

2004

Ken Brailsford v. Blaine P. Fetter : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KEN BRAILSFORD,

Plaintiff/Appellee,

v.

BLAINE P. FETTER,

Defendant/Appellant.

BRIEF OF APPELLANT

Court of Appeals Case No.

20040307-CA

Appeal from the Third Judicial District Court
In and For Salt Lake County, State of Utah
Judge Sandra Peuler

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STATEMENT OF RELATED CASES

Another lawsuit related to the lease that is the subject of the present matter was filed by Brailsford's assignor, the landlord, against Pina Unlimited, L.L.C., the tenant (*Warehouse Commercial, L.L.C. v. Pina Unlimited L.L.C.*, Third Judicial District Court, State of Utah, Salt Lake City, Civil No. 980905862). That case was filed before the present matter. In that initial lawsuit, the landlord sought, among other things, an injunction preventing the tenant from removing property from the leased premises at the time the tenant closed its restaurant business. The trial court eventually granted a prejudgment writ of attachment against the tenant. For convenience, the landlord's complaint in the prior lawsuit, as well as the order granting writ of attachment, are contained in the addendum to this brief.

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to UTAH CODE ANN. § 78-2a-3 and Rule 3, UTAH R. APP. P.

IDENTIFICATION OF THE PARTIES

Appellant is Blaine Fetter, referred to herein as "appellant" or "Fetter." Appellee is Ken Brailsford, referred to herein as "appellee" or "Brailsford." As explained more fully below, Brailsford is the landlord's assignee with respect to alleged rights under the restaurant lease that is the subject of this lawsuit. Fetter is a guarantor of certain obligations the tenant had under the restaurant lease.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the trial court err in granting Brailsford's motion for partial summary judgment as follows?:

- The trial court's order requires Fetter, pursuant to the subject guaranty of certain lease obligations, to pay for an expense that had been defined as "rent" despite the fact that the guaranty did not cover the payment of rent.
- The effect of the trial court's order is that a guarantor of a tenant under a lease must continue to pay for an improvement even after the lease is terminated and the premises and improvement are surrendered to, and accepted by, the landlord, and then used by subsequent tenants.
- The trial court awarded Brailsford a judgment for a specific dollar amount without taking into account that the amount is disputed and Fetter claims an offset.
- Summary judgment should have not been granted if there were inconsistencies and ambiguities in the relevant provisions of the subject lease.

STANDARD OF REVIEW

This appeal concerns the trial court's ruling on a motion for partial summary judgment. The appellate court reviews a trial court's summary judgment ruling for correctness, granting no deference to the trial court's legal conclusions. *See*

Woodbury Amsource, Inc. v. Salt Lake County, 73 P.3d 362, 364 (Utah 2003), *Kouris v. Utah Highway Patrol*, 70 P. 3d 72 (Utah 2003); *Smith v. Smith*, 793 P.2d 407 (Utah App. 1990).

Additionally, to the extent the trial court interpreted the subject contracts, *i.e.* the lease agreement and guaranty, as a matter of law, the appellate court accords the trial court's construction no particular weight and the trial court's action is reviewed under a correctness standard. *See Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985) (citation omitted). *See also Foster v. Montgomery*, 82 P.3d 191, 194 (Utah App. 2003) (questions of contract interpretation not requiring resort to extrinsic evidence are matters of law, and on such questions, the trial court's interpretation is accorded no presumption of correctness) (citations omitted).

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

There do not appear to be any determinative constitutional provisions and statutes involved in this matter.

STATEMENT OF THE CASE

I. Nature of the Case

This case involves the enforcement of a written guaranty of certain lease obligations Fetter executed in favor of the landlord, Brailsford's assignor, with respect to a restaurant lease agreement between the landlord, Warehouse

Commercial, L.L.C., (referred to herein as “the landlord” or “Warehouse”) and its tenant, Pina Unlimited, L.L.C. (referred to herein as “Pina” or “the tenant”).

The trial court held Fetter is liable under the guaranty to pay for a particular tenant improvement despite the fact that payment for the improvement was expressly classified as rent under the lease and Fetter’s guaranty did not cover rental payments. Additionally, the trial court held that Fetter is liable despite the fact the restaurant lease was terminated less than two years into the ten-year term and the premises, along with the subject improvement, were surrendered to the landlord. The subject improvement was necessary for the space to continue to be used as a restaurant. The landlord subsequently leased the restaurant space to another restaurant operator who continued to use the improvement for which Brailsford seeks to recover from Fetter.

II. Course of Proceedings

Brailsford filed a motion for partial summary judgment against Fetter to enforce the guaranty, pursuant to the second and third causes of action contained in Brailsford’s amended complaint. The trial court granted Brailsford’s motion and a judgment was entered against Fetter. Brailsford dismissed all of its claims against Fetter’s co-defendants, without prejudice, in order for the judgment against Fetter to become final and enforceable. Once the other defendants were dismissed out of this case, Fetter filed his notice of appeal.

III. Disposition in Trial Court

The trial court granted partial summary judgment in Brailsford's favor. The effect of this ruling was to make Fetter, as a guarantor, liable for a tenant obligation not covered by the guaranty executed by Fetter. Additionally, the court's ruling makes Fetter liable for an improvement even after it was surrendered to the landlord and used in subsequent restaurant operations.¹

IV. Statement of Facts

1. On or about August 2, 1996, Warehouse Commercial, as landlord, entered into a Lease Agreement ("the lease") with Pina, as tenant. R. at p. 169, 173-196. (Although portions of the lease are cited from the record on appeal (referred to herein as "R"), for convenience, a true and correct copy of the lease, including the guaranty agreement, is also contained in the addendum to this brief).

2. The term of the lease was ten (10) years. *Id.* at p. 173.

3. The purpose of the lease was for Pina to operate the Pina restaurant at the premises located at 327 West 200 South, Salt Lake City, Utah ("the restaurant space"). *Id.* at p. 169. The building in which the restaurant space was located

¹ Fetter had also filed a cross motion for partial summary judgment which was denied. Fetter's appeal does not include review of the denial of his motion for summary judgment inasmuch as Brailsford had disclaimed and abandoned any claims that were related to Fetter's motion. See Transcript of hearing on motion for partial summary judgment (R. at 433) at pp. 35-36. At the center of this appeal is the question of Fetter's liability as a guarantor under the guaranty agreement the landlord assigned to Brailsford.

contained condominium units on the upper floors. *See* transcript of hearing on motion for summary judgment (R. at 433) at p. 5.

4. At the time the lease was entered into, the restaurant space had not been built out for use as a restaurant. It was essentially a “bare shell.” R. at p. 152. Accordingly, certain improvements were needed for the space to accommodate a restaurant operation. *Id.*

5. There is no dispute that among the improvements needed to convert the space into space where a restaurant business could operate, was a make up air and exhaust system (the “exhaust system”). *Id.* at p. 169. The exhaust system was needed to vent out fumes and smoke from the kitchen area and return fresh air into the space. *See* transcript of hearing on motion for partial summary judgment (R. at p. 433) at p. 5.

6. Exhibit B to the lease is a list of items designating which items were to be paid for by the landlord (“PAID BY LANDLORD”) (R. at p. 195) and which items were to be paid for by the tenant (“PAID BY TENANT”) (*id.* at p. 196) in order to turn the leased premises into the desired restaurant space.

7. The “PAID BY TENANT” list contained in Exhibit B to the lease expressly states that with respect to the exhaust system, Pina, as tenant, was only

obligated to pay for “the *design* of the make up air and² exhaust system” (emphasis added). *Id.* at p. 196.

8. While the tenant was responsible for payment for the *design* of the exhaust system, the landlord agreed to pay for the *equipment* and *installation* of the subject exhaust system. *Id.* at p. 195. Specifically, the “PAID BY LANDLORD” list contained in Exhibit B to the lease, states as follows:

PAID BY LANDLORD . . . HVAC equipment and ductwork to main floor and basement for 72 degree environment; *exhaust system for kitchen including make up air (excluding hoods) as designed by tenant* and approved by landlord HVAC engineer (system to be installed by tenant, but cost of equipment and installation financed by landlord and *repaid through rent*).

Id. (Emphasis added).

In other words, the landlord was required to pay for the cost and installation of the exhaust system, but would be reimbursed through rental payments.

9. Section 5 of the lease, entitled “Base Rent,” obligated Pina to pay rent for the restaurant space. *R.* at pp. 169 and 175. In addition to Pina’s obligation to pay the base rent, section 5 contains the following provision, a portion of which is handwritten:

[Note: These amounts will increase to include amortization of the cost of the *make up air and* exhaust

² The words: “make up air and” are hand-written.

system over a 5-year period, with interest at 8%] (italics indicate the handwritten portions).

R. at p. 175.

10. In connection with the lease, Fetter, along with another individual,³ agreed to sign a document entitled: Guaranty of Certain Lease Obligations (the “guaranty”), guaranteeing certain obligations Pina owed under the lease. *Id.* at pp. 197-199.

11. The guaranty Fetter signed provides as follows:

[T]he undersigned Guarantors hereby guarantee to Landlord the full and prompt payment of all costs and expenses incurred in connection with the design, construction and installation of all improvements to the leased premises *to be paid by Tenant*,⁴ and the performance of all of Tenants’ *other* duties and obligations set forth in sections 12 and 14 of the lease.

Id. at p. 198 (emphasis added).

12. The guaranty refers specifically to Sections 12 and 14 of the lease, but does not refer to the obligation to pay rent under paragraph 5 of the lease. *Id.*

³ Fetter’s co-guarantor was dismissed out of this case in order for the summary judgment against Fetter to become final. R. at 377-378.

⁴ The tenant obligations are those set forth under the “PAID BY TENANT” list contained in Exhibit B to the lease. R. at 196. This list only required the tenant to pay for the *design* of the exhaust system. *Id.*

13. The guaranty states that it is an “absolute and unconditional” guaranty only with respect to the performance of the tenant’s duties and obligations under sections 12 and 14 of the lease. *Id.*

14. Section 12 of the lease essentially states that the landlord is liable for the items in Exhibit B specified under the “PAID BY LANDLORD” list and that the tenant is liable for the items under the “PAID BY TENANT” list. *Id.* at p. 178. The “PAID BY TENANT” list specifically provides that the tenant is to pay for the *design* of the exhaust system, but does not state that the tenant is obligated to pay for the exhaust system equipment and/or installation. R. at p. 178 and 196. Section 12 of the lease does not refer to the exhaust system. *Id.* at p. 178.

15. Section 12 of the lease also refers to tenant *modifications* made to the “Landlord’s Improvements,” and the requirement that the tenant pay, in advance, “all construction, architectural and other costs incurred in connection with such changes on the basis of the Landlord’s cost to make such changes plus eight percent (8%).” *Id.*

16. Section 14 of the lease refers to any subsequent alterations and additions made to the restaurant space by the tenant during the term of the lease. *Id.* at pp. 179 and 180.

17. The lease and its attachments expressly classify the amortizations for the payment of the exhaust system as “rent.” R. at pp. 175 and 195.

18. While the guaranty states that Fetter's obligation is not impacted by any "assignment, renewal, modification or extension of the Lease," the guaranty *does not* state that Fetter remains bound if the lease were terminated and the premises surrendered to the landlord. *Id.* at p. 198.

19. The exhaust system cost over \$90,000.00, which amount was reduced by Pina's monthly rental payments. *Id.* at p. 170.

20. For purposes of clarity, and in light of the landlord's efforts to have Pina pay for mechanical items for which it was not required to pay, Pina made out separate checks for the base rental amount and the amount of additional rent attributable to the financing of the restaurant's exhaust system. *Id.* at p. 201-202.

21. Brailsford, through counsel, admitted in arguments made at the summary judgment hearing that the fact that separate checks were paid for the base rent and the rent attributable to the repayment of the exhaust system is of no import concerning the issue of whether the repayment for the exhaust system is classified as rent. *See* transcript of hearing on motion for partial summary judgment hearing (R. at p. 433) at p. 31.

22. The lease between the landlord and Pina was terminated in June 1998, less than two years into the term of the lease, when Pina closed its business. R. at p. 202. The landlord changed the locks to the premises, preventing Pina from having access to its personal property despite the fact that rental payments were

current. Pina surrendered the premises, including the improvements, to the landlord. *Id.*

23. Included among the improvements surrendered to the landlord at the time the lease was terminated was the subject exhaust system, which was needed for the leased space to accommodate a restaurant business. *Id.* at p. 202.

24. Following the termination of Pina's lease, it is undisputed the restaurant space was leased to another restaurant business. *Id.*

25. Fetter claims Pina paid for improvements for which he and the tenant were not obligated to pay, but received no credit or offset for these amounts. R. at pp. 77 and 202. Fetter and his co-defendants asserted in their answer to the amended complaint that they were entitled to offsets for amounts they paid on obligations that belonged to the landlord. *See id.* at pp. 110, 113 and 114.

