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Utah Supreme Court

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IN THE UTAH SUPREME COURT

JOHN O. HOWE, Trustee; ROBERT E. HOWE and BONNIE F. HOWE, husband and wife; WILLIAM K. EVANS and CAROLE H. EVANS, husband and wife, as Trustee; and JUDITH H. STEENBLIK, Plaintiffs and Appellees, vs. PROFESSIONAL MANIVEST, INC., a Utah corporation; and MANIVEST CORPORATION, a Utah corporation, Defendants and Appellants,	Priority No. 16 Case No. [redacted] CA

BRIEF OF APPELLANTS

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County,
The Honorable J. Dennis Frederick, presiding

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MAR 15 1991

Clerk, Supreme Court, Utah

IN THE UTAH SUPREME COURT

JOHN O. HOWE, Trustee; ROBERT E. HOWE and BONNIE F. HOWE, husband and wife; WILLIAM K. EVANS and CAROLE H. EVANS, husband and wife, as Trustee; and JUDITH H. STEENBLIK,

Plaintiffs and Appellees,

vs.

PROFESSIONAL MANIVEST, INC., a Utah corporation; and MANIVEST CORPORATION, a Utah corporation,

Defendants and Appellants,

Priority No. 16

Case No. 900430

ERRATA TO BRIEF OF APPELLANTS

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Defendants - Appellants Professional Manivest, Inc. and Manivest Corporation hereby submit the following errata to their opening brief:

1. The citation to Kendall v. Ernest Pestana, Inc. at pages iii and 22 should read: 709 P.2d 837, 845.

2. The citation to New Mercur Mining Co. v. South Mercur Mining Co. at pp. iii and 29 should read: 102 Utah 131 128 P.2d 269, 272.

3. The Utah Reporter citation to Perkins v. Spencer at pp. iv and 39 is 121 Utah 468.

4. The citation to Southern Hotel Co. v. Miscott at pp. iv and 40 should read 337 N.E. 2d 660.

5. The page references to the secondary authorities listed on p. v of the Table of Authorities are:

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Restatement (Second) of Contracts, §241	40,41
Restatement (Second) of Property, (1977), §15.2	24
Williston on Contracts, 3d. Ed. vol. 12, §1455	39

6. On page 33, line 8, the word "winds" should read "weeds".

DATED this 14th day of March, 1991.

PRINCE, YEATES & GELDZAHLER

By James A. Boevers
JAMES A. BOEVERS

CERTIFICATE OF SERVICE

I hereby certify that, on the 14Th day of March, 1991, I caused the original and nine true and correct copies of the foregoing ERRATA TO BRIEF OF APPELLANTS to be mailed, first class postage prepaid thereon, to the Utah Supreme Court, and four true and correct copies to be mailed to:

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1. Lease dated October 14, 1960
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5. Judgment of Forfeiture and Order of Possession entered May 18, 1990
6. Findings and Conclusions entered September 10, 1990
7. Supplemental Judgment entered September 10, 1990

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j) (1953 as amended). The Judgment of Forfeiture and Order of Possession (R. 1023) from which defendants appeal was entered on May 18, 1990. Defendants filed a Motion to Alter or Amend Judgment or for New Trial (R. 1041) pursuant to Rules 52 and 59, Utah Rules of Civil Procedure on May 29, 1990 (the preceding day being a legal holiday). That motion was denied by an Order entered on August 9, 1990. Defendants filed their Notice of Appeal (R. 1287) on August 31, 1990. A Supplemental Judgment for Attorneys' Fees, Expenses and Prejudgment Interest (R. 1293) was entered on September 10, 1990. Defendants filed an Amended Notice of Appeal (R. 1322) regarding the Supplemental Judgment on October 4, 1990.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Whether paragraph 4 of the Lease, requiring that the lessors (plaintiffs) consent to certain assignments of the Lease by lessees (defendants), applies to the following:

a. Assignments of the Lease merely as security for loans;

b. Assignments of subleases, either as security for loans or otherwise;

c. Assignments of the Lease between limited partnerships having the same general partner.

2. Whether paragraph 4 of the Lease is a disabling restraint (rather than a forfeiture restraint) such that it

could not be a basis for forfeiture of the Lease under paragraph 9.

3. Whether paragraph 4 of the Lease permits the lessors to withhold consent to the lessees' assignments of the Lease arbitrarily, in order to force the lessees to renegotiate the rental, and whether the lessors breached the implied covenant of good faith and fair dealing by withholding consent for this purpose.

4. Whether the document that assigned certain assets of the lessees to a liquidating trust included the Lease at issue here.

5. Whether paragraph 6 of the Lease is an agreement by the lessees to do anything more than refrain from permitting liens or encumbrances to attach to the real property, particularly the lessor's fee interest;

a. Whether paragraph 6 applies to a Quit Claim Deed by the lessees of any interest they might have in property erroneously included in the Lease, but as to which the lessors had no right, title or interest; and

b. Whether paragraph 6 applies to encroachments on the Lease premises from neighboring buildings objected to by lessees.

6. Whether paragraph 5 of the Lease requires the lessees to do anything more than reasonable weed control on the leased premises.

Each of the foregoing issues is a legal issue of contract interpretation subject to de novo review. See,

Automotive Manufacturers Warehouse, Inc. v. Service Auto Parts, Inc., 596 P.2d 1033, 1036 (Utah 1979).

7. Whether the court erred in considering evidence of alleged contract breaches outside the pleadings and raised by lessors for the first time at trial without notice to the lessees, or in denying the lessees' motion for a continuance of trial to allow the lessees to prepare a defense to these allegations, or in refusing to reopen the evidence to allow lessees to present such a defense. The standard of review applicable to these issues is abuse of discretion. See, Westley v. Farmers Insurance Exchange, 663 P.2d 93 (Utah 1983).

8. Whether there was evidence in support of the following findings by the trial court:

a. That the lessees intentionally altered a document for the purpose of attempting to trick the lessors into subordinating their interest in the leased premises to certain security interests securing loans to lessees, or otherwise acted in bad faith;

b. That the lessees or their sub-tenants violated health and safety regulations;

c. That the lessees failed to maintain an adequate weed and debris control program.

d. That the lessors were damaged by the alleged lease defaults of the lessees;

e. That the lessors or their predecessors-in-interest would not have entered into the Lease if they could have foreseen the alleged defaults by the lessees.

These issues are subject to the clearly erroneous standard of review. See, Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

9. Whether the trial court erred in finding that the alleged lease defaults of the lessees, separately or together, were so material as to require forfeiture in light of the following:

a. The lease must be strictly construed against the parties seeking forfeiture;

b. Material breach must be proven by clear and convincing evidence;

c. There was no evidence of any damage to the lessors from the alleged defaults;

d. The value of the lessees' leasehold interest, as found by the trial court, was between $500,000 and $600,000, and the value of capital improvements made by the lessees was approximately $2,000,000 (R. 125);

e. There was no evidence or findings of the value of the lessors' reversionary interest, against which the court purportedly offset the value of the lessees' leasehold interest.

f. The lease does not expressly require that notice of default be given and numerous alleged defaults were not the subject of any notice;

g. The alleged defaults had been cured either prior to the filing of the lawsuit or prior to trial, while

those raised by the Howes for the first time at trial were curable if Manivest had been given the opportunity to do so;

h. The lessors had alternative remedies less drastic than lease forfeiture.

i. The lessees had good faith disputes over the lessors' interpretation of what the Lease required.

Because this is a mixed question of fact and law, it is subject to de novo review. See, Margolies v. Upchurch, 696 P.2d 1195, 1200 (Utah 1985). Moreover, this Court is free to review factual findings in reviewing an equitable remedy such as forfeiture. See, Horton v. Horton, 695 P.2d 102, 105 (Utah 1984). Although even in equity cases this Court defers to the trial court's factual findings (Id.), defendants submit this Court is free to substitute its judgment for the trial court's as to whether, based upon only those findings supported by the evidence, and applying the correct legal standards as determined by this Court, it was equitable for the trial court to forfeit the lessees' interest in the lease.

10. Whether the trial court's errors on any individual issue of law or fact so tainted its ultimate decision permitting lease forfeiture that defendants should be awarded a new trial. Defendants submit that interpretation of the trial court's decision should be governed by the de novo standard of review, but are unaware of any authority directly on point.

11. Whether the lessors' application for attorneys' fees and costs was barred as untimely, and whether the amount

awarded was unsupported by admissible evidence and was excessive. The standard of review applicable to the issue of the amount of attorneys' fees and costs is abuse of discretion, although this discretion is limited, especially as to the award of costs. Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988); Frampton v. Wilson, 605 P.2d 771, 774 (Utah 1980). Defendants submit that the issue of the admissibility of evidence is inherently a legal one subject to de novo review, although defendants are unaware of any authority directly on point.

STATEMENT OF THE CASE

Plaintiffs (hereinafter sometimes referred to cumulatively as the "Howes") are successors-in-interest to the lessors under a fifty-year ground lease dated October 14, 1960 [Trial Ex. 1, Addendum ("Add.") No. 1 hereto]. Defendants (sometimes referred to cumulatively as "Manivest") are successors-in-interest to the lessees. With the Howe's consent, Manivest and its predecessor lessors built the Southlake Shopping Center on the leased property, which is located on the southwest corner of Ninth East and 5600 South in Murray, Utah. With the lessors' consent, Manivest became the lessee as the general partner of a limited partnership (National Realty Ltd.), in November 1971. (Trial Ex. 6)

The Howes filed this action for forfeiture of the Lease in November, 1988. The Verified Complaint (R. 2, Add. No. 2) alleged the following defaults and no others:

1. That Manivest violated paragraphs 4 and 6 of the Lease (prohibiting certain assignments and encumbrances, respectively) by using the Lease as security for financing obtained from Valley Bank in May, 1978, June, 1982 and December, 1987 - January, 1988, without the Howes' consent. (Add. No. 2, ¶ ¶ 23-28.)

2. That Manivest violated paragraph 5 of the Lease by failing to control weeds and properly maintain the property. (Add. No. 2, ¶ ¶ 12, 21, 22.) Although paragraph 5 also requires that sublessees comply with applicable laws and regulations, no violation of any laws or regulations was alleged.

Paragraphs 17 and 18 of the Verified Complaint alleged in effect that the Lease allowed the Howes to withhold consent to any lease assignments required by lenders providing financing to Manivest, solely for the purpose of forcing renegotiation of the amount of the rental, which was $24,000 per year.

The Verified Complaint also alleged that although no notices were required under paragraph 9 of the Lease (governing forfeiture), notices of the above defaults had been given.

The Howes did not allege that they had suffered any damage as the result of the defaults. The prayer for relief sought no damages, other than any rentals due prior to termination (none having been alleged in the Complaint) and reasonable rental value after notice of termination was given by the Howes.

Manivest counterclaimed (R. 70), contending that the Howes had a duty to consent to the Valley Bank lease assignments, because there was no valid business reason for withholding consent, and alleged the Howes acted in bad faith in refusing to consent.

The case was tried to the court on March 6 and 7, 1990. During the course of the trial, Manivest objected to the Howes' offer of evidence of alleged lease defaults other than those alleged in the Verified Complaint, on grounds of surprise. (Tr. 44-52, 96.) Alternatively, Manivest moved for a trial continuance in order to prepare a defense to these new allegations. (Id.) However, most of the evidence was admitted and no trial continuance was granted. On March 9, 1990, the Howes filed a Motion to Amend Pleadings to Conform to the Evidence. (R. 434.)

The court delivered its decision from the bench on March 12, 1990 (R. 676, Ex. "D", Add. No. 3), ruling the Lease forfeited effective May 31, 1988; dismissing Manivest's counterclaim; awarding the Howes rentals accruing after May 31, 1988, as liquidated damages; and awarding the Howes their reasonable attorneys' fees (pursuant to paragraph 20 of the lease). The court entered its Findings and Conclusions (R. 1008, Add. No. 4) and Judgment of Forfeiture and Order of Possession (R. 1027, Add. No. 5) on May 18, 1990.

Manivest then filed a timely Motion to Alter or Amend Judgment or for New Trial (R. 1044). The motion also sought to reopen the evidence and made a proffer of Manivest's defense to

some of the newly alleged defaults. (R. 1044, pp. 10-11. See also, R. 676, Ex. "A" - "C.") That motion was denied. (R. 1264.) Manivest then filed a timely Notice of Appeal (R. 1287). On September 14, 1990, the Howes filed a Notice of Cross-Appeal (R. 1300) from the grant of a Manivest Motion in Limine (Manivest will address the Cross-Appeal in its Reply Brief).

In the meantime, the Howes submitted an application (R. 1181) for attorneys' fees, costs and prejudgment interest on rental payments made by Manivest after May 31, 1988 but returned by the Howes. The Howes also submitted supporting affidavits (R. 1107, 1149, 1240, 1251). Manivest opposed the application (R. 1190), and moved to strike the affidavits (R. 1272, 1275, 1278). On September 10, 1990, the court entered Findings and Conclusions (R. 1296, Add. No. 6) and a Supplemental Judgment (R. 1293, Add No. 7) awarding the Howes $131,867.55 in attorneys' fees; $16,231.05 in costs and expenses; and $2,969.20 in prejudgment interest. On October 4, 1990, the Howes filed an Amended Notice of Appeal (R. 1322) from the Supplemental Judgment.

STATEMENT OF FACTS

A. Facts Relating to Formation of the Lease:

1. The Lease and Option Agreement gave rise to this action was executed on October 14, 1960. The parties to the Agreement were members of the Howe family, succeeded in interest by the plaintiff Trust, as lessors, and Valley

Shopping Center, a general partnership, as lessee. (Tr. 19, Trial Ex. 1.)

2. Paragraph 4 of the Lease authorized Valley Shopping Center to assign the Lease to a corporation. Valley Shopping Center exercised this right by assigning the Lease to Southlake Shopping Center, Inc. (Tr. 20, Ex. 2.) In 1971, the Lease was assigned to National Realty, Ltd., a limited partnership, with the Howes' consent. (Trial Ex. 5.) Professional Manivest was the general partner of National.

3. The Lease was prepared on paper bearing the legend of the Law Offices of Moffit, Iverson and Elggren. Mr. Moffit was the attorney and custodian of the records for the Lessors until his death, when he was succeeded by Mr. Gerrit Steenblik. (Tr. 26, Trial Ex. 1.)

B. Facts Relating to the Trial Court's Conclusion That Manivest Improperly Assigned the Lease.

4. In May 1978, Professional Manivest acquired a $1,000,000 loan from First Security Bank. This loan was secured by a deed of trust covering the leasehold property and an assignment of the Howe lease and leases entered into by Manivest with the tenants of the Shopping Center. (Tr. 53, 54, Trial Ex. 11.) The assignment of the Howe lease was undertaken solely for the purpose of providing security for the loan and was subsequently released when the loan was paid. (Tr. 253, 254.)

5. In 1982, Manivest obtained a loan from Valley Bank and Trust Company. This loan was similarly secured

by a trust deed and an assignment of the Howe lease and tenant leases . The deed of trust and assignments were again entered into as security instruments and were released when the loan was paid. (Tr. 55, 254, Trial Ex. 12.)

6. In December 1987, Manivest sought a $4,000,000 line of credit from Valley Bank and Trust Company. As before, this obligation was secured by a trust deed, and an assignment of the Howe lease and tenant leases. Like its predecessor, the assignment was made for security purposes only. In October 1988, Valley Bank releases the assignment and reconveyed the trust deed. (Tr. 61, 255, Trial Ex. 16.)

7. Manivest did not seek the Howes' consent before pledging the security evidenced by the trust deeds and lease assignments for the 1978, 1982, or 1987 loans. (Tr. 29.)

8. Manivest and Valley Bank sought to obtain the Howes' consent to the assignment of the Howe lease as part of the 1987-1988 transaction. The Howes' refused to consent to the assignment. (Trial Ex. 19, 30, Tr. 72.)

9. Professional Manivest was the general partner of certain limited partnerships in addition to National Realty Ltd., including MD Investments Limited Partnership and Diversified Realty Limited Partnership. (Tr. 262, 263.)

10. On February 1, 1976, National Realty Limited executed a Purchase and Sale Agreement in which it sold the Southlake Shopping Center to MD Investments. On January 1, 1978, MD Investments sold the Southlake Shopping Center to Westco Realty, Inc. On the same day, Westco Realty, Inc., a

Manivest subsidiary, executed a Purchase and Sale Agreement conveying the Southlake Shopping Center to Diversified Realty Limited. Trial Ex. 22. Manivest did not request the prior consent of the Howes prior to making the conveyances to MD Investments, Westco Realty, or Diversified Realty Limited. (Tr. 296.)

11. Although the Shopping Center was transferred under the Purchase and Sale Agreements, ownership of the Howe lease remained with Manivest. (Trial Ex. 22.) In all of the transactions in which Manivest sought to assign the Lease for security purposes--the 1978 First Security Bank loan, and the 1982 and 1988 Valley Bank loans--Manivest was designated as the lessee and assignor. (Trial Ex. 11, 12, 13, 17, and 18.) In none of these transactions was Diversified Realty Limited or any other entity identified as having any interest whatsoever in the Lease. Irrespective of the Purchase and Sale Agreement, Manivest remained in control of the premises. (Tr. 91, 262, 263.)

