

63733-9

63733-9

NO.

WASHINGTON STATE COURT OF APPEALS, DIVISION I

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G&I IV KIRKLAND LLC, a Delaware limited liability company,

*Respondent,*

v.

STAT MEDICAL, INC.,

*Appellant.*

FILED DIV #1  
APPEALS SECTION  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 DEC 30 PM 4:55

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RESPONSE BRIEF

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On Appeal from King County Superior Court  
Hon. Douglass North

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Attorneys for Respondent and Plaintiff G&I Kirkland LLC:

Gregory M. Miller, WSBA No. 14459  
CARNEY BADLEY SPELLMAN, P.S.  
701 Fifth Ave., Suite 3600  
Seattle, Washington 98104-7010  
(206) 622-8020

Christine Martin-Lord, WSBA #31847  
Jeffrey M. Sayre, WSBA #19056  
SAYRE LAW OFFICES  
1320 University St.  
Seattle, Washington 98101  
(206) 625-0092

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## I. INTRODUCTION.

Respondent G&I IV Kirkland LLC (“G&I IV Kirkland”) was forced to bring this collection action against its former commercial tenant because that tenant, Appellant Stat Medical Inc. (“Stat Medical”), refused to pay the amount of holdover rent and other charges specified in the lease when it continued in the space as a month to month tenant after the lease expired on July 31, 2006. Stat Medical explicitly acknowledged in August 2006 that it owed holdover rent and tried to negotiate a lower rate than the lease required, tendering a lower amount while still in G&I IV Kirkland’s space. CP 85-86, App. F. But when G&I IV Kirkland did not accept the proposed discount, Stat Medical refused to pay the required holdover rent and other related close-out charges from its tenancy, forcing G&I IV Kirkland to sue and bring a summary judgment motion.

Stat Medical’s belated factual defense was that G&I IV Kirkland’s efforts in early June, 2006, to explore if Stat Medical would remain a tenant at the Kirkland 405 Corporate Center (even though it was already committed to its new space in Bothell) caused Stat Medical’s departure to be delayed, eventually until October 19 on completion of the build-out of its new space, so that it is excused from the holdover rent provision. But this overlooks the undisputed evidence that it was Stat Medical’s negotiation of extensive improvements *before* June, 2006, which determined that its new space in Bothell would not be ready until mid-October. Judge North recognized these circumstances and enforced the lease. CP 465-466, App. A (argument transcript).

Stat Medical submitted a less than minimal legal defense to the summary judgment motion, a wholly inadequate response. It failed to cite to any legal authority to support any legal theories, *see* CP 392-395 (Stat Medical’s four-page summary judgment response brief, App. B), arguing at the hearing it was entitled to rely on representations in its *pleadings*.<sup>1</sup> Stat Medical’s defense barely amounted to a Rule 12(b) defense based on the pleadings, rather than a Rule 56(e) defense based on admissible evidence. Given the lack of articulation of legal theories and its failure to present admissible evidence showing a dispute of a *material* fact on the legal theories at play, Judge North had no other choice under the rule but to grant G&I IV Kirkland’s motion.

As to the facts, Stat Medical’s “defense” below and on appeal tries to ignore the undisputed evidence of Stat Medical’s negotiation of the terms for its new space. Negotiations were complete by the May 5, 2006, signed letter of intent (CP 197-199, App. D), and the extensive improvements it negotiated with its New Landlord by May 24, 2006 (CP 275-278, App. E), *long before* any meeting with G&I IV Kirkland representatives in early June, 2006. This is significant since Stat Medical claimed it was damaged when it met with G&I IV Kirkland because that slowed down its negotiations with its New Landlord and delayed

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<sup>1</sup> “Your honor, we have notice pleading in this matter and *we have pled facts* giving rise to promissory estoppel, detrimental reliance at the least.” CP 452:13-16, Argument transcript, App. A (emphasis added). Promissory estoppel and detrimental reliance were allegedly “articulated in the pleadings and notice pleadings.” CP 453:4-5.

completion of the Bothell space. The Opening Brief barely mentions Stat Medical's negotiations for the Bothell space and fails to give any details about it. The Opening Brief also fails to cite or discuss the May 24 email detailing the extensive improvements it had given to its New Landlord and the time-frame for completion, with the earliest possible occupancy in mid-September. These pre-June events determined that Stat Medical's new space would be available in mid-October, 2006. Little wonder Judge North characterized Stat Medical's "defense" as "all smoke and mirrors" and granted summary judgment enforcing the terms of the lease. CP 466.

Judge North recognized that Stat Medical's negotiations with its New Landlord showed Stat Medical and its New Landlord were responsible for any delay and that any "damage" to Stat Medical's position – *i.e.*, the basis for its delay in leaving which triggered the holdover rent provision – occurred *before* Stat Medical met with G&I IV Kirkland. In fact, by May 24, Stat Medical had to plan on paying holdover rent given the (at least) late September occupancy date, which was covered by a waiver of the first five months' rent for the Bothell property. Thus, by May 24, as a matter of law, Stat Medical could not be "damaged" by having to pay holdover rent per the Lease. Holdover rent to G&I IV Kirkland was an expected cost of the new Bothell lease. There could be no "financial harm" from meeting with the G&I IV Kirkland representatives and still having to pay the already expected and required holdover rent. Rather, Stat Medical seeks a windfall.

## **II. RESTATEMENT OF ISSUES ON APPEAL.**

1. Must summary judgment for G&I IV Kirkland be affirmed because the undisputed, admissible evidence and all reasonable inferences from the evidence demonstrates that Stat Medical owes holdover rent under the Lease starting in August, 2006 through November, 2006 because any delays in leaving the premises were caused by Stat Medical and its New Landlord?
2. Was summary judgment properly granted where Stat Medical's response failed to demonstrate with admissible evidence and specific facts that there are factual disputes which are material to determining legal issues currently in this case, as required by CR 56(e)?
3. Must Stat Medical's new arguments and issues raised on appeal be disregarded under RAP 9.12 and governing cases because they were not briefed to the trial court?
4. Must Judge North's fee award to G&I IV Kirkland be affirmed because Stat Medical does not dispute its entitlement to fees as a prevailing party and waived any challenge to the amount of the fees by failing to file an objection to the requested amount?
5. Is G&I IV Kirkland entitled to attorneys fees on appeal?

## **III. RESTATEMENT OF THE CASE.**

### **A. Underlying Facts.**

G&I IV Kirkland stepped into the role of Stat Medical's landlord in May, 2006, when it bought the leased premises from Newtower Company Multi-Employer Property Trust. CP 5, ¶ 3.4 (Amended Complaint). Stat Medical had leased Suite 180 of Building C at the Kirkland 405 Corporate Center in Kirkland, Washington since June 5, 1999. CP 5, ¶3.1. At the time G&I IV Kirkland bought the premises, the lease ("Lease", CP 33-67) had been amended twice and had an expiration

date of July 31, 2006. CP 5, ¶¶ 5.2 – 3.6. Monthly base rent for the 8770 square feet was \$11,503.00, CP 69, or \$15.79 per square foot per year. G&I IV Kirkland sought to keep Stat Medical as a tenant and began discussions to accomplish this in June, 2006, shortly after acquiring the property.

However, Stat Medical had already begun looking for a new space in November of 2005 in the Bothell area with about 25 per cent less space. CP 379 (Davidson Dec.). In fact, it signed a Letter of Intent with LBA Realty Fund II-WBP III, LLC (the “New Landlord”) on April 27, 2006, and a revised Letter of Intent (“May 5 LOI”) on May 5, 2006, CP 189-90, 197-99, 379, committing to the Bothell space long before G&I IV Kirkland had assumed the role of Stat Medical’s current landlord. The May 5 LOI called for renting 6,405 square feet at zero dollars (\$0) for the first five months, then stepping up beginning in month six at \$12.00 per square feet per year, or \$6,405.00 per month. *See* CP 197-199. This five-month rent waiver compensated Stat Medical for the expected holdover rent it knew it was required to pay under the Lease for its Kirkland space, even as it downsized.

The May 5 LOI stated that the New Landlord was to “provide a turn-key improvement package in accordance with attached space plan and building standard improvements.” CP 198. In addition: [Stat Medical] reserves the right to make alterations to the ‘JPC test-fit plan’ so long as the cost does not exceed the April 19, 2006 budget by Foushee.” *Id.* Stat

Medical made over \$19,000.00 in changes to the new space during May and into the beginning of June of 2006. CP 254-73, 275.

On May 24, 2006, still well before Stat Medical ever met with its then-current landlord G&I IV Kirkland, Stat Medical was told that its new space would not be available until the end of September at the earliest:

Another issue that Daran raised yesterday was that [Stat Medical] wants to be in the space in 45 days (-July 1<sup>st</sup>). As I explained to Daran, this is not a realistic date. Here is a basic outline of an estimated timetable, assuming a lease is signed on 6/1:

Construction Drawings:	2 weeks
Review & Approval:	1 week
Permit:	4-6 weeks (final pricing, contract, etc)
Construction:	6 weeks

Therefore, assuming that a lease is signed next week, we are looking at an occupancy date in September.

CP 275 (emphasis in the original). It was only after learning its new space would not be ready until September that Stat Medical met with its current landlord, G&I IV Kirkland, in early June of 2006 to discuss remaining at Kirkland 405 Corporate Center. CP 332 at 13:4-5.

Stat Medical takes out of context one sentence of a proposal that Stat Medical never accepted to support its position that G&I IV Kirkland agreed holdover rent would not be charged. Opening Brief, pp. 7-8. The proposal was for a new space in Building E of Kirkland 405 Corporate Center, was submitted on June 16, 2006, and states the following:

LEASE COMMENCEMENT: Lease Commencement date shall be approximately October 1, 2006. Tenant shall be allowed to hold over in existing space without any hold over penalty.

CONDITIONS: This proposal is not an offer to lease, it is merely intended as the basis for the potential preparation of the lease. The final agreement and documentation is subject to negotiation and acceptance by the respective parties. It is further subject to our satisfactory review and approval of the space plan, and Tenant's financial information. Only a mutually acceptable, fully executed lease shall constitute a lease for the Premises. This Premises is subject to prior leasing and Colliers International reserved the right to change, modify or withdraw any provision of this proposal at any time without notice.

ACCEPTANCE: The terms and conditions specified herein shall remain valid until June 20, 2006.

CP 384, 386. Review of the full proposal demonstrates that not charging holdover rent was contingent on signing the lease to stay in Kirkland. Stat Medical did not accept the proposal. It signed the Bothell lease as soon as it got it on June 19, 2006. CP 278; CP 131-133.

Stat Medical now asserts that, "However, because the proposal required Stat Medical to relocate to another space owned by G&I IV Kirkland, Stat Medical rejected the proposal." Opening Brief, p. 7. This is not supported by the record. Stat Medical never provided a reason to G&I IV Kirkland why the proposal was rejected. CP 30, ¶10. The cite by Stat Medical to CP 371 is to Jack Rader's deposition testimony where he identifies the proposal. CP 379 is paragraph 5 of Daran Davidson's declaration where he states what took place in the meeting with the G&I IV Kirkland representatives before a proposal was made:

Various options were discussed including [1] moving Stat Medical out of its current location into another building where renovations would then be made to the existing premises. That was not a palatable option for Stat Medical because of the disruption. [2] Exploration was also made about moving Stat to another premises in Kirkland 405 and [3] lastly about the possibility of Stat purchasing the building in which it was a tenant.

CP 379. The proposal presented to Stat Medical was “option two,” moving Stat Medical to a new space within Kirkland 405 Corporate Center. CP 384. Stat Medical never provided G&I IV Kirkland a reason for rejection of the proposal. Furthermore, Darren Davidson’s statement does not state whether his reason for not going with “option one” was actually told to the G&I IV Kirkland representatives. All it states is why “option one” (which was never actually proposed to Stat Medical) would not work for Stat Medical.

Stat Medical signed the Bothell lease on June 19, 2006, the same day it was received. CP 131-32, 278, App. F. This contradicts Stat Medical’s conclusory assertions that it slowed down its negotiations with the New Landlord to consider G&I IV Kirkland’s proposal. Nothing in the record shows that Stat Medical would have received the Bothell lease any sooner if it had not met with G&I IV Kirkland. *See* CP 254-73, 275-76, 278. Stat Medical’s conclusory assertion that its “new lease could not start until October 1 because scheduling issues arose in part as a result of the several week delay in committing to the . . . lease because of the negotiations with G&I IV Kirkland” has no support in the record. It is inconsistent with the May 24, 2006 email setting out the construction schedule if the Bothell new lease was signed by June 1, CP 275, which it was not. Stat Medical met with G&I IV Kirkland *after* June 1. CP 332: 4-5. As Judge North remarked, “There is no indication that [Stat Medical was] delayed in any fashion” by G&I IV Kirkland. CP 465:8-9.

**B. Procedural History.**

G&I IV Kirkland filed its complaint in February, 2008 (CP 470 – 475), its amended complaint on November 26, 2008 (CP 4 – 7), then brought its motion for summary judgment on February 27, 2009. CP 16 – 362. Stat Medical filed response papers (CP 363-395), G&I IV Kirkland filed a reply brief and supplemental Christian Declaration related to CAM reconciliation charges (“CAM Charges”),<sup>2</sup> and the matter was argued to Judge North on March 27, 2009. CP 446-469, App. A.

The three main issues were the end date of Stat Medical’s tenancy; whether Stat Medical was required to pay holdover rent; and the amount of the CAM Charges. CP 455. Judge North granted summary judgment to G&I IV Kirkland that the tenancy terminated on November 30, 2006, and Stat Medical owed holdover rent through that date. CP 466. Judge North did not rule on the CAM Charges which had been briefed and submitted, but invited a renewed submission. *Id.* Judge North also awarded late fees and interest per the terms of the lease, but not attorney’s fees at that time. CP 467-68. The order on the holdover rent was entered May 4, 2009, including specification of the undisputed facts. CP 423-426.

G&I IV Kirkland then brought its motion for summary judgment on the 2006 CAM Charges on May 8 (Supp CP \_\_\_ - \_\_\_\_).<sup>3</sup> Stat

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<sup>2</sup> Stat Medical objected to G&I IV’s reply (CP 396-407) as over-length (CP 408-411) and Judge North only considered the first five pages. CP 454. The Christian Dec. (Sub 37) is at Supp. CP \_\_\_ - \_\_\_\_.

<sup>3</sup> In addition to monthly base rent, Stat Medical was required to pay an estimated amount for CAM charges. CP 17-18, Christian Dec. ¶ 8.a, 8.b. G&I IV Kirkland estimated CAM charges for the coming year, and each tenant was charged 1/12 of that estimated amount

Medical did not contest the second summary judgment motion. Stat Medical should have contested the 2006 CAM Reconciliation Charges for November 2006, since it alleged its tenancy ended October 31, 2009. Its failure to contest those charges below is inconsistent with its claim its tenancy ended on October 31. G&I IV Kirkland contends it also amounts to an admission by Stat Medical that its tenancy continued through November, as Judge North found. The CAM Charges motion was granted on June 8, 2009. CP 427-431.