26. Following termination of the lease, issues remained between the landlord and Pina concerning financial matters, including offsets claimed by Pina. *Id.* at pp. 77 and 202.

27. At the time Pina closed down its restaurant business, and before the current lawsuit was filed, a separate lawsuit was filed by the landlord against Pina to, among other things, enforce alleged liens on Pina's property and to enjoin Pina from removing any property from the premises. *Id.* *See also* addendum hereto at Exhibit "B."

28. On or about August 25, 1999, the landlord allegedly assigned its claims against Fetter and others to Brailsford.

SUMMARY OF ARGUMENT

Brailsford has no greater rights against Fetter than his assignor, the landlord. Fetter, as Pina's guarantor, did not guarantee the rent obligation under the lease. Payment for the exhaust system - the tenant improvement that is the subject of this case - was defined as "rent" under the lease documents. Therefore, Fetter cannot be held liable under the guaranty for the exhaust system. Even if payment for the subject improvement is not classified as rent, under the terms of the guaranty, Fetter cannot be held liable for the cost of the exhaust system equipment and installation.

Additionally, the landlord received the exhaust system at the termination of the lease. The landlord and its subsequent tenants have benefited from this improvement, which was needed for the space to continue to be used as a restaurant. Because the improvement was surrendered, Fetter is not required to pay for it. The landlord should not be allowed to keep the benefit of the improvement and, at the same time, require the tenant's guarantor to pay for it. Otherwise, the landlord improperly receives a windfall and Fetter is unfairly penalized.

Finally, there are questions of fact concerning the amount of the judgment. Fetter claims to have paid for improvements for which the landlord, rather than the tenant, was obligated to pay yet he has never been reimbursed for those payments. Fetter is entitled to an offset for these amounts.

ARGUMENT

POINT 1.

BRAILSFORD, AS THE LANDLORD'S ASSIGNEE, HAS NO GREATER RIGHTS THAN THE LANDLORD

It is a fundamental principle of law that an assignee of rights and obligations has no greater rights, and is in no better position than its assignor. *See, e.g., Wiscombe v. Lockhart Co.*, 608 P.2d 236, 238 (Utah 1980) (assignee takes nothing more by his assignor than his assignee had).

In the present matter, Brailsford claims to be the assignee of the landlord's rights against Fetter under the lease and guaranty. Because the lease was terminated in June 1998, Brailsford's rights are the same as the landlord's rights in light of that termination. In short, Brailsford cannot recover anything greater or better than the landlord could have received under the circumstances. Because of this principle of law, the use of the terms "landlord" and "Brailsford" in this brief are essentially interchangeable.

For the reasons set forth in more detail below, Brailsford, who has no choice but to stand in the landlord's shoes, cannot seek payment for the subject exhaust system from Fetter.

POINT 2.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN BRAILSFORD'S FAVOR BECAUSE FETTER DID NOT GUARANTEE THE PAYMENT OF RENT

A. Payment for the Exhaust System was Defined as Rent Under the Lease.

Under Exhibit B to the lease, where it individually lists the items the landlord was required to pay to prepare the restaurant space, it states: “[S]ystem to be installed by Tenant, but cost of equipment and installation financed by Landlord and *repaid through rent*.” R. at p. 195 (emphasis added). The lease itself, at section 5, states that the rent amount would “increase to include amortization of the cost of the make up air and exhaust system.” R. at 175. When the landlord and the tenant terminated the lease in June, 1998, the tenant's obligation to pay rent ceased. *See Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 900 (Utah 1989). Because the obligation to pay rent ceased, it is axiomatic that the tenant's obligation to pay for the exhaust system also ceased because that obligation was expressly defined and classified as “rent” under the lease.

It is well settled that the liability of the guarantor depends upon the construction and application of the primary contract being secured by the guaranty. *See* AM JUR. 2d. *Guaranty* §73 (1968). Therefore, because the tenant's obligation to pay for rent ended when the parties terminated the lease, Brailsford cannot now turn to Fetter to receive payment for rent under the guaranty.

B. *Under the Terms of the Guaranty Agreement, Fetter is Not Liable for the Exhaust System.*

"An instrument purporting to establish liability against a guarantor must be strictly construed." *Carrier Brokers, Inc. v. Spanish Trail*, 761 P.2d 268, 261 (Utah App. 1998) (citing *Valley Bank & Trust Co. v. Rite Way Concrete Forming, Inc.*, 742 P.2d 105, 110 (Utah App. 1987)). Liability under a guaranty "is not to be expanded beyond the fair import of its terms." *Carrier Brokers, Inc.*, 751 P.2d at 261 (citing *George E. Failing Co. v. Cardwell Inv. Co.*, 376 P.2d 892, 897 (Kan. 1962)). *See also, Grand Inv. Corp. v. Connaughton, Boyd & Kenter, P.C.*, 119 S.W. 3d. 101, 115 (Mo. Ct. App. 2003) ("a guarantor's liability is to be strictly construed according to the terms of the guaranty agreement in the guarantor's favor and may not be extended by implication beyond the strict letter of the obligation").

Additionally, like any other contract, any uncertainty or ambiguity as to the meaning of the terms of a guaranty contract is to be construed against the drafter. *See General Appliance Corp. v. Haw, Inc.*, 576 P.2d 346, 348 (Utah 1973).

Therefore, in this case, the landlord bears the risk of not being as clear and precise in preparing the guaranty as it might have otherwise been.

A strict reading of the subject guaranty shows that Fetter (and his co-guarantor) did not guarantee payment for the exhaust system, whether through rent payments or otherwise. The guaranty cannot be read to cover the tenant's obligations under section 5 of the lease (rent obligations). In fact, section 5 is referenced nowhere in the guaranty.

Additionally, applying the rules of strict construction to the guaranty agreement, which the trial court failed to do, reveals that the guaranty does not cover liability for payment of the exhaust system in any event. First, the title of the guaranty document is significant. The document itself reveals that it is not intended to be an absolute, unconditional guaranty of every tenant obligation under the lease – it is a guaranty of *certain* lease obligations. R. at 198.

Next, there is nothing in the guaranty referencing the exhaust system. The first full paragraph of the guaranty clearly shows that the purpose of the guaranty was to cover the items set forth under the “PAID BY TENANT” list contained in Exhibit B to the lease. The “PAID BY TENANT” list includes payment for the *design* of the exhaust system, but does not require the tenant to pay for the equipment and installation of the exhaust system. See R. at p. 196. Instead,

payment for the exhaust system was handled as a special financing arrangement and treated as rent under Section 5 of the lease.

In the second paragraph of the guaranty, the document clarifies that the only obligations to which there is an “absolute and unconditional” guaranty of payment are those set forth in sections 12 and 14 of the lease. There is no mention of section 5 of the lease, which has to do with the payment of rent.

Section 12 of the lease merely reiterates that the landlord is responsible for the items set forth on the landlord’s list and the tenant is responsible for the items on the tenant’s list (Exhibit B to the lease). Again, while the “PAID BY TENANT” list in Exhibit B includes payment for the *design* of the exhaust system, it says nothing about payment for any other liability associated with the subject exhaust system. *See* R. at 196. Certainly, the design of the exhaust system and the installation of the exhaust system are two different things. Arguing that “design” encompasses the cost of the equipment and installation would be more than a stretch.⁵

Section 14 of the lease, which is also guaranteed, refers to subsequent modifications and alterations made to the restaurant space by the tenant. *Id.* at 179-180. In short, section 14 has nothing to do with the subject exhaust system

⁵ Section 12 also contains an obligation to pay for modifications made to the “Landlord’s Improvements.” R. at 178.

and the judgment that is being appealed has nothing to do with any liability for Section 14 items.

Finally, while the guaranty expressly states that liability under the guaranty is not impacted by assignment, modification or extension of the lease (R. at 198), the guaranty is silent concerning the effect of termination on the guarantors' liability. In other words, there is nothing in the guaranty stating Fetter would remain bound upon the termination of the lease and the surrender of the premises and improvements to the landlord.

If the intent of the parties was to make the guarantors liable for the exhaust system, and to have that liability extend beyond termination of the lease, why wasn't the guaranty drafted to mirror this intent? The fact is that this was not the intent. Certainly, Fetter would not have agreed to guaranty the payment of improvements that would be surrendered to the landlord, and which would continue to benefit the landlord and its subsequent tenants.

Based upon the foregoing, and the requirement that liability under a guaranty be imposed only upon a strict interpretation of the guaranty, Fetter is not liable for the expense of the exhaust system equipment and installation.⁶ To hold

⁶ With respect to the exhaust system, the only thing Fetter could arguably have guaranteed was payment for the *design* of the exhaust system.

otherwise would expand Fetter's obligation beyond the strict letter of his obligation under the guaranty.

POINT 3.

THE TRIAL COURT ERRED IN GRANTING
SUMMARY JUDGMENT IN BRAILSFORD'S FAVOR
BECAUSE THE SUBJECT TENANT IMPROVEMENT
WAS SURRENDERED TO THE LANDLORD

Despite the fact the subject exhaust system was surrendered to, and accepted by, the landlord at the time the lease was terminated, the trial court ruled Fetter, as guarantor, was required to payoff the exhaust system and entered judgment against Fetter in the amount of \$89,686.63. In other words, although the lease was terminated less than two years into its ten year term, the trial court's granting of plaintiff's motion for partial summary judgment requires Fetter to pay in full the balance of the exhaust system cost. The trial court's minute entry indicates the decision turned on the court's interpretation of the lease document and guaranty which the court determined clearly provided that Fetter, the guarantor, was liable for the exhaust system cost. *See R. at 302.* This interpretation, as explained hereinabove, is incorrect.

It is undisputed the exhaust system, necessary for the operation of a restaurant, was surrendered to the landlord when the lease was terminated. Under the doctrine of surrender and acceptance in the state of Utah, when a tenant surrenders the leased premises to the landlord before the term of the lease expires,

and the landlord accepts the surrender, the tenant is no longer in privity of estate with the landlord and the obligation to pay rents accruing after the date of acceptance is extinguished. *See Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 900 (Utah 1989). In the present matter, as explained herein above, the payment for the exhaust system was expressly defined as rent and was paid as rent on a monthly basis. Therefore, under the doctrine of surrender and acceptance, assuming payment for the exhaust system was part of the tenant's obligation to pay rent, that obligation ended upon termination of the lease.

The *Reid* case also establishes that the doctrine of mitigation of damages applies in the context of a commercial lease. *Id.* at 905. In light of this, the trial court's ruling in the present matter is clearly inconsistent with the concept that a landlord has a duty to mitigate damages. When considering the duty to mitigate, it is completely illogical for Fetter, as guarantor, to continue to be held liable for an improvement that was surrendered to the landlord and which benefited the landlord and subsequent tenants who needed the exhaust system to operate any successor restaurant business.

The Utah Supreme Court, in *Reid*, acknowledged that permitting a landlord to "leave property idle when it could be profitably leased and force an absent tenant to pay rent . . . permits the landlord to recover more damages than it may reasonably require to be compensated" (*id.* at 905 and 906) and that it would be

“analogous to imposing a disfavored penalty upon the tenant.” *Id.* at 906. This same principle, ignored by the trial court, should apply to the question of the exhaust system in this case, whether payment for the exhaust system is classified as rent or not. The trial court’s ruling imposes a “disfavored penalty” upon Fetter.

Not only is the trial court’s ruling illogical when one stands back and looks at it, it is also inconsistent with the most basic of concepts in the law which prohibits a party from receiving a double recovery for the same loss. *See Brigham City Sand & Gravel v. Machinery Center, Inc.*, 613 P.2d 510 (Utah 1980). *See also Western Steel Co. v. Travel Batcher Corp.*, 663 P.2d 82, 84 (Utah 1983) (“an obligee is entitled to be paid in full but cannot exact double recovery”). This court should not permit Brailsford’s assignor to keep the benefit of the exhaust system while requiring Fetter to continue paying for it. The trial court’s minute entry and order granting Brailsford’s motion for partial summary judgment completely fails to address this issue or explain how enforcement of the guaranty against Fetter in this case does not violate the rule against double recovery.

With respect to the specific issue of whether a landlord can keep capital improvements and also recover the expense for those improvements, courts have correctly held landlords cannot have it both ways. *See In re Stewarts’ Properties, Inc.*, 41 B.R. 353, 356 (D. Hawaii 1984) (landlords may not recover expenses for long-term capital improvements where such expenditures ultimately benefited

themselves as lessors). *See also Matter of Parkview Gem, Inc.*, 465 F.Supp. 629 (W.D. Mo. 1979).

