisal Practice (“USPAP”) requires an appraiser to analyze the “probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, financially feasible, and that results in the highest value.” [R.3217, 3448 (emphasis added)].

The Deficiency Action Statute is based upon an important public policy concern, incorporated into the statute. “[T]he purpose of [the fair market value defense] is to protect the debtor, who in a non-judicial foreclosure has no right of redemption, from a creditor who could purchase the property at the sale for a low price and then hold the debtor liable for a large deficiency.” *Capital Assets Fin. Svs. v. Jordanelle Dev., LLC*, 2010 UT App 385, ¶ 8, 247 P.3d 411 (emphasis added). This case exemplifies the importance of these policy concerns, as the Defendants, and in particular Mr. Fox and Mr. Hulbert as personal guarantors, are facing approximately \$5 million as a result of SA Group’s decision to sell the Highland Property for millions of dollars below the amount of the debt.



**C. THE TRIAL COURT CLEARLY ERRED BY IGNORING THE THIRD DAY OF TRIAL, THE CROSS-EXAMINATION OF JORGENSEN, AND ADOPTING SA GROUP'S PROPOSED FINDINGS SUBMITTED BEFORE THE FINAL DAY OF TRIAL**

Much to the surprise of Defendants, it was disclosed for the first time (to Defendants anyway) literally during trial that SA Group's expert witness Jorgensen would have to leave at 3:00 p.m. on the then-final day of trial. [R.3186-3187]. Jorgensen did in fact leave the trial early, requiring a third day of trial to be scheduled months later, on August 12, 2015. [R.3653, 3739].

However, the parties were requested to submit, and did submit, their proposed findings of fact and conclusions of law before the final day of trial. [R.3662-3723, 3724-38]. During the final day of trial, SA Group's expert witness Jorgensen was vigorously cross-examined, including on many of the issues that had been included in SA Group's proposed findings. [R.3845-3936]. As explained, *infra*, in the "minutia" discussion, Jorgensen made important concessions, contrary to the "findings" proposed by SA Group, including for example a concession that Cook did not use a "disfavored" land residual method of valuation. [R.3854-3856].

Notwithstanding this evidence, the trial court adopted nearly verbatim the proposed findings submitted by SA Group before the last day of trial, which findings are contradicted by the evidence. [*Compare* R.3732-3734 with R.3757-3759]. When a trial court's findings implicate a material failure in the proceeding, litigants are entitled to turn to the appellate court for consideration not only of whether a finding is "against the clear

weight of the evidence,” but also where circumstances lead to a “firm conviction that a mistake has been made.” *Covey*, 2003 UT App 380, ¶ 17. The trial court’s failure to consider the third day of evidence leads to such a conviction.

**D. THE QUALITY AND DETAIL OF THE PROPOSED FINDINGS SUPPORTS A FINDING OF ERROR**

It is axiomatic that a trial court’s findings of fact must be based upon evidence.

In support of its proposed findings, Defendants’ counsel provided very detailed findings, walking chapter-and-verse through the appraisals, the trial exhibits, and the trial testimony of each witness. Every material finding in Defendants’ proposed findings included a citation to evidence, including verbatim clips of testimony and relevant portions of the exhibits. [R.3662-3723]. The result was over 62 pages of findings and conclusions, demonstrating the reliability of Cook’s valuation of \$14,710,000. [R.3662-3723].

By contrast, SA Group submitted only 13 pages of findings and conclusions, many of which were cursory and literally lacking in any citations to the evidence in the record. [R.3732-3735]. As explained, *infra*, in the minutia discussion, others were based on citations that did not actually support the proposed findings, and which were actually contradicted not only by the evidence, but by SA Group’s own expert witnesses. *See, infra*, Section G. As just one glaring example, the proposed findings asserted the incredible conclusion that Cook, a licensed and qualified MAI appraiser with more than 35 years of experience, had utterly departed from appraisal standards and failed to actually conduct an “as is” appraisal. *See, infra*, Section G.

The trial court adopted nearly verbatim the proposed findings submitted by SA Group, despite the lack of citation to the record or evidentiary support, and then copied and incorporated some portions of Defendants' proposed findings. [*Compare* R.3726-3738 and R.3662-3723 *with* R.3740-3764].

Appellants recognize that asking the appellate court to compare the proposed findings submitted by the parties is an unorthodox argument. However, the comparison demonstrates another big picture point, and supports a "firm conviction that a mistake has been made." *Covey*, 2003 UT App 380, ¶ 17.

**E. THE TRIAL COURT IMPROPERLY CONSIDERED THE FORECLOSURE SALE PRICE IN DETERMINING FAIR MARKET VALUE**

It is also axiomatic that under the Deficiency Act, the foreclosure sale price is not a proper measure of the fair market value of the property. Indeed, such a conclusion defeats the entire point of the Deficiency Act. Indeed, the statute might as well not exist if the sale price were the equivalent of fair market value, and allowing such a consideration would run counter to the important policy considerations of protecting the debtor.

Although the price paid at the foreclosure sale is not relevant to the actual fair market value of the Highland Marketplace, the trial court expressly referenced the amount obtained at the foreclosure sale in deciding to discount Cook's expert opinion. [R.3757]. Indeed, after noting that Cook's valuation was "approximately \$6 million more than the price paid by an independent third party bidder at the foreclosure sale," the trial court erroneously concluded that "Cook's valuation of the Highland Property

was artificially inflated. . . .” [R.3757 (emphasis added)].

However, by statute, the price at the foreclosure sale is irrelevant. The price could be \$1, \$100, or \$1,000,000, but in no event does a foreclosure sale price equate to a “fair market value.” It is well-established that “a foreclosure sale is not an arm’s length transaction involving a willing buyer and a willing seller” and, as a result, “is not evidence of fair market value.” *United States v. 79.95 Acres of Land, More or Less, in Rogers Cty., State of Okl.*, 459 F.2d 185, 187 (10th Cir. 1972) (emphasis added). Indeed, the United States Supreme Court has explained:

[M]arket value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very antithesis of forced-sale value. The market value of a piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular piece of property)

*BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537-38 (1994) (emphasis added) (internal quotations and ellipses omitted).

Tellingly, but perhaps not surprisingly, the trial court did not cite to any case law or testimony to support its conclusion that the foreclosure price was relevant. [R.3757-3759].

This rationale is reinforced by the purpose of the Deficiency Statute, which allows the “fair market value” defense for the “purpose of protect[ing] the debtor, who in a non-judicial foreclosure has no right of redemption, from a creditor who could purchase the property at the sale for a low price and then hold the debtor liable for a large deficiency.”

*Capital Assets*, 2010 UT App 385, ¶ 8 (emphasis added).

By expressly including and relying on the amount paid at the foreclosure sale to disregard Cook's opinion, the trial court disregarded the purpose of the Deficiency Statute and was improperly influenced in its determination of the fair market value. Such disregard for the guiding principles of the governing statute once again supports the "firm conviction that a mistake has been made" in this case. *Covey*, 2003 UT App 380, ¶ 17.

**F. THE TRIAL COURT INCORRECTLY DETERMINED THAT COOK DID NOT CONDUCT AN "AS IS" APPRAISAL**

The trial court cursorily and erroneously concluded that Cook failed to appraise the property in its "as is" condition, as required for a fair market valuation. [R.3758-3759]. The flaws in the trial court's description of the evidence relied upon for this conclusion are discussed, *infra*, Section G(4).

But, as another big picture matter demonstrating a "firm conviction that a mistake has been made," *Covey*, 2003 UT App 380, ¶ 17, there is no evidence or applicable analysis to support this conclusion. It is simply wrong to conclude that Cook, a licensed and qualified MAI appraiser with more than 35 years of experience, decided in this case to place his professional reputation and integrity on the line by utterly departing from appraisal standards and failing to actually conduct an "as is" appraisal. Indeed, this Court would have to conclude that Cook simply lied, repeatedly, when he wrote in his 197-page appraisal that he had concluded an "as is" value:

**AS IS**

**FOURTEEN MILLION SEVEN HUNDRED TEN THOUSAND DOLLARS  
(\$14,710,000)**

[R.4187 at 18-2, 18.63-18.66, 3491, 3547-3550, 3568].

No less important, there was no testimony from SA Group's two experts that Cook had failed to conduct an "as is" appraisal.

**G. THE TRIAL COURT COMMITTED CLEAR ERROR IN REJECTING COOK'S VALUATION OF THE HIGHLAND MARKETPLACE**

Appellants now turn to some of the minutia, demonstrating that the trial court clearly erred in both its rejection of Cook's valuation and acceptance of Jorgensen's valuation. In its Findings and Order, the trial court cursorily found "Cook's valuation of the Highland Marketplace [to be] artificially inflated and less credible than the valuations of Liddell and Jorgensen." [R.3757]. In reaching this conclusion, the trial court identified three reasons – in bullet point format – for deciding to reject Cook's opinion on the fair market value of the Highland Marketplace. Upon analysis, each is devoid of evidentiary support, and in fact contrary to the only evidence presented at trial – including evidence presented by SA Group's experts

First, the trial court incorrectly found that Cook's valuation was based on "unsupported and unreliable facts and data," that he gave "too much value to the Jack in the Box' Letter of Intent," and that Cook valued the Anchor Pad of the Highland Marketplace "using the condition[ ] that the Anchor Pad would function as multi-family housing." [R.3758]. However, the trial court cites nothing in the record to support this finding, and SA Group's proposed finding to this effect, which the trial court apparently copied, is equally devoid of evidence supporting this finding. [R.3731-3732].

Second, the trial court erroneously found that "Cook's valuation was based on



[the] un-established and unreliable valuation” methodology called the “land residual method.” [R.3758]. Once again, the trial court cites nothing in the record to support this finding, and SA Group’s proposed finding similarly failed to cite to any evidence. [R.3733-3734].

Finally, the trial court mistakenly determined that “Cook did not value the Highland Property in its “as is” condition as of the May 22, 2012 foreclosure date.” [R.3758]. The trial court made this finding based on the erroneous belief that Cook’s opinion relied on the following hypothetical conditions to determine fair market value of the Highland Marketplace:

(1) the relied-upon letter of intent would be executed and that a 'Jack in the Box' would be constructed; (2) the zoning of the anchor pads would be changed; (3) a Walgreen's would be timely constructed; (4) Pad I would be subdivided into two parcels; (5) the fitness club lease would be terminated; (6) the fitness space lease would be converted to retail space; and (7) the entire project would be leased to stabilized occupancy.

[R.3758-3759]. However, the trial court again failed to include any citation to the record that would support this finding, and the proposed finding upon which this is based also lacks citation to any evidentiary support. [R.3734-3735, 3758-3759].

### **1. Summary of Property and Valuation Differences**

The trial court’s fair market value conclusion for the property was erroneous. Defendants presented a single valuation opinion from well-respected appraiser Phillip Cook, who concluded a fully supported value of \$14,710,000. By contrast, SA Group

presented five different, ever increasing, valuations,<sup>11</sup> concluding with Jorgensen's last valuation, adopted by the trial court, of \$10,568,000.00.

Because Liddell's valuation was unreliable, including due to his departure from accepted appraisal practice (i.e., the Client's Instruction Flaw),<sup>12</sup> the trial court was left with one appraisal and valuation from Cook, concluding a fair market values of \$14,710,000 [R.3757], and Jorgensen's valuation which – after adjustment to account for his mistaken failure to value the Walgreen's lease – was \$10,568,000. [R.3761].

The valuation testimony focused primarily on six (6) portions of the project, Building A, Building –D / Lot 6 (Walgreens), Building E (Taco Time), Buildings F through H, Pad I / Lots 11 & 12 (Jack in the Box), and Lots 1 & 2 (Vacant Land). For context, these components are reflected on demonstrative Exhibit 101:

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<sup>11</sup> . In the Complaint, SA Group contended the fair market value of the Property was \$8,565,000. [R.0005]. However, in an unsuccessful motion for summary judgment, SA Group subsequently claimed the fair market value of the Property was \$9,240,000. [R. 93]. During expert discovery, SA Group advanced two differing opinions on the value of the Property, claiming the fair market value was either \$9,240,000 or \$9,800,000. [R.2085, 2341]. At trial, after SA Group's expert witness conceded he had failed to value an existing Walgreens lease, the final value advanced by SA Group increased from \$9,800,000 to \$10,568,000. [R. 3730].

<sup>12</sup> [R.3751-3755]. The details of the Client's Instruction Flaw were summarized in Defendants' proposed findings. [R.3688-94].

Lot	Lot 1 & 2	Lot 3	Lot 4	Lot 5	Lot 6	Lot 7	Lot 8	Lot 9	Lot 10	Lot 11	Lot 12
Building		Bldg A	Bldg B	Bldg C	Bldg D	Bldg E	Bldg F	Bldg G	Bldg H	Pad I	Pad I
Tenant(s)	Vacant	Newport Sports	N/A Sold	N/A Sold	Walgreens	Taco Time	T-Mobile	Barbacoa	1 Hr. Martinizing	Jack in Box	Vacant
							Little Caesars	Roxberry Juice	Dollar Cuts		
							Sweet Tooth	UPS Store			

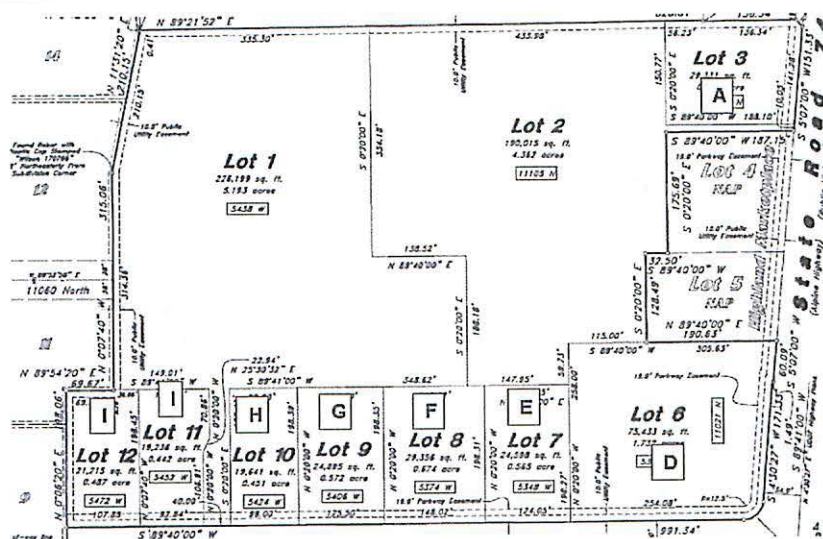


EXHIBIT 101.1

The primary differences between the two valuations<sup>13</sup> follow:

	<u>Cook</u>	<u>Jorgensen</u>
Building A <sup>14</sup>	\$1,934,516 <sup>15</sup>	\$1,181,329
Pad D – Lot 6 – Walgreens	\$2,601,392 <sup>16</sup>	\$995,000 (land) \$1,763,000 (lease)
Building E – Taco Time	\$1,454,379 <sup>17</sup>	\$837,004
Buildings F-H	\$3,928,745 <sup>18</sup>	\$3,423,124

<sup>13</sup> These figures are taken from Exhibit 12-21, except that Jorgensen changed his valuation for the Walgreen's, once flaws in his analysis became apparent. [R.4187 at 12-28, 12-31].

<sup>14</sup> Notably, SA Group's expert Liddell agreed with Cook's highest and best use methodology, that the proper method to value Building A was through an income approach that disregarded the actual, non-arm's length lease with the fitness club and appraised the building as office space. [R.4187 at 106.1, R.3350, 3411-3412]. In doing so, both arrived at a virtually identical value of price per square foot of Building A. [R.4187 at 106.1 (noting Cook's value at \$21 per square foot and Liddell's value at \$20 per square foot)]. Jorgensen's value is substantially lower, giving only a value of \$11.50 per square foot based on the non-arm's length lease. [R.4187 at 106.1]. Jorgensen's approach was also internally inconsistent – when it suited his purpose to lower the value he kept the non-arm's length lease for the fitness club, but then rejected the arm's length, actual leases for the other retail property. [R.4187 at 20.15, 3288, 3450-3451, 3453, 3519-3520].

<sup>15</sup> Cook's testimony regarding his analysis of Building A is found at R.3450-3451, 3453-3456, 3488, 3519-3522, 3525-3530, 3586-3587, and the cross examination of Jorgensen is found at R.3294-3316, 3912-3925.

<sup>16</sup> Cook's testimony regarding his analysis of Building –D / Lot 6 (Walgreens) is found at R.3458-3460, 3474, 3488-3489, 3491, 3504, 3506, 3509-3513, 3516-3517, 3541-3550, 3579-3580, 3586, and the cross examination of Jorgensen is found at R.3257-3265, 3273, 3328, R.3857-3858, 3866-3870, 3878-3879, 3888-3894, 3897-3912.

<sup>17</sup> Cook's testimony regarding his analysis of Building E (Taco Time) is found at R.3475, 3506-3507, 3530-3541, and the cross examination of Jorgensen is found at R.3277-3289, 3322-3323, 3325-3329, 3929-3933.

	<u>Cook</u>	<u>Jorgensen</u>
Pad I – Lot 11 – JIB	\$961,179 <sup>19</sup>	\$600,000
Anchor Pad – Lots 1-2	\$3,830,000 <sup>20</sup>	\$2,753,000
<b>Total Valuation (with final adjustments):</b>	<b>\$14,710,000</b>	<b>\$9,800,000 (land)</b> <b>\$10,568,000 (lease)</b>

The trial court did not squarely attack Cook's detailed analysis, instead relying upon "big picture" critiques, taken from SA Group's cursory proposed findings, many of which were lacking in citations to the record, and – where citations were included – the citations did not support the proposed finding and were in fact contradicted by the evidence and SA Group's own experts. Thus, the trial court's rejection of Cook's valuation was in error and must be reversed.

**2. The Trial Court's First Critique is Contrary to the Undisputed Evidence That Cook Did Not Value the Anchor Pad as Multi-Family Housing and Properly Attributed Value to the Jack-in-the-Box Letter of Intent**

The trial court clearly erred in finding that Cook's valuation was based on unsupported and unreliable facts and data.

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<sup>18</sup> Cook's testimony regarding his analysis of Buildings F through H is found at R.3519-3522, 3523-3524, 3545-3548, 3585-3587, and the cross examination of Jorgensen is found at R.3289-3294.

<sup>19</sup> Cook's testimony regarding his analysis of Pad I / Lots 11 & 12 (Jack in the Box) is found at R.3474, 3479, 3517-3519, 3530-3541, 3547-3549, and the cross examination of Jorgensen is found at R.3267, 3273, 3855-3856, 3866-3867, 3869-3870, 3881-3888.

<sup>20</sup> Cook's testimony regarding his analysis of Lots 1 & 2 (Vacant Land) is found at R.3478-3479, 3492-3497, 3550, 3553-3561, 3579-3584, 3654-3656, and the cross examination of Jorgensen is found at R.3323-3325, 3858-3865, 3875-3877.

a. *The Trial Court Clearly Erred in Finding That Cook Valued the Anchor Pad as Multi-Family Housing*

The trial court's first finding that Cook valued the anchor pad of the Highland Marketplace as multi-family housing, is clearly contradicted by the evidence. Indeed, this finding is expressly contradicted by the testimony of Cook, Jorgensen, and the appraisals of both Cook and Jorgensen's appraisal. During the second day of trial, Cook plainly testified that he valued the anchor pad as commercial property, not as multi-family, and that the value, whether commercial or multi-family, was identical. [R.3653-3654, 3493-3495, 3616-3617]. Cook's appraisal also confirmed that he appraised the anchor pads as commercial property, which is how the anchor pad was zoned at the time of the foreclosure sale. [R.3654-3656].

On the third day of trial, Jorgensen also conceded that Cook did not value the anchor pad as multi-family housing, testifying that Cook "did it correctly for the anchors":

19		That's an acknowledgment that Mr. Cook did
20		not solely rely upon his multifamily unit analysis,
21		correct?
22	A.	<u>For the anchors, yes.</u>
23	Q.	Yes. For the anchors, yes.
24	A.	<u>I think he did it correctly for the</u>
25		<u>anchors.</u>
1	Q.	Yeah. And, indeed, Mr. Cook's report
2		acknowledges that fact, does it not?
3	A.	Yes.



[R.3858-3859 (emphasis added)]. Jorgensen further confirmed that his second appraisal actually recognized that Cook appraised the anchor pads correctly. [R.3858-3859].

Despite the fact that all the evidence in the record established that Cook used the correct approach to value the anchor pads, the trial court erroneously rejected Cook's expert opinion on the baseless finding that Cook appraised the anchor pad as multi-family housing. Indeed, it appears the trial court's error arose from its virtually verbatim use of SA Group's proposed findings, which were submitted to the trial court before the final day of trial in which SA Group's own expert witness established the falsity of SA Group's proposed finding number 26(a). [R.3724-3738]. Simply put, the trial court committed clear error in finding that Cook's opinions were based on unsupported and unreliable facts and data because the trial court's finding is against the clear weight of the evidence. Consequently, this Court should reverse the trial court's Findings and Order.

*b. The Trial Court Clearly Erred In Finding That Cook Should Not Have Given Value to the JIB LOI*

The trial court's second finding that Cook gave too much value to the JIB LOI<sup>21</sup> is against the clear weight of the evidence, including the methodology employed by SA Group's own appraiser pre-litigation, and is also inconsistent with the trial court's other findings.

As an initial matter, the trial court recognized that the JIB LOI added value to the Property, although it found that such value was "marginal . . . because the Defendants did not have title to the property." [R.3753]. However, in addressing the various expert

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<sup>21</sup> [R.3758].

opinions, the trial court properly rejected Liddell's opinion, at least in part, on the basis that Liddell gave "no credence[ ] at all" to the existence of the JIB LOI. [R.3752-3753]. Curiously, after recognizing that the JIB LOI added at least some value to the Property, the trial court subsequently critiqued – and rejected – Cook's opinion, at least in part, because it gave "too much value to the 'Jack in the Box' Letter of Intent." [R.3758].

Inconsistently, the trial court determined that Jorgensen's valuation was more credible despite being subject to the same critique the trial court applied to Liddell's valuation: failure to include any value for the JIB LOI. Moreover, the trial court's erroneous finding is further compounded by the fact that Jorgensen not only gave no credence at all to the JIB LOI, but also because Jorgensen conceded on cross-examination that the JIB LOI "reflect[ed] on the potential for the property," i.e., the Property's value. [R.3267, 3841-3842, 3884-3885].

It is also telling that Cook was the only expert to conduct any due diligence on the proposed tenant. Cook did not simply take the JIB LOI at face value or ignore it as did Jorgensen and Liddell; instead, Cook performed due diligence on the JIB LOI and found that the potential tenant was a franchisee of Jack in the Box, that the base terms of the lease were determined, and that the probability that the Letter of Intent would turn into a lease was high. [R.3518]. In stark contrast, Liddell<sup>22</sup> and Jorgensen admitted they did

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<sup>22</sup> Despite doing no due diligence on the JIB LOI or even including it in his appraisal, Liddell had previously given value to letters of intent when valuing the Highland Marketplace in appraisals performed prior to foreclosure and litigation, thus conceding that Cook's inclusion of value was within acceptable appraisal standards. [R.3407-3408; R.4187 at 15.173 and 16.90]. It is also telling that the appraisal method

zero due diligence on the JIB LOI. [R.3267, 3886-3888]. Testimony from Mr. Fox confirmed that validity of the JIB LOI, including the quality of the tenant, which had developed numerous Jack-in-the-Box restaurants and that this would have been the first Jack-in-the-Box in Utah outside of the St. George area. [R.3771-3774, 3786-3788, 4187 at Exs. 43, 75-76]. This failure to conduct any due diligence is particularly condemning of Jorgensen's appraisal, because Jorgensen admitted on cross examination that a rational seller would try and get value for a signed letter of intent, and a rational buyer would do due diligence on the potential tenant. [R.3881, 3400, 3887-3888].<sup>23</sup>

As a result, the trial court's rejection of Cook's opinion was clearly erroneous for at least two reasons. First, the trial court inconsistently applied its own standard, rejecting one valuation because it provided no value, but adopting a valuation despite it also providing no value. Second, the trial court inconsistently rejected the opinion of the only expert who attributed any value to the JIB LOI, which value was not arbitrary because it was based on due diligence performed on the tenant.

The trial court's failure to consistently apply its own standard, particularly where

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changed once the litigation was filed, including as reflected in the Client's Instructions Flaw.

<sup>23</sup> Obviously, as this Court knows, the fair market value analysis requires an appraiser to value "the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts." *Mallinckrodt*, 1999 UT 66, ¶ 10. Jorgensen's concession regarding the actions of a reasonable buyer and a reasonable seller highlight his failure to properly appraise the fair market value of the Property with the goal of determining what actions a willing buyer and a willing seller would take. Instead, Jorgensen discounted and cut value at every turn in order to arrive at the lowest possible value. [R.4187 at 20.15]; [*See, infra*, Section III(B)]

the weight of the evidence establishes that the JIB LOI was with a superb franchisee and had a high likelihood of becoming a tenant, establishes that the trial court's Findings and Order are clearly erroneous and should be reversed.

**3. The Trial Court Clearly Erred When it Found that Cook Applied Unestablished and Unreliable Valuation Methodologies**

Reflecting the trial court's misunderstanding of the valuation methodologies used by all of the experts, the trial court concluded that Cook's appraisal – which was in compliance with all the applicable MAI and other standards and which applied the same methodologies as SA Group's own experts – relied upon unestablished or unreliable valuation methodologies.

*a. Cook Did Not use the Land Residual Method to Value the Anchor Pad*

In finding 102(b) the trial court incorrectly found that Cook used the land residual method to value “the Anchor Pad. . . .” [R.3758]. However, this finding, like many of the trial court's incorrect findings, is based on SA Group's proposed findings which were submitted before the final day of trial and are contrary to the evidence.

The trial court's finding that Cook's valuation of the anchor pad “was based on un-established and unreliable valuation” methodologies is clearly erroneous because it is contradicted by the evidence in the record, including the expert testimony of SA Group's own expert witness, Jorgensen. As discussed *supra*, Jorgensen testified that Cook “did it correctly for the anchors.” [R.3858]. This testimony, standing alone, contradicts the trial court's finding that Cook used unestablished and unreliable valuation methodologies to value the anchor pad.

