

2004

Ken Brailsford v. Blaine Fetter : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Mark R. Gaylord, Jason Boren; Bllard, Spahr, Andrews and Ingersoll; Attorneys for Appellee.

Donald J. Winder, John W. Holt; Winder and Haslam; Attorneys for Appellant.

Recommended Citation

Brief of Appellee, *Brailsford v. Fetter*, No. 20040307 (Utah Court of Appeals, 2004).

https://digitalcommons.law.byu.edu/byu_ca2/4911

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

KEN BRAILSFORD,

Plaintiff/Appellee,

vs.

BLAINE P. FETTER,

Defendant/Appellant.

Case No. 20040307-CA

BRIEF OF APPELLEE

**APPEAL FROM ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT; THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY
HONORABLE SANDRA N. PEULER**

DONALD J. WINDER (#3519)
JOHN W. HOLT (#5720)
WINDER & HASLAM, P.C.
175 West 200 South, Suite 4000
P.O. Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222
Facsimile: (801) 532-3706

Attorneys for Defendant/Appellant
Blaine P. Fetter

MARK R. GAYLORD (#5073)
JASON D. BOREN (#7816)
BALLARD SPAHR ANDREWS
& INGERSOLL, LLP
One Utah Center, Suite 600
201 S. Main Street
Salt Lake City, Utah 84111-2221
Telephone (801) 531-3000
Facsimile (801) 531-3001

Attorneys for Plaintiff/Appellee, Ken
Brailsford

**FILED
UTAH APPELLATE COURTS
JUL 30 2004**

IN THE UTAH COURT OF APPEALS

KEN BRAILSFORD,

Plaintiff/Appellee,

vs.

BLAINE P. FETTER,

Defendant/Appellant.

Case No. 20040307-CA

BRIEF OF APPELLEE

**APPEAL FROM ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT; THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY
HONORABLE SANDRA N. PEULER**

DONALD J. WINDER (#3519)
JOHN W. HOLT (#5720)
WINDER & HASLAM, P.C.
175 West 200 South, Suite 4000
P.O. Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222
Facsimile: (801) 532-3706

Attorneys for Defendant/Appellant
Blaine P. Fetter

MARK R. GAYLORD (#5073)
JASON D. BOREN (#7816)
BALLARD SPAHR ANDREWS
& INGERSOLL, LLP
One Utah Center, Suite 600
201 S. Main Street
Salt Lake City, Utah 84111-2221
Telephone (801) 531-3000
Facsimile (801) 531-3001

Attorneys for Plaintiff/Appellee, Ken
Brailsford

LIST OF PARTIES TO PROCEEDINGS
IN DISTRICT COURT

Plaintiff:

Ken Brailsford

Defendants:

Blaine P. Fetter, Pina Unlimited L.C.C. and Christian Oesch

TABLE OF CONTENTS

	Page
JURISDICTION OF COURT OF APPEALS	1
DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS.....	1
STATEMENT OF THE CASE	1
I. <u>NATURE OF THE CASE</u>	1
II. <u>COURSE OF PROCEEDINGS</u>	2
III. <u>DISPOSITION IN THE TRIAL COURT</u>	2
IV. <u>STATEMENT OF FACTS</u>	3
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. FETTER GUARANTEED THE PAYMENT OF THE EXHAUST SYSTEM.	12
A. Pina Was Obligated To Pay For The Cost And Installation Of The Exhaust System Pursuant To Sections 12 And 14 Of The Lease.....	13
B. Pina Was Also Obligated To Pay For The Exhaust System Pursuant To Section 5 Of The Lease.....	17
II. THE GUARANTY WAS NOT TERMINATED BY THE ALLEGED SURRENDER AND ACCEPTANCE OF THE LEASED PREMISES.....	19
A. Fetter Has Waived The Affirmative Defense of “Surrender and Acceptance.”	19
B. The Doctrine Of Surrender And Acceptance Is Inapplicable.....	19
C. The Guaranty Was Unconditional.....	22
D. Recovery Under The Guaranty Does Not Amount To A Double Recovery.....	24

III. FETTER IS NOT ENTITLED TO AN OFFSET.....	25
CONCLUSION.....	27

TABLE OF AUTHORITIES

STATE CASES

<i>Buehner Block Co. v. UWC Associates</i> , 752 P.2d 892 (Utah 1988)	15
<i>Cherry v. Utah State University</i> , 966 P.2d 866 (Utah App. 1998)	15
<i>In re Estate of Vangen</i> , 370 N.W.2d 479 (Minn. App. 1985)	26
<i>In re Schwenke</i> , 89 P.3d 117, 125 (Utah 2004)	25
<i>Lafary v. Lafary</i> , 522 N.E. 1d (Ind. App. 1988)	25
<i>Nicholas A. Cutaia, Inc. v. Buyer's Bazaar, Inc.</i> , 637 N.Y.S.2d 857 (N.Y. App. 1996)	21
<i>North Park Bank of Commerce v. Bottum, Utah</i> , 645 P.2d 620 (Utah 1982)	22
<i>Petersen v. Hodges</i> , 121 Utah 72, 239 P.2d 180 (1951)	21
<i>Reid v. Mutual of Omaha Insurance Co.</i> , 776 P.2d 896 (Utah 1989)	19, 21
<i>State v. Attman/Glazer P.B. Co.</i> , 594 A.2d 138 (Md. 1990)	24
<i>Strevell-Patterson Co. Inc. v. Francis</i> , 646 P.2d 741 (Utah 1982)	22
<i>The View Condominium Owners Association v. MSICO, L.L.C.</i> , 90 P.3d 1042, 1052 (Utah App. 2004)	25
<i>Trucker Sales Corp. v. Potter</i> , 104 Utah 1, 137 P.2d 370 (1943)	14, 18
<i>Utah Valley Bank v. Tanner</i> , 636 P.2d 1060 (Utah 1981)	15
<i>Valley Bank and Trust Co. v Rite Way Concrete Farming, Inc.</i> , 742 P.2d 105 (Utah App. 1987)	22
<i>Valley Bank and Trust Co. v. Wilken</i> , 668 P.2d 493 (Utah 1983)	19
<i>WebBank v. American General Annuity Service Corp.</i> , 54 P.3d 1139, 1144 (Utah 2002)	16
<i>Willard Pease Oil and Gas Co. v. Pioneer Oil and Gas Co.</i> , 899 P.2d 766 (Utah 1995)	16

STATE STATUTES

Utah Code Ann. § 78-2a-3(2)(j).....1

OTHER AUTHORITIES

Am. Jur. 2d *Landlord and Tenant* § 261 (2004).....21, 26

JURISDICTION OF COURT OF APPEALS

This Court has jurisdiction over this appeal pursuant to *Utah Code Ann.* § 78-2a-3(2)(j).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

There are no determinative constitutional provisions, statutes, ordinances, rules, or regulations whose interpretation is either determinative or of central importance to the appeal.