In *C.D. Stimson Co. v. Porter*, 195 F.2d 410 (10th Cir. 1952), a federal lawsuit originating in Utah, a landlord put on evidence that he had to spend \$5,600 in repairs and remodeling costs before he could re-rent the space to a new tenant. The amount spend by the landlord included the cost of dividing the premises into two units, adding two restrooms, and making other major alterations. *See id.* The court held improvements that are substantial and permanent in character, and which redound to the benefit of the landlord, “are not proper items of damages.” *Id.* at 414. In other words, the court held the landlord could not recover for permanent improvements that benefited the landlord.

Based upon the foregoing authorities, the trial court improperly granted summary judgment. The trial court’s ruling allows the landlord to keep the benefit of a permanent improvement while, at the same time, forcing Fetter to pay for it. There is no basis, under the facts of this case, for the landlord to receive such a windfall, and for Fetter to receive such a harsh and unintended penalty.

POINT 4.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN BRAILSFORD'S FAVOR BECAUSE THE AMOUNT IS IN DISPUTE

In an affidavit filed in opposition to Brailsford's motion for summary judgment, Fetter testified that there was a dispute concerning the improvements for which the tenant was obligated to pay. At the time of the surrender, the landlord received "hundreds of thousands of dollars" of improvements. R. at p. 202. In another affidavit filed in the case, Fetter testified that the landlord had never been compensated by the landlord for additional tenant improvements Fetter incurred in excess of those agreed to under the lease. R. at p. 77. In answer to Brailsford's amended complaint, Fetter claimed he was entitled to an offset for these expenditures. R. at pp. 110, 113 and 114. However, despite obvious issues of fact concerning the amount of liability in this case, the trial court entered judgment in Brailsford's favor for the entire balance of the exhaust system, without any credit for amounts owed to Fetter by the landlord.

At a minimum, even assuming Fetter could be held liable for the exhaust system under the guaranty, there are fact issues concerning the amount of liability making the trial court's granting of summary judgment inappropriate. *See, e.g., Gator Express Serv. Inc. v. Funding Systems Leasing Corp.*, 279 S. E.2d 332 (Ga. Ct. App. 1981) (substantial fact issue exists as to amount of offset to which

guarantors were entitled following repossession of property, precluding summary judgment). It was improper for the trial court to simply enter judgment in the amount sought by Brailsford in light of these factual issues.

POINT 5.

THE TRIAL COURT ERRED IN GRANTING
SUMMARY JUDGMENT IN BRAILSFORD'S
FAVOR IN THE FACE OF INCONSISTENCIES
IN THE RELEVANT CONTRACTUAL PROVISIONS

Exhibit B to the lease, under the heading "PAID BY TENANT," sets forth a list of improvements for which Pina, the tenant, was required to pay at the outset of the lease. Although Brailsford's position in this case is that being in the landlord's position, he is entitled to recover all of the costs associated with the exhaust system, Exhibit B specifically provides the tenant is only liable for the "*design of the make up and exhaust system.*" R. at p. 196 (emphasis added).

As more fully set forth in Points 2 and 3 of this brief, a common sense review of the lease, Exhibit B to the lease, and the guaranty reveal that Fetter cannot be held liable for the exhaust system. However, if Fetter's analysis of the lease documents is rejected, the court has no other choice but than to hold that the lease, taken as a whole, is ambiguous with respect to the issue of whether the exhaust system is classified as rent and/or whether the guaranty covers the cost of the exhaust system. The subject documents certainly do not establish clear liability on Fetter's part, as the trial court indicated in its minute entry. R. at 315.

Any ambiguities and conflicts in the lease documents, at a minimum, should have precluded the trial court from granting summary judgment.⁷ If an ambiguity exists, the intent of the parties becomes a question of fact. *Webbank v. American Gen. Annuity Serv.*, 54 P.3d 1139, 1145 (Utah 2002) (citations omitted). “A motion for summary judgment cannot be granted if a legal conclusion is reached that an ambiguity exists in the contract and there is a factual issue as to what the parties intended.” *Id.* (quotation omitted).

CONCLUSION

This court should reverse the trial court’s summary judgment against Fetter on the basis that the obligation for which Fetter is being held liable was characterized as rent under the lease and Fetter did not guaranty rent payments. Additionally, the guaranty document itself does not obligate Fetter to pay for the cost of the exhaust system. Furthermore, to require Fetter to pay for improvements surrendered to the landlord would fly in the face of the well-settled principles that one cannot receive a double recovery and one is required to mitigate damages.

Alternatively, at a minimum, there are questions of fact that make summary judgment improper in this case.

⁷ “A contract is ambiguous if it is unclear, omits terms, has multiple meanings, or is not plain to a person of ordinary intelligence and understanding.” *Utah Farm Bureau Ins. Co. v. Crook*, 980 P.2d 685, 686-687 (Utah 1999).

RESPECTFULLY SUBMITTED this 11th day of June, 2004.

WINDER & HASLAM, P.C.



DONALD J. WINDER

JOHN W. HOLT

Attorneys for
Defendant/Appellant

APPENDIX

Tab A

LEASE AGREEMENT

This Lease Agreement is made this 24 day of August, 1996, by and between WAREHOUSE COMMERCIAL, L.L.C., a Utah limited liability company ("Landlord"), and PINA UNLIMITED, L.L.C., a Utah limited liability company ("Tenant"). In consideration of the mutual covenants herein contained, the parties agree as follows:

WITNESSETH:

1. **LEASED PREMISES.** Landlord, in consideration of the rent to be paid and the covenants to be performed by Tenant, does hereby demise and lease unto Tenant, and Tenant hereby rents from Landlord, approximately see attached Ex A square feet as indicated on the floor plan attached hereto as Exhibit "A" and incorporated herein by this reference (the "premises" or "leased premises"), in a mixed-use condominium project located at 327 West 200 South, in the City of Salt Lake, County of Salt Lake, State of Utah (the "Building").
2. **TERM.**
 - 2.1 **Initial Term.** The rental term of this Lease shall commence on January 1, 1997, or on the opening by Tenant of its business in the leased premises if prior to January 1, 1997 (the "Commencement Date"), and shall be for a period of ten (10) years thereafter. For the purposes of this lease, the term "lease year" shall mean the period beginning on the Commencement Date and ending on the last day of the twelfth (12th) full calendar month following the Commencement Date, and each ensuing twelve (12) month period. Notwithstanding the foregoing, in the event that Tenant has not opened for business in the premises by January 1, 1997, as a result of delays by either Landlord or Tenant in the construction and installation of their improvements to the premises, as provided herein, then the Commencement Date shall be the date that Tenant first opens for business, so long as such opening is not later than January 31, 1997. If Tenant has not opened for business by January 31, 1997, as a result of a failure by Tenant, its contractors or suppliers to complete its improvements to the premises, complete the installation of Tenant's furnishings equipment in the premises or for any other delay caused by Tenant, its contractors or agents, then the Commencement Date shall be February 1, 1997, regardless of when Tenant actually opens for business. If Tenant has not opened for business by January 31, 1997 due to Landlord's failure to complete its improvements to the premises, as detailed on Exhibit "B" ("Landlord's Improvements") by Jan 31, 1997, 1996, then the Commencement Date shall be February 1, 1997, but once Tenant takes occupancy of the premises it shall be entitled to occupy the premises without any obligation to pay rent for a period



equal to the number of days after February 1, 1996 until
Landlord's Improvements are completed. Tenant, its contractors and suppliers,
shall have the right to enter the premises for the purpose of constructing its
improvements to the premises and installing its fixtures and personal property in
the premises from and after August 1, 1996. All such access shall be
coordinated with Landlord in order to minimize the impact of such activities on
Tenant's construction activities in the premises.

- 2.2 Option to Extend Term. So long as Tenant is not in default hereunder, Tenant shall have the option to extend this lease for one (1) additional ten (10) year term. Such option shall be exercised by Tenant providing Landlord with written notice at least eight (8) months prior to the expiration of the original lease term. In the event Tenant exercises this option to extend, Landlord and Tenant shall commence negotiation of the new Base Rent in good faith within thirty (30) days following Tenant's notice to extend the term. Base Rent for the Option Period shall be 95% of the fair market value rent for the Option Period, as agreed upon by Landlord and Tenant. If Landlord and Tenant cannot agree upon the fair market rent for the Option Period, Landlord and Tenant shall each select an M.A.I. appraiser who shall determine the fair market base rent for the premises during the Option Period, and the Base Rent shall be the average of the fair market base rent determined by each of the two appraisers, multiplied by 0.95. Landlord and Tenant shall each pay the fees of their own appraiser.
3. LEASE EXPIRATION. This Lease and the tenancy hereby created shall cease at the end of the term hereof, or any extension or renewal thereof, without the necessity of any notice from either Landlord or Tenant to terminate the same, and Tenant hereby waives notice to vacate the premises and agrees that Landlord shall be entitled to the benefit of all provisions of the law respecting the summary recovery of possession of premises from a Tenant holding over to the same extent as if statutory notice has been given.
4. AUTHORIZED USE. Tenant shall use the premises for a restaurant, and for no other purpose whatsoever without the written consent of Landlord first had and obtained. Without limiting the generality of the foregoing restriction on use, the premises may not be used as a dance club, discotheque, night club or other entertainment facility. Tenant shall not commit or knowingly permit any waste of the Premises and shall not knowingly permit any part of the Premises to be used for any unlawful purpose. Tenant will comply with all applicable Federal, State and local laws, ordinances and regulations relating to the Premises and its use and operation by Tenant, including, but not limited to, all environmental laws, all laws relating food preparation and service, and the sale of liquor, the Americans with Disabilities Act, and other similar or unrelated laws now existing or adopted in the future. Any use of the sidewalk in front of the premises for guest seating shall be subject to the ordinances, regulations and

restrictions of Salt Lake City, and other appropriate governmental authorities and agencies, as well as the prior review and approval of the plans for such seating and related improvements by Landlord.

5. **BASE RENT.** Tenant covenants and agrees to pay to Landlord, its representatives, agents, successors and assigns, as minimum rental for the premises the following amounts (the "Base Rent"):

[Note: These amounts will increase to include amortization of the cost of the *Make up Air and* exhaust system over a 5-year period, with interest at 8%]

	<u>Annual</u>	<u>Monthly</u>
Year One	\$ 48,000	\$4,000
Year Two	\$ 98,880	\$8,240
Year Three	\$103,330	\$8,611
Year Four	\$107,980	\$8,998
Year Five	\$112,839	\$9,403
Year Six	\$122,995	\$9,416
Year Seven	\$128,530	\$10,711
Year Eight	\$134,314	\$11,193
Year Nine	\$140,358	\$11,697
Year Ten	\$146,674	\$12,223

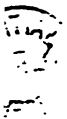
Concurrent with the execution hereof, Tenant has paid to Landlord the first month's rent, receipt of which is hereby acknowledged, subject to collection, however, if made by check. In the event the Commencement Date occurs on a day other than the first day of a calendar month, then the Base Rent for such month shall be pro-rated on a per-diem basis for the remainder of the month following the Commencement Date.

6. **REAL ESTATE TAXES.** Landlord shall be responsible for the payment, at such times as Landlord shall determine, of all real estate taxes and assessments which may be levied or assessed by any lawful authority against the leased premises ("Taxes"). The term "Taxes" shall not include or be deemed to include any income, franchise, corporate, sales, excess profits, transfer, revenue, estate, inheritance, gift, devolution or succession tax or any other tax, assessment, charge or levy upon, or measured in whole or in part by, rent payable to Landlord. In addition, as regards any assessment which under the laws then in force may be paid in installments, there shall be included within the meaning of the term "Taxes" with respect to any fiscal tax year only the current annual installment for such fiscal tax year. If any Taxes imposed on the premises to finance any improvement made or proposed by any taxing district shall be payable in installments over a period of time extending beyond the term of this Lease,

Tenant shall only be required to pay such installments thereof as shall become due and payable during the term of this Lease.

Tenant shall, within thirty (30) days following presentation of supporting documentation, pay or reimburse Landlord for the Taxes assessed during the lease term. Landlord shall also have the option of collecting from Tenant, as additional rent each month, one-twelfth (1/12) of the estimated Taxes for each year, as reasonably determined by Landlord. In such event, when the actual amount of the Taxes for a year is determined, Tenant shall pay any shortfall between the amounts collected and the actual amount of the Taxes within fifteen (15) days following written notice from Landlord. If Tenant has paid more than the actual amount of the Taxes in any year, such excess shall, at Tenant's option, either be returned to Tenant or applied to Tenant's payment of Taxes in the following year.