However, this is not the only evidence that directly contradicts the trial court's finding that Cook used the land residual methodology on the anchor pad. To the contrary, both Cook and Jorgensen acknowledged that Cook did not use the land residual methodology as the trial court erroneously concluded. During cross examination, Cook clearly testified that he did not use the land residual method to value the anchor pads but used the sales comparison approach:

24	Q.	And you don't use the land residual
25		methodology or theory to provide your opinion of

1		value; instead, you rely on the sales comparison
2		approach?

3	A.	<u>Correct.</u>
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[R.3616-3617 (emphasis added)]. Instead, Cook explained that his land residual analysis was to simply double check his sales comparison approach. [R.3614-3615].

Jorgensen also expressly acknowledged that Cook did not use the land residual method, testifying that Cook "correctly used the land value by direct sales comparison" approach and that Cook did not use the land residual method:

6	Q.	So he <u>did not</u> value the anchor pads using
7		the land residual method.

8	A.	<u>Right.</u> Correct.
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[R.3804-3806 (emphasis added)]. Despite this clear evidence, the trial court erroneously concluded that Cook used the land residual method to value the anchor pad. Because the trial court's finding is not only against the weight of the evidence, but wholly

unsupported by the evidence, the trial court's Findings and Order should be reversed.

*b. Cook Did Not Use a Disfavored Land Residual Technique*

The trial court clearly erred when it found that Cook used a specific type of land residual methodology that is disfavored by courts because Cook did not actually utilize the disfavored methodology. [R.3758]. One of Jorgensen's principal critiques of Cook's expert opinion was that Cook improperly used a type of land residual methodology for which "[c]ourts have shown a clear disdain." [R.3802-3803]. Although the trial court adopted this critique in finding 102(b), the finding ignored – and was contradicted by – Jorgensen's testimony on the third day of trial. In particular, Jorgensen had to concede he had made a mistake on cross examination, and that the methodology employed by Cook was not the same as the methodology courts disfavor. It became apparent upon cross-examination that Jorgensen had not read the definition of the disfavored methodology, or had not done so carefully. [R.3854-3856]. When his mistake was exposed, Jorgensen conceded that Cook's was "a slightly different technique" and that he "acknowledge[d] the point . . . that they've said the land residual technique, [that] the Courts have disdain [for] . . . is not precisely the technique Cook used." [R.3854-3856].

Despite Jorgensen's admission, the trial court's findings make no mention of the distinction between the disfavored methodology identified by Jorgensen and Cook's actual methodology in analyzing the Highland Marketplace. The trial court's failure to recognize the distinction between these two methodologies – and the fact that Cook did not actually use the disfavored methodology – undermines the trial court's findings and establishes that the trial court clearly erred in its rejection of Cook's appraisal.

Moreover, although there was a dispute regarding what methodology to use for Pad I, both Cook and Jorgensen used the same methodology to determine the value of Pad D, which had a lease signed by Walgreen's. Indeed, despite Jorgensen's general critique of the land residual method, which did not apply to Cook's methodology as established *supra*, Jorgensen admitted that he used the same methodology as Cook in valuing Pad D (Walgreen's) and that any critique of Cook's approach also applied to his approach:

15           Q.       (By Mr. Magleby) But, sir, did you not  
16       use the exact same technique that Mr. Cook used, for  
17       example, with Walgreens? You forecast out the income  
18       using the lease that was amended, you deducted  
19       expenses and made some other deductions, you came out  
20       with a number at the bottom, and then you applied a  
21       cap rate with it to come up with your value.

22           A.       Yes, it was similar.

23           Q.       Oh, okay. All right.

24                    So for whatever critique you have for  
25       Mr. Cook's approach, then might it similarly apply to

1       yours?

2           A.       Yes. To that incremental value  
3       enhancement, it would.

4           Q.       And so a minor adjustment by you of one of  
5       these other values could also result in a big  
6       difference in value.

7           A.       Yes.



[R.3857-3858 (emphasis added)]. Despite this evidence, the trial court incorrectly found that Cook's valuation was unreliable, and in doing, so completely ignored the established fact that Jorgensen used the same valuation methodology and was therefore subject to the identical criticism.

However, the trial court's disregard of Cook's opinion is even more confusing given its finding that Jorgensen's valuation of the Property was "based on established and reliable valuation methodologies," which included Jorgensen's use of the same residual methodology as Cook regarding the Walgreen's lease. [R.3760]. While Jorgensen's testimony makes clear that he used the identical methodology as Cook in valuing Pad D, the trial court inconsistently labeled this methodology as being "un-established and unreliable" when applied by Cook, but "established and reliable" when used by Jorgensen. [R.3758, 3760].

#### **4. The Trial Court Clearly Erred by Finding That Cook Did Not Value the Property in Its "As Is" Condition**

The trial court erroneously concluded that Cook failed to appraise the property in its "as is" condition, as required for a fair market value. [R.3758-3759]. In doing so, the trial court cursorily listed seven (7) reasons why Cook purportedly failed to perform an "as is" valuation of the Property.<sup>24</sup> Astonishingly, in making this sweeping finding,

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<sup>24</sup> Another flaw is that none of the reasons given by the trial court as support for the conclusion that Cook's appraisal was not "as is," actually relate to this issue – they are just critiques of Cook's valuation methodology. Cook met the definition of "as is". [R.4187 at 18.187 ("Market Value 'as is' on appraisal date means an estimate of the market value of a property in the condition observed upon inspection and as it physically and legally exists without hypothetical conditions, assumptions, or qualifications as of the date the appraisal is prepared.")].

neither the trial court nor SA Group's proposed findings upon which the trial court's finding was based, cite to evidence supporting the conclusory findings. Indeed, there is not a single citation to an exhibit or a line of testimony to support this finding.<sup>25</sup> Instead, it appears that SA Group simply included one of its arguments in the proposed findings and the trial court, without properly determining whether it had evidentiary support, erroneously adopted the finding. However, as discussed below, the trial court's finding is wholly unsupported by the record and against the clear weight of the evidence. Therefore, this finding should be reversed.

*a. In the First Instance, Cook Clearly Concluded an "As Is" Valuation*

The trial court's conclusion that Cook did not reach an "as is" valuation is stark and troubling, and casts the remaining balance of the analysis into question. Cook indisputably applied MAI and other appraisal standards, and reached an "As Is" valuation, as described in his appraisal:

AS IS

FOURTEEN MILLION SEVEN HUNDRED TEN THOUSAND DOLLARS  
(\$14,710,000)

[R.4187 at 18.2 (redlines added) and 18.63-18.66, 3491, 3547-3550, 3568]. Notably, Cook's appraisal is consistent with "as is" appraisals that are done every day for

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<sup>25</sup> Although SA Group's proposed findings included a single footnote citing to page 18.3 of Cook's report [R.3734-3735], this citation does not support the proposed finding and actually ignores page 18.2 of Cook's appraisal, which expressly sets forth the "as is" value of the Property [R.4187 at 18.2].

borrowers, lenders, banks, or litigation, and is consistent with the methodologies, standards and approach of SA Group's own experts. [R.4187 at 11-11 to 11-14, 10-7].<sup>26</sup>

Furthermore, the details upon which the trial court relied are also unsupported or contradicted by the evidence, as seen in the following discussion.

*b. Cook's Valuation Was Not Based on the Assumption That the JIB LOI Would Be Executed*

In finding 102(c)(1), the trial court found that Cook did not value the Highland Property in its "as is" condition because it relied on a letter of intent that "would be executed." [R.3758-3759]. However, this finding is clearly erroneous because the evidence irrefutably establishes that the JIB LOI had already been executed. [R.3771-3774, 3857-3858]. Thus, contrary to the trial court's erroneous finding, the execution of the JIB LOI was not an assumption or hypothetical condition.

*c. Cook Did Not Rely on a Zoning Change for the Anchor Pads*

In finding 102(c)(2), the trial court incorrectly found that Cook relied on a zoning change for the anchor pads of the Highland Marketplace. [R.3759]. As discussed *supra*, Cook did not actually rely on the zoning change in valuing the Highland Marketplace but, instead, appraised the anchor pads as commercial property. [R.3653-3656, 3858-3859]. In fact, contrary to the trial court's finding, both Cook and Jorgensen testified that Cook "did it correctly for the anchors." [R.3653-3656, 3858-3859]. Instead, Cook properly appraised the property in its "as is" state, as unambiguously set forth in his expert report and testimony. [R.4187 at 18.2, 18.63-18.66, 3491, 3547-3550, 3568]. Consequently,

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<sup>26</sup> Both of SA Group's experts also included assumptions as part of their appraisal. [R.3317-3319, 3358-3359].

the trial court's finding is clearly erroneous because it is not only unsupported by the record, it is directly contradicted by the evidence.

*d. Cook and Jorgensen Applied the Same Methodology to Pad D (Walgreens)*

The trial court's finding 102(c)(3) is based on the erroneous belief that Cook improperly relied on the timely construction of a Walgreen's. Once again, as discussed *supra*, both Cook and Jorgensen evaluated Pad D using the identical methodology, thus requiring that both assumed that a Walgreen's would be constructed in order to properly back out costs to determine the actual value of the lease. [R.3595-3596, 3604, 3888; R.4187 at 12-7 (noting the assumption based on the Walgreen's lease), 12-26 – 12-28 (analyzing construction costs of the Walgreen's)]. Jorgensen even explained that the increase in value to Pad D contained in his opinion and that of Cook was not based on the hypothetical construction of a Walgreen's, as the trial court erroneously concluded, but on the fact that there was an existing lease covering Pad D with Walgreen's that added additional value to that piece of property. [R.3869-3870].<sup>27</sup>

What the trial court failed to recognize is that the construction of a Walgreen's was an assumption that both experts used in order to arrive at the additional value

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<sup>27</sup> However, Jorgensen's testimony is also clear that he assumed construction of a Walgreen's, just as Cook did, because that is how the valuation of the Walgreen's lease should be performed. [R.3887-3893, 3899-3911]. Thus, the trial court's rejection of Cook's valuation for assuming construction of a Walgreen's is clearly erroneous because Jorgensen took the identical approach. This error appears to stem from the trial court's misunderstanding (perhaps based on SA Group's proposed findings) of the proper valuation technique for a lease that is in place that still requires construction of a building. Indeed, the record makes clear that Cook was not relying on hypothetical conditions (just as Jorgensen was not) but was appraising the Property in its "as is" condition.

generated by virtue of the lease being signed. As a result, the trial court inconsistently found Cook's approach to be unreliable but found Jorgensen's approach to be based on both reliable and established valuation principles despite the fact that both experts used the same methodology based on similar (indeed identical) assumptions. Thus, the trial court's determination that Cook's valuation was not done "as is" based on the Walgreen's construction is premised first on a misunderstanding of the evidence, which clearly establishes the propriety – even necessity – of such an assumption to determine the value attributed by the Walgreen's lease, and second, on a complete disregard for the evidence establishing that both experts used the same methodology.

*e. Cook's Opinion Did Not Require the Subdivision of Pad I*

In finding 102(c)(4), the trial court found that Cook did not value the Highland Property in its "as is" condition because it relied on the subdivision of Pad I into two parcels. [R.3759]. However, this finding is a critique without a basis because Jorgensen admitted that the subdivision of Pad I was completely unnecessary as a condition to put in the proposed Jack-in-the-Box. [R.3881-3883]. In other words, Jorgensen recognized that Cook's "assumption" of Pad I being subdivided was not really an assumption at all because it did not need to occur for the proposed Jack-in-the-Box to be built. [R.3881-3883]. Instead, Jorgensen explained that "whether the city approves the subdivision or not [is] irrelevant to the analysis." [R.3883]. Despite this clear testimony from SA Group's own expert, the trial court erroneously concluded that Cook's valuation was not an "as is" appraisal because it was based on the assumed subdivision of Pad I. However, because the subdivision of Pad I is "irrelevant to the analysis," the trial court's erroneous

conclusion that Cook's appraisal was not "as is" is not supported by the evidence and should be reversed. Thus, the trial court clearly erred when it disregarded Cook's valuation based, at least in part, on an assumption that was irrelevant to Cook's valuation.

*f. Cook Appraised the Property in its "As Is" Condition.*

Finding 102(c)(7) erroneously states that Cook did not appraise the property in its "as is" condition because Cook relied on the entire project being "leased to stabilized occupancy." [R.3759]. However, this finding ignores the clear testimony by Cook that his appraisal of the Property was an "as is" valuation of the Property, and was not based on the stabilized value. [R.3491, 3547-3550, 3568]. In fact, Cook testified that all three of the experts performed an as stabilized estimate, but, as with Cook's valuation, the stabilized value estimate was not the "as is" appraised value. [R.3491; R.4187 at 11-11 – 11-14 and 10-7]. Consequently, the trial court's finding that Cook did not perform an as is appraisal is unsupported by the record and clearly erroneous.

In sum, the trial court's stated reasons for rejecting Cook's testimony, as set forth in finding 102, are wholly unsupported by the evidence. As such, the trial court committed clear error because its finding regarding Cook's use of unreliable and unestablished methodologies is against the clear weight of the evidence.

**H. THE TRIAL COURT'S FINDING 103 REGARDING THE "LAND RESIDUAL METHOD" IS NOT SUPPORTABLE AND IS CLEARLY ERRONEOUS**

The trial committed clear error in finding Cook's valuation unreliable because the bases for its findings are against the clear weight of the evidence.

In finding 103, the trial court summed up its reasons for rejecting Cook's



valuation, stating:

The Court finds and concludes that Cook failed to use established and reliable valuation methodologies, and used, instead, a land residual technique not supported in appraisal literature. Cook failed to perform an “as is” appraisal of the Highland Property. He relied upon hypotheticals, unsupported and questionable data and facts in reaching his valuation which is, therefore, unreliable.

[R.3759]. As discussed *supra*, this finding is clearly erroneous.

First, Cook did not use a disfavored land residual method not supported in appraisal literature, but instead used the same methodology as Jorgensen. [See, *supra*, Section G(3)]. Thus, any critique against Cook’s methodology applied with equal force to Jorgensen’s methodology and was not a reasonable basis upon which to reject Cook’s valuation.

Second, the finding that Cook failed to perform an “as is” appraisal of the Highland Marketplace is directly contradicted by the evidence. [See, *supra*, Section G(4)]. In addition to the evidence directly contradicting this finding, it is also significant that neither the trial court nor SA Group’s proposed findings provide a single citation to the record that would support this finding. [R.3759, 3736]. Indeed, it appears that SA Group simply included this argument without any evidence and the trial court adopted it without considering the testimony from the third day of trial. Such failure to consider the directly applicable and contradictory evidence that Cook did in fact conduct an as is appraisal is, in and of itself, sufficient grounds to reverse the trial courts Findings and Order.

Finally, the finding that Cook used hypotheticals, unsupported and questionable



data and facts in appraising the Highland Marketplace is wholly unsupported by the record. [*See, supra*, Section G]; [R.3759]. Once again, neither the trial court's Findings and Order nor SA Group's proposed findings provide even a single citation to the hypotheticals or "questionable" data or facts Cook relied on in appraising the Highland Marketplace. [R.3736, 3759]. Indeed, if any experts relied on questionable facts or data it was SA Group's experts, who failed to even consider the Walgreen's lease [R.3747] until after Cook had already addressed Walgreen's in his rebuttal report.

**III. JORGENSEN'S OPINION OF VALUE WAS BASED ON NON-COMPARABLE PROPERTIES, REPEATEDLY CONSERVATIVE CHOICES, AND OTHER ATTEMPTS TO DRIVE DOWN THE VALUE OF THE HIGHLAND MARKETPLACE**

**A. DESPITE THE TRIAL COURT'S FINDINGS, THE PROPERTIES RELIED ON BY JORGENSEN WERE NOT COMPARABLE TO THE HIGHLAND MARKETPLACE**

Jorgensen's valuation of the Property was also unreliable because it was based on properties that were not reasonable comparable to the Highland Marketplace.

The trial court correctly found that the sales comparison approach is based on the principle of substitution, which "requires comparison of an equally desirable substitute property." [R.3748].

Despite this established principle, Jorgensen selected properties that were not comparable to the Highland Marketplace, including because they were 20, 40, and sometimes almost 50 years older than the subject Property, and were often third generation or repurposed buildings that had multiple prior tenants. [R.3454-3457, 3530-3536, 3554, 3275-3303].

The most glaring example of Jorgensen's inappropriate comps related to the Taco Time parcel. The Taco Time was a brand new build to suit building with an annual rent of \$130,166 or \$56.03 per square foot with very appealing architecture and a modern look:



[R.4187 at 18.70].

However, in valuing the property Jorgensen used numerous properties that were simply not comparable to the Taco Time. For example:

- A 30 year old building that was on its second or third tenant and was being leased by an independent restaurant called Scaddy's:



- A 27 year old building being leased by WingNutz, which was originally leased by a flower shop:



- A thirty year old restaurant called the Blue Finn Sushi Bar that was originally a Wendy's:



[R.4187 at 11-154, 11-156, 11-158]. Obviously, use of outdated and un-comparable buildings, with markedly different tenants, and Jorgensen's decision to ignore the most-comparable property of a contemporaneously constructed Del Taco, was inappropriate. [R.3531-3535, 3275-3289].

Although none of these properties even pass the look test for being an adequate comparable for the Taco Time under the principle of substitution, the dates of



construction and rent rates for each of these properties further confirm that Jorgensen relied on properties that were not comparable and violate the principle of substitution. The below chart compares the rent rates and construction dates of the three “comparables” to that of the Taco Time:

<u>Property</u>	<u>Rent Per Sq. Ft.</u>	<u>Construction Date</u>
Scaddy’s	\$21.00	1979
Blue Finn	\$24.07	1982
Wing Nuts	\$22.00	1984
Taco Time	\$56.03	2010

In light of this information, the properties relied on by Jorgensen can hardly be deemed to be proper “comparables” for the Taco Time. This is especially true given that the trial court found that Jorgensen relied on properties that were older, inferior in appearance, and also did not look as modern or as good as the Highland Marketplace. [R.3759-3760]. While the trial court erroneously concluded that Jorgensen compensated for these variations, such a finding is clearly erroneous because comparables must “be as similar as possible.” [R.3305-3306].

**B. JORGENSEN DROVE DOWN THE VALUE OF THE HIGHLAND MARKETPLACE BY USING UNSUPPORTED AND UNREASONABLY CONSERVATIVE CHOICES**

The trial court also erred in adopting Jorgensen’s valuation of the Property

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<sup>28</sup> [R.4187 at 11-153 – 11-158].

<sup>29</sup> [R.4187 at 18.38].

because Jorgensen repeatedly drove down his appraised value by relying on unsupported and ultra-conservative choices. By repeatedly making conservative, lender friendly determinations of value, Jorgensen's valuation violates the well-established law in Utah that the fair market value is "the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts." *Mallinckrodt*, 1999 UT 66, ¶ 10.

Although Jorgensen's appraisal is replete with conservatism, and Cook identified numerous instances, some examples follow.

First, in Cook's expert report discussing Jorgensen's valuation, he found that the major factors that go into valuing a property all had downward adjustments in Jorgensen's valuation, which resulted in a lower fair market value of the Property than was credible. [R.4187 at 20.15]. While SA Group challenged Cook's assessment of Jorgensen's adjustments during cross examination, suggesting that Cook highlighted only the downward adjustments and ignored other upward adjustments, Cook boldly and in dramatic fashion challenged SA Group's counsel to "show me one" upward adjustment. [R.3597-3598]. SA Group's counsel could not meet the challenge and identify a single upward adjustment by Jorgensen. [R.3597-3600].

Second, Jorgensen used the rents from each of the outdated buildings discussed *supra* to determine a market rent rate, rather than using the actual rent being paid by the Taco Time tenant on the date of the foreclosure sale. Jorgensen concluded that market rent was \$32 per square foot and completely disregarded the fact that the actual rent

being paid by the tenant at the time of the foreclosure sale was \$56.08 per square foot. [R.4187 at 18.38, 3524-3530, 3288-3289].

Third, Jorgensen gave more value to the building of a building (which can be done by any competent contractor), than he did to obtaining a Walgreen's lease (which are very hard to come by, and exceptionally valuable).<sup>30</sup> Despite recognizing that there are any number of general contractors that can build a building and not just anyone can get a Walgreen's lease, Jorgensen allocated nearly \$400,000 more in value to simply constructing a building than to obtaining the lease. [R.4187 at 12-27 – 12-28]. As Jorgensen admitted (after some resistance):

<p>Q.       Yep.   So any general contractor can build a building, but not just anyone can get a Walgreens lease.   Would you agree with that?</p> <p>A.       Yeah.</p>
--

[R.3902-3905].

Fourth, Jorgensen further reduced the value of the Highland Marketplace by applying a 25% discount to the Walgreen's lease, despite the fact that it called for \$363,000 in rent over the course of 75 years, and a rational seller would not agree to such a discount. [R.3906-3912]. The application of this discount violates the requirement that

---

<sup>30</sup> As Cook (and others) testified, and as found by the trial court, the highest and best use of Pad D was a Walgreens; the lease was for 75 years with a monthly rent of \$30,250, there was a valid lease at the time of the foreclosure sale, the lease "was a legitimate marketable right that added value," Walgreens had a market cap of over \$34 billion as of 2012. [R.3747]. Even SA Group's expert witnesses admitted that Walgreens was an exceptional and unusually strong tenant. [R.2187, 2699, 4187 at 10-110, 3460, 3510-3511].

the fair market value of the property be based on a willing buyer and a willing seller, reflects in essence a “double counting” of discounts, and reflects yet another attempt by Jorgensen to drive down the value of the Property. [R.3458-3460, 3458-3460,3510-3517].

Finally, and ironically, the trial court’s decision to ignore Jorgensen’s consistently downward adjustments is inconsistent with the trial court’s critique of Liddell for doing the same thing:

70. The Court finds that each of Mr. Liddell’s judgments regarding the property were conservatively made resulting in an appraised value that is not credible. [See Trial Transcript, at 299:17-300:12 (Mr. Cook)].

[R.3751 (emphasis added)].

#### **IV. APPELLANTS REQUEST THEIR ATTORNEY FEES IF THEY PREVAIL ON APPEAL**

For the reasons noted, this Court should reverse the judgment against Appellants in whole. Upon so doing, Defendants would be entitled to all or some of their costs and attorney fees below and on appeal pursuant to Utah Code section 57-1-32.

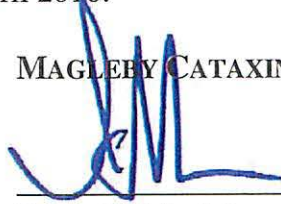
#### **CONCLUSION**

For the foregoing reasons, this Court should reverse the district court’s Judgement and Findings and Order, and remand with instructions to allow Defendants to file and proceed with the proposed amended complaint.



DATED this 7<sup>th</sup> day of April 2016.

MAGLEBY CATAXINOS & GREENWOOD



James E. Magleby  
Kennedy D. Nate

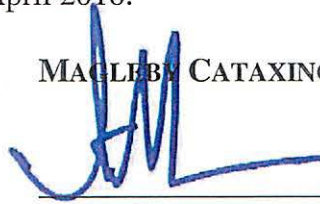
Attorneys for Defendants and Appellants  
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Solana Beach Holdings, L.C.; Thomas A. Hulbert;  
and Bret B. Fox

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the word count of this **OPENING BRIEF OF APPELLANT DEFENDANTS HIGHLAND MARKETPLACE, L.C., ET AL.**, as determined using Microsoft Word and manually counting the clips and/or images, is 13,854 words in length (jurisdictional statement through conclusion, inclusively) and, therefore, in compliance with the Utah Rule of Appellate Procedure 24(f)(1)(A).

DATED this 7<sup>th</sup> day of April 2016.

**MAGLEBY CATAXINOS & GREENWOOD**

A handwritten signature in blue ink, appearing to be 'JM', is written over a horizontal line.

James E. Magleby  
Kennedy D. Nate

Attorneys for Defendants and Appellants  
Highland Marketplace, L.C.; High Noon, L.C.;  
Solana Beach Holdings, L.C.; Thomas A. Hulbert;  
and Bret B. Fox

**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of the foregoing **OPENING BRIEF OF APPELLANT DEFENDANTS HIGHLAND MARKETPLACE, L.C., ET AL.**, were served this 7<sup>th</sup> day of April, 2016, to the following via hand-delivery (two copies) and electronic mail:

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\_\_\_\_\_

## **OPENING BRIEF ADDENDUM INDEX**

<b><u>Tab No.</u></b>	<b><u>Description</u></b>
1.	Utah Code Annotated 1953 § 57-1-32 – Sale of Trust Property by Trustee
2.	Utah Rules of Civil Procedure, Rule 15 – Amended and Supplemental Pleadings
3.	5/20/2014 – Ruling on Motion for Leave to Amend and Motion to Extend Fact Discovery (R.1673-R.1681)
4.	8/11/2015 – Findings of Fact, Conclusion of Law, and Order (R.3662-R.3723)
5.	8/11/2015 – Plaintiff's Proposed Findings of Fact and Conclusions of Law for Trial (R.3724-R.3738)
6.	8/24/2015 – Findings of Fact, Conclusions of Law and Order (R.3740-R.3764)

Tab 1

## **ADDENDUM 1**

West's Utah Code Annotated

Title 57. Real Estate

Chapter 1. Conveyances (Refs & Annos)

U.C.A. 1953 § 57-1-32

§ 57-1-32. Sale of trust property by trustee--Action to recover balance due upon obligation  
for which trust deed was given as security--Collection of costs and attorney's fees

Currentness

At any time within three months after any sale of property under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in that action the complaint shall set forth the entire amount of the indebtedness that was secured by the trust deed, the amount for which the property was sold, and the fair market value of the property at the date of sale. Before rendering judgment, the court shall find the fair market value of the property at the date of sale. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale. In any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred.

**Credits**

Laws 1961, c. 181, § 14; Laws 1985, c. 68, § 4; Laws 2001, c. 236, § 13, eff. April 30, 2001.