12. The Howes' Amended Complaint makes no reference to the Manivest Liquidating Trust and Workout Plan. R. 2. The Manivest Liquidating Trust document was introduced into evidence over the objection of Manivest's counsel that its introduction was beyond the scope of the pleadings. (Tr. 100.)

13. In the Manivest Liquidating Trust and Workout Plan document, Note 1 to the Balance Sheet of Diversified Realty Limited states that ownership of the Southlake Shopping Center was vested in Professional Manivest,

Inc. rather than the Limited Partnership because of the landlease restriction in the ground lease. (Trial Ex. 22, 40.) The Manivest Liquidating Trust and Workout Plan document does not otherwise indicate that the Lease was to be assigned to the Trust. (Trial Ex. 40.) Although the Manivest Liquidating Trust and Workout Plan document contemplated the retirement of Professional Manivest as the general partner of Diversified, Professional Manivest's retirement could not occur because consent was not acquired from all of Diversified's limited partners. Accordingly, Professional Manivest retained both sole ownership in the Lease and its status as the general partner of Diversified. (Tr. 303.)

C. Facts Relating to the Trial Court's Conclusion that Manivest Violated the Lease's Prohibition Against Encumbrances.

14. Paragraph 6 of the Lease obligated Manivest to keep the leased property free and clear of all liens and encumbrances. This prohibition against liens expressly excluded the mortgage securing an initial construction loan which encumbered the Howes' fee interest. (Trial Ex. 1.)

15. None of the trust deeds or assignment which secured the 1978 First Security Bank loan (Trial Ex. 11) or the 1982 and 1988 Valley Bank loans (Trial Ex. 12, 13, 14, 17, and 18) encumbered the Howes' fee interest. (Tr. 114, 115.)

16. The only evidence received by the Court concerning the alleged encroachment onto the leasehold property by an adjacent landowner was a quitclaim deed executed by

Professional Manivest, Inc., in favor of Wallaby Enterprises. (Trial Ex. 10.) In the quitclaim deed, Wallaby Enterprises acknowledged that improvements encroached onto land subject to Manivest's lease. Although the land onto which the improvements encroached was part of the property leased by Manivest by the Howes, and for which Manivest paid rent, the Howes did not own the property, having relinquished their interest in it through a quitclaim deed and boundary line agreement dated March 21, 1956. (R. 686-688.) Irrespective of the true state of the fee ownership of the land encroached upon, Manivest's quitclaim deed stated, "Said encroachments are unacceptable to grantor [Manivest]." (Trial Ex. 10.) Nothing in the record even suggests that Manivest consented to any encroachment.

D. Facts Relating to the Trial Court's Conclusion that Manivest Breached the Lease's Covenant to Control Weeds.

17. Paragraph 5 of the Lease obligated Manivest to keep the premises "free from weeds and other obnoxious growth." (Trial Ex. 1.) In September 1983, Mr. Gerrit Steenblik advised Manivest's Mr. Larry Leeper by letter that weeds were growing through the pavement on the southwest portion of the property. (Trial Ex. 23.) Manivest's management supervisor, Mr. S. L. Dobson, responded by letter of October 19, 1983, advising Mr. Steenblik that the weeds had been sprayed. (Trial Ex. 24.)

18. On July 10, 1989, Murray City issued a violation notice concerning weeds on a vacant field which is part of the leased premises. This notice was one of several hundred issued to various property owners. (Tr. 372.) Mr. Dobson had the weeds removed, and Murray City took no further action. (Tr./343.) Mr. Jerry Adamson, Manivest's property manager since June 1988, testified that Manivest retained an on-site maintenance man who was responsible for daily debris pickup and that Manivest retained several firms to cut and spray weeds which grow and accumulate on the shopping center property, especially the undeveloped ground adjacent to it. (Tr. 382, 383.)

E. Facts Relating to the Trial Court's Conclusion that Manivest Breached the Lease's Prohibition Against Violations of Law.

19. Paragraph 5 of the Lease requires Manivest to prohibit its lessees from conducting any business or performing any act "in violation of the ordinances or regulations of Murray City, the laws of the state of Utah or the United States government." (Trial Ex. 1.)

20. Murray City served two notices of violation on Southlake: the first in April 1983 (Trial Ex. 23) alleging the accumulation of waste material on the property and the second, a July 1989 notice concerning weed growth (Trial Ex. 37). No evidence was introduced to suggest that the 1983 violation was not remedied timely. Murray City's enforcement officer testified that appropriate weed control measures were

undertaken to remedy the problem which led to the 1989 citation. (Tr. 373.)

21. Robert P. Leonard, an architect, testified that he observed several electrical outlets around a building at the shopping center that did not have cover plates on them, an electrical cord plugged into a non-waterproof outlet, a dislodged light fixture, and a gas line on the roof of a building supported by stacked wood. (Tr. 196-198.) Mr. Leonard also observed stacked wood and pallets. He stated that in his opinion these conditions violated local codes. (Tr. 198, 200.) Mr. Leonard also testified that although he did not observe underground gasoline storage tanks, it was his opinion that if the tanks were present, they would violate regulations unless they were registered. (Tr. 204.) Mr. Leonard could not identify any specific codes which were violated by any of the conditions which he observed. (Tr. 206, 207.) No testimony was introduced to indicate that the conditions which, in Mr. Leonard's opinion, constituted unspecified code violations had been present for more than the sixty days granted by paragraph 9 of the Howes' Lease to Manivest to cure alleged defaults. The Howes also introduced no testimony that they had notified Manivest of the alleged unspecified code violations before Mr. Leonard testified at trial.

F. Facts Relating to the Trial Court's Finding That the Howes Were Damaged.

22. No facts appear in the record from which the conclusion may be drawn that the Howes were damaged by Manivest's conduct.

G. Facts Relating to the Trial Court's Finding That Manivest Included Language in a 1988 Acknowledgment of Assignment Document Intended to Subordinate the Howes' Fee Interest to the Valley Bank Loan.

23. Mr. Larry Leeper, Manivest's vice president, advised Mr. Steenblik by letter of January 22, 1988, that Manivest had completed a loan transaction with Valley Bank. As part of that transaction, Manivest assigned the Howes' lease as security. Mr. Leeper's letter enclosed a copy of the Assignment together with a document entitled "Acknowledgment of Assignment." The Acknowledgment stated in part: "The undersigned acknowledges that the lessee is encumbering their interest in the property and said loan is hereby approved as required by said lease." (Trial Ex. 8.) A previous draft of the Acknowledgment did not contain this sentence. (Trial Ex. 17.) A copy of the original draft of the Acknowledgment on which appeared a handwritten version of this sentence relating to "encumbrancing" [sic] the lessee's interest was obtained from Manivest's files. (Tr. 67, 68.) The handwriting was not attributed to anyone associated with Manivest. The final edition of the Acknowledgment which was forwarded to the Howes by Mr. Leeper was prepared at Valley Bank's law firm. (Tr. 155, 158.) Valley Bank's counsel never advised Valley

Bank to attempt to acquire an interest in the Howes' fee interest. (Tr. 152.)

INTRODUCTION AND SUMMARY OF ARGUMENT

It is apparent from the trial court's decision from the bench (Add. No. 3), as well as the Findings and Conclusions (Add. No. 4), that the Court was greatly influenced by the misimpression that Manivest tried to take unfair advantage of the Howes. The Court's decision permitting forfeiture on facts such as these is otherwise inexplicable. Ironically, were the outcome of this case to turn on which party most sought to disadvantage the other, Manivest would have easily prevailed based on the Howes' repeated efforts to unfairly exploit Manivest driven by a growing dissatisfaction over the bargain they struck in 1960. When Manivest declined to renegotiate the Lease, it was the Howes, not Manivest, who seized on technical and illusory defaults which caused them no damage and parlayed them into a successful forfeiture lawsuit.

Owing, in whole or in part, to its miscasting of Manivest as the villain, the trial court's rulings bristle with legal and factual errors. They include the following:

1. The trial court misconstrued paragraph 4 of the Lease--the paragraph relating to assignments--in several respects. Even the Howes admitted that paragraph 4 was not intended to apply to assignments of the Lease made solely as security for Manivest loans. Paragraph 4 was also not intended to apply to assignments of subleases, or internal assignments among Manivest controlled limited partnerships.

2. The trial court failed to take into account the difference between a disabling restraint on alienation and a forfeiture restraint. Paragraph 4 is not an agreement not to assign, the material violation of which could subject the Lease to forfeiture. It is a disabling restraint that simply voids any assignments to which it does apply.

3. In light of the implied contractual duty of good faith recognized by Utah law, the Howes could not arbitrarily withhold consent to lease assignments, for the sole purpose of renegotiating the rental amount. Accordingly, the trial court erred in dismissing Manivest's counterclaim.

4. The Court misinterpreted the Manivest Liquidating Trust document which excluded the lease at issue from the assets conveyed to that trust.

5. The Court misconstrued paragraph 6 of the Lease. Paragraph 6 applies to encumbrances of the leased property itself, and to encumbrances of the Howes' interest in the property, not to encumbrance of Manivest's leasehold interest. Paragraph 6 also does not apply to mere encroachments, or to property erroneously included as part of the property description in the Lease, where the Howes had no right, title or interest in that erroneously included property.

6. The Court misinterpreted paragraph 5 as requiring something more than reasonable efforts at weed and debris control.

7. The trial court erred in considering evidence of alleged lease defaults alleged by the Howes for the first time

at trial, without any prior notice to Manivest. The Court should have excluded the evidence, or granted a continuance in order for Manivest to prepare a defense, or reopened the evidence when evidence to contest some of the new default allegations became available to and was proffered by Manivest.

8. The record contains no evidence in support of the following findings of fact by the trial court:

a. That Manivest altered an "Acknowledgment of Assignment" for the purpose of attempting to deceive the Howes into subordinating their interest in the leased property to Valley Bank's security interests in the leasehold.

b. That although the trial court found Manivest's alleged defaults to be "willful and persistent," all the evidence showed was a good faith disagreement by Manivest with the Howes' interpretation of the lease requirements.

c. That Manivest consented to the encroachment of Walby Enterprises over the leased premises. The only evidence introduced at trial expressly stated Manivest's objection to the encroachment. (Trial Ex. 10.)

d. That Manivest or its sub-tenants violated health and safety regulations.

d. That Manivest failed to maintain an adequate weed and debris control program. Although there was evidence of weed and debris problems that arose from time to time, the undisputed evidence was that Manivest took reasonable steps to prevent and resolve these problems.

e. That the Howes were damaged by the alleged defaults. There was no evidence of damage to the Howes.

f. That the Howes would not have entered into the Lease if they would have known of the alleged defaults. There was absolutely no evidence in support of this finding, and no testimony from anyone who could have had personal knowledge of the lessors' state of mind in 1960.

9. The trial court erred in finding that Manivest materially breached the lease. Again, there was no evidence of damage to the Howes from the alleged defaults, and the Court found the present value of the Manivest leasehold interest that was forfeited to be $500,000-$600,000. In addition, Manivest forfeited capital improvements of approximately $2,000,000.00 (R. 125). The Court made no findings of the value of the Howes' reversionary interest, or that this interest had in any way been impaired by Manivest. The alleged defaults had been cured or were curable, and to the extent defaults existed at all, they were technical ones contrived by the Howes to force renegotiation of the Lease under threat of forfeiture.

10. It is not clear from the Court's decision whether it found that each of the alleged defaults individually was material enough to warrant lease forfeiture, or whether the forfeiture was based on the cumulative effect of the alleged defaults.

a. If the Court concluded that each alleged individual default was material, this conclusion was clear

error, because some of the alleged defaults, such as the weeds, were clearly technical.

b. If the decision was based on the cumulative effect of the alleged defaults, then Manivest is entitled to a new trial because the decision was tainted by the Court's legal and factual errors as to several of the alleged defaults that cumulatively formed the basis for lease forfeiture.

11. The Howes' application for attorneys' fees and costs was untimely under Rule 54(d)(1), Utah Rules of Civil Procedure. Also, the award of fees and costs was not supported by competent evidence and was excessive.

ARGUMENT

I.
PARAGRAPH 4 OF THE LEASE DOES NOT APPLY TO ANY OF THE MANIVEST ASSIGNMENTS

Paragraph 4 of the Lease states, in pertinent part, that "this lease shall be unassignable except with the prior consent of the Lessors." The purpose of this provision is to permit a Lessor to determine the ability of the proposed assignee of the Lessee to perform under the lease. See, Kendall v. Ernest Pestana, Inc., 709 P.2d 835, 837 (Cal. 1985). The purpose is not to prohibit using the Lease as security for loans to the Lessee. Even the Howes admitted, in their Trial Brief, that paragraph 4 does not prohibit the use of the Lease as security for the Valley Bank and other loans. (R. 435, pp. 18, 30.) See also, Chapman v. Great Western Gypsum Co., 14 P.2d 758 (Cal. 1932).

Also, nothing in paragraph 4 suggests that assignments of subleases are prohibited. See also, Baehr v. Penn O-Tex Oil Corp., 104 N.W.2d 661 (Minn. 1960). To the contrary, paragraph 4 expressly permits Manivest to sublease to shopping center sub-tenants without the Howes' prior consent, so long as the Howes' fee interest is not implicated. Moreover, if the Howes had terminated the Lease due to nonpayment of rentals by Manivest, these sublease assignments to Valley Bank would not have been valid as against the Howes. (Tr. 145, 149.) Since paragraph 4 prevents the subleases themselves from attaching to the Howes' reversionary interest, no assignment of the sublease could attach to that interest either.

The transfers between National Realty, MD Investments, Westco Realty and Diversified Realty were merely paper transfers, because Manivest was the general partner of each (except Westco, which is a wholly owned subsidiary of Manivest). As general partner, Manivest remained in control of the premises and liable under the law. (Trial Ex. 22, Tr. 91, 262-263.) Accordingly, these transfers were not prohibited by paragraph 4 either. See, Prince v. Elm Inv. Co., Inc., 649 P.2d 820, 822-823 (Utah 1982).

II.

PARAGRAPH 4 VOIDS ANY ASSIGNMENTS TO WHICH IT DOES APPLY BUT IS NOT A BASIS FOR LEASE FORFEITURE.

Paragraph 9 of the Lease permits lease forfeiture only in the event of Manivest's failure to pay rent, or "to keep any covenant herein contained to be performed by Lessee" (emphasis added). However, paragraph 4 (quoted above) contains no

covenants on the part of Manivest; it simply restrains alienation by making the Lease "unassignable" without the Howes' consent. The lessee of a lease that is "unassignable" cannot alienate the leasehold, irrespective of any attempts to do so. This is because the "unassignability" of the Lease is a characteristic of the Lease itself, rather than a covenant by the lessee.

The Restatement (Second) of Property characterizes this species of restraint as a "disabling restraint on alienation." Restatement (Second) of Property (1977) § 15.2, Comment "c." The Restatement defines a disabling restraint on alienation as one "that makes an attempted transfer by the tenant of his interest in the leased property without the landlord's consent a nullity." The Restatement distinguishes the disabling restraint on alienation from promissory restraints on alienation described in Comment "d" to Section 15.2, as follows:

> The tenant may promise not to transfer an interest in the leased property without the landlord's consent. The failure of the tenant to perform his promise gives the landlord the same remedies that are available to him for the failure of the tenant to perform other promises contained in the lease. If the landlord has the right to terminate the lease in the event the tenant does not perform as promised, the promissory restraint becomes a forfeiture restraint with the additional right to sue the tenant for damages for breach of his promise.

Id. at Comment "d" (emphasis added). Accordingly, while a promissory restraint can be a basis for lease forfeiture, a disabling restraint cannot.

Paragraph 4 contains no promissory language and unambiguously makes unassignability without the Lessor's consent one of the lease's inherent characteristics rather than a basis for forfeiture. Because the Lease is unassignable and no action other than the consent of the Howes could alter its status, Manivest did not--and could not--breach any covenant under the Lease even if it did attempt an assignment. As a matter of law, paragraph 4 cannot be a basis for lease forfeiture.

III.
PARAGRAPH 4 DOES NOT PERMIT THE HOWES TO WITHHOLD CONSENT TO LEASE ASSIGNMENTS ARBITRARILY, FOR THE PURPOSE OF FORCING THE AMOUNT OF THE RENTAL TO BE RENEGOTIATED.

Nothing in the language of paragraph 4, or any other provision of the lease, suggests that the Howes have the absolute right to withhold consent to lease assignments. Even though paragraph 4 does not expressly state that the Howes must act reasonably, the trend in those jurisdictions that have considered the issue is to imply duty of reasonableness. This requirement devolves, at least in part, from the contractually implied obligation of good faith. While this Court has not yet considered the specific issue of whether a duty not to withhold consent unreasonably should be implied, it has ruled that every contract contains an implied duty of good faith and fair dealing. Ted R. Brown and Associates, Inc. v. Carnes Corporation, 753 P.2d 964, 970 (Utah. App. 1988). Rio Algom Corp. v. JIMCO, Ltd., 618 P.2d 497, 505 (Utah 1980). There is no reason why a party to a commercial lease should be exempted

from an otherwise universal duty to act reasonably. See, Prestin v. Mobil Oil Corp., 741 F.2d 268 (9th Cir. 1984).