G&I IV Kirkland then moved for a final judgment and its attorneys fees, *see* Supp. CP \_\_\_ - \_\_\_ and CP 476-494 (Lord declaration re fees), which Stat Medical also did not oppose. Even so, Judge North looked at the submission carefully and excluded \$195 in the request because it was for “anticipated fees for responding to opposition to request for attorneys fees” since there had been no opposition and, thus, no reply to that opposition. *See* CP 433, annotation by Judge North.

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each month, to be paid with base rent. CP 18, Christian Dec. ¶ 8.b. At the end of the year, G&I IV Kirkland then calculated the actual CAM charges and, if the estimated amount paid by tenant was less than the actual amount, the tenant was billed the difference. *Id.* This is what happened here. The only arguable issue (if preserved) is whether the CAM charges include November.

#### IV. RESPONSE ARGUMENT.

**A. The Basic Principles of Rule 56 Require Affirming Summary Judgment Because the Rule Requires Reasonable Inferences and Submission of Specific Facts Via Admissible Evidence to Successfully Resist the Motion, and RAP 9.12 Precludes Consideration of Stat Medical's New Arguments and Issues on Appeal.**

**1. The summary judgment hearing.**

Judge North carefully considered G&I IV Kirkland's full stack of moving and reply papers, and also the very slender response from Stat Medical. CP 448. Then, rather than have G&I IV Kirkland begin argument as the moving party normally does, he turned to Stat Medical's counsel and began questions on what actual evidence there was to support Stat Medical's position that G&I IV Kirkland as landlord "consented to [Stat Medical] remaining there at the existing rate," CP 448:13-13, because, "you know, I found the plaintiff's motion fairly persuasive, so I guess I need to find out what your issues of fact are that we need to address here." CP 448:20-23. *See* CP 448 – 454, App. A hereto.

Those five-plus pages of exchange between Judge North and Stat Medical's counsel showed both that Judge North had examined all the papers and that Stat Medical could not show any facts were in dispute which required trial. Judge North listened to the proffered "facts" of claimed proposals sent to Stat Medical and focused on what was the only "deal" that, as a matter of law, could have been struck between the parties in June, 2006: "We're not going to charge you holdover rent if you agree to rent from us[.] I mean, I guess, that's the deal and they never entered

into the deal.” CP 451:21-25. Stat Medical responded with a paraphrase of its president Mr. Conforto’s declaration, that the “deal” was Stat Medical would not be charged holdover rent “[i]f you will hold back, take your time **and not go someplace else**,” CP 452: 3 – 7, which was in fact an admission of G&I IV Kirkland’s position and Judge North’s view of what the record shows.<sup>4</sup>

Stat Medical then argued that it had “pled facts giving rise to promissory estoppel, detrimental reliance at the least.” CP 452:14 – 16. Judge North’s response was two-fold and Stat Medical had no genuine, satisfactory answer: 1) the Lease states that any modification of the landlord’s duties “have to be indicated in writing and we don’t have anything in writing from the landlord indicating that something like that is going to occur,” CP 452:20-22; and 2) Stat Medical’s contention that promissory estoppel and detrimental reliance got around any writing requirement was “going to be an interesting argument. That was not articulated in the written materials.” CP 453:1-3, Judge North explained:

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<sup>4</sup> Stat Medical’s proffered gloss on that characterization of the “deal” -- that Stat Medical “didn’t [leave the Kirkland space] at the time” in early June, 2006, and “go somewhere else” (CP 452:7) - was wholly irrelevant (assuming *arguendo* it existed) since **the Lease was not up until nearly eight weeks later**. Stat Medical would not and could not go anywhere else “at the time.” As discussed *infra*, under applicable law such a predicate would have no meaning under the law of agreements since it would constitute only an illusory agreement and thus not a valid one. See § B.2., *infra*. The only **reasonable** interpretation of any deal, one which would have the terms of a contract, would be what Judge North stated: an agreement by G&I IV Kirkland that holdover rent would not be charged if Stat Medical agreed to a new lease with G&I IV Kirkland – the proposal (CP 382-387) Stat Medical rejected.

THE COURT: Well, suffice it to say the materials did not do a great job of laying all those out for me. The only one I was aware of from reading the [Stat Medical] materials was the assertion that there had been an agreement to forgo the increased rent in return -- in dealing with the negotiations.

And I thought that there was some real concern about whether that was valid or not, in view of the requirement that things be done in writing. I didn't see any allegation of promissory estoppel. Now, maybe I missed that in there somewhere, but I didn't see that.

CP 454: 16 - 24. Stat Medical then admitted those legal theories were not argued on summary judgment, but were only contained in its initial pleadings. CP 454:2-4.

Judge North gave Stat Medical additional argument time after hearing G&I IV Kirkland's argument. Stat Medical tried to argue G&I IV Kirkland caused Stat Medical's lease with its New Landlord to be delayed, to which Judge North got a telling, fatal admission: Stat Medical "signed the lease the day they got it" on June 19. CP 465:16 – 19. Judge North then refused to deny summary judgment because he required genuine evidence that G&I IV Kirkland's actions *in fact* slowed down the process of Stat Medical getting and signing the final lease for the Bothell space. CP 465:20-23. Concluding that Stat Medical's response to summary judgment was "all smoke and mirrors" Judge North granted summary judgment to G&I IV Kirkland, holding Stat Medical to the terms of its Lease and the statutory notice requirement for the month-to-month tenancy, meaning the tenancy ended November 30, 2006. CP 466.

**2. The summary judgment standard of reasonable inferences and specific facts.**

Stat Medical correctly states that review of summary judgment is *de novo*. However, Appellant seeks to change the emphasis in CR 56(c) which provides that summary judgment “*shall*” be granted when the moving party is entitled to judgment as a matter of law based on undisputed material facts:

The judgment sought *shall* be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

CR 56(c) (emphasis added).

While Stat Medical also correctly states reasonable inferences must be resolved in a non-moving party’s favor, the emphasis here must be on *reasonable* inferences, because an inference which is not reasonable will not defeat summary judgment. *Marshall v. AC&S Inc.*, 56 Wn. App. 181, 184-85, 782 P.2d 1107 (1989) (affirming dismissal and rejecting the plaintiff’s contention there was a genuine issue of material fact about when he learned of his illness because the inferences on which this was based was not reasonable); *Scott v. Blanchet High School*, 50 Wn. App. 37,44-45, 747 P.2d 1124 (1987), *review denied*, 110 Wn.2d 1016 (1988) (rejecting plaintiff’s appeal because the claimed dispute of material fact was based on an inference which was not reasonable).

The second element of summary judgment analysis which Stat Medical overlooks is the requirement in subsection (e) for the nonmoving

party to demonstrate an issue of material fact by submitting specific facts through admissible evidence.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party ***may not rest upon the mere allegations or denials of his pleading***, but his response, by affidavits or as otherwise provided in this rule, ***must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.***

CR 56(e), emphasis added. Washington follows Rule 56(e)'s requirement to demonstrate by specific facts that there is a genuine issue for trial, facts based on admissible evidence, not speculation. *Grimwood v. Puget Sound*, 110 Wn.2d 355, 359-361, 753 P.2d 517 (1988) (affirming dismissal of age discrimination claim because the plaintiff's conclusory statements were unsupported by specific evidence and therefore were inadequate); *Mackey v. Graham*, 99 Wn.2d 572, 576, 663 P.2d 490 (1983) (affirming dismissal of promissory estoppel claim because plaintiff did not satisfy "his burden as to the facts necessary to establish the elements of that theory" and a party seeking to avoid summary judgment "cannot simply rest upon the allegations of his pleadings").<sup>5</sup> The fact submitted also must be material, *i.e.*, a fact on which the litigation "depends in whole or in part." *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 803, 23 P.3d 477 (2001).

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<sup>5</sup> *Accord, Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989) (affirming dismissal of plaintiff's case for failure to present adequate competent evidence to rebut the defendant's showing of the absence of a material issue of fact); *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 429-431, 38 P.3d 322 (2002), *citing and quoting with approval Marshall v. AC&S, supra*; *Dicomes v. State*, 113 Wn.2d 612, 631, 782 P.2d 1002 (1989) (dismissal affirmed).

Finally, as Judge North recognized (CP 451:3-6), self-serving statements are insufficient since “[i]ssues of material fact cannot be raised by merely claiming contrary facts.” *Meyer v. University of Washington*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986) (summary judgment affirmed despite claimed contrary facts based only on assertions). Stat Medical’s claim of modification and that it’s move was delayed and it was thus “damaged” are nothing more than argumentative assertions, “smoke and mirrors,” as Judge North recognized, which are inadequate to defeat summary judgment. *Meyer v. University of Washington*.

The undisputed material facts demonstrate that Stat Medical’s delay in leaving the premises after July 31, 2006 was entirely of its own creation. It looked for and found a new facility with less square footage and more favorable terms (over \$3 per square foot per year less than the rate it was paying for its current space) and signed its second letter of intent on May 5, 2006, over a month before its conversation with the G&I IV Kirkland representatives. It negotiated many changes to the new location which meant it could not possibly move in before late September, even if the new lease was signed on June 1 and if all the scheduled build-outs went according to plan.

There is not one scintilla of evidence that Stat Medical said or did anything to delay its New Landlord’s completion of a final execution copy of the lease for the Bothell space after meeting with G&I IV Kirkland representatives on June 6. Stat Medical could point to no such evidence

when questioned by Judge North. There is no letter or email from Stat Medical to the New Landlord asking it to slow down or doing anything that would slow down the process of finalizing the Bothell lease. Nor is there any letter or email from the New Landlord asking Stat Medical for information or authority needed to finish an execution copy of the Bothell lease. Rather, the *only* evidence is that Stat Medical signed the Bothell lease the day it was received, June 19, 2006, CP 278, 131-133, App. F, for a tenancy scheduled to begin “approximately October 1, 2006 (the “**Estimated Completion Date**”). . . .” CP 110, ¶ 1.7 (bold in original), consistent with the May 5 LOI. As Judge North stated, “There is no indication they were delayed in any fashion.” CP 465:8-9.

Stat Medical asserts: “Conforto reasonably believed that the G&I IV Kirkland representatives had promised that Stat Medical would not be charged holdover rent as a result of any delay in vacating after the July 31, 2006 termination date.” Opening Brief, p. 8. The undisputed facts show that Mr. Conforto’s belief is completely unreasonable. *First*, Stat Medical knew on May 24, 2006, two weeks *before* it first met with the G&I IV Kirkland representatives that its new space would not be ready until at least mid-September. CP 275. *Second*, the proposal makes clear that holdover rent would be charged unless Stat Medical stayed at Kirkland 405 Corporate Center. CP 382-387. Moreover, the letters from Linda Kaviola were sent after the Lease expired and holdover rent began - Stat Medical could not have relied on non-existent letters in its June, 2006

decision-making. *Third*, Mr. Conforto's August 28, 2006 letter, CP 85, demonstrates in Mr. Conforto's own hand he was expecting to pay holdover rent and was trying to negotiate the amount lower.

Even assuming *arguendo* that Stat Medical validly raised some form of a detrimental reliance theory below (which is not conceded on this record), the claimed reliance was not *material*. Under the undisputed facts, there was no detriment to Stat Medical from its June meetings with G&I IV Kirkland representatives since there is no evidence those meetings caused Stat Medical to tell its New Landlord to stop or slow down on the improvements and other aspects of the new lease to which it was committed. Stat Medical did not meet the requirement of CR 56(e).

**3. Stat Medical's failure to brief its legal theories at summary judgment precludes their consideration on appeal per RAP 9.12.**

As pointed out *supra*, Stat Medical attempted to resist summary judgment under what would only generously be called a Rule 12(b) defense that the *pleadings* provided adequate defense as to the law.

MR. GOULD: It's articulated in the pleadings and notice pleadings. . . I am, quite frankly, surprised that the Court is having any difficulty with this because of the numerous, numerous genuine issues of material fact.

THE COURT: Well, suffice it to say the materials did not do a great job of laying all those out for me. The only one I was aware of from reading the materials was the assertion that there had been an agreement to forgo the increased rent in return -- in dealing with the negotiations.

CP 453. Thus the approach that Stat Medical took to its obligation to articulate its legal theories in its response papers was that there was no requirement to do so. This is seen in its response brief below, App. B.

Stat Medical's four-page trial court response brief failed to articulate any of the legal concepts its counsel claimed applied, much less apply them to the facts. The only authority it graced the Superior Court with was cited for the proposition that an ambiguity in a contract "is construed against the drafter of the contract," citing *Queen City Savings v. Manhalt*, 111 Wn.2d 503, 513, 760 P.2d 350 (1988). No other legal theory was presented and supported with authority in the Stat Medical response papers. Stat Medical's response was thus wholly inadequate because it failed to give either G&I IV Kirkland or Judge North an opportunity to evaluate the legal theories it now claims apply, or apply the facts to them.

Our appellate rules provide that the appellate court will only examine the issues and arguments raised below and not new ones raised on appeal. RAP 9.12 states in material part:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.

RAP 9.12. *Accord, Ducote v. State*, \_\_\_ Wn. 2d \_\_\_, \_\_\_ P.3d \_\_\_ (No. 81714, Dec. 17, 2009), Slip Op. p. 3 ("We review only those issues raised by the parties and considered by the trial court."); *Van Dinter v. Orr*, 157 Wn.2d 329, 333-34, 138 P.3d 608 (2006) (citing RAP 9.12 and refusing to

address issues the non-moving party had not raised to the trial court); *Wilson v. Steinbach*, 98 Wn.2d 434, 440, 437, 656 P.2d 1030 (1982) (raising the issue of negligence *per se* for the first time at the Court of Appeals is too late).

These principles necessarily exclude consideration of Stat Medical's new arguments on appeal that the lease was orally modified, or that G&I IV Kirkland was equitably stopped from seeking holdover rent, or that there was an issue of fact whether Stat Medical gave timely notice of termination of its month to month tenancy. Those arguments were never articulated with legal authority in Stat Medical's slim response brief so that G&I IV Kirkland could respond to them. Nor were the issues of oral modification or equitable estoppels even raised in oral argument. Neither Judge North nor G&I IV Kirkland's counsel had any opportunity to prepare for or address these new arguments and whether the facts met their legal requirements. All must be excluded on appeal under RAP 9.12 and established case law.

Stat Medical's counsel did fleetingly mention promissory estoppel, detrimental reliance, and the written notice issues at oral argument. *E.g.*, CP 452-454 – promissory estoppel and detrimental reliance; CP 464 – notice. G&I IV Kirkland noted they had not been raised in the response brief and argued they were not part of the case. CP 456-457. Under RAP 9.12 and the above cases, it is not proper or fair to consider them now.

