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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 v. Professional Maninvest, Inc., a Utah corporation; and Maninvest Corporation, a Utah corporation : Petition for Writ of Certiorari

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, :

v. :

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

Defendants and Appellants. :

Priority No. 16

Case No. _____

PETITION FOR WRIT OF CERTIORARI OF APPELLANTS

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County,
The Honorable J. Dennis Frederick Presiding, and
From the Judgment of the Utah Court of Appeals,
The Honorable Russell W. Bench;
The Honorable Pamela T. Greenwood; and
The Honorable Gregory K. Orme (dissenting) Presiding

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LIST OF PARTIES

The caption of the case contains the names of all parties.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a 50-year commercial ground lease having a present value the trial court found to be at least \$500,000 may be forfeited based solely upon the following three alleged defaults:

(a) An alleged "encumbrance" of the fee interest which the Court of Appeals ruled had no legal effect and which was created by a December, 1987 pledge of the leasehold interest solely for financing.

(b) An alleged "assignment" of the lease, made solely as security for the same financing transaction, which the Court of Appeals ruled also had no legal effect, and which the lessors conceded did not violate a general lease prohibition against assignments.

(c) Weeds remaining on the subject property despite the lessees' reasonable efforts at weed control.

2. Whether the lessees were entitled to a new trial because the trial court based its forfeiture decision upon eight additional alleged defaults which the Court of Appeals implicitly ruled should not have been considered, because they were not included in the notices of default and forfeiture sent by the lessors.

3. Whether the lessors violated the implied contractual covenant of good faith and fair dealing in withholding consent to the above "assignment", because the

lessors intended to require renegotiation of the rental amount as a condition to such consent.

REPORT OF OPINION ISSUED BY THE COURT OF APPEALS

The reported Court of Appeals Opinion is found at 184 Utah Adv. Rpt. 55. West Publishing also indicates that the Opinion will be reported at 829 P.2d 160. A copy of the Opinion is attached hereto as Appendix "A", and a copy of the Order denying rehearing is attached hereto as Appendix "C".

SUPREME COURT JURISDICTION

The Court of Appeals' decision was entered on April 3, 1992 (App. "A"). The Court of Appeals extended the time for filing the petition for rehearing until April 24, 1992 (App. "B"). The petition for rehearing was filed on April 23, 1992, and the Order denying that petition was entered on May 14, 1992 (App. "C"). This Court has jurisdiction to review the Court of Appeals decision by writ of certiorari pursuant to Utah Code Ann. § 78-2-2(3)(a) and (5) (1953 as amended).

CONTROLLING PROVISIONS OF CONSTITUTIONS, STATUTES, ORDINANCES AND REGULATIONS

There are no such provisions that appellants deem to be controlling.

STATEMENT OF THE CASE

Plaintiffs-Appellees (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, App. "H".) Defendants (sometimes referred to cumulatively as "Manivest") are successors-in-interest to

the lessees. With the lessors' consent, Manivest and its predecessor 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 Howes' 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, App. "G") alleged only the following defaults:

1. That Manivest violated paragraphs 4 and 5 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. (App. "G", ¶¶23-28.)

2. That Manivest violated paragraph 5 of the Lease by failing to control weeds and properly maintain the property. (App. "G", ¶¶12, 21, 22.)

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, as leverage to force renegotiation of the \$24,000 per year rental.

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, Add. "I"), 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", App. "F"), ruling the lease was 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, App. "F") and Judgment of Forfeiture and Order of Possession (R. 1027, App. "D") 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.

The appeal was transferred to the Court of Appeals, and on April 3, 1992 the Court of Appeals entered its decision affirming the trial court. (App. "A".) On May 14, 1992 Manivest's petition for rehearing was denied (App. "B".) Judge Orme dissented from both decisions.

STATEMENT OF FACTS

1. The Lease and Option Agreement at issue was executed on October 14, 1960. The lessors were members of the Howe family, succeeded in interest by the plaintiff Trust. The lessee was Valley Shopping Center, a general partnership. [App. "H"; Court of Appeals' Opinion ("Opinion"), App. "A", p. 2.]

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, Trial Ex. 2, Opinion, p. 2.) In 1971, the Lease was assigned to National Realty, Ltd., a limited partnership, with the Howes' consent. (Trial Ex. 5.) Professional Maninvest was the general partner of National. Although the lease contained an option to purchase, the option was never exercised, and it expired. (App "H"; Opinion, p. 2.)

3. In September 1983, Mr. Gerrit Steenblik advised Maninvest's Mr. Larry Leeper by letter that weeds were growing through the pavement on the southwest portion of the property. (Trial Ex. 23.) Maninvest'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.)

4. In the period from December, 1987 to January, 1988 Maninvest sought a \$4,000,000 line of credit from Valley Bank and Trust Company. This obligation was secured by a trust deed, and an assignment of the Maninvest ground lease and subtenant leases. The assignment and trust deed were made for security purposes only. (Opinion, p. 2.) Although the trust deed did not expressly limit its reach to the Maninvest leasehold, the trust deed was never intended to encumber the Howes' fee interest. (Tr. 114, 115.)

5. Maninvest and Valley Bank sought the Howes' consent to the assignment of the Howe lease as part of the 1987-1988 transaction. The Howes' refused. (Trial Ex. 19, 30, Tr. 72, Opinion, p. 2.) Thereafter, the Howes sent notices of

default and termination based only on the assignment, the trust deed, and weed growth on the property. (Opinion, pp. 2-3.) Although other default allegations surfaced at trial, only the three alleged defaults discussed herein formed the basis for the Court of Appeals' decision. (Opinion, pp. 2-3, n. 2.)

6. In October 1988, prior to the filing of this action, Valley Bank released the assignment and reconveyed the trust deed. (Tr. 61, 255, Trial Ex. 16., Opinion, p. 2.)

7. On July 10, 1989, while this action was pending in the trial court, Murray City issued a violation notice concerning weeds on a vacant field which is part of the leased premises. (Opinion, p. 3.) 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 several firms to cut and spray weeds which grow and accumulate on the shopping center property and the undeveloped ground adjacent to it. (Tr. 382, 383.)

8. The trial court found that at the time of forfeiture of the lease, the present value to Manivest of the cash flow from the subleases during the remaining term of the lease was between \$500,000 and \$600,000 (App. "E", Finding No. 26.)

ARGUMENT

INTRODUCTION

Forfeiture is an equitable remedy that cannot be based on technical, non-material defaults that caused no harm to the lessors. Because one could not imagine more technical or harmless defaults than the three that the Court of Appeals found to be sufficient for forfeiture, this Court should grant certiorari.

The first two alleged defaults were really one transaction (the December 1987 pledge of the leasehold to Valley Bank as security for financing), which the Court of Appeals found breached two lease provisions, a covenant against "encumbrances" and a prohibition of "assignments." At page 5 of its Opinion, however, the Court of Appeals apparently acknowledged that the alleged encumbrance created by the trust deed was not "legally enforceable" and had no "legal effect." Similarly, at page 6 the Court of Appeals found the alleged assignment to be a default justifying forfeiture "regardless of the legal effect of an actual or purported transfer."

The final alleged default was the failure to keep the property free from weeds. The Court of Appeals found forfeiture to be justified even if Manivest's efforts at weed control were reasonable. (Opinion, pp. 6-7.)

Forfeiture on these facts is nothing more than a contractual penalty, which is not permitted by law. At the time of purported termination, the parties were only about half

way through a 50-year ground lease. Thus, premature termination resulted in a cash flow loss to Manivest (and windfall to the Howes) that the trial court found to be between \$500,000 and \$600,000 when discounted to present value. On the other hand, nowhere does the Court of Appeals suggest that any harm to the Howes resulted from the three purported defaults.

While the Court of Appeals considered only the three alleged defaults discussed above, the trial court based its forfeiture award upon the cumulative effect of a myriad of other alleged defaults as well. However, the Court of Appeals implicitly ruled that these latter alleged defaults could not be considered because they were not the subject of any notice to Manivest. Opinion, pp. 2-3, n.2 and p. 7. At minimum, Manivest is entitled to a new trial to determine whether a finder of fact would award forfeiture, without the taint of the alleged defaults that were not the subject of any notice.

Although the Court of Appeals acknowledged the Howes' implied contractual covenant of good faith and fair dealing, it attempted to avoid the implied covenant by ruling that Manivest waited too long to request the Howes' consent to the Valley Bank transaction. However, the Court of Appeals overlooked that, even assuming consent was required, an earlier request would have been futile, given the bad faith position of the Howes that they were entitled to renegotiate the rental amount as a condition of giving consent.

I.
THE COURT OF APPEALS DEPARTED FROM PRIOR DECISIONS OF THIS COURT, AND FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, BY AFFIRMING LEASE FORFEITURE BASED UPON THREE ALLEGED DEFAULTS THE COURT OF APPEALS FOUND TO BE TECHNICAL AND HARMLESS

Manivest's briefs cited cases from Utah and other jurisdictions, uniformly holding that forfeiture of a contract is not permitted absent a material breach of that contract. (Manivest opening Brief, pp. 39-44, App. "J".) These authorities also show the analysis to be followed in distinguishing material breaches from technical breaches, which cannot support a forfeiture because they cause no real harm to the party seeking this most drastic remedy. (Id.)

The Court of Appeals' decision abandons these uniformly followed principles of law governing forfeiture, and fails to provide any meaningful analysis showing why the three alleged defaults considered by the Court justify forfeiture. Instead, the Court's Opinion highlights the reasons why these three alleged defaults could not be a basis for forfeiture.

A. The Alleged "Encumbrance" and "Assignment" Defaults Resulting From the 1987 Valley Bank Transaction Were Not a Proper Basis for Affirming Forfeiture Because The Court of Appeals Found They Had No Legal Effect.

The Court of Appeals apparently accepted Manivest's argument that the trust deed had no legal effect on the Howes' fee interest, because Manivest could not mortgage any more than it had, which was only the leasehold. Nonetheless, the Court ruled that "legal impossibility is [not] a defense to breach of a lease covenant against encumbrances", that "whether the

Valley Bank trust deed is legally enforceable is immaterial to whether Manivest breached the covenant against encumbrances", and that "Manivest breached the lease covenant against encumbrances, therefore, by recording the trust deed regardless of its legal effect". Opinion, pp. 4-5 (emphasis added). Similarly, at page 6, the Court ruled that "Manivest breached the covenant against assignment, therefore, regardless of the legal effect of an actual or purported transfer." (Emphasis added.)

In so ruling, the Court relied solely upon Brewer v. Beatross, 595 P.2d 866 (Utah 1979). That reliance is misplaced. In Brewer, the grantor conveyed by warranty deed property included within a Special Improvement District that was created prior to the conveyance. Although the District commenced construction of the improvements prior to the conveyance, the property was not assessed, and the assessment lien did not become effective, until after the conveyance.