Notes of Decisions (57)

U.C.A. 1953 § 57-1-32, UT ST § 57-1-32

Current through 2015 First Special Session

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Tab 2

## **ADDENDUM 2**

West's Utah Code Annotated  
State Court Rules  
Utah Rules of Civil Procedure (Refs & Annos)  
Part III. Pleadings, Motions, and Orders

Utah Rules of Civil Procedure, Rule 15

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

Currentness

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 21 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 14 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) **Amendments to conform to the evidence.** When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) **Supplemental pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

**Credits**

[Amended effective May 1, 2014.]

Notes of Decisions (515)

Rules Civ. Proc., Rule 15, UT R RCP Rule 15  
current with amendments received through February 1, 2016.

Tab 3

## **ADDENDUM 3**



FILED

MAY 20 2014

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

---

SA GROUP PROPERTIES, INC., a  
Minnesota corporation,

Plaintiff,

vs.

HIGHLAND MARKETPLACE, L.C., a Utah  
limited liability company; HIGH NOON,  
L.C., a Utah limited liability company;  
SOLANA BEACH HOLDINGS, L.C., a Utah  
limited liability company; THOMAS A.  
HULBERT, an individual; and BRET B.  
FOX, an individual,

Defendants.

---

: Ruling on Motion for Leave to Amend  
and Motion to Extend Fact Discovery

: Date: May 16, 2014

: Case No.: 120401312

: Division VII: Judge James R. Taylor

This matter is before the Court on Defendants' Motion for Leave to Amend and Defendants' Motion for Extension of Fact Discovery. For the reasons explained below the Motion for Leave to Amend is denied. The Motion for Extension of Fact Discovery is denied as moot.

Litigation Timeline

The sequential history of pleadings and discovery in this case is relevant to the present motion. Plaintiff, SAGP, served the initial complaint on August 20, 2012. The complaint alleged breach of the loan agreement and breach of the guaranty agreement. Defendants filed an answer to the complaint on September 19, 2012. On March 4, 2013, Plaintiff filed a motion for summary judgment. The motion focused on the fair market value of the Highland Property at the

time of default and the amount of the debt owed at that time by the Defendants. Prior to the first motion for summary judgment, Defendants were represented by Durham Jones & Pinegar. Shortly after the summary judgment motion was filed, on March 13, 2013, James Magleby, of Magleby & Greenwood, entered an appearance as substitute counsel for Defendants. Mr. Magleby prepared the memorandum in opposition to the motion for summary judgment. Briefing on the motion for summary judgment was completed on May 14, 2013 and the Court heard oral argument on the motion June 21, 2013. Neither party addressed accounting issues in the summary judgment briefs or at oral argument. The parties stipulated to the dismissal of the affirmative defenses asserted by Defendants. The Court denied in part the motion for summary judgment and dismissed the affirmative defenses. (Memorandum Decision 7/2/2013).

Defendants filed the first motion for extension of fact discovery on October 11, 2013. Briefing was completed November 5, 2013. The Court granted the motion and extended fact discovery to February 28, 2014. (Ruling and Order 11/19/2013).

The first motion for leave to amend was filed by the Defendants on December 23, 2013. The motion was based on discovery received through September 25, 2013 and addressed failed draw requests. (Memo in Supp. Of First Motion to Amend at 4). Defendants withdrew the first motion to amend after fact discovery had closed. (Notice of Withdrawal of Defendants Motion for Leave to Amend 3/5/2014).

Defendants filed the current motion for leave to amend on March 10, 2014. The motion requests leave to amend the Answer filed in 2012 and to assert counterclaims against SAGP.



Defendants also filed a motion for extension of fact discovery on March 10, 2014. The motion to extend is dependent on the Court granting the motion to amend. On March 24, 2014, the Plaintiff filed a memorandum in opposition to both the motion to amend the answer and the motion to extend discovery. Defendants replied on March 31, 2014 and the Court heard oral argument on the motions May 6, 2014.

#### Motion to Amend

After responsive pleadings are closed, “a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” UT. R. Civ. Pro. 15(a). Utah courts consider the following factors in deciding whether to grant a motion for leave to amend: (1) timeliness of the motion, (2) prejudice to the opposing party, and (3) whether the amendment is justified. Swan Creek Vill. Homeowners Ass’n v. Warne, 134 P.3d 1122, ¶20 (Utah 2006); Turville v. J&J Properties, L.C., 2006 UT App. 305, ¶31. The court can also consider additional factors such as whether the amendment is futile or made in bad faith. Aurora Credit Servs., Inc. v. Liberty West Dev., Inc., 970 P.2d 1273, 1282 (Utah 1998).

#### Timeliness

A motion to amend is “typically deemed untimely when it is filed in the advanced procedural stages of the litigation process, such as after the completion of discovery, on the eve of a scheduled trial date, or after an order of dismissal has already been entered.” Kelly v. Hard Money Funding, Inc., 87 P.3d 734, ¶29 (UT. App. 2004). The present case was filed August 20,

2012. The Plaintiff motion for summary judgment was denied and the affirmative defenses asserted by Defendants were dismissed. (Memorandum Decision, July 2, 2013). The Court has already granted one extension of fact discovery which ended February 28, 2014. (Ruling and Order, November 19, 2013). Expert discovery is currently underway. Although there is no trial date set, significant procedural stages in the litigation process have been completed.

The timeliness prong also requires the court to consider whether the moving party was previously aware of the substance of the new allegations and whether the amendment would delay trial. Westley v. Farmer's Ins. Exchange, 663 P.2d 93, 94 (Utah 1983). The proposed Amended Answer and Counterclaim is based on allegedly failed draw requests and a resulting failure to make property tax payments. Defendants argue that the amendment is necessary because new information on the draw requests was discovered in documents recently produced by plaintiff, SAGP. (Memo. in Support of Motion for Leave to Amend at 4). The amended answer and counterclaim relies on five documents: (1) the October 28, 2009 Draw Request; (2) FCB's Ledger; (3) FCB's Advance Distribution Summary dated 11/4/09; (4) FCB's Loan Approval Form dated 12/1/10; and (5) an email string dated April 19-20, 2010 ("2010 Hulbert Email"). SAGP produced these five documents between April 9, 2013 and September 25, 2013. (Memo. in Opp. to Motion for Leave to Amend and Extend Fact Discovery, Background of Relevant Fact No. 30). Defendants reviewed all documents produced through September 25, 2013, including the five key documents, prior to filing the first motion to amend on December 23, 2013. (Memo in Supp. Of First Motion to Amend at 4). The memo in support of the first

motion to amend is based on “First Community Bank and US Bank’s refusal to fund draw requests made in August 2010.” (Id.) Because the first motion to amend was based on the draw request issue, Defendants can not claim that they just learned of the failed payments. Defendants were aware of the funding problems as early as 2010, as evidenced by the draw request, loan forms, and 2010 Hulbert Email. This was well before the case began and the Highland Property was foreclosed.

Plaintiff produced documents nine times throughout the discovery period. (Transcript of May 6, 2014 Hearing, 8:11-12). Multiple document productions may make discovery investigation more complex, but do not justify the Defendants’ failure to assert the counterclaim before the present motion to amend. The complaint, answer, and summary judgment arguments focused on the “fair market value of the real property subject to foreclosure and on which the amount of any claimed deficiency must be based.” (Def. Memo. in Supp. Of Rule 56(f) Motion at 4). Despite Defendant’s knowledge of the failed draw requests, discovery on the draw requests was not pursued even after the extension on fact discovery was granted. The motion to amend is untimely based on Defendants’ previous knowledge of the failed draw requests and the completion of significant procedural stages in the case.

At oral argument on the Motion for Summary Judgment, the parties stipulated to dismiss the following affirmative defenses: estoppel and waiver, unjust enrichment, lack of standing, failure to mitigate damages and offset, self-infliction of damages and unavoidable circumstances. (Memorandum Decision July 7, 2013 at pg.7). The ruling of the Court is the governing law of

the case. Defendants argue that because the defenses are supported by the recently produced evidence on Draw Request 23 it is proper to reassert waiver and estoppel, unjust enrichment, failure to mitigate damages and offset, self-infliction of damages and unavoidable circumstance. As explained above, there is evidence that the Defendants knew draw requests had failed prior to receiving the most recent discovery. Defendants stipulated to the dismissal of the affirmative defenses with knowledge of the failed draw requests. Summary judgment was granted and there is insufficient justification to reintroduce the affirmative defenses at this stage in the litigation.

#### Prejudice

The prejudice prong of the analysis requires the nonmoving party to show more than simple prejudice or the need for further discovery. Prejudice requires that “the opposing side would be put to *unavoidable prejudice* by having an issue adjudicated *for which he had not time to prepare.*” Kelly, 87 P.3d 724, ¶31 quoting Kasco Services Corp. v. Benson, 831 P.2d 86, 92 (Utah 1992). Litigation has focused on two main issues up to this point: (1) the fair market value of the Highland Property and (2) the amount of the debt owed by Defendants. (*See* Complaint, Answer, Memorandums in Support of and in Opposition to Summary Judgment, and the November 19, 2013 Ruling and Order). The motion to amend is accompanied by a motion to extend fact discovery. Plaintiff has voiced the need to interview former FCB and Highland Marketplace employees, review documents which were previously considered to be irrelevant, and conduct additional discovery if the motion to amend is granted. (Plaintiff’s Memo in Opp. at 22-23). If the Court granted the motion to amend and extended discovery, the case would be

further delayed and any potential recovery due the Plaintiff would be postponed. The resulting prejudice to the Plaintiff is not unavoidable because an extension would give the Plaintiff time to prepare to litigate the new issues.

The Court can deny the motion to amend even without a finding of undue or unavoidable prejudice. “A district court acts within the bounds of its discretion when it denies leave to amend for ‘untimeliness’ or ‘undue delay.’ Prejudice to the opposing party need not be shown also.” Kelly 87 P.3d 734, ¶42 quoting First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc., 820 F.2d 1127, 1133 (10<sup>th</sup> Cir. 1987). The Defendants had prior knowledge of the substance of the claims asserted in the Motion to Amend, fact discovery in the case has already been extended once, the Court has issued a ruling on summary judgment, and expert discovery is underway. The motion to amend is not timely and can be denied even though the Plaintiff would not experience undue prejudice if it were granted.

#### Justification

The justification factor focuses on “whether the moving party had knowledge of the events that are sought to be added.” Swan Creek, 134 P.3d 1122, ¶22 quoting Kelly, 87 P.3d 734, ¶32. In addition to a party’s prior knowledge, Utah courts consider whether the motion was filed as the result of a dilatory motive, bad faith, or unreasonable neglect. Kelly at ¶38. The requirements for finding a dilatory motive, bad faith, or unreasonable neglect have not been defined, but the Utah Court of Appeals has determined that “where the party’s knowledge was minimal, or where it was instead based on suspicious or inconclusive evidence, the party’s

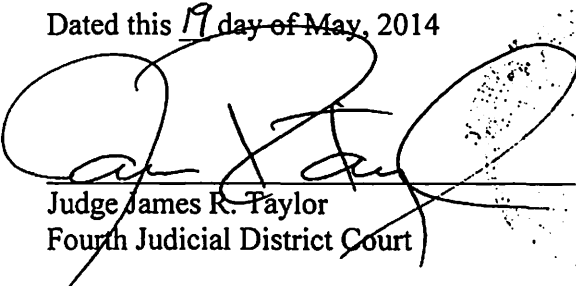
decision to hold off on pleading those allegations until reliable confirmation could be obtained should not serve as grounds for procedural default.” Swan Creek, 134 P.3d 1122, ¶22 quoting Kelly at ¶38.

There is no evidence that Defendants acted with a dilatory motive or bad faith. Defendants argue that there is no unreasonable neglect because “[w]hile Defendants were obviously aware of some of the events that are implicated in the proposed counterclaim (i.e. the fact that some funds were not actually disbursed), they were not in possession of the evidence which substantiated the new claims and clarified which draws were not actually funded until Plaintiff’s recent document productions...” (Defendants Memo in Supp. at 9). Defendants had more than minimal knowledge of the failed payments long before the most recent discovery was received. The companies knew that some of the Draw Requests failed as early as 2010. The current motion to amend relies on draw requests, loan forms, and emails produced by Plaintiff and reviewed by Defendants prior to the first motion to amend being filed in December 2013. No further “reliable confirmation” was necessary to include the allegations in a previous pleading, yet Defendants did not raise the issue of accounting or draw requests in the answer or in response to the motion for summary judgment. The issue of the failed draw requests is not new and Defendants acted with unreasonable neglect when the issue was not raised in prior pleadings. Based on Defendants previous knowledge, the motion to amend the answer and counterclaim is not justified.

### Conclusion

Because the Defendants' Motion for Leave to Amend is untimely and not justified, the motion is denied. The need for extension of fact discovery described in the Motion for Extension of Fact Discovery is predicated on an amendment to the pleadings requested in the Motion for Leave to Amend. Inasmuch as the motion to amend has been denied, the Motion for Extension of Fact Discovery is denied as moot.

Dated this 19 day of May, 2014



Judge James R. Taylor  
Fourth Judicial District Court

Copies of this Order distributed to:

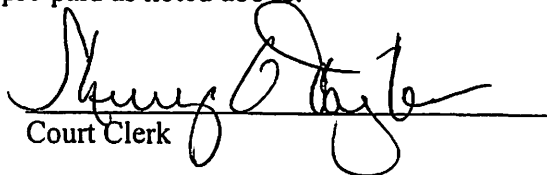
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Mailed this \_\_\_ day of May, 2014, postage pre-paid as noted above.



Court Clerk

Page 9 of 9



Tab 4

## **ADDENDUM 4**

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Attorneys for Defendants

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**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, PROVO DEPARTMENT, STATE OF UTAH**

---

**SA GROUP PROPERTIES, INC., a  
Minnesota corporation,**

**Plaintiff,**

**v.**

**HIGHLAND MARKETPLACE, L.C., a  
Utah limited liability company; HIGH  
NOON, L.C. a Utah limited liability  
company; SOLANA BEACH HOLDINGS,  
L.C., a Utah limited liability company,  
CR V MAIN-MAIN, L.P., a Delaware  
limited liability partnership; THOMAS A.  
HULBERT, an individual and BRET B.  
FOX, an individual,**

**Defendants.**

**FINDINGS OF FACT, CONCLUSION OF  
LAW, AND ORDER**

**Case No. 120401312**

**Honorable James R. Taylor**

---

Based upon the pleadings and papers on file with the Court and the evidence and arguments presented at trial of this matter, the Court hereby enters these Findings of Fact, Conclusions of Law and Order.

**INTRODUCTION**

This case is governed by Utah Code Ann. § 57-1-32 (the "Deficiency Action Statute"), under which "the court shall find the fair market value of the property at the

date of sale,” and providing that if the fair market value (or “FMV”) of the property at the time of the foreclosure exceeds the debt, then the foreclosing party shall have no recovery against the borrower or guarantors. See Utah Code § 57-1-32. The Deficiency Action Statute is based upon an important public policy purpose “to protect the debtor, who in a non-judicial foreclosure has no right of redemption, from a creditor who could purchase the property at the sale for a low price and then hold the debtor liable for a large deficiency.” *Capital Assets Fin. Svs. v. Jordanell Dev., LLC*, 2010 UT App 385, ¶ 8, 247 P.3d 411.

The Court has heard evidence relating to the fair market value of the subject property from three appraisers, two from Plaintiff SA Group Properties, Inc. (“Plaintiff” or “SA Group”) and one from Defendants.

Plaintiff called two expert witnesses to testify regarding the fair market of the Highland Marketplace: Kerry M. Jorgensen (“Mr. Jorgensen”) and Darrin W. Liddell (“Mr. Liddell”). As the Plaintiff, SA Group has the burden of proof, but has not met its burden.

Mr. Liddell’s testimony did not meet SA Group’s burden of proof because (among other things) he admitted on cross-examination that he valued the property using only the income approach and in a certain way because he was instructed to do so by his client, SA Group; that the approach he used was inconsistent with how he would evaluate this property 95% of time; that he would have used a different approach if his client had not told him what to do; and – critically – that if he had used a different approach, the value of the property would have been higher. Mr. Liddell did not use the

sales comparison approach, which as explained by Mr. Cook would have shown that his valuation was too low. Since fair market value, by definition, incorporates the concept of highest and best use and highest value under appraising standards, with these admissions the Court cannot rely upon Mr. Liddell's valuation.

Mr. Jorgensen's testimony did not meet SA Group's burden of proof because (among other things) he failed to properly consider the value of an existing lease with Walgreen's; improperly substituted a lower "market rent" for existing leases on the property; consistently chose comparables that were of a different age, type or use and therefore had only marginal applicability as a valuation tool when compared to the new construction of the subject property; improperly applied a bulk discount; and consistently chose downward adjustments on every aspect of his work.

Plaintiff's two appraisers reach inconsistent conclusions, further undercutting the credibility of their valuation analyses. For example, Mr. Jorgensen levels numerous criticisms against Mr. Cook which apply with equal force to Mr. Liddell's analysis, including the decision by both Mr. Cook and Mr. Liddell to value the first floor of Building A using a market rate analysis instead of the existing but non-arm's length lease. Similarly, Mr. Jorgensen critiques Mr. Cook for failing to use the cost approach, but Mr. Liddell also did not use the cost approach (and as noted did not use the sales approach either). Were the Court to accept Mr. Jorgensen's critique of Mr. Cook, it would reject Mr. Liddell's analysis for the same reasons. And the Court cannot accept Mr. Liddell's work because, as noted, he admitted that he applied an analysis dictated by the client

and which resulted in a lower – but unquantified – value than if he had independently chosen how to appraise the property.

Defendants called Philip Cook (“Mr. Cook”) as an expert witness to testify regarding the fair market value of the Highland Marketplace. The Court finds Mr. Cook’s analysis thorough and credible, including (among other things) Mr. Cook’s decision to use the existing leases for valuation purposes (but only after validating this conclusion by conducting a separate market rent analysis), Mr. Cook’s analysis of comparable Walgreen’s transactions, and his sales comparison analysis based upon the sale of other shopping centers.

It is also notable that much of Mr. Cook’s analysis is supported by Mr. Liddell, and that these two appraisers disagree with SA Group’s primary witness Mr. Jorgensen. For example, Mr. Cook and Mr. Liddell agree that the cost approach is not appropriate for the subject property, agree that the highest and best use of the first floor of Building A is retail space, and conclude a very similar market rent rate for that property.

Plaintiff has failed to meet its burden of proof, and the Court accepts Mr. Cook’s valuation that the Property had a fair market value of \$14,710,000, as of May 22, 2012. Accordingly, under the Deficiency Action Statute, Plaintiff is not entitled to any recovery against any of Defendants, who are the prevailing parties.

## **FINDINGS OF FACT**

### **The Parties and Witnesses**

1. Plaintiff SA Group Properties, Inc. (“Plaintiff” or “SA Group”) is a Minnesota corporation and an assignee of U.S. Bank National Association (“US Bank”).

2. US Bank is the successor-in-interest to the Federal Deposit Insurance Corporation, as receiver of First Community Bank ("First Community").

3. Highland Marketplace, L.C. ("Highland") is a Utah limited liability company with its principal place of business in Salt Lake County, Utah.

4. High Noon, L.C. ("High Noon") is a Utah limited liability company with its principal place of business in Salt Lake County, Utah.

5. Solana Beach Holdings, L.C. ("Solana") is a Utah limited liability company with its principal place of business in Salt Lake County, Utah.

6. Thomas A. Hulbert ("Mr. Hulbert") is an individual who resides in Salt Lake County, Utah.

7. Bret B. Fox ("Mr. Fox") is an individual who resides in Summit County, Utah.

### **The Highland Marketplace Loan**

8. On or about September 5, 2007, Highland, High Noon, and Solana entered into a Construction Loan Agreement with First Community that governed the terms of a \$28,000,000 line of credit (the "Loan Agreement").

9. In connection with the Loan Agreement, Highland, High Noon and Solana executed a Promissory Note, dated September 5, 2007, in favor of First Community and in the principal amount of \$28,000,000 (the "Note").

10. Mr. Hulbert entered into a Commercial Guaranty with First Community (the "Hulbert Guaranty") pursuant to which he "absolutely and unconditionally guarantee[d]



full and punctual payment and satisfaction of the Indebtedness of . . . all Borrower's obligations under the Note and Related Documents." [Hulbert Guaranty at 1].

11. Mr. Fox also entered into a Commercial Guaranty with First Community (the "Fox Guaranty"), pursuant to which he "absolutely and unconditionally guarantee[d] full and punctual payment and satisfaction of the Indebtedness of . . . all Borrower's obligations under the Note and Related Documents." [Fox Guaranty at 1].

12. Highland, High Noon and Solana executed a Construction Deed of Trust dated April 27, 2007 in favor of First Community, as Trustee, and First Community, as Beneficiary, to secure certain obligations owing to First Community (the "Original Deed of Trust"). [See Original Deed of Trust].

13. The Original Deed of Trust contains an express Power of Sale clause and was recorded with the Utah County Recorder's Office on May 3, 2007, as entry number 65863:2007. [See *id.*].

14. On or about September 5, 2007, the prior obligation owing to First Community by Defendants, as secured by the Original Deed of Trust, was replaced by the Loan Agreement and Note, and in connection therewith, the Original Deed of Trust was modified by that certain Modification Deed of Trust dated September 5, 2007 (the "Modified Deed of Trust" and, together with the Original Deed of Trust, the "Deeds of Trust"). [See Modified Deed of Trust].

15. The Modified Deed of Trust was recorded with the Utah County Recorder's Office on September 21, 2007, as entry number 138163:2007. [See Declaration of Timothy N. Scheer ("Scheer Decl."), ¶ 17].

16. Pursuant to the Deeds of Trust, Highland, High Noon, and Solana granted First Community, among other things, a first position deed of trust lien on certain real property located in Utah County, Utah (the "Highland Marketplace" or the "Trust Property"), the legal description of which is set forth below:

**PARCEL 1:**

Commencing South 1274.60 feet and East 1039.5 feet from the Northwest Corner of Section 36, Township 4 South, Range 1 East, Salt Lake Base and Meridian; thence North 89°40' East 352.231 feet; thence North 86°48'15" East 100.12 feet; thence North 89°40' East 476.58 feet; thence Northeasterly 44.59 feet along the arc of 30 foot radius curve line (chord North 47°05'14" East 40.6 feet); thence North 4°30'27" East 172.836 feet; thence West 972.079 feet; thence South 210.349 feet to the point of beginning.

Less and Excepting that portion conveyed to Utah Department of Transportation by that certain Warranty Deed recorded April 24, 1990, as Entry No. 12548 of Official Records and being described as follows:

A parcel of land in fee for the widening of Highway State Route 92 known as Project No. 0202, being part of an entire tract of property, situate in the North Half of the Northwest Quarter of Section 36, Township 4 South, Range 1 East, Salt Lake Base & Meridian. The boundaries of said parcel of land are described as follows:

Beginning at the intersection of the Westerly boundary line of said entire tract and the Southerly boundary fence line of said entire tract, which point is 63 rods (equals 1037.9 feet) East and 78 rods (equals 1287.8 feet) South from the Northwest Corner of said Section 36; and running thence East (which equals highway bearing North 89° 34'14" East) 954.94 feet along said Southerly boundary fence line to a fence corner; thence continuing East (equals highway North 89° 34'14" East) 18.56 feet, more or less, to the Southeast Corner of said entire tract; thence North (equals highway North 0° 06'35" East) 227.20 feet; (Note: Deed of record gives this as 13 1/2 rods or 222.75 feet) to the Northeast Corner of said entire tract; thence West (equals highway South 89° 34'14" West) 1.07 feet, more or less, along the north boundary line of said entire tract to a fence corner in the Westerly right of way fence line of the existing highway State Route 74; thence South 4° 30'27" West (highway bearing) 177.30 feet along said Westerly right of way fence line to point of tangency with a 30.00—foot radius curve to the left; thence Southwesterly 44.59 feet along the arc of said curve (Note: Chord to said curve bears South 47° 05'14" West for a distance of 40.60 feet) to a point 50.00 feet perpendicularly distant Northerly from the control line of said project at Engineer Station 296+76.58; thence South 89° 40'00" West (highway bearing) 476.58 feet along a line parallel to said control line; thence South 86°48'15" West (highway bearing) 100.12 feet to a point 45.00 feet perpendicularly distant Northerly from said center line at Engineer Station 291+00.00; thence South 89° 40'00" West (highway bearing) 352.58 feet along a line parallel to said control line to the Westerly boundary of said entire tract; thence South (equals highway South 0° 06'25" West) 19.69 feet along said Westerly boundary line to the point of beginning as shown on the Official Map of said project on file in the Office of the Utah Department of Transportation.

Also, Less and Excepting that portion conveyed to Utah Department of Transportation by that certain Warranty Deed recorded April 24, 1990, as Entry No. 12549 of Official Records and being described as follows:

A parcel of land in fee for the widening of Highway State Route 92 known as Project No. 0202, being part of an entire tract of property, situate in the North Half of the Northwest

Quarter of Section 36, Township 4 South, Range 1 East, Salt Lake Base & Meridian. The boundaries of said parcel of land are described as follows:

Beginning at the intersection of the Westerly boundary line of said entire tract and the Southerly boundary fence line of said entire tract, which point is 63 rods (equals 1037.9 feet) East and 78 rods (equals 1287.0 feet) South from the Northwest corner of said Section 36; and running thence East (which equals highway bearing North  $89^{\circ}34'14''$  East) 954.94 feet along said Southerly boundary fence line to a fence corner; thence continuing East (equals highway North  $89^{\circ}34'14''$  East) 18.56 feet, more or less, to the Southeast corner of said entire tract; thence North (equals highway North  $0^{\circ}06'35''$  East) 227.20 feet (Note: Deed of record gives this as 13 1/2 rods or 222.75 feet) to the Northeast Corner of said entire tract; thence West (equals highway South  $89^{\circ}34'14''$  West) 1.07 feet, more or less, along the North boundary line of said entire tract to a fence corner in the Westerly right of way fence line of the existing Highway State Route 74; thence South  $4^{\circ}30'27''$  West (highway bearing) 177.30 feet along said Westerly right of way fence line to a point of tangency with a 30.00-foot radius curve to the left; thence Southwesterly 44.59 feet along the arc of said curve (Note: Chord to said curve bears South  $47^{\circ}05'14''$  West for a distance of 40.60 feet) to a point 50.00 feet perpendicularly distant Northerly from the control line of said project at Engineer Station 296+76.58; thence South  $89^{\circ}40'00''$  West (highway bearing) 476.58 feet along a line parallel to said control line; thence South  $86^{\circ}48'15''$  West (highway bearing) 100.12 feet to a point 45.80 feet perpendicularly distant Northerly from said center line at Engineer Station 291+00.80; thence South  $89^{\circ}40'00''$  West (highway bearing) 352.58 feet along a line parallel to said control line to the Westerly boundary of said entire tract; thence South (equals highway South  $0^{\circ}06'25''$  West) 19.69 feet along said Westerly boundary line to the point of beginning as shown on the Official Map of said project on file in the Office of the Utah Department of Transportation.