Our courts normally refuse to consider arguments which a party raises without giving the other side a proper opportunity to address and rebut it on the basis of fundamental fairness as well as procedure, such as precluding consideration of a moving party's new theory or issue raised for the first time in a reply brief. *See Kent v. White Medical Center*, 61 Wn. App. 163, 169, 810 P.2d 4 (1991). This logically extends to exclude consideration of legal theories a party tries to raise for the first time in the summary judgment oral argument which it had not briefed. *See CNG Transmission Management VEA v. United States*, 84 Fed. Cl. 327, 332 n. 2 (2008).<sup>6</sup> In this case these principles exclude consideration of Stat Medical's oral modification and notice arguments which were not briefed and only fleetingly referenced in oral argument, as well as its new equitable estoppel argument which was never briefed in the trial court or raised in oral argument.<sup>7</sup>

**B. Stat Medical Has Failed To Establish Essential Elements Demonstrating The Parties Orally Modified The Lease.**

As discussed in Section A *supra*, this theory was not presented to the trial court in Stat Medical's response brief with any statement of

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<sup>6</sup> The Federal Claims Court's footnote includes quotes from earlier federal decisions, including that "The court will not consider arguments that were presented for the first time in a reply brief or after briefing was complete" and that "courts are rightfully loathe to allow a party to raise an issue at oral argument for the first time because there is a lack of notice to the court and adversary." 84 Fed. Cl. at 332, n. 2 (internal citations omitted).

<sup>7</sup> Oral modification was possibly raised in argument, but not by that term. Stat Medical's counsel mentioned promissory estoppel in argument, but it was not argued in the Opening Brief. *See* CP 452, 454. It cannot raise it on reply. *White v. Kent Med. Ctr.*

authority, *see* CP 392-395, nor was it raised in oral argument. It therefore cannot be raised for the first time on appeal. RAP 9.12; *Ducote v. State, supra*; *Van Dinter, supra*; *Wilson v. Steinbach, supra*. Stat Medical's oral modification defense also fails based on the undisputed evidence.

A non-moving party must establish each essential element of its case in order to survive summary judgment: "If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to his case then the trial court should grant the motion." *Hines v. Data Line Systems*, 114 Wn.2d 127, 148, 787 P.2d 2 (1990). This means specific facts from admissible evidence that supports each and every element of its oral modification defense.

Modification of a contract by subsequent agreement of the parties arises out of the parties' intention and requires a meeting of the minds. Mutual assent generally requires a valid offer and acceptance. There must be consideration separate from that of the original contract for a valid contract modification.

*Dragt v. Dragt/Detray*, 139 Wn. App. 560, 571, 161 P.3d 473 (2007) (internal citations omitted); *Rosellini v. Banchemo*, 83 Wn.2d 268, 273, 517 P.2d 955 (1974) (modification failed for lack of consideration).

Assuming Stat Medical's specific, non-speculative facts and reasonable inferences based on admissible evidence, Stat Medical has failed to demonstrate it could establish a meeting of the minds or that new consideration was provided. There is no need for a trial.

**1. Stat Medical's contemporaneous writings and the terms of the lease demonstrate there was no meeting of the minds on the claimed "oral modification."**

Despite Stat Medical's contention in its Opening Brief at p. 18, there is no evidence in the record demonstrating that G&I IV Kirkland ever stated it would waive holdover rent if Stat Medical "agreed to entertain options to stay on as a tenant."

*First*, the June 6 meeting took place two months before the Lease expired and holdover rent was not discussed. While the declarations of both Mike Conforto and Daran Davidson explain in detail the June 6 meeting, neither mentions holdover rent nor suggests it was discussed. CP 379, 389. Rather, the non-self-serving record shows that Stat Medical's actual understanding was that holdover rent was due after the Lease terminated beginning in August. This is demonstrated by its August 28, 2006 letter from its President, Mr. Conforto, which explicitly recognized Stat Medical's obligation under the Lease to pay holdover rent while also attempting to cut the obligation in half: "I have enclosed a check equivalent to a 50% increase [of the base rent] (which is certainly within the parameters of an appropriate holdover charge)<sup>8</sup> to hopefully fulfill this obligation." CP 85. Further confirmation that Stat Medical understood it was obligated to pay holdover rent under the Lease is in Mr.

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<sup>8</sup> Mr. Conforto knew that typical holdover charges were double rent given his signature of the lease for the Bothell space two months earlier on June 19 which specified holdover rent of "200% of the Base Rent then payable." CP 130-131.

Conforto's email of September 19, 2006, to Daran Davidson discussing a copy of G&I IV Kirkland's third letter:

Attached is the letter from our landlord ***about our attempt to negotiate the hold over rent***. It is not what we hoped for. This is particularly bad in that they are now going back to August. First letter was October, second letter was September and now the third.....[sic]"

CP 160 (emphasis added). This understanding that holdover rent was being charged is also consistent with G&I IV Kirkland's June 16, 2006 proposal which ***did*** reference holdover rent and provided it would not be charged ***if*** Stat Medical continued as a tenant with the proposed lease.

CP 382-387, esp. 384.

The only reasonable interpretation of this undisputed evidence is that Stat Medical knew in June through September, 2006, that the Lease had not been modified and that it owed holdover rent after July 31. There is no reasonable inference from the evidence that there was a meeting of the minds between Stat Medical and G&I IV Kirkland in June, 2006, that the latter had agreed holdover rent would not be required simply because Stat Medical had agreed to have a discussion in June 2006 about potential renewal of the tenancy.

***Second***, Stat Medical's attempt to rely on the letters from Linda Kaviola to prove an oral modification of the Lease is directly contradicted by the Lease with which Stat Medical was fully familiar. The Lease establishes that Ms. Kaviola had no authority to modify the Lease:

no property manager or broker shall be considered an authorized agent of Landlord to amend, renew or terminate this Lease or to compromise any of Landlord's claims under this Lease, or to bind Landlord in any manner."

Lease, ¶ 6.17, CP 57. Nor is there any evidence that G&I IV Kirkland authorized Ms. Kaviola to send the August 16 and the August 22 letters. See CP 81, 83. Stat Medical's contention that G&I IV Kirkland authorized these letters and that they show G&I IV Kirkland agreed to not charge holdover rent misrepresents the evidence viewed as a whole.

**Third**, Stat Medical completely ignores in its Opening Brief (just as Stat Medical failed to address to the trial court) the letter from Ms. Kaviola which responded to Stat Medical's August 28, 2006 letter, and which specifically refuted Stat Medical's position by expressly relating G&I IV Kirkland's position, at CP 88:

The existing lease term for Stat Medical, Suite 180 expired on 7/31/06. I consulted the Landlord regarding your month-to-month "Holdover" tenancy. In the event that Stat Medical renewed their tenancy at Kirkland 405, the Landlord was willing to waive the Holdover rental rate during the time it took to secure a new lease for your existing space.

Our correspondence to you dated August 16, 2006, and August 22, 2006 states an incorrect date for the Holdover rental rate increase. The current lease term for Stat Medical expired on 7/31/06 and the Holdover rate at twice the rate of the Base Rent in effect on the expiration or termination of the Lease term is effective as of 8/1/06. All other terms of the Master Lease remain unchanged.

**Fourth**, case law refutes Stat Medical's arguments that Ms. Kaviola was G&I IV Kirkland's authorized agent:

The rule that, in determination of the question whether an agent acts within the apparent scope of his authority, ***the acts of the principal alone and not the acts of the agent*** are to be considered, needs no citation of sustaining authority.

*Haagen v. Landeis*, 56 Wn.2d 289, 293, 352 P.2d 636 (1960)(emphasis added). Here, by G&I IV Kirkland's letter re-stating its position that holdover rent would be charged per the Lease, the acts of the principal made clear that Ms. Kaviola had no authority to modify the Lease. CP 88. There is neither evidence in the record nor legal authority to support Stat Medical's new argument on appeal that Ms. Kaviola had authority to modify the Lease.

***Finally***, Stat Medical's reliance on *Pacific N.W. Group A v. Pizza Blends*, 90 Wn. App. 273, 951 P.2d 826 (1998) is misplaced given the difference in facts between that case and this case. Based on the specific facts, the *Pacific N.W. Group* court held that whether there was a meeting of the minds was a question of fact because in that case the tenant provided immediate written confirmation to the landlord of an alleged oral modification ***and the Landlord did not appear to dispute the written confirmation***. *Id.* at 280-81.

First, unlike the tenant Pizza Blends, in this case Stat Medical waited almost three months before it addressed holdover rent in a letter to G&I IV Kirkland in Mr. Conforto's August 28 letter -- but, unlike the *Pacific N.W. Group* situation, Stat Medical's letter ***did not claim there had been a modification of the lease term requiring holdover rent***.

Rather, Mr. Conforto's August 28 letter tried to negotiate a lower amount for the holdover rent Mr. Conforto recognized was owed. CP 85.

Second, the tenant Pizza Blends testified that without the claimed agreement, it "would have vacated at the end of the written lease term," so to avoid any holdover rent, 90 Wn. App. at 280, an option that was already impossible for Stat Medical as of May 24 due to the Bothell build-out schedule it had received that day. CP 275.

Third, in contrast to the landlord's acquiescence to the tenant's claim of modification in *Pacific N.W. Group*, here G&I IV Kirkland rejected the effort to negotiate the amount of holdover down and clarified that the terms of the lease remained in effect, *i.e.*, there was no modification. CP 88. There is no reasonable factual basis for the claimed modification in this case, in sharp contrast to the circumstances in *Pacific N.W. Group*.

In sum, Stat Medical's after-the-fact claim that it was concerned that meeting with the Landlord on June 6 would somehow slow down its progress with its Bothell lease and was the basis for an agreed oral modification of the written lease terms which could only be modified in writing is only contradicted (not supported) by the undisputed record: Stat Medical knew on May 24, two weeks **before** the June 6<sup>th</sup> meeting, that its new space would not be ready until late September; and it wrote on August 28 to see if it could get G&I IV Kirkland to reduce the amount of holdover rent that was required under the lease. Since a non-moving party

cannot raise a disputed issue of material fact “by merely claiming contrary facts,” *Meyer v. University, supra*, 105 Wn.2d at 852, Stat Medical failed to demonstrate any facts supporting a meeting of the minds in early June, 2006, that the lease was modified, as it belatedly claims.

**2. Stat Medical failed to give consideration to support any modification since a mere promise to meet to consider options was illusory.**

Stat Medical has failed to present evidence that it gave any consideration for the alleged oral modification of the Lease since, at most, it claims it only promised to meet to consider a proposal from G&I IV Kirkland to remain a tenant, and nothing more. Under the law, it promised nothing.

An ‘illusory promise’ is a purported promise that actually promises nothing because it leaves the speaker the choice of performance or non performance. . . . When the provisions of the supposed promise leave the promisor’s performance optional or entirely within the discretion, pleasure, and control of the promisor, the ‘promise’ is illusory.

*Interchange Associates v. Interchange Inc.*, 16 Wn. App. 359, 360-61, 557 P.2d 357 (1976). The Court reinforced this point by quoting the RESTATEMENT OF CONTRACTS (1932), §2, comment B as follows:

An apparent promise which according to its terms makes performance optional with the promisor whatever may happen, or whatever course of conduct in other respects he may pursue, is in fact no promise, although often called an illusory promise.

*Id.*, 16 Wn. App. at 361. Thus, “An ‘illusory promise’ is neither enforceable nor sufficient consideration to support enforcement of a return promise.” *Id. See Rosellini v. Banchemo*, 83 Wn.2d at 273-274 (no

consideration for modification where one party performs an additional obligation while the other performs as the original contract required).

Stat Medical claims only that it promised to “entertain options to stay on as a tenant” at Kirkland 405 Corporate Center. Opening Brief, p. 18. *See* CP 379 (Davidson Dec.), CP 389 (Conforto Dec.). However, since performance of any such promise was “entirely within the discretion, pleasure, and control” of Stat Medical, it was, thus, not a genuine promise but illusory. *Interchange Associates, supra*. Since Stat Medical’s “promise” was illusory, it failed to demonstrate separate consideration which would support the claimed modification. This is virtually the same form of failed consideration as in *Rosellini*, which similarly demonstrates the failure of the consideration element of the oral modification defense.

Since Stat Medical did not present specific evidence to the trial court beyond unsubstantiated and unreasonable assertions that there was a meeting of the minds, or that necessary consideration was provided, it failed to establish essential elements of its defense and summary judgment was required. CR 56(e).

**C. Judge North Correctly Found Stat Medical’s Month-to-Month Tenancy Ended November 30, 2006, Since Stat Medical Failed to Provide Timely Written 30-day Notice Required by RCW 59.04.020.**

As discussed in Section A *supra*, this theory also was not presented to the trial court in Stat Medical’s response brief with any statement of authority (*see* CP 392-395) and only briefly in oral argument.<sup>9</sup> It therefore

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<sup>9</sup> Stat Medical did not provide any written argument to the trial court disputing the

cannot be raised for the first time on appeal. RAP 9.12; *Ducote v. State, supra*; *Van Dinter, supra*; *Wilson v. Steinbach, supra*. Raising it in oral argument also was too late. See *White v. Kent Medical Center, supra*; *CNG Transmission, supra*. Nevertheless, this argument also fails on the merits. The applicable statute, case law, and undisputed evidence support Judge North's conclusion that Stat Medical's month-to-month tenancy ended November 30, 2006.

As a matter of law, a periodic tenancy results when a tenant pays and a landlord accepts rent after the expiration of a tenancy, as occurred here. *Worthington v. Moreland Motor Truck Co.*, 140 Wash. 528, 532, 250 P. 30 (1926). In order to terminate its month-to-month tenancy, Stat Medical was required to provide its landlord G&I IV Kirkland with "written notice of thirty days or more, preceding the end" of the month the tenancy was to end. RCW 59.04.020.<sup>10</sup> Stat Medical failed to provide the required notice. While Stat Medical stated in its letter dated August 26, 2006, to Linda Kaviola, that "[i]t is our intention to be out of the space by the end of September," Stat Medical paid October 2006 rent and did not

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Landlord's claim the tenancy ended November 30, 2006. See CP 363-395. Stat Medical's counsel only mentioned the notice issue in passing. CP 449 at 4:17-18; CP 464 at 19:5-8. Stat Medical also did not argue or raise to the trial court's attention the October 3, 2006, email it is now relying on in this appeal in the Opening Brief at p. 22.