Utah law has expressly extended the implied duty of good faith to the conduct of contracting parties whose consent is a prerequisite to a benefit sought by another. In Prince v. Elm Inv. Co., Inc., supra, at 649 P.2d 825, this Court stated: "Where a contract provides that the matter of approval of performance is reserved to a party, he must 'act fairly and in good faith in exercising that right. He has no right to withhold arbitrarily his approval; there must be a reasonable justification for doing so.'" (Citations omitted, emphasis added.) Thus, this Court should follow the trend requiring that a landlord's consent to a lease assignment not be unreasonably withheld.

Cases from other jurisdictions support this conclusion. In Campbell v. Westdahl, 715 P.2d 288 (Ariz. App. 1985), the court dealt with a similar clause requiring the lessor's written consent prior to assignment, but not expressly requiring the lessor to act reasonably. The court quoted with approval § 15.2(2) of the Restatement (Second) of Property 1977):

> A restraint on alienation without the consent of the landlord of the tenant's interest in the lease property is valid, but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely-negotiated provision in the lease gives the landlord an absolute right to withhold consent.

715 P.2d at 292 (emphasis added). As in Campbell, there is no freely negotiated lease provision here granting the Howes the absolute right to withhold consent arbitrarily.

Other cases also imply an obligation on the landlord not to withhold consent to tenant assignments unreasonably. In Kendall v. Ernest Pestana, Inc., supra, the California Supreme Court stated:

> [i]t hardly needs citation of authority to the principle that covenants limiting the free alienation of property such as covenants against assignment are barely tolerated and must be strictly construed. . . . A growing minority of jurisdictions now hold that where a lease provides for assignment only with the prior consent of the lessor, such consent may be withheld only where the lessor has a commercially reasonable objection to the assignment. . .

(Citations omitted, emphasis added) 709 P.2d at 840-841. As authority for this trend, Kendall cited cases from New Mexico, Illinois, Florida, Arkansas, Idaho, Alaska, Alabama and Ohio. The factors listed by Kendall as to what constitutes a commercially reasonable objection are:

> . . . financial responsibility of the proposed assignee; suitability of the use for the particular property; legality of the proposed use; need for alteration of the premises; and nature of the occupancy, i.e., office, factory, clinic, etc.

Id. at 845 (citations omitted). Although in Kendall the restraint on alienation was a forfeiture restraint, Kendall applies with even greater force to the disabling restraint here, since disabling restraints are viewed with even less favor than forfeiture restraints.

The Howes' motives and behavior do not fare well when measured against the standard of "reasonableness". There can be no doubt that the Howes had no intention of consenting to the Valley Bank lease assignment, regardless of Valley's ability to perform under the lease, unless the rental amount was renegotiated. Paragraphs 17 and 18 of the Verified Complaint, and the opening statement of the Howes' counsel at trial (Tr. 7) admit as much. Thus, it would have been futile for Manivest to request consent in advance of the assignments, even if Manivest had believed that consent for these assignments was required under paragraph 4.

While the Howes claim that they were within their rights in refusing to consent to any security assignment that would subordinate their interest under the lease, Valley Bank never sought the Howes' subordination (Tr. 152). There was no question about Valley's ability to perform on the lease, and, thus, no question that the Howes violated the implied covenant of good faith recognized by Utah law. Accordingly, the trial court erred as a matter of law in dismissing Manivest's Counterclaim.

IV.
THE TRIAL COURT MISINTERPRETED THE MANIVEST LIQUIDATING TRUST DOCUMENT WHICH EXPRESSLY EXCLUDED THE LEASE AT ISSUE FROM THE ASSETS TRANSFERRED TO THAT TRUST.

In addition to misinterpreting the lease, the trial court also misinterpreted the document creating the Manivest Liquidating Trust (Trial Ex. 21, 40). Apparently the trial court's confusion arose from the fact that the general business

purpose of the Trust was to assume ownership of the assets of Manivest. However, the Trust document clearly establishes that ownership of the Southlake Shopping Center remained with Manivest and was never conveyed to the Trust. (Trial Ex. 21, p. 5). Although the Trust document contemplated that the Trust would substitute for Manivest as the general partner of various Manivest limited partnerships, the required approval from the Diversified Realty limited partners was never obtained, and Manivest remained the general partner of Diversified Realty.

Thus, the trial court erred in concluding that the Trust document constituted an assignment, much less one to which the Howes did not consent.

V.

PARAGRAPH 6 OF THE LEASE DOES NOT APPLY TO THE ALLEGED ENCUMBRANCES COMPLAINED OF BY THE HOWES.

Paragraph 6 of the Lease states: "Lessee agrees to keep the demised premises free and clear of liens and encumbrances of any nature whatsoever, except as to those liens created pursuant to Paragraph 14 hereof." (emphasis added.) Paragraph 14 allowed the original lessees to use the property as security for a loan used to construct the shopping center, and to subordinate the lessors' interests to that of the construction lender.

Despite the trial court's misplaced reliance on paragraph 4, the Howes argued that it was paragraph 6, rather than paragraph 4, that prohibited the use of the Lease as security for financing. The plain language of paragraph 6, however, renders it a poor candidate upon which to promote a

default claim. Manivest did not encumber the "demised premises," it encumbered only its leasehold interest, an act not prohibited by paragraph 6. Although several of the financing documents were not as carefully drafted as they might have been, giving the appearance that something more was being encumbered, any lapses in drafting skill were of no legal or practical consequence. Manivest could not pledge more than it owned, and all it owned was the leasehold interest. See, Bonanza, Inc. v. McClean, 747 P.2d 792, 795 (Kan. 1987).

The exception in paragraph 6 to encumbrances in paragraph 14 defines the scope of paragrah 6's prohibition. The paragraph 14 encumbrances attached to and jeopardized the Howes' fee interest in the property, through the contemplated subordination. By contrast, none of the security interests given by Manivest could have encumbered the real property, and all of the security interests were subordinate to the Howes' fee interest.

Paragraph 4 further illuminates the intent of paragraph 6. In addition to containing the "unassignable" language discussed above, paragraph 4 also expressly grants to the lessees the right to sublease to shopping center sub-tenants, "provided, however, that said subleases shall not attach to or become binding in any way upon the fee interest of the Lessors. . . ." (emphasis added). Again, all that the Howes were concerned about and all that they had (or presently have) a right to be concerned about, was their fee interest not be put at risk.

Similarly, since Manivest could not convey what it didn't own, the Quit Claim Deed complained of by the Howes (Trial Ex. 10) did not encumber either the "demised premises" or the Howes' interest in it. Moreover, because of an erroneous legal description in the Lease (another instance of less than careful drafting, this time by the lessors or their lawyer), the Howes themselves had no interest in the property being quit claimed. (R. 676, Ex. "A" - "C".) The Quit Claim did no more than recognize that the grantees, and not the Howes, owned the fee to the subject property.

Also, the "encroachment" alleged by the Howes is something quite different than an "encumbrance". An encumbrance (such as a mechanics' lien, which could attach to the real property through some act of the tenant, and which is the type of encumbrance paragraph 6 was designed to prevent), is "any right that a third party holds in land which constitutes a burden or limitation upon the rights of the fee title holder." Bergstrom v. Moore, 677 P.2d 1123, 1124 (Utah 1984) (citations omitted, emphasis added). An encroachment, almost by definition, exists without a claim of a right to the property being encroached upon. Finally, the alleged encroachment occurred over Manivest's express objection (Trial Ex. 10).

In sum, the trial court based its award of the forfeiture on a misinterpretation of paragraph 6.

VI.
ALL THAT LEASE PARAGRAPH 5 REQUIRES OF MANIVEST IS REASONABLE WEED CONTROL AND MAINTENANCE.

Paragraph 5 of the Lease requires Manivest "to maintain the [demised premises] and keep it free from weeds and other obnoxious growth . . ." The trial court heard an abundance of evidence concerning maintenance and weeds. Manivest presented a number of witnesses on this point, including Stephen Dobson (Tr. 340 et. seq.), Larry Leeper (Tr. 256-258), Jerry Adamson (Tr. 380 et. seq.), Neils Fugal (Tr. 333 et. seq.), and Don Mayer (Tr. 324 et. seq.). Mr. Dobson, Mr. Leeper and Mr. Adamson testified that Manivest had in place a systematic program for dealing with weeds and debris. Each morning, a maintenance person cleaned up trash or other debris that may have accumulated. Manivest periodically cut weeds at the property and treated areas of raw ground to prevent future weed growth.

At times, these efforts were not completely successful. It is self evident that as long as seeds and moisture combine with dirt, weeds are likely to sprout on any property. The trial court should not have read the maintenance responsibilities of Paragraph 5 as imposing an absolute duty on Manivest's part, but only as requiring that Manivest act reasonably and in good faith in maintaining the property. Manivest has done that.

The testimony of Mr. Fugal and Mr. Mayer indicated that the maintenance of the property did not impair its insurability nor did it make Southlake less attractive to new

tenants. In addition, existing tenants of the property do not have complaints about how it is maintained or how weeds or debris are dealt with. Evidence presented by the plaintiffs demonstrated only two occasions over a 29-year period when Murray City issued citations for the weeds and debris on the property. In both instances, Manivest dealt with the problem quickly and responsibly. Southlake was not the only property in Murray City plagued by winds, as evidenced by the hundreds of citations issued to various property owners all over the city. (Tr. 372). Maintenance requirements should be interpreted reasonably and not hypertechnically. See, Puget Inv. Co. v. Wench, 221 P.2d 459 (Wash. 1950). The trial court failed to do that here and allowed the Howes to use these requirements as a technical basis for lease forfeiture.

VII.
THE TRIAL COURT ERRED IN CONSIDERING ALLEGED LEASE DEFAULTS RAISED BY THE HOWES FOR THE FIRST TIME AT TRIAL.

As set out in the Statement of the Case above, the only defaults alleged by the Howes in the Verified Complaint were the security assignments of the Lease or subleases to Valley Bank in 1978, 1982 and 1987-1988 and the failure to maintain the property or keep it free from weeds. These alleged defaults were also the subject of written notice to Manivest (Trial Ex. 30, 31).

The Howes used the trial, however, as the forum to raise a host of other alleged defaults for the first time. While the trial court correctly refused to admit evidence as to

some of these newly-alleged defaults, it erroneously admitted evidence of others (over Manivest's objection) and relied on these defaults, at least in part, in arriving at its decision to forfeit the lease. These newly alleged defaults included the following:

1. The encroachments/encumbrances created by Trial Ex. 10 (Finding No. 5);

2. The transfers to the Manivest controlled limited partnerships (Finding No. 19);

3. The alleged assignment to the Manivest Liquidating Trust (Finding No. 20);

4. The alleged violations of health and safety regulations (Finding No. 23), including underground storage tanks (Finding No. 24).

While the merits (or rather lack of merit) of these default allegations are argued elsewhere herein, the threshhold issue is whether they were properly before the trial court.

Although the Utah Rules of Civil Procedure permit "notice pleading", the Howes' Verified Complaint specified the alleged defaults, and omitted those enumerated above. Moreover, while paragraph 9 of the Lease apparently does not expressly require notice of default and an opportunity to cure prior to forfeiture, the Howes gave Manivest prior written notice (Trial Ex. 30) of the defaults alleged in the Verified Complaint. The Howes gave no notice as to the other defaults--obviously none for the alleged defaults first raised at trial--not even in their final notice of termination (Trial

Ex. 31). Despite this, the trial court found that the notice of termination "complies with the terms of the Lease . . . ." (Finding No. 28.)

Rule 15(b), Utah Rules of Civil Procedure, allows a party to move to amend the complaint to conform to the evidence at trial. However, Rule 15(b) also states that such a motion should be granted only where the opposing party is not prejudiced (such as by surprise). The surprise and prejudice to Manivest here is obvious from the record. Manivest was prepared to defend against allegations of four or five defaults. Instead, it was required to defend against more than twice that number, many of which were totally unrelated to the defaults originally pled, and none of which were the subject of any prior notice.

Manivest both objected to the new allegations of default and moved for a continuance to prepare a defense. (Tr. 44-52, 96). Rule 15(b) states that "[t]he court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence." Nonetheless, no continuance was granted. The court also rejected Manivest's attempt to reopen the evidence to show that it had a valid defense to the alleged encumbrance created by the Ex. 10 Quit Claim Deed (R. 1044, pp. 10-11, R. 1264).

At trial, the Howes argued that Manivest was not unfairly surprised, because some of the documents allegedly evidencing the additional defaults were produced by Manivest in discovery and listed by the Howes as trial exhibits. However,

this argument was without merit because, absent adequate notice, Manivest could not determine what the Howes would or would not allege to be a default. Moreover, since the Howes had already given notice of forfeiture based solely on the defaults alleged in the Verified Complaint, it was improper for them to rely on alleged defaults that were not the basis for that forfeiture, and that occurred or were raised after the Lease purportedly had already been forfeited.

Regardless of whether the Lease required notices of default, basic due process requires that a party be given notice and an opportunity to defend before important property rights of that party may be taken away by a court. Manivest was not afforded either adequate notice or an opportunity to defend.

VIII.
THERE WAS NO EVIDENCE IN THE RECORD IN SUPPORT OF NUMEROUS CRITICAL FINDINGS BY THE TRIAL COURT.

Manivest is aware that, ordinarily, the clearly erroneous standard of review of trial court findings is a difficult standard for an appellant to meet. Manivest also is mindful that to meet that standard, ordinarily an appellant must marshal the evidence supporting the finding. See, Scharf v. BMG Corp., supra. Accordingly, Manivest does not challenge some findings (e.g., the present value of Manivest's leasehold interest) which Manivest believes to be wrong but which the trial court entered based upon competing evidence. Instead, Manivest argues that there were several findings critical to

the outcome of this case that have no supporting evidence to marshal. These findings are as follows:

1. The Court found that Larry Leeper altered the document given to the Howes to acknowledge their consent to the 1988 Valley Bank lease assignment, in an attempt to fool the Howes into subordinating their interest. (Add No. 3, p. 4, Add No. 4, Finding No. 10.) However, counsel for Valley Bank testified that he made the revision in question on the final draft, but could not recall at whose request (Tr. 157-162). There was no evidence as to who made the handwritten revision in an earlier draft (Trial Ex. 19). There was no evidence of any motive for Manivest to alter the document, since Valley Bank was not requesting subordination from the Howes (Tr. 152) and ultimately did not even require Manivest to obtain the Howes' consent to the assignment (Tr. 149). It is also not even clear whether the language at issue, even if agreed to by the Howes, would have in fact subordinated their interest (Tr. 108-110, 294).

2. The Court found that certain conditions at the leased property violated health and safety regulations (Findings No. 23, 24). Paragraph 5 of the Lease required Manivest to prohibit its lessees from performing "any act in violation of the ordinances or regulations of Murray City, the laws of the State of Utah or the United States Government." The only violations of ordinances for which Manivest was cited were the 1983 citation for refuse on the site and the 1989 "weed" citations. In both instances, the violations were

appropriately remedied. The Howes called an architect, Robert Leonard, who testified that his observations of the property led him to conclude that in his opinion certain conditions violated unspecified building codes. However, on cross-examination he could not identify what regulations were violated (Tr. 206) or that they were municipal ordinances or state or federal statutes. No attempt was made to offer any regulations into evidence or to otherwise shore up Mr. Leonard's opaque opinions.

3. As to the Court's findings on weed control and maintenance (Findings No. 21, 22), see Argument VI herein.

4. The Court found that the Howes were harmed by the alleged defaults (Finding No. 27). There is absolutely no evidence in the record of anything more than nominal damage to the Howes.

5. Finally, the Court found that the original lessors would not have entered into the Lease if they could have foreseen the alleged defaults (Finding No. 25). However, none of the original lessors testified, and there was no testimony from anyone who participated in the original transactions other than J. E. Lehnherr, one of the original lessees, who was not asked to speculate about the lessors' state of mind (Tr. 397).

Accordingly, these findings must be reversed.

IX.
THERE WERE NO LEASE DEFAULTS BY MANIVEST MATERIAL ENOUGH TO WARRANT LEASE FORFEITURE.

Utah appellate courts have consistently voiced the law's disfavor of contract forfeiture, strictly construing forfeiture provisions against the party seeking that harsh remedy. Moon Lake Electric Association, Inc. v. Ultrasystems Western Constructors, Inc., 767 P.2d 125, 128 (Utah App. 1988). When forfeiture ". . . would allow an unconscionable and exorbitant recovery, bearing no reasonable relationship to the actual damage suffered, we have uniformly held it to be unenforceable." Perkins v. Spencer, 243 P.2d 446, 452 (1952). The party alleging forfeiture must plead and prove its case by clear and convincing evidence. New Mercur Mining Co. v. South Mercur Mining Co., 128 P.2d 169, 272 (1942).

Forfeiture is available only if the breach "defeats the very object of the contract" or is "of such prime importance that the contract would not have been made if default in that particular had been contemplated." Polyglycoat Corp. v. Holcomb, 591 P.2d 449, 451 (Utah 1979) (quoting Williston on Contracts, 3d. Ed., vol. 12, § 1455).

Virtually all jurisdictions also require proof of substantially more than a technical breach before granting a lease forfeiture:

> . . . the law will not sanction a forfeiture of possession where no substantial injury occurs or where a mere technical breach of the lease is involved.