7. **ALL OTHER TAXES.** Tenant shall be exclusively liable for all other taxes and governmental charges of every kind and nature whatsoever assessed against the personal property or trade fixtures or inventory kept or permitted by Tenant to be located upon the premises. If any of Tenant's personal property is taxed with the premises, Tenant shall pay such taxes to Landlord the taxes within fifteen (15) days following written notice.
8. **TENANT OPERATING EXPENSES.**
 - 8.1 Condominium Assessments. Tenant acknowledges that the premises are situated in one or more commercial condominium units in the Warehouse District Condominiums. Tenant shall, within 30 days following presentation of an invoice therefor, but not more often than monthly, pay all regular and special assessments for common expenses assessed to the premises by the owners' association of the condominium project in which the premises are located.
 - 8.2 Utilities. Tenant shall be responsible for the cost of all electricity, gas, telephone, cable television, communication lines and services, water, sewer and all other utilities serving the leased premises, and all janitorial, refuse disposal and cleaning costs for the leased premises.
9. **NET RENT.** It is the intention of the parties that the Base Rent shall be an absolute net figure to Landlord and that all other expenses of any type or nature incurred by Landlord in connection with the leased premises (except for the initial cost of Landlord's Improvements and any warranty work performed by Landlord or its contractors) shall be included as additional rent and paid by Tenant.
10. **LATE RENT CHARGES.** If Tenant shall fail to pay any installment of Base Rent, Taxes or any other amounts or charges to be paid by Tenant hereunder, within 10 days



after the due date thereof, Tenant shall pay a late fee equal to five percent (5%) of such past due amount. In addition, all late amounts shall accrue interest at the rate of eighteen percent (18%) per annum from the due date until paid.

11. INSURANCE.

11.1 Fire, Casualty, and General Liability Insurance. Other Insurance. Tenant shall obtain and maintain throughout the term of this Lease, at its expense (and in the event of loss, pay the deductible portion thereof) insurance against loss (including loss of rents) or damage of the premises by reason of fire, casualties, vandalism, and other risks at least as broad as those covered by the Standard Extended Coverage Endorsement, and against business interruption, with a qualified insurance company or companies, in an amount and with such coverage as are satisfactory to and approved by Landlord. In the event that such insurance is carried by the owners' association of the Warehouse Condominiums under a blanket policy for the entire building, such blanket policy shall, at the discretion of Landlord, satisfy the requirements of this Section, so long as such policy is kept in force throughout the lease term.

11.2 Fire Insurance on Tenant's Fixtures. At all times during the term hereof, Tenant shall keep in force at its sole cost and expense, replacement cost insurance for the perils covered by a standard all-risk policy coverage in companies acceptable to Landlord, equal to the replacement cost of Tenant's improvements, trade fixtures, furnishings, equipment, and contents upon the Premises, and naming Landlord as a co-insured. This insurance coverage shall also include plate glass insurance covering all plate glass in the premises.

11.3 Liability Insurance on Tenant's Premises. Tenant also agrees to obtain and keep in force at its cost and expense from and after the date Landlord delivers possession of the premises to Tenant and throughout the lease term at Tenant's own cost and expense:

(a) Comprehensive general liability insurance including personal injury, bodily injury, property damage, contractual liability, host liquor (if liquor is provided by Tenant) and premises operations insuring against liability for injury to persons or property occurring in, on or about the premises or arising out of the ownership, maintenance, use or occupancy thereof. The limit of liability under such insurance shall not be less than \$1,000,000 combined single limit.

(b) Worker's Compensation and Employer's Liability Insurance in amounts required by law.



11.4 Provisions to be Contained in Policies. All insurance provided for in this Lease to be maintained by Tenant shall be effected under enforceable policies issued by insurers approved by Landlord, and a copy of all policies shall be delivered to Landlord on or before the Commencement Date, or on or before the day Tenant begins Tenant's work on the Premises, whichever is first. The policy or policies shall provide by their terms that they are noncancellable except on 20 days' prior written notice to Landlord. At least 20 days prior to the expiration date of any policy, the original renewal policy for such insurance shall be delivered by Tenant to Landlord. Within 20 days after the premium on any policy shall fall due and payable, Landlord shall be furnished with satisfactory evidence of its payment. All policies, except Worker's Compensation, shall name Landlord, Tenant, and any management company, lender or other persons or entities designated by Landlord, as insureds. All policies shall be written as primary policies, not contributing with and not in excess of coverage which Landlord may carry. All such policies shall contain a provision that Landlord, although named as an insured, shall nevertheless be entitled to recover under such policies for any loss occasioned to it, its servants, agents, and employees by reason of negligence of the Tenant. All such insurance shall specifically insure the performance by Tenant of the indemnity agreements as to liability contained herein. All such insurance shall provide that the coverage afforded shall not be affected by the performance of any work in or about the Premises.

12. **CONSTRUCTION OF IMPROVEMENTS TO THE PREMISES.** Landlord agrees prior to the commencement of the lease term, at Landlord's sole cost and expense, to make the improvements to the leased premises designated as Landlord's responsibility on the plans and specifications which are attached hereto as Exhibit "B" and herein by this reference ("Landlord's Improvements"). Tenant shall be responsible, and shall pay the full cost for all other improvements to the premises, as shown and described on attached Exhibit "B" ("Tenant's Improvements"). Tenant agrees that no minor changes from said plans and specifications which may be necessary during the improvement of the leased premises shall affect, invalidate or otherwise change this Lease. In the event that Tenant requests any modifications to Landlord's Improvements which are acceptable to Landlord, Tenant shall pay, in advance, all construction, architectural and other costs incurred in connection with such changes on the basis of Landlord's cost to make such changes plus eight percent (8%). The parties hereto agree that Tenants' occupancy of the premises shall constitute formal acceptance that the same are in the condition called for hereunder, except for any items specifically excepted in writing at date of occupancy as incomplete. Landlord's Improvements shall be warranted by Landlord's general contractor against construction defects for a period of one-year following construction.

13. **MAINTENANCE OF PREMISES.** Tenant shall be responsible for all maintenance and repairs of the leased premises and agrees to keep the premises clean and well



maintained at all times. Tenant shall take all steps necessary to assure that all refuse, waste, grease, odors and smoke from the operation of Tenant's business in the premises are disposed of, vented or otherwise promptly removed from the premises and the Building, so that the other occupants of the Building are not subjected to smoke or odors from Tenant's operations. Tenant shall not penetrate the exterior walls, ceilings or floors of the premises without the prior written consent of Landlord, and shall maintain any signs used for advertising purposes in a well repaired, neat and clean condition.

14. MODIFICATIONS BY TENANT.

- 14.1 Landlord Consent Required. Tenant shall not make or cause to be made any alterations, additions, or improvements to the leased premises, or install or cause to be installed any exterior signs, antennas, exterior lighting, plumbing fixtures, shades, canopies or awnings or make any changes to the exterior of the premises without the prior written approval of Landlord. Tenant may make interior non-structural alterations and/or improvements to the leased premises with the prior written consent of Landlord, which consent shall not be unreasonably withheld. Tenant shall present to Landlord any plans or specifications for such work at the time approval is sought. All alterations and improvements by Tenant must comply with all applicable building codes and other governmental requirements.
- 14.2 Selection of Contractors. In making any Tenant's Improvements and any other alterations or other improvements to the premises, Tenant shall select a reputable contractor acceptable to Landlord: (1) having demonstrated ability to competently perform such work, and (2) having sufficient financial strength to insure that such work will be completed free of liens or other claims from subcontractors employed by the contractor. Tenant or its contractors shall obtain all permits required by law, as well as payment bonds or evidence of available funds acceptable to Landlord, in its reasonable judgement, to assure completion of the work and payment of all subcontractors and material suppliers. The terms of any agreement to perform such work shall be governed by a separate construction contract signed by Tenant and the contractor that will be performing the work. Tenant shall provide Landlord with a copy of all construction contracts for Tenant's improvements to the premises within five (5) days following the execution thereof.
- 14.3 Payment for Improvements. Tenant shall promptly pay all contractors and materialmen so as to avoid the possibility of a lien attaching to the leased premises, and should any such lien be made or filed, Tenant shall immediately bond against or discharge the same, and shall indemnify and hold Landlord harmless from all loss or damage therefrom. Tenant's principals, Blaine Fetter

and Christian Oesch, shall personally guaranty the payment of all costs and expenses of Tenant's Improvements to the premises, in accordance with the Guaranty Agreement which is attached hereto as Exhibit "C" and incorporated herein by this reference. In the event that Tenant fails to bond against or discharge any mechanic's lien relating to Tenant's improvements, alterations, or repairs within twenty (20) days after written notice from Landlord, Tenant shall be in default hereunder and Landlord (in addition to its other remedies available in the event of Tenant's default) may, but shall not be required to, pay or bond against such lien, in which event all such amounts expended by Landlord shall be immediately reimbursed by Tenant, and shall be considered additional rent for all purposed herein, due and payable upon demand, together with interest from the date of disbursement at the rate of eighteen percent (18%) per annum until paid.

15. MAINTENANCE RESPONSIBILITIES.

15.1 Landlord's Responsibilities. Until a Declaration of Condominium for the Warehouse District Condominiums (the "Declaration") is recorded in the Office of the Salt Lake County Recorder, Landlord shall be responsible for repair and maintenance of the roof, exterior walls, structural repairs, exterior painting and all common areas serving the leased premises. Following the recording of the Declaration, all such maintenance and repairs shall be the responsibility of the owners' association of the condominium project of which the premises is a part.

15.2 Tenant's Responsibilities. Tenant shall be responsible for maintaining the interior of the premises and all facilities situated in, or exclusively serving, the leased premises. Without limiting the generality of the foregoing, Tenant shall be responsible for the maintenance, cleaning, repair and replacement of all windows and glass, interior decoration, light fixtures, globes and tubes, phone, computer and other utility lines, plumbing fixtures, loading docks and ramps, ventilation systems and equipment, interior walls (including paint and other wall coverings), floors and ceilings, sidewalk areas occupied by Tenant or its customers, carpeting, tile and other floor coverings, window coverings, heating and air conditioning equipment serving the leased premises and all other non-structural items. If Tenant refuses or neglects to commence to complete repairs promptly and adequately, Landlord may, but shall not be obligated to, make and complete said repairs, and Tenant shall upon demand pay the costs incurred by Landlord in connection therewith plus fifteen percent (15%) for Landlord's administrative and overhead expenses in making such repairs.

16. DESTRUCTION OF LEASED PREMISES. In the event that the premises are damaged and/or destroyed during the term of this Lease or any extensions or renewals thereof to such an extent that the same cannot be expected to be put into tenable

condition within 150 days, then and in that event either party shall have the right, exercisable upon notice to the other within 60 days of the date of damage and/or destruction, to terminate this Lease as of the date of such damage and/or destruction. If neither party is entitled to nor elects to terminate the Lease, Landlord shall proceed with all due diligence to repair and restore the Building and the premises. Landlord shall be entitled to all insurance proceeds payable on Tenant's insurance policies insuring against the loss or damage to the Building and improvements, and any such proceeds received by Tenant from such insurance shall be promptly paid to Landlord. During such repair and restoration period, Tenant shall not be obligated to pay any Base Rent, additional rent or other charges unless Tenant shall occupy a portion of the premises during such time as they are being restored, in which case Tenant shall pay rent for the portion of the premises being so used in proportion to the rent for the entire demised premises, such rent to be pro-rated on the basis of square footage. Tenant shall be solely responsible for Tenant's trade fixtures, inventory and personal property, and Landlord's reconstruction obligation shall not include murals, works of art, or decorative treatments of Tenant's premises.