STATEMENT OF THE CASE¹

I. NATURE OF THE CASE.

This case concerns the enforcement of a written “Guaranty of Certain Lease Obligations” (the “Guaranty”) pursuant to which Blaine P. Fetter (“Fetter”) guaranteed to pay for “all costs and expenses incurred in connection with the design, construction and installation of all improvements to the leased premises” for which the Tenant, Pina Unlimited LLC (“Pina”) was obligated to pay to the Landlord, Warehouse Commercial

¹ Fetter includes a “Statement of Related Cases” in his brief even though there is no reference to the “related case” in the record below. This Court should disregard any references to the “Related Case” as it is not supported by the record. See Rule 24(a)(7) of the Utah Rules of Appellate Procedure (“all statements of fact and references to the proceedings below shall be supported by citations to the record.”)

L.L.C. (“Warehouse”) under a Commercial Lease Agreement (the “Lease”).² Pursuant to the Lease, Pina was required to pay for the costs and installation of a make-up air and exhaust system (“Exhaust System”), but failed to do so. Accordingly, Fetter, as a guarantor, is liable for said costs.

II. COURSE OF PROCEEDINGS.

On September 23, 1999, Brailsford filed an Amended Complaint against Fetter, Christian Oesch (“Oesch”), and Pina for, among other things, breach of the Guaranty. Brailsford later filed a Motion for Partial Summary Judgment against Fetter to enforce the Guaranty pursuant to the second and third causes of action of Brailsford’s Amended Complaint. The trial court granted Brailsford’s Motion for Partial Summary Judgment, and a judgment was entered against Fetter on April 22, 2003. Subsequently, Brailsford dismissed all of his claims against Fetter’s co-defendants, without prejudice, rendering the judgment against Fetter final. Fetter now appeals that judgment.

III. DISPOSITION IN THE TRIAL COURT.

On April 22, 2003, the trial court entered an order granting Brailsford’s Motion for Partial Summary Judgment. The trial court entered judgment against Fetter in the amount of \$89,686.63 together with post-judgment interest at the statutory rate. The trial court’s Order was not final pursuant to Rule 54(b) of the *Utah Rules of Civil Procedure* because

² Warehouse assigned its claims against Fetter to Ken Brailsford (“Brailsford”).

it adjudicated fewer than all the claims of the parties as Fetter was only one of multiple defendants.

On May 17, 2004, Brailsford and Fetter stipulated that the claims against the other defendants, Pina and Oesch, neither of whom had been served or entered an appearance, would be dismissed without prejudice and the Order would become final.

The trial court entered an Order on May 17, 2004 dismissing Pina and Oesch without prejudice and rendering the Order against Fetter final pursuant to Rule 54 of the *Utah Rules of Civil Procedure*. Fetter filed a Notice of Appeal on or about March 31, 2004 appealing the judgment against him.

IV. STATEMENT OF FACTS.

1. On or about August 2, 1996, Warehouse, as Landlord, entered into the Lease with Pina, as Tenant, for property located at 327 West 200 South, Salt Lake City, Utah (the “leased premises”). (R. at 169, 173-196.)

2. Pursuant to the Lease, Warehouse was to rent the leased premises to Pina for a period of ten (10) years, commencing on January 1, 1997. (R. at 173-196.)

3. Pina leased the leased premises in order to operate a restaurant. (R. at 169.)

4. The building in which the leased premises was located was a mixed-use condominium project which contained condominium units on the upper floors. (R. at 173, 433 p. 4.)

5. The main level of the building was to be converted into a restaurant. (R. at 433 p. 4.)

6. The leased premises was a bare shell that needed to be built out for use as a restaurant. (R. at 152, 169.) Accordingly, numerous improvements needed to be made to accommodate a restaurant. (R. at 169.)

7. Among the necessary improvements to the leased premises was the Exhaust System. (R. at 169.) The Exhaust System was needed for the kitchen area so that smoke and fumes could be vented out and fresh air brought back into the kitchen area. (R. 433 p. 5.)

8. Warehouse was unwilling to bear the costs of purchasing the Exhaust System without being repaid by Pina and without those costs being guaranteed by Fetter and Oesch, principals of Pina. (R. at 153, 159, 179-180.)

9. Pina requested that Warehouse loan the money for the cost of the Exhaust System to Pina. (R. at 153.)

10. Warehouse agreed to loan the money to Pina for the Exhaust System and to be paid back over five years at eight percent interest. (R. at 153.)

11. Section 12 of the Lease expressly provides that:

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 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 Tenant’s 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.

(R. at 178.)

12. Exhibit B to the Lease consists of two pages. (R. at 195-196.) The first page of Exhibit B to the Lease contains the heading “PAID BY LANDLORD” and specifically provides that:

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)**

(R. at 195.) (emphasis added).

13. The second page of Exhibit B to the Lease contains the heading “PAID BY TENANT” and specifically provides that:

Hoods for appliances; design of makeup air and exhaust system

(R. at 196.).

14. Section 14 of the Lease provides in part that:

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.

(R. at 179-180.)

15. Section 5 of the Lease additionally provides that:

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%]

(R. at 175.) (emphasis original).

16. In connection with the Lease, Fetter and Oesch, signed the Guaranty. (R. at 197-199.)

17. The Guaranty provides:

FOR VALUE RECEIVED, and in consideration of and inducement for the execution and delivery of the Lease referred to above between the 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 tenants 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 dealings or transactions or matters or things occurring between Landlord and the Tenant, whether or not the Guarantors have knowledge or notice thereof.

. . .

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

(R. 197-199.) (emphasis added).

18. Warehouse paid \$112,476.70 for the purchase, construction and installation of the Exhaust System and some other minor HVAC work. (R. at 153.)

19. Fetter had discussions with Warehouse concerning what portion of the payments should be attributed to the Exhaust System. (*Id.*)

20. Fetter believed that the amount attributable to the Exhaust System was only \$90,000.00. (*Id.*) Warehouse believed the amount was greater. (R. at 154.)

21. Warehouse accepted Fetter's designation of \$90,000 as the principal amount to be paid for the Exhaust System. (R. at 154.)

22. Fetter then provided a loan repayment schedule to Warehouse for the Exhaust System describing the loan amount as \$90,000, the loan date of January 1, 1997, the term of the loan as 60 months, the interest rate as eight percent, monthly payments of \$1,824.88 per month, and an allocation of each monthly payment to interest and principal. (R. at 154, 156.) (Attached as Exhibit "A" to the Addendum is a copy of the loan repayment schedule provided by Fetter).