**PARCEL 2:**

Commencing 2058.93 feet East along the Section line and 536.52 feet South to a fence corner and South  $5^{\circ}7'$  West 210.9 feet from the Northwest Corner of Section 36, Township 4 South, Range 1 East, Salt Lake Base and Meridian; thence South  $5^{\circ}7'$  West 314 feet along a fence and the West line of a road to a fence corner; thence South  $89^{\circ}51'$  West 969.0 feet along a fence; thence North  $0^{\circ}7'$  East 314 feet; thence North  $89^{\circ}51'$  East 995.5 feet to the point of beginning.

**PARCEL 3:**

A parcel of land located in Section 36, Township 4 South, Range 1 East, Salt Lake Base and Meridian, commencing at a point in the Easterly boundary of Stoneridge Subdivision, according to the Official Plat thereof on file at the Office of the Recorder, Utah County, Utah, the point being the intersection of a fence line with the Easterly boundary of said subdivision, which point has coordinates of X (East) = 1,919,831.52 feet and Y (North) = 765,085.53 feet; referred to the Utah Coordinate System, Central Zone, the point also being South 745.81 feet and East 1045.19 feet-grid distances from the Northwest Corner Meridian (the section line having a bearing of South  $08^{\circ}13'$  West, Southerly from said section corner); thence North  $07^{\circ}40'$  West 1.06 feet along an Easterly boundary of said Stoneridge Subdivision; thence North  $11^{\circ}31'20''$  East 210.15 feet along the Easterly boundary of said Stoneridge Subdivision to a point which is intersected by a fence line; thence North  $89^{\circ}21'04''$  East 402.05 feet along a fence line to a point (a 5/8" rebar set); thence South  $02^{\circ}16'$  West 208.89 feet to a point in the Northerly boundary of the Crockett Development, Inc., property (5/8" rebar set); thence South  $89^{\circ}39'$  West 443.87 feet along the Northerly boundary of said Crockett Development, Inc. property to the point of beginning.

**PARCEL 4:**

Commencing 1287 feet South and 1039.5 feet East from the Northwest Corner of Section 36, Township 4 South, Range 1 East, Salt Lake Base & Meridian; North 222.7 feet, West 62.7 feet, South 222.7 feet, East 62.7 feet to beginning.

Less and Excepting that portion conveyed to Utah Department of Transportation by that certain Warranty Deed recorded April 24, 1990, as Entry No. 12551 of Official Records and being described as follows:

A parcel of land in fee for the widening of Highway State Route 92 known as Project No. 0202, being part of an entire tract of property, situate in the North Half of the Northwest Quarter of Section 36, Township 4 South, Range 1 East, Salt Lake Base & Meridian. The boundaries of said parcel of land are described as follows:

Beginning at the Southeast Corner of said entire tract, which point is 1287 feet South and 1039.5 feet East from the Northwest Corner of said Section 36; and running thence North 19.69 feet along the East boundary line of said entire tract to a point 45.00 feet perpendicularly distant Northerly from the center line of said project at Engineer Station 287+48.15; thence North 89° 54' 14" West 62.70 feet, along a line parallel to said center line, to the West boundary fence line of said entire tract; thence South 19.80 feet along said West, boundary fence line to the Southwest fence corner of said entire tract; thence East 62.7 feet along the South boundary fence line of said entire tract to the point of beginning as shown on the Official Map of said project on file in the Office of the Utah Department of Transportation.

(Note: Rotate all bearings in the above description 0° 25' 46" counterclockwise to match highway bearings based on the Utah State Plane Coordinate System, modified.)

**PARCEL 5:**

Beginning 2058.93 feet East along the Section Line and 536.52 feet South to a fence corner, from the Northwest Corner of Section 36, Township 4 South, Range 1 East, Salt Lake Base and Meridian; thence South 5° 07' West 210.9 feet along the West side of State Highway; thence West 551.48 feet; thence North 208.19 feet, more or less, to a fence; thence North 89° 41' East 571.25 feet along a fence line to the point of beginning.

The above five (5) Parcels being further described by survey as follows:

A part of the Northwest Quarter of Section 36, Township 4, South, Range 1 East, Salt Lake Base and Meridian, U.S. Survey in Utah county, Utah:

Beginning at an existing right-of-way monument on the North line of State Highway 92 as it exists at 45.00 foot half-width being 1039.54 feet North 89° 49' 50" East along the section line (1039.5 feet East record); and 1271.04 feet South 1274.60 feet record) from the Northwest Corner of said Section 36; and running thence along the North line of said State Highway the following three courses: North 89° 40' 00" East 350.87 feet (352.231 feet record) to an existing right-of-way monument; North 86° 48' 15" East 100.12 feet; and North 89° 40' 00"

East 476.58 feet to a point of curvature; thence Northeasterly along the arc of a 30.00 foot radius curve to the left a distance of 44.59 feet (central angle equals  $85^{\circ}09'33''$ ) and long chord bears North  $47^{\circ}05'14''$  East 40.60 feet to a point of tangency on the Westerly line of State Highway 74 as it exists at 54.00 foot half-width; thence North  $4^{\circ}30'27''$  East 176.34 feet (172.836 feet record) along said Westerly line to a point on the projection of an existing boundary line fence (said fence line being the same fence as described in Parcel 1 of that certain Special Warranty Deed recorded 15 March, 1985 as Instrument No. 6937 in Book 2203 at Pages 297 and 298 of the Official Records of Utah county, Utah); thence North  $89^{\circ}41'00''$  East 1.49 feet along the projection of said fence line to the Southeasterly Corner of said Special Warranty Deed; thence North  $5^{\circ}07'00''$  East 526.98 feet along said deed line to the boundary of Alpine Way Plat "A" Subdivision; thence along said Subdivision boundary the following two courses: South  $89^{\circ}24'50''$  West 146.34 feet to the Southwest Corner thereof; and North  $4^{\circ}48'50''$  East 1.12 feet to a point on the projection of an existing boundary line fence; thence South  $89^{\circ}21'52''$  West 825.51 feet along said existing fence line to the Easterly boundary of Stoneridge Subdivision Plat "A" Amended; thence along said Easterly 210.15 feet; South  $0^{\circ}07'48''$  East 315.06 feet; South  $89^{\circ}54'20''$  West 69.67 feet; and South  $0^{\circ}06'20''$  West 208.06 feet to the North line of State Highway 92 as it exists at 45.00 foot half-width; thence North  $89^{\circ}40'00''$  East 63.54 feet along said North line to the point of beginning.

[See Scheer Decl., ¶ 18]; [See also Exhibit 5, at 5-9 – 5-12].

17. On or about January 28, 2011, the New Mexico Financial Institutions Division closed First Community, and FDIC was named as receiver of First Community ("FDIC-R"). [See Scheer Decl., ¶ 19].

18. FDIC-R sold substantially all of First Community's assets, including the Loan Agreement, Note, Hulbert Guaranty, Fox Guaranty and the Deeds of Trust (collectively, the "Loan Documents") to US Bank, such that US Bank obtained the rights to enforce the Loan Documents. [See Scheer Decl., ¶ 20].

19. On May 21, 2012, US Bank assigned to the Plaintiff in this case, SA Group, its interest in the Loan Documents, specifically including the Deeds of Trust, as reflected by the Assignment of Deed of Trust recorded with the Utah County Recorder's Office on May 22, 2012, as entry number 42508:2012 (collectively, the "Assignments"). [See Scheer Decl., ¶ 24].

20. Defendants failed to make certain payments that were due under the terms of the Loan Agreement, Note, Hulbert Guaranty, and Fox Guaranty. [See Scheer Decl., ¶ 25].

### **The Trustee's Sale**

21. On May 22, 2012, the Trustee of the Highland Marketplace sold the Highland Marketplace to a third party in accordance with state law and the terms of the Deeds of Trust and other loan documents. [See Scheer Decl., ¶ 26].

22. The Trustee's Deed contains recitals relating to the exercise of the Power of Sale contained in the Deeds of Trust and the sale of the Trust Property. [See Scheer Decl., ¶ 27].

23. At the time of the foreclosure sale, the amount owing to SA Group by Defendants under the Note and Loan Documents was \$14,685,370.37, which consisted of \$13,390,939.93 in principal, including \$246,914.33 for the payment of past due real estate taxes; \$633,160.49 in interest; late charges of \$655,269.95; costs incurred for appraisal and environmental reports in the amount of \$6,000.00; plus the additional accrual of attorneys' fees and costs as allowed under the Loan Documents. [See Scheer Decl., ¶ 28].

24. At the foreclosure sale, the Trust Property was sold to a third party for the amount of \$8,565,000.00. [See Scheer Decl., ¶ 29].

25. Since the foreclosure sale, interest has accrued on the deficiency balance owed to SA Group after the sale of the Trust Property at the rate of 6.25%, which rate is comprised of: (a) the Prime Index Rate, as set forth in the Note, which rate has

remained at 3.25% since December 16, 2008; I plus (b) the additional 3.0% default rate, as set forth in the Note. [See Scheer Decl., ¶ 31].

26. On or about October 2, 2012, SA Group received \$177,896.00 from Len Stillman of Stillman Consulting Services, who was appointed the Receiver of the Trust Property on December 14, 2011, by the Honorable Steven L. Hansen, Fourth Judicial District Court Judge for the State of Utah, Utah County, Case No. 110403100, and which receivership terminated on August 15, 2012. SA Group applied this payment to further reduce the principal amount owing to SA Group by Defendants. [See Scheer Decl., ¶ 32].

### **The Highland Marketplace**

27. The Highland Marketplace is located at the northwest corner of the Alpine Highway and Timpanogos Highway in Highland, Utah. [See Exhibit 18, at 18.1].

28. The Highland Marketplace has good linkage to I-15 on the Timpanogos Highway and the Alpine Highway runs into American Fork. [See Trial Transcript, at 310:25-311:9 (Mr. Cook)].

29. Highland is an area with higher end homes, with a population that has purchasing power, such that they can afford to go out to dinner and support restaurants and retail stores. [See Trial Transcript, at 311:10-17 (Mr. Cook)].

30. Although there is competition from a Kohler's across the street, and Highland has Sunday closing laws, if someone wants to do business in Highland they have to be at the Highland Marketplace. [See Trial Transcript, at 311:18-312:8 (Mr. Cook)].



31. Highland is a growing city that had a lot of optimism in the market as of May 2012. [See Trial Transcript, at 313:11-24 (Mr. Cook)].

32. The Highland Marketplace was fully entitled as of May 2012 and contained the following horizontal improvements: utilities, water, sewer, gas, power, curbing and gutters, sidewalks, and roadways. [See Trial Transcript, at 314:20-317:13 (Mr. Cook)].

33. The Highland Marketplace also had various vertical improvements, including buildings on Lots 3, 7, 8, 9, & 10. [See Trial Transcript, at 317:18-318:6 (Mr. Cook)]; [See also Exhibit 18].

34. The buildings in the Highland Marketplace are good quality buildings, are architecturally pleasing, and typical of what is built today for good quality retail and office type buildings. [See Trial Transcript, at 319:2-5 (Mr. Cook)].

35. The construction quality of the buildings is good and the condition of the buildings is also good. [See Trial Transcript, at 319:5-6 (Mr. Cook)].

36. The Highland Marketplace is uniquely located, as it is at the only commercial intersection in Highland City. [See Trial Transcript, at 251:7-10 (Mr. Liddell)].

### **SA Groups Expert Witnesses**

37. SA Group called two expert witnesses to testify regarding the fair market of the Highland Marketplace: Kerry M. Jorgensen and Darrin W. Liddell.

38. Kerry M. Jorgensen ("Mr. Jorgensen") is the principal of Jorgensen Appraisal, Inc. Mr. Jorgensen has a bachelor's degree from the University of Utah in finance with a real estate emphasis, is MAI certified, and is a Certified General Appraiser in the State of Utah. [See Trial Transcript, at 29:19-30:6 (Mr. Jorgensen)].

39. Mr. Jorgensen has been an appraiser for approximately 36 years. [See Trial Transcript, at 31:13-14 (Mr. Jorgensen)].

40. Darrin W. Liddell ("Mr. Liddell") is the owner of the Integra Realty Resources franchise in Salt Lake City, Utah. Mr. Liddell has a bachelor's degree in finance and a master's degree in business administration, both of which come from the University of Utah. [See Trial Transcript, at 180:21-24; 182:7-11 (Mr. Liddell)].

41. Mr. Liddell is also a Certified General Appraiser for the State of Utah and is MAI certified. [See Trial Transcript, at 180:23-181:3; 181:18-20 (Mr. Liddell)].

#### **Defendants' Expert Witness**

42. Defendants called Philip Cook ("Mr. Cook") as an expert witness to testify regarding the fair market value of the Highland Marketplace.

43. Mr. Cook is a commercial real estate appraiser with approximately 35 years of experience and is the principal and owner of J. Philip Cook and Associates, LLC. [See Trial Transcript, at 280:13-17 (Mr. Cook)].

44. Mr. Cook obtained his bachelor's degree in finance from the University of Utah in 1980. Mr. Cook completed an MBA in 1982, also at the University of Utah. [See Trial Transcript, at 280:20-25 (Mr. Cook)].

45. Mr. Cook has also taught appraisal classes on Real Estate Appraisal Principles and Uniform Standards of Professional Appraisal Practice for the Appraisal Institute, which promulgates education and standards for appraisers and sponsors the MAI designation. [See Trial Transcript, at 282:3-19 (Mr. Cook)].

46. Mr. Cook has served in all the local office positions for the Appraisal Institute, including as the President of the Utah Chapter of the Appraisal Institute. Mr. Cook has also served as a regional representative and sat on the National Board of Directors for the Appraisal Institute. [See Trial Transcript, at 283:1-7 (Mr. Cook)].

47. Mr. Cook has served as a board member and as Chairman of the Utah State Appraiser Board, which works with the Utah Division of Real Estate to oversee the licensing and professional oversight of appraisers in the State of Utah. [See Trial Transcript, at 283:11-15 (Mr. Cook)].

48. Mr. Cook has been qualified as an expert witness on real estate appraisal related issues in both federal and state courts, and has appraised such shopping centers as Provo Towne Center, University Mall, the Riverwoods development, Fashion Place Mall, the City Creek project in downtown Salt Lake City, the Gateway mall, and numerous other big box, neighborhood, and strip centers. [See Trial Transcript, at 284:8-285:4 (Mr. Cook)].

#### **The Uniform Standards of Professional Appraisal Practice and The Appraisal of Real Estate**

49. The Uniform Standards of Professional Appraisal Practice ("USPAP") are a set of standards promulgated by The Appraisal Foundation that have been adopted by Utah into its state appraiser regulations. [See Trial Transcript, at 35:2-7 (Mr. Jorgensen)].

50. USPAP is one of the authoritative publications on appraising real estate. [See Trial Transcript, at 287:14-16 (Mr. Cook)].

51. The Appraisal of Real Estate is the most recognized and commonly used treatise by appraisers and is considered authoritative. [See Trial Transcript, at 287:10-16 (Mr. Cook)].

### **Appraising Value**

52. Appraisers do not merely appraise the value of real estate. Instead, appraisers appraise property rights, including lease rights. [See Trial Transcript, at 466:20-25, 467:17 (Mr. Cook)].

### **Highest and Best Use**

53. In determining the fair market value of a property an appraiser must determine the highest and best use of the property. [See Trial Transcript, at 290:18-25; 291:14-292:5 (Mr. Cook)]; [See also Exhibit 121]; [See Exhibit 122].

54. Highest and best use is defined in The Appraisal of Real Estate as “the probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, financially feasible, and that results in the highest value.” [See Trial Transcript, at 290:6-9, 20-22; 291:14-292:5 (Mr. Cook)]; [See also Exhibit 121]; [See Exhibit 122].

55. Highest and best use may also consider a zoning change that is reasonably probable. [See Trial Transcript, at 60:6-8 (Mr. Jorgensen)].

56. The highest and best use of the Highland Marketplace is considered both as if vacant and as improved. [See Trial Transcript, at 319:25-320:9 (Mr. Cook)].

57. On an as-vacant basis, the highest and best use for Pad I would be to construct a Jack in the Box restaurant consistent with a signed Letter of Intent with Jack in the Box. [See Trial Transcript, at 320:19-321:6 (Mr. Cook)].

58. For the anchor lots, Lots 1 and 2, the highest and best is to develop apartments or commercial buildings. [See Trial Transcript, at 321:7-12 (Mr. Cook)]; [See also Exhibit 18, at 18.22]. Although Mr. Cook initially analyzed these lots as containing apartment buildings, he also did a separate analysis of Lots 1 and 2 as commercial property and concluded that the value of Lots 1 and 2 as commercial property was the same as if they included apartment buildings. Stated differently, the extraordinary assumption that Lots 1 and 2 could be rezoned and have apartments constructed does not affect the appraised value of the Highland Marketplace because the value of the land for multifamily or commercial is the same. [See Trial Transcript, at 336:8-337:23 (Mr. Cook)].

59. On an as-improved basis, the highest and best use is to operate the center as an integrated economic unit to maximize value because shopping centers are typically bought as integrated units. [See Trial Transcript, at 321:20-322:17 (Mr. Cook)].

60. Although Mr. Liddell agrees that the highest and best use of the Highland Marketplace is to use it as an integrated unit, he inconsistently treated the Property as individual parcels in his appraisal:

HIGHEST AND BEST USE AND VALUE TYPES				
	Liddell	Jorgensen	Jorgensen Rebuttal	Cook
Overall Center	Sell as individual parcels	Operate as a whole	Operate part and sell part	Operate as a whole
Building A	Retail and office	Industrial type fitness center	Industrial type fitness center	Retail and office
Walgreens	Leased (but not leased)	Non-existent	Possibly leased	Leased

[See Ex. 103, at 103.1]; [See also Trial Transcript, at 330:2-9 (Mr. Cook)].

61. The highest and best use is not to sell each building or tax parcel separately:

20	Q.	Why not -- or isn't the highest and best
21		use to sell each building or tax parcel separately?
22	A.	It's not.
23	Q.	Why not?
24	A.	<u>It doesn't maximize value.</u> It doesn't do
25		anything for you. Shopping centers are typically
1		bought as integrated units.

[See Trial Transcript, at 321:20-322:1 (Mr. Cook) (emphasis added)].

62. It is not typical for a shopping center to be valued as separate parcels because shopping centers are sold as a whole and most of the time the seller only wants to know what the whole property is worth without knowing the individual components. [See Trial Transcript, at 228:6-21 (Mr. Liddell)].

63. Mr. Liddell admitted that he has used the separate parcel approach only about five percent (5%) of the time when appraising shopping centers and that most shopping centers are not appraised in individual parcels:



9       A.   Most -- most shopping centers that I  
10 appraise, we do not value them in individual parcels.  
11       Q.   All right. And, in fact, you would say  
12 maybe about 5 percent of the time you would use this  
13 approach; is that right?  
14       A.   That's reasonable.  
15       Q.   All right. And is one reason you  
16 typically wouldn't do it this way is because shopping  
17 centers are sold as a whole?  
18       A.   Shopping centers are sold as a whole, but  
19 most of the time they want to know what the whole  
20 thing is worth without knowing the individual  
21 components.

[See Trial Transcript, at 228:9-21 (Mr. Liddell) (emphasis added)].

64.     The reason Mr. Liddell used the separate parcel approach in this case was because he was instructed to do so by US Bank. [See Trial Transcript, 229:24-230:20 (Mr. Liddell)].

#### Highest and Best Use of Lot 3, Building A

65.     Both Mr. Cook and Mr. Liddell disagreed with Mr. Jorgensen, and concluded that the highest and best use of Building A is as a retail space, not a fitness center:

16       Q.   So did you determine that the building A  
17 space would have a use other than as a fitness  
18 center?  
19       A.   I felt that the property should be -- on  
20 the main level it should be leased as retail space.  
21       Q.   And so you disregarded the Newport Sports  
22 lease as if it did not exist?  
23       A.   That's what I did, yes.

\*\*\*



20 Q. With regard to building A, why not use a  
21 fitness center as the highest and best use for  
22 building A?  
23 A. I thought it was more indicative of a  
24 retail space that would be very similar to the other  
25 retail spaces in the center.

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1 Q. And the one right next door perhaps?  
2 A. Yes.

\*\*\*

1 Q. Understood. And have you already told us  
2 what you have to say as to why you determined that  
3 the first floor of building A should be retail as  
4 opposed to a fitness club?  
5 A. Well, I -- fitness club is just a use.  
6 It's not the building. Mr. Jorgensen makes it the  
7 building, and it's not. So it's a retail building  
8 designed for retail use. Sure, you could lease it if  
9 there was an arm's length fitness center that wanted  
10 it at a market rent. You could lease it for that  
11 use, but it's not typical for that.  
12 Fitness centers want mirrors on the walls.  
13 Well, if you've got all this glass on the outside of  
14 that building, you don't have a place to put mirrors.  
15 So it's not a good fit for a fitness center. That  
16 was a stopgap measure, remember.

[See Trial Transcript, at 192:16-23; 253:20-254:2 (Mr. Liddell); 362:1-16 (Mr. Cook)]; [See also Exhibit 20, at 20.9]; [See Exhibit 106, at 106.1].

66. Both Mr. Cook and Mr. Liddell disagreed with Mr. Jorgensen, and concluded that because the lease on Building A was not an arm's length lease, it should be disregarded in determining the fair market value of the Highland Marketplace. [See Trial Transcript, at 192:21-23; 251:19-252:5 (Mr. Liddell); 362:1-362:15 (Mr. Cook)].

Highest and Best Use of Lot 6, Pad D

67. The highest and best use of Pad D is to construct a building based on the Walgreen's lease between Highland, High Noon, and Solana, on the one hand, and Walgreen Co. ("Walgreen's"), on the other, that was executed on October 13, 2010.

[See Exhibit 31]; [See also Exhibit 18, 18.21].

68. The Walgreen's lease was for a seventy-five year term. [See Trial Transcript, at 353:4-7 (Mr. Cook)].

69. The Walgreen's lease called for a monthly rent of \$30,250 for a total annual rent of \$363,000:

**2. RENT**

Tenant shall pay rent for the Leased Premises, as follows:

(a) A fixed rent of \$30,250.00 per month, commencing on the Possession Date (as defined in Section 3(a) hereof) and continuing thereafter for the remainder of the Term (as defined in Section 3(a) hereof). Fixed rent shall be payable on the first day of each and every month in advance and shall be properly apportioned for any period less than a full calendar month.

[See Exhibit 31, at 31.3 (emphasis added)].

70. Although the initial lease required a completed building to be delivered to Walgreen's by no later than June 1, 2012, the First Amendment to Lease ("Walgreen's Amendment") amended the date by which a building had to be completed and delivered to Walgreen's by changing the deadline to October 1, 2013. [See Exhibit 31]; [See also Exhibit 36].

71. The Walgreen's lease is a legitimate marketable right that adds value to the Highland Marketplace. [See Trial Transcript, at 316:17-21, 466:22-24 (Mr. Cook)].

72. Walgreen's is a very credit worthy tenant and was a company with a 34 and a half billion dollar market cap as of 2012. [See Trial Transcript, at 352:219-24 (Mr. Cook)].

73. As of May 2012, there was a year and a half left to build the Walgreen's. The Walgreen's building would have taken only taken about six months to construct. [See Trial Transcript, at 351:19-24 (Mr. Cook)].

74. Despite the existence of the Walgreen's lease and the Walgreen's Amendment, Mr. Jorgensen did not separately value Lot 6, Pad D or consider the Walgreen's lease associated with that Pad in determining the fair market value of the Highland Marketplace. [See Trial Transcript, at 99:15-20 (Mr. Jorgensen)].

75. Mr. Jorgensen admitted that at the time he performed his appraisal he was not even aware of the signed Walgreen's lease. [See Trial Transcript, at 99:25-100:8 (Mr. Jorgensen)].

76. SA Group had the Walgreen's Lease and the Walgreen's Amendment in its possession but did not provide it to Mr. Jorgensen for his initial appraisal. [See Exhibit 31]; [See *also* Exhibit 36].

77. Although Mr. Liddell was aware of the Walgreen's lease at the time of his appraisal, he believed that the lease had expired and did not include any value for the lease. Instead, he simply appraised Pad D as vacant land:

11 Q. All right. And with regard to the  
 12 Walgreens lease, I just want to make sure I  
 13 understand. By the time you did your analysis of the  
 14 Walgreens parcel, you believe the lease had expired  
 15 and so your valuation includes in it the need to go  
 16 and get a new lease signed; is that right?  
 17 A. Yes.  
 18 Q. All right. And so basically you appraised  
 19 it as vacant land using sales comparison; is that  
 20 right?  
 21 A. In its as-is condition, yes.  
 22 Q. All right. And there was no upward  
 23 adjustment reflecting the Walgreens lease with regard  
 24 to parcel D, correct?  
 25 A. I valued the fee simple interest for

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1 parcel D.  
 2 Q. I just want to make sure. So there was no  
 3 upward adjustment applied for the Walgreens lease,  
 4 correct?  
 5 A. No. That would be a leased fee value. I  
 6 gave a fee simple value.