17. EMINENT DOMAIN. All damages that may be awarded for a taking under the power of eminent domain, whether for the whole or a part of the leased premises, shall belong to and be the property of Landlord whether such damages shall be awarded as compensation for diminution in value to the leasehold or to the fee of the premises; provided, however, that Landlord shall not be entitled to the award made to Tenant for loss of business, depreciation to stock and fixtures, and if a separate proceeding is required for Tenant to recoup these expenses, Tenant shall be entitled to institute and maintain the same. If the whole of the premises hereby leased shall be taken under the power of eminent domain then the term of this Lease shall cease as of the day possession shall be taken, and the rent shall be paid up to that day with a proportionate refund by Landlord of such rent as may have been paid in advance. If less than the whole is taken then the rental shall be reduced in proportion to the amount of the leased premises taken.
18. SUBLEASING AND ASSIGNMENT. Tenant shall not assign, transfer, mortgage, pledge, hypothecate or encumber this Lease, or any interest therein, and shall not sublet the premises or any part thereof, or any right or privilege appurtenant thereto, or allow any person other than the agents and employees of Tenant to occupy or use the premises, or any portion thereof, without the prior written consent of Landlord, which approval will not be unreasonably withheld. Without limiting the generality of Landlord's right to refuse to consent to a sublease or assignment for any reasonable cause, in considering any request for approval of a sublease or assignment, it shall not be considered unreasonable for Landlord to withhold its consent if: (i) the proposed subtenant or assignee has a net worth which is less than the net worth of Tenant or its financial principal, Blaine P. Fetter; (ii) the management of the proposed subtenant or assignee is not as experienced in its business as Tenant's other principal, Christian



Oesch, is in the restaurant business; or (iii) if the proposed use of the premises will, in Landlord's judgement, create additional noise, odors, pedestrian or vehicular traffic, or other conditions that may adversely affect other occupants of the Building. Any sale, assignment or other transfer, directly or indirectly, by Tenant of fifty percent (50%) or more of the ownership interest in Tenant (either in a single transaction or in the aggregate of several transactions during the course of the lease term) shall constitute an assignment of Tenant's interest in this Lease, requiring the prior written consent of Landlord. The consent by Landlord to any transfer of interest shall not operate as a waiver of the necessity to obtain such consent to any subsequent transfer of interest. Any such assignment or subletting without such consent shall be void, and shall, at the option of Landlord, constitute a default under this Lease. No assignment of this Lease or subletting of the premises shall release Tenant from liability for the payment and performance of all of the obligations of the Tenant hereunder.

19. **CONDOMINIUM DOCUMENTS.** Tenant acknowledges that the premises are part of a residential and commercial condominium project known as the Warehouse District Condominiums, and that the premises and all other portions of the project are, or shall be, encumbered by a Declaration of Condominium (the "Declaration") and Record of Survey Map (the "Map"), as the same may be amended from time to time. Tenant shall comply with all of the terms and provisions of the Declaration applicable to the premises, and shall comply with all rules and regulations adopted, from time to time, by the owners' association of the project. To the extent that any of the terms or provisions of this Lease contradict or are inconsistent with the terms of the Declaration, including without limitation, the provisions dealing with damage, destruction and condemnation of the premises, the terms and provisions of the Declaration shall control.
20. **SURRENDER OF PREMISES.** At the termination of the tenancy hereby created, Tenant shall deliver to Landlord the leased premises in the same condition as the leased premises were in upon delivery of possession thereof to Tenant, reasonable wear and tear excepted, and shall surrender all keys for the leased premises to Landlord at the place then fixed for the payment of rent. At Landlord's request, Tenant shall remove all its trade fixtures before surrendering the premises and shall repair any damage to the leased premises caused thereby. Tenant's obligations to observe or perform this covenant shall survive the expiration or other termination of the term of this Lease.
21. **ESTOPPEL STATEMENT.** Tenant agrees, within fifteen (15) days after request therefore by Landlord, to execute in recordable form and deliver to Landlord a statement in writing, certifying:
 - (a) whether this Lease is in full force and effect;
 - (b) the date of commencement of the term of this Lease;

- (c) whether rent is paid currently without any offset or defense thereto;
 - (d) the amount of rent, if any, paid in advance;
 - (e) that there are no uncured defaults by Landlord or stating those claimed by Tenant; and
 - (f) such other items as Landlord and any lender or purchaser may reasonably request.
22. **ATTORNNMENT.** Tenant shall, in the event any proceedings are brought for the foreclosure of, or in the event of exercise of the power of sale under any mortgage or deed of trust made by Landlord covering the leased premises, attorn to the purchaser upon any such foreclosure or sale and recognize such purchaser as the Landlord under this Lease. Tenant shall confirm such agreement, in writing, upon request of any lender or potential lender of Landlord.
23. **SUBORDINATION.** Tenant agrees that this Lease shall, at the option of any lender having a mortgage or deed of trust to the premises, be subordinate to any mortgages or deeds of trust encumbering the premises, and to any and all advances to be made thereunder, and to the interest thereon, and any renewals, replacements and extensions thereof. Tenant shall also subordinate this Lease to any future mortgage or deed of trust upon receipt by Tenant of a non-disturbance agreement, reasonably satisfactory to Tenant and in recordable form, executed by the holder(s) of such interest(s). Tenant agrees to execute any documents requested by Landlord in order to effectuate such subordination so long as such do not otherwise adversely affect the rights and/or obligations of Tenant under this Lease.
24. **WASTE OR NUISANCE.** Tenant shall not commit or suffer to be committed any waste upon the leased premises, or any nuisance or other act or thing which may unduly disturb the quiet enjoyment of any other occupant of the building in which the leased premises are located. The parties acknowledge that there is a certain amount of noise and traffic associated with a successful restaurant, and that the reasonable sounds associated with cooking, eating, background music and conversation shall not be considered a nuisance. Tenant shall have the right to have music in the premises consistent with holiday celebrations (e.g. New Year's Eve, Cinco de Mayo, etc.) on not more than six holidays per year. However, Tenant shall not permit fireworks, music which exceeds normal sound pressure levels (e.g. excessive volume, bass sounds or percussive effects), public address systems, music performed outdoors, or other activities within or outside of the premises that exceed the noise or other disturbances reasonably expected of a successful restaurant located in a mixed-use residential and commercial building and neighborhood. Tenant shall not change traffic flows, access or parking arrangements associated with the Building in such a way as to interfere with



the access or parking of other occupants of the Building. Tenant acknowledges that this Lease does not entitle Tenant, its employees, guests or invitees, to utilize any parking spaces associated with the Building. Tenant shall not permit deliveries to the premises before 8:30 a.m. on weekdays, and 9:00 a.m. on weekends and holidays, or after 5:00 p.m. on any day. Tenant shall exercise its best efforts to operate its business in the premises with sensitivity to the concerns of the residential occupants of the Building, in order to minimize the negative effects that a restaurant in the Building might have on the other Building occupants.

25. **HAZARDOUS SUBSTANCES.** Tenant shall not create, generate, use, bring, allow, emit, dispose or permit on the premises any toxic or hazardous gaseous, liquid or solid material or waste ("Toxic Material"), including, without limitation, any material or substance (i) having characteristics of ignitability, corrosivity, reactivity, or extraction procedure toxicity, or (ii) which is defined as "Hazardous Substances," "Hazardous Materials" or "Toxic Substances" in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 USC Section 9601, et seq; the Hazardous Materials Transportation Act, 49 USC Section 1801, et seq; the Resource Conservation and Recovery Act, 42 USC Section 6901, et seq; or in the regulations adopted and publications promulgated pursuant to said laws, or (iii) which has been determined by any state, federal, or local governmental or public authority or agency to be capable of posing a risk of injury to health, safety or property. Tenant, at its sole cost, shall immediately take all steps necessary to effect a cleanup of any contamination of the premises, or any part thereof, caused or permitted by Tenant in violation of the preceding sentence, and to obtain appropriate governmental agency certification of such cleanup. Tenant shall indemnify and hold Landlord harmless from any claims, liabilities, costs or expenses incurred or suffered by Landlord arising from such bringing, allowing, using, permitting, generating, creating, emitting, or disposing of Toxic Materials, whether or not consent to same has been granted by Landlord. Tenant's indemnification and hold harmless obligations shall include, without limitation, (i) claims, liability, costs or expenses resulting from or based upon administrative, judicial (civil or criminal), or other action, legal or equitable, brought by any private or public person under common law or any federal, state, county or municipal law, ordinance or regulation, including, without limitation, any subsequent Tenant or owner of the premises or adjacent property, (ii) claims, liabilities, costs or expenses pertaining to the cleanup or containment of Toxic Materials, the identification of the pollutants in the Toxic Materials, the identification of the scope of any environmental contamination, the removal of pollutants from soils, river beds or aquifers, and obtaining customary certification from the appropriate governmental agency of such removal, the provision of any alternative public drinking water source or the long term monitoring of ground water and surface waters, (iii) all costs and fees incurred in defending such claims, and (iv) all costs or losses to Landlord arising from any delay or inability in selling or leasing the premises after the expiration of the Lease, including, without limitation, reduction in the market value of the premises.



Tenant shall comply, at its sole cost, with all laws pertaining to such Toxic Materials. Tenant's hold harmless and indemnity obligations hereunder shall survive the expiration or termination of this Lease.

26. DEFAULT AND REMEDIES.

26.1 No Limitation on Remedies. The rights and remedies provided in this Section are not intended to limit, but are in addition to, all other rights and remedies available to Landlord pursuant to this Lease or otherwise available at law, or in equity, as a result of Tenant's default.

26.2 Right of Re-Entry. In the event of any failure of Tenant to pay any installment of Base Rent, Taxes, condominium assessments or other monetary sum due hereunder within ten (10) days after the due date thereof, or any failure to perform any other term, condition, or covenant of this Lease to be observed or performed by Tenant for more than fifteen (15) days after receipt by Tenant of written notice of such failure, or if Tenant shall become bankrupt or insolvent, file any debtor proceedings, or take or have taken against Tenant in any court, pursuant to any statute either of the United States or of any State, a petition in bankruptcy or insolvency or for reorganization or for the appointment of a receiver or trustee of all or a portion of Tenant's property, or if Tenant shall abandon the leased premises, or suffer this Lease to be taken under any writ of execution, then Landlord, in addition to all other rights or remedies it may have at law or in equity, shall have the immediate right of re-entry and may remove all property from the premises and store the same in a public warehouse or elsewhere at the cost of, and for the account of, Tenant; all without service of notice or resort to legal process and without being deemed guilty of trespass, or becoming liable for any loss or damage which may be occasioned thereby.

26.3 Termination, Damages and Other Remedies. Should Landlord elect to re-enter, as herein provided, or should it take possession pursuant to legal proceedings or pursuant to any notice provided for by law, it may either terminate this Lease or it may, from time to time without terminating this Lease, make such alterations and repairs as may be necessary in order to relet the premises, and relet said premises or any part thereof for such term or terms (which may be for a term extending beyond the lease term) and at such rental or rentals and upon such other terms and conditions as Landlord, in its sole discretion, may deem advisable. Upon each such reletting, all rentals received by Landlord from such reletting shall be applied, first, to the payment of any indebtedness other than rent due hereunder from Tenant to Landlord; second, to the payment of any costs and expenses of such reletting, including brokerage fees and commissions, attorneys' fees, and costs of alterations, refurbishment, remodeling and repairs to the premises; third, to the payment of rent and other amounts due and unpaid



hereunder, and the residue, if any, shall be held by Landlord and applied in payment of future rent as the same may become due and payable hereunder. If such revenues received from such reletting during any month are less than that to be paid during that month by Tenant hereunder, Tenant shall pay any such deficiency to Landlord. Such deficiency shall be calculated and paid monthly. No such re-entry or retaking possession of the premises by Landlord shall be construed as an election on its part to terminate this Lease unless a written notice of such intention is given to Tenant or unless the termination thereof is decreed by a court of competent jurisdiction. Notwithstanding any such reletting without termination, Landlord may at any time thereafter elect to terminate this Lease for such previous breach. Should Landlord at any time terminate this Lease for any breach, in addition to any other remedies Landlord may have, Landlord may recover from Tenant all damages it may incur by reason of such breach, including the cost of recovering the premises, the reasonable costs of refurbishing and remodeling the premises for use by another tenant, reasonable attorneys' fees, brokerage fees and commissions, appraisal fees, and the present value (calculated using an 6% interest factor) at the time of such termination of the excess, if any, of the amount of rent and charges equivalent to rent reserved in this Lease for the remainder of the lease term over the then reasonable rental value of the premises for the remainder of the lease term, all of which amounts shall be immediately due and payable from Tenant to Landlord.

26.4 Security Interest in Equipment and Fixtures.

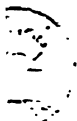
(a) As additional security for the performance by Tenant of all of its duties and obligations under this Lease, Tenant hereby grants to Landlord a first priority lien and security interest in all of the trade fixtures, equipment, appliances, furniture, cookware, dishes, utensils and all other personal property installed or located upon the premises, as well as all trade fixtures, equipment, appliances, furniture, cookware, dishes, utensils and all other personal property which may be hereafter acquired and located in the premises (the "Personal Property"). The Personal Property shall not include the cash register system being leased by Landlord for use in the premises. Upon the acquisition of the Personal Property by Tenant, Landlord and Tenant shall attach to this Lease, or an amendment hereto, an exhibit listing the various items of personal property situated at, or used in connection with, the premises. Landlord shall have a first priority security interest in not only those items set forth in such list, but all other personal property and fixtures situated in the premises, both now and in the future. Concurrent with the execution hereof, and from time to time in the future as Landlord may request, Tenant shall execute such financing statements and continuation statements as are deemed necessary by Landlord, from time to time, in order to perfect its security interest in the Personal Property.