Harar Realty Corp. v. Michlin & Hill, Inc., 449 N.Y. Supp. 2nd 213 (N.Y. 1982). Courts also agree that where a party

continues to receive the benefit of the bargain, technical breaches do not trigger forfeiture.

In Southern Hotel Company v. Miscott, 377 N.E.2d 660 (Ohio App. 1975), the appellate court listed the equities the trial court properly considered in finding no material breach had occurred and forfeiture was unjustified: (1) the probability that the landlord would continue to receive the benefit of the bargain by obtaining lease payments from the tenant; (2) the tenant's substantial capital improvements on the property; (3) the tenant's tender of rent immediately upon being given notice of forfeiture; and (4) the tenant's substantial loss if forfeiture were granted.

The First and Second Restatements of Contracts incorporate similar principles in §§ 275 and 241, respectively. Restatement (Second) of Contracts, § 241 states:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

The equitable principles outlined in § 241 of the Restatement and in cases such as Southern Hotel all weigh heavily against forfeiture here, as illustrated by the following facts:

1. Even assuming the assignments of Manivest's leasehold interest to Valley Bank or First Security Bank were lease defaults, these assignments merely allowed Valley or First Security to step into Manivest's shoes and cure any default under the Lease. Because of the undisputed financial strength of both lenders, Manivest's assignments actually increased rather than decreased the probability that the Howes would receive the benefits bargained for under the 1960 Lease.

2. Any nominal damage the Howes could possibly show was compensable without requiring forfeiture. Nonetheless, the Howes never asked for any award of compensatory damages but instead requested the most far-reaching, radical remedy of all: a judgment terminating the Lease and forfeiting Manivest's leasehold interest. Even the Howes admitted, in their Trial Brief, that there were other more conservative

remedies that would adequately protect their interests (R. 435, pp. 29-30).

3. Forfeiture of the Lease was immeasurably harmful to Manivest by depriving it of a stream of income the Court found had a present value of over $500,000. Moreover, Manivest would lose its substantial capital improvements in the property. Although the Court purported to "offset" these amounts against the value of the Howes' reversionary interest (Add. No. 3, p. 7) no findings were made as to the value of this interest.

4. Before this action was filed, Manivest completely cured many of the technical breaches alleged to have occurred, by voiding most of the "assignments" or "encumbrances" of which the Howes complain (Tr. 253-255), and by increasing its maintenance and weed and debris control efforts . Moreover, even the newly-alleged defaults were readily curable. Eg. Tr. 322. Over the decades, Manivest has paid its rent, paid off debt secured by the Lease and acted responsibly to address weed control and related problems as they arose. From this history, the Howes have adequate assurances that Manivest can and will perform its lease obligations in the future, once this Court determines what those obligations are.

5. The above actions also establish Manivest's good faith in dealing with the Howes. The allegations and findings of Manivest's bad faith emanate either from Manivest's good faith disputes with the Howes over the proper interpretation of

the Lease (Trial Ex. 30, 32) or from trial court misperceptions unsupported by evidence in the record (Add. No. 3, p. 4).

This Court should also consider the following additional factors in weighing the equities:

1. The lease does not expressly require either notice of forfeiture or opportunity to cure. Moreover, no notice of default or opportunity to cure was given as to the newly alleged defaults discussed elsewhere herein. Without notice or opportunity to cure, a higher standard than even "material breach" should be imposed before forfeiture is permitted. This is especially true here, where the requirements of the Lease were in dispute. See, First Security Bank of Utah, N.A. v. Maxwell, 659 P.2d 1078, 1081 (Utah 1983) (forfeiture not permitted unless contract is "clear and unequivocal" or where notice of default is "indefinite or uncertain" Without a requirement of notice and opportunity to cure, virtually any pretext for forfeiture can be used by an overreaching landlord, as is the case here.

2. It is clear from the record here that the Howes were looking for any such pretext to either force re-negotiations under threat of forfeiture, or actually make good on the threat and end what they perceived (almost 30 years later) to be a bad bargain. They felt that they should be getting $200,000 per year in rental rather than $24,000 (R. 462), and even argued that their "damages" included additional rent they could have imposed as a condition to consenting to lease assignments (R. 708).

3. As also discussed elsewhere herein, the Howes' refusal to consent to the Valley Bank assignment breached the implied contractual duty of good faith and fair dealing. One who seeks equity must come before the Court with clean hands.

In light of the foregoing factors, this Court should determine that, as a matter of law, there was an inadequate basis for forfeiture of the lease.

X.

AT MINIMUM, MANIVEST IS ENTITLED TO A NEW TRIAL BECAUSE THE FORFEITURE DECISION WAS TAINTED BY THE TRIAL COURT'S LEGAL AND FACTUAL ERRORS.

Manivest submits that the law and facts that inform the foregoing arguments compel reversal of the Judgment of Forfeiture and reinstatement of the Lease without the need for further proceedings, except on ancillary issues such as the amount of Manivest's attorneys' fees. However, even if this Court credits some of the trial court's findings or conclusions, the trial court's remaining legal and factual errors sufficiently taint the outcome to require a new trial on the ultimate issue of forfeiture.

If the trial court had correctly construed paragraphs 4, 5 or 6 of the lease, or the Manivest Liquidating Trust document; if the court had excluded evidence of newly alleged defaults, ordered a continuance or reopened the evidence; if the court had not made the findings as to which there was no supporting evidence; or if the court had weighed <u>all</u> of the equities necessary for a determination of forfeiture, perhaps that determination would have been different. A reversal of

any portion of the Findings and Conclusions or of the evidentiary rulings, could lead to a different result, which, at the very least, would require the issues to be retried according to the correct standards, as announced by this Court.

XI.

THE HOWES' APPLICATION FOR COSTS AND ATTORNEYS' FEES WAS UNTIMELY, AND THE ATTORNEYS' FEES AND COSTS AWARDED TO THEM WERE NOT SUPPORTED BY SUFFICIENT ADMISSIBLE EVIDENCE AND WERE UNREASONABLY EXCESSIVE.

Of course, if the Judgment of Forfeiture is reversed, the award of attorneys' fees and costs to the Howes must also be reversed. However, even if the judgment on the merits is affirmed, the award of attorneys' fees and costs must still be reversed, or at least substantially reduced.

Manivest's objections to the attorneys' fees and costs claimed by the Howes are detailed in Manivest's Memorandum in opposition to the application for fees and costs, and in its motions to strike various supporting affidavits filed by the Howes (R. 1190, 1272, 1275, 1278). In summary form, the flaws in the Howes' fee and costs application include the following:

1. Manivest's application for fees and costs was untimely. Rule 54(d)(2) Utah Rules of Civil Procedure requires that a memorandum of costs be filed within five days after entry of judgment on the merits. This time period is mandatory, and untimely cost requests may not be considered by the trial court. See, Walker Bank and Trust Co. v. New York Terminal Warehouse Co., 10 Utah 2d 210, 350 P.2d 626, 630-631 (1960). Here, the Judgment of Forfeiture was entered on

May 18, 1990, and the Howe's application for fees and costs was not filed until June 27, 1990 (R. 1181). While the Judgment of Forfeiture indicated that a supplemental judgment would be entered on attorneys' fees and costs, the Judgment of Forfeiture did not relieve the Howes from the requirements of Rule 54(d)(2).

2. Many of the costs claimed by the Howes are not permitted under Utah law. Utah law severely restricts the types of costs that may be awarded. See, Frampton v. Wilson, supra. (expert witness fees not awardable as costs). Typically, only costs such as filing and witness fees may be awarded. Id. Although in special cases some deposition costs may be awarded (Id.), the Findings and Conclusions (Add. No. 6) in support of the Supplemental Judgment do not state any special circumstances, and it was the Howes' burden to show such circumstances. Lloyds Unlimited v. Nature's Way Marketing, Ltd., 753 P.2d 507, 512-513 (Utah App. 1988). Costs such as expert witness fees, depositions not used at trial, extra copies of depositions, other photocopying costs, Westlaw, air express, word processing and long distance charges must be excluded from the Supplemental Judgment.

3. The affidavits in support of the claim for attorneys' fees and costs contained little in the way of admissible evidence. They were conclusory, lacked foundation and were argumentative. The Carlston Supplemental Affidavit obviously is based on recollection refreshed through review of documents not made available to Manivest.

Similarly, the fee and cost itemizations attached to the various affidavits appear to be summaries, rather than the actual business records themselves, which also were not provided. See, Rule 1006, Utah Rules of Evidence. Moreover, the summaries did not contain a description of the services performed that was sufficiently detailed for the Court to determine whether the fees were reasonable, or even incurred on the case at hand.

4. The fees awarded were excessive. There was obvious duplication of effort. For example, Mr. Wheeler was brought in at the eleventh hour to try the case, without an explanation of why Mr. Carlston and Mr. Steenblik could not have tried it. Mr. Wheeler obviously had to be brought up to speed, and three partner-level attorneys at trial was an unnecessary expense (almost $400 per hour).

5. Mr. Steenblik's fees in the amount of $65,950 should be disallowed in their entirety. He is the husband of one of the plaintiffs and was himself one of the lessors until he conveyed his interest to his wife for purposes of filing this lawsuit. (R. 1190, p. 5). There was no showing that his fees were actually incurred or would have been charged to or paid by plaintiffs if they had lost. In effect, he was representing himself, and the award of his fees was a windfall to him.

6. Although Finding No. 7 (Add. No. 6) in support of the Supplemental Judgment purported to make findings required

by Dixie State Bank v. Bracken, supra, there was simply no evidence offered in support of most of those findings.

In sum, the award of attorneys' fees and costs must be reversed, or substantially reduced, even if the Howes otherwise prevail on this appeal. Alternatively, this issue should be remanded to the trial court for redetermination in accordance with the applicable standards, which may require an evidentiary hearing.

CONCLUSION

For these reasons, Manivest respectfully requests the following relief on appeal:

1. Reversal of the Judgment of Forfeiture and Order of Possession and the Supplemental Judgment, with direction to the trial court to reinstate the lease, effective March 31, 1988, on remand. The dismissal of Manivest's Counterclaim should also be reversed, with a determination that the Howes violated the implied covenant of good faith and fair dealing by withholding consent to the Valley Bank assignments, for improper purposes. The trial court should also be directed to award Manivest its costs and reasonable attorneys' fees incurred in the lower court and on this appeal, in an amount to be determined upon remand.

2. Alternatively, Manivest should be awarded a new trial, with directions to the trial court as to the appropriate standards under which the issues are to be determined.

3. In the event the Judgment of Forfeiture is affirmed, the award of attorneys' fees should be reversed or

substantially reduced. Alternatively, the issue of attorneys' fees and costs should be remanded to the trial court for redetermination after an evidentiary hearing, again with directions to the trial court as to the appropriate standards.

DATED this 11th day of March, 1991.

PRINCE, YEATES & GELDZAHLER

By _____
Ronald E. Nehring

By _____
James A. Boevers
Attorneys for Defendants and Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on the 11th day of March, 1991, I caused the original and nine true and correct copies of the foregoing BRIEF OF APPELLANTS to be hand-delivered to the Utah Supreme Court, four true and correct copies to be hand-delivered to:

Michael R. Carlston (A0577)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

and four true and correct copies to be mailed, first-class postage prepaid thereon, to:

Gerrit M. Steenblik
JENNINGS, STROUSS & SALMON
One Renaissance Square
Two North Central
Phoenix, Arizona 85004-2393

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BOOK 1704 PAGE 20

Ordered ... at ... of James P. Cowley
Fee Paid Nellie M Jack,
Recorder, Salt Lake County, Utah
By J Asselmo Deputy
Ref D. 91-A-109-19

1744315

LEASE AND OPTIONS 9.80

THIS INDENTURE MADE AND ENTERED INTO this 14th day of October, 1960, by and between EARL E. HOWE and VIVIAN HOWE, his wife, and JOHN O. HOWE and MAXINE HOWE, his wife, of Salt Lake County, Utah, hereinafter referred to as Lessors and J. E. LEHNHERR, HERMAN L. FRANKS and STANFORD L. HALE, copartners, doing business under the firm name and style of VALLEY SHOPPING CENTER, hereinafter referred to as the Lessees.

W I T N E S S E T H

That the Lessors, for and in consideration of the covenants and agreements hereinafter mentioned to be kept, paid and performed by the Lessees, has demised and leased to the Lessees that certain real estate situated in Murray, Salt Lake County, Utah, more particularly described as follows:

Description

S2 NW' + NW' SW' Sec 17. 2 S-1E

Commencing at a point 52 rods West and 14 rods North from the Southeast corner of the Northwest quarter of Section 17, Township 2 South, Range 1 East, Salt Lake Meridian, and running thence North 66 rods, more or less, to the North line of the South half of said Northwest quarter; thence West along said North line 953 feet, more or less, to the Northeast corner of premises described in deed recorded as Entry No. 326068, Official Records; thence South 1° 02' West 387.8 feet, more or less, to the Southeast corner of said premises; thence West along the Southerly boundary of said premises 226 feet, more or less, to the Southwest corner thereof, thence onward West 321.75 feet, more or less, to the Northwesterly corner of a parcel of land described in deed recorded as Entry No. 165237, Official Records; thence following the exterior boundaries of a parcel of land described in said deed South 19 rods; thence South 27° 45' East 32.7 rods; thence South 50° 05' East 11.2 rods; thence South 4.5 rods, more or less, to the South line of said Northwest quarter; thence East along the South line of said Northwest quarter to a point on the Northerly line of Vine Street; thence North 46° 43' 30" East 71.5 feet; thence East 189 feet; thence South 300 feet to the center of Vine Street; thence South 51° 24' East along the center of Vine Street to a point 4.5 chains West and South 2° East from the Northeast corner of the Northwest quarter of the Southwest quarter of said

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Section 17; thence North 2° West to a point on the South line of said Northwest quarter; thence North 14 rods; thence East 46.3 rods, more or less, to the point of beginning, with 25 shares of the capital stock of the G. W. R. H. Irrigation Company.

TO HAVE AND TO HOLD THE SAME UNTO the Lessees from the 15th day of October, 1960, to the 15th day of October, 2010.

1. The Lessee covenants and agrees to pay by way of rent for said property the following amounts: First year, $7,500.00, receipt of which is hereby acknowledged; Second year, $7,500.00, payable one (1) year from date; Third year, $15,000.00; and each year thereafter during the term of this Lease, $24,000.00 per year. The rentals provided herein payable after the first year shall be paid in equal monthly installments on the first day of November and the first day of each and every month thereafter during the term of this Lease.

ıtal

2. Lessees shall, in addition to the rent hereinbefore reserved, pay all of the real estate taxes, special improvement taxes, sewer taxes and all other taxes levied upon the above described property, and any improvements which may be placed thereon together with all water rents, gas bills, sewer charges and all other charges for services or utilities rendered to the Lessees or any tenants of the Lessees situated upon the demised premises.

ıdditional Rental oligations

3. It is agreed between the parties hereto that the Lessees contemplate to and pursuant to this Lease Agreement the construction of a regional shopping center on the demised premises which shall contemplate the installation of utilities upon the demised premises so as to serve all parts thereof, the construction of buildings and other improvements on said premises, and the subleasing of the same. All improvements placed upon said demised premises shall remain the property of the Lessees so long as this

Purpose of lease

Title to improvements

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Lease remains in full force and effect.

4. Lessees shall have the right to assign this Lease and Option to purchase to a corporation to be formed for the purpose of carrying out the terms of this Agreement. Such assignment shall not release the Lessee of any liabilities hereunder. Except as to the assignment permitted pursuant to this paragraph, this Lease shall be unassignable except with the prior consent of the Lessors. Provided, however, that the Lessees or their assignee as herein provided shall have the right to enter into subleases of portions of the demised premises, provided, however, that said subleases shall not attach to or become binding in any way upon the fee interest of the Lessors; that said Lessees shall be limited to that class of business commonly known of as "retail trade and service".

Assignment of Lease and subleasing

5. Lessee agrees to be responsible for the entire demised premises, and during the term of the lease to maintain the same and keep it free from weeds and other obnoxious growth; that it will not allow any of its lessees to conduct any business or perform any act in violation of the ordinances orregulations of Murrary City, the laws of the State of Utah or the United States Government.

Maintenance of premises

6. Lessee agrees to keep the demised premises free and clear of all liens and encumbrances of any nature whatsoever, except as to those liens created pursuant to Paragraph 14 hereof.

Liens

7. The Lessors shall have the right at all reasonable times to inspect the demised premises and any and all improvements placed thereon.

Inspection

8. It is covenanted and agreed between the parties hereto that the Lessor does not by anything herein contained waive

Landlord's lien

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any rights under and pursuant to the landlord's lien law as provided by the statutes of the State of Utah.

9. Should Lessees fail to pay the rent herein reserved or make any of the other payments or charges to be paid by them hereunder or fail to keep any covenant herein contained to be performed by Lessee, or within sixty (60) days thereafter, then in that event, without notice from the Lessors, this Agreement shall cease and terminate, and the Lessees shall surrender said premises to the Lessors.

10. If the Lessees shall abandon or vacate said premises or, for cause, be removed therefrom, the same may be re-let by the Lessor for such rent and on such terms as the Lessor may reasonably obtain, and if a sufficient sum shall not be thus realized to satisfy the minimum rent hereby reserved, the Lessees agree to pay and satisfy all deficiencies.