23. Pina made separate payments for the rent and the amount due for the Exhaust System. (R. at 154 – 163; 170.) (Attached as Exhibit B to the Addendum is a collection of checks, signed by Fetter, that were received from Pina for the Exhaust System (the "Checks")). The Checks describe payments for the Exhaust System as amounts for "Tenant Improvement Amortization." (*Id.*)

24. Pina made amortization payments for the Exhaust System for the period February 1997 through May, 1998 for a total of 16 payments. (R. at 154.) Pursuant to Pina's own loan repayment schedule, Pina still owed a principal balance of \$69,390.86. (R. at 154, 156.)

25. In June 1998, the Pina Restaurant closed for business. (R. at 202.)

26. At that time, Pina had failed to make monthly rental payments pursuant to the Lease Agreement. (R. at 202.) *See also* Addendum at Exhibit "B" to Appellant's Brief.

27. Pursuant to Paragraph 26.4 of the Lease, Pina granted to Warehouse a first priority lien and security interest in all of the trade fixtures, equipment, appliances, cookware, dishes, utensils and all other personal property located in the space. (R. at 186-187.)

28. On or about June 12, 1998, Warehouse filed a lawsuit seeking, among other things, recovery of past due rent and a restraining order enjoining Pina from removing any of the property subject to the Security Agreement. (R. at 202.) *See also* addendum Ex. B. to Appellant's Brief.

29. Subsequently, Pina stipulated to an order granting a writ of attachment directing the constable to attach the personal property, equipment and fixtures subject to the Security Agreement, and allowing the constable to change the locks for the Space, as

Pina was in breach of the lease. (R. at 202.) *See also* Addendum Ex. C to Appellant's Brief.

30. The leased premises has been leased to another tenant. (R. at 202.)

31. On or about August 25, 1999, Commercial assigned its claims against Pina Restaurant and against Fetter under the Guaranty to Brailsford. (R. at 154, 171.)

32. Fetter did not raise "surrender and acceptance" as an affirmative defense in his Answer to the Amended Complaint. (R. at 108-115.) (Attached as Exhibit C to the Addendum is a copy of Fetter's Answer to the Amended Complaint).

SUMMARY OF ARGUMENT

In order to operate a restaurant at the leased premises, numerous improvements needed to be made. Among them was the Exhaust System. Pina requested that Warehouse loan the money for the costs of the Exhaust System to Pina. However, Warehouse was unwilling to bear the costs of the Exhaust System without being repaid by Pina and without those costs being guaranteed by Fetter and Oesch, Pina's principals. Accordingly, Warehouse financed the costs of the Exhaust System, but was to be repaid by Pina, pursuant to the Lease, over a five-year period at eight percent interest. Additionally, Fetter personally guaranteed 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" Inasmuch as Pina was required to pay for the

Exhaust System (which Fetter acknowledges is an improvement) pursuant to the Lease, Fetter, as a guarantor, is liable for said costs.

Fetter's argument that the Guaranty was terminated by the surrender and acceptance of the premises is without merit because (1) Fetter waived the affirmative defense of surrender and acceptance by not asserting it in his Answer to the Amended Complaint; (2) the doctrine of surrender and acceptance is not applicable in this case; (3) surrender and acceptance only discharges future rent obligations, not liabilities which were incurred prior to termination of a lease; and (4) even if the Lease was terminated, the Guaranty was absolute and unconditional.

Finally, Fetter's argument that he is entitled to an offset is without merit because (1) he failed to raise the argument in the trial court; (2) he did not obtain written consent for any improvements as required by the Lease; and (3) a tenant is not entitled to be reimbursed for improvements it makes absent an agreement to the contrary.

Pursuant to the express language of the Guaranty, Fetter is liable for the costs of the Exhaust System. The judgment against Fetter should be affirmed and Brailsord should be entitled to additional attorney's fees incurred on appeal.

ARGUMENT

I. FETTER GUARANTEED THE PAYMENT OF THE EXHAUST SYSTEM.

Fetter guaranteed Pina's obligation to pay for the Exhaust System. The Guaranty expressly provides that:

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.

(R. 198.) (emphasis added).

In other words, Fetter not only personally guaranteed payment for all the Tenant Improvements provided for in Sections 12 and 14 of the Lease, but also any costs and expenses for **other** improvements which were to be paid by Pina under the Lease. Fetter acknowledges that the Exhaust System is an improvement. (*See Fetter's Statement of Facts at ¶ 5.*) Accordingly, the only question to be determined is whether Pina was obligated to pay for the cost and installation of the Exhaust System under the Lease.

As set forth more fully below, Pina was unequivocally required to pay for the Exhaust System under the Lease. Inasmuch as Pina failed to pay for the costs of the Exhaust System, Fetter, as a guarantor, is obligated to do so.

A. Pina Was Obligated To Pay For The Cost And Installation Of The Exhaust System Pursuant To Sections 12 And 14 Of The Lease.

Pina was required to pay for the Exhaust System under both Sections 12 and 14 of the Lease. Section 12 of the Lease specifically provides that:

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").**

(R. at 178.) (emphasis added).

Exhibit B to the Lease consists of two pages. The first page of Exhibit B contains the heading "PAID BY LANDLORD" and specifically provides that:

HVAC equipment and ductwork on 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.)**

(R. at 195.) (emphasis added).³

³ Section 14.3 of the Lease further provides that:

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.

(continued...)

Although the cost of the Exhaust System is under the heading “PAID BY LANDLORD,” rather than the heading “PAID BY TENANT” it is clearly a Tenant Improvement and an obligation which ultimately was to be paid for by Pina. Section 12 of the Lease defines “Tenant Improvements” as those improvements which are not the Landlord’s responsibility under Exhibit B. Because Exhibit B expressly provides that the Landlord was to merely **finance** the cost of the Exhaust System and that the Tenant was to repay those costs, they were “Tenant Improvements” rather than “Landlord Improvements.”

Fetter himself has characterized the Exhaust System as a Tenant Improvement. In fact, Fetter signed separate checks to repay the cost of the Exhaust System, which described said payments as “Tenant Improvements.” Nothing shows the intention of the parties more clearly than the interpretation they themselves place upon a contract.