[Trial Transcript, at 240:11-241:6 (Mr. Liddell) (emphasis added)].

78. SA Group had the Walgreen's Amendment in its possession but did not provide it to Mr. Liddell. [See Exhibit 31]; [See also Exhibit 36].

79. Mr. Cook is the only expert to appraise the value of the Highland Marketplace with the Walgreen's lease. [Compare Exhibit 18 with Exhibits 10 & 11].

#### Highest and Best Value of Lot 11, Pad I

80. The highest and best use of Pad I is to construct a building based on the Jack in the Box Letter of Intent between Highland, High Noon, and Solana, on the one hand, and Vinod Mehta ("Mr. Mehta"), on the other, that was executed on May 14, 2012,

shortly before the foreclosure sale. [See Exhibit 75]; [See also Trial Transcript, at 320:19-321:6 (Mr. Cook)].

81. Mr. Cook performed due diligence on the Letter of Intent and found that Mr. Mehta was a franchisee of Jack in the Box, that the base terms of the lease were determined, and that the probability that the Letter of Intent would turn into a lease was high. [See Trial Transcript, at 360:4-21 (Mr. Cook)].

82. The Jack in the Box that was the subject of the Letter of Intent would have been the first Jack in the Box in northern Utah. [See Trial Transcript, at 361:9-11 (Mr. Cook)].

83. Mr. Jorgensen did not include the Jack in the Box Letter of Intent in his appraisal. [See Trial Transcript, at 115:13-15 (Mr. Jorgensen)].

84. Mr. Liddell admitted that at the time he performed his appraisal he was not aware of the signed Jack in the Box Letter of Intent. [See Trial Transcript, at 242:10-17 (Mr. Liddell)].

85. However, Mr. Liddell has used letters of intent to determine the value of the Highland Marketplace in previous appraisals, including letters of intent from T-Mobile and Dollar Cuts. [See Trial Transcript, at 249:3-25, 250:15-20 (Mr. Liddell)]; [See also Exhibit 15, at 15.173]; [See Exhibit 16, at 16.90].

86. Both T-Mobile and Dollar Cuts subsequently became tenants in the Highland Marketplace. [See Exhibit 18, at 18.38].



## Consistently Conservative Conclusions

87. Mr. Liddell and Mr. Jorgensen are also consistently conservative in their conclusions of the Highland Marketplace's value. [See Trial Transcript, at 299:17-21 (Mr. Cook)].

88. Mr. Cook summarized Mr. Liddell's conservative conclusions as follows:

INTEGRA CONCLUSION SUMMARY		
ISSUE	INTEGRA CONCLUSION OR TREATMENT	DIRECTION OF VALUE FAVORED
Valuation of the highest and best use of the property	Fails to recognize the single integrated economic nature of the subject and values the property as individual development parcels, followed by a bulk sale discount	Downward
Omission of the sales comparison approach	Fails to develop the sales comparison approach for the improved pads, which in most cases, would have acted as a check against the as is values both before and after applying abnormally high lease-up deductions to as stabilized values	Downward
Market Rent - In-line	Comparables indicated a market rent above what was concluded for this space	Downward
Market Rent - Office	The comparables Integra used suggest a market rent above what was concluded for this space	Downward
Market Rent - Fast Food	Most comparables were not of similar build to suit buildings and therefore did not represent the investment and expected return on the investment selected in the lease rate.	Downward
Capitalization Rate - In-line	Includes a table of capitalization rates that blanket various retail investments and concludes to the average. The most recent and comparable capitalization rate comparables in the same table indicate a lower capitalization rate.	Downward
Capitalization Rate - Walgreen's	Uses older sales data that does not reflect current trends, and overstates the capitalization rate.	Downward
Capitalization Rate - Fast Food	Concludes to a capitalization rate that is higher than supported by the comparables.	Downward
Rent Differential Analyses	Uses an arbitrary discount rate to establish the present value of differences between contract and market rent (which is often understated).	Downward
As Is Values - In-line	Applies a rent loss period with no market support which also extends beyond the stated prospective stabilization date.	Downward
As Is Value - Walgreen's	Fails to account for the value added for having a signed lease by Walgreen's, who is just waiting for the building to be constructed.	Downward
Land Valuation - Pad Sites	Fails to fully develop and understanding of the comparables used and adjust properly for them. Also includes multiple sales that are not reflective of pad site sales, and still concludes below their suggested value.	Downward
Land Valuation - Anchor Pad	Inexcusably values the anchor pad as two separate parcels as they are legally subdivided, although a buyer and user of that land would use them together, and then applies a bulk sale discount. Concludes well below the suggested value of the comparables.	Downward
Bulk Sale	Suggests that the property is not one economic unit and further discounts the depressed values without market support	Downward
Subdivision Analysis - Vacant Land	Fails to recognize the importance of the anchor pad to the remainder of the development as well as the joint marketing and exposure period that could be had by both the anchor and the pads.	Downward

[See Exhibit 19, at 19.23].

89. Mr. Cook summarized Mr. Jorgensen's conservative conclusions as follows:

JORGENSEN CONCLUSION SUMMARY		
ISSUE	JORGENSEN CONCLUSION OR TREATMENT	DIRECTION OF VALUE FAVORED
Valuation of the highest and best use of the property	Fails to recognize that the rear pad retail/office building is just that, and not a fitness center although it is currently occupied by a fitness tenant. Also, fails to include the proposed Walgreen's in the valuation.	Downward
Land Valuation	Treats subject as raw, unentitled, and unimproved land, ignoring that is fully platted and improved.	Downward
Cost Approach	Based on unsupportedly low estimates of replacement cost	Downward
Income Capitalization Approach	Fails to recognize income from a signed Walgreen's lease.	Downward
Market Rent - Pad A	Analyzes the Pad A building as it is a fitness center, which is incorrect, and concludes a market rent well below the buildings design and potential.	Downward
Market Rent - Fast Food	All comparables were not of similar build to suit buildings and therefore did not represent the investment and expected return on said investment reflected in the lease rate.	Downward
Property Rights Adjustment	Uses arbitrary discount rates to establish the present value of differences between contract and market rent, which is not reflective of the properties highest and best use and the way properties transact.	Downward
Sales Comparison Approach	Fails to use comparable property sales, specifically with the inclusion of fitness center sales.	Downward

[See Exhibit 20, at 20.15].

90. Mr. Liddell used cap rates developed from actual income and applied them to the market rent concept resulting in artificially low value. [See Trial Transcript, at 299:17-300:12 (Mr. Cook)].

91. In addition, Mr. Liddell took an additional ten percent (10%) discount by incorrectly applying the bulk sale discount. [See Trial Transcript, at 299:17-300:12 (Mr. Cook)].

92. In short, each of Mr. Liddell's judgment calls were conservatively made resulting in an appraised value that is not credible. [See Trial Transcript, at 299:17-300:12 (Mr. Cook)].

93. Mr. Jorgensen likewise made repeated conservative adjustments, such as including a thirty percent (30%) profit discount to the Walgreen's lease when the correct



adjustment should have been between five and ten percent. [See Trial Transcript, at 300:13-301:14 (Mr. Cook)].

94. Mr. Jorgensen then makes another downward adjustment of twenty-five percent (25%), which results in an even further reduction in the Highland Marketplace's value. [See Trial Transcript, at 300:13-302:7 (Mr. Cook)].

95. As with Mr. Liddell's judgment calls, Mr. Jorgensen is consistently conservatively in his adjustments, resulting in an appraised value that is not credible. [See Trial Transcript, at 300:13-302:7 (Mr. Cook)].

96. While Plaintiff challenged Mr. Cook's assessment of the adjustments made by Mr. Liddell and Mr. Jorgensen, suggesting that Mr. Cook highlighted only the downward adjustments, Mr. Cook challenged Plaintiff's counsel to "show me one" upward adjustment. [See Trial Transcript, at 440:6-441:15].

97. Plaintiff did not identify any instance where Mr. Jorgensen or Mr. Liddell made an upward adjustment. [See *generally* Trial Transcript].

98. Even if there was such an instance, the Court finds that the consistent downward adjustments made by both Mr. Liddell and Mr. Jorgensen undermine their appraisals such that their proffered values are not credible.

### **Scope of the Appraisal**

99. While portions of Mr. Liddell's analysis and reasoning agree with Mr. Cook (and disagree with Mr. Jorgensen), Mr. Liddell's ultimate valuation conclusion suffers from a critical flaw, based upon the scope of his appraisal.

100. The role of an appraiser is to be an impartial market observer or analyst who interprets real estate markets and works independently of a client. [See Trial Transcript, at 285:23-286:6 (Mr. Cook)].

101. Although an appraiser may receive client input, there are limits on the amount of direction an appraiser can accept from a client and it is the appraiser's responsibility to define the scope of work based on the intended use and the intended user or users of the appraisal. [See Trial Transcript, at 235:12-19 (Mr. Liddell); 307:11-19 (Mr. Cook)].

102. This responsibility is set forth in USPAP:

365 **SCOPE OF WORK RULE<sup>d</sup>**

366 **For each appraisal, appraisal review, and appraisal consulting assignment, an appraiser must:**

- 367     **1. identify the problem to be solved;**  
368     **2. determine and perform the scope of work necessary to develop credible assignment results; and**  
369     **3. disclose the scope of work in the report.**

370 **An appraiser must properly identify the problem to be solved in order to determine the appropriate**  
371 **scope of work. The appraiser must be prepared to demonstrate that the scope of work is sufficient to**  
372 **produce credible assignment results.**

[See Exhibit 126, at 126.1]; [See also Trial Transcript, at 307:20-308:11 (Mr. Cook)].

103. An appraiser may not accept assignment conditions that limit the scope of work to such a degree that the assignment results are not credible:

419 **An appraiser must not allow assignment conditions to limit the scope of work to such a degree that the**  
420 **assignment results are not credible in the context of the intended use.**

[See Exhibit 126, at 126.2]; [See also Trial Transcript, at 308:14-25 (Mr. Cook)].

104. Nor is an appraiser allowed to let the intended use of an assignment or a client's objectives cause the assignment results to be biased:

428 An appraiser must not allow the intended use of an assignment or a client's objectives to cause the  
429 assignment results to be biased.

[See Exhibit 126, at 126.2]; [See also Trial Transcript, at 309:1-5 (Mr. Cook)].

105. In this case, it was the appraisers' responsibility to research factual and market data necessary to support an understanding of the Highland Marketplace, to support the highest and best use analysis, and to perform the approaches necessary to value the Highland Marketplace. [See Trial Transcript, at 309:6-21 (Mr. Cook)].

106. In addition,

2. USPAP requires that the scope of work be tailored to the intended use of the appraisal. Accordingly, it is critical that the appraiser understand the intended use of the appraisal. In this case, the intended use was for "financing purposes." Although inconsistent with the USPAP requirement that market value is always based on highest and best use, the lender may have wanted an ultra-conservative view of "value" and instructed Integra (inappropriately) on how to value the property to get that result. Since it is the appraiser's – and specifically not the client's – responsibility to determine the scope of work, Integra erred in accepting an assignment condition that led to misleading results.

[See Exhibit 19, at 19.5 (emphasis added)].

107. In appraising the Highland Marketplace, Mr. Liddell did not determine the scope of the assignment but instead did what the client requested:

25	Q. (BY MR. MAGLEBY) "And do you have any	
		230
1	input into whether you think it ought to be by parcel	
2	versus one property maybe with the pad separated out	
3	or do you just do what the client tells you?"	
4	Answer, "I will -- I will do what the	
5	client is requesting with the scope of the	
6	<u>assignment.</u> "	
7	Was that my question, <u>was that your</u>	
8	<u>answer?</u>	
9	A. Here, yes.	

[See Trial Transcript, at 229:25-230:9 (Mr. Liddell) (emphasis added)].

108. Despite Mr. Liddell's obligation to determine the scope of the assignment, he admitted that but for the Bank's instruction, he would have valued the shopping center as one economic unit:

17 Q. But for the Bank's instructions, would you  
18 have valued lots 1 and 2 together or the entire  
19 center as one unit?  
20 A. If they only wanted the one project, I  
21 would probably have valued it as a shopping center,  
22 as an economic unit. But since I had the pieces,

[See Trial Transcript, at 255:17-22 (Mr. Liddell) (emphasis added)].

109. Mr. Liddell admitted that he has used the separate parcel approach only about five percent (5%) of the time when appraising shopping centers and that most shopping centers are not appraised in individual parcels:

9 A. Most -- most shopping centers that I  
10 appraise, we do not value them in individual parcels.  
11 Q. All right. And, in fact, you would say  
12 maybe about 5 percent of the time you would use this  
13 approach; is that right?  
14 A. That's reasonable.  
15 Q. All right. And is one reason you  
16 typically wouldn't do it this way is because shopping  
17 centers are sold as a whole?  
18 A. Shopping centers are sold as a whole, but  
19 most of the time they want to know what the whole  
20 thing is worth without knowing the individual  
21 components.

[See Trial Transcript, at 228:9-21 (Mr. Liddell) (emphasis added)].

110. Mr. Liddell violated the principles of USPAP by accepting the instruction to value the Highland Marketplace as separate pieces:

3 Q. (BY MR. MAGLEBY) Based on the testimony  
4 and what you saw, Mr. Cook, is it your opinion that  
5 Mr. Liddell violated the USPAP?

\*\*\*

16 A. I -- I believe that it violates the  
17 standard relative to highest and best use, which is  
18 the highest use that -- the highest value number.  
19 There's four tests of highest and best use. The last  
20 one is maximally productive. And by assuming that  
21 this is going to be parcelled off and sold as  
22 individual properties by a buyer -- so a buyer  
23 discounts heavily the price so that the buyer can  
24 make profit by selling individual components is not  
25 in accordance with highest and best use. So I don't

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1 believe that it reflects market value.  
2 Q. If -- and if Mr. Liddell made those  
3 decisions based on the client instructions, is that  
4 contrary to your understanding of the applicable  
5 standards or maybe the science part of your analysis?  
6 A. Yes. The determination of scope of work  
7 is left up to the appraiser -- should be. It's the  
8 appraiser's responsibility under USPAP, considering  
9 the intended use and intended users.  
10 And in this case and this intended use  
11 specific to this case, I would say that that's a  
12 violation.

[See Trial Transcript, at 414:3-5, 414:16-145:12 (Mr. Cook) (emphasis added)].

111. Indeed, Mr. Liddell admitted that if he had not appraised the Highland Marketplace the way US Bank instructed him to do it, the appraised value of the Highland Marketplace would have been higher:

11 Q. (BY MR. MAGLEBY) In this instance,  
 12 Mr. Liddell, did you do it this way because it was at  
 13 the request of the client?  
 14 A. To not include any building improvements  
 15 on the pad site, yes.  
 16 Q. Yes.  
 17 A. They wanted me to value as-is with those  
 18 pad sites as vacant.  
 19 Q. All right. And in addition, I think you  
 20 told me you had -- earlier you had valued it a  
 21 different way, but they told you to do it this way  
 22 this time so you did that way.  
 23 A. When you say "this time," I've appraised  
 24 it --  
 25 Q. I'm sorry. The May 2nd -- the March 2012

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1 appraisal, the May 2012 appraisal.  
 2 A. So they wanted it the same as the  
 3 September 2011 appraisal, to follow the same  
 4 methodology; so going back in time, I'm not sure what  
 5 I'm answering here. I'm sorry.  
 6 Q. All right. If you had valued it with an  
 7 anchor building, as they had on occasion asked you to  
 8 do previously, would the value have been higher?  
 9 A. Yes.  
 10 Q. Almost certainly, right?  
 11 A. Yes.

[See Trial Transcript, at 234:11-235:11 (Mr. Liddell) (emphasis added)].

112. Mr. Liddell did not, however, offer any testimony or evidence as to how much higher the value of the Highland Marketplace property would have been, if he had not followed the client's instructions and performed an independent analysis. [See *generally* Trial Transcript].

113. Accordingly, Mr. Liddell's valuation conclusion cannot be relied upon by the Court, as under the Deficiency Action Statute the Court must determine the fair



market value of the property, and the fair market value requires an analysis of value based on a willing buyer and a willing seller "that results in the highest value" and maximal productivity of the property. [See Trial Transcript, at 290:6-9, 20-22; 291:14-292:5 (Mr. Cook) (emphasis added)]; [See also Exhibit 121]; [See Exhibit 122]; [See Exhibit 11, at 11-62].

114. Mr. Liddell does a fair amount of appraisal work for US Bank and its related entities, and has been doing so for more than 15 years. [See Trial Transcript, at 223:16-21 (Mr. Liddell)].

115. Mr. Liddell does more than ten and sometimes more than twenty appraisals per year for US Bank. [See Trial Transcript, at 223:22-25 (Mr. Liddell)].

116. US Bank is a good customer and a steady client for Mr. Liddell. [See Trial Transcript, at 224:1-4 (Mr. Liddell)].

117. At the time of trial, Mr. Liddell was doing one appraisal for US Bank and hopes to get more of US Bank's work. [See Trial Transcript, at 224:15-13 (Mr. Liddell)].

### **Approaches to Value**

118. When appraising real estate there are three approaches to value: the sales comparison approach, the cost approach, and the income approach. [See Trial Transcript, at 65:20-25 (Mr. Jorgensen); 340:5-6 (Mr. Cook)]; [See also Exhibit 11, at 11-109 - 11-110]; [See Exhibit 100].

119. In appraising property, an appraiser must develop those approaches to value that are necessary to produce credible results, but may also omit an approach if it is not necessary. [See Trial Transcript, at 294:15-20 (Mr. Cook)]; [See also Exhibit 124].]

120. The income approach is “based on the appraisal principle of anticipation, which attests that property value is estimated as the present worth of future anticipated benefits accruing to ownership.” [See Exhibit 18, at 18.36].

121. With the income approach, the value of real property is equal to the net operating income (“NOI”) divided by the capitalization rate. [See Trial Transcript, at 65:20-25 (Mr. Jorgensen); 341:24-342:11 (Mr. Cook)].

122. Mr. Cook, Mr. Liddell, and Mr. Jorgensen all agree that the income approach is applicable to determining the fair market value of the Highland Marketplace. [See Exhibit 104.1].

123. The sales comparison approach “is based on the appraisal principle of substitution and takes into consideration the selling price of improved properties that provide utility equal or similar to the subject.” [See Exhibit 18, at 18.57].

124. The sales comparison approach uses the sales of comparable properties to try to predict what the subject property would sell for if it was placed on the market. [See Trial Transcript, at 87:14-17 (Mr. Jorgensen)].

125. Both Mr. Cook and Mr. Jorgensen agree that the sales comparison approach is applicable in this case and actually applied the sales comparison approach to the Highland Marketplace. [See Exhibit 104, at 104.1]; [See *also* Trial Transcript, at 65:20-25 (Mr. Jorgensen); 340:19-24 (Mr. Cook)].

126. In contrast, Mr. Liddell did not do a sales comparison approach for the income producing property. [See Exhibit 104.1]; [See *also* Trial Transcript, at 184:13-18 (Mr. Liddell); 418:10-419:12 (Mr. Cook)]; [See Exhibit 19, at 19.23].

127. A summary of the approaches to value used by the appraisers is included below:

COMPARISON OF VALUATION TECHNIQUES				
	Liddell	Jorgensen Appraisal	Jorgensen Rebuttal	Cook
Land Valuation	Yes	Yes	Yes	Yes
Cost Approach	No	Yes	N/A	No
Sales Comparison Approach	No	Yes	N/A	Yes
Income Approach	Yes	Yes	N/A	Yes
Income Approach Methodology	Individual lot valuations; bulk sale discount	Value as a whole	Value as a whole; then apply bulk sale discount selectively	Value as a whole
Stabilized Value Estimate	Yes	Yes	N/A	Yes
As Is Value Estimate	Yes	Yes	N/A	Yes
Discounted Bulk Sale Value Estimate	Yes	No	Yes	No

[See Exhibit 104, at 104.1].

### The Cost Approach

128. “The cost approach to value is based on the principle of substitution, which affirms that a knowledgeable buyer would pay no more for a property than the cost to acquire a similar site and construct improvements of equivalent desirability and utility without undue delay.” [Exhibit 11, at 11-65].

129. Although Mr. Jorgensen performed a cost approach, both Mr. Liddell and Mr. Cook agree that a cost approach is unnecessary to determine the fair market value of the Highland Marketplace because the cost approach is inapplicable to an income producing property. [See Trial Transcript, at 184:12-18, 236:10-22 (Mr. Liddell); 295:19-25 (Mr. Cook)].

### Sales Comparison Approach and the Principal of Substitution

130. The sales comparison approach is based on the principle of substitution.

[See Trial Transcript, at 296:1-297:20 (Mr. Cook)].

131. The principle of substitution requires comparison of an equally desirable substitute property. Stated differently, when applying the sales comparison approach the appraiser needs to find sales that are closely enough compared that the comparable is truly a substitute property to a prospective buyer and to a prospective seller:

17 Q. (BY MR. MAGLEBY) And, Mr. Cook, why don't  
18 you go ahead and explain the principle of  
19 substitution to us.  
20 A. Well, it is -- I think it's not the  
21 highlighted portion, but it's most easily understood  
22 with the first sentence of the second paragraph  
23 there, which says, "Property values tend to be set by  
24 the price of acquiring an equally desirable  
25 substitute property." which means -- well, appraising

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1 is all about comparison.  
2 We've all had our homes appraised and  
3 we've been irritated that an appraiser selected a  
4 home two miles away when the home two doors away sold  
5 that we think is most similar to our property. It --  
6 it's that idea that you want to find sales that are  
7 comparable to the subject, similar enough to the  
8 subject that they -- now, there's no two comparables  
9 that are -- or no two properties are exactly alike,  
10 so we have an adjustment process.  
11 But you need to find sales that are  
12 closely enough compared that it is a truly substitute  
13 property to a prospective buyer, to a prospective  
14 seller. And that's sort of the principle. You have  
15 to find good comparables.

[See Trial Transcript, at 296:17-297:20 (Mr. Cook) (emphasis added)].

132. Mr. Jorgensen agrees with Mr. Cook, and testified that under the substitution principle "a buyer would not pay more than they would expect to pay for a substitute" and that an appraiser wants "to have the comparables be as similar as possible." [See Trial Transcript, at 147:5-148:4 (Mr. Jorgensen) (emphasis added)].

133. Similarly, Mr. Jorgensen testified that when choosing comparable properties it is important that an appraiser try to find comparable sales that are actually comparable. [See Trial Transcript, at 110:14-17 (Mr. Jorgensen)].

134. In making this selection, some of the things an appraiser should look to compare are size, location, age of improvements, and a use that actually matches the highest and best use of the subject property:

14	Q.	All right. But in terms of choosing
15		comps, is it important to try to find comps or
16		comparables that are actually comparable?
17	A.	Yes.
18	Q.	And some of the things that you want to
19		compare are size; is that right?
20	A.	Yes.
21	Q.	Location?
22	A.	Yes.
23	Q.	Age of improvements if you're comparing
24		improvements?
25	A.	Yes.
111		
1	Q.	A use that actually matches the highest
2		and best use?
3	A.	Yes.

[See Trial Transcript, at 110:14-17 (Mr. Jorgensen)].

135. As noted, Mr. Liddell failed to conduct a sales comparison approach on the income producing property. [See Exhibit 104, at 104.1]; [See *also* Trial Transcript, at 184:13-18 (Mr. Liddell); 418:10-419:12]; [See Exhibit 19, at 19.23].

136. Mr. Liddell's failure to do a sales comparison approach on income producing property had a significant downward impact on his proffered value of the Highland Marketplace because it prevented him from using comparable sales as a benchmark for his income based analysis. [See Trial Transcript, at 419:7-12, 295:4-18 (Mr. Cook)].

137. For example, had Mr. Liddell performed a sales comparison on Building A, he would have discovered that comparable buildings were selling for approximately \$45 more per square foot than the \$80 per square foot listed by Mr. Liddell. [See Trial Transcript, at 295:4-18 (Mr. Cook)].

138. By failing to do such a check and establish a benchmark, Mr. Liddell violated the rule requiring appraisers to develop the approaches to value that are necessary to produce credible results. [See Trial Transcript, at 294:13-295:18 (Mr. Cook)].

139. Although Mr. Liddell was aware of the Walgreen's lease at the time of his appraisal, he did not include any value for the lease and, instead, simply appraised it as vacant land:



11 Q. All right. And with regard to the  
 12 Walgreens lease, I just want to make sure I  
 13 understand. By the time you did your analysis of the  
 14 Walgreens parcel, you believe the lease had expired  
 15 and so your valuation includes in it the need to go  
 16 and get a new lease signed; is that right?  
 17 A. Yes.  
 18 Q. All right. And so basically you appraised  
 19 it as vacant land using sales comparison; is that  
 20 right?  
 21 A. In its as-is condition, yes.  
 22 Q. All right. And there was no upward  
 23 adjustment reflecting the Walgreens lease with regard  
 24 to parcel D, correct?  
 25 A. I valued the fee simple interest for

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1 parcel D.  
 2 Q. I just want to make sure. So there was no  
 3 upward adjustment applied for the Walgreens lease,  
 4 correct?  
 5 A. No. That would be a leased fee value. I  
 6 gave a fee simple value.

[Trial Transcript, at 240:11-241:6 (Mr. Liddell) (emphasis added)].

140. Similarly, Mr. Liddell appraised Pad I as vacant land despite the existence of a Jack in the Box Letter of Intent. Mr. Liddell admitted that at the time he performed his appraisal he was not aware of the signed Jack in the Box Letter of Intent. [See Trial Transcript, at 242:10-17 (Mr. Liddell)].

141. Mr. Jorgensen violated the principal of substitution by choosing sales that were not similar or comparable to the Highland Marketplace. [See Trial Transcript, at 297:21-298:15 (Mr. Cook)].