11. If Lessees shall make or attempt to make an assignment for the benefit of creditors, or if a petition for voluntary or involuntary bankruptcy is filed against or on behalf of Lessees, the Lessor may terminate this Lease and an amount equal to the total of the minimum monthly rental for each and every month then remaining in the term of this lease shall immediately become due and payable, less such sum as Lessor may be able to realize by re-renting the premises for such rent and on such terms as Lessor may see fit.

12. This Agreement shall not be modified or changed except by the written agreement of the parties hereto.

13. This Agreement shall inure to the benefit of and be binding upon the heirs, successors, personal representatives, administrators, and assigns of the parties hereto.

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14. The Lessors agree that upon the Lessees supplying them with a duplicate original lease between the Lessees and some tenant qualified by the terms of this Agreement to become a sub-lessee and providing the Lessors with full information concerning the terms and conditions of the proposed mortgage and the construction agreement providing for the application of the proceeds of the same, the Lessors will subordinate their interest in the land upon which the improvement is to be made to a single first mortgage of such reasonable amount as may be necessary to finance the construction of the improvements called for by said Lease Agreement. Said subordination shall be executed by the Lessors conveying said property to the Lessee or sub-lessee as the case may be, who shall cause a first mortgage to be placed thereon and to reconvey said property to the Lessor without any assumption by the Lessor of the obligation to pay any sum due or to become due by reason of said mortgage.

Subordination of Lessors' interest to Mortgagee

15. The Lessees are hereby given an Option to buy any or all of the demised premises upon the following terms and conditions:

Option to buy

The purchase price for the first twelve (12) months following the execution of this Agreement shall be $366,000.00, said purchase price shall be increased upon the first anniversary of this Agreement by the sum of $20.00 per acre for each acre then covered by this Lease, and upon each and every anniversary of this Agreement for the first five years by a like amount, and thereafter it shall be increased $100.00 per acre, for each acre then covered by this Lease, per year.

Purchase price

16. The Option herein granted shall be exercised by the Lessees giving notice in writing to the Lessors of their exercise

Method of exercise of Option

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of this Option, describing therein the tract of land so acquired, and offering to pay the purchase price as herein provided, upon receiving a good and sufficient warranty deed conveying said land to the Lessee.

The Option hereby granted shall provide to the whole of the said tract of land and to a ten-acre portion thereof, and after said ten-acre portion or more shall have been purchased by the Lessee, to any other three-acre or larger tracts. Should the Lessee exercise option to purchase a ten-acre tract or larger, but less than the whole hereof, the purchase price shall be the pro-rata share of the total purchase price as herein provided for, plus $10,000.00. The subsequent tracts of land shall be at the prorata acreage price hereinbefore provided, provided however that the total purchase price shall not be more than the total purchase price as herein provided.

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17. Any tract so purchased shall be designated by the Lessee; it shall be contiguous with itself and any tracts theretofore purchased by the Lessee; it shall have four sides, i.e., a street side, two side lines at right angles to the street, and a straight rear line; and the street frontage shall be in the same proportion to the total street frontage that the area bears to the total area.

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18. This Option shall endure for fifteen (15) years from date hereof. The exercise of the right of the Lessee to purchase less than the whole hereof shall effect a prorata reduction in the rental payable hereunder, after the payment of the purchase price as herein provided.

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19. The Lessor shall furnish the Lessee, upon demand, a good and sufficient abstract of title certified to as of the date of this Agreement, or any date subsequent thereto, and the

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title

obligation of the Lessors shall be limited to delivering a good and marketable title as of the date of this Agreement. Lessors covenant not to encumber the title to said property.

Cost and attorney's fees

20. The Lessors and Lessees each agree that should they default in any of the covenants or agreements contained herein, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this Agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

Number and gender

21. As herein used, the singular number includes the plural and the masculine gender includes the feminine and the neuter.

Commence construction

22. The Lessee covenants and agrees to commence construction of the shopping center herein contemplated within 45 days of the date of this Agreement, and to thereafter diligently proceed with the development and construction of said shopping center.

Force majeure

23. Time is of the essence of this Agreement, including the provisions of Paragraph 22. Performance of the conditions of Paragraph 22, however, shall be excused by strikes, accidents, acts of God, weather conditions and other causes of nonperformance beyond the control of the Lessee.

Taxes

24. Real estate taxes for the year 1960 shall be prorated as of the date of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this

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SUITE 1211 WALKER BANK BUILDING
SALT LAKE CITY 11 UTAH

Agreement to be executed the day and year first above written.

Earl E. Howe
John O. Howe
Vivian Howe
Maxine W. Howe

LESSORS

J. E. Lehnherr
Herman L. Franks
Stanford Hale

Doing business as:

VALLEY SHOPPING CENTER,

LESSEES

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On this 14th day of October, 1960, personally appeared before me EARL E. HOWE and VIVIAN HOWE, his wife, and JOHN O. HOWE and MAXINE HOWE, his wife, who, being first duly sworn, acknowledged to me that they executed the foregoing Lease and Option as Lessors.

Notary Public
Residing at Salt Lake County

My Commission Expires:
6/9/1961

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On this 24th day of October, 1960, personally appeared before me J. E. LEHNHERR, HERMAN L. FRANKS and STANFORD L. HALE, who, being first duly sworn, acknowledged to me that they executed the foregoing Lease and Option as Lessees.

Notary Public
Residing at Salt Lake County

My Commission Expires:
6/9/1964

FILED IN CLERK'S OFFICE
Salt Lake County, Utah

NOV 22 1988

H. Dixon Hindley, Clerk of Dist. Court
By _____
Deputy Clerk

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Attorneys for Plaintiff

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JOHN O. HOWE, Trustee, ROBERT E. HOWE and BONNIE F. HOWE, husband and wife; WILLIAM K. EVANS and CAROLE H. EVANS, husband and wife, as Trustee; and JUDITH H. STEENBLIK,

Plaintiffs,

vs.

PROFESSIONAL MANIVEST INC., a Utah corporation; PROFESSIONAL MANIVEST, INC., a Utah corporation, as Trustee; MANIVEST CORPORATION, a Utah corporation and JOHN DOES 1 through 10,

Defendants.

VERIFIED COMPLAINT

Civil No. 880907595PR

[illegible]

Plaintiffs complain of defendants and allege as follows:

GENERAL ALLEGATIONS

1. Plaintiff, John O. Howe is the Trustee of the John O. Howe and Maxine Howe Family Trust of June 6, 1988, and is a resident of Washington County, Utah.

2. Plaintiffs, William K. Evans and Carole H. Evans are husband and wife, are residents of Salt Lake County, Utah, and are the Trustees of the William K. Evans and Carole H. Evans Family Trust of August 12, 1985.

3. Plaintiffs, Robert E. Howe and Bonnie F. Howe are husband and wife and are residents of Contra Cosa County, California.

4. Plaintiff, Judith H. Steenblik is a married woman dealing with her sole and separate property and is a resident of Maricopa County, Arizona.

5. All of the aforementioned parties described in paragraphs 1 through 4, either individually or as Trustees, are hereinafter referred to collectively as plaintiffs.

6. Upon information and belief, Professional Manivest, Inc. and Manivest Corporation (hereinafter referred to as defendants) are corporations organized for profit under the laws of the State of Utah, having their principal place of business in Salt Lake County, Utah.

7. Defendants John Does 1 through 10 are individuals or entities who, as a result of dealings with Professional Manivest Inc., Manivest Corporation, or others, may claim some interest or right in the Lease or Premises which is the subject of this action. Plaintiffs reserve the right to amend this Complaint by adding the actual names of said John Does 1 through 10 as soon as the same are ascertained. Professional Manivest Inc. and Manivest Corporation, whether individually or as trustee, and John Does 1 through 10 are referred to herein collectively as defendants.

8. Plaintiffs are the owners of the fee simple interest in certain improved and unimproved real property located at the southwest corner of 5600 South and 900 East in Salt Lake County, Utah, the legal description of which is set forth in the attached Exhibit "A" which is incorporated herein by reference. Said real property is hereinafter called the "Premises".

9. Plaintiffs are the current Lessors under that certain Lease and Option Agreement dated October 15, 1960, between Earl E. Howe and Vivian J. Howe, husband and wife, and John O. Howe and Maxine Howe, husband and wife, as Lessors, and J. E. Lehnherr, Herman L. Franks and Stanford L. Hale, co-partners doing business as Valley Shopping Center, as Lessees (the "Lease"), which originally demised certain real property which

included but was not limited to the Premises and which was recorded on Cctober 31, 1960, in Book 1754, Pages 25-32, of the official records of Salt Lake County, Utah. A true and accurate copy of the Lease is attached as Exhibit "B" and incorporated herein by reference.

At all pertinent times prior to June 1, 1988, the Premises were subject to the Lease.

10. Upon information and belief, defendants either individually or as trustee, claim to be the holder of Lessee's interest under the Lease or claim some interest in Lessee's interest under the Lease.

11. Pursuant to relevant provisions of the Lease, including but not limited to paragraph 4 of the Lease, defendants covenanted and agreed not to assign the Lease except with the prior consent of the Lessors.

12. Pursuant to relevant provisions of the Lease, including but not limited to paragraph 5 of the Lease, defendants covenanted and agreed to maintain and keep the entire Premises in good condition and repair during the term of the Lease.

13. Pursuant to relevant provisions of the Lease, including but not limited to paragraph 5 of the Lease, defendants covenanted and agreed to keep the entire Premises free from weeds and other obnoxious growth during the term of the Lease.

14. Except as was otherwise set forth in paragraph 14 of the Lease, pursuant to relevant provisions of the Lease, including but not limited to paragraph 6 of the Lease, defendants covenanted and agreed to keep the Premises free and clear of all liens and encumbrances of any nature whatsoever.

15. Plaintiffs and their predecessors have fully discharged and satisfied all of their obligations under the Lease, including, but not limited to the obligations pursuant to paragraph 14 of the Lease to allow financing for the original construction of improvements on the Premises, and at no pertinent time have defendants had any further rights pursuant to paragraph 14 of the Lease.

16. Pursuant to relevant provisions of the Lease, including but not limited to paragraph 9 of the Lease, in the event that defendants failed to perform any of their covenants or obligations under the Lease for a period of 60 days, plaintiffs were entitled to terminate the Lease, and Defendants were obligated to surrender the Premises to plaintiffs.

17. The parties, as indicated in the manner in which the Lease is structured and as indicated by the Lease terms agreed in effect that if it were necessary to make material additional improvements to the Premises or if unforeseen or uncontemplated conditions required additional financing of the Premises, then the parties would be required to modify in writing the terms of the Lease before any such action could be taken.

18. The intent of the Lease therefore, as indicated by its terms was to restrict the right of the parties to encumber or otherwise take advantage of changing economic conditions associated with an interest in the Lease or an interest in the Premises.

19. Defendants have willfully disregarded their obligations under the Lease and have sought to obtain economic advantage from breaching it in ways calculated to disadvantage the plaintiffs.

20. Despite repeated requests by plaintiffs, defendants have willfully failed to keep and perform their covenants and obligations under the Lease.

21. Despite repeated requests, defendants have allowed weeds and other obnoxious growth to accumulate upon portions of the Premises.

22. Upon information and belief, defendants have failed and refused and neglected to maintain the Premises in good condition as required by the Lease, and the Premises, including but not limited to the improvements thereon, are in need of substantial maintenance and repairs.

23. Upon information and belief, in May of 1978, in connection with financing which defendants obtained from First Security Bank of Utah, N.A., and without plaintiffs' knowledge or consent, defendants encumbered the Premises in violation of, among other provisions, paragraphs 4 and 6 of the Lease.

24. Upon information and belief, in June of 1982, in connection with financing which defendants obtained from Valley Bank and Trust Company ("Valley Bank"); without plaintiffs' knowledge or consent, defendants again encumbered the Premises in violation of, among other provisions, paragraphs 4 and 6 of the Lease.

25. On or about December 8, 1987, without plaintiffs' knowledge or consent, defendants executed, acknowledged and delivered to Valley Bank a Trust Deed and Assignment of Rents by which defendants conveyed and warranted the Premises, and thereby created an encumbrance upon the Premises.

26. On or about January 5, 1988, without plaintiffs' knowledge or consent, the aforementioned Trust Deed and Assignment of Rents was recorded in the official records of Salt Lake County Utah, as Entry No. 4571125, in Book 5994, at Pages 1434-1439.

27. On or about December 8, 1987, without plaintiffs' knowledge or consent, defendants executed, acknowledged and delivered to Valley Bank an Assignment of Lease by which defendants sold, assigned and transferred the Lease to Valley Bank.

28. On or about January 5, 1988, without plaintiffs' knowledge or consent, the aforementioned Assignment of Lease was recorded in the official records of Salt Lake County, Utah, as Entry No. 4571126, in Book 5994 at Pages 1440-1444, attached

as an exhibit to a UCC-1 Financing Statement executed by defendants as debtor and Valley Bank as secured party.

29. Although the Lease did not require notice of default by the Lessees, on March 30, 1988, plaintiffs notified defendants in writing by certified mail that defendants were in default of their covenants and obligations under the Lease and that plaintiffs' intended to terminate the Lease. True and accurate copies of said notice and return receipt showing delivery to defendants on March 31, 1988 are attached hereto as Exhibit "C" and incorporated herein by reference.

30. On April 29, 1988, plaintiffs mailed to defendants, by certified mail, written notification that defendants were in default of their covenants and obligations under the Lease and of the plaintiffs' intention to terminate the Lease. True and accurate copies of said notice and of return receipt showing delivery to defendants on May 2, 1988 are attached hereto as Exhibit "D" and incorporated herein by this reference.

After receiving said notices, defendants continued to fail to keep and perform their covenants and obligations under the Lease.

31. On May 31, 1988, plaintiffs, by and through their attorneys, mailed to defendants by certified mail written notification that plaintiffs declared the Lease terminated as of the date on which defendants first received a copy of said

letter. True and accurate copies of said letter and the return receipt showing delivery to defendants on June 1, 1988, are attached hereto as Exhibit "E" and incorporated herein by reference.

32. In a letter dated September 28, 1988, defendants, by and through their attorneys, controverted plaintiffs' right to terminate the Lease and threatened to sue plaintiffs for damages by reason of plaintiffs' unwillingness to consent to the aforementioned encumbrances by defendants in favor of Valley Bank. A true and correct copy of said letter is attached hereto as Exhibit "F" and incorporated herein by this reference.

COUNT ONE
(Breach of Covenant Not to Assign)

33. Plaintiffs reallege and incorporate herein paragraphs 1 through 32 of this Complaint.

34. Defendants have failed to keep and perform their covenants and obligations described in paragraph 4 of the Lease for a period in excess of 60 days; such failure is within the contemplation of paragraph 9 of the Lease; by reason of such failure, plaintiffs were entitled to terminate the Lease; plaintiffs duly terminated the Lease in accordance with its terms effective not later than June 1, 1988; and since that date, plaintiffs have been and are now entitled to immediate possession of the Premises, including but not limited to all

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improvements and fixtures thereon and all rents and profits therefrom.

35. An actual dispute and justiciable controversy exists between plaintiffs and defendants with respect to their status and other legal relations under the Lease.

36. Defendants are liable to plaintiffs for actual damages in an amount not less than the rental and all other amounts which became due and payable pursuant to the Lease prior to its termination.

37. Defendants are liable to plaintiffs for actual damages for defendants' wrongful withholding of possession of the Premises in an amount equal to the reasonable fair market rental value of the Premises from and after the termination of the Lease until the date on which plaintiffs recover possession of the Premises.

38. Defendants have wrongfully retained and continue to wrongfully retain rents and other monies generated from the Premises and have refused to vacate the Premises. While defendants are wrongfully in possession of the Premises, defendants are liable for keeping and performing all covenants and obligations contained in the Lease until such time as plaintiffs recover possession, including but not limited to real property taxes, repairs and maintenance, public liability insurance, casualty insurance, etc.

39. Plaintiffs are entitled to an order evicting defendants from the Premises and putting plaintiffs in possession of the Premises.

40. Pursuant to the Lease, plaintiffs are entitled to an award of attorney's fees and costs incurred in the prosecution of this matter.

COUNT TWO
(Breach of Covenant to Maintain)

41. Plaintiffs reallege and incorporate herein paragraphs 1 through 40 of this Complaint.

42. Defendants have failed to keep and perform their covenants and obligations described in paragraph 5 of the Lease for a period in excess of 60 days; such failure is within the contemplation of paragraph 9 of the Lease; by reason of such failure, plaintiffs were entitled to terminate the Lease; plaintiffs duly terminated the Lease in accordance with its terms effective not later than June 1, 1988; and since that date, plaintiffs have been and are now entitled to immediate possession of the Premises, including but not limited to all improvements and fixtures thereon and all rents and profits therefrom.

43. Defendants are liable to plaintiffs for actual damages in an amount not less than the rental and all other amounts which became due and payable pursuant to the Lease prior to its termination.

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44. Defendants are liable to plaintiffs for actual damages for defendants' wrongful withholding of possession in an amount equal to the reasonable fair market rental value of the Premises from and after the termination of the Lease until the date on which plaintiffs recover possession of the Premises.