<sup>10</sup> RCW 59.04.020 provides (emphasis added):

When premises are rented for an indefinite time, with monthly or other periodic rent reserved, such tenancy shall be construed to be a tenancy from month to month, or from period to period on which rent is payable, **and shall be terminated by written notice of thirty days or more**, preceding the end of any of said months or periods, given by either party to the other.

vacate the Leased Premises until October 19, 2006. CP 29, ¶6. This is significant since

1. **The August 28 Letter was not proper written notice since it was not delivered as required by the Lease.**

Even giving Stat Medical the benefit of the doubt that the one sentence out of four paragraphs stating “[i]t is our intention to be out of the space by the end of September” constitutes proper written notice, Stat Medical cannot rely on the August 28 letter because Stat Medical failed to properly deliver the August 28 letter to G&I IV Kirkland. Under the Lease, notices must be mailed via certified or registered mail, return receipt requested. CP 54 at ¶6.1. All notices are also required to be mailed to the landlord at specified addresses. *See id.*; CP 78-79. The August 28 letter was not sent certified or registered mail and was not provided to G&I IV Kirkland at the required addresses. *See id.*; CP 85. During the holdover period, the notice provision of the Lease was still in effect because lease provisions continue to apply when a tenant holds over on a month-to-month basis. *Marsh-McLennan Bldg., Inc. v. Clapp*, 96 Wn. App. 636, 648, 980 P.2d 311 (1999). Thus, the August 28 letter was not proper written notice as required by the Lease. It also was not adequate once Stat Medical stayed into October.

2. **Stat Medical did not vacate the Leased Premises at the end of September and paid base rent for October, creating a new month-to-month tenancy.**

Stat Medical did not vacate the Leased Premises by the end of September. CP 425 at ¶2(k). Instead, Stat Medical held over another month and paid October base rent in full. CP 425 at ¶2(j). This October base rent payment nullified any notice contained in the August 28 letter and started a new month-to-month tenancy. *Worthington v. Moreland Motor Truck Co.*, 140 Wash. at 532. Since a new month-to-month tenancy resulted upon Stat Medical's payment of October base rent, Stat Medical was required to provide a new and proper notice to end its new tenancy. See RCW 59.04.020; *Worthington*, 140 Wn. at 532.

**3. Stat Medical's email dated October 3, 2006, to G&I IV Kirkland's property manager was untimely and not served pursuant to the Lease.**

Stat Medical admits in its own briefing that its October 3, 2006, email was untimely – “Stat Medical provided . . . written notice [of termination] on October 3, 2006 (**28 days before the end of the month**) . . .” Opening Brief 21-22 (emphasis added). Twenty-eight days is simply not “thirty days or more” before the end of the month as required to terminate a month-to-month tenancy. RCW 59.04.020. Based on this email, on which Stat Medical now relies,<sup>11</sup> the earliest that Stat Medical could terminate its month-to-month tenancy under the statute was November 30, 2006, as Judge North held.

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<sup>11</sup> At the trial court, Stat Medical did not argue in its briefing or orally that the October 3, 2006, email was a proper and adequate written notice terminating the month-to-month tenancy. CP 363-395, 446-468.

Just as important, the Lease requires any notice that is sent via “electronic means” to also be sent “concurrently by certified or registered mail, return receipt requested.” CP 54 at ¶6.1. This was not done. The October 3, 2006, email therefore was not properly delivered to G&I IV Kirkland. Under the plain terms of the Lease, the applicable statute, and the undisputed evidence of the October 3 email belatedly proffered by Stat Medical, its month-to-month tenancy did not terminate until November 30, 2006, as a matter of law.

**D. Equitable Estoppel Can Not Apply Since Stat Medical Failed To Present Clear, Cogent, and Convincing Evidence That Stat Medical “Slowed Down” Its Lease Negotiations With Its New Landlord or Was Damaged.**

As discussed in Section A *supra*, this theory also was not presented to the trial court in Stat Medical’s response brief with any statement of authority, *see* CP 392-395, was not even raised in oral argument, and thus cannot be raised for the first time on appeal. RAP 9.12; *Ducote v. State, supra*; *Van Dinter, supra*; *Wilson v. Steinbach, supra*. Like the other new theories Stat Medical raises for the first time on appeal, the equitable estoppel argument also fails on the merits once the applicable law and undisputed facts are considered.

In order to prevail on an equitable estoppel claim, Stat Medical must establish the following elements with “*clear, cogent, and convincing evidence*:”

(1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance on that act, statement, or admission; and (3) injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission.

*Peterson v. Groves*, 111 Wn. App. 306, 310, 44 P.3d 894 (2002). Without providing a single fact established by admissible evidence, Stat Medical argues that it “slowed down” negotiations with its New Landlord in order to meet with the G&I IV Kirkland representatives and, as a result, scheduling issues with the construction required for Stat Medical’s new Bothell space was delayed, causing financial harm in the form of holdover rent. Opening Brief, pp. 19-21.

But instead of presenting specific facts (let alone clear, cogent, and convincing evidence of such facts), Stat Medical bases its case on self-serving and unsupported conclusions that it “slowed down” negotiations with its New Landlord, *see* Opening Brief 19-21; CP 338-39, CP 379 at ¶4, CP 389 at ¶4,<sup>12</sup> which is inadequate. *Meyer v. University of Washington*. The record shows Stat Medical’s conclusory statements have no factual basis, that Stat Medical did not delay negotiations with its New

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<sup>12</sup> Without any cite to the record, Stat Medical argues it “relied on its conversations with G&I IV Kirkland that it would not be assessed holdover penalties so long as they came to the table to negotiate.” Opening Brief, p. 20. However, Stat Medical’s own evidence shows that the G&I IV Kirkland representatives never told Stat Medical it would waive holdover rent at the June 6 meeting: “[Mr. Rader] said he wanted to present us with some other options and that he affirmatively represented that we would not be financially impacted by doing that.” CP 389 at ¶6. Specific reference to holdover rent is also nonexistent in both Mr. Conforto and Mr. Davidson’s declarations. CP 378-91. Finally, it is contrary to both 1) Mr. Conforto’s August 28, 2006 letter attempting to negotiate a lower amount of holdover rent, and 2) Mr. Conforto’s September 19, 2006 email to Mr. Davidson on his efforts to negotiate down the amount of holdover rent from what the lease required.

Landlord, and it was not “damaged” by meeting with G&I IV Kirkland in June, 2006.

The evidence fails to show that negotiations were delayed but, rather, is to the contrary: that Stat Medical (or its New Landlord) was the cause for any delay of its new space being ready, not G&I IV Kirkland.

The below time line of undisputed facts makes this evident:

- April 27, 2006: Stat Medical provided New Landlord with a Letter of Intent. CP 189-90.
- May 5, 2006: After discussing additional terms, Stat Medical signed a new Letter of Intent with New Landlord with specified rent terms for 60 months. CP 193-95, 198-99.
- May 15, 2006: Stat Medical received a draft lease from New Landlord for its review. CP 201-251.
- May and June 2006: Stat Medical makes extensive changes to the plans for its new space. CP 254-73.
- May 24, 2006: Stat Medical is informed by New Landlord that, given Stat Medical’s extensive changes to the space, the earliest the space would be available is September 2006 even assuming the lease was signed June 1, 2006. CP 275-76.
- June 6, 2006: Current Landlord G&I I Kirkland and Stat Medical meet to discuss Stat Medical remaining at Kirkland 405 Corporate Center. CP 389 at ¶5.
- June 16, 2006: Stat Medical receives a non-binding Proposal to Lease from G&I I Kirkland; it automatically expired on June 20, 2006, if not accepted. CP 384-87.

- June 19, 2006: Stat Medical receives and signs the New Lease with the New Landlord with a commencement date specified as “approximately October 1, 2006.” CP 110, 131-32, 278.
- August 1, 2006: Holdover rent period automatically begins. CP 43 at ¶3.6
- August 11, 2006: Stat Medical informed by New Landlord that the space will not be ready until October 6, 2006. CP 326.

As this time line clearly shows, Stat Medical in no way “slowed down” its negotiations with the new Landlord. Stat Medical knew almost two weeks *before* meeting with the G&I IV Kirkland representatives that its New Space would not be ready until mid-September – making its conclusory statements that it “slowed down” negotiations in order to meet with the G&I IV Kirkland representatives simply implausible and unreasonable. CP 275-76. Stat Medical’s extensive changes to the space plan, in excess of \$19,000.00, was the reason Stat Medical could not move to its new space until October of 2006. *Id.* As discussed *supra*, no facts are presented that show that Stat Medical slowed down negotiations with its New Landlord. The evidence demonstrates only that any delay was solely caused by Stat Medical and its New Landlord.

Stat Medical also presented no evidence it was damaged in any way by meeting with G&I IV Kirkland. At the time of the June 6 meeting Stat Medical already knew it was required to pay holdover rent under the Lease after July 31, 2006. The five months without rent in the Bothell space addressed this known cost. Stat Medical could not be “injured” by

having to continue to have to pay holdover rent it already knew was required. All it could do was try to lessen it with the August 28 letter. Without an injury, equitable estoppel cannot apply as a matter of law.

**E. The Summary Judgment for the CAM Charges Should Be Affirmed.**

Stat Medical did not oppose G&I IV Kirkland's summary judgment on the CAM charges and summary judgment was entered on June 8, 2009 for \$11,531.52. CP 427-430. However, although that order was included in the notice of appeal, the Opening Brief did not assign error to the entry of the June 8, 2009 judgment for CAM charges. *See* Opening Brief, pp. 2-3. More important is that Stat Medical failed to make any argument in the opening brief to challenge the calculation or the basis for that order, just the November portion, at most. Any claim of error as to the judgment for CAM charges is therefore abandoned. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

**F. The Unopposed Fee Award Should Be Affirmed.**

The underlying lease has a fee provision which provides for a fee award to the prevailing party. CP 54, ¶6.2. Stat Medical conceded this was a proper basis for the fee award to G&I IV Kirkland below. *See* Opening Brief, p. 23. But Stat Medical contends that, not only that the fee award should be vacated in the event Stat Medical wins the appeal, but it also should be vacated "in any event" because the award was not

“supported by findings of fact establishing the reasonableness of the fees,” *id.*, citing *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1996).

While *Mahler* is the seminal case for the proposition that a trial court fee award must be supported by adequate findings to permit review, that principle does not apply here because, as noted *supra*, Stat Medical never opposed or objected to the amount of the fees that G&I IV Kirkland requested. Stat Medical thus failed to preserve any error there may have been in Judge North’s determination of the amount of the fees, making a set of findings by Judge North superfluous since it is not subject to review. RAP 2.5(a). *Draper Mach. Works, Inc. v. Habert*, 34 Wn. App. 483, 488, 663 P.2d 141 (1983) (challenge to amount of fees could not be raised for first time on appeal); *King County v. Guardian Casualty & Guaranty Co.*, 103 Wash. 509, 516, 175 Pac. 166 (1918) (“the question as to the allowance of attorneys fees” could not be raised on appeal where not raised below).<sup>13</sup>

Since Stat Medical did not state that any of the fees requested by G&I IV Kirkland were too high or should not have been awarded, it failed to preserve any potential error for review on appeal. It also waived any error that may have been made by Judge North in fixing the amount. *Id.*

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<sup>13</sup> See *State v. Branch*, 129 Wn.2d 635, 651, 919 P.2d 1228 (1996) (party’s failure to raise an issue at the trial court generally waives that party’s right to challenge the issue on appeal). See also WASHINGTON APPELLATE PRACTICE DESKBOOK §17.2(1), (2) (3<sup>rd</sup> Ed., 2005), discussing RAP 2.5(a) and citing *State v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) for the rationale of giving the trial court the chance to correct claimed errors.

**G. G&I IV Kirkland Should be Awarded Fees on Appeal.**

The Lease's fee provision also explicitly provides for an award of fees to the non-breaching party "relating to any appeal." CP 54, ¶6.2. Therefore, pursuant to the provisions of the lease and of RAP 18.1, G&I IV Kirkland should be awarded its fees on appeal if it prevails on appeal. If the entirety of the summary judgment is reversed and there is no determination of a breaching party, then the fees would abide the ultimate trial court decision and G&I IV Kirkland would be awarded its fees on appeal following success at trial. However, because Stat Medical did not contest it failed to pay the CAM charges due, it effectively admitted it breached the lease.

Since Stat Medical admits it is in breach by not paying the CAM charges, and since the lease provides for fees to the non-breaching party including on appeal, G&I IV Kirkland should be awarded all its fees since the judgment for CAM charges must be affirmed.<sup>14</sup>

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<sup>14</sup> Although Stat Medical argues the fees it should be required to pay if the case is remanded on the holdover rent should be limited to the CAM charges, and those CAM-related fees limited further to the time entries for the second summary judgment motion (Opening Brief, p. 24, n.5), such a limitation is not appropriate. First, G&I IV Kirkland's counsel spent time on that aspect of the lease in the first summary judgment brief and associated materials, *see, e.g.*, CP 360-362 (summary judgment brief), CP 403-407 (reply brief) & CP 17-19 (Christian Dec. setting out CAM charges) and Supp. CP \_\_\_\_\_ (Supp. Christian Dec.), as well as in the preliminary stages of the case and discovery. Second, as noted *supra*, Stat Medical did not make any objections to the fee application below when any such objection would have given G&I IV Kirkland's counsel the opportunity to specify what, if any, breakdown was appropriate. It is far too late to now claim there should be some segregation of the fees awarded below. All of G&I IV Kirkland's trial and appeal fees should be awarded given Stat Medical's waivers in the trial court on the CAM charges, its breach, and on the fee application.

## V. CONCLUSION.

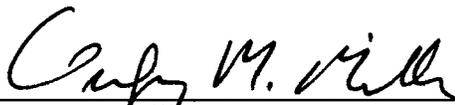
This is a case about a calculated business decision by a commercial lessee who made a series of knowing decisions as its lease term neared its end. Stat Medical chose to move its location and not renew its Kirkland Lease, but needed to remain on a month to month tenancy until its new location was ready. Its New Landlord generously gave Stat Medical the first five months of occupancy rent-free. Like any business entity, Stat Medical wanted to minimize its costs so it also sought to negotiate a lower holdover rent than the Lease required. Then, when its current landlord G&I IV Kirkland, declined to reduce the holdover rent, Stat Medical chose to not pay and claim the Lease had been “modified,” apparently hoping this would save it money by a negotiated result.

As a signor to a contract bound to its terms (*Lyall v. DeYoung*, 42 Wn. App. 252, 256-57, 711 P.2d 356 (1985), *rev. den.*, 105 Wn.2d 1009 (1986)), Stat Medical has no legal argument that relieves it from its obligations under the Lease. Stat Medical presented no admissible evidence to demonstrate a dispute of material fact requiring trial on the enforcement of the Lease. Under CR 56(e) Stat Medical cannot simply assert it relies on its pleadings or unsubstantiated assertions to resist summary judgment. Nor is it permitted to raise all its legal theories for the first time on appeal. RAP 9.12.

For both substantive and procedural reasons, Judge North's orders granting summary judgment for November base rent, all holdover rent, and the late and CAM Charges and interest should be affirmed. The fee award should also be affirmed and G&I IV Kirkland awarded its fees for this appeal.

DATED this 29<sup>th</sup> day of December, 2009.