Contrary to the Court of Appeals' interpretation, the issue in Brewer was not whether the Special Improvement District encumbered the property, but when the encumbrance occurred, for purposes of determining whether the grantor breached the warranties in the warranty deed at the time of conveyance. This Court merely ruled that since the construction of the improvements began before the conveyance, and the costs of construction ultimately would be assessable to the property, the property was encumbered at the time of the

conveyance, especially since the grantor knew of these facts at that time.

The Court of Appeals correctly noted that Brewer defines an encumbrance as "any right that a third person holds in land which constitutes a burden or limitation upon the rights of the fee title holder." Opinion, p. 5 (emphasis added); citing Brewer at 595 P.2d 868. However, contrary to the Court of Appeals' analysis, that definition requires that the third party have some legal "right" to burden or limit the fee interest. In Brewer that legal right was created by the construction of the improvements, which, by statute, would ultimately allow the Special Improvement District to "burden" the fee interest by levying the assessment, and, if necessary, by foreclosing on that interest to satisfy the assessment lien.

Accordingly, the Court of Appeals erred in stating that, "[w]hether the lien was legally enforceable was thus immaterial to the Court's analysis of whether the lien encumbered the property in Brewer". Opinion, p. 5. Under Brewer, if the third party has no legal right to burden the fee interest, there is no "encumbrance". If, in Brewer, the Special Improvement District had not constructed the improvements, or had no statutory or other legal right to assess the property for improvements that were constructed, but wrongfully attempted to assess the property anyway, the grantee might be "burdened" by having to defend against the illegal

assessment, but that illegal assessment would not breach the grantor's warranty against "encumbrances".

Similarly, here, the Valley Bank trust deed was not an "encumbrance" of the "demised premises", or the Howes' fee interest therein, because it gave Valley Bank no legal "right" to "burden" anything other than Manivest's leasehold. Even if Valley Bank had foreclosed on that trust deed, there would have been no burden on the Howes' fee interest, because all that the trustee can sell is what the trustor (Manivest) owns. Utah Code Ann. § 57-1-28(2) (1953 as amended). Thus, contrary to the Court of Appeals' Opinion, an encumbrance or assignment without "legal effect" is not even a technical breach of a covenant against assignments or encumbrances, much less a breach sufficient to warrant forfeiture. See, Manley v. Pool, 246 P. 386, 387 (Okla. 1926); See also, 20 Am. Jur. 2d, Covenants, Conditions, and Restrictions, § 83, p. 647, n.9; See also, 5 A.L.R. 1084, 1086-1087, Annot. Unfounded outstanding claims to or against real property as breach of covenants of deed.

Also, the Court of Appeals' reference to the legal effect of the "assignment" to Valley Bank purports to address only Manivest's argument that any assignment falling within the purview of the "unassignable" language of lease paragraph 4 was a nullity, rather than a default. However, Manivest's other argument on this issue, which was overlooked by the Court, was that a lease assignment given solely as security for a loan is

not precluded by a general covenant against lease assignments. (App. "J", p. 22; Manivest Reply Brief, App. "K", pp. 10-13.) Ultimately, even the Howes agreed with this position. (Howes' Trial Brief, R. 435, App. "M", pp. 18, 30.)

B. Weeds Remaining After Manivest's Reasonable Efforts at Weed Control Also Were Not A Proper Basis For Affirming Forfeiture

In response to Manivest's argument that it should be held only to a standard of reasonableness in controlling weeds on the property, the Court of Appeals stated that "[T]he lease, however, was silent as to the standard of maintenance to be applied", and that "[i]f the parties intended that maintenance would be governed by a reasonableness standard, they should have included it in the contract". (Opinion, pp. 6-7.)

These statements overlook the settled rule of contract interpretation that where a contract is silent as to the standard of performance, a standard of reasonableness will be presumed or implied. The Brower Co. v. Garrison, 468 P.2d 469, 473 (Wash. App. 1970); Cf., Puget Inv. Co. v. Wenck, 221 P.2d 459, 464 (Wash. 1950) (Lease providing that tenant maintain premises in 'first class state of repair' required only such repairs as were "reasonably necessary" to conduct tenant's business.) To apply an absolute standard, as the Court of Appeals apparently did, leads to ludicrous results.

A single weed left growing on the property could result in forfeiture, regardless of the lengths to which the lessee went in attempting to exterminate weed growth. See, Weiner v. Wilshire Oil Co. of Texas, 389 P.2d 803, 808 (Kan.

1964) (In interpreting a contract "[r]esults which...reduce the terms of the contract to an absurdity should be avoided".) A party should not be required to include a provision in a contract stating, "This contract will be interpreted reasonably", and instead has a right to expect that a court will interpret it reasonably. Id.

At page 7 of the Opinion, the Court of Appeals also stated that "Manivest was cited by Murray City for growing weeds on the property". However, the Court also overlooked that one of these citations was issued on July 10, 1984 (Ex. 34), over a year after the purported forfeiture, and while this litigation was pending. The other citation was issued on April 21, 1983 (Ex. 23), almost five years before the first Notice of Default. Accordingly, neither of these citations could have been a basis for forfeiture.

C. The Court of Appeals' Rationale For Forfeiture Permits That Remedy To Be Used As An Impermissible Contractual Penalty

Even assuming that the "encumbrance", "assignment" or weeds constituted breaches of the lease, the Court of Appeals' own descriptions of these defaults, quoted above, show just how technical and meaningless they really were. Nonetheless, the Court brushed aside all of Manivest's arguments concerning the gross inequities of forfeiture here, except one.

For some reason, the Court focused only on the value of the improvements. After noting at the beginning of the Opinion that Manivest or its predecessors had an option to

purchase the property which they declined to exercise, the Court stated at page 7 of the Opinion:

We have reviewed the remaining arguments raised on appeal concerning the appropriateness of forfeiture. Because the option to purchase had expired and the parties agreed that the Howes would succeed to the improvements upon termination, we deem them to be without merit.

(Emphasis added.) While Manivest agrees that the Court is not required to specifically address each and every argument raised by the parties, Manivest believes that the Court overlooked the two most important points:

1. The real loss to Manivest, and windfall to the Howes, was not the value of the improvements, but the cash flow from the shopping center subleases over the 20-25 years remaining on the lease at the time of forfeiture. The trial court found the present value of this loss and windfall to be \$500,000 - \$600,000. (App. "E", Finding No. 26.)

2. Nowhere in the Court's Opinion is there even a hint of any harm to the Howes that could justify an award to them in excess of half a million dollars. Instead, this award is nothing more than a penalty imposed upon Manivest for an alleged encumbrance and assignment that in the Court of Appeals' own words had no "legal effect", and for the presence of a few weeds despite Manivest's reasonable efforts at weed control.

On these facts, a \$500,000 - \$600,000 award to the Howes by the trial court pursuant to a contractual liquidated

damages provision would have to be reversed as a penalty.

Abbott v. Goodwin, 809 P.2d 716 (Ore. App. 1991); Such an award is no less a penalty when it results from forfeiture.

Alumet v. Bear Lake Grazing Co., 812 P.2d 253, 258 (Idaho 1991).

II.

BECAUSE THE COURT OF APPEALS INDICATED THAT ONLY THREE OF THE ALLEGED DEFAULTS COULD PROPERLY BE CONSIDERED, PRIOR DECISIONS BY THIS COURT ESTABLISH THAT MANIVEST IS ENTITLED TO A NEW TRIAL FREE OF THE TAINT OF THE EIGHT ADDITIONAL DEFAULTS FOUND BY THE TRIAL COURT.

Because the Court of Appeals' Opinion considered only the three allegations of default that were the subject of written notice to Manivest from the Howes, Manivest understands the Opinion to mean that these were the only three that properly could be considered. Opinion, pp. 2-3, n. 2 and p. 7. Utah law requires written notice of default and opportunity to cure as a condition precedent to forfeiture, even if the lease does not. (App. "K", pp. 3-10.)

However, the trial court's award of forfeiture was based upon eight additional alleged defaults that were not the subject of written notice, and were raised for the first time at trial. (App. "K", pp. 6-7.) In issuing its decision from the bench, the trial court recited its findings on all of these alleged defaults and then stated:

The cumulative effect and cause [sic] 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 [i.e., forfeiture] is appropriate.

App. "F", p. 7 (emphasis added).

Accordingly, the trial court's decision was tainted by the eight alleged defaults that should not have been considered. Under Jack B. Parson Construction Co. v. State of Utah, 725 P.2d 614 (Utah 1986), when an appellate court cannot determine whether the trial court's decision was based on proper or improper grounds, the correct course of action is to remand for a new trial, rather than for the appellate court to decide the issue itself.

III.

THE COURT OF APPEALS IGNORED PRIOR DECISIONS BY THIS COURT THAT WHERE A PARTY TO A CONTRACT RESERVES A RIGHT OF CONSENT, THAT PARTY IS REQUIRED TO GIVE ITS CONSENT UNLESS IT HAS A REASONABLE AND GOOD FAITH BASIS FOR WITHHOLDING CONSENT.

Although at page 6 of its Opinion, the Court of Appeals acknowledges the implied contractual covenant of good faith, cooperation and fair dealing, the Court goes on to state:

However, there is no violation of the duty of good faith, as a matter of law, when a party is simply exercising its contractual rights.

Thus, the Court appears to be implying that where the consent of a party is required by contract, that party may withhold consent for a good reason, a bad reason, or no reason at all. If so, the Court of Appeals has overlooked this Court's decision in Prince v. Elm Inv. Co., Inc., 649 P.2d 820 (Utah 1982), holding that, based upon the implied covenant of good faith, consent cannot be withheld arbitrarily.

The Court of Appeals also indicates that the Manivest request for consent was untimely. However, that request was

almost simultaneous with the Valley Bank transaction at issue. The assignment document is dated December 8, 1987 (Ex. 17), and the Manivest letter requesting consent is dated January 22, 1988 (Ex. 8). If the Howes had no reasonable basis for withholding consent prior to the transaction, the fact that the request for consent occurred shortly after the transaction should give them no additional basis for withholding consent, except as another technicality. Manivest was not seeking "compelled condonation" (Opinion, p. 6), but only the fair treatment that the implied covenant of good faith requires.

More importantly, the Court of Appeals overlooked that it would have been futile for Manivest to request consent prior to the transaction, and that where a tender of performance is futile, that performance is excused. Kreger v. Hall, 125 P.2d 638, 643 (Wash. 1967). As the Howes made clear, both in the trial court (App. "G", ¶¶17 and 18; Tr.6-8, App. "N") and on appeal (App. "L", pp. 36-37), even if their objection to the form of the consent document had been resolved, they had no intention of giving consent absent renegotiation of the rental amount. Since nothing in the lease gave the Howes the right to condition consent on an increase in rental, they were not, as the Court of Appeals suggests, merely "exercising contractual rights". Instead, they were acting in bad faith.