Trucker Sales Corp. v. Potter, 104 Utah 1, 137 P.2d 370, 371 (1943). It is well settled that where the parties to a contract, by their actions, place upon it a construction which is not contrary to the usual meaning of the language used, courts will follow that construction. *Id.* (citing *Fowers v. Lawson*, 56 Utah 420, 191 P.227 (1920); *Roberts v. Tuttle*, 36 Utah 614, 105 P. 916 (1909); *Titton v. Sterling Coal & Coke Co.*, 28 Utah 173,

(...continued)

77 P. 758 (1904); *Snyder v. Fidelity Savings Association*, 23 Utah 291, 64 P. 870 (1901); *Woodward v. Edmonds*, 20 Utah 118, 57 P. 848 (1899); *Peay v. Salt Lake City*, 11 Utah 331, 40 P. 206 (1895)). As demonstrated by Fetter's own actions, the Exhaust System was a Tenant Improvement to be paid for by Pina under Sections 12 and 14 of the Lease. Therefore, Fetter is liable to repay said costs under the Guaranty.

Fetter argues that Pina had no obligation to pay for the costs and installation of the Exhaust System under Sections 12 and 14 because the list of items "TO BE PAID BY TENANT" on Exhibit B only identifies the design of the Exhaust System. Fetter further claims, at the very least, that Exhibit B is ambiguous.⁴ Fetter's argument is without merit. Pursuant to basic principles of contract interpretation, neither the Lease nor the Guaranty is ambiguous.

In interpreting a contract, courts first look to the four corners of the agreement to determine the intent of the parties. *Cherry v. Utah State Univ.* 966 P.2d 866, 869 (Utah App. 1998). It is axiomatic that a contract should be interpreted so as to harmonize all of its provisions and all of its terms, and that all of its terms should be given effect. *Buehner Block Co. v. UWC Associates*, 752 P.2d 892, 895 (Utah 1988); *Utah Valley Bank v.*

⁴ Fetter incorrectly asserts that because the Lease is allegedly ambiguous, it should be construed against the drafter, who Fetter infers is Warehouse. However, there is no support in the record for the assertion that Warehouse drafted either the Lease or the Guaranty. Therefore, the argument must be rejected.

Tanner, 636 P.2d 1060, 1061-62 (Utah 1981); *WebBank v. American General Annuity Service Corp.*, 54 P.3d 1139, 1144 (Utah 2002) (in interpreting contract, court looks to writing itself to ascertain parties' intentions, and considers each contract provision in relation to all others, with view toward giving effect to all and ignoring none). A contract provision is not necessarily ambiguous because parties differ in their interpretation of its language. *Willard Pease Oil and Gas Co. v. Pioneer Oil and Gas Co.*, 899 P.2d 766, 772 (Utah 1995). To demonstrate an ambiguity in a contract provision, the contrary positions must each be a reasonable interpretation of the terms of the provision. *Id.*

Here, the only reasonable interpretation of the Lease and the Guaranty is that Fetter is obligated to pay for the cost and installation of the Exhaust System because Pina was obligated to pay for it. Any other interpretation would be contrary to the intent of the parties.

Fetter's argument ignores these principles of contract interpretation and overlooks key contractual provisions. First, Fetter ignores Section 12 of the Lease which provides that "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." Second, Fetter ignores Exhibit "B" to the Lease, which provides that "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).” Finally, Fetter ignores Section 5 of the Lease which states that “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%.”

When read together, these contractual provisions demonstrate the intent of the parties that Warehouse was to finance the initial costs and installation of the Exhaust System, that Pina was to repay those costs, and that Fetter was to guarantee them. It was never the intent of the parties to burden the Landlord with the costs of the Exhaust System. Fetter’s interpretation is contrary to the intent of the parties. In short, Fetter is liable for the cost of the Exhaust System because it was a Tenant Improvement cost to be paid by Pina under the Lease and Fetter personally guaranteed Pina’s obligation to pay for it.

B. Pina Was Also Obligated To Pay For The Exhaust System Pursuant To Section 5 Of The Lease.

Even if the Exhaust System was not a “Tenant Improvement,” Pina nevertheless agreed to pay for the costs of the Exhaust System under Section 5 of the Lease. Section 5 of the Lease specifically provides that:

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 makeup air and exhaust system over a 5-year period, with interest at 8%] (emphasis original).

Although the amortized costs of the Exhaust System were to be repaid with rent, they did not constitute rent. Rather, the rental amount was simply increased by the amortization of the costs of the Exhaust System for five years even though the lease itself was for ten years.

Additionally, both Fetter and Pina characterized the obligation as a “Loan” rather than rent by preparing an amortization schedule, and by making out separate checks for the rent and the repayment of the amortized costs of the Exhaust System. *Trucker Sales Corp. v. Potter*, 104 Utah 1, 137 P.2d 370, 371 (1943). Thus, the trial court properly construed the obligation as the repayment of a loan, rather than rent.

Fetter argues that he did not guarantee Pina’s obligation to pay for the Exhaust System because there is nothing in the Guaranty which specifically references Section 5 of the Lease or Pina’s obligation to pay rent. In making this argument, Fetter ignores the plain language of his Guaranty: “Guarantors hereby guarantee to Landlord the full and prompt payment of **all costs and expenses incurred in connection with . . . the construction and installation of all improvements to the leased premises to be paid by Tenant.**” (emphasis added). Here, there is no question that the Exhaust System is an **improvement** to the leased premises. The fact that Pina was expressly obligated to repay the Landlord the costs of the Exhaust System whether by direct payment, or along with

the rents, should end the inquiry because Fetter guaranteed to pay for the costs of all improvements to be paid by Pina.

II. THE GUARANTY WAS NOT TERMINATED BY THE ALLEGED SURRENDER AND ACCEPTANCE OF THE LEASED PREMISES.

Fetter claims that because the Lease was allegedly terminated under the doctrine of “surrender and acceptance,” both Pina’s obligation to pay for the costs of the Exhaust System and Fetter’s Guaranty were terminated. Fetter’s argument lacks merit for several reasons.

A. Fetter Has Waived The Affirmative Defense of “Surrender and Acceptance.”

Fetter’s argument that the premises was “surrendered and accepted” has been waived. Surrender and acceptance is an affirmative defense. *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 901 (Utah 1989). Failure to plead an affirmative defense constitutes a waiver of the defense pursuant to Utah R. Civ. P. 12(h). *Valley Bank and Trust Co. v. Wilken*, 668 P.2d 493, 493 (Utah 1983). Fetter failed to plead “surrender and acceptance” as an affirmative defense in his Answer to the Amended Complaint. (R. 108-115.) Accordingly, it has been waived.