45. Defendants are liable for keeping and performing all other covenants and obligations contained in the Lease until the date on which plaintiffs recover possession of the Premises, including but not limited to real property taxes, repairs and maintenance, public liability, casualty insurance, etc.

46. Plaintiffs are entitled to an order evicting defendants from the Premises and putting plaintiffs in possession of the Premises.

47. Pursuant to the Lease, plaintiffs are entitled to an award of attorney's fees and costs incurred in the prosecution of this matter.

COUNT THREE
(Breach of Covenant Not to Encumber)

48. Plaintiffs reallege and incorporate herein paragraphs 1 through 47 of this Complaint.

49. Defendants have failed to keep and perform their covenants and obligations described in, among other paragraphs,

paragraph 6 of the Lease for a period in excess of 60 days; such failure is within the terms of the Lease provisions, including but not limited to paragraph 9 of the Lease; by reason of such failure, plaintiffs were entitled to terminate the Lease; the plaintiffs duly terminated the Lease in accordance with its terms effective as of June 1, 1988; and since that date, plaintiffs have been and are now entitled to immediate possession of the Premises, including but not limited to all improvements and fixtures thereon and all rents and profits therefrom.

50. Defendants are liable to plaintiffs for actual damages in an amount not less than the rental and all other amounts which became due and payable pursuant to the Lease prior to its termination.

51. Defendants are liable to plaintiffs for actual damages for defendants' wrongful withholding of possession in an amount equal to the reasonable fair market rental value of the Premises from and after the termination of the Lease until the date on which plaintiffs recover possession of the Premises.

52. Defendants are liable for keeping and performing all other covenants and obligations contained in the Lease until the date on which plaintiffs recover possession of the Premises, including but not limited to real property taxes,

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repairs and maintenance, public liability insurance, casualty insurance, etc.

53. Plaintiffs are entitled to an order evicting defendants from the Premises and putting plaintiffs in possession of the Premises.

54. Pursuant to the Lease, plaintiffs are entitled to an award of attorney's fees and costs incurred in the prosecution of this matter.

COUNT FOUR
(Appointment of Receiver)

55. Plaintiffs reallege and incorporate herein paragraphs 1 through 54 of this Complaint.

56. As set forth herein, plaintiffs have commenced proceedings to regain possession of the Premises and plaintiffs are entitled to regain possession as the lawful owners of the Premises.

57. Upon information and belief, defendants are in imminent danger of insolvency, as set forth in Exhibit "F".

58. A dispute also exists as to entitlement and to the use and possession of the premises. Plaintiffs have an interest in the Premises, believe that they have good and paramount title thereto and are entitled to the rents from the Premises for use and possession. Upon information and belief, such rents are in

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danger of being lost by being applied for the benefit of persons not entitled to the rents.

59. Attached hereto as Exhibit "G" and incorporated herein by this reference are the 1988 Valuation and Tax Notices issued by the Salt Lake County Treasurer for the Premises in the total amount of $37,526.84. These real property taxes are due and payable before 12:00 o'clock noon on November 30, 1988.

60. Upon information and belief, by reason of defendants' failures and neglects, subtenants occupying space within the Premises are in default in the payment of their rents and the performance of their obligations.

61. By reason of the foregoing, plaintiffs' interest in the Premises is in danger of being materially injured.

62. In order to protect their interest in the Premises, plaintiffs are now entitled by law to the appointment of a receiver to obtain the business records of defendants and their existing property manager, and any rents and income held by either of them, all as reasonably necessary to operate the Premises, to serve without bond, and to have full authority under supervision of this Court to pay operating expenses and make necessary repairs. Defendants, together with their agents should be barred and enjoined by restraining order or injunction from asserting any right to manage, supervise, or otherwise direct operation of the Premises, or to occupy any

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part thereof under any claimed status, and that the receiver be empowered to collect all rents, issues, and profits from the Premises for the benefit of plaintiffs, to account for the same, to expend necessary maintenance, insurance, and other operating expenses, to remit the excess of rents, issues and profits collected from the Premises over such necessary expenditures to this Court pending its further decisions, and to advertise, to lease or rent space to existing or new tenants, to remove any occupants not lawfully occupying and paying fair rental value, to employ professionals, to hire and fire employees, to enter into service contracts relating to the Premises, to maintain any legal action necessary to protect the Premises, and to otherwise have and exercise all lawful powers of a receiver.

WHEREFORE, plaintiffs pray that the Court enter its judgment declaring as follows:

On Count One:

1. Defendants have failed, refused and neglected to perform their covenants and obligations under the Lease;

2. The Lease has been terminated in accordance with its terms and plaintiffs are now entitled and have been entitled to immediate possession of the Premises since its termination;

3. The plaintiffs shall have and recover their actual damages against defendants for the rent and all other amounts,

which became due and payable under the Lease prior to its termination;

4. The plaintiffs shall have and recover their actual damages against defendants for the fair market rental value of the Premises since the termination of the Lease and for other damages as may be proven at trial;

5. The defendants shall vacate the Premises forthwith and grant plaintiffs restitution of possession of the Premises;

6. For the time defendants were in possession of the Premises defendants are liable to plaintiffs for all damages resulting from defendants' failure to keep and perform all covenants and objections contained in the Lease.

7. The Plaintiffs shall have and recover their reasonable attorney's fees and expenses, and costs of court and that the Court grant such other and further relief as may be appropriate under the circumstances.

On Count Two

1. Defendants have failed, refused and neglected to perform their covenants and obligations under the Lease;

2. The Lease has been terminated in accordance with its terms and plaintiffs are now entitled and have been entitled to immediate possession of the Premises since its termination;

3. The plaintiffs shall have and recover their actual damages against defendants for the rent and all other amounts

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which became due and payable under the Lease prior to its termination;

4. The plaintiffs shall have and recover their actual damages against defendants for the fair market rental value of the Premises since the termination of the Lease and for other damages as may be proven at trial;

5. The defendants shall vacate the Premises forthwith and grant plaintiffs restitution of possession of the Premises;

6. For the time defendants were in possession of the Premises defendants are liable to plaintiffs for all damages resulting from defendants' failure to keep and perform all covenants and objections contained in the Lease.

7. The plaintiffs shall have and recover their reasonable attorney's fees and expenses, and costs of court; and that the Court grant such other and further relief as may be appropriate under the circumstances.

On Count Three

1. Defendants have failed, refused and neglected to perform their covenants and obligations under the Lease;

2. The Lease has been terminated in accordance with its terms and plaintiffs are now entitled and have been entitled to immediate possession of the Premises since its termination;

3. The plaintiffs shall have and recover their actual damages against defendants for the rent and all other amounts

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which became due and payable under the Lease prior to its termination;

4. The plaintiffs shall have and recover their actual damages against defendants for the fair market rental value of the Premises since the termination of the Lease and for other damages as may be proven at trial;

5. The defendants shall vacate the Premises forthwith and grant plaintiffs restitution of possession of the Premises;

6. For the time defendants were in possession of the Premises defendants are liable to plaintiffs for all damages resulting from defendants' failure to keep and perform all covenants and objections contained in the Lease.

7. The plaintiffs shall have and recover their reasonable attorney's fees and expenses, and costs of court; and that the Court grant such other and further relief as may be appropriate under the circumstances.

On Count Four

1. For an order requiring defendants and their agents, to turn over to plaintiffs all rents, income and revenues from the Premises, and all books and records related thereto;

2. For an appointment of a receiver for the Premises;

3. For plaintiffs' attorneys' fees and expenses, and costs of court;

4. For such other and further relief as the Court deems appropriate.

DATED this 18 day of November, 1988.

SNOW, CHRISTENSEN & MARTINEAU

By _____
Michael R. Carlston

JENNINGS, STROUSS & SALMON

By _____
Gerrit M. Steenblik

Attorneys for Plaintiffs

Plaintiffs' Address:
c/o William K. Evans
3690 Gilroy Road
Salt Lake City, Utah 84109

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VERIFICATION

STATE OF UTAH)
:ss.
COUNTY OF SALT LAKE)

William K. Evans hereby deposes and states that he has read the foregoing Verified Complaint and knows the contents thereof, and that the allegations of the Verified Complaint are true and correct to the best of his information, knowledge and belief.

DATED this 18 day of November, 1988.

William K. Evans

SUBSCRIBED AND SWORN to before me this 18th day of November, 1988.

NOTARY PUBLIC
Residing at: Salt Lake Co, UT

My Commission Expires:
3/12/89

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MONDAY, MARCH 12. 1990

THE COURT: THIS IS THE TIME SET FOR RULING IN THE MATTER OF JOHN O. HOWE, ETC., VERSES PROFESSIONAL MANIVEST, INC., ETC., CASE #C-88-7595. I NOTE COUNSEL ARE PRESENT.

AT THE CONCLUSION OF THE TRIAL IN THIS MATTER, THIS COURT TOOK UNDER ADVISEMENT ITS RULING TO ENABLE ME THE FURTHER OPPORTUNITY TO EXAMINE THE EXHIBITS THAT WERE RECEIVED, PLEADINGS AND THE TESTIMONY ELICITED. THIS COURT HAS NOW DONE SO. AND MOREOVER, I HAVE RECEIVED AND REVIEWED THE RESPECTIVE MEMORANDUM SUBMITTED BY BOTH SIDES BEARING UPON THE ISSUES IN THIS CASE, WHICH WERE SUBMITTED IN LIEU OF CLOSING ARGUMENT.

PLAINTIFFS IN THIS ACTION SEEK A DETERMINATION UNDER DEFENDANT'S BREACH IN VARIOUS PARTICULARS: THE LEASE AND OPTION AGREEMENT OF OCTOBER 14, 1960, EXHIBIT 1, BETWEEN THE PARTIES, AND/OR THEIR PREDECESSORS IN INTEREST. PLAINTIFFS SEEK IN ADDITION A DETERMINATION THAT THE APPROPRIATE REMEDY FOR SUCH BREACHES IS FORFEITURE OF THE DEFENDANT'S LEASEHOLD INTEREST. THESE ALLEGED BREACHES FALL GENERALLY INTO THREE CATEGORIES.

NO. 1: BREACH OF PARAGRAPH 4 OF EXHIBIT 1, WHEREIN IT IS PROVIDED THAT THIS LEASE SHALL BE UNASSIGNABLE, EXCEPT WITH PRIOR CONSENT OF THE LESSORS BY

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DEFENDANTS ASSIGNING ITS LEASEHOLD INTEREST.

NO. 2: BREACH OF PARAGRAPH 6 OF EXHIBIT 1, WHICH STATES, "LESSEE SHALL AGREE TO KEEP THE DEMISE PREMISES FREE AND CLEAR OF ALL LIENS AND ENCUMBRANCES OF ANY NATURE WHATSOEVER."

NO. 3: BREACH OF PARAGRAPH 5 OF EXHIBIT 1, "WHEREIN THE LESSEE AGREED TO MAINTAINED THE DEMISED PREMISES AND KEEP IT FREE FROM WEEDS AND OTHER NOXIOUS GROWTH, AND NOT PERFORM ANY ACT IN VIOLATION OF THE ORDINANCES OR REGULATIONS OF MURRAY CITY, LAWS OF THE STATE OF UTAH OR THE UNITED STATES GOVERNMENT."

THE DEFENDANTS DENY THE ALLEGED BREACHES, BUT CLAIM IF INDEED THE BREACHES OCCURRED, THEY WERE TECHNICAL AND NONMATERIAL ONLY, RESULTING IN NO DAMAGE TO THE PLAINTIFFS. THE DEFENDANTS FURTHER CLAIM THAT PLAINTIFFS BREACHED THE LEASE BY REFUSING WITHOUT JUST CAUSE TO GRANT PERMISSION FOR ASSIGNMENT OF DEFENDANT'S LEASEHOLD INTEREST, AND FURTHER THAT PLAINTIFFS BREACHED THEIR IMPLIED COVENANT OF FAIR DEALING AND GOOD FAITH.

THIS COURT IS COGNIZANT OF THE DISFAVOR WITH WHICH THE WAY OUR COURTS VIEW FORFEITURE AND THEY ARE TO BE STRICTLY CONSTRUED AGAINST THOSE SEEKING SUCH REMEDY." MOON LAKE ELECTRIC ASSOCIATION VERSES ULTRA SYSTEMS WESTERN CONSTRUCTORS, 767 P2D 125, A UTAH COURT OF APPEALS DECISION, 1988, AND RUSSEL VS. PARK CITY UTAH CORPORATION,

548 P2D 889, A 1976 CASE. "BUT IT IS ALSO TRUE PARTIES ARE FREE TO CONTRACT ACCORDING TO THEIR DESIRES IN WHATEVER TERMS THEY CAN AGREE UPON. AND FURTHER THAT THE CONTRACT SHOULD BE ENFORCED ACCORDING TO ITS TERMS UNLESS THAT RESULT IS SO UNCONSCIONABLE THAT A COURT OF EQUITY WOULD REFUSE TO ENFORCE IT." JACOBSON VS. SWAN, 278 P2D 294, A 1954 CASE AND PERKINS VS. SPENCER, 243 P2D 446, 1952.

"A PARTIES' RIGHT TO CONTRACT SHOULD NOT BE LIGHTLY INTERFERED WITH. IT IS ONLY WHEN THE FORFEITURE AS CLEARLY DEMONSTRATED BY THE FACTS WOULD BE SO GROSSLY EXCESSIVE TO BE ENTIRELY DISPROPORTIONATE TO ANY POSSIBLE LOSS THAT MIGHT HAVE BEEN CONTEMPLATED TO ENFORCE IT, WOULD SHOCK THE CONSCIENCE OF A COURT OF EQUITY. IT HAS BEEN HELD THAT AS FAR AS RESCISSION IS CONCERNED IT SHOULD NOT BE GRANTED WITHOUT A MATERIAL BREACH, WHICH HAS BEEN DEFINED AS ONE OF SUCH PRIME IMPORTANCE THAT THE CONTRACT WOULD NOT BE MADE IF DEFAULT IN THAT PARTICULAR HAD BEEN CONTEMPLATED. POLYGLYCOAT VS. STEVEN HOLCOMB, 591 P2D 449, 1979. IN THIS CASE THE EVIDENCE HAS ESTABLISHED TO THIS COURT'S SATISFACTION THE FOLLOWING:

NO. 1: THE DEFENDANT'S CONVEYED BY QUITCLAIM DEED TO WALBY ENTERPRISES SEPTEMBER 1, 1983, A STRIP OF LAND, PART OF THE LEASE PREMISES OF 677 FEET BY 244 FEET IN DIMENSION, WITHOUT THE KNOWLEDGE OR THE CONSENT OF THE PLAINTIFFS AS REPRESENTED BY EXHIBIT 10. THE QUITCLAIM

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DEED CONTAINED WITHIN EXHIBIT 10 WAS RECEIVED BY STIPULATION OF COUNSEL.

NO. 2: THE DEFENDANTS ASSIGNED TO VALLEY BANK AND TRUST ITS INTEREST, THEIR INTEREST IN THE LEASE ON MAY 21, 1982, WITHOUT THE KNOWLEDGE OR THE CONSENT OF THE PLAINTIFFS, EXHIBITS 12 AND 13.

NO. 3: THE DEFENDANTS ASSIGNED AND EXECUTED A TRUST DEED IN FAVOR OF FIRST SECURITY BANK, THEIR INTEREST IN THE LEASE ON MAY 18, 1978, WITHOUT THE KNOWLEDGE OR CONSENT OF THE DEFENDANTS. EXHIBIT 11.

NO. 4: THE DEFENDANTS ASSIGNED AND GRANTED A TRUST DEED TO VALLEY BANK AND TRUST, THEIR INTEREST IN THE LEASE ON DECEMBER 8, 1987, WITHOUT THE KNOWLEDGE OR CONSENT OF THE PLAINTIFFS, EXHIBITS 17 AND 18.

NO. 5: WHEN DEFENDANTS AGENT LEAPER (SIC) SOUGHT RATIFICATION AND APPROVAL FROM THE PLAINTIFFS ON JANUARY 22ND, 1988, HE FAILED INTENTIONALLY OR OTHERWISE TO ADVISE THE PLAINTIFFS THE LANGUAGE OF THE ACKNOWLEDGEMENT OF ASSIGNMENT HE SOUGHT PLAINTIFF'S APPROVAL OF, HAD BEEN MODIFIED TO INCLUDE ACKNOWLEDGEMENT NOT REQUESTED BY THE BANK; THAT THE PLAINTIFFS AGREED THE ASSIGNMENT WAS QUOTE: "ENCUMBERING THEIR INTEREST", UNQUOTE. EXHIBITS 8, 17 AND 19.

THIS CONDUCT CONSTITUTED SOMETHING LESS THAN GOOD FAITH AND FAIR DEALING. THE PLAINTIFFS OBJECTED AND

DEMANDED THE ASSIGNMENT AND TRUST DEED WERE IN VIOLATION OF THE LEASE BY LETTER OF MARCH 30, 1988, EXHIBIT 30. YET THE CONVEYANCE OF THE TRUST DEED AND THE RELEASE OF ASSIGNMENT WERE NOT OBTAINED UNTIL SEPTEMBER 1 OF '88, ON SEPTEMBER 22ND OF '88, RESPECTIVELY. EXHIBIT 33.