CONCLUSION

By interpreting the lease mechanistically rather than realistically, the Court of Appeals Opinion exalted form over substance and rewrote the law of forfeiture. Unless certiorari is granted and that decision overturned, the precedent created will turn the law of contracts and of forfeiture on its head.

DATED this 15th day of June, 1992.

PRINCE, YEATES & GELDZAHLER

By Ronald E. Nehring
Ronald E. Nehring

By James A. Boever
James A. Boever
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on the 15th day of June, 1992, I caused the original and nine true and correct copies of the foregoing PETITION FOR WRIT OF CERTIORARI to be hand-delivered to the Utah Supreme Court, and four true and correct copies to be mailed, first-class postage prepaid thereon, to each of the following:

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

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

RECEIVED

FILED

APR - 4 1992

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

APR 3 1992

Prisco, Yeates, & Goldstein

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

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, Appellees,)
and Cross-Appellants,)

v.)

Professional Maninvest, Inc., a)
Utah corporation; Maninvest)
Corporation, a Utah)
corporation,)

Defendants, Appellants)
and Cross-Appellees.)

OPINION
(For Publication)

Case No. 910598-CA

F I L E D
(April 3, 1992)

Third District, Salt Lake County
The Honorable J. Dennis Frederick

Attorneys: Ronald E. Nehring, Salt Lake City, for Appellants
Michael R. Carlston, Max D. Wheeler, Salt Lake City,
and Gerrit M. Steenblik, Phoenix, for Appellees

Before Judges Bench, Greenwood, and Orme.

BENCH, Presiding Judge:

Professional Maninvest, Inc. (Maninvest) appeals from a
judgment by the trial court arising out of breach of lease. The
trial court awarded damages, attorney fees, costs and expenses.
We affirm.

FACTS

On October 15, 1960, J. E. Lehnherr, Herman L. Franks, and
Stanford L. Hale (as partners doing business as Valley Shopping
Center) leased land in Salt Lake County from Earl E. Howe, John

O. Howe, Vivian Howe, and Maxine W. Howe (the Howes)¹ under the terms of a fifty-year ground lease. The lessees had a fifteen-year option to purchase the property under the lease. The lessees were also prohibited from making any assignments except to a corporation that would be organized to build the shopping center. The partners of Valley Shopping Center assigned the lease to Southlake Shopping Center, Inc., Manivest's predecessor-in-interest. When the option to purchase expired in October 1975, only certain portions of the leased property had been bought, leaving other parts subject to the lease without a purchase option.

In December 1987, Manivest sought a \$4 million loan from Valley Bank & Trust Company (Valley Bank), and assigned the ground lease as well as the rents from all tenant subleases to Valley Bank. As security, Manivest also executed and recorded a deed of trust in favor of Valley Bank. After the trust deed had been executed, delivered, and recorded, Manivest sought the consent of the Howes to the assignment by sending them an "acknowledgement." The Howes refused to consent to the assignment, specifically objecting to language of the acknowledgement that would have subordinated their interest to Valley Bank.

The undersigned acknowledges that the Lessee is encumbering their interest in the property and said loan is hereby approved as required by said lease.

The Howes thereupon demanded that Manivest remove the trust deed, and served Manivest a notice of default by a letter dated March 30, 1988. As grounds for default, the letter cited that Manivest was in breach of

1. The covenant to keep the premises free and clear of all liens and encumbrances²;

1. The trial court found that co-plaintiffs John O. Howe; Robert E. Howe and Bonnie F. Howe; William K. Evans and Carole H. Evans; and Judith H. Steenblik are successors-in-interest to the original lessors.

2. The Howes also discovered that Manivest had earlier recorded trust deeds on the property in 1978 and 1982 to secure other loans. The Howes also learned that Manivest had quitclaimed real property to Wallaby Enterprises in 1983. Although the loans were paid and the trust deeds released when the obligations were

(continued...)

2. The covenant not to assign the Lease without [the lessor's] prior written consent; and

3. The covenant to maintain the premises and to keep them free from weeds and other obnoxious growth.

Manivest failed to cure the conditions complained of, and the Howes sent Manivest a second notice of default on April 29, 1988. When the conditions remained unchanged, the Howes served Manivest a notice of termination on May 31, 1988, demanding that Manivest surrender the property. Manivest refused to vacate the premises. Before receiving the termination notice, Manivest had assigned its interest in the lease to a trust, again unbeknownst to the Howes, to liquidate all assets, including the Southlake Shopping Center for the benefit of creditors on April 28, 1988.

In September 1988, Manivest apparently removed some, but not all of the encumbrances. The Howes thereupon filed a complaint against Manivest in November 1988 on the ground that the assignments and encumbrances violated the lease. The Howes also complained that Manivest's failure to maintain the property constituted an additional lease violation. Manivest counterclaimed that the Howes had no valid reason for withholding their consent to the assignment and, therefore, acted in bad faith. While the case was still pending, Murray City notified Manivest on July 10, 1989, that weeds growing on the property violated a city ordinance.

The trial court found that Manivest had executed, delivered, and recorded a trust deed on the leased property and made an assignment of the lease in favor of Valley Bank. The trial court also found that weed growth and other lease violations were substantial, and when taken together with the assignments and encumbrances, constituted a material breach of the lease. The trial court dismissed Manivest's counterclaim, and ruled that Manivest had "forfeited" its interest in the leasehold estate to the Howes. The trial court then ordered possession, and entered judgment in favor of the Howes in the amount of \$24,489.50 as "liquidated" damages for Manivest's continued use of the

2. (...continued)
satisfied, none of the transactions had been entered into with the Howes' knowledge or consent. Inasmuch as the acts complained of in the Howes' March 1988 default letter support a claim for breach of contract, we do not address the legal effect, if any, of the earlier transactions.

property, \$16,231.05 in related costs and expenses, and \$131,867.55 in attorney fees.

LEASE

A. Standard of Review

Interpretation of an "unambiguous, integrated contract is a question of law, which is reviewed on appeal for correctness." Crowther v. Carter, 767 P.2d 129, 131 (Utah App. 1989). A cardinal rule in construing a contract is to give effect to the intentions of the parties and, if possible, to glean those intentions "from an examination of the text of the contract itself." LDS Hosp. v. Capitol Life Ins. Co., 765 P.2d 857, 858 (Utah 1988). "It is a long-standing rule in Utah that persons dealing at arm's length are entitled to contract on their own terms without the intervention of the courts to relieve either party from the effects of a bad bargain." Hal Taylor Assocs. v. Unionamerica, Inc., 657 P.2d 743, 749 (Utah 1982).

B. Covenant Against Encumbrances

Manivest contends that the Valley Bank trust deed did not encumber the Howes' reversionary fee interest because Manivest could not have pledged more than its own leasehold estate to Valley Bank. Manivest argues that the trial court erred in determining that the Valley Bank trust deed was a breach of the covenant against encumbrances. The lease required the lessee, however, "to keep the demised premises free and clear of all liens and encumbrances of any nature whatsoever." The lease prohibition against all encumbrances of any nature encompasses each and every encumbrance. Manivest breached the lease by recording the trust deed, therefore, because the trust deed not only encumbered Manivest's leasehold interest in the demised premises, but also purported to encumber the Howes' fee interest. Accordingly, we reject the argument that legal impossibility is a defense to breach of a lease covenant against encumbrances.

The Utah Supreme Court reached a similar conclusion in Brewer v. Peatross, 595 P.2d 866 (Utah 1979). In Brewer, the grantors of a warranty deed argued that a lien in favor of an improvement district did not legally encumber real property because the lien did not attach until after an ordinance levying assessment for the improvements came into effect. Id. at 868. Despite the argument that the property was not legally encumbered, the court held the grantors liable for breach of the covenant against encumbrances. The court reasoned that the property was encumbered because the existence of the improvements was either known to the grantors or was discoverable from the

record by the lien filed. Id. Whether the lien was legally enforceable was thus immaterial to the court's analysis of whether the lien encumbered the property in Brewer. Likewise, whether the Valley Bank trust deed is legally enforceable is immaterial to whether Manivest breached the covenant against encumbrances.

In Brewer, the Utah Supreme Court defined an "encumbrance" as "any right that a third person holds in land which constitutes a burden or limitation upon the rights of the fee title holder." Id. The Valley Bank trust deed burdened the Howes' fee interest until it was removed from the record because it purported to limit their rights. Manivest breached the lease covenant against encumbrances, therefore, by recording the trust deed regardless of its legal effect.

C. Covenant Against Assignment

Manivest contends that its assignment of the lease to Valley Bank was not a breach of the covenant against assignment. Manivest argues that a valid assignment could not have been legally effected without the Howes' consent inasmuch as the lease was, by its terms, unassignable. The lease prohibition against assignment is as follows:

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 as "retail trade and service."

(Emphasis added.)

The Howes agreed to assignment of the lease to a corporation that would build the shopping center. Beyond the initial assignment agreed to in the lease, however, the parties agreed that the Howes' consent to any other future assignments would be

required as a prior condition of assignment. Because it is the mere act of assignment that constitutes a breach of the lease, and not the legal effect of an assignment, we reject the argument that the prohibition against assignment was limited to only those assignments carrying some legal effect. Like other provisions of the lease, the lease term against assignment is enforceable.

Manivest also argues, in the alternative, that the Howes acted in bad faith by arbitrarily withholding their consent to the assignment. In Zion's Properties, Inc. v. Holt, 538 P.2d 1319, 1321 (Utah 1975), the Utah Supreme Court recognized that "there is implied in any contract a covenant of good faith and cooperation, which should prevent either party from impeding the other's performance of his obligations thereunder; and that one party may not render it difficult or impossible for the other to continue performance and then take advantage of the non-performance he has caused." However, there is no violation of the duty of good faith, as a matter of law, when a party is simply exercising its contractual rights. Heiner v. S.J. Groves & Sons Co., 790 P.2d 107, 115 (Utah App. 1990).

The Howes were not obligated to consent to every proposed assignment. Manivest's argument that the Howes could not arbitrarily withhold their consent to an assignment of the lease confuses the duty to seek their prior permission with compelled condonation. Manivest assigned the lease to Valley Bank without first seeking or obtaining the Howes' consent. The non consensual assignment was not permitted by the lease. Manivest breached the covenant against assignment, therefore, regardless of the legal effect of an actual or purported transfer.

D. Duty to Maintain

Manivest argues that the lease imposed a duty to keep the premises only "reasonably" free from weeds. The lease, however, was silent as to the standard of maintenance to be applied:

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 or regulations [sic] of Murrar [sic] City, the laws of the State of Utah or the United States Government.

(Emphasis added.)