B. The Doctrine Of Surrender And Acceptance Is Inapplicable.

Even if the Court finds no waiver, the doctrine of surrender and acceptance is inapplicable in this case. First, Brailsford is not attempting to recover rents. Rather, he is attempting to recover payments for improvements which were financed by the Landlord

and which were to be repaid by the Tenant. Said repayments do not constitute rent and were simply repayments of a loan. Even Fetter has characterized the payments as an amortization of a loan rather than payment of rent.

Second, the Lease has never been terminated. Section 26.3 of the Lease provides in part that:

. . . 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.

Even though a court entered an order granting a writ of attachment, it never ruled that the Lease was terminated. Nor did the Landlord give any written notice of its intent to terminate the Lease. In fact, the very purpose of the action was premised on Pina's breach of the Lease for ceasing to make the monthly rental payments. Therefore, the Lease was not terminated.⁵

⁵ Fetter cites *Reid v. Mutual Of Omaha Ins. Co.*, 776 P.2d 896, 900 (Utah 1989) in support of his argument that the Lease was allegedly terminated by surrender and acceptance. In *Reid*, the tenant gave notice and voluntarily vacated the premises. *Id.* at 890. The Landlord subsequently remodeled the premises and leased it to another tenant. *Id.* Even under those circumstances, the *Reid* court held that the Landlord's actions did not amount to a termination of the lease by reason of surrender and acceptance.

Here, unlike the tenant in *Reid*, Pina never voluntarily surrendered the leased premises. Instead, a court entered an order granting a writ of attachment and allowing the constable to change the locks due to Pina's breach of the Lease. Therefore, Pina never

(continued...)

Third, the doctrine of surrender and acceptance does not apply because the Tenant is liable for rents even after termination of the Lease. Section 26.3 of the Lease provides that:

. . . 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 present value (calculated using a 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.

Thus, even if the Lease were terminated, the Tenant was nevertheless obligated to pay rent.

Finally, termination of a lease by reason of surrender and acceptance only operates to discharge the lessee from **future** obligations to pay rent. *Reid v. Mutual of Omaha*, 776 P.2d 896, 900 (Utah 1989); *Petersen v. Hodges*, 121 Utah 72, 239 P.2d 180, 182 (1951). It does not relieve the lessee of liability incurred **prior** to the surrender. *Nicholas A. Cutaia, Inc. v. Buyer's Bazaar, Inc.*, 637 N.Y.S.2d 857 (N.Y. App. 1996); 49 Am. Jur. 2d *Landlord and Tenant* § 261 (2004) (the surrender of a lease by a tenant, even though made with the consent of or by agreement with the landlord, operates only to

(...continued)

voluntarily surrendered the premises and the doctrine of surrender and acceptance cannot apply.

release him from liability on the covenants taking effect after the date of the surrender). In this case, Pina's obligation to pay for the cost and installation of the Exhaust System was incurred prior to any alleged termination of the Lease. Moreover, due to Pina's breach, all rents were accelerated and were due prior to any alleged termination of the Lease. Therefore, even if the Lease was terminated by the doctrine of "surrender and acceptance," Fetter remains liable.

C. The Guaranty Was Unconditional.

Even if the Lease were terminated by the doctrine of "surrender and acceptance," the Guaranty was meant to be enforceable after the Lease had been breached or terminated. Indeed, that was the very purpose of the Guaranty. Under Utah law, a guarantee of the payment of an obligation without words of limitation or condition, is construed as an absolute and unconditional guaranty. *Valley Bank and Trust Co. v Rite Way Concrete Farming, Inc.*, 742 P.2d 105, 100 (Utah App. 1987); *Strevell-Patterson Co. Inc. v. Francis*, 646 P.2d 741, 743 (Utah 1982); *North Park Bank of Commerce v. Bottum*, Utah 645 P.2d 620 (Utah 1982).

The Guarantee did not provide any words of limitation or condition. Rather, the Guaranty confirmed that it is absolute and unconditional and meant to survive termination of the Lease. The Guaranty specifically provides that:

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 Tenant's obligations under the Lease by 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

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

(R. at 197-199.) (emphasis added). Therefore, even if the Lease was terminated by

“surrender and acceptance”, Fetter is nevertheless liable under the Guaranty for the cost and installation of the Exhaust System.

D. Recovery Under The Guaranty Does Not Amount To A Double Recovery.

Finally, allowing the Landlord to keep the Exhaust System and to recover additional amounts would not amount to an impermissible double recovery. It is generally recognized that absent a specific lease term to the contrary, fixtures placed on a premises by a tenant remain with the leased premises after eviction. *See generally, State v. Attman/Glazer P.B. Co.*, 594 A.2d 138, 146 (Md. 1990) (“the [trial] court concluded that it would be unfair for [landlord] to realize the value of these improvements as part of the condemnation award when the improvements were paid for by the [tenant]. In so concluding, the court ignored the plain language of the lease and violated well-settled contract law.”).

Pina was specifically required to both pay for and surrender the improvements upon termination of the Lease. Section 20 of the Lease provides that:

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 . . . Tenant’s obligations to observe or perform this covenant shall survive expiration or other termination of the term of this Lease.

Accordingly, the fact that the Exhaust System was left on the premises and is presumably now being used by a new restaurant tenant is of no legal significance to the question of whether Pina should have paid for it. Pina was obligated to pay for the Exhaust System

whether it remained in the leased premises for the full ten years or not. And, Fetter unconditionally guaranteed to pay for the Exhaust System if Pina failed to do so.

The cases cited by Fetter are easily distinguishable. In each of the cases cited by Fetter, the Landlord tried to recover damages for improvements made to the premises after the Lease was terminated. The Landlord claimed that such costs were necessary to relet the premises. In this instance, Pina was required to pay for the improvements from the outset. Accordingly, Fetter's argument must be rejected.

III. FETTER IS NOT ENTITLED TO AN OFFSET.

Fetter is not entitled to an offset as a matter of law. Fetter failed to argue that he was entitled to an offset in the trial court. It is well settled that appellate courts generally will not consider an issue raised for the first time on appeal. *In re Schwenke*, 89 P.3d 117, 125 (Utah 2004); *The View Condominium Owners Association v. MSICO, L.L.C.*, 90 P.3d 1042, 1052 (Utah App. 2004). Fetter failed to argue in the trial court that he was entitled to an offset for "additional tenant improvements" which Fetter allegedly incurred in excess of those agreed to under the Lease. Accordingly, this Court should decline Fetter's invitation to consider this argument.

In any event, Fetter is not entitled to an offset. Section 12 of the Lease specifically provides that:

The parties hereto agree that Tenant's 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.

Section 14 of the Lease further provides that:

Landlord's Consent Required. Tenant shall not make or cause to be made any alterations, additions, or improvements to the leased premises, on 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.