CARNEY BADLEY SPELLMAN, P.S.

By:   
Gregory M. Miller, WSBA No. 14459  
Attorneys for G&I IV KIRKLAND LLC

SAYRE LAW OFFICES

By:   
Christine Martin-Lord, WSBA #31847  
Jeffrey M. Sayre, WSBA #19056

Attorneys for G&I IV KIRKLAND LLC

WASHINGTON STATE COURT OF APPEALS, DIVISION I

G&I IV KIRKLAND LLC, a  
Delaware limited liability  
company,

Respondent,

vs.

STAT MEDICAL, INC.,

Appellant.

NO. 63733-9-I

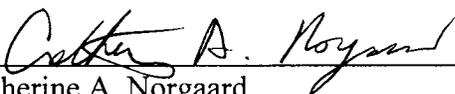
CERTIFICATE OF SERVICE

I declare under penalty of perjury that I caused copies of respondent's *Response Brief*, and this Certificate of Service by causing a true copy thereof to be served to counsel of record on <sup>this</sup> date, as follows:

<p>Howard M. Goodfriend Edwards, Sieh, Smith &amp; Goodfriend, PS 1109 First Ave. So., Ste. 500 Seattle, WA 98101-2988 P: 206-624-0974 F: 206-624-0809 Email: <a href="mailto:howard@washingtonappeals.com">howard@washingtonappeals.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Other _____</p>
<p>Christine Martin-Lord Jeffrey M. Sayre Sayre Law Offices 1320 University St. Seattle, WA 98101 P: 206-625-0092 F: 206-625-9040 Email: <a href="mailto:Chrissy@sayrelawoffices.com">Chrissy@sayrelawoffices.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Other _____</p>

Robert B. Gould 2110 N. Pacific St., Ste. 100 Seattle, WA 98103-9181 P: 206-633-4442 F: 206-633-4443 Email: <a href="mailto:rbgould@nwlegalmal.com">rbgould@nwlegalmal.com</a>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Other _____
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DATED this 30 day of December, 2009.

  
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Catherine A. Norgaard  
Legal Assistant to Gregory M. Miller

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# **APPENDIX A**

THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

-----

G&I IV KIRKLAND LLC, a Delaware )	
Limited Liability Company, )	No. 08-2-06112-4 SEA
Plaintiffs, )	
vs. )	
STAT MEDICAL, INC. a Washington )	
Corporation, )	
Defendants. )	

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ORIGINAL

**FILED**  
**KING COUNTY WASHINGTON**  
**APR 21 2009**  
**SUPERIOR COURT CLERK**

HEARING

March 27, 2009

THE HONORABLE DOUGLASS NORTH PRESIDING

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TRANSCRIBED BY: Marjorie Jackson, CETD  
Notary Public  
Court-Approved Transcriptionist

DATE TRANSCRIBED: April 18, 2009

APPEARANCES

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FOR THE PLAINTIFFS:

CHRISTINE A. MARTIN-LORD

Sayre Law Offices

1320 University Street

Seattle, Washington 98101

FOR THE DEFENDANTS:

ROBERT B. GOULD

Law Offices of Robert B. Gould

2110 North Pacific Street

Suite 100

Seattle, Washington 98103

1 March 27, 2009

2 -o0o-

3

4 THE COURT: Please be seated. Good afternoon.

5 MR. GOULD: Good afternoon, Your Honor.

6 MS. LORD: Good afternoon.

7 THE COURT: So we're here on Kirkland vs. Stat  
8 Medical, and I have seen a lot of materials here. I am  
9 not sure that we don't have a lot more heat than light,  
10 but anyway...

11 I gather, Mr. Gould, the position of your  
12 client is that the landlord consented to them remaining  
13 in there at the existing rate.

14 MR. GOULD: Exactly correct, Your Honor.  
15 Pursuant to the agreement and pursuant to Civil Rule 56,  
16 there are numerous genuine issues of material fact,  
17 which, if the Court wants me to, I stand ready, willing  
18 and able to address.

19 THE COURT: Well, I guess that's probably where  
20 we ought to start out because, you know, I found the  
21 plaintiff's motion fairly persuasive, so I guess I need  
22 to find out what your issues of fact are that we need to  
23 address here.

24 MR. GOULD: Be more than happy to, Your Honor.

25 First and foremost -- and I will do them in

1 order -- Answer to Interrogatory No. 4, page 5, lines 21  
2 through 24, the plaintiff agreed that if the defendant  
3 would, quote, "hear them out, it would not result in  
4 damaging us in the form of holdover rent," end quote.

5 Right there. And there are numerous other  
6 contemporaneous facts that support that. I will just  
7 list a few.

8 Number one, the letter of August 16, 2006 from  
9 Linda Kaivola, Exhibit E to the deposition of Jack Rader  
10 of February 27, 2009, that the client would have until  
11 October 1, 2006 before their tenancy would terminate.  
12 Again, consistent with the agreement of June 6, 2006.

13 Secondly -- thirdly, she talks with Mr. Rader  
14 about these things. I commend your attention to the  
15 excerpts from the declaration of myself where Mr. Rader  
16 says -- and if you would like I can be happy to quote  
17 them -- numerous conversations with Linda Kaivola. They  
18 gave 30-days advance written notice.

19 Mr. Conforto's letter of August 28, 2006,  
20 Exhibit 6 to the declaration of Mr. Rader. The letter  
21 was attached. And wherein, again, Mr. Conforto  
22 contemporaneously, within -- to be accurate, less than  
23 60 days from the understanding, reiterated the  
24 agreement.

25 Lastly, the 28,000, as testified to under oath,

1 by Mr. Conforto and Ms. Bowman, is greater than any  
2 amount owed to plaintiff.

3 Lastly, after the meeting of June 6, 200 --

4 THE COURT: Wait a second, wait a second. The  
5 28,000, that's what your client has deposited in the  
6 bank. You're asserting that somebody else said that  
7 that was greater than any amount owed? I mean, I --

8 MR. GOULD: No, Your Honor.

9 THE COURT: Okay.

10 MR. GOULD: Two people said that under oath,  
11 for CR 56 purposes.

12 THE COURT: And who --

13 MR. GOULD: Both Mr. Conforto --

14 THE COURT: Okay.

15 MR. GOULD: -- in his declaration, and  
16 Ms. Bowman, a certified public accountant, in her  
17 declaration.

18 THE COURT: And I need to, because there's so  
19 many people running around in this, I get lost.

20 Mr. Conforto is the --

21 MR. GOULD: President of --

22 THE COURT: President.

23 MR. GOULD: -- Defendant Stat Medical.

24 THE COURT: Okay.

25 MR. GOULD: Ms. Brett Bowman is the chief

1 financial officer, certified public accountant, with  
2 Stat Medical.

3 THE COURT: Okay. And so what does that tell  
4 me? Because all that is, is the people that it benefits  
5 saying something that benefits them. I mean, I'm not  
6 following how --

7 MR. GOULD: Contraire, Your Honor. If I may  
8 respectfully disagree with the Court. I commend and  
9 incorporate, by reference, Ms. Bowman's declaration  
10 where -- if you would like, I will turn to it -- she  
11 lists eight or ten issues where the CAM charges are  
12 absolutely not accurate and overstated.

13 After the meeting of June 6, 2006, on June 16,  
14 ten days after the meeting, another agent of the  
15 plaintiff, Mr. Schreck, on the leasing arm as opposed to  
16 the management arm of the plaintiff, sends a proposal to  
17 Mr. Conforto, Stat Medical, consistent with the  
18 agreement where he reiterates, again, there will be no  
19 holdover rent. It's Exhibit A to the Lord declaration  
20 of February 27, 1990.

21 THE COURT: Right, I have seen that. But isn't  
22 that basically saying: We're not going to charge you  
23 holdover rent if you agree to rent from us?

24 I mean, I guess -- that's the deal and they  
25 never entered into the deal.

1 MR. GOULD: That's not the deal, Your Honor.  
2 That's not the deal.

3 Rather, if I may, it supports the, quote,  
4 "deal," to use your words, that is in Mr. Davidson's  
5 declaration, that is in Mr. Conforto's declaration: "If  
6 you will hold back, take your time and not go someplace  
7 else" -- and they didn't at the time -- "and if you  
8 agree to meet with us on June 6" -- which they did --  
9 "you will not be financially harmed, you will not be  
10 charged holdover rent."

11 That's, again, in the Answers to  
12 Interrogatories No. 4. Your Honor, there are numerous  
13 genuine issues of material fact. Your Honor, we have  
14 notice pleading in this matter and we have pled facts  
15 giving rise to promissory estoppel, detrimental reliance  
16 at the least.

17 THE COURT: Well, I guess what I am trying to  
18 do is, there is a provision in the contract indicating  
19 that the modification of the landlord's duties have to  
20 be indicated in writing, and we don't have anything in  
21 writing from the landlord indicating that something like  
22 this is going to occur.

23 MR. GOULD: You don't need a writing to  
24 substantiate promissory estoppel, detrimental reliance,  
25 Your Honor.

1 THE COURT: Well, I guess that's going to be an  
2 interesting argument. That was not articulated in the  
3 written materials.

4 MR. GOULD: It's articulated in the pleadings  
5 and notice pleadings. This is the gravamen of what this  
6 case is all about. I do not -- and I mean this with  
7 respect to this able and experienced court -- under all  
8 of the facts and the inferences therefrom which this  
9 court must construe most favorably to the defendant,  
10 non-moving party, I am, quite frankly, candidly  
11 surprised that the Court is having any difficulty with  
12 this because of the numerous, numerous genuine issues of  
13 material fact.

14 THE COURT: Well, suffice it to say the  
15 materials did not do a great job of laying all those out  
16 for me. The only one that I was aware of from reading  
17 the materials was the assertion that there had been an  
18 agreement to forego the increased rent in return -- in  
19 dealing with the negotiations.

20 And I thought that there was some real concern  
21 about whether that was valid or not, in view of the  
22 requirement that things be done in writing. I didn't  
23 see any allegation of promissory estoppel. Now, maybe I  
24 missed that in there somewhere, but I didn't see that.

25 MR. GOULD: That's a legal concept, Your Honor.

1 Our obligation, as this court is well aware, is to raise  
2 genuine issues of material fact. The promissory  
3 estoppel, detrimental reliance is in our Answer and  
4 Affirmative Defenses, where the concept arises from.

5 What we're here today is to show this court --  
6 and, again, with respect, I don't see how the Court  
7 could read the material submitted in its totality,  
8 including that offered by the plaintiff, and not see, as  
9 the defendant sees, genuine numerous issues of material  
10 fact.

11 THE COURT: Okay.

12 So, Ms. Lord?

13 MS. LORD: I guess I will try to address his  
14 issues. And I guess I'm not sure if you have read the  
15 full reply after page 5 or whatever issue was resolved  
16 on that line --

17 THE COURT: Okay. I guess I should say, I  
18 think that it is only appropriate to read the reply  
19 through page 5 because that's the limit of what was --  
20 is required by the rules, so that's what I considered,  
21 is through page 5.

22 MS. LORD: Okay. Then that kind of will tell  
23 me how to address all these issues.

24 Well, first -- and I think it's been  
25 contested -- the first is that there doesn't seem to be

1 a question of when the tenancy ended. Even -- so I  
2 understand -- here's the issue:

3 The three issues are:

4 When did defendant's tenancy end;

5 Whether the defendant was required to pay

6 holdover rent in the amount of the 2006 CAM

7 Reconciliation.

8 So starting with the first one, they're  
9 relying -- the fact that they are relying on, that  
10 creates a question of fact, is the one sentence in the  
11 8/28/06 letter from Mike Conforto stating, "It is our  
12 intention to be out of the space by the end of  
13 September."

14 Even -- and so there's several issues. The  
15 first, it's just an intention. If the tables were  
16 turned and I, as a landlord, wrote a statement like that  
17 and then tried to do an unlawful detainer at the end of  
18 September, there is no way a court would uphold that to  
19 be proper notice, because it was just an intent, it  
20 wasn't specific and it is not detailed enough.

21 Additionally, the notice was not properly sent  
22 as provided for under the lease. It had to be provided  
23 certified mail, return receipt requested and sent to a  
24 specific address that the defendant was well aware of.

25 Finally, even if the letter is notice,

1     construing it in as favorable light as you can, that  
2     doesn't matter. Defendant's tenancy was a  
3     month-to-month as of August 1, 2006. They paid October  
4     rent, which, under Worthington v. Moreland Motor Truck  
5     Company, which is at 140 Wn. 528, that started a new  
6     tenancy. When a tenant pays and landlord accepts, in a  
7     month-to-month tenancy, rent for the next month, a new  
8     tenancy begins. Therefore, they were required to  
9     provide an additional 30-days notice before their  
10    tenancy ended. Since they moved out without notice on  
11    October 19, 2006, the earliest their tenancy could have  
12    ended was November 30, 2006.

13             So plaintiff states there are no issues of fact  
14    as to when their tenancy ended, which was November 30,  
15    2006.

16             The next one, I think, what is the (inaudible)  
17    case here is the holdover rent situation. I think, as  
18    the Court has noticed, that the lease is very clear that  
19    if you hold over without consent from the landlord after  
20    the lease expires, holdover rent is immediately owing.  
21    As pointed out in defendant's brief, is that written  
22    consent was not required.

23             Well, the lease is clear that any consent by  
24    the landlord shall be delivered in writing. They're  
25    basing their -- from what I'm seeing that was not in the

1 written materials, is this promissory estoppel or they  
2 detriment-relied on this meeting. That just is not the  
3 case in this matter.

4 I have kind of a summary, kind of illustration  
5 for the Court and for Mr. Gould, kind of the time line  
6 of events that happened, to show that they were not  
7 actually financially harmed by this meeting. The only  
8 reason for defendant's failure to leave is that they  
9 made over \$19,000 in extensive changes to their new  
10 space and the landlord -- new landlord could not  
11 complete them in time, so I ask that I can submit this.

12 THE COURT: Well, sure. Give a copy to  
13 Mr. Gould and I will see what you got there. Just hand  
14 them to the clerk. Thank you.

15 MS. LORD: So they kind of rest their "not  
16 financially harmed" on three pieces of -- or three  
17 facts.

18 First, this June 6, '06 meeting. Holdover --  
19 they're trying to construe the term "not financially  
20 harmed" in this case based on the meeting. Well, their  
21 meaning of "not financially harmed" is completely  
22 unreasonable. They want this court to say that  
23 holdover -- they can hold over indefinitely for a  
24 meeting with the plaintiff almost two months before  
25 their lease actually expired, when holdover wasn't even

1 an issue at that time. How can any interpretation of  
2 the phrase "financially harmed" include the waiver of  
3 holdover rent indefinitely when it's not an issue?

4 For that matter, defendant has not been  
5 financially harmed in this matter. Defendant's  
6 continued changes to the space plans at its new location  
7 is the sole reason for defendant's any alleged harm, not  
8 any tenant discussions in a meeting.