(b) Tenant warrants and represents with respect to all Personal Property now owned or hereafter acquired and used in the premises that Tenant is the sole owner of such property, free and clear of all liens, security interests, leases and encumbrances of any type or nature. Tenant will keep the Personal Property free from any adverse lien, security interest or encumbrance. Tenant shall keep the Personal Property in good order and repair, and shall not sell or otherwise transfer any of the Personal Property without the prior written consent of Landlord. Tenant shall promptly notify Landlord of all acquisitions of Personal Property throughout the Lease Term.

(c) In the event of a default by Tenant under this Lease, Landlord shall, in addition to its other rights and remedies set forth herein, have the right to exercise all of the remedies of a secured party under the Utah Uniform Commercial Code, including but not limited to the right to peaceful repossession of the Personal Property without judicial process. Landlord may require Tenant to assemble the Personal Property and make it available to Landlord at a place to be designated by Landlord which is reasonably convenient to both parties. Unless the Personal Property threatens to decline speedily in value or is of the type customarily sold in a recognized market, Landlord will give Tenant reasonable notice of the time and place of any public sale of the Personal Property or of the time after which any private sale or any other intended disposition thereof is to be made. The requirements of reasonable notice shall be met if such notice is mailed, postage prepaid, to the address of Tenant shown herein at least five (5) days before the time of sale or disposition. Tenant shall be liable for all expenses of retaking, holding, preparing for sale, selling, or the like, which expenses shall include Landlord's actual attorneys' fees and other legal expenses. Notwithstanding the foregoing, nothing in this subsection shall be construed as requiring Landlord to exhaust its remedies against the Personal Property prior to, or as a condition of, its collection or enforcement of any obligation of Tenant arising hereunder.

27. EXCUSE OF LANDLORD'S PERFORMANCE. Anything in this Lease to the contrary notwithstanding, providing such cause is not due to such party's willful act or neglect, Landlord shall not be deemed in default with respect to the performance of any of the terms, covenants, and conditions of this Lease, if same shall be due to any strike, lockout, civil commotion, war-like operation, invasion, rebellion, hostilities, military or usurped power, sabotage, governmental regulations or controls, severe weather conditions, Act of God, or other cause beyond the control of Landlord.
28. LEGAL EXPENSES. In the event of default by either party hereunder, the defaulting party hereby agrees to pay all costs incurred in enforcing this Lease or any right arising out of the breach thereof, whether by suit or otherwise, including reasonable attorney's fees and disbursements.



29. **WAIVER OF REDEMPTION RIGHTS.** Tenant hereby waives all rights of redemption granted by or under any present or future laws or rulings in the event of Landlord's obtaining possession of the premises by reason of the violation by Tenant, of any of the covenants or conditions of this Lease, or otherwise.

30. **BANKRUPTCY.**

30.1 If Tenant shall be adjudicated or declared bankrupt, or if any proceedings are filed by or against Tenant, under the United States Bankruptcy Code or any similar provisions of any future federal bankruptcy law, or any state insolvency law, then and in any such event, the Landlord may, at its option, terminate this Lease and all rights of Tenant hereunder by giving to Tenant written notice of Landlord's election to so terminate, in which event this Lease shall cease and terminate with the same force and effect as though the date set forth in said notice were the date originally set forth herein and fixed for the expiration of the term, and Tenant shall vacate and surrender the premises but shall remain liable to the full extent permitted by law. Neither the election to terminate nor the right of re-entry shall apply when an involuntary petition for bankruptcy is dismissed within sixty (60) days of filing.

30.2 If as a matter of law Landlord has no right on Tenant's bankruptcy to terminate this Lease, then if Tenant, as debtor, or its trustee, wishes to assume or assign the Lease, in addition to curing or adequately assuring the cure of all defaults existing under this Lease on Tenant's part on the date of filing of the proceedings (such assurances being defined below), Tenant, as debtor or its trustee, must also furnish adequate assurance of curing defaults and of future performance (as defined below) under this Lease. Adequate assurance of curing defaults means the posting with Landlord of a sum in cash sufficient to defray the costs of curing all existing defaults. Adequate assurance of future performance under this Lease means posting a deposit equal to three (3) months' rent including Taxes, insurance, condominium assessments, utilities and all other charges payable by Tenant hereunder, and in the case of an assignee, assuring Landlord that the assignee is financially capable of assuming this Lease and that its use of the premises will be as provided elsewhere in this Lease and for no other use. In a reorganization under the Bankruptcy Code, the debtor or trustee must assume this Lease or assign it within sixty (60) days from the filing of the proceeding or it shall be deemed to have rejected and terminated this Lease.

30.3 If this Lease is assumed by a bankruptcy trustee appointed for Tenant or by Tenant as debtor-in-possession and thereafter Tenant is liquidated or files a subsequent petition for reorganization under the Bankruptcy Code, then



Landlord may, at its option, terminate this Lease and all rights of Tenant hereunder by giving Tenant written notice of its election to so terminate no later than thirty (30) days after the occurrence of either of such events.

- 30.4 When, pursuant to the Bankruptcy Code, a trustee or debtor-in-possession shall be obligated to pay reasonable use and occupancy charges for the use of the premises or any portion thereof, such charges shall not be less than all rent and other monetary obligations of Tenant hereunder.
31. **RIGHT OF ENTRY.** Landlord and Landlord's agents shall have the right upon reasonable advance notice (except that notice shall not be required in case of emergency) to enter the leased premises at all reasonable times to examine the same, and to show them to prospective lenders and purchasers, and to make all reasonable repairs as Landlord may deem necessary or desirable, and shall be allowed to take all material into and upon said premises without the same constituting an eviction of Tenant in whole or in part. During the twelve (12) months prior to the expiration of the term of this Lease or any renewal term, Landlord may, upon reasonable advance notice to Tenant, exhibit the premises to prospective Tenants.
32. **HOLDING OVER.** Any holding over after the expiration of the term hereof, with the consent of the Landlord, shall be construed to be a tenancy from month to month at the rents in effect immediately prior to such expiration, plus fifty percent (50%), and shall otherwise be on the terms and conditions herein specified so far as applicable.
33. **SUCCESSORS.** All rights and liabilities herein given to or imposed upon the respective parties hereto shall extend to and bind the respective heirs, executors, administrators, successors and assigns of the said parties; and if there shall be more than one Tenant, they shall all be bound jointly and severally by the terms, covenants and agreements herein. No rights, however, shall inure to the benefit of any assignee of Tenant unless the assignment to such assignee has been approved by Landlord in writing, which approved will not be unreasonably withheld.
34. **QUIET ENJOYMENT.** So long as Tenant is not in default hereunder, it may have peaceful and quite enjoyment of the premises.
35. **WAIVER.** One or more waivers of any covenant or condition by either party shall not be construed as a waiver of any subsequent breach of the same covenant or condition, or the consent or approval to or of any subsequent similar act by the other party. No breach of a covenant or condition of this Lease shall be deemed to have been waived by either party unless such waiver by in writing signed by such party.
36. **SIGNAGE.** Tenant shall be permitted to affix a sign, as approved by Landlord, on the exterior of the Building fronting 200 South Street. The size, design and location of all

signs on the Building shall be subject to the prior approval of Landlord. All signs installed by Tenant shall conform with all municipal ordinances and other applicable laws, covenants and regulations applicable thereto. Tenant shall be responsible for, and shall pay, all costs of maintaining and repairing its signage.

37. ENTIRE AGREEMENT. This Lease, and any exhibits affixed hereto, set forth all the covenants, promises, agreements, conditions and understandings between Landlord and Tenant concerning the leased premises and there are no oral covenants, promises, agreements, conditions or understandings between them other than are herein set forth. No subsequent alteration, amendment, change or addition to this Lease shall be binding upon Landlord or Tenant unless reduced to writing and signed by each party.
38. NOTICES. All notices required or permitted under this Lease, or any communication for billing, correspondence, and any other legal purpose whatsoever ("notices") shall be in writing and shall be sent by United States mail, postage prepaid, registered or certified, or by Federal Express, Airborne Express or similar overnight courier and addressed as follows:

Landlord

2696 North University Avenue
Suite 290
Provo, Utah 84604

Attn: Harrison H. Horn

Tenant

Blaine P. Fetter
3618 Oak Wood Dr.
Park City, Utah 84060

Any change of address as above indicated may be made by giving notice to the address above indicated. Notices shall be effective five (5) business days after prepaid posting, if sent by mail, or on the next business day after delivery to the courier service, if sent by courier.

39. TRANSFER OF LANDLORD'S INTEREST. In the event of any transfer or transfers of Landlord's interests in the premises, the transferor shall be automatically relieved of any and all obligations and liabilities on the part of Landlord hereunder from and after the date of such transfer provided that transferee expressly assume same. The foregoing release of liability shall not operate to release any contractor constructing Landlord's or Tenant's Improvements from their warranty obligations to Landlord or Tenant in connection with such construction.
40. NO BROKER. Except for Internet Properties, which shall be paid a commission by Landlord, Landlord and Tenant represent and warrant that they have not dealt with any broker or agent in the negotiation for or the obtaining of this Lease. Each party agrees

to indemnify and hold each other harmless from any and all cost or liability for compensation claimed by broker or agent (other than Internet Properties) employed by it or claiming to have been engaged by it in connection with this Lease.

41. **RECORDING.** Neither Landlord nor Tenant shall record this Lease; however, upon the request of either party hereto, the other party shall join in the execution of a memorandum of lease for the purposes of recordation. Said memorandum of lease shall describe the parties, the premises, the lease term, any subordination, and any special provisions other than those pertaining to rent, and shall contain such additional information as may be required for recordation in the jurisdiction in which the premises is located, and shall incorporate this Lease by reference.
42. **SEVERABILITY.** If any term, condition or covenant of this Lease or the application thereof to any person or circumstance shall be invalid or unenforceable, the remainder of this Lease or circumstances other than those as to which it has been held invalid or unenforceable, shall be unaffected thereby and each term, covenant or condition of this Lease shall be valid and be enforced to the fullest extent permitted by law.
43. **CORPORATE AUTHORITY.** If Tenant signs as a corporation, each of the persons executing this Lease on behalf of Tenant does hereby covenant and warrant that (i) Tenant is a duly authorized and validly existing corporation, (ii) Tenant has and is qualified to do business in Utah, (iii) the corporation has full right and authority to enter into this Lease, and (iv) each person executing this lease on behalf of the corporation is authorized to do so.
44. **INDEMNITY.** Tenant shall indemnify and hold Landlord harmless from and defend Landlord against any and all claims of liability for any injury or damage to any person or property whatsoever ("Claims") occurring in, on or about the leased premises or any part thereof unless caused by the negligence or willful act of Landlord and/or its agents, employees, independent contractors or invitees. Each party shall further indemnify and hold the other harmless from and against any and all Claims arising from any breach or default in the performance of any obligation on such party's part to be performed under the terms of this Lease, or arising from any willful act or negligence of such party, or any of its agents, employees, independent contractors or invitees and from and against all costs, attorney's fees, expenses and liabilities incurred in the defense of any such Claim or any action or proceeding brought thereon. In case any action or proceeding be brought against either party by reason of any such Claim, the indemnifying party, upon written notice, shall defend the same at its expense by counsel approved by indemnified party; provided, however, that the indemnifying shall not be liable for damage or injury occasioned by the negligence or willful acts of the indemnified party and/or its agents, employees, independent contractors or invitees.

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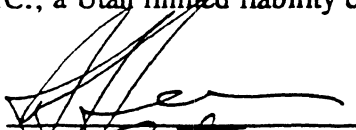
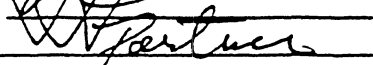
Tenant, as a material part of the consideration to Landlord, hereby assumes all risk of damage to property or injury to persons in, upon or about the leased premises from any cause and Tenant hereby waives all claims in respect thereof against Landlord unless caused by the negligence or willful act of Landlord and/or its agents, employees, independent contractors or invitees.

45. **EXEMPTION OF LANDLORD FROM LIABILITY.** Landlord shall not be liable for injury or damage which may be sustained by any persons, goods, wares, merchandise, or property of Tenant, its employees, invitees or customers, or any other persons in or about leased premises caused by or resulting from fire, steam, electricity, gas, water or rain which may leak or flow from or into any part of the premises, or from the breakage, leakage, obstruction or other defects of the pipes, sprinklers, wires, appliances, plumbing, air conditioning or lighting fixtures of the same, whether the damage or injury results from conditions arising upon the premises or upon other portions of the Building, or from other sources, unless caused by the gross negligence or willful act of Landlord and/or its agents, employees, independent contractors or invitees. Landlord shall not be liable for any damages arising from any act or neglect of any other Tenant of the Building.
46. **EXHIBITS.** Exhibit "A" through "C" attached hereto are by this reference made a part of this Lease.