Therefore, by occupying the leased premises, Pina formally accepted the Landlord's improvements. Moreover, if any additional improvements were to be made, the Landlord's consent was required. There is no evidence in the record that Pina or Fetter ever received the Landlord's consent for any "additional Tenant Improvements" in excess of those agreed under the Lease.

Moreover, Courts have routinely held that a tenant is not entitled to compensation for improvements made to a leasehold in the absence of an agreement that the Landlord would pay for them, even though the tenant does not have the right to remove the improvements. *In re Estate of Vangen*, 370 N.W. 2d 479, 480 (Minn. App. 1985); *Lafary v. Lafary*, 522 N.E. 1d 916, 918 (Ind. App. 1988); 49 Am. Jur. 2d *Landlord and Tenant* § 902 (2004).

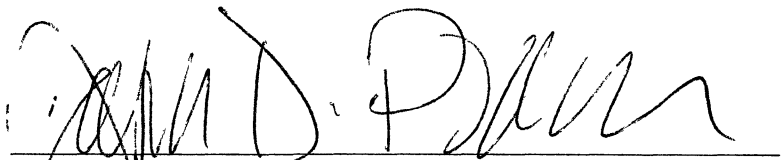
In the case at bar, there is no agreement requiring the Landlord to pay for any tenant improvements which Fetter or Pina allegedly incurred in excess of those agreed to under the Lease. Accordingly, Fetter cannot claim an offset for these alleged improvements as a matter of law.

CONCLUSION

For the foregoing reasons, Brailsford respectfully requests that the Court affirm the District Court's Order granting Partial Summary Judgment to Brailsford and to allow the trial court to augment the judgment for additional interest and attorney's fees incurred by reason of this appeal.

RESPECTFULLY SUBMITTED this 30th day of July 2004.

BALLARD SPAHR ANDREWS & INGERSOLL, LLP

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

Mark R. Gaylord, Esq.

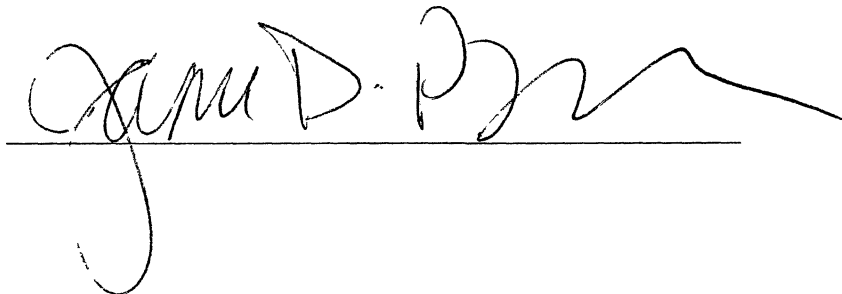
Jason D. Boren, Esq.

Attorneys for Ken Brailsford

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July 2004, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEE** to be mailed, via First-Class Mail, postage prepaid, to the following:

Donald J. Winder, Esq.
John W. Holt, Esq.
WINDER & HASLAM, P.C.
175 West 200 South, Suite 4000
P.O. Box 2668
Salt Lake City, Utah 84110-2668

A handwritten signature in black ink, appearing to read "James D. P.", is written over a solid horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

ADDENDUM

Tab A

Jan 26, 1997

INA UNLIMITED LLC

Loan Amount: \$ 90,000.00
Term of Loan: 60
Amortization Method: Normal, 360 D/Y

Loan Date: 01-01-1997
Annual Interest Rate: 8.000 %
Interest Compounded: Monthly

PMT Due Date	Payment Amount	Interest	Principal	Balance
1 02-01-97	1,824.88	600.00	1,224.88	88,775.12
2 03-01-97	1,824.88	591.83	1,233.05	87,542.07
3 04-01-97	1,824.88	583.61	1,241.27	86,300.80
4 05-01-97	1,824.88	575.34	1,249.54	85,051.26
5 06-01-97	1,824.88	567.01	1,257.87	83,793.39
6 07-01-97	1,824.88	558.62	1,266.26	82,527.13
7 08-01-97	1,824.88	550.18	1,274.70	81,252.43
8 09-01-97	1,824.88	541.68	1,283.20	79,969.23
9 10-01-97	1,824.88	533.13	1,291.75	78,677.48
10 11-01-97	1,824.88	524.52	1,300.36	77,377.12
11 12-01-97	1,824.88	515.85	1,309.03	76,068.09
1997 totals	20,073.68	6,141.77	13,931.91	
12 01-01-98	1,824.88	507.12	1,317.76	74,750.33
01 02-01-98	1,824.88	498.34	1,326.54	73,423.79
14 03-01-98	1,824.88	489.49	1,335.39	72,088.40
15 04-01-98	1,824.88	480.59	1,344.29	70,744.11
16 05-01-98	1,824.88	471.63	1,353.25	69,390.86
17 06-01-98	1,824.88	462.61	1,362.27	68,028.59
18 07-01-98	1,824.88	453.52	1,371.36	66,657.23
19 08-01-98	1,824.88	444.38	1,380.50	65,276.73
20 09-01-98	1,824.88	435.18	1,389.70	63,887.03
21 10-01-98	1,824.88	425.91	1,398.97	62,488.06
22 11-01-98	1,824.88	416.59	1,408.29	61,079.77
23 12-01-98	1,824.88	407.20	1,417.68	59,662.09
1998 totals	21,898.56	5,492.56	16,406.00	

Tab B

PINA UNLIMITED, LLC
327 WEST 200 SOUTH
SALT LAKE CITY, UTAH 84101
(801) 355-7462

CHASE
Commerce Bank - California
21535 Hawthorne Blvd.
Torrance, CA 90503

90-3782/1211

No 3062

DATE June 26, 1997

PAY Nine Thousand One Hundred Twenty-Four and 40/100 DOLLARS \$9,124.40

TO THE
ORDER OF

Warehouse LLC


AUTHORIZED SIGNATURE

⑈00003062⑈ ⑆121137522⑆ 8971⑈01297⑈9⑈

DATE	DESCRIPTION	AMOUNT
------	-------------	--------

Amortized tenant improvements
February, March, April, May and June @ \$1,824.88/month

PINA UNLIMITED, LLC Salt Lake City, Utah 84101

PLEASE DETACH AND RETAIN THIS STATEMENT • ATTACHED CHECK IS IN PAYMENT OF ITEMS DESCRIBED ABOVE.