SOME FIVE MONTHS AFTER PLAINTIFFS CONSIDERED SUCH ACTION VIOLATIVE OF THE LEASE TERMS, TO THIS DATE TENANT LEASES ARE STILL ASSIGNED.

NO. 6: DEFENDANTS EXECUTED THREE SEPARATE PURCHASE AND SELL AGREEMENTS BETWEEN AND AMONG NATIONAL REALTY LIMITED TO M.D. INVESTMENTS LIMITED FEBRUARY 1, 1976; M.D. INVESTMENTS TO WESTCO REALTY INC., JANUARY 1, 1978; AND WESTCO REALTY INC. TO DIVERSIFIED REALTY, LIMITED JANUARY 1, 1978, PURPORTING TO SELL DEFENDANT'S INTEREST IN THE LEASEHOLD PROPERTY WITHOUT THE KNOWLEDGE OR CONSENT OF THE PLAINTIFFS. EXHIBIT 22.

NO. 7: THE DEFENDANTS ASSIGNED THEIR INTEREST IN THE LEASE TO THE MANIVEST, MANIVEST LIQUIDATING TRUST, APRIL 28, 1988, WITHOUT THE ACKNOWLEDGEMENT OR KNOWLEDGE OR CONSENT OF PLAINTIFFS. EXHIBITS 21 AND 40.

PLAINTIFFS RECEIVED TWO NOTICES IN VIOLATION OF THE MURRAY CITY ORDINANCES, OR NOTICES OF VIOLATION OF MURRAY CITY ORDINANCES APRIL 21, 1983, WHICH IS EXHIBIT 23, AND JULY 10, 1989, WHICH IS 20 AND 34, FOR THE DEFENDANTS HAVING ALLOWED WEEDS AND WASTE MATERIAL TO ACCUMULATE ON

THE PROPERTY, WHICH CONDITIONS CONTINUED OR WERE ALLOWED TO OCCUR AGAIN EVEN AFTER THE TERMINATION EFFORT OF THE LEASE NOTICE OF MAY 31, 1988, AND APPEAR IN EXHIBITS 28 AND 26.

DEFENDANTS, CONTRARY TO TERMS, PARAGRAPH 5 OF THE LEASE, ALLOWED EITHER THEMSELVES OR THROUGH THEIR TENANTS, CONDITIONS IN VIOLATION OF PERTINENT HEALTH AND SAFETY CODES OR REGULATIONS TO EXIST. EXAMPLES: ELECTRICAL OUTLETS WITHOUT COVERS, EXPOSED MECHANICAL EQUIPMENT, EXTERIOR ELECTRICAL OUTLETS NOT WATERPROOF, SAGGING ROOF, IMPROPER SUPPORT OF GAS LINE, LOOSE DEBRIS ON THE ROOF, DISREPAIR OF THE PARKING LOT, BROKEN WINDOW, EXCESSIVE WATER ACCUMULATION ALLOWING FREEZING POTENTIAL. EXHIBIT 39. AND THIS IS SUPPORTED BY EXHIBIT 39 AND THE TESTIMONY OF THE ARCHITECTS, JUD HAWKS AND ROBERT LEONARD. THE DEFENDANTS ALSO FAILED TO REGISTER WITH THE STATE OF UTAH THE UNDERGROUND GAS STORAGE TANKS.

DEFENDANTS WERE GIVEN NOTICE OF PLAINTIFF'S POSITION REGARDING THE DEFAULTS ON OR ABOUT MARCH 30, 1988 -- EXHIBIT 30 -- WHEN IT CAME TO PLAINTIFF'S ATTENTION. CERTAINLY THOUGH BY NO MEANS ALL OF THE ASSIGNMENTS HAD TAKEN PLACE, YET THE DEFENDANTS CONSISTENTLY MAINTAINED A NO VIOLATION POSTURE, RATHER THAN ADDRESS THE DEFAULTS.

FURTHER NOTICE WAS GIVEN TO DEFENDANTS ON APRIL 29, 1988 -- EXHIBIT 30 -- GIVEN DEFENDANT'S FAILURE TO REMEDY THE SITUATION. PLAINTIFFS SERVED THE NOTICE OF

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TERMINATION. EXHIBIT 31.

THE FOREGOING RECITATION OF FACTS PROVED IN THIS CASE IN THIS COURT'S JUDGMENT REPRESENTS VIOLATIONS OF THE LEASE TERMS, IN PARTICULAR PARAGRAPHS 4, 5 AND 6: THE CUMULATIVE EFFECT AND CAUSE OF THE COURSE OF CONDUCT BY THE DEFENDANTS, REPRESENTS IN THIS COURT'S VIEW A MATERIAL BREACH OF SUCH A SUBSTANTIAL NATURE THAT THIS COURT IS PERSUADED THE REMEDY SOUGHT IS APPROPRIATE. THIS COURT IS PERSUADED THAT THE BREACHED TERMS, PARTICULARLY THOSE PROHIBITING ASSIGNMENTS, ENCUMBRANCES AND LEASES ARE OF SUCH PRIMARY IMPORTANCE TO THE PLAINTIFFS THEY WOULD HAVE NOT ENTERED INTO THE LEASE HAD THEY BEEN AWARE DEFENDANTS WOULD VIOLATE SAID TERMS.

THIS COURT DETERMINES THAT THE PRESENT ADJUSTED VALUE OF THE LEASEHOLD IS BETWEEN 500 AND $600,000, PURSUANT TO EXHIBIT 42, AND THE TESTIMONY OF A WITNESS. THIS IS THE MORE BELIEVABLE EVIDENCE. THE LEASE CONTEMPLATES THAT AT THE EXPIRATION OF ITS TERM THE FORFEITURE OF THE REVERSIONARY INTEREST AND IMPROVEMENTS WOULD OCCUR. THIS VALUE, WHATEVER IT MAY BE, IS AN OFFSETTING VALUE TO THE PRESENT VALUE OF THE LEASEHOLD. GIVEN THE CIRCUMSTANCES, THIS COURT'S VIEW IS THE FORFEITURE IS NOT SO GROSSLY EXCESSIVE AS TO BE ENTIRELY DISPROPORTIONATE TO ANY LOSS THAT MIGHT HAVE BEEN CONTEMPLATED.

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THIS COURT IS MOREOVER OF THE VIEW THAT THE PLAINTIFF'S LETTER OF TERMINATION DATED MAY 31, 1988 -- EXHIBIT 31 -- COMPLIED WITH THE TERMS OF THE LEASE AND WAS EFFECTIVE. DEFENDANT'S INTEREST IS ACCORDINGLY TERMINATED OR FORFEITED AS OF MAY 31, 1988. ALL SUMS PAID THEREAFTER BY THE DEFENDANTS ARE TO BE RETAINED BY THE PLAINTIFFS AS FAIR RENTAL LIQUIDATED DAMAGE VALUE FOR THE DEFENDANTS CONTINUED OCCUPANCY SINCE THE DATE OF FORFEITURE.

NO CREDIBLE EVIDENCE HAS BEEN ELICITED TO SUPPORT THE COUNTERCLAIM THAT THE PLAINTIFFS BREACHED ANY OBLIGATION OF FAIR DEALING AND GOOD FAITH, OR THAT THE PLAINTIFFS ARBITRARILY WITHOUT JUST CAUSE REFUSED TO EXCEED TO DEFENDANT'S REQUEST FOR APPROVAL OF ANY ASSIGNMENTS; ACCORDINGLY, THIS COURT FINDS NO CAUSE OF ACTION IN THE COUNTER CLAIM. THE PLAINTIFFS ARE GRANTED REASONABLE ATTORNEY FEES AND COSTS FOR THE NECESSITY OF BRINGING THIS ACTION. COUNSEL FOR THE PLAINTIFFS ARE TO PREPARE THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT OF FORFEITURE AND TO SUBMIT BY AFFIDAVIT THEIR CLAIM FOR ATTORNEY FEES AND COSTS PURSUANT TO RULE 4501.

COUNSEL, ARE THERE ANY QUESTIONS? VERY WELL, THIS COURT WILL BE IN RECESS.

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JOHN O. HOWE, Trustee, et al.,

Plaintiffs,

vs.

PROFESSIONAL MANIVEST, INC., a Utah corporation, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Civil No. 880907595

Frederick

This case came on regularly for trial before the Court on March 6, 1990, and again on March 7, 1990. Plaintiffs, John O. Howe, Trustee, Robert Howe, Bill Evans and Carole Evans were present and all plaintiffs were represented by their counsel, Michael R. Carlston and Max D. Wheeler of Snow, Christensen & Martineau. The defendants were present and represented by their counsel, Ronald E. Nehring and Brian S. King of Prince, Yeates & Geldzahler. Witnesses were sworn. Testimony and other evidence was considered and received into evidence by the Court. At the conclusion of the evidence, pursuant to the stipulation of the parties, oral argument was waived and the parties agreed to submit written summaries of their respective positions. Such summaries were presented by the parties on March 9, 1990.

The Court, having considered the summaries, the sworn testimony of the witnesses and the other evidence presented, now makes and enters its:

FINDINGS OF FACT

1. Plaintiffs, John O. Howe, Trustee; Robert E. Howe and Bonnie F. Howe, husband and wife; William K. Evans and Carole H. Evans, husband and wife, and Judith H. Steenblik, are the successors-in-interest to John O. Howe, Maxine Howe, Earl Howe and Vivian Howe, as Lessors under a Lease and Option dated October 14, 1960 (the "Lease").

2. Defendants are the successors-in-interest to the Lessees under the Lease.

3. The Lease contained an option to purchase the real property subject to the Lease. Pursuant to the terms of the option, certain portions of the real property which was subject to the Lease, were purchased and from thenceforth no longer subject to the Lease.

4. The option in the Lease expired in October 1975, leaving the below described real property and all of the improvements then or thereafter located thereon (collectively the "Property") subject to the Lease, to wit:

Parcel 1:

BEGINNING at a point on the South line of 5600 South Street, said point being South 1340.07 feet and East 1589.02 feet from the Northwest corner of Section 17, Township 2 South, Range 1 East, Salt Lake Base and Meridian; and running thence South 0°14'30" West 155 feet; thence North 89°49'35" West 31.07 feet; thence

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South 66°00' West 433.52 feet; thence North 24°00' West 100.0 feet; thence South 66°00' West 35.0 feet; thence North 24°00' West 100.0 feet; thence North 66°00' East 28.30 feet; thence North 24°00' West 167.50 feet to the South line of 5600 South Street; thence South 89°49'35" East 583.36 feet to the point of BEGINNING.

Parcel 2:

BEGINNING at a point on the West line of 900 East Street, said point being South 1957.25 feet and East 1711.42 feet from the Northwest corner of Section 17, Township 2 South, Range 1 East, Salt Lake Base and Meridian; and running thence South 66°00' West 461.39 feet, more or less; thence North 24°00' West 485.00 feet; thence North 66°00' East 508.62 feet; thence South 89°49'35" East 156.07 feet to the West line of 900 East Street; thence South 0°14'30" West 461.81 feet to the point of BEGINNING.

Parcel 3:

BEGINNING at a point of the West line of 900 East Street, said point being South 1957.25 feet and East 1711.42 feet from the Northwest corner of Section 17, Township 2 South, Range 1 East, Salt Lake Base and Meridian; and running thence South 0°14'30" West along said West line 429.66 feet; thence West 200.50 feet; thence North 0°14'30" East 275.69 feet; thence North 24°00' West 58.86 feet; thence North 66°00' East 246.39 feet to the point of BEGINNING.

Parcel 4:

BEGINNING at a point East 1025 feet and North 265 feet from the West quarter corner of Section 17, Township 2 South, Range 1 East, Salt Lake Base and Meridian; and running thence East 499.5 feet; thence North 0°14'30" East 275.69 feet; thence North 24°00' West 58.86 feet; thence South 66°00' West 215.2 feet, more or less; thence North 24°00' West 485.0 feet; thence North 66°00' East 75.1 feet, more or less, to the Westerly line of Parcel 1 above; thence along said Westerly line of Parcel 1, North 24°00' West 100 feet; thence South 66°00' West 35 feet; thence North 24°00' West 100 feet; thence North 66°00' East 28.3 feet; thence North 24°00' West 167.5 feet to the South line of 5600 South Street; thence along South line of 5600 South Street North 89°49'35" West 155 feet, more or less; thence South 03°19' West 192.23 feet, more or less; thence South 89°49'35" East 127.52 feet, more or less; thence South 24°00' East 677.76 feet, more or less; thence South 85°51'30" West 229.12 feet; thence South 02°34' East 230 feet, more or less, to the point of BEGINNING.

Parcel 5:

Commencing at a point on the South line of 5600 South Street, said point being South 1340.07 feet and East 1559.02 feet from the Northwest corner of Section 17, Township 2 South, Range 1 East, Salt Lake Base and Meridian, Salt Lake County, Utah, and running thence South 0°14'30" West 155 feet; thence South 89°49'35" East 155 feet to the West line of 900 East Street; thence North 0°14'30" East along the West line of 900 East Street 155 feet to the intersection of the West line of 900 East Street and the South line of 5600 South Street; thence North 89°49'35" West 155 feet along the South line of 5600 South Street to the point of commencement.

5. In September, 1983, defendants, without the plaintiffs' knowledge or consent, permitted encroachments on to the Property. Exhibit "10".

6. In May of 1978, defendants, without the plaintiffs' knowledge or consent, executed, delivered and recorded a Trust Deed on the Property and an assignment of the Lease and of all tenant subleases in favor of First Security Bank. Exhibit "11".

7. In 1982, defendants, without the plaintiffs' knowledge or consent, assigned the Lease and all tenant subleases to Valley Bank & Trust ("Valley Bank"). Exhibits "12", "13" and "14".

8. In December of 1987, without the plaintiffs' knowledge or consent, defendants assigned the Lease and all of the tenant subleases to Valley Bank in connection with a $4,000,000 loan. Exhibit "17".

9. In January of 1988, defendants, without the plaintiffs' knowledge or consent, executed, delivered and recorded a Trust

Deed on the Property and an Assignment of the Lease in favor of Valley Bank. Exhibits "17" and "18".

10. In January of 1988, pursuant to the terms and conditions of the 1987-88 Valley Bank loan, Larry Leeper on behalf of the defendants solicited the plaintiffs' consent to the 1987-88 Valley Bank loan. This request was made following the execution, delivery and recording by the defendants of a Trust Deed on the Property and an Assignment of the Lease in favor of Valley Bank and following the assignment of all tenant subleases to Valley Bank. Intentionally, or otherwise, the acknowledgement submitted to the plaintiffs included language intended to cause the plaintiffs' interest to be subordinated to the 1987-88 Valley Bank loan. Exhibits "8", "17", "18" and "19". The action of the defendants in making this request in the form proposed constituted something less than good faith and fair dealing.

11. By letter dated March 30, 1988, the plaintiffs put the defendants on notice that defendants were in default of covenants and obligations under the Lease, and plaintiffs requested removal of the aforementioned assignments to and encumbrances in favor of Valley Bank and correction of the improper condition of the Property. Exhibit "30".

12. The defendants received the March 30, 1988 notice and did not take action to remedy the defaults as requested.

13. The defendants also received an April 29, 1989 notice from plaintiffs, as indicated in Exhibit "30", and still did nothing to remedy the defaults.

14. Defendants' failure to remedy the continuing defaults after receipt of the March 30, 1988 and April 29, 1988 Notices precipitated the service by plaintiffs of a Notice of Termination dated May 31, 1988. Exhibit "31".

15. Defendants received the Notice of Termination on June 1, 1988.

16. Defendants made no affirmative response to plaintiffs' demands regarding the condition of the Property until late July of 1988. Exhibits "28" and "32".

17. Defendants made no affirmative response to plaintiffs' request that the Valley Bank assignments and encumbrances be removed until September 1 and September 22, 1988, some five months following the plaintiffs' request, when certain of the encumbrances were released. Exhibit "33".

18. At the time of trial, all of the tenant subleases had been purportedly assigned to Valley Bank.

19. Defendants, on three separate occasions, entered into agreements called Purchase and Sale Agreements without the knowledge or consent of the plaintiffs. These agreements purported to sell the defendants' interest to MD Investments Limited Partnership on February 1, 1976; from MD Investments

Limited Partnership to Westco Realty, Inc. on January 1, 1978; and from Westco Realty, Inc. to Diversified Realty Limited Partnership on January 1, 1978. Exhibit "22".

20. On or about April 28, 1988, without plaintiffs' knowledge or consent, defendants assigned their interest in the Lease to a liquidating trust. Exhibits "21" and "40". The Liquidating Trust was expressly established to liquidate all assets, including the Southlake Shopping Center situated on the Property, for the benefit of creditors.

21. Defendants received two separate notices of violation of Murray City ordinances on April 21, 1983, as evidenced by Exhibit "23", and on July 10, 1989, as evidenced by Exhibit "37". These notices pertain to improper conditions of the Property with respect to the weeds, debris and other environmental matters associated with the Property.

22. Said improper conditions on the Property continued after the aforementioned notices from Murray City, or were allowed to reoccur on multiple occasions, including after plaintiffs served notice of intent to terminate the Lease. Exhibits "26" and "28".