142. For example, more than one third of Mr. Jorgensen's retail center comparable sales were more than twenty years old, with one comparable being over thirty years old, and one being forty years older than the Highland Marketplace:

Market Data Summary							
#	Identification/ Location	Sale Date	SF Size	Year Built	Anchor (Yes/No)	Overall Cap Rate	Price/SF
Retail Centers							
1	MIC Retail Layton, Utah	5/2008	10,400	2003	No	7.85%	\$120.19
2	Plum Tree Provo, Utah	2/2008	158,599	1987	Yes	7.75%	\$126.10
3	1549 North State Street Orem, Utah	6/2007	13,104	1980	Shadow	7.97%	\$144.99
4	Heritage Park Layton, Utah	6/2008	7,995	1997	No	7.06%	\$163.85
5	Plaza 1000 Clearfield, Utah	1/2009	9,450	2004	No	8.05%	\$164.55
6	Three Tenant Retail Midvale, Utah	1/2012	3,547	1972	No	8.84%	\$184.38
7	Wallpaper Warehouse Sandy, Utah	10/2010	7,245	1991	No	8.60%	\$174.33
8	West Bench Plaza Magna, Utah	4/2009	45,628	1999	Shadow	7.34%	\$175.33
9	River Park Plaza Salt Lake City, Utah	1/2012	7,128	2003	No	9.24%	\$186.59
10	Shops at 9th Street Murray, Utah	1/2011	5,004	2007	Shadow	7.50%	\$306.74
11	33rd Street Station Salt Lake City, Utah	5/2010	7,792	2008	No	8.70%	\$334.69
Subject by Comparison - 05/22/2012			15,839	2008-10	No	7.70%	\$288.00

[See Exhibit 11, at 11-103 (emphasis added)]; [See also Trial Transcript, at 148:10-149:14, 151:25-153:25 (Mr. Jorgensen)].

143. Mr. Jorgensen conceded that the older shopping centers used in his appraisal as comparables were not only inferior in appearance, but also did not look as modern nor as good as the Highland Marketplace:

17 Q. Let's take a look at the photo 11.188. I  
 18 call this the money store photo. This is -- is this  
 19 the photo of that particular property?  
 20 A. Yes.  
 21 Q. Does that look like the same quality  
 22 construction and tenants as we have in the subject  
 23 property?  
 24 A. The construction quality is similar, but  
 25 it's older and it's -- so its appearance is certainly

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1 inferior; you know, just doesn't look as modern.  
 2 Q. And would you agree that's the case with a  
 3 number of these older buildings we've been looking  
 4 at?  
 5 A. Yes.  
 6 Q. Thank you. Let's look at comp number  
 7 seven, 11 -- 11.184, I think. No. 11.189.  
 8 Apologies. Built in about 1991?  
 9 A. Yes.  
 10 Q. So about 20 years old compared to the  
 11 comp. Is that -- or to the subject property,  
 12 correct?  
 13 A. It's -- it was 19, yeah.  
 14 Q. Nineteen. Okay. You're -- appraisers are  
 15 always better at math than lawyers.  
 16 A. Well, I --  
 17 Q. At least this lawyer. Let's go to the  
 18 next page and take a look at the photo. Wallpaper  
 19 Warehouse; is that right?  
 20 A. Yes.  
 21 Q. And, again, would you say this is an  
 22 older -- older building, not as new as the subject?  
 23 A. Yes.  
 24 Q. Doesn't look as good, does it?  
 25 A. No.

[See Trial Transcript, at 152:17-153:25 (Mr. Jorgensen) (emphasis added)].

144. Mr. Cook's sales comparison approach, as set forth in his report in Exhibit 18 and as discussed during his testimony at trial, relies on more comparable properties and is the more credible of the experts' opinions and is hereby adopted by the Court.

### **Income Approach**

145. The income approach is based on the appraisal principle of anticipation, described as follows:

This approach is based on the appraisal principle of anticipation, which attests that property value is estimated as the present worth of future anticipated benefits accruing to ownership. In the subject instance, these benefits take the form primarily of monetary factors.

[See Exhibit 18, at 18.36-18.37].

146. In performing an income approach, an appraiser looks at the market rents by studying rents of comparable properties as well as the subject property's rental history. [See Trial Transcript, at 71:24-72:1 (Mr. Jorgensen)].

147. However, there is no better comparable than the subject property itself:

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1	A. Well, the only other one that really	
2	stands out is Highland Marketplace. This is the	
3	subject. And this is the T-Mobile space. June of	
4	2011, so it's a pretty recent lease. You had	
5	actually leased for 24.50 per square foot, and	
6	<u>there's no better comparable than the subject itself</u>	
7	<u>as long as it's supported by other information.</u>	
8	And so that was adjusted to 24.50, and	
9	that's an actual tenant that went into the space.	
10	Q. Understood. So is a -- are you saying an	
11	actual lease is actually also market data?	
12	A. <u>Yes. There's no better data than the</u>	
13	<u>subject property.</u>	

[See Trial Transcript, at 366:1-13 (Mr. Cook) (emphasis added)].



148. In this case, it was undisputed that a large portion of the subject property was already leased and generating income; thus, there was credible, real-time evidence as to the income from the property, without having to rely upon more speculative estimates of market rent. [See Trial Transcript, at 379:13-382:2 (Mr. Cook)].

149. The existing leases, with the exception of the lease for the fitness center in Building A (discussed below), were the result of arm's length transactions, and were entered into prior to litigation.

150. Just as with the sales comparison approach, when comparing other properties as part of the market rent analysis, an appraiser has to find good comparable properties. [See Trial Transcript, at 297:11-15 (Mr. Cook)].

151. A summary of the differences in the income approaches applied the appraisers is included below:

INCOME APPROACH DIFFERENCES			
	Liddell	Jorgensen	Cook
Rental Estimates			
Building A - Main Level	\$ 20.00	\$ 11.50	\$ 21.00
Building A - Top Floor	\$ 11.00	\$ 11.50	\$ 11.00
Inline Shops	\$22 to \$27	\$ 23.00	\$22-\$30.46
Walgreens	\$ 363,535	Omitted	\$ 363,000
Taco Time	\$ 40.00	\$ 32.00	\$ 56.03
Jack-in-the-Box	Omitted	Omitted	\$ 58.34
Vacancy (1)	4.6%	8.0%	5.0%
Management Fee (1)	1.7%	5.0%	3.0%
Replacement Reserves (1)	0.3%	\$ 0.15	1.0%
Capitalization Rates (1)	7.55%	7.70%	7.75%
(1) Liddell's conclusions are weighted averages			

[See Exhibit 106, at 106.1].

### Taco Time

152. The Taco Time, located on Lot 7, has an existing lease that was negotiated at arm's length. [See Exhibit 18, at 18.38].

153. The Taco Time has been operated from its current location in the Highland Marketplace since April 2010. [See Exhibit 18, at 18.38].

154. The Taco Time lease is a 15 year lease, with an annual rent of \$130,166 or \$56.03 per square foot. [See Exhibit 18, at 18.38].

155. The Taco Time lease is personally guaranteed by the three principals of the leasing company, at least one of whom owns 15 other stores. [See Exhibit 18, at 18.38]; [See also Trial Transcript, at 378:16-379:12 (Mr. Cook)].

156. Like the other existing leases, the Taco Time lease was the result of an arm's length negotiation, prior to litigation. [See Trial Transcript, at 378:16-382:4 (Mr. Cook)].

157. Mr. Cook ultimately determined to use the existing Taco Time lease in his income approach. However, Mr. Cook did not simply assume that the existing Taco Time lease was sufficient for this conclusion. [See Trial Transcript, at 378:16-382:4 (Mr. Cook)].

158. Instead, in order to evaluate the Taco Time lease, Mr. Cook selected various comparable restaurants such as Kneaders, Arby's, and Del Taco to compare to the Taco Time restaurant in the Highland Marketplace. [See Trial Transcript, at 373:2-374:11 (Mr. Cook)].

159. The Arby's, Del Taco, and Kneaders were built in 2009, 2010, and 2012 respectively, in close temporal proximity to the subject Taco Time. [See Exhibit 18, at 18.47].



160. The Del Taco is one of the best comparables because it is the exact same age as the Taco Time and it has similar architectural appeal, construction type, and quality, as can be seen from a visual comparison of the Taco Time (top) and the Del Taco (bottom):



[See Exhibit 18, at 18.70, 18.145]; [See also Trial Transcript, at 376:22-377:17 (Mr. Cook)].

161. Likewise, the Arby's (below) is an excellent comparable to the Taco Time (top):



[See Exhibit 18, at 18.70, 18.149]; [See also Trial Transcript, at 376:22-377:17 (Mr. Cook)].

162. In his appraisal, Mr. Jorgensen selected properties that are not comparable to the subject property because they are 20, 40, and almost 50 years older than the Taco Time, are third generation buildings, and are not build to suit like the Taco Time. [See also Trial Transcript, at 377:18-378:13 (Mr. Cook)].

163. As Mr. Cook explained, when one uses comparable sales such as these, they do not comply with the principal of "substitution," requiring that the property "be as similar as possible" and that it be a true "substitute property." [See Trial Transcript, at 147:5-148:4 (Mr. Jorgensen); 296:17-297:20 (Mr. Cook)].



164. Mr. Cook further explained that an appraiser “need[s] to find sales that are really similar as a starting point. That’s the very most fundamental thing.” [See Trial Transcript, at 297:11-12-14 (Mr. Cook)].

165. While an appraiser can apply adjustments when using buildings that are not comparable to the subject property, this approach is inappropriate under the rule of substitution because it requires too much subjectivity and results in valuations that are simply not credible. [See Trial Transcript, at 298:6-15, 377:23-378:15 (Mr. Cook)].

166. For example, Mr. Jorgensen’s ninth comparable is an approximately 30 year old building that is on its second or third tenant and is being leased by an independent restaurant called Scaddy’s. [See also Trial Transcript, at 125:9-127:19 (Mr. Jorgensen)].

167. The Scaddy’s (below) is not a build to suit transaction and is not an adequate comparable for the Taco Time (top):





[See Exhibit 18, at 18.70]; [See also Exhibit 11, at 11-154]; [See Trial Transcript, at 127:20-22 (Mr. Jorgensen); 297:16-20 (Mr. Cook)].

168. Mr. Jorgensen's tenth comparable is a 27 year old building being leased by WingNutz, which was originally leased by a flower shop:



[See Trial Transcript, at 127:23-128:22 (Mr. Jorgensen)]; [See also Exhibit 11, at 11.156].

169. Mr. Jorgensen's fifteenth comparable is a thirty year old restaurant called the Blue Fin Sushi Bar. The Blue Fin Sushi Bar was originally a Wendy's restaurant and is not a custom-built, free standing restaurant like Taco Time:





[See Trial Transcript, at 128:24-130:4 (Mr. Jorgensen)]; [See also Exhibit 11, at 11.156].

170. Mr. Jorgensen based his market rent conclusion of \$32 per square foot on these properties as well as the others contained in his report. [See Trial Transcript, at 130:21-131:25 (Mr. Jorgensen)].

171. The actual market rent for the Taco Time was \$56.08 per square foot in May 2012. [See Exhibit 18, at 18.38].

172. Although Mr. Jorgensen noticed that Mr. Cook used the Del Taco built in 2010 as a comparable, he testified that the Del Taco was "not the sort of comparable" he was looking for:

6	Q. All right. Did you see Mr. Cook's
7	rebuttal report?
8	A. Yes.
9	Q. And did you notice he had a new Del Taco
10	in Saratoga Springs that he used as a comp?
11	A. I don't remember that one specifically,
12	but I -- I know that he had information of that sort.
13	Q. Well, when you were looking at his comps,
14	did you have access to the same comps that he chose?
15	Could you have used those if you had wanted to?
16	A. I don't -- <u>that's not the sort of</u>
17	<u>comparable I was looking for</u> , so I can't really say
18	whether I had that one available to me or not.

[See Trial Transcript, at 131:6-18 (Mr. Jorgensen) (emphasis added)].

173. Mr. Jorgensen' twelfth and fourteenth comparable properties were not entirely free standing and are different than the entirely free standing Taco Time. [See Trial Transcript, at 125:1-14 (Mr. Jorgensen)].

#### Building A

174. Mr. Jorgensen appraised Building A as a fitness center and used other fitness centers to determine market rent. [See Trial Transcript, at 64:3-11, 75:19-21 (Mr. Jorgensen)].

175. However, both Mr. Cook and SA Group's expert Mr. Liddell agreed that the highest and best use of Building A is as a retail space, not a fitness center. [See Trial Transcript, at 192:16-23; 253:20-254:2 (Mr. Liddell); 362:1-16 (Mr. Cook)]; [See also Exhibit 20, at 20.9].

176. Fitness centers want walls with mirrors and Building A has glass on the outside of the building making it a bad fit for a fitness center:





[See Trial Transcript, at 362:5-16 (Mr. Cook)]; [See also Exhibit 18, at 18.69].

177. Mr. Jorgensen's fifteenth comparable was originally built in 1965 and used to be a grocery store:



[See Trial Transcript, at 139:12-140:18 (Mr. Jorgensen)]; [See also Exhibit 11, at 11-166].

178. Mr. Jorgensen's sixteenth comparable was originally built in 1972 and is largely dissimilar to Building A:



[See Trial Transcript, at 140:20-141:12 (Mr. Jorgensen)]; [See also Exhibit 11, at 11-168].

179. Mr. Jorgensen's seventeenth comparable was originally built in 1981, is an in-line building without office space on the second floor, with rent starting out at \$3 per square foot:



[See Trial Transcript, at 141:13-142:11 (Mr. Jorgensen)]; [See also Exhibit 11, at 11-171].

180. Mr. Jorgensen's eighteenth comparable was originally built in 1981:





[See Trial Transcript, at 143:8-144:2 (Mr. Jorgensen)]; [See also Exhibit 11, at 11-173].

181. While Mr. Jorgensen used these older fitness centers, he did not use the 24 Hour Fitness more recently built in 2004, which paid \$19.95 per square foot, in determining the market rent for Building A:

8 Q. All right. Let's take a look at -- it's  
9 11.17 -- 199. So, again, this was not used -- you  
10 did not use this comp when you were doing your  
11 fitness center income approach, correct?  
12 A. Correct.  
13 Q. But obviously this was in your file at the  
14 time?  
15 A. Yes.  
16 Q. And it is a 24 Hour Fitness. It is a  
17 fitness center, correct?  
18 A. Yes.  
19 Q. And it was built a little more recently,  
20 2004?  
21 A. Yes.  
22 Q. So only eight years different from the  
23 subject building on the valuation date, correct?  
24 A. It was eight years old, yes.  
25 Q. All right. Was this a build-to-suit

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1 tenant?  
2 A. Yes.  
3 Q. Do you know what rent was being paid for  
4 that space?  
5 A. \$19.95.  
6 Q. All right. And I believe you have an  
7 opinion the rent was above market?  
8 A. Yes.  
9 Q. But regardless of that, you did not use  
10 this lease as a rent comparable for your income  
11 approach with regard to the fitness center, did you?  
12 A. Well, it's a 2004 lease would have been  
13 one reason, but build to suit is the other. We don't  
14 typically rely on build-to-suit leases as evidence of  
15 market rent.

[See Trial Transcript, at 144:8-145:15 (Mr. Jorgensen) (emphasis added)]; [See also Exhibit 11, at 11-199  
– 11-200].

182. Mr. Cook's income approach, as set forth in his report in Exhibit 18 and as discussed during his testimony at trial, is the most credible of the experts' opinions and is hereby adopted by the Court.

### **Age of the Property**

183. Although Mr. Jorgensen contends that he made adjustments to account for the age disparity between his comparables, there is too much subjectivity in attempting to make such adjustments and it is therefore an improper application of appraisal technique. [See Trial Transcript, at 297:17-298:10 (Mr. Cook)].

184. Instead, Mr. Jorgensen should have found sales that are more similar at the starting point, as that is a fundamental element of the substitution principal. [See Trial Transcript, at 298:11-15 (Mr. Cook)].

### **Capitalization Rates**

185. Capitalization rates need to be applied to income in the same way they were developed. In other words, if an appraiser uses actual income to develop a capitalization rate, he must also apply that capitalization rate to the actual income of the subject property. [See Trial Transcript, at 298:16-299:9 (Mr. Cook)].

186. A capitalization rate can be affected by a property's age, quality, and condition. [See Trial Transcript, at 145:25-146:8 (Mr. Jorgensen)].

187. More recent construction projects and newer retail centers sell for the highest prices and can typically justify a lower capitalization rate. [See Trial Transcript, at 146:15-22 (Mr. Jorgensen)].

188. Mr. Liddell applies a capitalization rate derived from actual income on comparable properties to his concluded market rate to individual buildings and to the Highland Marketplace as a whole, and then applies a ten percent bulk discount. [See Trial Transcript, at 298:16-299:16 (Mr. Cook)].

189. In other words, Mr. Liddell uses the wrong capitalization rate twice, which results in a substantially lower appraised value. [See Trial Transcript, at 299:1-16; 419:13-21 (Mr. Cook)].

190. Mr. Liddell's capitalization rate also fails to consider the Walgreen's lease which further results in a downward impact on value. [See Trial Transcript, at 428:16-21 (Mr. Cook)].

191. As a result of Mr. Liddell's incorrect application of the capitalization rate, his overall opinion of the Highland Marketplace's value results in a downward impact on the value of the Highland Marketplace. [See Trial Transcript, at 299:1-300:12, 419:13-21 (Mr. Cook)].

192. Mr. Cook's analysis, explanation, and application of capitalization rates, as set forth in his report in Exhibit 18 and as discussed during his testimony at trial, are sound and the more credible of the experts' opinions and his opinion is hereby adopted by the Court.

#### **The Plaintiff's Appraisers Improperly Applied a Bulk Sale Discount**

193. Both of Plaintiff's appraisers applied what was termed a "bulk sale" discount in their valuations. [See Exhibit 10, at 10-204]; [See also Trial Transcript, at 333:1-4 (Mr. Cook)].



194. Mr. Liddell, after appraising the Highland Marketplace as individual parcels, applied a ten percent bulk sale discount, which artificially reduced the appraised value of the Highland Marketplace. [See Exhibit 10, at 10-204].

195. "The bulk sale analysis is meant to reconcile the individual retail values to one value for a single buyer. This is contrary to highest and best use . . . which would be to operate it as an integrated shopping center as [Mr. Liddell himself] concludes in the highest and best use analysis." [See Exhibit 19, at 19.21].

196. It is not industry practice to appraise shopping centers by applying a bulk sale discount. [See Trial Transcript, at 416:2-14 (Mr. Cook)]; [See *also* Exhibit 19, at 19.5].

197. Neither Mr. Cook nor Mr. Jorgensen applied a bulk sale discount in their appraisals of the fair market value of the Highland Marketplace. [See Trial Transcript, at 416:11-14 (Mr. Cook)].

198. Mr. Liddell conceded that a seller of real property would not request that a ten percent bulk sale discount be applied to the value of its property because a hypothetical seller wants to maximize their value. [See Trial Transcript, at 219:25-220:13 (Mr. Liddell)].

199. The bulk sale analysis is ordinarily applicable where various parcels or lots within a subdivision compete against each other or where there are a bunch of non-income producing property that have associated carrying costs, such as with residential subdivisions. [See Exhibit 19, at 19.22]; [See Trial Transcript, at 221:16-222:20 (Mr. Liddell)]. For example, in a residential subdivision all the parcels are competing against each other and a bulk sale discount is applied to allow the owner to sell all the lots at once so that

the owner can avoid the carrying costs associated with selling competing lots over an extended period of time. [See Trial Transcript, at 222:21-223:10 (Mr. Liddell); 323:11-326:9, 326:22-327:5 (Mr. Cook)].

200. In contrast, in the Highland Marketplace, Lots 1 and 2 are vacant, Lots 3, 7, 8, 9, and 10 all have buildings on them, Lot 6 has a signed Walgreen's lease, and Lot 11 or Pad I has a signed letter of intent with Jack in the Box. However, none of these lots or pads compete with each other. [See Trial Transcript, at 326:10-21 (Mr. Cook)].

201. For example, a potential tenant for the remaining space on Lot 11, such as another restaurant or retail space, would not compete with an apartment building or anchor tenant on Lots 1 and 2. [See Trial Transcript, at 326:10-21 (Mr. Cook)].

202. The different lots in the Highland Marketplace are complementary to each other because they operate as an integrated economic unit. [See Trial Transcript, at 332:19-25, 333:16-18 (Mr. Cook)].

203. In addition, Mr. Liddell agreed that the developed lots in the Highland Marketplace are income producing and, if sold as an integrated economic unit, the bulk discount is inapplicable because the seller is not avoiding any carrying costs. [See Trial Transcript, at 223:4-10 (Mr. Liddell)].

204. Thus, the bulk sale discount is inapplicable to the fair market value analysis of the Highland Marketplace. [See Trial Transcript, at 322:18-23 (Mr. Cook)].

205. Plaintiff did not cross examine Mr. Cook on his explanation regarding the inapplicability of the bulk sale discount to the Highland Marketplace. [See *generally* Trial Transcript, at 278:1-502:11 (Mr. Cook)].

206. Mr. Cook's determination of the highest and best use of the Highland Marketplace, as set forth in his report in Exhibit 18 and as discussed during his testimony at trial, is the most credible of the experts' opinions and is hereby adopted by the Court.

### CONCLUSIONS OF LAW

1. This action is governed by the Utah Code Ann. § 57-1-32. See Utah Code § 57-1-32.

2. Under the Deficiency Action Statute:

the court shall find the fair market value of the property at the date of sale. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale.

Utah Code Ann. § 57-1-32.

3. Under Utah law, fair market value is defined as "the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts." *Mallinckrodt v. Salt Lake Cnty.*, 1999 UT 66, ¶ 10, 983 P.2d 566.

4. Determination of fair market value requires an appraiser to analyze the "probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, financially feasible, and that results in the highest value." [See Trial Transcript, at 290:6-9 (Mr. Cook) (emphasis added)]; [See also Exhibit 122, at 122.1]; [See Exhibit 11, at 11-62].

5. The Deficiency Action Statute is based upon an important public policy concern, incorporated into the statute. "[T]he purpose of [the fair market value defense] is to protect the debtor, who in a non-judicial foreclosure has no right of redemption, from a creditor who could purchase the property at the sale for a low price and then hold the debtor liable for a large deficiency." *Capital Assets*, 2010 UT App 385, ¶ 8.

6. As of May 22, 2012, the date of the foreclosure sale of the Highland Marketplace, the fair market value of the Highland Marketplace was \$14,710,000. [See Exhibit 18, at 18.2].

7. The fair market value of the Highland Marketplace exceeded the total debt owed to SA Group as of May 22, 2012, therefore there is no deficiency and SA Group is not entitled to damages.

8. As the prevailing party, Defendants are entitled to collect their costs and reasonable attorney fees incurred during the prosecution of this action. See Utah Code Ann. § 57-1-32.

### **ORDER**

1. SA Group is not entitled to damages because the fair market value of the Highland Marketplace exceeded the total debt owed by Defendants on May 22, 2012.

2. Defendants are the prevailing party and are therefore entitled to collect their costs and reasonable attorney fees incurred during the prosecution of this action.

3. Defendants shall prepare a fee application pursuant to Rule 73 of the Utah Rules of Civil Procedure and provide the fee application to Plaintiff by no later than September 15, 2015.

4. If Plaintiff and Defendants cannot agree upon the amount of the fee application submitted by Defendants, Defendants will file the fee application with the Court by no later than October 15, 2015.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2015.

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Honorable James R. Taylor

### CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of MAGLEBY & GREENWOOD, P.C., 170 South Main Street, Suite 1100, Salt Lake City, Utah 84101, and that pursuant to Rule 5(b), Utah Rules of Civil Procedure, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** was delivered to the following this 11<sup>th</sup> day of August, 2015 by:

- ☐ Hand Delivery
- ☐ Depositing the same in the U.S. Mail, postage prepaid
- ☒ Via Electronic Mail
- ☒ Via submission to the Utah State Court electronic filing system

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Tab 5

## **ADDENDUM 5**

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*Attorneys for SA Group Properties, Inc.*

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**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

---

SA GROUP PROPERTIES, INC., a Minnesota  
corporation,

Plaintiff,

v.

HIGHLAND MARKETPLACE, L.C., a Utah  
limited liability company; HIGH NOON, L.C., a  
Utah limited liability company; SOLANA BEACH  
HOLDINGS, L.C., a Utah limited liability  
company; THOMAS A. HULBERT, an individual;  
and BRET B. FOX, an individual,

Defendants.

**PLAINTIFF'S PROPOSED FINDINGS  
OF FACT AND CONCLUSIONS OF  
LAW FOR TRIAL**

Civil No. 120401312

Judge: James Taylor

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Plaintiff SA Group Properties, Inc. submits the attached proposed findings of fact and  
conclusions of law for the consideration of adoption by this Court upon the close of this case.

Dated this 11th day of August, 2015

**DORSEY & WHITNEY LLP**

/s/ Steven T. Waterman  
Steven T. Waterman  
Nathan S. Seim  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 11, 2015, a true and correct copy of the foregoing  
**PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR  
TRIAL** was served via electronic service and email upon the persons named below:

MAGLEBY & GREENWOOD, P.C.  
James E. Magleby  
Kennedy D. Nate  
170 South Main Street, Suite 850  
Salt Lake City, Utah 84101

/s/ Nathan S. Seim

---

**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

---

SA GROUP PROPERTIES, INC., a Minnesota  
corporation,

Plaintiff,

v.

HIGHLAND MARKETPLACE, L.C., a Utah  
limited liability company; HIGH NOON, L.C., a  
Utah limited liability company; SOLANA BEACH  
HOLDINGS, L.C., a Utah limited liability  
company; THOMAS A. HULBERT, an individual;  
and BRET B. FOX, an individual,

Defendants.

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

Civil No. 120401312

Judge: James Taylor

---

On May 26–27 and August 12, 2015, the Court held a trial in this deficiency action. Steven T. Waterman and Nathan S. Seim of Dorsey & Whitney LLP appeared on behalf of Plaintiff, SA Group Properties, Inc. (“SAGP”). James E. Magleby and Kennedy D. Nate of Magleby & Greenwood, P.C. appeared on behalf of Defendants, Highland Marketplace, L.C. (“Highland”), High Noon, L.C. (“High Noon”), Solana Beach Holdings, L.C. (“Solana”), Thomas Hulbert (“Hulbert”) and Bret Fox (“Fox”).