9 If you look at the time line, it kind of goes  
10 through -- they began working with the new landlord in  
11 April of 2006. Begin -- middle -- beginning/middle of  
12 May -- or by May 5th, they have already had a letter of  
13 intent signed with the new landlord.

14 On May 15th, they got their first version of  
15 the lease for their review. Between there and end of  
16 June, defendant has made over \$19,000 in changes to the  
17 space plan.

18 And on May 24, 2006 -- and this is still all  
19 before meeting with my client in June -- they were  
20 informed by the new landlord that the earliest their  
21 space would be available is September, due to the  
22 defendant's expensive changes to the plan. And that is  
23 in an e-mail at my declaration at Exhibit L. But their  
24 new landlord states, "It is our hope that we can come to  
25 the final resolution on the cost of tenant's

1 improvements."

2 As you know, the cost between the first and  
3 second space plan increased over \$19,000. Despite  
4 Stat's prior agreement that they would pay for any cost  
5 increase above the first plan, they are now asking LBA  
6 to absorb the extra cost and to turn-key the  
7 improvement.

8 So even after knowing that they couldn't get in  
9 there December, they then met with our client in June,  
10 claiming they wouldn't be financially harmed, and after  
11 that, ten days later, they receive a non-binding  
12 proposal to the lease from our client. And three days  
13 later, they sign a new lease at a new space. Nowhere  
14 between June 6th and June 19th is there any indication  
15 that they called the new landlord and said, "Oh, wait,  
16 we're talking to our old landlord to consider a new  
17 space. Put the project on hold."

18 They didn't even receive a lease for -- to sign  
19 from the new landlord until the 19th, and they signed it  
20 the exact same day. The lease wasn't going to come any  
21 sooner between the May 24th and June 19th, or it would  
22 have because the new landlord is not going to care less  
23 what negotiations they're trying do with us.

24 There is no evidence anywhere in the record  
25 stating that Stat Medical told their new landlord "Stop

1 the project, we're meeting with our old landlord to see  
2 if there is a deal."

3 All -- any financial harm alleged is due to  
4 defendant's own doing.

5 The next piece of evidence relied on to support  
6 any alleged agreement is a proposal to lease provided to  
7 the defendant. Well, it's just that. It's a proposal  
8 which specifically states, "This proposal is not an  
9 offer to lease. It is merely intended as the basis."

10 In addition, as the Court has already pointed  
11 out, is there was a condition precedent to the proposal,  
12 that if defendant rented space in Building E of the  
13 complex, it would be allowed to remain in its current  
14 space until that was ready without holdover penalty.

15 So take that aside and put in the fact that,  
16 let's say the proposal is an agreement of some kind.  
17 Defendant rejected that proposal, rejected that proposal  
18 agreement when it signed a new lease and when it failed  
19 to accept that the June 20 deadline is provided for in  
20 that contract.

21 So they can't now argue that, well, there was  
22 an agreement because we rejected it. That just simply  
23 is an unreasonable conclusion of the facts.

24 The final other set of facts that the  
25 defendants seem to be relying on are the letters from

1 Linda Kaivola. To begin with, these letters were sent  
2 after the holdover period began. They cannot rely on  
3 them to support an alleged agreement that supposedly  
4 incurred before holdover was even an issue so that -- it  
5 can't be construed as that.

6 Secondly, the lease makes very clear that the  
7 property manager has no authority to compromise any of  
8 the landlord's claims under the lease or to waive them  
9 or to bind the landlord in any matter.

10 What's interesting is defendant has failed to  
11 recognize Ms. Kaivola's third letter in this matter,  
12 which was a response to the defendant's August 28th  
13 letter, basically stating: The landlord has instructed  
14 me that you have not -- it has not waived holdover rent.

15 So their promissory estoppel and detrimental  
16 reliance argument, while not presented, is simply  
17 unreasonable. The defendant's promissory -- reliance on  
18 what? A meeting two months before holdover was even an  
19 issue on a proposal that didn't affect anything in  
20 regards to getting into their new space? And letters  
21 that were with no authority and were provided after the  
22 whole -- they didn't rely on it when holdover had  
23 already began on August 1st. So I think it can be held  
24 that there are no material questions of fact as to  
25 regard to the holdover rent.

1           Now, since the Court stopped reading after  
2 page 5, I do want to address the CAM reconciliation  
3 charges. If you did read the declaration of -- the  
4 supplemental declaration of Jim Christian, it addresses  
5 each and every red herring that the defendant has tried  
6 to raise on the CAM charges.

7           I will try to go through this real quickly. I  
8 know it's kind of detail oriented.

9           THE COURT: Well, yeah. I mean, quite frankly,  
10 there is just no way that I'm going to be able to grant  
11 summary judgment on that issue, because -- I mean, I'm  
12 not necessarily going to preclude you from moving on it  
13 again, but I didn't have -- I mean, I can't do that  
14 orally. It's got to be done on paper and I haven't been  
15 through all that, so it's not something we're going to  
16 get there on today.

17           MS. LORD: Okay. So should I not go into that  
18 right now?

19           THE COURT: I don't think there is any point in  
20 arguing that. What I am going to do is deny your motion  
21 on that without prejudice so you can bring it again if  
22 you want to, but I am not prepared to be able to address  
23 the CAM charges at this point.

24           MS. LORD: And is it my understanding that you  
25 would just want more written population details --

1 THE COURT: Well, I need to have a comparison  
2 between their arguments as to why there is a dispute and  
3 your response to that. And because I quit reading at  
4 page 5, I never got into all that, so, I mean, I don't  
5 know.

6 MS. LORD: Okay. Okay. That's fine. I  
7 will -- thank you.

8 THE COURT: Okay.

9 So, Mr. Gould?

10 MR. GOULD: Thank you for the opportunity, Your  
11 Honor.

12 As the matter of law, Linda Kaivola is an agent  
13 of the plaintiffs. They talk in terms of "red herring."  
14 Red herrings for their purpose are verities, as the  
15 court of appeals tells us, for purposes of this motion  
16 in front of you.

17 They talked in terms of delay. Your Honor, the  
18 verities are that there was delay. I commend your  
19 attention and incorporate by reference the declaration  
20 of Messrs. Daran Davidson and Michael Conforto. This  
21 chart that was in front of you also verified, as it must  
22 for our purposes, the delay.

23 What do I mean? The meeting took place on June  
24 6, 2006. The lease in the other premises was not signed  
25 until almost two weeks, one day short, 13 days later,

1 after the meeting.

2 The position of the plaintiff is rather  
3 inconsistent with regard to Linda Kaivola. They say, on  
4 the one hand, that she can give notice and, on the other  
5 hand, they say that she can't. Your Honor, we gave  
6 written notice of our intention to vacate the premises  
7 on September 31st -- September 30, 2006. That is the  
8 requisite 30-days notice. We are responsible for  
9 holdover rent on October 1, 2006.

10 Even with that, Your Honor, the amount in  
11 controversy is much less than that by the defendants.  
12 We gave 30-days notice. There are genuine issues of  
13 material fact with regard to this agreement. And I  
14 believe, respectfully, Your Honor, it is contrary to the  
15 multiplicity of rulings which this court is well aware  
16 of, if not even better than I, that in light of these  
17 genuine issues of material fact, that there was a  
18 proposal made, we agreed to the proposal, we agreed and  
19 stated in answers to Interrogatory No. 4 exactly what it  
20 was, quote -- and this is before you and must be  
21 construed most strictly in our favor -- that if we  
22 would, quote, "hear them out, it would not result in  
23 damaging us in the form of holdover rent."

24 And we relied on that, the objective  
25 manifestations of the parties. Linda Kaivola, Nick

1 Schreck, all support that. I respectfully submit that  
2 this motion should be denied.

3 Thank you, Your Honor.

4 THE COURT: I guess what I'm not following,  
5 Mr. Gould, is finding any indication in the record that  
6 your clients were delayed in any way. It appears that  
7 they proceeded on a straight track to lease the other  
8 property and there is no indication that they were  
9 delayed in any fashion.

10 MR. GOULD: Your Honor cannot so state. And if  
11 you want, I can go to the exact words. Mr. Davidson  
12 said they slowed it down. Mr. Conforto says they slowed  
13 it down. The records show that they didn't sign the  
14 lease until almost two weeks later. They did slow it  
15 down.

16 THE COURT: Well, but they didn't get the --  
17 they got the lease -- they signed the lease the day they  
18 got it.

19 MR. GOULD: Yes.

20 THE COURT: Yeah. But I'm supposed to just  
21 take -- one can defeat summary judgment then simply by  
22 saying, "oh, we slowed it down" without any evidence  
23 that that's true at all.

24 MR. GOULD: But they did. They did. They were  
25 prepared to sign the lease on the 6th, but they didn't.

1 And Mr. Davidson says that. Mr. Conforto says that --  
2 and I mean this with respect to the Court, I am  
3 perplexed by the Court saying to the contrary -- that  
4 there was, in fact, a delay, and that's what the  
5 plaintiff asked us to do, which we agreed to do. We did  
6 delay. And there are a number of facts that support the  
7 defendant's position, "If you delay, you will not be  
8 damaged, you will not be charged holdover rent."

9 THE COURT: Okay. I think it's all smoke and  
10 mirrors. So I will grant the motion for summary  
11 judgment on the first two -- on the two issues that the  
12 tenancy ended as of November 30, 2006, and that  
13 there's --

14 MR. GOULD: Did the Court misspeak --

15 THE COURT: What's that?

16 MR. GOULD: November 30, 2006?

17 THE COURT: Right, November 30, 2006. And  
18 the -- and that there is -- that the plaintiff is  
19 entitled to holdover rent.

20 Now, the amount of the CAM charge, I can't  
21 address at this point, so that is something that we're  
22 going to have to -- you can file a new motion on that if  
23 you wish, Ms. Lord.

24 MS. LORD: Thank you, Your Honor. And I will  
25 prepare an order. Can I just strike out and cross out

1 the proposed order --

2 THE COURT: Sure, that's fine if you want to do  
3 that. Thank you.

4 MR. GOULD: I would like to --

5 THE COURT: So you have a question about  
6 something else?

7 MS. LORD: I apologize, Your Honor. Our  
8 initial brief also had requested for late fees and  
9 interest pursuant to the lease, and that wasn't really  
10 contested in any way by defendant. And also for his  
11 attorney's fees and costs. And with the attorney fees  
12 and costs to be awarded them to be -- with actual fees  
13 and costs presented at a later date. So I am asking the  
14 Court to rule on that pursuant to --

15 THE COURT: Okay. So, Mr. Gould?

16 MR. GOULD: The latter, of course, is governed  
17 by the local rules that say it's premature at this point  
18 to address attorney's fees and statutory costs.

19 As to the other, it is correct we didn't  
20 address it because -- for the reasons earlier proffered.

21 THE COURT: Right. You didn't figure that it  
22 was owed under the arrangement.

23 MR. GOULD: Exactly, Your Honor.

24 THE COURT: I will award the late fees and  
25 costs you're talking about, but not the attorney fees

1 and statutory costs because those, I think, have to  
2 abide the final result.

3 MS. LORD: Okay.

4 THE COURT: Okay? Thank you.

5 MS. LORD: Thank you.

6 (Proceedings are adjourned.)

7

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C E R T I F I C A T E

STATE OF WASHINGTON )

)

COUNTY OF SNOHOMISH )

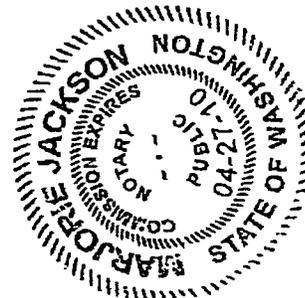
I, the undersigned, under my commission as a Notary Public in and for the State of Washington, do hereby certify that the foregoing recorded statements, hearings and/or interviews were transcribed under my direction as a transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this *20<sup>th</sup>* day of *April* 2009.

*Mary Jo*  
NOTARY PUBLIC in and for

the State of Washington,  
residing at Lynnwood.

My commission expires 4-27-10.



# **APPENDIX B**

FILED

09 MAR 16 PM 4: 38

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

Honorable Douglass North  
March 27, 2009 at 1:30 PM  
Hearing with Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

G&I IV KIRKLAND LLC, a Delaware Limited  
Liability Company,

Plaintiffs,

v.

STAT MEDICAL, INC., a Washington  
Corporation,

Defendants.

NO. 08-2-06112-4 SEA

MEMORANDUM IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT

I. SUMMARY

Plaintiffs overlook the salient term in the lease agreement between the parties. ¶ 3.6 on page 11, a courtesy copy of which is attached to the Court's working copy only, provides "Holdover. If Tenant, *without the prior consent of Landlord*, holds over after the expiration or termination of the Lease Term..." An agreement was reached between Plaintiff and Defendant that if Defendant would meet with Plaintiff to hear Plaintiff out in an attempt to keep Defendant in the premises Plaintiff would not be financially harmed.

Consistent with that understanding and *after* communication between Plaintiff and its

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT- 1

Law Offices of  
ROBERT B. GOULD  
2110 N. Pacific Street, Suite 100  
Seattle, Washington 98103-9181  
(206) 633-4442 (Phone)  
(206) 633-4443 (Fax)

ORIGINAL

1 management authority, Linda Kiavola, Defendant was informed that their Lease Term would  
2 expire September 30, 2006. This was consistent with the understanding reached between the  
3 parties.

4 After the parties met on June 6, 2006, the Plaintiff's marketing agent, Mr. Mike Schreck  
5 of Colliers, sent a proposal to Defendant consistent with the agreement that had been reached.  
6 Mr. Schreck's proposal of June 16, 2006, ten days after the June 6<sup>th</sup> meeting, provided, *inter alia*,  
7 that the lease commencement on the proposed new space would be "... approximately October 1,  
8 2006. Tenant [Stat Medical] shall be allowed to holdover in existing space without any holdover  
9 penalty." Plaintiff now abrogates and breaches that agreement. Contrary to the agreement that  
10 was reached and contrary to ¶ 3.6 of the Lease, Plaintiffs seek Summary Judgment. For the  
11 reasons stated below this Court should deny Plaintiff's Motion.  
12

## 13 II. ARGUMENT AND CITATION OF AUTHORITY

14 It is ironic that in their Motion for Summary Judgment Plaintiff fails to specifically bring  
15 to the Court's attention the seminal clause addressing the specific issue before the Court. It is  
16 worthwhile to note that both amendments to the lease of June 5, 1999 re-acknowledge the  
17 validity of ¶ 3.7. The first amendment to the Lease of September 1, 1999 ¶ 8 states "except as  
18 expressly modified above, all terms and conditions of the Lease remain in full force and effect  
19 and are hereby ratified and confirmed."  
20

21 The second amendment to Lease dated October 22, 2003 ¶ 5 does exactly the same thing.

22 Plaintiff through Mr. Rader was most anxious to try and keep Stat Medical as a tenant at  
23 Kirkland 405 – either through tenancy or as a purchaser. Plaintiff was informed both by  
24 Defendant itself and Defendant's realtor, Mr. Daran Davidson, that the Defendant was far along  
25 in seeking other space. The Plaintiff as an inducement both to Mr. Davidson and Defendant

1 affirmatively represented that if Defendant met with Plaintiff that Defendant would not be  
2 financially harmed. Mr. Conforto reasonably understood this to be precisely consistent with  
3 Plaintiff's reasonable proposal ten days later that they could holdover without any holdover  
4 penalty. Additional evidence of the agreement is put forth by Plaintiff's agent, Linda Kiavola  
5 Property Manager's letter of August 16<sup>th</sup>. This speaking agent, who had conferred with Mr.  
6 Rader, states that Defendants rental will be increased *only* on October 1, 2006. In that letter,  
7 consistent with the agreement, Ms. Kiavola states "it is our understanding that Stat Medical  
8 would like to continue leasing suite 180 on a month to month holdover basis." She then informs,  
9 after conferring with Mr. Rader, see Exhibit A to the Declaration of Robert Gould, that only on  
10 October 1, 2006 will the monthly base rent be increased.