Blank signed OK

12

PINA UNLIMITED, LLC
327 WEST 200 SOUTH
SALT LAKE CITY, UTAH 84101
(801) 355-7462

COMMERCIAL
Commerce Bank - California
21535 Hawthorne Blvd.
Torrance, CA 90503
90-3752/1211

No 3149

DATE August 1, 1997

PAY One Thousand Eight Hundred Twenty-Four and 88/100 DOLLARS \$ 1,824.88

TO THE
ORDER OF

• warehouse LLC

[Signature]
NON-NEGOTIABLE

AUTHORIZED SIGNATURE

⑈00003149⑈ ⑆121237522⑆ 8971001297⑈9⑈

DATE	DESCRIPTION	AMOUNT
------	-------------	--------

August TI Amortization

PINA UNLIMITED, LLC Salt Lake City, Utah 84101

PLEASE DETACH AND RETAIN THIS STATEMENT • ATTACHED CHECK IS IN PAYMENT OF ITEMS DESCRIBED ABOVE.

#13

PINA UNLIMITED, LLC
327 WEST 200 SOUTH
SALT LAKE CITY, UTAH 84101
(801) 355-7462

Commerce Bank - California
21536 Hawthorne Blvd.
Torrance, CA 90503
90-3752/1211

No 3218

DATE September 1, 1997

PAY ONE THOUSAND EIGHT HUNDRED TWENTY-FOUR AND 88/100 DOLLARS \$1,824.88

TO THE
ORDER OF

Warehouse LLC

[Signature]
NON-NEGOTIABLE
AUTHORIZED SIGNATURE

⑈00003218⑈ ⑆222137522⑆ 8971⑈01247⑈9⑈

DATE	DESCRIPTION	AMOUNT
------	-------------	--------

September tenant improvement amortization

PINA UNLIMITED, LLC Salt Lake City, Utah 84101
PLEASE DETACH AND RETAIN THIS STATEMENT • ATTACHED CHECK IS IN PAYMENT OF ITEMS DESCRIBED ABOVE

PINA UNLIMITED, LLC
327 WEST 200 SOUTH
SALT LAKE CITY, UTAH 84101
(801) 355-7462

COMMERCIA
Commerce Bank - California
21535 Hawthorne Blvd.
Torrance, CA 90503

90-3752/1211

No 3290

DATE 10/3/97

PAY One thousand eight hundred twenty four and 88/100* * * * * DOLLARS \$ 1,824.88

TO THE
ORDER OF

• **COMMERCIAL WAREHOUSE LLC**
c/o. Harrison Horn
2696 N. University Ave., Ste. 290
Provo, UT 84604

NON-NEGOTIABLE

AUTHORIZED SIGNATURE

⑈00003290⑈ ⑆121137522⑆ 8971001297⑈9⑈

DATE	DESCRIPTION	AMOUNT
10/3/97	T.I. Amortization	\$1,824.88

PINA UNLIMITED, LLC Salt Lake City, Utah 84101

PLEASE DETACH AND RETAIN THIS STATEMENT • ATTACHED CHECK IS IN PAYMENT OF ITEMS DESCRIBED ABOVE.

#15

PINA UNLIMITED, LLC
327 WEST 200 SOUTH
SALT LAKE CITY, UTAH 84101
(801) 355-7462

CORRECTION
Comet Bank - California
21535 Hawthorne Blvd.
Torrance, CA 90503
90-3752/1211

No 3352

DATE 11/3/97

PAY One thousand eight hundred twenty four and 88/100* * * * * DOLLARS \$ 1,824.88

TO THE
ORDER OF

COMMERCIAL WAREHOUSE LLC
c/o Harrison Horn
2696 N. University Ave., Ste. 290
Provo, UT 84604

NON-NEGOTIABLE

AUTHORIZED SIGNATURE

⑈00003362⑈ ⑆121137522⑆ 8971⑈01297⑈9⑈

DATE	DESCRIPTION	AMOUNT
11/3/97	T.I. Amortization	\$1,824.88

PINA UNLIMITED, LLC Salt Lake City, Utah 84101

PLEASE DETACH AND RETAIN THIS STATEMENT • ATTACHED CHECK IS IN PAYMENT OF ITEMS DESCRIBED ABOVE.

#16
PINA UNLIMITED, LLC
327 WEST 200 SOUTH
SALT LAKE CITY, UTAH 84101
(801) 355-7462

UNION
Commerce Bank - California
21535 Hawthorne Blvd.
Torrance, CA 90503
90-3752/1211

№ 3447

DATE December 3, 1997

PAY One thousand eight hundred twenty four and 88/100* * * * * DOLLARS \$1,824.88

TO THE
ORDER OF

COMMERCIAL WAREHOUSE LLC
c/o Harrison Horn
2696 N. University Ave., Ste. 290
Provo, UT 84604


NON-NEGOTIABLE
AUTHORIZED SIGNATURE

⑈00003447⑈ ⑆123137522⑆ 8971⑈01297⑈9⑈

DATE	DESCRIPTION	AMOUNT
12/3/97	T.I. Amortization	\$1,824.88

PINA UNLIMITED, LLC Salt Lake City, Utah 84101

PLEASE DETACH AND RETAIN THIS STATEMENT • ATTACHED CHECK IS IN PAYMENT OF ITEMS DESCRIBED ABOVE.

Tab C

DONALD J. WINDER (#3519)
STEWART R. KNIGHT (#6591)
WINDER & HASLAM, P.C.
175 West 200 South, Suite 4000
P.O. Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

FILED
COURT
93 OCT -7 PM 4:29
[Signature]
CLERK

Attorneys for Defendant Fetter

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

KEN BRAILSFORD,	:	
	:	
Plaintiff,	:	ANSWER TO PLAINTIFF'S
	:	AMENDED COMPLAINT
vs.	:	
	:	
WAREHOUSE COMMERCIAL, LLC;	:	
PINA UNLIMITED, LLC; BLAINE P.	:	Civil No. 990900465
FETTER; and CHRISTIAN OESCH,	:	
	:	Judge Sandra Peuler
Defendants.	:	

Defendant Blaine P. Fetter ("Fetter") responds to the allegations of plaintiff's Amended Complaint as follows.

FIRST DEFENSE

Plaintiff's Amended Complaint fails to state a cause of action upon which relief may be granted.

SECOND DEFENSE

Fetter responds to the specifically numbered paragraphs of plaintiff's Amended

Complaint as follows:

1. Fetter lacks knowledge and information sufficient to form a belief as to the truth of paragraph 1 and therefore denies the same.

2. Admits.

3. Fetter admits he was one of the members of Pina and signed a guarantee, the terms of which speak for themselves, and denies each and every allegation inconsistent herewith.

4. Fetter admits Defendant Oesch was one of the members of Pina. As to the rest of paragraph 4, Fetter admits Oesch signed a guarantee, the terms of which speak for themselves.