Manivest was cited by Murray City for growing weeds on the property. Because the condition was a violation of Murray City ordinance and Manivest allowed the condition to exist, Manivest was in breach of the lease for failure to maintain the premises free from weeds or obnoxious growth. If the parties intended that maintenance would be governed by a reasonableness standard, they should have included it in the contract. However, "[w]e will not rewrite a contract to alleviate a contracting party's mistake, but will construe it according to its terms as written." Hoth v. White, 799 P.2d 213, 217 (Utah App. 1990).

E. Remedy for Breach

The lease imposed a sixty-day cure period for breach of any of the lease covenants, and further provided that the lease would terminate automatically without notice if breach was not cured.

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 Lessor.

(Emphasis added.)

Manivest was notified of the breach of three lease covenants, and had sixty days to cure the conditions complained of. Manivest took no action to cure the defaults within that time. The trial court, therefore, correctly determined that the lease terminated as a result of Manivest's breach.

As long as the lease remained "in full force and effect," the parties agreed that "[a]ll improvements placed upon said demised premises shall remain the property of the Lessees." The Howes, therefore, succeeded to the improvements on the property upon termination. We have reviewed the remaining arguments raised on appeal concerning the appropriateness of forfeiture. Because the option to purchase had expired and the parties agreed that the Howes would succeed to the improvements upon termination, we deem them to be without merit. See State v. Carter, 776 P.2d 886, 888 (Utah 1989) (appellate court not required to analyze and address in writing each and every argument, issue, or claim raised on appeal).

ATTORNEY FEES AND COSTS

The trial court entered judgment in favor of the Howes on May 18, 1990, and awarded them fees, expenses and costs. The trial court further directed that the amount of attorney fees and costs "would be established by a supplemental judgment." The Howes applied for fees, expenses and costs approximately five weeks later. The trial court supplemented the earlier judgment with specific amounts as to costs, expenses, and fees. On appeal, Manivest challenges the award of attorney fees, expenses and costs on the ground that the Howes did not make timely application for them under Rule 54(d)(2) of the Utah Rules of Civil Procedure.

Attorney fees may be awarded in Utah "only if authorized by statute or contract." Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988). The Howes were contractually entitled to an award of a reasonable attorney fees under the lease executed in 1960 as follows

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.

(Emphasis added.)

Under the express terms of the contract, the Howes are entitled to a reasonable attorney fee, costs and expenses incurred at trial and on appeal. See G.G.A., Inc. v. Leventis, 773 P.2d 841, 846 (Utah App. 1989). Costs are also an appropriate expense of litigation. Because the time limitation of Rule 54(d)(2) does not apply to expenses or attorney fees, the rule does not bar the award. The trial court's calculations were supported by evidence in the record. See Dixie State Bank, 764 P.2d at 988-89. Accordingly, we affirm the award of attorney fees, costs, and expenses.

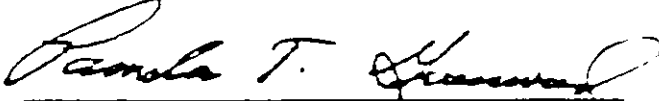
CONCLUSION

Manivest breached the lease covenant to maintain the premises as well as the covenants against assignment, and encumbrances. The lease was terminated by Manivest's separate breach of three lease covenants. The Howes were thereby entitled to possession of the premises and an award of attorney fees, expenses and related costs.



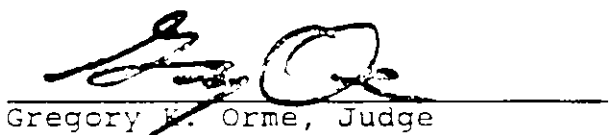
Russell W. Bench,
Presiding Judge

I CONCUR:



Pamela T. Greenwood, Judge

I DISSENT:



Gregory E. Orme, Judge

APR 23 1992

FILED

APR 18 1992

PRINCE, YEATES & GELDZAHLER
Ronald E. Nehring (2374)
James A. Boevers (0371)
PRINCE, YEATES & GELDZAHLER
Attorneys for Appellants
City Centre I, Suite 900
175 East Fourth South
Salt Lake City, Utah 84111
(801) 524-1000

Mary E. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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, :

Case No. 910598-CA

Plaintiffs and Appellees, :

vs. :

MOTION, STIPULATION AND
ORDER TO EXTEND TIME FOR
FILING PETITION FOR REHEARING

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

Defendants and Appellants. :

MOTION

Pursuant to Rule 22, Utah Rules of Appellate
Procedure, Appellants hereby move the Court for an Order
extending the time for filing their Petition for Rehearing from
April 17, 1992, to April 24, 1992. The grounds for this Motion
are that this Court's Opinion issued on April 3, 1992, was not
received by the counsel for Appellants until April 6, 1992, and

that after review of the Opinion and discussion between Appellants and their counsel, a decision to file the Petition was not made until April 10, 1992. Accordingly, Appellants require an additional week within which to file their Petition. Appellants have not previously sought an extension for filing this Petition.

DATED this 15th day of April, 1992.

PRINCE, YEATES & GELDZAHLER

By James A. Boevers
James A. Boevers
Attorneys for Appellants

STIPULATION

Appellants and Appellees hereby stipulate that the time for filing Appellants' Petition be extended from April 17, 1992, to April 24, 1992.

DATED this _____ day of April, 1992.

PRINCE, YEATES & GELDZAHLER

By James A. Boevers
James A. Boevers
Attorneys for Appellants

SNOW, CHRISTENSEN & MARTINEAU

By Michael R. Carlston
Michael R. Carlston
Attorneys for Appellees *for*

FILED

APR 21 1992

Mary Neenan

Mary T. Neenan
Clerk of the Court
Court of Appeals

ORDER

Based upon the foregoing Motion and Stipulation, IT IS
HEREBY ORDERED that the time for filing Appellants' Petition
for Rehearing is extended from April 17, 1992, to April 24,
1992.

DATED this 21st day of April, 1992.

BY THE COURT:

[Signature]

CERTIFICATE OF HAND DELIVERY

I hereby certify that, on the 15th day of April,
1992, I caused to be hand-delivered a true and correct copy of
the foregoing MOTION, STIPULATION AND ORDER TO EXTEND TIME FOR
FILING PETITION FOR REHEARING to the following:

Michael R. Carlston
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Salt Lake City, UT 84145

Karen M. McCullough

9019G
041592

CERTIFICATE OF MAILING

I hereby certify that on the 21st day of April, 1992, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

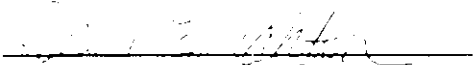
Ronald E. Nehring
Prince, Yeates & Geldzahler
Attorneys at Law
175 East 400 South, #900
Salt Lake City, UT 84111

Michael R. Carlston
Max D. Wheller
Snow, Christensen & Martineau
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10 Exchange Place, 11th Floor
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Salt Lake City, UT 84110

Gerrit M. Steenblik
Jennings, Strouss & Salmon
Attorneys at Law
One Renaissance Square
Two North Central
Phoenix, Arizona 85004-2393

Dated this 21st day of April, 1992.

By


Deputy Clerk

FILED

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

MAY 14 1992

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, Appellees,
and Cross-Appellants,)

v.)

Professional Maninvest, Inc.,)
a Utah corporation; Maninvest)
Corporation, a Utah)
corporation,)

Defendants, Appellants,
and Cross-Appellees.)

ORDER DENYING
PETITION FOR REHEARING
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

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MAY 15 1992

FILED

Case No. 910598-CA

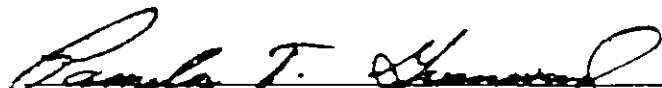
THIS MATTER having come before the Court upon appellant's
Petition for Rehearing, filed April 23, 1992,

IT IS HEREBY ORDERED that the appellant's Petition for
Rehearing is denied.

Dated this 14th day of May, 1992.

BY THE COURT:


Russell W. Bench, Judge


Pamela T. Greenwood, Judge

I dissent from the denial of the petition for rehearing at
this juncture. I would call for a response.


Gregory K. Orme, Judge

CERTIFICATE OF MAILING

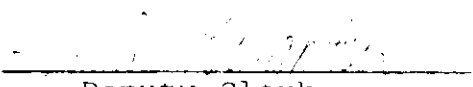
I hereby certify that on the 14th day of May, 1991, a true and correct copy of the foregoing ORDER DENYING PETITION FOR REHEARING was deposited in the United States mail to the parties listed below:

Ronald E. Nehring
Prince, Yeates & Geldzahler
Attorneys at Law
175 East 400 South, #900
Salt Lake City, UT 84111

Michael R. Carlston
Max D. Wheller
Snow, Christensen & Martineau
Attorneys at Law
10 Exchange Place, 11th Floor
P. O. Box 3000
Salt Lake City, UT 84110

Gerrit M. Steenblik
Jennings, Strouss & Salmon
Attorneys at Law
One Renaissance Square
Two North Central
Phoenix, Arizona 85004-2393

Dated this 14th day of May, 1992.

By 
Deputy Clerk

FILED
MAR 13 11 58 AM 1990
[Signature]

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

JOHN O. HOWE, Trustee, et al.,
Plaintiffs,

JUDGMENT OF FORFEITURE AND
ORDER OF POSSESSION

vs.

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

Civil No. 880907595

Defendants.

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 $0^{\circ}14'30''$ West 155 feet; thence North $89^{\circ}49'35''$ West 31.07 feet; thence South $66^{\circ}00'$ West 433.52 feet; thence North $24^{\circ}00'$ West 100.0 feet; thence South $66^{\circ}00'$ West 35.0 feet; thence North $24^{\circ}00'$ West 100.0 feet; thence North $66^{\circ}00'$ East 28.30 feet; thence North $24^{\circ}00'$ West 167.50 feet to the South line of 5600 South Street; thence South $89^{\circ}49'35''$ 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 $66^{\circ}00'$ West 461.39 feet, more or less; thence North $24^{\circ}00'$ West 485.00 feet; thence North $66^{\circ}00'$ East 508.62 feet; thence South $89^{\circ}49'35''$ East 156.07 feet to the West line of 900 East Street; thence South $0^{\circ}14'30''$ 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 $0^{\circ}14'30''$ West along said West line 429.66 feet; thence West 200.50 feet; thence North $0^{\circ}14'30''$ East 275.69 feet; thence North $24^{\circ}00'$ West 58.86 feet; thence North $66^{\circ}00'$ 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 $0^{\circ}14'30''$ East 275.69 feet; thence North $24^{\circ}00'$ West 58.86 feet; thence South $66^{\circ}00'$ West 215.2 feet, more or less; thence North $24^{\circ}00'$ West 485.0 feet; thence North $66^{\circ}00'$ East 75.1 feet, more or less, to the Westerly line of Parcel 1 above; thence along said Westerly line of Parcel 1, North $24^{\circ}00'$ West 100 feet; thence South $66^{\circ}00'$ West 35 feet; thence North $24^{\circ}00'$ West 100 feet; thence North $66^{\circ}00'$ East 28.3 feet; thence North $24^{\circ}00'$ 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.