12 An agreement was reached between the parties. There is significant *contemporaneous*  
13 written documentary evidence supporting that agreement. Indeed as this experienced Court  
14 knows, there are at a minimum genuine issues of material fact which preclude the granting of  
15 Plaintiff's Motion. The Plaintiff, lessor, did not, in drafting ¶ 3.6, require prior *written* consent  
16 of Landlord; rather the Landlord drafted language simply requiring the prior *consent* of  
17 Landlord. It was the Plaintiff who granted that consent as an inducement to Defendant. As this  
18 Court is also well aware, this contractual language must be construed against the drafter "... the  
19 ambiguity is construed against the drafter of the contract." *Queen City Savings v. Mannhalt*, 111  
20 Wn.2d 503 at 513, 760 p.2d 350 (1988) cited with approval in *King v. Rice* 146 Wash.App 662 at  
21 671, 191 p.3d 946 (2008). Defendant would hasten to add, however, that the words "... without  
22 the prior consent of Landlord," are not ambiguous.

## 24 II. CONCLUSION

25 Plaintiff had its salesman shoes on through Mr. Jack Rader. This was done in an attempt

26 MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT- 3

Law Offices of  
ROBERT B. GOULD  
2110 N. Pacific Street, Suite 100  
Seattle, Washington 98103-9181  
(206) 633-4442 (Phone)  
(206) 633-4443 (Fax)

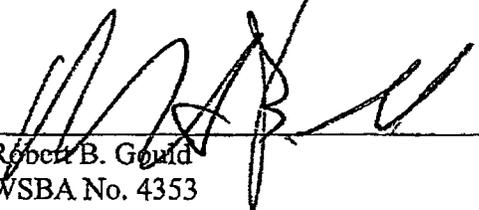
1 to keep Defendant in Plaintiff's development. As part of that zeal to keep Defendant in the  
2 complex, Plaintiff affirmatively represented that Defendant would not be financially harmed  
3 should Defendant acquiesce to meet with Plaintiff; hear Plaintiff out and delay consummation of  
4 a transaction elsewhere. Defendant agreed to do so.

5  
6 There is contemporaneous, objective evidence supporting that agreement which Plaintiff  
7 now seeks to breach. Viewing the evidence and all reasonable inferences in the light most  
8 favorable to Defendant, Defendant has consistent with the Stipulation of the parties and pursuant  
9 to CR 67 deposited with the registry of the King County Superior Court an amount *greater* than  
10 is in fact owed. For all the foregoing reasons, consistent with Civil Rule 56, Plaintiff's Motion  
11 must be denied.

12  
13 DATED this 16<sup>th</sup> day of March, 2009.

14  
15 *Respectfully submitted:*

16 LAW OFFICES OF ROBERT B. GOULD

17  
18 By:   
19 Robert B. Gould  
20 WSBA No. 4353  
21 Counsel for Defendant Stat Medical, Inc.

22  
23  
24  
25 N:\My Documents\Stat Medical - G&I Kirkland\Pleadings\Memo in Opposition to P's Motion for S.J..doc

26 MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT- 4

Law Offices of  
ROBERT B. GOULD  
2110 N. Pacific Street, Suite 100  
Seattle, Washington 98103-9181  
(206) 633-4442 (Phone)  
(206) 633-4443 (Fax)

# APPENDIX C



500 108th Avenue NE, Suite 2400  
Bellevue, Washington 98004  
Tel: 425.454.7040  
Fax: 425.451.3058  
www.gvakm.com

April 27, 2006

Mr. Chris Langer  
BRODERICK GROUP  
10500 NE 8th Street, #900  
Bellevue, WA 98004

**RE: Letter of Intent – STAT Medical  
Highlands Campus Tech Center**

Dear Chris:

Thank you for your Proposal to Lease dated April 19, 2006 regarding STAT Medical and Highlands Campus Tech Center, Building C. STAT Medical will accept your proposal with these changes to the following sections. If the Landlord is in agreement, please have them indicate where provided and begin drafting leases for STAT's review.

<b>Base Rent:</b>	Months 1 – 5	\$ 0.00/SF/Yr, NNN
	Months 6 – 12	\$12.00/SF/Yr, NNN
	Months 13 – 24	\$12.50/SF/Yr, NNN
	Months 25 – 36	\$13.00/SF/Yr, NNN
	Months 37 – 48	\$14.00/SF/Yr, NNN
	Months 49 – 60	\$15.00/SF/Yr, NNN

**Tenant Improvements:** Landlord shall provide a turn-key tenant improvement package in accordance with attached space plan and building standard improvements. Tenant reserves the right to make alterations to the "JPC test-fit plan" so long as the cost does not exceed the April 19, 2006 budget by Foushee.

**Agency Disclosure:** Paul Jerue and Chris Langer of Broderick Group, Inc. represent Landlord and Daran Davidson of GVA Kidder Mathews represents Tenant. Pursuant to Washington State Law, this letter shall serve as written notification of agency regarding this transaction. In addition, the parties acknowledge receipt of the pamphlet entitled "The Law of Real Estate Agency".

Mr. Chris Langer  
April 25, 2006  
Page 2 of 2

GVA Kidder Mathews shall be paid a Leasing Commission equal to Five and No/100 Dollars (\$5.00) per rentable square foot leased by Tenant, payable upon Lease Execution.

**Non-Binding:**

This letter shall evidence the intentions of the parties and is specifically subject to approval by counsel to both parties. This does not constitute a binding agreement. Any legal obligations of the parties will only be as set forth in a Lease Agreement in the form and content satisfactory to both parties.

If the Landlord is agreeable to the above changes to your proposal, please have them sign below no later than 5:00pm, Monday, May 1, 2006.

Sincerely,

GVA KIDDER MATHEWS



Daran Davidson  
First Vice President

**ACKNOWLEDGED AND AGREED:**

**LANDLORD**  
Bedford Property Investments, Inc.

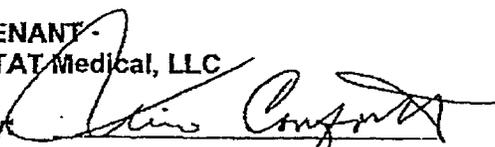
By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

**ACKNOWLEDGED AND AGREED:**

**TENANT**  
STAT Medical, LLC

By:  \_\_\_\_\_

Its: President \_\_\_\_\_

Date: 4/27/06 \_\_\_\_\_

**Daran Davidson**

---

**From:** Chris Langer [Langer@broderickgroup.com]  
**Sent:** Friday, April 28, 2006 4:33 PM  
**To:** Daran Davidson  
**Cc:** Paul Jerue; Andy Albrecht (E-mail)  
**Subject:** RE: Stat Medical

Hope to have a positive answer on Monday.

Chris Langer  
Principal  
Broderick Group, Inc.  
425-646-5228 office  
425-646-3443 fax  
206-650-6361 cell  
[langer@broderickgroup.com](mailto:langer@broderickgroup.com)

-----Original Message-----

**From:** Daran Davidson [mailto:darand@gvakm.com]  
**Sent:** Thursday, April 27, 2006 12:06 PM  
**To:** Chris Langer  
**Subject:** Stat Medical

Hello Chris --

Please see attached Letter of Intent from Stat Medical to lease space at Highlands Campus Tech Center.  
Please call with any questions.

Daran

# **APPENDIX D**



500 108<sup>th</sup> Avenue NE, Suite 2400  
Bellevue, Washington 98004  
Tel: 425.454.7040  
Fax: 425.451.3058  
www.gvakm.com

May 5, 2006

Mr. Chris Langer  
BRODERICK GROUP  
10500 NE 8<sup>th</sup> Street, Suite 900  
Bellevue, WA 98004

Re: Letter of Intent to Lease Space at Highlands Campus Tech Centre  
STAT Medical, Inc.

Dear Chris:

This Letter of Intent outlines the deal points which Stat Medical has agreed to regarding leasing space at Highlands Campus. Please have the Landlord sign where provided if they are in agreement.

- Building Name/  
Location: Highlands Campus Tech Centre  
Building C  
21222 30<sup>th</sup> Drive SE  
Bothell, WA 98021
- Premises: Approximately 6,405 rentable square feet to be located on the 2<sup>nd</sup> floor.
- Landlord/Developer: Bedford Property Investors, Inc. (BPI) owns and will manage the Building. Bedford Property Investors is a publicly traded Real Estate Investment Trust (NYSE:BPI) and development company. The Company holds over 7 million square feet of properties including over 1,000,000 SF in the Seattle metropolitan area. For more information on Bedford Property Investors visit [www.bedfordproperty.com](http://www.bedfordproperty.com) or request an annual report by calling (425) 272-0260. Bedford Property Investors has a regional office in Renton.
- Lease Term: The lease term shall commence on approximately August 1, 2006. Lease expiration shall be sixty (60) months following the commencement date.

Mr. Daran Davidson  
May 5, 2006  
Page 2

Base Rent:	Months 01 – 05: \$00.00/SF/Year, NNN
	Months 06 – 12: \$12.00/SF/Year, NNN
	Months 13 – 24: \$12.50/SF/Year, NNN
	Months 25 – 36: \$13.00/SF/Year, NNN
	Months 37 – 48: \$14.00/SF/Year, NNN
	Months 49 – 60: \$15.00/SF/Year, NNN

**Operating Expenses & Janitorial:** Initial operating expenses (NNN charges), including taxes, utilities, maintenance and insurance, but excluding janitorial, HVAC maintenance, natural gas and garbage, are estimated to be \$3.10 per rentable square foot, per year for 2006.

**Tenant Improvements:** Landlord shall provide a turn-key tenant improvement package in accordance with attached space plan and building standard improvements. Tenant reserves the right to make alterations to the "JPC test-fit plan" so long as the cost does not exceed the April 19, 2006 budget by Foushee.

**Right of First Opportunity:** Subject to any pre-existing rights, Tenant shall have the one time right of first opportunity to lease any contiguous space on the same floor as the initial premises. Landlord shall notify Tenant when such space is to be available together with the proposed lease terms, which shall be comparable to those being committed to by other comparable buildings. Tenant shall have five (5) days to notify Landlord of its election to exercise such right.

**Options to Renew:** One (1), five (5)-year option to renew at 100% of market. "Market" shall be defined as the rental then being paid by tenants renewing their leases in buildings of comparable quality, condition, and age for space of approximately the same size and location within said building, and taking into consideration all concessions, term of lease, type of lease (gross, net, plus utilities), existence of brokerage commission, parking ratio/cost and concessions.

**Building Access:** Tenant shall have twenty-four hours a day access seven days a week.

**Security Deposit:** Landlord's acceptance of Tenant and the security deposit shall be determined upon Landlord's review of tenant's certified financial statements.

**ADA Compliance:** The Building, as permitted and constructed, is in compliance with the current provisions of the Americans with Disabilities Act, as applied by the local regulatory authorities.

Mr. Daran Davidson  
May 5, 2006  
Page 3

**Parking:** Landlord shall provide 3.0 unreserved, uncovered parking spaces for every one thousand (1,000) square feet of area leased by Tenant.

**Signage:** Tenant shall be allowed exterior building signage, subject to reasonable approval by Landlord and approval by City of Bothell. Landlord shall provide building standard signage, which shall include signage on the building directory, elevator lobby and at the entrance door to the space leased by Tenant.

**Agency Disclosure:**



Paul Jerue and Chris Langer of Broderick Group, Inc. represent Landlord and Daran Davidson of GVA Kidder Mathews represents Tenant. Pursuant to Washington State Law, this letter shall serve as written notification of agency regarding this transaction. In addition, the parties acknowledge receipt of the pamphlet entitled "The Law of Real Estate Agency".

GVA Kidder Mathews shall be paid a Leasing Commission equal to Five and No/100 Dollars (\$5.00) per rentable square foot leased by Tenant, payable upon Lease Execution.

This letter does not constitute a formal and binding agreement. This letter reflects our present offering to lease space at Highlands Campus Tech Centre and we expect that the definitive agreement, subject to Landlord's approval of Tenant's use, which shall be negotiated between us with respect to this transaction, shall be generally consistent with the provision of this letter.

Sincerely,  
GVA KIDDER MATHEWS

Daran Davidson

Agreed to and accepted this 5<sup>th</sup> day of May 2006.

STAT Medical, Inc.

By:

Its: President

Agreed to and accepted this \_\_\_ day of \_\_\_\_\_ 2006.

Bedford Property Investors, Inc.

By: \_\_\_\_\_

Its: \_\_\_\_\_

DDs/050606 Chris Langer LOI Stat Med.doc

# **APPENDIX E**

**Daran Davidson**


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**From:** Albrecht, Andy [AAlbrecht@lbarealty.com]  
**Sent:** Wednesday, May 24, 2006 5:34 PM  
**To:** Chris Langer  
**Cc:** Paul Jerue; Daran Davidson; Albrecht, Andy  
**Subject:** RE: STAT

Chris,

Per our discussion, and my conversation with Daran yesterday, LBA Realty has drafted a lease for Stat Medical's review based on Daran's 5/5/06 letter outlining basic lease terms. Along with the expense of drafting the lease, LBA has also incurred the cost of architecture fee for space planning. It is our hope that as Stat Medical is reviewing the lease language, and any further discussions that are needed on the language or terms, that we can come to a final resolution on the cost of the Tenant Improvements. As you know, the cost between the 1<sup>st</sup> and 2<sup>nd</sup> space plan increased over \$19,000. Despite STAT's prior agreement that they would pay for any cost increase above the 1<sup>st</sup> plan, they are now asking LBA to absorb the extra cost and "Turn-key" the improvements. As stated in the message below, STAT believes that we should be able to achieve savings in the TI bid; therefore, I think it would be a good idea to get Tenant, Landlord, Architect and General Contractor together to review the plan. That way, we can be sure that Stat is getting a space that fits their requirements and LBA is able to achieve the best possible pricing. With input from all parties, we will hopefully be able to come to a joint agreement on the TI costs.