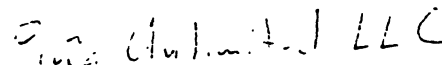
IN WITNESS WHEREOF, the parties have executed this Lease Agreement as of the day and year first above written.

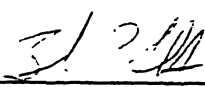
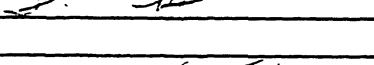
LANDLORD:

WAREHOUSE COMMERCIAL,
L.L.C., a Utah limited liability company

By: 
Its: 

TENANT:

 LLC
a Utah limited liability company

By: 
Its: 

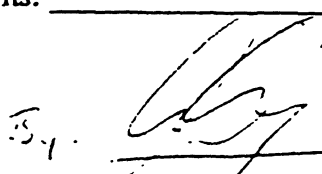

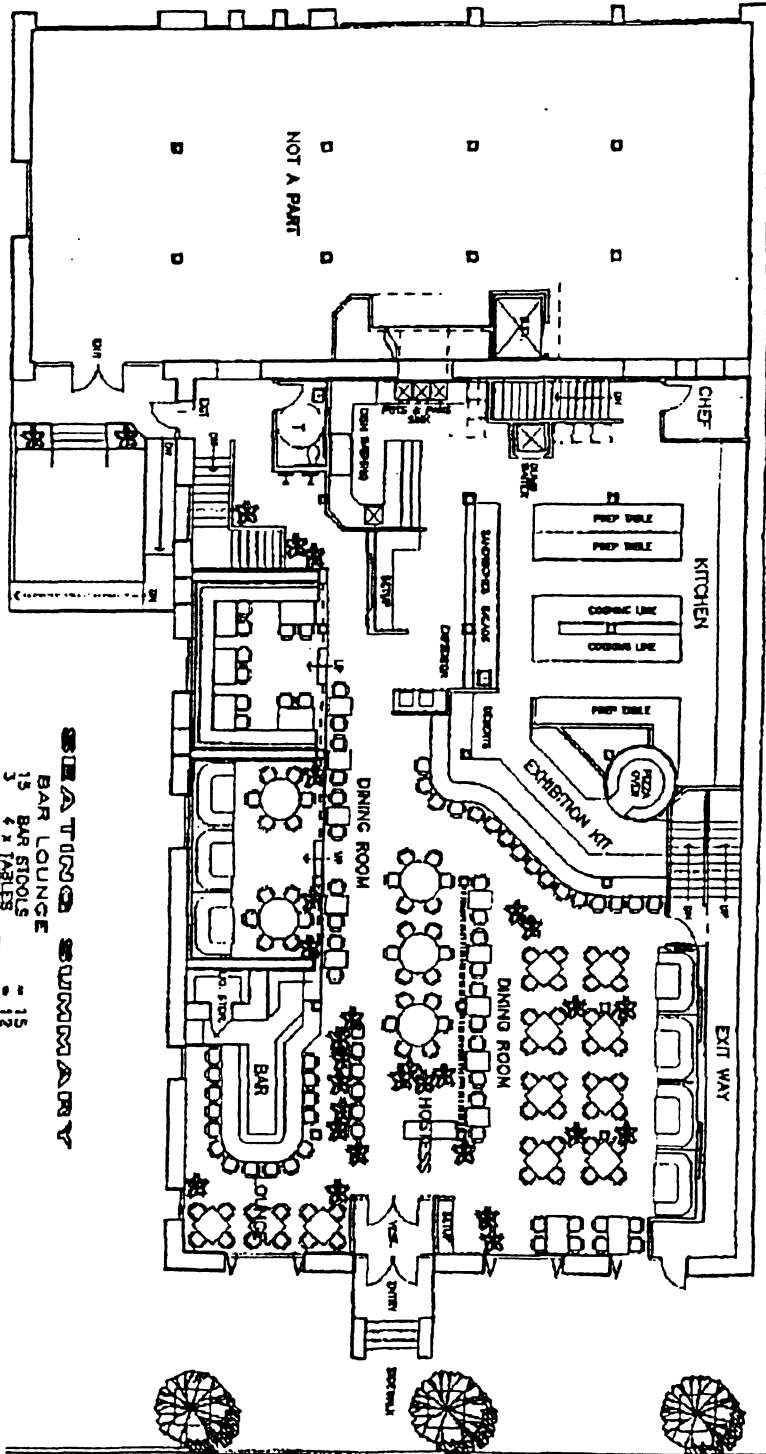
By: 
Its: 

Exhibit "A" 1

ARCADE PLEASANT PLAN
 327 WEST 200 SOUTH
 SALT LAKE CITY, UTAH
 41-N-008
 8-2-98



SEATING CAPACITY

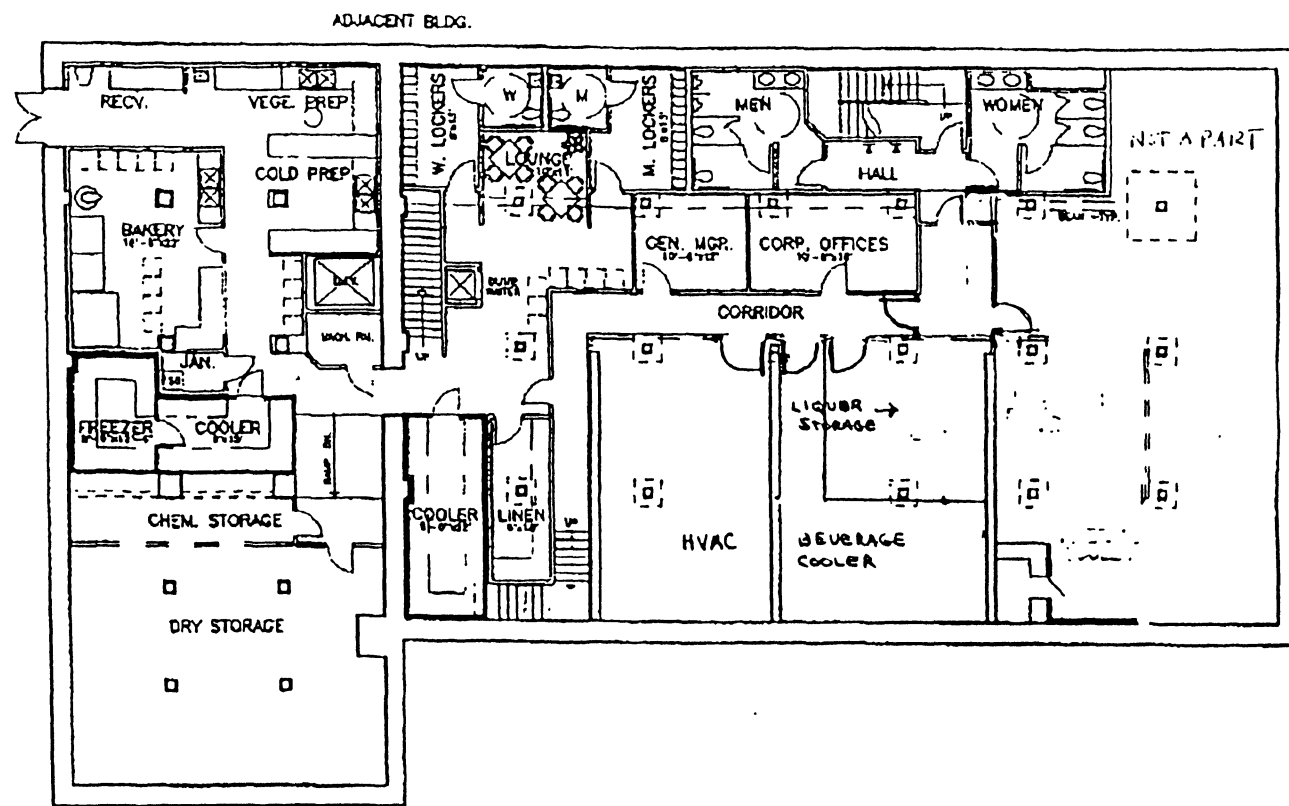
BAR LOUNGE	
15 BAR STOOLS	= 15
3 4 x 12 TABLES	= 12
SUB-TOTAL	= 27
DINING ROOM	
18 4 x 8 TABLES	= 72
18 4 x 12 TABLES	= 72
3 4 x 12 TABLES	= 12
3 4 x 12 TABLES	= 12
SUB-TOTAL	= 154

TOTAL SEATS = 181

Richard
 S. [illegible]
 Architect

[Handwritten signature]

Exhibit "A-2"



➔
BASEMENT FLOOR PLAN
 SCALE: 1/16" = 1'-0"
 01-7-80
 0-5-80
Piña Restaurant
 327 WEST 200 SOUTH SALT LAKE CITY, UTAH

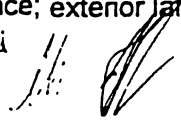
EXHIBIT B

PAID BY LANDLORD

- All structural improvements
- Walls, beams and pillars sandblasted
- All exterior renovation and painting
- Exterior windows and doors, including French doors to exterior, vestibule; main floors doors; all doors to be solid core, paint grade finish
- 400 amp electrical service; \$2.75/foot electrical allowance for other items, total of \$15,873. Electrical to mechanical systems are not part of the allowance.
- HVAC equipment and ductwork to main floor and basement for 72 degree environment; exhaust system for kitchen including make-up air (excluding hoods), as designed by Tenant (system to be installed by Tenant, but cost of equipment and installation financed by Landlord and repaid through rent)
and approved by Landlord HVAC Engineer
- Fire sprinklers for the entire space to code requirements
- Rough plumbing and standard fixtures in all restroom (3 customer, 2 employee), sewer line installed, rough plumbing to all of Tenant's fixtures, 100 gal. Rapid recovery water heater (or 2 - 50 gallon)
- Sheetrocked ceiling, main floor walls and all restroom and all kitchen areas
- Floor leveled and sub-floor installed on main floor; flooring up to \$4.00 per foot on main floor, total \$23,088
- \$5,000 allowance for dumbwaiter
- Exiting to comply with code requirements including doors, hardware, exit lighting
- Standard finish in three customer restroom and two employee restroom, including standard tile floors, partitions and wainscot as required by code
- Basement clearance to be code and adequate for tenants use
- Any other problems which arise that are out of the ordinary due to the age of the building
- Credit for exterior lighting

EXHIBIT B

PAID BY TENANT

- All interior Painting
- All electrical and light fixtures in excess of allowance; exterior lanterns or torches
- Hoods for appliances; design of exhaust system ^{make up air and} 
- All sinks, drains and other plumbing fixtures for kitchen
- All framing and sheetrock in basement, except restrooms and kitchen areas
- Additional flooring in excess of allowance
- Dumbwaiter cost in excess of allowance
- All upgrades to restrooms
- All kitchen equipment and refrigeration devices
- Any improvements to sidewalk area for restaurant use (subject to Landlord approval)
- All other improvements to basement



GUARANTY OF CERTAIN LEASE OBLIGATIONS

TENANT: Pina Unlimited, L.L.C.
LANDLORD: Warehouse Commercial, L.L.C.
ADDRESS: 327 West 200 South, Salt Lake City, Utah
LEASE DATED: August 1, 1996
GUARANTORS: Blaine P. Vetter and Christian Oesch

FOR VALUE RECEIVED, and in consideration of and as an inducement for the execution and delivery of the Lease referred to above between Landlord and Tenant, the undersigned Guarantors hereby guarantee to Landlord the full and prompt payment of all costs and expenses incurred in connection with the design, construction and installation of all improvements to the leased premises to be paid by Tenant, and the performance of all of Tenant's other duties and obligations set forth in Sections 12 and 14 of the Lease. Guarantors hereby covenant and agree that if Tenant shall at any time fail to pay or otherwise perform its obligations under Sections 12 or 14, the Guarantors shall promptly pay such amounts, and/or perform and fulfill all of such terms, covenants, conditions and agreements, and will pay the Landlord all damages and expenses, including attorney's fees, that may arise in consequence of any default by the Tenant in the payment of such sums.

This Guaranty is an absolute and unconditional guaranty of payment and of performance of the duties and obligations of Tenant under Sections 12 and 14 of the Lease. It shall be enforceable against the Guarantors, or either of them, without the necessity of any suit or proceedings on the Landlord's part of any kind or nature whatsoever against the Tenant. The Guarantors hereby expressly agree that the validity of this Guaranty and the obligations of the Guarantors hereunder shall in no way be terminated, affected, diminished or impaired by reason of the assertion or failure to assert by the Landlord against the Tenant any of the rights and remedies available to the Landlord, or by relief of Tenant from any of the Tenant's obligations under the Lease by the rejection of the Lease in connection with the proceedings under the bankruptcy or insolvency laws now or hereafter in effect or otherwise.