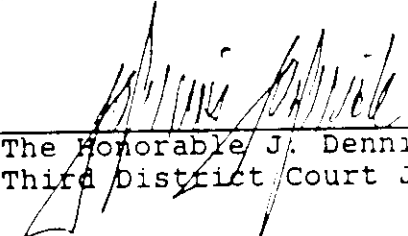
5. Plaintiffs are awarded liquidated damages for defendants' continued use of the Property to March 12, 1990 in the amount of \$24,489.50, together with prejudgment interest as allowed by law.

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.

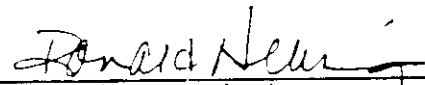
DATED this 18th day of May, 1990.

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

11

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

JOHN O. HOWE, Trustee, et al.,
Plaintiffs,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

vs.

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

Civil No. 880907595

Defendants.

Friedman

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.

3-10-90

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

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.

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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.

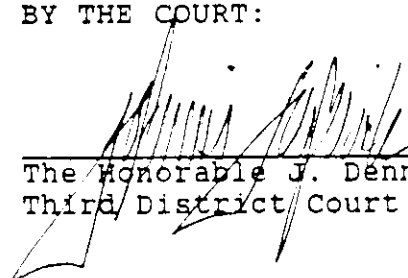
11. Plaintiffs are entitled to a judgment of forfeiture and an order granting immediate possession of the Property.

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:

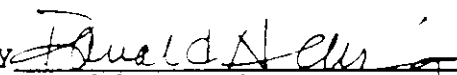


The Honorable J. Dennis Frederick
Third District Court Judge

APPROVED AS TO FORM:

PRINCE, YEATES & GELDZAHLER

By



Ronald E. Nehring
Brian S. King
Attorneys for Defendants

1 MONDAY, MARCH 12. 1990

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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

CREED H. BARKER, CSR

EXHIBIT "D" 336693

1 DEFENDANTS ASSIGNING ITS LEASEHOLD INTEREST.

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

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

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

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

1 548 P2D 889, A 1976 CASE. "BUT IT IS ALSO TRUE PARTIES ARE
2 FREE TO CONTRACT ACCORDING TO THEIR DESIRES IN WHATEVER
3 TERMS THEY CAN AGREE UPON. AND FURTHER THAT THE CONTRACT
4 SHOULD BE ENFORCED ACCORDING TO ITS TERMS UNLESS THAT
5 RESULT IS SO UNCONSCIONABLE THAT A COURT OF EQUITY WOULD
6 REFUSE TO ENFORCE IT." JACOBSON VS. SWAN, 278 P2D 294, A
7 1954 CASE AND PERKINS VS. SPENCER, 243 P2D 446, 1952.

8 "A PARTIES' RIGHT TO CONTRACT SHOULD NOT BE
9 LIGHTLY INTERFERED WITH. IT IS ONLY WHEN THE FORFEITURE
10 AS CLEARLY DEMONSTRATED BY THE FACTS WOULD BE SO GROSSLY
11 EXCESSIVE TO BE ENTIRELY DISPROPORTIONATE TO ANY POSSIBLE
12 LOSS THAT MIGHT HAVE BEEN CONTEMPLATED TO ENFORCE IT, WOULD
13 SHOCK THE CONSCIENCE OF A COURT OF EQUITY. IT HAS BEEN
14 HELD THAT AS FAR AS RESCISSION IS CONCERNED IT SHOULD NOT
15 BE GRANTED WITHOUT A MATERIAL BREACH, WHICH HAS BEEN
16 DEFINED AS ONE OF SUCH PRIME IMPORTANCE THAT THE CONTRACT
17 WOULD NOT BE MADE IF DEFAULT IN THAT PARTICULAR HAD BEEN
18 CONTEMPLATED. POLYGLYCOAT VS. STEVEN HOLCOMB, 591 P2D
19 449, 1979. IN THIS CASE THE EVIDENCE HAS ESTABLISHED TO
20 THIS COURT'S SATISFACTION THE FOLLOWING:

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

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

3 NO. 2: THE DEFENDANTS ASSIGNED TO VALLEY BANK
4 AND TRUST ITS INTEREST, THEIR INTEREST IN THE LEASE ON MAY
5 21, 1982, WITHOUT THE KNOWLEDGE OR THE CONSENT OF THE
6 PLAINTIFFS, EXHIBITS 12 AND 13.

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

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

15 NO. 5: WHEN DEFENDANTS AGENT LEAPER (SIC)
16 SOUGHT RATIFICATION AND APPROVAL FROM THE PLAINTIFFS ON
17 JANUARY 22ND, 1988, HE FAILED INTENTIONALLY OR OTHERWISE TO
18 ADVISE THE PLAINTIFFS THE LANGUAGE OF THE ACKNOWLEDGEMENT
19 OF ASSIGNMENT HE SOUGHT PLAINTIFF'S APPROVAL OF, HAD BEEN
20 MODIFIED TO INCLUDE ACKNOWLEDGEMENT NOT REQUESTED BY THE
21 BANK; THAT THE PLAINTIFFS AGREED THE ASSIGNMENT WAS QUOTE:
22 "ENCUMBERING THEIR INTEREST", UNQUOTE. EXHIBITS 8, 17 AND
23 19.

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

000025

1 DEMANDED THE ASSIGNMENT AND TRUST DEED WERE IN VIOLATION OF
2 THE LEASE BY LETTER OF MARCH 30, 1988, EXHIBIT 30. YET THE
3 CONVEYANCE OF THE TRUST DEED AND THE RELEASE OF ASSIGNMENT
4 WERE NOT OBTAINED UNTIL SEPTEMBER 1 OF '88, ON SEPTEMBER
5 22ND OF '88, RESPECTIVELY. EXHIBIT 33.

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

9 NO. 6: DEFENDANTS EXECUTED THREE SEPARATE
10 PURCHASE AND SELL AGREEMENTS BETWEEN AND AMONG NATIONAL
11 REALTY LIMITED TO M.D. INVESTMENTS LIMITED FEBRUARY 1,
12 1976; M.D. INVESTMENTS TO WESTCO REALTY INC., JANUARY 1,
13 1978; AND WESTCO REALTY INC. TO DIVERSIFIED REALTY, LIMITED
14 JANUARY 1, 1978, PURPORTING TO SELL DEFENDANT'S INTEREST IN
15 THE LEASEHOLD PROPERTY WITHOUT THE KNOWLEDGE OR CONSENT OF
16 THE PLAINTIFFS. EXHIBIT 22.

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

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

000007

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

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

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

23 FURTHER NOTICE WAS GIVEN TO DEFENDANTS ON APRIL
24 29, 1988 -- EXHIBIT 30 -- GIVEN DEFENDANT'S FAILURE TO
25 REMEDY THE SITUATION. PLAINTIFFS SERVED THE NOTICE OF

200629

1 TERMINATION. EXHIBIT 31.

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

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

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

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

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

23

24

25

FILED IN CLERK'S OFFICE
Salt Lake City, Utah

NOV 22 1988

H. Dixon Hingston, Salt Lake Dist. Court
By H. Dixon Hingston
Deputy Clerk

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Attorneys for Plaintiff

37569
37623
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,

VERIFIED COMPLAINT

Plaintiffs,

vs.

Civil No. 880967595 PL

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.

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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 Maninvest, Inc. and Maninvest 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 Maninvest Inc., Maninvest 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 Maninvest Inc. and Maninvest 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 October 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 unanticipated 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

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.

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,

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

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

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

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

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

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
William K. Evans

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

Duane W. Carter
NOTARY PUBLIC
Residing at: Salt Lake Co, UT

My Commission Expires:

3/12/89

SCMMRC395

Recorded at _____
 of _____
 Filed _____
 Recorder, Salt Lake County, Utah
 By _____
 Per _____

1744315

LEASE AND OPTIONS

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. LEINHER, HERMAN L. FRANKS and STANFORD L. HALE, copartners, doing business under the firm name and style of VALLEY SHOPPING CENTER, herein- after referred to as the Lessees.

W I T N E S S E T H

That the Lessors, for and in consideration of the cove- nants 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:

Descrip-
tion

S 2 7/4 W 4 7/4 S 12 2 1/2 E

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 Southwesterly 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

LAW OFFICES OF
 MOFFAT, IVERSON AND ELLGREN
 100 WEST WALKER STREET
 SALT LAKE CITY, UTAH

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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. R. 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.

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.

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

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LAW OFFICES OF
MOFFAT IVERSON AND EUGENEN
SALT LAKE CITY, UTAH

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Lease remains in full force and effect.

Assignment
of Lease
and sub-
leasing

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".

Maintenance
of
premises

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 or regulations of Murrariy City, the laws of the State of Utah or the United States Government.

Liens

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.

Inspection

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

Landlord's
lien

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

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.

Termination upon default

Lessee's liability upon default

Assignment for creditors and bankruptcy

Changes

Heirs and successors

Subordina-
tion of
Lessors'
interest
to Mort-
gagee

14. The Lessors agree that upon the Lessees supplying them with a duplicate original lease between the Lessors 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.

Option
to buy

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

Purchase
price

The purchase price for the first twelve (12) months following the execution of this Agreement shall be \$365,000.00, 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.

Method of
exercise
of Option

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

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MOFFAT, IVERSON AND EUGEN
SUITE 101, WALKER BARR BUILDING
SALT LAKE CITY, UTAH

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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 prorata 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.

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.

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.

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

MOFFAT, IVERSON AND ELOGREN
SALT LAKE CITY, UTAH

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 450 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.

So
as

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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LAW OFFICES OF
MOFFAT, IVERTSON AND ELGREN
SOUTH 1001 WEST 1000 SOUTH
SALT LAKE CITY 11, UTAH

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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. Lehen
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.

My Commission Expires: 6/9/1961

Richard K. [Signature]
 Notary Public
 Residing at Salt Lake County

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

On this 24th day of October, 1960, personally appeared before me J. E. LEHEN, 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.