At trial, the Court admitted into evidence documentary exhibits (collectively, the “Exhibits”), including the stipulated *Declaration of Timothy N. Scheer for Trial* [Exhibit 28] (the “Scheer Declaration”), the reports of SAGP’s expert appraisal witnesses, Kerry Jorgensen (“Jorgensen”) and Darrin Liddell (“Liddell”), and the reports of Defendants’ expert appraisal

witness, Phillip Cook (“Cook”). The Court also heard live testimony from Jorgensen, Liddell and Cook (collectively, the “Expert Witnesses”).

The Court has reviewed and considered the evidence presented, including the Exhibits; has heard the testimony of the Expert Witnesses and considered their demeanor and credibility; has heard the arguments of counsel; and has researched the applicable law. Based thereon, the Court enters the following findings of fact and conclusions of law.

### **STIPULATED BACKGROUND FACTS**

The Parties having stipulated to Fact Nos. 1–17, as set forth in the stipulated Scheer Declaration, thus the Court finds as follows:

#### **The Loan Agreement and Note**

1. On or about September 5, 2007, Defendants Highland, High Noon, and Solana entered into a Construction Loan Agreement with First Community Bank (“First Community”) that governed the terms of a \$28,000,000 line of credit (the “Loan Agreement”).

2. In connection with the Loan Agreement, Highland, High Noon and Solana executed a Promissory Note, dated September 5, 2007, in favor of First Community and in the principal amount of \$28,000,000 (the “Note”).

3. Also in connection with the Loan Agreement and Note, Defendants Hulbert and Fox entered into Commercial Guaranties with First Community, pursuant to which they “absolutely and unconditionally guarantee[d] full and punctual payment and satisfaction of the Indebtedness of . . . all Borrower’s obligations under the Note and Related Documents.”



*The Deeds of Trust and the Highland Property*

4. Highland, High Noon and Solana executed a Construction Deed of Trust dated April 27, 2007 in favor of First Community, as Trustee, and First Community, as Beneficiary, to secure certain obligations owing to First Community (the "Original Deed of Trust").

5. The Original Deed of Trust contains an express Power of Sale clause and was recorded with the Utah County Recorder's Office on May 3, 2007, as entry number 65863:2007.

6. On or about September 5, 2007, the prior obligation owing to First Community by Defendants, as secured by the Original Deed of Trust, was replaced by the Loan Agreement and Note, and in connection therewith, the Original Deed of Trust was modified by that certain Modification Deed of Trust dated September 5, 2007 (the "Modified Deed of Trust") and, together with the Original Deed of Trust, the "Deeds of Trust").

7. The Modified Deed of Trust was recorded with the Utah County Recorder's Office on September 21, 2007, as entry number 138163:2007.

8. Pursuant to the Deeds of Trust, Highland, High Noon and Solana granted First Community, among other things, a first position deed of trust lien on certain real property located in Utah County, Utah, the legal description of which is set forth on "Exhibit A" to the Original Deed of Trust (the "Highland Property").

9. On or about January 28, 2011, the New Mexico Financial Institutions Division closed First Community, and FDIC was named as receiver of First Community ("FDIC-R").

10. FDIC-R sold substantially all of First Community's assets, including the Loan Agreement, Note, Hulbert Guaranty, Fox Guaranty, Deeds of Trust and all other documents

associated therewith (collectively, the “Loan Documents”) to U.S. Bank National Association (“U.S. Bank”), such that U.S. Bank obtained the rights to enforce the Loan Documents.

Foreclosure of the Highland Property and Amount Owing to SAGP on the Foreclosure Date

11. On approximately May 14, 2012, U.S. Bank obtained an appraisal of the Highland Property from Liddell [Exhibit 10] (the “Liddell Appraisal”), which valued the Highland Property, as of April 23, 2012, in the amount of \$9,240,000.00.

12. On May 21, 2012, U.S. Bank assigned to SAGP its interest in the Loan Documents, specifically including the Deeds of Trust, as reflected by the Assignment of Deed of Trust recorded with the Utah County Recorder’s Office on May 22, 2012, as entry number 42508:2012.

13. Defendants failed to make payments that were due under the terms of the Note, Hulbert Guaranty, Fox Guaranty and other Loan Documents. Thus, on May 22, 2012, the Trustee of the Highland Property sold the Highland Property to a third party in accordance with state law and the terms of the Deeds of Trust and other Loan Documents [Exhibit 9].

14. At the time of the foreclosure sale, the amount owing to SAGP by Defendants under the Note and Loan Documents was \$14,685,370.37, which consisted of \$13,390,939.93 in principal, including \$246,914.33 for the payment of past due real estate taxes; \$633,160.49 in interest; late charges of \$655,269.95; costs incurred for appraisal and environmental reports in the amount of \$6,000.00; plus the additional accrual of attorneys’ fees and costs as allowed under the Loan Documents.

15. At the foreclosure sale, the Highland Property was sold to a third party for the amount of \$8,565,000.00 [Exhibit 9].

16. SAGP relied on the Liddell Appraisal, and the appraised value of the Highland Property set forth therein, in determining the amount of its credit bid on the Highland Property at the foreclosure sale. Specifically, SAGP determined that if it purchased the Highland Property at the foreclosure sale, it would incur holding and sale costs in the approximate amount of \$750,000.00 relating to the Highland Property.

17. On or about October 2, 2012, SAGP received \$177,896.00 from Len Stillman (the “Receiver”), who was appointed the Receiver of the Highland Property on December 14, 2011, by the Honorable Steven L. Hansen, Fourth Judicial District Court Judge for the State of Utah, Utah County, Case No. 110403100, and which receivership terminated on August 15, 2012. SAGP applied this payment to reduce the principal amount owing to SAGP by Defendants.

#### **THE EXPERT WITNESSES AND REPORTS**

18. Each of the Expert Witnesses opined on the market value of the Highland Property as of May 22, 2012—the date of the foreclosure sale. Plaintiff’s appraisers, Liddell and Jorgensen, opined that the fair market value of the Highland Property on the foreclosure date was \$9,240,000.00 [Exhibit 10] (the “Liddell appraisal”) and 10,568,000.00 [Exhibits 11 and 12] (the “Jorgensen Appraisal”), respectively. Defendants’ appraiser, Cook, opined that the fair market value of the Highland Property was 14,710,000.00 [Exhibit 18] (the “Cook Appraisal”).

#### **Darrin Liddell**

19. U.S. Bank retained Liddell to provide a contemporaneous market value opinion of the Highland Property just prior to the foreclosure of the Property. U.S. Bank, and subsequently SAGP, commissioned and relied on the Liddell Appraisal in determining the amount to credit bid

on the Property at the foreclosure sale. As set forth in the Liddell Appraisal, Liddell values the Highland Property as of the foreclosure date in the amount of \$9,240,000.00 [Exhibit 10].

20. The Liddell Appraisal, which is dated prior to the foreclosure sale, and prior to the commencement of this case, as well as Liddell's testimony at trial, appear complete, competent, unbiased, and persuasive.

Kerry Jorgensen

21. Jorgensen was retained to provide a retroactive valuation of the Highland Property for purposes of this trial.

22. Jorgensen's original appraisal values the Highland Property as of the foreclosure date in the amount of \$9,800,000.00 [Exhibit 11]. Subsequently, subject to the potential of a signed lease agreement amendment with Walgreen's, Jorgensen would increase his valuation of the Highland Property by \$768,000.00, to the amount of \$10,568,000.00 [Exhibit 12 at pp. 12-28 and 12-31].

23. Jorgensen's valuation of the Highland Property, and his testimony at trial, were complete, competent, unbiased, and persuasive.

Phillip Cook

24. Cook was retained to provide a retroactive valuation of the Highland Property for purposes of helping to defend actions filed against the Defendants. Cook testified that he typically reads the pleadings in the litigation action and that he generally understands the issues involved in a deficiency action.<sup>1</sup> Cook also testified that he was aware of, and observed a second deficiency action that Defendants are involved in relating to the Highland Property with CRV-

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<sup>1</sup> See May 27, 2015 Transcript, on File with the Court, at p. 445, Lines 3–15.

Main Main, L.P. ("CRV-Main"), the mezzanine lender that foreclosed Defendants' interest in the Highland Property prior to SAGP's foreclosure.<sup>2</sup> Finally, Cook's colleague, Nate Herrscher ("Herrscher"), "extensively" assisted Cook in Cook's valuation of the Highland Property.<sup>3</sup> Herrscher, however, assisted in preparing, and certified to, several other appraisals that Liddell performed on the Highland Property, which appraisals Cook (and Herrscher) now criticize.

25. As set forth in the Cook Appraisal [Exhibit 18], Cook values the Highland Property as of the foreclosure date in the amount of \$14,710,000.00, which is approximately \$4 million more than Jorgensen's valuation, approximately \$5 million more than Liddell's valuation, and approximately \$6 million more than the price paid by an independent third party buyer at the sale.

26. The Court finds that the following factors, among others, caused Cook's valuation of the Highland Property to be artificially inflated and less credible than the valuations of Liddell and Jorgensen:

(a) Cook's valuation was based on unsupported and unreliable facts and data.

For example, Cook relied on non-binding Letters of Intent to value the Highland Property, which are generally not relied upon in appraisal practice, including a Jack and the Box Letter of Intent that (i) was dated 18 days prior to the foreclosure sale; (ii) was signed by Highland as the Landlord, even though CRV-Main owned the Highland Property at the time the Letter of Intent was signed; (iii) is addressed to a Mr. Mehta, though the purported signature appears to be from a different person; and (iv) does not

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<sup>2</sup> See *id.* at p. 491, Line 20–p. 492, Line 3.

<sup>3</sup> See *id.* at p. 430, Line 17–p. 431, Line 3.

otherwise appear to be a valid and reliable Letter of Intent. Additionally, Cook valued the “Anchor Pad” of the Highland Property using the “hypothetical condition”<sup>4</sup> that the Anchor Pad would be used for multi-family housing, even though (i) the Highland Property was not zoned for multi-family housing;<sup>5</sup> (ii) the Highland Property was not equipped with a sewer system or other necessary infrastructure to handle multi-family housing; (iii) Highland City has stated that it is against re-zoning the property;<sup>6</sup> and (iv) there is no indication, other than Defendants’ own statements to Cook, that Highland City was ever willing to re-zone the Highland Property for multi-family use.

(b) Cook’s valuation was based on unestablished and unreliable valuation methodologies. For instance, Cook valued the Anchor Pad and other pads comprising the Highland Property using the “land residual method,” which takes the projected future value of a hypothetical project on the land (such as multi-family use housing on the Anchor Pad), and then deducts the costs of building the project to reach the value of the

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<sup>4</sup> As testified by Cook, a “hypothetical condition” is an appraisal term of art, which means that “something is known to be contrary to fact but is assumed for purposes of analysis.” *See id.* at p. 451, Line 25–p. 452, Line 2.

<sup>5</sup> Cook testified that his zoning assumption with the Anchor Pad was merely an “extraordinary assumption,” another appraisal term of art that means an assumption “that is unknown. It could be right, it could be wrong.” *See id.* at p. 452 at Lines 2–4. Because an extraordinary assumption could be true for purposes of an analysis, it is less problematic and controversial than a hypothetical condition, which is an assumption known to be false. However, as set forth by the appraisal guidelines published pursuant to FIRREA [Exhibit 52], “an example of a hypothetical condition is when an appraiser assumed a particular property zoning is different than what the zoning actually is.” *See* Exhibit 52 at p. 77472.

<sup>6</sup> *See* May 27, 2015 Transcript, on File with the Court, at p. 335, Lines 15–17 (“When I talk with the City, they say, ‘we don’t want apartments there.’”).



land.<sup>7</sup> “Courts have shown a clear disdain” for this valuation methodology because small variations in the variables used “can result in a dramatic change in the land value estimate.”<sup>8</sup> Further, Cook could not find any support for his methodology for valuing the assumed construction and subsequent lease of the Walgreen’s pad in the more than 800 pages of the Appraisal Institute’s treatise, *The Appraisal of Real Estate* 14<sup>th</sup> Edition.<sup>9</sup>

(c) Cook did not value the Highland Property in its “as is” condition as of the May 22, 2012 foreclosure date. This is because Cook valued the Highland Property using a number of assumptions and hypothetical conditions, including that (i) the relied-upon letters of intent would be executed; (ii) the zoning of the anchor pads would be changed; (iii) a Walgreen’s would be timely constructed; (iv) Pad I would be subdivided into two parcels; (v) a Jack in the Box would be constructed; (vi) the fitness club lease would be terminated; (vii) the fitness space lease would be converted to retail space; and (viii) the entire project would be leased to stabilized occupancy. These assumed factors did not reflect the true condition of the Highland Property as of the foreclosure date. The Cook Appraisal states: “We have been asked to estimate *hypothetical value as if the subject improvements were stabilized occupancy as of the effective date of the appraisal*. This assumes the proposed construction of the Walgreens and the Jack and the Box buildings, as well as tenant improvements for vacant space, are complete. *This limiting condition*

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<sup>7</sup> See *id.* at p. 457, Line 17–p. 458, Line 11.

<sup>8</sup> The Appraisal of Real Estate 14<sup>th</sup> Edition, published by the Appraisal Institute [Exhibit 22] at p. 22.383.

<sup>9</sup> See May 27, 2015 Transcript, on File with the Court, at p. 473, Line 13–p. 478, Line 15.

affects the assignment results.”<sup>10</sup> The Cook Appraisal does not comply with the requirement that the Property be valued in its condition as of the foreclosure date, but assumes a hypothetical condition.

*Fair Market Value of the Highland Property*

27. The Court finds that the Highland Property valuations of both Liddell and Jorgensen are based on the Property as it existed on the foreclosure date. As such, the Court finds that the fair market value of the Highland Property as of May 22, 2012, was no greater than \$10,568,000.00—the highest value assigned to the Property by either Liddell or Jorgensen.

**APPLICABLE LAW**

28. Utah Code Ann. § 57-1-32 states:

At any time within three months after any sale of property under a trust deed . . . an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security. . . . Before rendering judgment, the court shall find the fair market value of the property at the date of sale. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale.

29. “The meaning of the term fair market value is well settled. It is the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.”<sup>11</sup> This definition means that the subject property must be valued in its “as is” condition.<sup>12</sup>

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<sup>10</sup> Cook Appraisal (Exhibit 18) at p. 18.3 (emphasis added).

<sup>11</sup> *Capital Assets Fin. Svcs. v. Jordanelle Dev. LLC*, 2010 UT App. 385, ¶ 7, 247 P.3d 411.

<sup>12</sup> *See id.* (holding that foreclosed property must be valued in its current state, subject to superior liens and encumbrances).

30. Here, it is undisputed that SAGP commenced this action within three months of the foreclosure date. It is also undisputed, based on the parties' stipulation, that the amount owed to SAGP by Defendants as of the foreclosure date was \$14,685,370.37. Thus, the only factual issue before the Court is the fair market value of the Highland Property as of the foreclosure date, which was opined upon by the parties' respective Expert Witnesses.

31. Utah R. Evid. 702 provides that an expert witness may testify in the form of an opinion or otherwise "if the expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."<sup>13</sup> Additionally, Rule 702 circumscribes the limits of an expert witness and indicates that the expert may testify "only if there is a threshold showing that the principles or methods that are underlying in the testimony (b)(1) are reliable; (b)(2) are based upon sufficient facts and data; and (b)(3) have been reliably applied to the facts."<sup>14</sup> The required threshold showing is satisfied only if the methods used by the expert are generally accepted within the relevant expert community.<sup>15</sup>

32. The Court finds and concludes that Cook failed to use established and reliable valuation methodologies, instead using a land residual technique not supported in appraisal literature; Cook failed to perform an "as is" appraisal of the Highland Property, instead relying upon hypotheticals, unsupported and questionable data and facts in reaching his valuation; and Cook otherwise enhanced his opinion of market value of the Highland Property to reach a desired result.

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<sup>13</sup> Utah R. Evid. 702(a).

<sup>14</sup> Utah R. Evid. 702(a).

<sup>15</sup> Utah R. Evid. 702(c).

33. On the other hand, the Court finds and concludes that the valuations of the Highland Property by Liddell and Jorgensen are complete, based upon sound data, and based on established and reliable valuation methodologies.

### **CONCLUSION**

34. The amount owing to SAGP by Defendants under the Note and Loan Documents as of the May 22, 2012 foreclosure date was \$14,685,370.37. Because the Court concludes that the fair market value of the Highland Property on that date was no greater than \$10,568,000.00, the deficiency balance owed to SAGP as of the foreclosure date was \$4,117,370.37 (the “Deficiency Amount”).

35. Since the foreclosure sale, interest has accrued on the Deficiency Amount at the rate of 6.25%, which rate is comprised of: (a) the Prime Index Rate, as set forth in the Note, which rate has remained at 3.25% since December 16, 2008;<sup>16</sup> plus (b) the additional 3.0% default rate, as set forth in the Note.

36. On approximately October 2, 2012, SAGP received \$177,896.00 from the Receiver of the Highland Property, which SAGP applied to reduce the principal amount owing to SAGP by Defendants.

37. Additionally, SAGP has incurred attorneys’ fees and costs in its efforts to collect amounts owed by Defendants under the Loan Documents, which costs and fees SAGP is entitled to recover from Defendants, jointly and severally, under the Loan Documents, and which amounts may be later established by an affidavit filed within 30 days of the entry of this Order.

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<sup>16</sup> See [http://www.fedprimerate.com/wall\\_street\\_journal\\_prime\\_rate\\_history.htm](http://www.fedprimerate.com/wall_street_journal_prime_rate_history.htm).

38. Accordingly, SAGP is entitled to judgment against Defendants, jointly and severally, in the total amount of \$4,747,891.39, as of August 12, 2015, plus attorneys' fees and costs to be established by affidavit within 30 days of the entry of this Order, with the further accrual of interest at 6.25% and attorneys' fees for collection until paid in full.

**END OF FINDINGS OF FACT AND CONCLUSIONS OF LAW**  
**(The Court's signature appears at the top of the first page of this Order)**

Tab 6



## **ADDENDUM 6**

FILED

AUG 24 2015

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

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SA Group Properties, Inc.,

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Plaintiff

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Findings of Fact, Conclusions of Law and  
Order.

:

vs.

:

Date: August 24, 2015

Highland Market Place. L.C. et al ,

:

Case Number: 120401312

Defendant

:

Division VII: Judge James R. Taylor  
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**INTRODUCTION**

On May 26–27 and August 12, 2015, the Court held a trial in this deficiency action. Steven T. Waterman and Nathan S. Seim of Dorsey & Whitney LLP appeared on behalf of Plaintiff, SA Group Properties, Inc. (“SAGP”). James E. Magleby and Kennedy D. Nate of Magleby & Greenwood, P.C. appeared on behalf of Defendants, Highland Marketplace, L.C. (“Highland”), High Noon, L.C. (“High Noon”), Solana Beach Holdings, L.C. (“Solana”), Thomas Hulbert (“Hulbert”) and Bret Fox (“Fox”). At trial, the Court admitted into evidence documentary exhibits (collectively, the “Exhibits”), including the stipulated *Declaration of Timothy N. Scheer for Trial* [Exhibit 28] (the “Scheer Declaration”), the reports of SAGP’s expert appraisal witnesses, Kerry Jorgensen (“Mr. Jorgensen”) and Darrin Liddell (“Mr. Liddell”), and the reports of Defendants’ expert appraisal witness, Phillip Cook (“Mr. Cook”). The Court also heard live testimony from Jorgensen, Liddell and Cook (collectively, the “Expert Witnesses”).

The Court has reviewed and considered the evidence presented, including the Exhibits; has heard the testimony of the expert witnesses and considered their demeanor and credibility; has heard the arguments of counsel; and has researched the applicable law. Based thereon, the Court enters the following findings of fact and conclusions of law.

### FINDINGS OF FACT

#### The Parties and Witnesses

1. Plaintiff SA Group Properties, Inc. ("Plaintiff" or "SA Group") is a Minnesota corporation and an assignee of U.S. Bank National Association ("US Bank").
2. US Bank is the successor-in-interest to the Federal Deposit Insurance Corporation, as receiver of First Community Bank ("First Community").
3. Highland Marketplace, L.C. ("Highland") is a Utah limited liability company with its principal place of business in Salt Lake County, Utah.
4. High Noon, L.C. ("High Noon") is a Utah limited liability company with its principal place of business in Salt Lake County, Utah.
5. Solana Beach Holdings, L.C. ("Solana") is a Utah limited liability company with its principal place of business in Salt Lake County, Utah.
6. Thomas A. Hulbert ("Mr. Hulbert") is an individual who resides in Salt Lake County, Utah.
7. Bret B. Fox ("Mr. Fox") is an individual who resides in Summit County, Utah.
8. On or about January 28, 2011, the New Mexico Financial Institutions Division closed

Community, and FDIC was named as receiver of First Community ("FDIC-R"). [See Scheer Decl., ¶ 19].

9. FDIC-R sold substantially all of First Community's assets, including the Loan Agreement, Note, Hulbert Guaranty, Fox Guaranty and the Deeds of Trust (collectively, the "Loan Documents") to US Bank, such that US Bank obtained the rights to enforce the Loan Documents. [See Scheer Decl., ¶ 20].

10. On May 21, 2012, US Bank assigned to the Plaintiff in this case, SA Group, its interest in the Loan Documents, specifically including the Deeds of Trust, as reflected by the Assignment of Deed of Trust recorded with the Utah County Recorder's Office on May 22, 2012, as entry number 42508:2012 (collectively, the "Assignments"). [See Scheer Decl., ¶ 24].

11. Defendants failed to make certain payments that were due under the terms of the Loan Agreement, Note, Hulbert Guaranty, and Fox Guaranty. [See Scheer Decl., ¶ 25].

#### The Trustee's Sale

12. On May 22, 2012, the Trustee of the Highland Marketplace sold the Highland Marketplace to a third party in accordance with state law and the terms of the Deeds of Trust and other loan documents. [See Scheer Decl., ¶ 26].

13. The Trustee's Deed contains recitals relating to the exercise of the Power of Sale contained in the Deeds of Trust and the sale of the Trust Property. [See Scheer Decl., ¶ 27].

14. At the time of the foreclosure sale, the amount owing to SA Group by Defendants under the Note and Loan Documents was \$14,685,370.37, which consisted of \$13,390,939.93 in

principal, including \$246,914.33 for the payment of past due real estate taxes; \$633,160.49 in interest; late charges of \$655,269.95; costs incurred for appraisal and environmental reports in amount of \$6,000.00; plus the additional accrual of attorneys' fees and costs as allowed under the Loan Documents. [See Scheer Decl., ¶ 28].

15. At the foreclosure sale, the Trust Property was sold to a third party for the amount of \$8,565,000.00. [See Scheer Decl., ¶ 29].

16. Since the foreclosure sale, interest has accrued on the deficiency balance owed to SA Group after the sale of the Trust Property at the rate of 6.25%, which rate is comprised of: (a) the Prime Index Rate, as set forth in the Note, which rate has remained at 3.25% since December 16, 2008; I plus (b) the additional 3.0% default rate, as set forth in the Note. [See Scheer Decl., ¶ 31]. On or about October 2, 2012, SA Group received \$177,896.00 from Len Stillman of Stillman Consulting Services, who was appointed the Receiver of the Trust Property on December 14, 2011, by the Honorable Steven L. Hansen, Fourth Judicial District Court Judge for the State of Utah, Utah County, Case No. 110403100, and which receivership terminated on August 15, 2012. SA Group applied this payment to further reduce the principal amount owing to SA Group by Defendants. [See Scheer Decl., ¶ 32].

#### The Highland Marketplace

18. The Highland Marketplace is located at the northwest corner of the Alpine Highway and Timpanogos Highway in Highland, Utah. [See Exhibit 18, at 18.1].

19. The Highland Marketplace has good linkage to I-15 on the Timpanogos Highway and the

Alpine Highway runs into American Fork. [See Trial Transcript, at 310:25-311:9 (Mr. Cook)].

20. Highland is an area with higher end homes, with a population that has purchasing power, such that they can afford to go out to dinner and support restaurants and retail stores. [See Trial Transcript, at 311:10-17 (Mr. Cook)].

21. Although there is competition from a Kohler's across the street, and Highland has Sunday closing laws, if someone wants to do business in Highland they have to be at the Highland Marketplace. [See Trial Transcript, at 311:18-312:8 (Mr. Cook)].

22. Highland is a growing city that had a lot of optimism in the market as of May 2012. [See Trial Transcript, at 313:11-24 (Mr. Cook)].

23. The Highland Marketplace was fully entitled as of May 2012 for construction as designed and contained the following horizontal improvements: utilities, water, sewer, gas, power, curbing and gutters, sidewalks, and roadways. [See Trial Transcript, at 314:20-317:13 (Mr. Cook)]. The Highland Marketplace also had various vertical improvements, including buildings on Lots 3, 7, 8, 9, & 10. [See Trial Transcript, at 317:18-318:6 (Mr. Cook)]; [See also Exhibit 28]. The buildings in the Highland Marketplace are good quality buildings, are architecturally pleasing, and typical of what is built today for good quality retail and office type buildings. [See Trial Transcript, at 319:2-5 (Mr. Cook)].

26. The construction quality of the buildings and condition of the buildings are good. [See Trial Transcript, at 319:5-6 (Mr. Cook)].

27. The Highland Marketplace is uniquely located, as it is at the only commercial intersection



in Highland City. [See Trial Transcript, at 251:7-10 (Mr. Liddell)].

28. Each of the Expert Witnesses opined on the market value of the Highland Property as of May 22, 2012—the date of the foreclosure sale. Plaintiff’s appraisers, Mr. Liddell and Mr. Jorgensen, each opined that the fair market value of the Highland Property on the foreclosure was less than the balance due: \$9,240,000.00 [Exhibit 10] (the “Liddell appraisal”) and 10,568,000.00 [Exhibits 11 and 12] (the “Jorgensen Appraisal”), respectively. Defendants’ appraiser, Mr. Cook, opined that the fair market value of the Highland Property was greater than the debt at \$14,710,000.00 [Exhibit 18] (the “Cook Appraisal”).