This Guaranty shall be a continuing guaranty, and the liability of the Guarantors hereunder shall in no way be affected, modified or diminished by reason of any assignment, renewal, modification or extension of the Lease or by reason of any modification or waiver of or change in any of the terms, covenants, conditions or provisions of the Lease, or by reason of any extensions of time that may be granted by the Landlord to the Tenant or by reason of a change for different use of the demised premises or by reason of any dealings or transactions or matters or things occurring between Landlord and the Tenant, whether or not the Guarantors have knowledge or notice thereof.

The assignment by Landlord of the Lease and/or the rents and other receipts thereof made either with or without the Guarantors' knowledge or notice shall in no manner

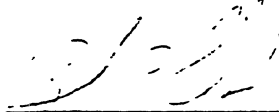


whatsoever release the Guarantors from any liability as Guarantors. This Guaranty may be assigned by Landlord.

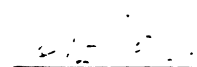
All the Landlord's rights and remedies under the said Lease or under this Guaranty are intended to be distinct, separate and cumulative, and no such right and remedy therein or herein mentioned is intended to be an exclusion or a waiver of any of the others. This Guaranty shall be binding upon the Guarantors and their respective heirs, successors and assigns. If this Guaranty is signed by more than one guarantor, the liability of each such guarantor shall be joint and several.

IN WITNESS WHEREOF, the undersigned have executed this Guaranty of Certain Lease Obligations as of the day and year set forth below.

GUARANTORS:

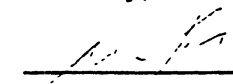


Blaine P. Fetter

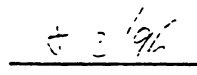


Date


Address:
3618 Oak Wood Dr.
Park City, Utah 84060

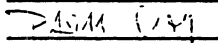



Christian Oesch



Date

Address:








Tab B

FILED DISTRICT COURT
Third Judicial District

JUN 12 1998

By [Signature] SALT LAKE COUNTY
Deputy Clerk

PRINCE, YEATES & GELDZAHLER
Roger J. McConkie (5513)
Attorneys for Plaintiff
City Centre I, Suite 900
175 East 400 South
Salt Lake City, UT 84111
(801) 524-1000

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WAREHOUSE COMMERCIAL, LLC,

Plaintiff,

vs.

PINA UNLIMITED, LLC, and
PINEAPPLE UNLIMITED, LLC,

Defendant.

VERIFIED COMPLAINT FOR
BREACH OF CONTRACT,
RESTRAINING ORDER, AND
PRE-JUDGMENT WRIT OF
ATTACHMENT

Civil No. 980905412

Judge McCall

Plaintiff Warehouse Commercial, LLC, hereby complain against defendants by alleging as follows:

1. Plaintiff is a Utah limited liability company who entered into a Lease Agreement as landlord with defendant Pina Unlimited, LLC, a Utah limited liability company, leasing the premises located at 327 West 200 South in Salt Lake City, Utah, (the "Premises"). A copy of the Lease Agreement is attached hereto as Exhibit "A" and incorporated herein by reference.

2. On information and belief, plaintiff alleges that Pina Unlimited, LLC, has attempted to assign, sell, or otherwise transfer its interests and rights in the Lease Agreement to Pineapple Unlimited, LLC.

FIRST CAUSE OF ACTION

(Breach of Contract)

3. Plaintiff incorporates herein by reference paragraphs 1 through 3 above as if fully set forth herein.

4. The tenant Pina Unlimited, LLC, is obligated to make monthly rental payments pursuant to the Lease Agreement. Defendant failed to make the August 1997 rental payment in the amount of \$4,000. The tenant has also failed to make the May 1998 rental payment in the amount of \$8,240. Defendant has also failed to make other rental payments which total over \$30,000.

5. Defendant is in breach of the Lease Agreement by its failure to make timely rent payments. Despite demand made upon defendant, defendant failed and refused and continues to fail and refuse to pay the amounts owed under the Lease Agreement. Such failure to make rental payments constitutes a breach of contract. Plaintiff has been damaged as a direct result of the defendant's breach of contract in an amount to be proven at trial but not less than \$42,040.00.

SECOND CAUSE OF ACTION

TEMPORARY RESTRAINING ORDER

6. Plaintiff incorporates paragraphs 1 through 5 above as if fully set forth herein by reference.

7. Plaintiff has been informed and believes that the defendant is going to shut down its restaurant establishment as of Saturday, June 13, 1998.

8. Peter Larson, the managing member of Warehouse Commercial, LLC, has been informed by employees of the defendant that they will be closing the restaurant on Saturday, June 13, 1998. He was informed when he asked to make a reservation for Monday, June 15, 1998, that the restaurant was to be closed on June 13, 1998, and would not be reopened.

9. Plaintiff has been informed and believes and hereby alleges that defendant's employees have been seen removing equipment and other items from the Premises.

10. Plaintiff and defendant Pina Unlimited, LLC, entered into a Security Agreement attached hereto as Exhibit "B" and incorporated herein by reference wherein the plaintiff obtained a security interest which was subsequently perfected in and to all of the trade fixtures, equipment, appliances, furniture, cookware, dishes, utensils, and all other personal property installed or otherwise located upon the Premises as well as all trade fixtures, equipment, appliances, furniture, cookware, dishes, utensils and all personal

property which may hereafter be acquired and located on the Premises. The collateral which is the subject of the Security Agreement is identified on Exhibit "C" attached hereto and incorporated herein by reference.

11. The plaintiff properly perfected the Security Agreement by recording the appropriate financing statements/UCC-1 form signed by defendant Pina Unlimited, LLC. A copy of which is attached hereto as Exhibit "D" and incorporated herein by reference.

12. Pursuant to the Security Agreement and the Lease Agreement, the defendant agreed not to remove any of the items identified in the Security Agreement from the Premises without the express written consent of the plaintiff.

13. The plaintiff has not consented to the removal of any such items from the Premises.

14. Immediate and irreparable injury, loss, or damage will result to the plaintiff if the items of property which are subject to the Security Agreement are removed from the Premises.

15. If the items of property are removed from the Premises, in violation of the Security Agreement, the plaintiff is left without security to secure defendant's performance under the Lease Agreement including, but not limited to, attachment of the security and execution thereof as a result of the defendant's breach of the Lease Agreement. For these reasons, plaintiff respectfully request the Court to grant a

Temporary Restraining Order ordering the defendant to not remove any of the items identified in the Security Agreement and the attachments thereto from the Premises.

THIRD CAUSE OF ACTION

(Lessor's Lien)

16. Plaintiff incorporates herein by reference paragraphs 1 through 15 above as if fully set forth herein.

17. Pursuant to Utah Code Annotated §38-3-1 *et seq.*, the plaintiff has a lessor's lien for rent due upon all non-exempt property of the lessee brought or kept upon the Premises so long as the lessee shall occupy said Premises and for thirty days thereafter.

18. Presently the lessee is still occupying the Premises.

19. Pursuant to Utah Code Annotated §38-3-3, the lessor's lien attaches, without other grounds, when any rent shall be due and unpaid under the lease or the lessee shall be about to remove his property from the Premises.

20. As is set forth above, rent is due and owing at this time and landlord has reason to believe that the lessee is about to remove his property from the Premises.

21. Plaintiff seeks a Writ of Attachment pursuant to the lessor's lien statute upon all of the non-exempt property which is found in the Premises located at 327 West 200 South in Salt Lake City, Utah, being leased from Warehouse Commercial, LLC, to Pina Unlimited, LLC, ordering the constable to seize possession of the personal property

and/or fixtures presently located within the Premises or identified in the attachments to the Security Agreement and to change the locks of the Premises.

22. The Writ of Attachment is not sued out for the purpose of vexing or harassing the lessee.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for the following relief:

A. Under its First Cause of Action plaintiff prays for damages to be awarded to the plaintiff in the amount of not less than \$42,040.00, plus interest.

B. For fees and costs associated with this lawsuit.

C. For such other and further relief as the Court deems equitable under the Premises.

D. Under the plaintiffs' Second Cause of Action, the plaintiff prays for a Restraining Order enjoining the defendant from removing any of the personal property located upon the Premises.

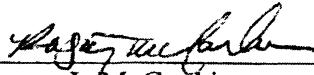
E. For fees and costs associated with this action.

F. For such other and further relief as the Court deems equitable in the Premises.

G. Under the plaintiffs' Third Cause of Action, the plaintiff prays for a Writ of Attachment authorizing the constable to seize possession of the personal property and fixtures identified in the Security Agreement and the attachment thereto and to change the locks on the Premises.

DATED this 12th day of June, 1998.

PRINCE, YEATES & GELDZAHLER



Roger J. McConkie
Attorneys for Plaintiff

Plaintiff's Address:

c/o Summerset Corp.
2520 N. University Avenue, Suite 50
Provo, UT 84604

VERIFICATION

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

Harrison Horn
I, ~~Peter Larson~~, as the Managing Member of Warehouse Commercial, LLC,

being duly first sworn on oath, depose and say that: Warehouse Commercial, LLC, is the plaintiff above-named, that I have read the foregoing **VERIFIED COMPLAINT FOR**

**BREACH OF CONTRACT, RESTRAINING ORDER, AND PRE-JUDGMENT WRIT
OF ATTACHMENT,**

know the contents thereof, and that the same are true to the best of my knowledge,
information, and belief.

~~PETER LARSON~~, Managing Member of
Warehouse Commercial, LLC

SUBSCRIBED AND SWORN to before me this ____ day of June, 1998.

NOTARY PUBLIC
Residing at Salt Lake County

My Commission Expires:

Tab C

PRINCE, YEATES & GELDZAHLER
 Roger J. McConkie (5513)
 Attorneys for Plaintiff
 City Centre I, Suite 900
 175 East 400 South
 Salt Lake City, UT 84111
 (801) 524-1000

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

WAREHOUSE COMMERCIAL, LLC,

Plaintiff,

vs.

PINA UNLIMITED, LLC, and
 PINEAPPLE UNLIMITED, LLC,

Defendant.

ORDER GRANTING WRIT OF
 ATTACHMENT

Civil No. 980905862
 Judge WOEL

Based upon the Stipulation to Entry of Pre-Judgment Writ of Attachment,
 executed by Stewart R. Knight, of the law firm of Winder & Haslam, on behalf of
 defendants Pina Unlimited, LLC, and Pineapple Unlimited, LLC, and Roger J. McConkie,
 of the law firm of Prince, Yeates & Geldzahler, on behalf of plaintiff Warehouse
 Commercial, LLC;

IT IS THE ORDER OF THIS COURT that a Pre-Judgment Writ of Attachment
 regarding the property described in this Order be granted forthwith. The constable any
 time after the close of business Saturday, June 13, 1998, is directed to seize and/or secure

all of the personal property, trade fixtures, equipment, appliances, furniture, cookware, dishes, utensils, and all other personal property installed or otherwise located upon the Premises as well as all trade fixtures, equipment, appliances, furniture, cookware, dishes, utensils and all personal property which may hereafter be acquired and located on the Premises, presently located in the Premises located at 327 West 200 South in Salt Lake City, Utah, (the "Premises"). Further, the constable shall have the right to change the locks at the direction of the plaintiff ^{upon reasonable request from the defendant}. The defendant shall have reasonable access to the

Premises but will not be permitted to remove items from the Premises. ^{notwithstanding the above provisions, Blaine D. Fetter and employees of defendant shall have the right to access the premises}

THIS ORDER IS ISSUED on the 12 day of June, 1998, at the hour of

4:45 P.M.

DATED this 12 day of June, 1998.

*NO BOND REQUIRED
IN THAT THIS ORDER
IS BASED UPON
DEFINITION*

MA

BY THE COURT:

[Signature]
District Court Judge



*to remove any
property owned
primarily by him*

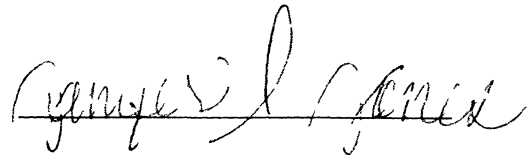
MA

6 MAY 1998 001 024 1000

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 2004, I caused two true and correct copies of the foregoing Brief of Appellant to be mailed, postage prepaid, to the following:

MARK R. GAYLORD
JASON BOREN
BALLARD SPAHR ANDREWS & INGERSOLL LLP
201 S. Main Street
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "Mark R. Gaylord", written over a horizontal line.