My Commission Expires: 6/9/1961

Richard K. [Signature]
 Notary Public
 Residing at Salt Lake County

LAW OFFICES OF
 MOFFAT, IVerson AND ELGOREN
 SUITE 100, WALKER BARR BUILDING
 SALT LAKE CITY, UTAH

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PRINCE, YEATES & GELDZAHLER
John P. Ashton (0134)
Brian S. King (4610)
Attorneys for Defendants
City Centre I, Suite 900
175 East Fourth South
Salt Lake City, Utah 84111
(801) 524-1000

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

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

ANSWER AND
COUNTERCLAIM

Plaintiffs and
Counterclaim Defendants, :

vs. :

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

Civil No. 880907595PL
Judge J. Dennis Frederick

Defendants and
Counterclaim Plaintiffs. :

Defendants Professional Manivest, Inc. and Manivest
Corporation (hereafter "Manivest"), by and through its

the date of this Answer, and, as a non-material breach, fails to justify forfeiture of the lease.

EIGHTH DEFENSE

The terms of the lease between the parties do not bar Manivest, in its ordinary course of business, from assigning for security purposes its rights to a third party so long as such conduct does not endanger or jeopardize plaintiffs' interest or equity in the property which is the subject of this action.

NINTH DEFENSE

Plaintiffs fail to satisfy the requirements of Rule 66 of the Utah Rules of Civil Procedure in seeking to have a receiver appointed for the property.

WHEREFORE, Manivest prays that plaintiffs' Verified Complaint be dismissed with prejudice, that plaintiffs take nothing thereby and that Manivest recover its attorneys' fees and costs pursuant to the terms of paragraph 20 of the lease between the parties.

COUNTERCLAIM

Counterclaim-plaintiffs, Professional Manivest, Inc. and Manivest Corporation, (hereafter "Manivest") counterclaim and allege against the plaintiffs and counterclaim defendants (hereafter "Howes") as follows:

JURISDICTION AND VENUE

1. Jurisdiction in this Court is proper pursuant to Utah Code Ann. § 78-3-4.

2. Venue is appropriate pursuant to Utah Code Ann. § 78-13-1 and 4.

FIRST CAUSE OF ACTION (Breach of Contract)

3. Manivest is the successor to the interest of J. E. Lehnherr, Herman L. Franks and Stanford L. Hale, lessees under that certain lease dated October 14, 1960.

4. Howes are the successors to the interest of the original lessors under the same lease.

5. Under paragraph 4 of the lease agreement, the leasehold interest may be assigned with the prior consent of the lessors.

6. At times prior to the date of this Complaint, the Howes and/or their predecessors allowed Manivest to pledge and/or assign its leasehold interest in the subject property to third parties and thereafter make improvements on the property without objection and without claim that such action constituted a breach of the lease.

7. On January 22, 1988, Manivest requested that Howes consent to the assignment by Manivest of its leasehold interest, solely for the purposes of security, to Valley Bank & Trust Company. Under the terms of the Acknowledgment of

Assignment Manivest requested the Howes sign and subsequent correspondence forwarded to the Howes from Manivest and Valley Bank, it is clear that the assignment was for security purposes only and did not jeopardize or endanger the nature, extent or priority of the Howes' interest in the property.

8. Despite this full explanation and assurance given by Manivest to the Howes, the Howes, without any legitimate reason, refused to grant consent to the requested assignment and sign the Acknowledgment of Assignment.

9. The withholding by Howes of their acknowledgment of the assignment was unreasonable under the circumstances, constitutes a breach of the express and implied conditions of paragraph 4 of the lease between the parties and impaired Manivest's working relationship with Valley Bank & Trust.

10. Manivest has been damaged by the Howes' withholding of consent in an amount exceeding \$50,000, to be proven with greater specificity at trial in this matter, plus consequential damages, Manivest's attorneys' fees and costs pursuant to the agreement between the parties, and interest.

SECOND CAUSE OF ACTION
(Breach of Fair Dealing and Good Faith)

11. Manivest realleges and incorporates by reference the allegations of paragraphs 1 through 10 above.

12. In addition to the actions outlined above, in the period beginning in approximately 1985, Howes made repeated,

frivolous claims that Manivest was in breach of the lease between the parties.

13. The claims have been made by the Howes as a pretext to obtain possession of the property which is the subject of this lease and relieve themselves of what they perceive to be disadvantageous contractual obligations.

14. These actions on the part of the Howes demonstrate a failure to deal fairly and in good faith with Manivest and further constitute harassment and interference with Manivest's regular business activity with the purpose of impairing Manivest's ability to perform its obligations under the lease.

15. The Howes' actions have been carried out in an intentional and malicious effort to divest Manivest of its interest in the property, and Manivest has been damaged in an amount exceeding \$50,000, to be proven with greater specificity at trial of this matter, plus punitive damages in an amount exceeding \$50,000, all consequential damages, Manivest's attorneys' fees, costs and interest.

WHEREFORE, Manivest prays for judgment against Howes as follows:

A. For judgment against Howes on Manivest's First Cause of Action in an amount exceeding \$50,000, to be proven with specificity at trial in this matter, plus consequential damages, Manivest's attorneys' fees and costs pursuant to the

agreement between the parties and interest.

B. For judgment against Howes on Manivest's Second Cause of Action in an amount exceeding \$50,000, to be proven with greater specificity at trial of this matter, plus punitive damages in an amount exceeding \$50,000, all consequential damages, Manivest's attorneys' fees, costs and interest.

C. For such further relief as the Court deems equitable in the premises.

DATED this 13 day of January, 1989.

PRINCE, YEATES & GELDZAHLER

By

John P. Ashton
John P. Ashton

By

Brian S. King
Brian S. King
Attorneys for Manivest

CERTIFICATE OF HAND DELIVERY

I hereby certify that, on the 13th day of January, 1989, I caused to be hand-delivered a true and correct copy of the foregoing ANSWER AND COUNTERCLAIM to the following:

Michael R. Carlston, Esq.
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Salt Lake City, Utah 84145

Counterclaimants' Address:
255 East 400 South, Suite 200
Salt Lake City, Utah 84111
6463k/010789

Victoria Lane

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

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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Appellees.

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(801) 524-1000

Attorneys for Defendants and
Appellants.

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).

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. 2d 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 all of the equities necessary for a determination of forfeiture, perhaps that determination would have been different. A reversal of

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,	:	
	:	Priority No. 16
vs.	:	
	:	Case No. 900430
PROFESSIONAL MANIVEST, INC.,	:	
a Utah corporation; and	:	
MANIVEST CORPORATION, a Utah	:	
corporation,	:	
	:	
Defendants and Appellants,	:	

REPLY BRIEF OF APPELLANTS

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

Michael R. Carlston (A0577)
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(801) 524-1000

Attorneys for Defendants and
Appellants.

trial court erred in refusing to admit evidence related to the maintenance issue, which Manivest disputes, at most the Howes are entitled to a new trial. Manivest does not dispute the need for a new trial, given the taint created by the trial court's errors.

ARGUMENT

I.

CLEAR WRITTEN NOTICE AND AN OPPORTUNITY TO CURE
WERE REQUIRED AS TO EACH ALLEGED DEFAULT THAT
FORMED THE BASIS FOR LEASE FORFEITURE

At page 9 of their brief the Howes argue that the lease did not require written notice of default. See also, Verified Complaint, ¶ 29 (Add No. 2 to Manivest's opening brief.) Nonetheless, they also argue that they gave Manivest adequate written notice of the alleged defaults and an opportunity to cure. There is no merit to these arguments.

In Hansen v. Christensen, 545 P.2d 1152 (Utah 1976), the seller under an installment contract for the sale of real property (which is not dissimilar to a 50 year ground lease) contended that the buyer's interest had been forfeited, even though no written notice of default or opportunity to cure had been given. Unlike the standard Uniform Real Estate Contract, and like paragraph 9 of the lease at issue here (Add No. 1 to Manivest's opening brief), the contract in Hansen did not require notice of default or opportunity to cure. Instead, the contract "provided that after the continuance of a default for ninety days the seller had a right to exercise three options" (i.e. foreclosure, forfeiture, or other legal remedy). Id at 1154.

Nonetheless, this Court held that these contractual provisions "are not self executing. They require some affirmative act on the part of the seller." The Court also held that mere notice of termination, without opportunity to cure, was not enough:^{2/}

[T]he seller must give the defaulting buyer a reasonable time within which to cure the default. Without this notice the defaulting buyer would not know what to do. He would not have certain knowledge his tenancy was at an end. He could assume that the seller may have waived default, or would elect to enforce the contract rather than forfeit it; or he could assume he would be permitted to perform."

(Id. Footnote omitted.)^{3/}

Hansen applies here, even in the face of paragraph 9 of the lease, which states that in the event the lessees "fail

2/ In Johnston v. Austin, 748 P.2d 1084 (Utah 1988), this Court held that where the seller chooses the remedy of acceleration of the contract rather than forfeiture, notice of default and an opportunity to cure are not necessary unless required by the contract. To that extent only, the Court overruled Hansen. However, the Court reaffirmed Hansen, as applied to contractual forfeitures: "Forfeiture is a harsh remedy, and a seller must therefore give a buyer notice of default and a reasonable period of time in which to cure the default before exercising a forfeiture provision." 748 P.2d 1086-1087 (citations omitted). That this requirement applies regardless of the contractual provisions is shown by the next sentence of the Court's opinion: "In fact, written notice of default is expressly required by . . . the contract." Id. at 1087.

3/ See Also, Restatement of the Law (Second) Property 2d Landlord and Tenant, Vol 1, § 13.1, comment h. at p. 389 (1976):

The landlord may hold the tenant in default, under the rule of this section, for the tenant's failure to perform a promise contained in the
(Footnote continued on next page)

to keep any covenant herein contained to be performed by Lessees, or within sixty (60) days thereafter, then in that event, without notice from the Lessors, this Agreement shall cease and terminate...."

First, this provision is not self-executing, even though forfeiture is the only remedy expressly provided. As suggested in Hansen, the lessors could waive the default, or they could elect to affirm rather than forfeit the contract and sue for damages, specific performance or some other remedy, or they could allow the lessees to cure.^{4/}

Second, the fact that the Howes did give notices of default and of forfeiture either evidences their belief that paragraph 9 was not self-executing, or constitutes a waiver or estoppel as to any claim that it was self-executing.

Third, the requirement of notice in Hansen is not simply to inform the lessee which remedy the lessor has elected to invoke upon the lessee's default. The notice mandated by Hansen is a product of simple fairness, by giving the lessee facing forfeiture "a reasonable time within which to cure the default". Hansen at 545 P.2d 1154. Under Hansen, opportunity

(Footnote continued from previous page)

lease only if the landlord has requested the tenant to perform and given him a reasonable opportunity to do so.

^{4/} Also, paragraph 11 of the lease, now also relied upon by the Howes in their brief, is expressly not self-executing. Paragraph 11 provides that in the event of lessees' assignment for the benefit of creditors, "the Lessor may terminate this Lease . . ." (Emphasis added.) As in Hansen, forfeiture is optional, not automatic.

to cure is required regardless of which remedies are otherwise available, even the remedy of a "self-executing" forfeiture.