23. Defendants, directly or through their tenants, allowed health and safety violations to occur and continue on the Property through the present, including, but not limited to, electrical violations, disrepair of the parking lot, exposed

mechanical equipment, sagging roof, improperly supported gas line, loose debris on the roof, broken windows, water accumulating by electrical lines and excess water accumulation, and exterior electrical outlets not waterproofed, as evidenced by the testimony of Architects Robert P. Leonard and Judge Hawks. Exhibit "39".

24. Underground storage tanks located on a portion of the Property, which has been subleased by defendants, have not been registered as required by law.

25. All of the foregoing facts represent lease violations, with the principal violations pertaining to paragraphs 4, 5 and 6 of the Lease. These violations, separately and together, were material breaches of the Lease and were of a substantial nature. These breaches of the Lease, particularly the breaches regarding assignments, encumbrances and other related lease terms were and are of such primary importance to the plaintiffs, that plaintiffs would not have entered into the Lease had they been aware defendants would breach these terms.

26. Conflicting evidence was offered pertaining to the value of the defendants's leasehold estate. The most credible and believable evidenced was provided by witness Charles Huber, C.P.A. and Exhibit "42". This evidence establishes that the current value of the defendants' leasehold estate is between $500,000 and $600,000. The Lease expressly provides for a

forfeiture of the Property, including, but not limited to the improvements, at the end of the term or upon the earlier expiration of the Lease by reason of default.

27. Taking into account that the provisions of the Lease are to be strictly construed against the parties seeking forfeiture and considering all of the facts and circumstances according to the applicable standard of proof, including, but not limited to, the materiality of the defendants' defaults, the harm caused to plaintiffs by defendants' defaults, the value of the defendants' leasehold estate, the fair market value of the Property and the reasonable rental value thereof, the willful and persistent nature of the defendants' defaults, the defendants' failure to respond to the notice of default, the fact that the Lease itself contemplates forfeiture and that the Lessor will succeed to the ownership of the improvements, and the defendants' conduct in seeking the plaintiffs' consent to the 1987-88 Valley Bank loan, this court is persuaded that the value of the defendants' leasehold estate is not so excessive as to be entirely disproportionate to any loss that might have been contemplated. Such a result does not shock the conscience of the Court and is not unconscionable.

28. Plaintiffs' Notice of Termination, Exhibit "31" complies with the terms of the Lease insofar as required in order to forfeit the defendants' interest in the Lease.

29. Although defendants asserted as a counterclaim that plaintiffs breached their duty of fair dealing, defendants provided no credible evidence in support of this counterclaim.

30. Although defendants asserted as a counterclaim that plaintiffs had a duty to consent to the assignment of the Lease to Valley Bank for the 1987-88 loan arrangement, defendants provided no credible evidence in support of this counterclaim.

31. The Lease provides under certain circumstances for the awarding of expenses and attorneys' fees, and this action falls within the terms of the Lease requiring the award to plaintiffs of attorneys' fees and costs for bringing this action.

The Court, having made its findings of fact, now makes and enters its:

CONCLUSIONS OF LAW

1. Defendants have defaulted on their covenants and obligations under the Lease.

2. The defendants' defaults set forth in the foregoing Findings of Fact are material, in that the plaintiffs would not have entered into the Lease unless the provisions which the defendants violated had been included in the Lease.

3. The Lease expressly provides for forfeiture of the defendants' leasehold estate upon default.

4. Plaintiffs have complied with all conditions required by the Lease and by law in order to forfeit all of the right, title and interest of defendants in the Lease.

5. All interest of the defendants as the owners of the of the Lessee's interest in the Lease was forfeited effective June 1, 1988, and defendants' possession of the Property should be terminated.

6. Taking into account that the provisions of the Lease are to be strictly construed against the parties seeking forfeiture and considering all of the facts and circumstances according to the applicable standard of proof, including, but not limited to, the materiality of the defendants' defaults, the value of the defendants' leasehold estate, the fair market value of the Property and the reasonable value thereof, the harm caused to the plaintiffs by the defendants' defaults, the willful and persistent nature of the defendants' defaults, the defendants' failure to timely respond to notice of default, that the Lease itself contemplates a forfeiture with the Lessor succeeding to the improvements and the defendants' conduct in seeking the plaintiffs' consent to the 1987-88 Valley Bank loan arrangement on a document which, if signed, would have amended material terms of the Lease and may have subordinated plaintiffs' fee interest in the Property to the Valley Bank loan, the value of the defendants' leasehold estate is not such that forfeiture is so

excessive as to be entirely disproportionate to any loss that might have been contemplated. Such a result does not shock the conscience of the Court and is not unconscionable. There is no reason that the contractual result agreed and contemplated by the parties should be prevented from occurring.

7. Plaintiffs are therefore entitled to have forfeited to them all of the defendants' interest of whatever kind or nature, including, but not limited to, defendants' interest in the Lease, the Property and all improvements thereon.

8. The defendants' leasehold estate and the Lease should be forfeited and terminated as of the effective date of the forfeiture notice, to wit: June 1, 1988.

9. The plaintiffs are entitled to all rents and other income attributable from the Property from March 12, 1990 forward.

10. Plaintiffs are entitled to liquidated damages for the defendants' continued use of the Property to March 12, 1990 in the amount of $24,489.50, together with prejudgment interest as allowed by law.

11. Plaintiffs are entitled to a judgment of forfeiture and an order granting immediate possession of the Property.

12. Plaintiffs are entitled to an award of their reasonable

attorneys' fees and expenses as provided by contract, such amounts to be determined by the Court.

DATED this 18th day of May, 1990.

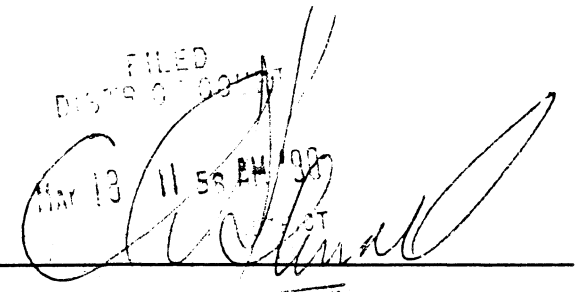
BY THE COURT:

The Honorable J. Dennis Frederick
Third District Court Judge

APPROVED AS TO FORM:

PRINCE, YEATES & GELDZAHLER

By
Ronald E. Nehring
Brian S. King
Attorneys for Defendants



IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JOHN O. HOWE, Trustee, et al., Plaintiffs, vs. PROFESSIONAL MANIVEST, INC., a Utah corporation, et al., Defendants.	JUDGMENT OF FORFEITURE AND ORDER OF POSSESSION Civil No. 880907595 Frederick

The above-entitled cause came on regularly for trial commencing March 6, 1990, and continuing through March 7, 1990, before The Honorable J. Dennis Frederick. Plaintiffs were represented by Michael R. Carlston and Max D. Wheeler of Snow, Christensen & Martineau, and the defendants were represented by Ronald E. Nehring and Brian S. King of Prince, Yeates & Geldzahler. The Court, having previously made and entered its Findings of Fact and Conclusions of Law in favor of the plaintiffs, and wherefore, by virtue of the law and by reason of the aforesaid,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The lease (herein the "Lease") between the parties affects the following described real property and all improvements located thereon (collectively, the "Property") in Salt Lake County, Utah, to wit:

Parcel 1:

BEGINNING at a point on the South line of 5600 South Street, said point being South 1340.07 feet and East 1589.02 feet from the Northwest corner of Section 17, Township 2 South, Range 1 East, Salt Lake Base and Meridian; and running thence South 0°14'30" West 155 feet; thence North 89°49'35" West 31.07 feet; thence South 66°00' West 433.52 feet; thence North 24°00' West 100.0 feet; thence South 66°00' West 35.0 feet; thence North 24°00' West 100.0 feet; thence North 66°00' East 28.30 feet; thence North 24°00' West 167.50 feet to the South line of 5600 South Street; thence South 89°49'35" East 583.36 feet to the point of BEGINNING.

Parcel 2:

BEGINNING at a point on the West line of 900 East Street, said point being South 1957.25 feet and East 1711.42 feet from the Northwest corner of Section 17, Township 2 South, Range 1 East, Salt Lake Base and Meridian; and running thence South 66°00' West 461.39 feet, more or less; thence North 24°00' West 485.00 feet; thence North 66°00' East 508.62 feet; thence South 89°49'35" East 156.07 feet to the West line of 900 East Street; thence South 0°14'30" West 461.81 feet to the point of BEGINNING.

Parcel 3:

BEGINNING at a point of the West line of 900 East Street, said point being South 1957.25 feet and East 1711.42 feet from the Northwest corner of Section 17, Township 2 South, Range 1 East, Salt Lake Base and Meridian; and running thence South 0°14'30" West along said West line 429.66 feet; thence West 200.50 feet; thence North 0°14'30" East 275.69 feet; thence North 24°00' West 58.86 feet; thence North 66°00' East 246.39 feet to the point of BEGINNING.

Parcel 4:

BEGINNING at a point East 1025 feet and North 265 feet from the West quarter corner of Section 17, Township 2 South, Range 1 East, Salt Lake Base and Meridian; and running thence East 499.5 feet; thence North 0°14'30" East 275.69 feet; thence North 24°00' West 58.86 feet; thence South 66°00' West 215.2 feet, more or less; thence North 24°00' West 485.0 feet; thence North 66°00' East 75.1 feet, more or less, to the Westerly line of Parcel 1 above; thence along said Westerly line of Parcel 1, North 24°00' West 100 feet; thence South 66°00' West 35 feet; thence North 24°00' West 100 feet; thence North 66°00' East 28.3 feet; thence North 24°00' West 167.5 feet to the South line of 5600 South

Street; thence along South line of 5600 South Street North 89°49'35" West 155 feet, more or less; thence South 03°19' West 192.23 feet, more or less; thence South 89°49'35" East 127.52 feet, more or less; thence South 24°00' East 677.76 feet, more or less; thence South 85°51'30" West 229.12 feet; thence South 02°34' East 230 feet, more or less, to the point of BEGINNING.

Parcel 5:

Commencing at a point on the South line of 5600 South Street, said point being South 1340.07 feet and East 1559.02 feet from the Northwest corner of Section 17, Township 2 South, Range 1 East, Salt Lake Base and Meridian, Salt Lake County, Utah, and running thence South 0°14'30" West 155 feet; thence South 89°49'35" East 155 feet to the West line of 900 East Street; thence North 0°14'30" East along the West line of 900 East Street 155 feet to the intersection of the West line of 900 East Street and the South line of 5600 South Street; thence North 89°49'35" West 155 feet along the South line of 5600 South Street to the point of commencement.

2. The Lease was terminated effective June 1, 1988, and all interest in said Lease was terminated on such date, and the defendants have no further interest in the Lease or the Property.

3. The plaintiffs are awarded immediate possession of the Property.

4. Defendants are ordered to immediately vacate the Property in favor of plaintiffs, and plaintiffs are awarded all rents and all other income from and after March 12, 1990, less all necessary expenses incurred in management and operation of the Property incurred prior to the time Judgment is entered.

5. Plaintiffs are awarded liquidated damages for defendants' continued use of the Property to March 12, 1990 in the amount of $24,489.50, together with prejudgment interest as allowed by law.

6. Defendants' Counterclaim against plaintiffs and each Count thereof is hereby dismissed with prejudice.

7. Plaintiffs are awarded attorneys' fees and costs in an amount to be established by a supplemental judgment.

DATED this 18th day of May, 1990.

BY THE COURT:

The Honorable J. Dennis Frederick
Third District Court Judge

APPROVED AS TO FORM:

PRINCE, YEATES & GELDZAHLER

By
Ronald E. Nehring
Attorneys for Defendants

SEP 10 1990

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JOHN O. HOWE, Trustee, et al., Plaintiffs, vs. PROFESSIONAL MANIVEST, INC., a Utah corporation, et al., Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ATTORNEYS' FEES, EXPENSES AND PREJUDGMENT INTEREST Civil No. 880907595 Judge J. Dennis Frederick

The court having fully considered all of the pleadings filed in support of and in opposition to plaintiffs' Application for Supplemental Judgment for Attorneys' Fees, Expenses and Prejudgment Interest (the "Application"); having considered the record in this case and the evidence regarding the Application; and having previously announced its ruling on the Application, now makes and enters its:

FINDINGS OF FACT

1. There is competent evidence in the record from which this Court can evaluate the necessity of the services rendered and the reasonableness of the fees and expenses requested.

2. The legal services described in the plaintiffs' Application for Supplemental Judgment for Attorneys' Fees, Expenses and Prejudgment Interest and the various affidavits in support thereof (the "Services") were actually performed.

3. The Services were reasonably necessary in order to properly represent the plaintiffs' interests in this litigation.

4. The rates for the plaintiffs' attorneys are consistent with rates customarily charged in this jurisdiction for similar legal services.

5. The fees incurred for expert witnesses are consistent with the fees customarily charged in this jurisdiction for similar services.

6. The particular circumstances of this case do not require the consideration of any additional factors in order for the Court to determine what constitutes a fair and reasonable award of attorneys' fees and related costs and expenses.

7. The Court, however, has considered other factors and finds that the amount of fees and expenses claimed by the plaintiffs are fair and reasonable in light of those other factors, which include but are not limited to the importance of the subject matter, the amount in controversy, the results obtained, the litigation strategy and tactics of opposing counsel, the amount of fees allegedly incurred by the opposing parties, the difficulty of the litigation, the novelty of the legal questions, the efficiency of the attorneys presenting the case and the expertise and experience of the attorneys involved.

8. Taking into account the terms of the Lease and all of the facts and circumstances, according to the applicable standard of proof, the plaintiffs are entitled to recover attorneys' fees

in the amount of $131,867.55 and related costs and expenses in the amount of $16,231.05. Such amounts are fair and reasonable.

9. Prejudgment interest on the liquidated damages previously awarded by this Court, at the legal rate, amounts to $2,969.20 through May 18, 1990.

10. Plaintiffs are entitled to an award of their reasonable attorneys' fees and related costs and expenses for services rendered subsequent to those set forth in the aforementioned Application, in an amount to be determined by the Court.

The Court, having made its Findings of Fact, now makes and enters its:

CONCLUSIONS OF LAW

1. The defendants' Motions to Strike the Affidavit of Max D. Wheeler and the Supplemental Affidavits of Michael R. Carlston and Gerrit M. Steenblik are denied.

2. In accordance with the terms of the Lease, plaintiffs are entitled to an award of attorneys' fees in the amount of $131,867.55.

3. In accordance with the terms of the Lease, plaintiffs are entitled to an award for related costs and expenses in the amount of $16,231.05.

4. Plaintiffs are entitled to prejudgment interest in the amount of $2,969.20 on the liquidated damages set forth in the Judgment dated May 18, 1990.

5. From and after the date hereof, plaintiffs are entitled to interest at the legal rate of twelve percent (12%) per annum on the following sums until paid in full:

Prejudgment interest:	$ 2,969.20
Attorneys' fees:	131,867.55
Costs and expenses:	16,231.05
TOTAL	$151,067.80

6. Plaintiffs are entitled to an award of their reasonable attorneys' fees and related costs and expenses for services rendered subsequent to those set forth in the aforementioned Application, in an amount to be determined by the Court.

DATED this 10th day of ~~August,~~ Sept 1990.

BY THE COURT:

The Honorable J. Dennis Frederick
Third District Court Judge

Approved as to form:

PRINCE, YEATES & GELDZAHLER

By_____
Ronald E. Nehring
Brian S. King
Attorneys for Defendants

JUDGEMENT

SEP 10 1990

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JOHN O. HOWE, Trustee, et al., Plaintiffs, vs. PROFESSIONAL MANIVEST, INC., a Utah corporation, et al., Defendants.	SUPPLEMENTAL JUDGMENT FOR ATTORNEYS' FEES, EXPENSES AND PREJUDGMENT INTEREST Civil No. 880907595 Judge J. Dennis Frederick 2159587 9-14-90-8:04am

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

Plaintiffs are awarded Judgment against defendants in the sum of $131,867.55 for attorneys' fees and in the sum of $16,231.05 for related costs and expenses.

Plaintiffs are awarded prejudgment interest of $2,969.20 on the liquidated damages awarded in the Judgment dated May 18, 1990. The total amount awarded in this Supplemental Judgment is $151,067.80.

The amounts set forth in both this Judgment and the May 18, 1990 Judgment shall bear interest from and after the respective dates of entry at the judgment rate of twelve percent (12%) per annum until paid in full.

This Judgment is in addition to the amount and terms of the

Judgment dated May 18, 1990, and does not in any way supersede that Judgment.

DATED this 10th day of ~~August~~ Sept, 1990.

BY THE COURT:

The Honorable J. Dennis Frederick
Third District Court Judge

Approved as to form:

PRINCE, YEATES & GELDZAHLER

By_____
Ronald E. Nehring
Brian S. King
Attorneys for Defendants

AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

De Anne W. Barron, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for Plaintiffs herein; that she served the attached Findings of Fact and Conclusions of Law on Attorneys' Fees, Expenses and Prejudgment Interest and Supplemental Judgment for Attorneys' Fees, Expenses and Prejudgment Interest, Civil No. 880907595, Third District Court, upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Ronald E. Nehring, Esq.
Brian S. King, Esq.
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De Anne W. Barron

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Residing at: Salt Lake

My Commission Expires:
10/29/92