#### Highest and Best Use

29. “The meaning of the term fair market value is well settled. It is the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.” This definition means that the subject property must be valued in its “as is” condition.

30. In determining the fair market value of a property an appraiser must determine the highest and best use of the property. [See Trial Transcript, at 290:18-25; 291:14-292:5 (Mr. Cook)]; [See also Exhibit 121]; [See Exhibit 122].

31. Highest and best use is defined in The Appraisal of Real Estate as “the probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, financially feasible, and that results in the highest value.” [See Trial Transcript, at 290:6-9, 20-22; 291:14-292:5 (Mr. Cook)]; [See also Exhibit 121]; [See Exhibit 122].

32. Highest and best use may also consider a zoning change that is reasonably probable. [See Trial Transcript, at 60:6-8 (Mr. Jorgensen)].

33. The highest and best use of the Highland Marketplace is considered both as if vacant and as improved. [See Trial Transcript, at 319:25-320:9 (Mr. Cook)].

34. On an as-improved basis, the highest and best use is to operate the center as an integrated economic unit to maximize value because shopping centers are typically bought as integrated units. [See Trial Transcript, at 321:20-322:17 (Mr. Cook)].

35. It is not typical for a shopping center to be valued as separate parcels because shopping centers are sold as a whole and most of the time the seller only wants to know what the whole property is worth without knowing the individual components. [See Trial Transcript, at 228:6-21 (Mr. Liddell)].

#### 1. Highest and Best Use of Lot 6, Pad D

36. The highest and best use of Pad D as of the time of foreclosure was to construct a building based on the Walgreen's lease between Highland, High Noon, and Solana, on the one hand, and Walgreen Co. ("Walgreen's"), on the other, that was executed on October 13, 2010. [See Exhibit 31]; [See also Exhibit 18, 18.21].

37. The Walgreen's lease was for a seventy-five year term. [See Trial Transcript, at 353:4-7 (Mr. Cook)].

38. The Walgreen's lease called for a monthly rent of \$30,250 for a total annual rent of \$363,000:

65. Although the delivery date of the completed building to Walgreen's was June 1, 2012, the deadline was later changed to October 1, 2013 by the First Amendment Lease ("Walgreen's Amendment"). [See Exhibit 31]; [See also Exhibit 36].

39. The Walgreen's lease was a legitimate marketable right that added value to the Highland Marketplace. [See Trial Transcript, at 316:17-21, 466:22-24 (Mr. Cook)].

40. Walgreen's is a very credit worthy tenant and was a company with a 34 and a half billion dollar market cap as of 2012. [See Trial Transcript, at 352:219-24 (Mr. Cook)].

41. As of May 2012, there was a year and a half left to build the Walgreen's. The building would have only taken about six months to construct. [See Trial Transcript, at 351:19-351:19-24 (Mr. Cook)].

42. Despite the existence of the Walgreen's lease and the Walgreen's Amendment, Mr. Jorgensen did not initially separate the value Lot 6, Pad D or consider the Walgreen's lease associated with that Pad in determining the fair market value of the Highland Marketplace. [See Trial Transcript, at 99:15-20 (Mr. Jorgensen)].

43. Mr. Jorgensen admitted that at the time he performed his appraisal he was not aware of the signed Walgreen's lease. [See Trial Transcript, at 99:25-100:8 (Mr. Jorgensen)].

44. Although Mr. Liddell was aware of the Walgreen's lease at the time of his appraisal, he believed that the lease had expired and did not include any value for the lease.

#### Expert Witnesses

45. An appraiser has the role of an impartial market observer or analyst who must interpret

real estate markets independently of a client. [See Trial Transcript, at 285:23-286:6 (Mr. Cook)].

46. When appraising real estate there are three approaches to value: the sales comparison approach, the cost approach, and the income approach. [See Trial Transcript, at 65:20-25 (Mr. Jorgensen); 340:5-6 (Mr. Cook)]; [See also Exhibit 11, at 11-109 - 11-110]; [See Exhibit 100].

47. In appraising property, an appraiser must develop those approaches to value that are necessary to produce credible results, but may also omit an approach if it is not necessary. [See Trial Transcript, at 294:15-20 (Mr. Cook)]; [See also Exhibit 124].]

#### Sales Comparison Approach and the Principal of Substitution

48. The sales comparison approach is based on the principle of substitution. [See Trial Transcript, at 296:1-297:20 (Mr. Cook)].

49. The principle of substitution requires comparison of an equally desirable substitute property. Stated differently, when applying the sales comparison approach the appraiser needs to find sales that are closely enough in nature so that the comparable is a true substitute property to prospective buyers and sellers. [See Trial Transcript, at 296:17-297:20 (Mr. Cook) (emphasis added)].

50. Mr. Jorgensen agrees with Mr. Cook, and testified that under the substitution principle “a buyer would not pay more than they would expect to pay for a substitute” and that an appraiser wants “to have the comparables be as similar as possible.” [See Trial Transcript, at 147:5-148:4 (Mr. Jorgensen) (emphasis added)].

51. In making this selection, some factors to consider include size, location, age of

improvements, and a use that actually matches the highest and best use of the subject property.

52. The sales comparison approach “is based on the appraisal principle of substitution and takes into consideration the selling price of improved properties that provide utility equal or similar to the subject.” [See Exhibit 18, at 18.57].

53. The sales comparison approach uses the sales of comparable properties to try to predict what the subject property would sell for if it was placed on the market. [See Trial Transcript, at 87:14-17 (Mr. Jorgensen)].

54. Both Mr. Cook and Mr. Jorgensen agree that the sales comparison approach is applicable in this case and actually applied the sales comparison approach to the Highland Marketplace. [See Exhibit 104, at 104.1]; [See also Trial Transcript, at 65:20-25 (Mr. Jorgensen); 340:19-24 (Mr. Cook)].

55. In contrast, Mr. Liddell did not do a sales comparison approach for the income producing property. [See Exhibit 104.1]; [See also Trial Transcript, at 184:13-18 (Mr. Liddell); 418:10-419:12 (Mr. Cook)]; [See Exhibit 19, at 19.23].

#### The Cost Approach

56. “The cost approach to value is based on the principle of substitution, which affirms that a knowledgeable buyer would pay no more for a property than the cost to acquire a similar site and construct improvements of equivalent desirability and utility without undue delay.” [Exhibit 11, at 11-65].

#### Income Approach

57. The income approach is “based on the appraisal principle of anticipation, which attests that property value is estimated as the present worth of future anticipated benefits accruing to ownership.” [See Exhibit 18, at 18.36].

58. With the income approach, the value of real property is equal to the net operating income (“NOI”) divided by the capitalization rate. [See Trial Transcript, at 65:20-25 (Mr. Jorgensen); 341:24-342:11 (Mr. Cook)].

59. Mr. Cook, Mr. Liddell, and Mr. Jorgensen all agree that the income approach is to determining the fair market value of the Highland Marketplace. [See Exhibit 104.1].

60. In performing an income approach, an appraiser looks at the market rents by studying of comparable properties as well as the subject property’s rental history. [See Trial Transcript, at 71:24-72:1 (Mr. Jorgensen)].

61. The existing leases, with the exception of the lease for the fitness center in Building A (discussed below), were the result of arm’s length transactions, and were entered into prior to litigation.

62. Just as with the sales comparison approach, when comparing other properties as part of market rent analysis, an appraiser must find good comparable properties. [See Trial Transcript, 297:11-15 (Mr. Cook)].

#### Taco Time

63. The Taco Time, located on Lot 7, had an existing lease that was negotiated at arm’s [See Exhibit 18, at 18.38].



64. The Taco Time had operated at the Highland Marketplace location since April 2010. [See Exhibit 18, at 18.38].

65. The Taco Time lease was a 15 year lease, with an annual rent of \$130,166 or \$56.03 per square foot. [See Exhibit 18, at 18.38].

66. The Taco Time lease was personally guaranteed by the three principals of the leasing company, at least one of whom owned 15 other stores. [See Exhibit 18, at 18.38]; [See also Trial Transcript, at 378:16-379:12 (Mr. Cook)].

67. Like the other existing leases, the Taco Time lease was the result of an arm's length negotiation, prior to litigation. [See Trial Transcript, at 378:16-382:4 (Mr. Cook)].

Mr. Liddell

68. Darrin W. Liddell ("Mr. Liddell") is the owner of the Integra Realty Resources franchise Salt Lake City, Utah. Mr. Liddell has a bachelor's degree in finance and a master's degree in business administration, both of which come from the University of Utah. [See Trial Transcript, at 180:21-24; 182:7-11 (Mr. Liddell)].

69. Mr. Liddell is also a Certified General Appraiser for the State of Utah and is MAI [See Trial Transcript, at 180:23-181:3; 181:18-20 (Mr. Liddell)].

70. The Court finds that each of Mr. Liddell's judgments regarding the property were conservatively made resulting in an appraised value that is not credible. [See Trial Transcript, at 299:17-300:12 (Mr. Cook)].

71. Although an appraiser may receive client input, there are limits on the amount of

an appraiser can accept from a client and it is the appraiser's responsibility to define the scope of work based on the intended use and the intended user or users of the appraisal. [See Trial Transcript, at 235:12-19 (Mr. Liddell); 307:11-19 (Mr. Cook)].

72. Mr. Liddell did not offer any testimony or evidence as to how much the value of the Highland Marketplace property would have increased if he had not followed the client's instructions and performed an independent analysis. [See generally Trial Transcript].

73. As noted, Mr. Liddell failed to conduct a sales comparison approach on the income producing property. [See Exhibit 104, at 104.1]; [See also Trial Transcript, at 184:13-18 (Mr. Liddell); 418:10-419:12]; [See Exhibit 19, at 19.23].

74. Mr. Liddell's failure to do a sales comparison approach on income producing property a significant downward impact on his proffered value of the Highland Marketplace because it prevented him from using comparable sales as a benchmark for his income based analysis. [See Trial Transcript, at 419:7-12, 295:4-18 (Mr. Cook)].

75. By failing to do such a check and establish a benchmark, Mr. Liddell violated the rule requiring appraisers to develop the approaches to value that are necessary to produce credible results. [See Trial Transcript, at 294:13-295:18 (Mr. Cook)].

76. Although Mr. Liddell was aware of the Walgreen's lease at the time of his appraisal, he not include any value for the lease and, instead, simply appraised it as vacant land.

77. Similarly, Mr. Liddell appraised Pad I as vacant land despite the existence of a 'Jack in Box,' Letter of Intent. Mr. Liddell admitted that at the time he performed his appraisal he was

aware of the signed 'Jack in the Box' Letter of Intent. [See Trial Transcript, at 242:10-17 (Mr. Liddell)]. The Court is of the view that the letter of intent would have added only marginal value to the property because the Defendants did not have title to the property included in the letter. Nevertheless, Mr. Liddell gave the circumstance no credence, at all.

78. In order to apply the income approach Mr. Liddell used cap rates developed from actual income and applied them to the market rent concept resulting in an artificially low value. [See Trial Transcript, at 299:17-300:12 (Mr. Cook)].

79. The age, quality, and condition of the property can affect a capitalization rate that is used for the income approach. [See Trial Transcript, at 145:25-146:8 (Mr. Jorgensen)].

80. More recent construction projects and newer retail centers sell for the highest prices and can typically justify a lower capitalization rate. [See Trial Transcript, at 146:15-22 (Mr. Jorgensen)].

81. Mr. Liddell applied a capitalization rate derived from actual income on comparable properties to his concluded market rate of individual buildings and to the Highland Marketplace as a whole, and then applied a ten percent bulk discount. [See Trial Transcript, at 298:16-299:16 (Mr. Cook)].

82. In other words, Mr. Liddell used the wrong capitalization rate twice, which resulted in a substantially lower appraised value. [See Trial Transcript, at 299:1-16; 419:13-21 (Mr. Cook)].

83. As a result of Mr. Liddell's incorrect application of the capitalization rate, his overall opinion resulted in a downward impact on the value of the Highland Marketplace. [See Trial

Transcript, at 299:1-300:12, 419:13-21 (Mr. Cook)].

84. After appraising the Highland Marketplace as individual parcels Mr. Liddell applied a ten percent bulk sale discount, which artificially reduced the appraised value of the Highland Marketplace. [See Exhibit 10, at 10-204].

85. “The bulk sale analysis is meant to reconcile the individual retail values to one value for a single buyer. This is contrary to highest and best use . . . which would be to operate it as an integrated shopping center as [Mr. Liddell himself] concludes in the highest and best use [See Exhibit 19, at 19.21].

86. It is not industry practice to appraise shopping centers by applying a bulk sale discount. [See Trial Transcript, at 416:2-14 (Mr. Cook)]; [See also Exhibit 19, at 19.5].

87. Mr. Liddell conceded that a seller of real property would not request the application of a percent bulk sale discount to the value of its property because a hypothetical seller wants to maximize their value. [See Trial Transcript, at 219:25-220:13 (Mr. Liddell)].

88. The bulk sale analysis is ordinarily applicable where various parcels or lots within a subdivision compete against each other or where there are a bunch of non-income producing properties that have associated carrying costs, such as with residential subdivisions. [See Exhibit 19, at 19.22]; [See Trial Transcript, at 221:16-222:20 (Mr. Liddell)]. For example, in a subdivision all the parcels are competing against each other and a bulk sale discount is applied to allow the owner to sell all the lots at once so that the owner can avoid the carrying costs with selling competing lots over an extended period of time. [See Trial Transcript, at 222:21-

222:21-223:10 (Mr. Liddell); 323:11-326:9, 326:22-327:5 (Mr. Cook)].

89. In contrast, in the Highland Marketplace, Lots 1 and 2 are vacant, Lots 3, 7, 8, 9, and 10 have buildings on them, Lot 6 has a signed Walgreen's lease, and Lot 11 or Pad I had at least an apparent letter of intent for construction of a 'Jack in the Box' restaurant. However, none of lots or pads competed with each other. [See Trial Transcript, at 326:10-21 (Mr. Cook)].

90. For example, a potential tenant for the remaining space on Lot 11, such as another restaurant or retail space, would not have competed with an apartment building or anchor tenant Lots 1 and 2. [See Trial Transcript, at 326:10-21 (Mr. Cook)].

91. The different lots in the Highland Marketplace are complementary to each other because they operate as an integrated economic unit. [See Trial Transcript, at 332:19-25, 333:16-18 (Mr. Cook)].

92. In addition, Mr. Liddell agreed that the developed lots in the Highland Marketplace are income producing and, if sold as an integrated economic unit, the bulk discount is inapplicable because the seller is not avoiding any carrying costs. [See Trial Transcript, at 223:4-10 (Mr. Liddell)].

93. Thus, the bulk sale discount is inapplicable to the fair market value analysis of the Highland Marketplace. [See Trial Transcript, at 322:18-23 (Mr. Cook)].

Mr. Cook

94. Defendants called Philip Cook ("Mr. Cook") as an expert witness to testify regarding the fair market value of the Highland Marketplace. Mr. Cook was retained to provide a retroactive

valuation of the Highland Property for purposes of helping to defend actions filed against the Defendants.

95. Mr. Cook is a commercial real estate appraiser with approximately 35 years of and is the principal and owner of J. Philip Cook and Associates, LLC. [See Trial Transcript, at 280:13-17 (Mr. Cook)].

96. Mr. Cook obtained his bachelor's degree in finance from the University of Utah in 1980. Mr. Cook completed an MBA in 1982, also at the University of Utah. [See Trial Transcript, at 280:20-25 (Mr. Cook)].

97. Mr. Cook has also taught appraisal classes on Real Estate Appraisal Principles and Uniform Standards of Professional Appraisal Practice for the Appraisal Institute, which promulgates education and standards for appraisers and sponsors the MAI designation. [See Transcript, at 282:3-19 (Mr. Cook)].

98. Mr. Cook has served in all the local office positions for the Appraisal Institute, including the President of the Utah Chapter of the Appraisal Institute. Mr. Cook has also served as a regional representative and sat on the National Board of Directors for the Appraisal Institute. [See Trial Transcript, at 283:1-7 (Mr. Cook)].

99. Mr. Cook has served as a board member and as Chairman of the Utah State Appraiser Board, which works with the Utah Division of Real Estate to oversee the licensing and professional oversight of appraisers in the State of Utah. [See Trial Transcript, at 283:11-15 (Mr. Cook)].



100. Mr. Cook has served as an expert witness on real estate appraisal related issues in both federal and state courts, and has appraised such shopping centers as Provo Towne Center, University Mall, Riverwoods mall, Fashion Place mall, the City Creek project in downtown Salt Lake City, the Gateway mall, and numerous other big box, neighborhood, and strip centers. [See Trial Transcript, at 284:8-285:4 (Mr. Cook)].

101. Mr. Cook testified that he typically reads the pleadings in the litigation action and that he generally understands the issues involved in a deficiency action (May 27th, 2015 Transcript, on File with the Court, at p. 445). Mr. Cook also testified that he was aware of, and observed a deficiency action that Defendants are involved in relating to the Highland Property with CRV-CRV-Main Main, L.P. ("CRV-Main") the mezzanine lender that foreclosed Defendants' interest in the Highland Property prior to SAGP's for foreclosure. (See *id.* at p. 491, Line 20---p. 492, 3). As set forth in the Cook Appraisal [Exhibit 18], Mr. Cook valued the Highland Property as the foreclosure date in the amount of \$14,710,000.00, which is approximately \$4 million more than Mr. Jorgensen's valuation, approximately \$5 million more than Mr. Liddell's valuation, and approximately \$6 million more than the price paid by an independent third party bidder at the foreclosure sale.

102. The Court finds that Mr. Cook's valuation of the Highland Property was artificially inflated and less credible than the valuations of Mr. Liddell and Mr. Jorgensen for the following reasons:

(a) Mr. Cook's valuation was based on unsupported and unreliable facts and data. For

example, Mr. Cook gave too much value to the 'Jack in the Box,' Letter of Intent that was dated days prior to the foreclosure sale and was signed by Highland as the Landlord, even though CRV-Main owned the Highland Property at the time the Letter of Intent was signed.

Additionally, Mr. Cook valued the "Anchor Pad" of the Highland Property using the condition" that the Anchor Pad would function as multi-family housing, even though, (1) the Highland Property was not zoned for multi-family housing; (2) the Highland Property was not equipped with a sewer system or other necessary infrastructure to handle multi-family housing; Highland City has stated that it is against re-zoning the property; and (4) there is no indication, other than Defendants' own statements to Mr. Cook, that Highland City was ever willing to re-zone the Highland Property for multi-family use.

(b) Mr. Cook's valuation was based on un-established and unreliable valuation

For instance, Mr. Cook valued the Anchor Pad and other pads comprising the Highland Property using the "land residual method," which takes the projected future value of a hypothetical project on the land (such as multi-family use housing on the Anchor Pad), and then deducts the costs of building the project to reach the value of the land. "Courts have shown a clear disdain" for this valuation methodology because small variations in the variables used "can result in a dramatic change in the land value estimate.

(c) Mr. Cook did not value the Highland Property in its "as is" condition as of the May 22, 2012 foreclosure date. MR. Cook did not value the property 'as is' because he used assumptions and hypothetical conditions, including that (1) the relied-upon letter of intent would be executed

and that a 'Jack in the Box' would be constructed; (2) the zoning of the anchor pads would be changed; (3) a Walgreen's would be timely constructed; (4) Pad I would be subdivided into two parcels; (5) the fitness club lease would be terminated; (6) the fitness space lease would be converted to retail space; and (7) the entire project would be leased to stabilized occupancy. assumed factors did not reflect the true condition of the Highland Property as of the foreclosure date. The Cook Appraisal states: "We have been asked to estimate hypothetical value as if the subject improvements were stabilized occupancy as of the effective date of the appraisal. This assumes the proposed construction of the Walgreens and the 'Jack in the Box' buildings, as well tenant improvements for vacant space, are complete. This limiting condition affects the assignment results." The Cook Appraisal does not comply with the requirement that the value the Property in its condition as of the foreclosure date, but assumes a hypothetical

103. The Court finds and concludes that Mr. Cook failed to use established and reliable valuation methodologies, and used, instead, a land residual technique not supported in appraisal literature. Mr. Cook failed to perform an "as is" appraisal of the Highland Property. He relied upon hypotheticals, unsupported and questionable data and facts in reaching his valuation which is, therefore, unreliable.

Mr. Jorgensen

104. Kerry M. Jorgensen ("Mr. Jorgensen") was retained to provide a retroactive valuation of the Highland Property for purposes of this trial.

105. Mr. Jorgensen is the principal of Jorgensen Appraisal, Inc. Mr. Jorgensen has a

bachelor's degree from the University of Utah in finance with a real estate emphasis, is MAI certified, and is a Certified General Appraiser in the State of Utah. [See Trial Transcript, at 29:19-30:6 (Mr. Jorgensen)].

106. Mr. Jorgensen has been an appraiser for approximately 36 years. [See Trial Transcript, at 31:13-14 (Mr. Jorgensen)].

107. The Uniform Standards of Professional Appraisal Practice ("USPAP") are a set of standards promulgated by The Appraisal Foundation that have been adopted by Utah into its appraiser regulations. [See Trial Transcript, at 35:2-7 (Mr. Jorgensen)].

108. USPAP is one of the authoritative publications on appraising real estate. [See Trial Transcript, at 287:14-16 (Mr. Cook)].

109. The Appraisal of Real Estate is the most recognized and commonly used treatise by appraisers and is considered authoritative. [See Trial Transcript, at 287:10-16 (Mr. Cook)].

110. The Court finds and concludes that the valuation of the Highland Property by Mr. Jorgensen is complete, based upon sound data, and based on established and reliable valuation methodologies. The Jorgensen appraisal, with the added valuation resulting from the Walgreen's lease, is adopted by reference as the finding of the Court for the value of the property.

111. Mr. Jorgensen admitted that at the time he performed his appraisal he was not aware of signed Walgreen's lease. [See Trial Transcript, at 99:25-100:8 (Mr. Jorgensen)].

112. Mr. Jorgensen conceded that the older shopping centers used in his appraisal as comparables were not only inferior in appearance, but also did not look as modern nor as good as

the Highland Marketplace.

113. However, the Court concludes that Mr. Jorgensen adequately compensated for these variations in computing the “as is” market value of the property.

114. Mr. Jorgensen appraised Building A as a fitness center and used other fitness centers to determine market rent. [See Trial Transcript, at 64:3-11, 75:19-21 (Mr. Jorgensen)].

115. Jorgensen’s original appraisal valued the Highland Property as of the foreclosure date in the amount of \$9,800,000.00 [Exhibit 11]. After adjusting to properly account for the valid Walgreen’s lease at the time of the foreclosure, Mr. Jorgensen would increase his valuation of Highland Property by \$768,000.00, to the amount of \$10,568,000.00 [Exhibit 12].

116. The Court finds that the Highland Property valuation of Mr. Jorgensen was based on the Property as it existed on the foreclosure date. As such, the Court finds that the fair market value the Highland Property as of May 22, 2012, was no greater than \$10,568,000.00—the highest assigned to the Property by Mr. Jorgensen.

#### CONCLUSIONS OF LAW

1. This action is governed by the Utah Code Ann. § 57-1-32. See Utah Code § 57-1-32.
2. Under the Deficiency Action Statute:

The court shall find the fair market value of the property at the date of sale. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee’s and attorney’s fees, exceeds the fair market value of the property as of the date of the sale. Utah Code Ann. § 57-1-32.

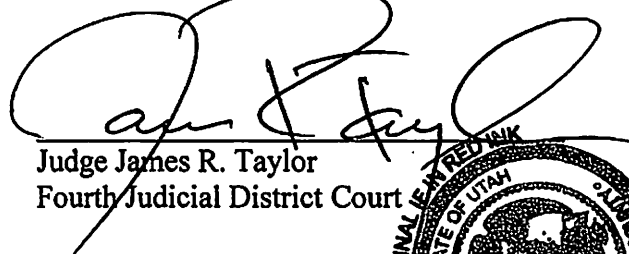
### ORDER

1. The amount owing to SAGP by defendants under the note and loan as of the May 22, 2012 foreclosure date was \$14,685,370.37. The court concludes the fair market value of the Highland property on that date was no greater than \$10,568,000.00 and as such, the deficiency balance owed to SAGP as of the foreclosure date was \$4,117,370.37 (the "deficiency amount").
2. Since the foreclosure sale, interest has accrued on the deficiency amount at the rate of 6.25%, which rate is comprised of: (a) the prime index rate, as set forth in the note, which rate remained at 3.25% since December 16, 2008; plus (b) the additional 3.0% default rate, as set in the note.
3. On approximately October 2, 2012, SAGP received \$177,896.00 from the receiver of the highland property, which SAGP applied to reduce the principal amount owing to SAGP by defendants.
4. Additionally, SAGP has incurred attorneys' fees and costs in its efforts to Amounts owed by Defendants under the loan documents, which costs and fees SAGP is entitled to recover from Defendants, jointly and severally, under the loan documents, and which an affidavit filed within days of the entry of this order may later establish.
5. Accordingly, SAGP is entitled to judgment against Defendants, jointly and severally, in the total amount of \$4, 747, 891. 39, as of August 12, 2015, plus attorneys' fees and costs to be established by affidavit within 30 days of entry of this Order, with the further accrual of interest



6.25% and attorneys' fees for collection until paid in full.

Dated this 24<sup>th</sup> day of August, 2015



Judge James R. Taylor  
Fourth Judicial District Court



A certificate of mailing is on the following page.

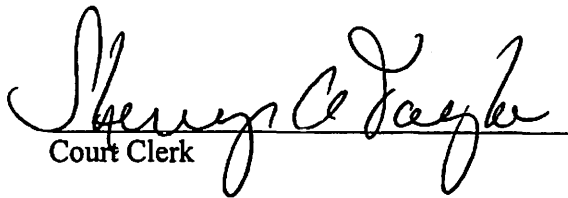
**SA Group Properties, Inc., v Highland Marketplace et al., 120401312 Findings of Fact,  
Conclusions of Law and Order 8/18/15**

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Mailed this 24 day of Aug, 2015, postage pre-paid as noted above.

  
Court Clerk