5. Admits.

6. Admits.

7. Fetter lacks knowledge and information sufficient to form a belief as to the truth of paragraph 7 and therefore denies the same.

8. Fetter lacks knowledge and information sufficient to form a belief as to the truth of paragraph 8 and therefore denies the same. Fetter reserves the right to file an action against Harrison Horn, individually, or Warehouse Commercial.

9. Fetter admits Warehouse Commercial and Pina entered into a Lease Agreement dated August 2, 1996. Fetter affirmatively alleges that Warehouse Commercial had not yet been legally formed at the time of execution of the Lease Agreement. Fetter admits he signed a guarantee, the terms of which speak for themselves and denies each and every allegation

inconsistent herewith.

10. Fetter affirmatively alleges a portion of the tenant improvements may have been made by Collins Development and Construction, Inc. ("Collins Construction"), but has no knowledge of the nature and amount of those tenant improvements. Fetter admits Restaurant and Store Equipment Co. ("Restaurant Equipment") provided certain tenant improvements to the Restaurant Space. Fetter affirmatively alleges Pina has paid or is entitled to offsets from defendant Warehouse Commercial and/or its agent Scott Collins for Pina's share of the tenant improvements as required under the Lease Agreement and that any additional payment is the responsibility of Warehouse Commercial. Fetter further affirmatively alleges that certain tenant improvements made by Collins Construction were improperly installed, not in compliance with applicable building codes, not in conformance with the Collins Construction's own plans, not authorized by Pina, or the labor provided was performed in an unworkmanlike manner. Fetter further affirmatively alleges Pina was required to hire its own contractors to complete certain tenant improvements and incurred additional costs for which neither Fetter nor Pina has received payment. Fetter denies the remainder of this paragraph. Fetter reserves the right to file an action against Scott Collins, individually, and Land Development Group, Inc. for claims against Scott Collins and Land Development Group, Inc.

11. Fetter affirmatively alleges Pina has paid or is entitled to offsets from defendant Warehouse Commercial and/or its agent Scott Collins for Pina's share of the tenant improvements as required by the Lease Agreement. Fetter affirmatively denies the allegations as to reasonable value for all dollar claims asserted herein. As to the remainder of paragraph

11, Fetter lacks knowledge and information sufficient to form a belief as to the truth of paragraph 11 and therefore denies the same.

12. Fetter lacks knowledge and information sufficient to form a belief as to the truth of paragraph 12 and therefore denies the same.

13. Fetter lacks knowledge and information sufficient to form a belief as to the truth of paragraph 13 and therefore denies the same.

14. Fetter lacks knowledge and information sufficient to form a belief as to the truth of paragraph 14 and therefore denies the same. Fetter reserves the right to file an action against Scott Collins, individually, or Land Development Group, Inc. for claims against both.

15. Denies.

16. Fetter lacks knowledge and information sufficient to form a belief as to the truth of paragraph 16 and therefore denies the same.

17. Denies.

18. Fetter lacks knowledge and information sufficient to form a belief as to the truth of paragraph 18 and therefore denies the same.

19. Denies. Fetter reserves the right to file an action against Warehouse Commercial, Scott Collins, Land Development Group, Inc. and Harrison Horn for claims against said entities and individuals.

20. Fetter incorporates by reference his responses above to paragraphs 1 through 19 of plaintiff's Amended Complaint as if fully set forth herein.

21. Admits.

22. Denies.

23. Denies.

24. Denies.

25. Denies.

26. Fetter incorporates by reference his responses above to paragraphs 1 through 25 of plaintiff's Amended Complaint as if fully set forth herein.

27. Fetter admits he signed a guarantee, the terms of which speak for themselves and denies each and every allegation inconsistent herewith.

28. Denies.

29. Denies.

30. Denies.

31. Denies.

32. Fetter incorporates by reference his responses above to paragraphs 1 through 31 of plaintiff's Amended Complaint as if fully set forth herein.

33. Fetter admits Pina signed the Lease Agreement, the terms of which speak for themselves. Fetter denies each and every allegation inconsistent herewith.

34. Fetter admits he signed a guarantee, the terms of which speak for themselves and denies each and every allegation inconsistent herewith.

34. [sic] Denies.

35. Denies.

36. Denies.

37. Denies.

38. Denies.

39. Fetter incorporates by reference his responses above to paragraphs 1 through 38 of plaintiff's Amended Complaint as if fully set forth herein.

40. Fetter incorporates by reference his response to paragraph 10.

41. Denies.

41.[sic] Denies.

42. Denies.

THIRD DEFENSE

The claims of plaintiff are barred by the doctrine of unclean hands.

FOURTH DEFENSE

Plaintiff's claims are barred by virtue of plaintiff's negligence in failing to file a timely Declaration of Condominium on plaintiff's property.

FIFTH DEFENSE

Fetter paid for improvements which plaintiff or his assignors should have paid under the Lease Agreement for which Fetter is entitled to an offset for damages, if any, awarded.

SIXTH DEFENSE

Plaintiff's enforcement of the mechanic's liens is barred by plaintiff's failure to comply with the provisions of the Utah Mechanic's Lien Act (Utah Code Ann. Chapter 38-1-1, et. al.).

SEVENTH DEFENSE

To the extent Plaintiff's claim relates to Fetter, plaintiff is not entitled to the compensation he seeks, due to the fact certain tenant improvements were not in compliance with applicable building codes, not in conformance with building plans, not authorized, not properly installed and the labor was performed in an unworkmanlike manner.

EIGHTH DEFENSE

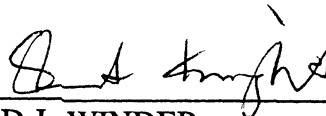
Plaintiff's claims fail for lack of consideration.

NINTH DEFENSE

Plaintiff has been paid for Pina's share of the tenant improvements under the Lease Agreement.

DATED this 7th day of October, 1999.

WINDER & HASLAM, P.C.



DONALD J. WINDER
STEWART R. KNIGHT
Attorneys for Blaine P. Fetter

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the above and foregoing
ANSWER TO PLAINTIFF'S AMENDED COMPLAINT, via U.S. Mail, postage prepaid, on
this 7th day of OCTOBER, 1999, on the following:

Attorneys for Plaintiff:

Stephen T. Hand

Robert J. Sonne

Giauque, Crockett, Bendinger & Peterson

170 South Main Street, Suite 400

Salt Lake City, Utah 84101

The original was hand delivered that same day to:

Salt Lake County Clerk

Scott M. Matheson Courthouse

450 South State Street

Salt Lake City, Utah 84111

SLC Knight