Attached as Addenda "A", "B" and "C" hereto (Trial Ex. 30, and 31) are copies of the three notices (dated March 30, 1988, April 29, 1988 and May 31, 1988) offered up by the Howes to justify forfeiture of Manivest's leasehold. The only defaults complained of in these notices are the December 1987 - January 1988 lease pledges to Valley Bank as security for financing, and "piles of Christmas-time trash and last year's crop of obnoxious weeds . . . and . . . the surface of the parking lot is not and for some period of time has not been in good order or repair . . .". (Add. "A", p. 2).

Nonetheless, at trial the Howes summoned up a host of other alleged defaults that were never the subject of any notice of default prior to termination. These same alleged defaults also found their way into the trial court's Findings of Fact (Add. No. 4 to Manivest's opening brief) and were the foundation for the trial court's imposition of the harsh judgment of forfeiture. These "notice-less" alleged defaults included:

1. Purported encroachments in 1983 (Trial Ex. 10, Finding No. 5);
2. A May, 1978 pledge of the lease to First Security Bank as security for financing (Trial Ex. 11, Finding No. 6), which was subsequently released (Tr. 253, 254);
3. A pledge of the lease to Valley Bank as security for financing in 1982 (Trial Ex. 12-14, Finding No. 7), which also was subsequently released (Tr. 254);

4. Lease assignments between Manivest controlled entities in 1976 and 1978 (Trial Ex. 22, Finding No. 19);

5. A purported assignment to the Manivest Liquidating Trust on April 28, 1988 (Trial Ex. 21, 40, Finding No. 20);

6. Alleged violations of Murray City ordinances in 1983, and in 1989 after the lease had already been purportedly terminated (Trial Ex. 23, 26, 28, 37, Findings No. 21, 22);

7. Alleged health and safety violations observed in 1989 or 1990, again long after the lease had purportedly been terminated (Trial Ex. 39, Tr. 168, Finding No. 23);

8. Underground Storage Tanks (Finding No. 24).

The Howes' brief bristles with contentions that Manivest enjoyed "grace periods" (p. 45) and the opportunity to cure these defaults. This assertion is belied not only by the Howes' failure to give notice of the alleged defaults enumerated above, but also by the content of the notices they did give.

Where is the "grace period" in the Howes' initial notice of March 30, 1988? That notice simply stated: "Based upon these defaults, it is our position that we are entitled to terminate Manivest's rights under the Lease" (Add. "A", p. 2). The Howes' April 29, 1988, notice demanded performance^{5/} but

^{5/} However, the April 29 notice addressed only the lease pledge to Valley Bank, not the allegations regarding weeds, debris and potholes in the parking lot.

did not specify what the purported "grace period" was: "On behalf of the lessors, I hereby advise you that time is of the essence [sic] and that we insist upon strict performance" (Add. "B", p. 2).

Other than indicating that time was of the essence, this second purported notice gave no inkling of the period in which cure was expected. Was it 60 days, as one might infer from paragraph 9 of the lease, or a longer or shorter period? Did the period begin to run from April 29, 1988, when performance was first demanded, or from March 30, 1988 when the Howes attempted to terminate the lease without giving any opportunity to perform? The third notice dated May 31, 1988 (Add. "C"), purported to terminate the lease effective upon receipt of the notice, even though it was sent only 32 days after the April 29 notice first requesting performance.^{6/}

Thus, even the notices of default that the Howes did give were too "indefinite or uncertain" to sustain a forfeiture. First Security Bank of Utah, N.A. v. Maxwell, 659 P.2d 1078, 1081 (Utah 1983). Also, forfeiture is permitted only where the agreement itself has "clear and unequivocal terms." Id. Here, even if the Howes' tortured interpretations of the lease were correct, it suffers from "ambiguity or lack

^{6/} The Howes also argue that Manivest was remiss in failing to cure even after the date upon which its interest in the lease was forfeited, which the trial court found to be June 1, 1988 (Conclusion No. 8). However, based upon this finding, Manivest no longer owed the Howes any contractual duties after that date.

of clarity" fatal to a claim for forfeiture, because it failed to provide Manivest adequate notice of what was required in order to avoid forfeiture.^{7/} Id.

It is no answer for the Howes to argue that Manivest was put on notice of the newly alleged defaults by inclusion of some documents on a pre-trial exhibit list, or that Manivest was required to send out interrogatories to ferret out allegations of default not contained in any notice, or even the Complaint. By this time Manivest's leasehold interest had already been forfeited, at least according to the trial court. Moreover, Hansen and Maxwell establish that it is the duty of the party seeking forfeiture to provide adequate notice of default, not the burden of the party against whom forfeiture is sought to play a guessing game. In short, allegations of default, even if proven to be true, will not support the harsh remedy of forfeiture, if not included in a notice of default. Reeploeg v. Jensen, 490 P.2d 445, 447 (Wash. App. 1971), rev'd on other grounds 503 P.2d 99 (Wash. 1972), cert. den. 414 U.S. 839 (1973); Tower v. Halderman, 782 P.2d 719, 720-721 (Ariz. App. 1989).

^{7/} Another example of this ambiguity is the 60-day period referenced in paragraph 9. When does this period begin to run? Is some notice required to start the period, even though that same paragraph purports to eliminate any notice requirement? Can the lessor secretly observe a default on day one, hope the lessee doesn't discover or cure the default, and then declare a forfeiture on day 61 as a "gotcha"? To permit such a result is to forsake fairness and to ignore the drastic consequences of forfeiture.

Manivest argued the notice issues at trial in the context of its objections, on grounds of surprise, to the Howes' eleventh-hour default allegations. (Tr. 44-52, 96.) Because these allegations did not appear in any pleading filed by the Howes before trial, and because the trial court abused its discretion in denying Manivest's motion to adjourn the trial to permit Manivest to prepare a defense to the new claims, Manivest had no opportunity to raise the notice defects in any other context.

In any event, the trial court committed plain error in premising the forfeiture on the belated default allegations. Accordingly, the Judgment of Forfeiture and Order of Possession must be reversed, and the lease must be reinstated and possession returned to Manivest.

II.
THE TRIAL COURT'S FORFEITURE OF THE LEASE
WAS MANIFESTLY UNJUST.

Forfeiture here was manifestly unjust not only because of the absence of notice and opportunity to cure, but also because it was based upon assignments that did not violate the lease, and upon technical, non-material defaults.

A. Manivest Did Not Violate any Prohibitions Against Assignment of the Lease or Covenants Against Encumbrance of the "Demised Premises".

The Howes concede that Manivest's assignments as security for financing did not violate the prohibition against lease assignments in paragraph 4 of the lease. Instead, they continue to argue that these assignments breached the covenant in paragraph 6 against encumbering the "demised premises".

However, if the Howes (or their predecessors-in-interest) intended to prevent the lessors from using the value of the leasehold to secure financing, it was incumbent on the Howes to clearly articulate this prohibition in the lease. General restraints on lease assignments or encumbrances, which do not unambiguously apply to pledges of the leasehold for security, do not suffice, particularly when the consequence of a transgression is forfeiture.

At page 43 of their brief, the Howes rely on R. Powell's treatise on real property for an expansive definition of the word "encumbrance". However, the Howes overlook Professor Powell's comments which bear most directly on the facts here:

Modern courts almost universally adopt the view that restrictions on the tenant's right to transfer are to be strictly construed. Thus it has been held that lease provisions prohibiting 'assignments' were not violated by . . . mortgaging the lease term; by sale of the controlling stock in the tenant corporation or change in the personnel of the tenant partnership . . .

R. Powell, The Law of Real Property Volume 2, ¶ 248[1] at pp. 17-43, 17-44 (1991 ed.) (footnotes omitted). See also, Restatement of the Law (Second) Property 2d Landlord & Tenant, Vol. 2, § 15.2, comment e., at p. 102 (1976) and illustrations thereto. Powell similarly states:

A lease, which creates a present possessory interest in the tenant, is an entirely separate interest from the landlord's future reversionary interest in the property. Thus, the tenant in the absence of a covenant in the lease or a statutory restriction, has the right to mortgage his interest in the property separately.

R. Powell, supra, ¶ 258[1], p. 17A-57 (footnote omitted).

The covenant against encumbrances of the "demised premises" in paragraph 6 fails to differentiate between the lessor's interest in those premises and the lessee's interest, and thus cannot be construed as prohibiting mortgages of only the lessee's interest under the rule of strict construction suggested by Powell.

At page 36 of their brief, the Howes argue that paragraph 6 was designed to protect their presumed right to collect rentals from Manivest subtenants in the event Manivest's interest was terminated. However, the Howes had no such right because they had no privity of contract with the subtenants. R. Powell, supra, at ¶ 248[1], p. 17-39. See also, the portion of paragraph 4 of the lease prohibiting any subleases from binding the Howes. Instead, termination of the Manivest lease would terminate the subleases and any assignments thereof. Accordingly, Manivest's pledges of its leasehold interest or subleases could not jeopardize any "right" of the Howes, whether at law or reserved by the lease.

Nor did the assignments among the Manivest controlled entities violate paragraph 4 of the lease. The Howes' attempts to distinguish Prince v. Elm Inv. Co., Inc. 649 P.2d 820 (Utah 1982) because it involved a tenant's right of first refusal are to no avail. The relevant issue both in Elm and here was whether a stranger has been inserted into the transaction. The fact that the Elm plaintiff sought to enforce a right of first refusal rather than compel a forfeiture does not diminish Elm's precedential value. Under the principles of Elm (at pp. 822-823), limited partnerships that have the same general

partner, or wholly owned corporate subsidiaries, are not "strangers" to the transaction, contrary to the Howes' argument at p. 32 of their brief.^{8/} The quotes from Powell above suggest that, if anything, the principles of Elm apply with even greater force to the issue of who is a stranger to the lease for purposes of construing a prohibition on lease assignments.

Also, the testimony of Larry Leeper or Swen Mortenson about their understanding of the relationship between Manivest and the Manivest Liquidating Trust, or about their relationship with the two entities, could not change the clear language of the trust document. That language provides that the lease at issue here was excluded from the assets transferred to the trust, and was retained by Manivest. (Manivest Liquidating Trust and Workout Plan, Note 1 to the Balance Sheet of Diversified Realty, Ltd., Trial Ex. 22, 40). Accordingly, there was no assignment in violation of either paragraph 4 or paragraph 11 of the lease.

B. The Forfeiture of the Lease Constituted
A Windfall to the Howes.

In addition to the "assignments" discussed above, Manivest also disputes the Howes' other allegations of default,

^{8/} The Howes acknowledged as much here, by suing not National Realty, Ltd., the limited partnership that was the named successor tenant on the lease, but its general partner Manivest, which was also the general partner of the assignee limited partnerships (Tr. 262), and the parent of the wholly-owned subsidiary assignee, Westco Realty, Inc. (Trial Ex. 40, p. 2).

IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs, Cross-
Respondents,

vs.

Case No. 900430

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,

Respondents, Cross-
Appellants.

BRIEF OF RESPONDENTS AND CROSS-APPELLANTS

On Appeal from the District Court of Salt Lake County
Honorable J. Dennis Frederick, District Judge

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Paragraph 6 played an important role. It not only protected the Howes' reversionary estate, but also meant that a financially responsible tenant would remain in possession. The Lease thus left no room for a bank to "worm" its way into the deal to claim the rental income from the subleases. The Lease prohibited Manivest from mortgaging its leasehold and thereby impeding the Howes' contractual right to collect rents in the event that Manivest vacated the Property or was removed therefrom. (Ex. 1, § 10.)³⁵

Read separately, read in the context of applicable real estate principles, and read together, paragraphs 6, 14 and 19 can have only one meaning: It was a breach of the Lease for Manivest to encumber any real estate interest whatsoever, without the Howes' knowledge and consent. All of these paragraphs were essential. They were a comprehensive attempt to deal with all of the various financing issues which could arise during the term of the Lease.

The practical consequence of this structure was that the parties would be required to negotiate if either wanted to use

³⁵ In Baehr v. Penn-O-Tex Oil Corp., 104 N.W.2d 661 (Minn. 1960), the landlord successfully terminated the lease and retook possession. Afterwards, when the landlord could not recover unpaid rent from the tenant, the landlord sued the corporation to whom the tenant had assigned its right to receive rents from subtenants. The court held that the landlord could not enforce the lease and collect rents from the assignee who had taken the assignment of subrents as security for a debt. If anything, the Baehr case further illustrates why the Howes had good reason to prohibit such assignments in the Lease. In Chapman v. Great Western Gypsum, Co., 14 P.2d 750 (Cal. 1932), the court only considered whether a mortgage on a lease violated a prohibition against assignments. The lease did not include any other restrictions against encumbrances.

its respective interest for financing purposes other than for the original improvements.³⁶ Rather than dealing with this financing problem in a straightforward way, Manivest borrowed for its own benefit and without informing the Howes.

Other courts have upheld this concept. In Airport Plaza, Inc. v. Blanchard, 234 Cal. Rptr. 198 (Cal. App. 1987), the successor to the original master tenant on a 75-year ground lease claimed the right to mortgage its leasehold interest, without the owner's consent. The owner had subordinated to the construction of the original improvements. Of the two pertinent paragraphs in the Airport Plaza lease, one addressed the "hypothecations" for constructing the original improvements. The other merely stated:

Except as otherwise provided in this lease, lessee shall not transfer or assign this lease in whole or in part, or its interest hereunder . . . without receiving the prior written consent of lessor.

Id. at 201. The tenant argued that because the Lease did not expressly forbid leasehold financing after completion of the improvements, hypothecation of the tenant's leasehold interest must be freely permitted. Id.

³⁶ These paragraphs recognized the inherent uncertainties of a long-term lease which did not otherwise address potential changes in economic circumstances. For example, there were no percentage rents and no cost of living adjustments. Ex. 1. Consequently, at the time of trial the total amount that would have been payable as rent was not \$24,000 per year as alleged by Manivest, but approximately \$12,000 per year. (R. 701). This was the basis for the Howes' allegations in Paragraph 17 and 18 of the Complaint. (R. 2.) See Airport Plaza, Inc. v. Blanchard, 234 Cal. Rptr. 198 (Cal. App. 1987). This case is not like Bonanza, Inc. v. McLean, 747 P.2d 792 (Kan. 1987) where the tenant sought financing only to construct additional improvements. The lessor clearly had agreed to subordinate for this purpose. The court had no trouble finding that the tenant's financing was "for the purpose of carrying out the original intention of the parties." Id. at 796. In Bonanza there was no reference to any other prohibition in the lease against either assignments or encumbrances.

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

JOHN O. HOWE, Trustee, et al.

TRIAL BRIEF AND SUMMARY

Plaintiffs,

vs.

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

Civil No. 880907595

Judge J. Dennis Frederick

Defendants.

Plaintiffs submit the following Trial Brief and Summary in
Support of their position.²

PRELIMINARY STATEMENT

This action arises out of a lease (the "Lease") pursuant to
which the Howes as Lessors required a portion of their farmland
to be developed as a regional shopping center. Upon learning

²Most of Manivest's 29 page Trial Brief is simply a restate-
ment of its earlier motion for summary judgment. In response,
Manivest incorporates by reference its Response in Opposition to
the Motion for Summary Judgment which convincingly distinguishes
most of the authorities upon which Manivest relies. Certain
cases, however, appear in a different context and require a
specific response.

As set forth above, an assignment for security is, by definition, not a true "assignment." It is a collateral assignment and is not meant to be governed by a general prohibitions against assignments. Therefore, paragraph 4 alone was not sufficient to protect the Howes. Without paragraph 6, Manivest may have been able to grant an assignment for security. Paragraph 6 was essential.

Under Utah law, all rights or estates in land, including a leasehold estate, may be mortgaged. See Utah Code ann. § 57-1-1 et seq.; see also Bybee v. Stuart, 189 P.2d 118 (Utah 1948). An assignment of a lease for security purposes is a mortgage of a lease. See e.g., Slane v. Polar Oil Co., 41 P.2d 490 (Wyo. 1935); Harbel Oil Co. v. Steele, 83 Ariz. 181, 318 P.2d 359 (1957). A real property interest is mortgaged if the circumstances demonstrate that the parties intended not to transfer the entire estate but only to create an encumbrance upon it. General Glass Corp. v. Mast Const. Corp., 766 P.2d 429 (Utah App. 1988).

The evidence is undisputed that the following liens and encumbrances were placed on property interests associated with the Lease.

1. Resolution of Encroachment in favor of a third party. The Quitclaim Deed of defendants signed by Larry

program which will keep all of the property in a clean and neat condition. In addition, the Court should void the unauthorized assignments and order that all interests under the Lease be reassigned to the entity approved by the Howes in 1971.

Furthermore, the Court should order the lessee to seek and obtain lessor's prior approval before assigning the Lease to anyone, and order that the Lease cannot be assigned for the benefit of creditors. The court should also order Manivest to immediately obtain from Valley Bank a reconveyance of the tenant leases and to make no further such encumbrances.³

**VI. MANIVEST HAS FAILED TO PROVIDE SUPPORT FOR ITS
COUNTERCLAIM AND THE COUNTERCLAIM SHOULD BE DISMISSED.**

The First Cause of Action in the Counterclaim is that under paragraph 4 of the Lease, the Howes had a duty to consent to the Assignment to Valley Bank in 1988. There is no way paragraph 4 can be pummeled into an interpretation supporting this claim. The evidence is clear that the defendants did not obtain prior consent as required for any assignment. It is also clear that paragraph 4 applies to contemplated assignments of the Lessee's entire estate, not to assignments for security purposes. Even if the Court were to conclude that the Howes had a duty to consent to assignments for security purposes, they are not required to sign documents which could jeopardize their own fee interest or

³The Howes reserve the issue of expenses and attorneys' fees.

COP

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR 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 and
Counterclaim Defendants,

TRIAL

vs.

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

Civil No.
C880907595PL

Defendants and
Counterclaim Plaintiffs.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE J. DENNIS FREDERICK

on Tuesday, March 6, 1990

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1 expect a return of those premises at some date and expect it
2 to be maintained in a fashion so that it can be used for the
3 purposes set forth in the lease, namely a shopping center
4 and retail trade and services.

5 Paragraph 6 is the next provision that is of
6 import. It provides that the lessee agrees to keep the
7 demised premises free and clear of all liens and encum-
8 brances of any nature whatsoever except as to those liens
9 created pursuant to paragraph 14.

10 Paragraph 14 provides that at the outset the
11 lessees here, the predecessors in interest to Manivest,
12 would have the right to borrow money against the property in
13 order to construct the improvements that were initially
14 contemplated.

15 As a consequence of that, the Howes did subordi-
16 nate their interests to various loans that were made, as I
17 recall, totalling in the neighborhood of a million dollars,
18 which money was used to build the buildings that are out
19 there today, and paragraph 6 provides that with the excep-
20 tion of those liens and encumbrances that the lessee may be
21 assigned or may not encumber -- excuse me -- the property.
22 It is a provision separate and apart from the prohibition
23 against assignments.

24 Now, this lease is one that in some respects is
25 somewhat unusual. Your Honor will see that it contains a

1 number of fairly harsh provisions against both parties to
2 the contract. It is harsh against the Howes because it sets
3 a flat rate rent with no clause for adjusting those rents
4 over the years, even though the lease was for 50 years, and
5 obviously back in 1960 when the lease was signed inflation
6 was a shown fact of life and yet there was no acceleration
7 or adjustment clause pertaining to the lease payments.

8 On the other side, the lease is harsh on the
9 lessee because it provides that they cannot encumber or
10 assign their interests or, for that matter, any interest in
11 that property which essentially establishes a stalemate
12 between the two sides.

13 Reading through some of the hornbooks on property
14 law, it's not uncommon for leases to provide essentially
15 stalemated positions where the parties do not want to
16 attempt to anticipate what the future will bring and so they
17 build into the lease essentially a stalemate that requires
18 both sides to sit down from time to time and renegotiate
19 their positions, and that is what is contemplated by the
20 lease provisions here, that once the improvements that were
21 subordinated at the outset became obsolete or required
22 repair, required substantial infusions of capital, it was --
23 it is obviously contemplated by the lease that the parties
24 would sit down and renegotiate their positions, that Howes
25 then being in a position to adjust the rents to meet the

1 market at the time of their renegotiation. That obviously
2 didn't happen.

3 What the lessee has done here is they have
4 secretly, we have now found out, secretly breached these
5 provisions allowing -- or prohibiting liens and encum-
6 brances, allowing them to benefit from funding, but denying
7 the Howes the opportunity to sit down and renegotiate the
8 harshness of the provisions against them, and so the end
9 result is over the last 30 years and as of today the Howes
10 are receiving approximately one-twentieth of the rents that
11 are justified by the market values of their land out there.

12 The land is worth in the neighborhood of two and a
13 half million dollars. They are getting less than a thousand
14 dollars a month for that under the current situation,
15 whereas under any standard in the industry they should be
16 getting in the neighborhood of \$250,000 a year, so what the
17 unilateral and secret breaches of the lessee have done here
18 is to deprive the Howes of the financial benefits that were
19 built into the lease that would have required renegotiation
20 from time to time.

21 Now, the evidence regarding breaches, your Honor,
22 is hopefully going to be fairly direct and to the point. We
23 will start out by showing in 1971 that the lessee did in
24 fact come to the Howes and did in fact request that they
25 subordinate their interests and allow them, the lessees, to