Regarding the fee, GVAKM will be paid a fee of \$5.00/RSF, for a 60 month lease term, in the event the lease is fully executed and tenant takes occupancy of the space and pays rent. The fee shall be paid ½ upon full execution and ½ upon occupancy and payment of rent.

Another issue that Daran raised yesterday was that the Tenant wants to be in the space in 45 days (~July 1<sup>st</sup>). As I explained to Daran, this is not a realistic date. Here is a basic outline of an estimated timetable, assuming a lease is signed on 6/1:

Construction Drawings:	2 weeks
Review & approval:	1 week
Permit:	4-6 weeks (final pricing, contract, etc)
Construction:	6 weeks

Therefore, assuming that a lease is signed next week, we are looking at an occupancy date in September. Based on current TI jobs we are now doing, there is a real backlog in Doors, Door Frames, windows, etc. which is pushing completion timing out.

LBA looks forward to completing the lease with STAT Medical and welcoming them as a Tenant to HCTC.

Thanks  
A

Andy Albrecht  
Vice President, Regional Operations Manager  
LBA Realty | 660 SW 39th Street, Suite 255 | Renton, Washington | 98055  
(425) 272-0267 *direct* | (425) 272-0265 *fax*  
[www.lbarealty.com](http://www.lbarealty.com)

---

**From:** Chris Langer [mailto:Langer@broderickgroup.com]  
**Sent:** Tuesday, May 23, 2006 8:41 AM  
**To:** Albrecht, Andy  
**Cc:** Paul Jerue; Daran Davidson (E-mail)

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STAT

Page 2 of 2

**Subject:** STAT

Andy,

Per my voicemail. STAT/Daran Davidson would like an email/written confirmation from you stating the following:

1. Landlord will turnkey improvements based on most recent space plan 5/16. Tenant believes there should be achievable savings in TI bid that can get pricing back to previous budget.
2. Landlord is in agreement with the LOI prepared by Daran Davidson dated 5/5/2006. The draft lease reflects these terms.
3. Landlord is prepared to pay Daran Davidson a commission equal to \$5/rsf.

I have cc'd Daran on this email.

Chris Langer  
Principal  
Broderick Group, Inc.  
425-646-5228 office  
425-646-3443 fax  
206-650-6361 cell  
[langner@broderickgroup.com](mailto:langner@broderickgroup.com)

GVA00391

6/23/2008

Page 276

E-2

# APPENDIX F

**Daran Davidson**

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**From:** Albrecht, Andy [AAlbrecht@lbarealty.com]  
**Sent:** Monday, June 19, 2006 8:48 AM  
**To:** Chris Langer; Daran Davidson  
**Subject:** FW: STAT Medical Lease  
**Attachments:** Travis S. Thornton (travis@fksdlaw.com).vcf; STAT Lease03(TT)-redline.doc; STAT Lease03\_TT\_.pdf

Daran,

Please see the attached execution lease (and redline). Please have Mike initial, sign and notarize 3 originals. Please have them sent back to me in Renton for processing.

Please call with questions.

A

Andy Albrecht  
Vice President, Regional Operations Manager  
LBA Realty | 660 SW 39th Street, Suite 255 | Renton, Washington | 98055  
(425) 272-0267 *direct* | (425) 272-0265 *fax*  
[www.lbarealty.com](http://www.lbarealty.com)

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**From:** Travis Thornton [mailto:travis@fksdlaw.com]  
**Sent:** Friday, June 16, 2006 12:32 PM  
**To:** Albrecht, Andy  
**Subject:** STAT Medical Lease

Andy, the final STAT Medical lease is attached. The attached redline shows changes to the text, but does not have exhibits attached. The attached .pdf has all exhibits attached and is ready for execution. As always, please remind the tenant to initial Section 12.3 as part of execution.

F-1

GVA00474

all the conditions, provisions and obligations of this Lease (as applicable to a month-to-month tenancy) as existed during the last month of the Term, except the Base Rent shall be increased to 200% of the Base Rent then payable. Any option or right to extend, renew or expand shall not be applicable. Landlord's acceptance of Rent after such expiration or termination shall not constitute a holdover hereunder or result in a renewal of this Lease.

30.14 Substituted Premises. In the event the Premises consist of less than eight thousand (8,000) square feet, Landlord shall have the right, at any time during the Term hereof, upon not less than ninety (90) days' prior written notice to Tenant, to substitute for the Premises such other space in the Complex as shall be substantially the same size as the Premises (the "Substituted Premises"), provided that Landlord shall pay all reasonable expenses of Tenant incidental to Tenant's relocation to the Substituted Premises and that Landlord shall improve the Substituted Premises for Tenant's use and occupancy at least to the same extent as the Premises occupied by Tenant prior to such relocation.

30.15 Binding Effect. The covenants and conditions of this Lease, subject to the provisions as to assignment, apply to and bind the heirs, successors, executors, administrators and assigns of the Parties.

30.16 Time of the Essence. Time is of the essence of this Lease.

30.17 Release of Landlord. If Landlord sells its interest in the Building or Complex, then from and after the effective date of the sale or conveyance, Landlord shall be released and discharged from any and all obligations and responsibilities under this Lease except those already accrued. If Tenant provides a Security Deposit, Landlord may transfer the Security Deposit to a purchaser of the Building and Landlord shall be discharged from any further liability in reference thereto.

30.18 Waiver by Tenant. The Parties have negotiated numerous provisions of this Lease, some of which are covered by statute. Whenever a provision of this Lease and a provision of any statute or other law cover the same matter, the provisions of this Lease shall control.

30.19 Non-Business Days. Whenever action must be taken (including the giving of notice or the delivery of documents) under this Lease during a certain period of time (or by a particular date) that ends (or occurs) on a non-business day, then such period (or date) shall be extended until the immediately following business day. As used herein, "business day" means any day other than a Saturday, Sunday or federal or State holiday.

30.20 Waiver of Jury Trial. Landlord and Tenant hereby waive trial by jury in any action, proceeding or counterclaim brought by either of the Parties against the other on any matters whatsoever arising out of this Lease, or any other claims.

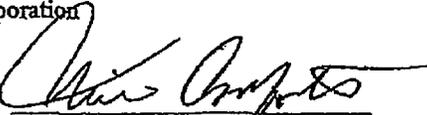
30.21 Authorization. Each person executing this Lease on behalf of a Party represents and warrants (i) that he or she is duly authorized to execute this Lease on behalf of such Party and (ii) that this Lease is binding upon the Party in accordance with its terms.

30.21 Governing Law. This Lease shall be governed by and construed according to the internal laws of the State in which the Building is located without reference to choice of law principles.

Landlord and Tenant have executed this Lease as of the date first written above.

"Tenant"

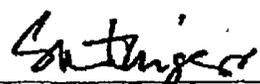
STAT Medical, Inc., a Washington corporation

By:   
Name: Mike Conforto  
Title: President

  
Landlord's Initials

"Landlord"

LBA Realty Fund II-WBP III, LLC, a Delaware limited liability company

By:   
Name: Steven R. Briggs  
Title: Authorized Signatory

  
Tenant's Initials

Date: 6/19/06

Date: 6/23/06

FOR OFFICE USE ONLY:

PREPARED BY: \_\_\_\_\_; REVIEWED BY: \_\_\_\_\_; APPROVED BY: \_\_\_\_\_

SB

Landlord's Initials

[Signature]

Tenant's Initials

STATE OF \_\_\_\_\_ )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

*See attached 3*

I certify that I know or have satisfactory evidence that \_\_\_\_\_ is the person who appeared before me, and said person acknowledged that said person signed this instrument, on oath stated that said person was authorized to execute the instrument and acknowledged it as the \_\_\_\_\_ of LBA Realty Fund II-WBP III, LLC, the company that executed the within and foregoing instrument, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
\_\_\_\_\_  
(print or type name)  
NOTARY PUBLIC in and for the State of \_\_\_\_\_, residing  
at \_\_\_\_\_  
My Commission expires: \_\_\_\_\_

[Seal or Stamp]

STATE OF WA )  
 ) ss.  
COUNTY OF KING )

I certify that I know or have satisfactory evidence that MIRE CONFORTI is the person who appeared before me, and said person acknowledged that said person signed this instrument, on oath stated that said person was authorized to execute the instrument and acknowledged it as the PRESIDENT of STAT Medical, Inc., the corporation that executed the within and foregoing instrument, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated this 14th day of JUNE, 2006.

Susan R. Davis  
SUSAN R. DAVIS  
(print or type name)  
NOTARY PUBLIC in and for the State of WA, residing  
at 20409-270 AVE SE, BOTHELL  
My Commission expires: 6/12/09

[Seal or Stamp]

SB  
Landlord's Initials

[Signature]  
Tenant's Initials

# APPENDIX G

# STAT MEDICAL

Patient Care Specialists Since 1979

Corporate Headquarters • 12020 113th Avenue NE, Suite C-160 • Kirkland, WA 98034 • (206) 621-1982 • Fax (206) 621-1124

August 28, 2006

Ms. Linda Kaivola  
Colliers International, Inc.  
601 Union Street, Suite 5300  
Seattle, Wa. 98101-4045

Re: Stat Medical Inc.  
Kirkland 405, Building C, Suite 180

Linda,

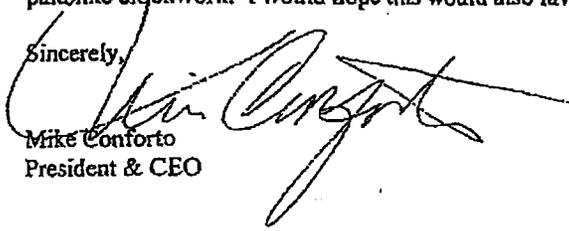
I am in receipt of your letters dated August 16, 2006 and August 22, 2006. Just today, I noticed the two letters were not identical, and that one indicated a different timeline for payment of our holdover rent. It is our intention to be out of the space by the end of September.

Just prior to our finalizing our new lease in Bothell, we were approached by two gentleman representing the new owner of the building. One of the two, Jack Rader may even be a general partner in the project. Apparently they were not allowed to approach us on a renewal here until the purchase was completed. We were pretty far along in what we felt was a very good new lease for us in Bothell. In our discussion with Jack Rader, we expressed our concern that entertaining a new proposal was likely to take us beyond the end of our lease on the new project, should we decide not to renew at the current location. My broker Daran Davidson and I were told we would not be penalized for taking the time to explore any proposals they had for us.

Based on that brief discussion, we slowed down our pursuit of the new lease to listen to what Jack had to say and had a number of internal discussions about their proposal and the related issues. I believe my broker also had several additional conversations with Jack. While we did not spend a great deal of time on this before we let Jack know that we would continue with the deal we had on the table, it did delay our progress as the delay to commit in Bothell resulted in our running into upcoming scheduling issues, vacations, and other projects our new landlord and other interested parties had going on.

I am hopeful that you will take this into consideration with regard to the holdover amounts that would be charged to us. I have enclosed a check equivalent to a 50% increase (which is certainly within the parameters of an appropriate holdover charge) to hopefully fulfill this obligation. Even though you are a new owner, we have been a very good tenant here with our rent always promptly paid like clockwork. I would hope this would also favor our request for consideration.

Sincerely,

  
Mike Conforto  
President & CEO

PLF0045

STAT MEDICAL, INC.  
PHONE (206) 621-1982  
12020 113TH AVE NE  
SUITE C-180  
KIRKLAND, WA 98034

THE COMMERCE BANK OF WASHINGTON  
601 UNION STREET, SUITE 3600  
SEATTLE, WA 98101  
5-801/1230

34659

PAY  
TO THE  
ORDER OF

G & IV KIRKLAND LLC

08/31/2006

\$ \*\*\*\*\*5,751.50\*

\*FIVE THOUSAND SEVEN HUNDRED FIFTY-ONE AND 50 / 100

DOLLARS

MEMO

G & IV KIRKLAND LLC  
1649 PAYSHERE CIRCLE  
LOCKBOX 1649  
CHICAGO, IL 60674



AUTHORIZED SIGNATURE

SECURITY FEATURES INCLUDED. DETAILS ON BACK

⑆034659⑆ ⑆1250080131⑆ 002005522⑆

STAT MEDICAL, INC.

WWW.COMMERCIALBANKOFWASHINGTON.COM

34659

DATE	INVOICE NO	COMMENT	AMOUNT	DISCOUNT	NET AMOUNT
08/28/2006	082806	HOLD OVER CHARGE	5,751.50	0.00	5,751.50

CHECK: 034659    08/31/2006    G & IV KIRKLAND LLC    CHECK TOTAL:    5,751.50

**Daran Davidson**

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**From:** Mike Conforto [Mike@statinc.com]  
**Sent:** Tuesday, September 19, 2006 12:23 PM  
**To:** Daran Davidson  
**Attachments:** colliers letter..JPG

Daran,  
Attached is the letter from our landlord about our attempt to negotiate the hold over rent. It is not what we hoped for. This is particularly bad in that they are now going back to August. First letter was October, second letter was September and now the third.....

**Mike Conforto**  
President & CEO  
12020 113th Ave NE  
Building C160  
Kirkland Wa. 98034  
425-216-3924 direct line  
425-897-3808 fax

# APPENDIX H

**COLLIERS  
INTERNATIONAL**

Colliers International  
11411 NE 124<sup>th</sup> Street, Suite 195  
Kirkland, WA 98034  
Telephone: 425.821.8308  
Fax: 425.821.8381  
www.colliers.com

August 16, 2006

Mr. Michael Conforto  
Stat Medical  
12020 - 113<sup>th</sup> Avenue N.E., Suite 180  
Kirkland, WA 98034

Re: Stat Medical, Inc.  
Kirkland 405, Building C, Suite 180

Dear Mr. Conforto:

This letter serves as a follow up to your correspondence dated 8/28/06. The existing lease term for Stat Medical, Suite 180 expired on 7/31/06. I consulted the Landlord regarding your month-to month "Holdover" tenancy. In the event that Stat Medical renewed their tenancy at Kirkland 405, the Landlord was willing to waive the Holdover rental rate during the time it took to secure a new lease for your existing space. However, it is our understanding that you plan to vacate Suite 180 on approximately 9/30/06. Pursuant to the Lease, the monthly base rent for the Holdover period, August 2006 and monthly thereafter until Stat Medical vacates the Premises will be increased from \$11,503.00 NNN per month to \$23,006.00 NNN per month.

Thank you for remitting check number 34659 in the amount \$5,751.50 for partial Holdover rent for the month of August 2006. The monthly base rent balance due for August 2006 is \$17,254.50. The total monthly base rent due for September 2006 is \$23,006.00.

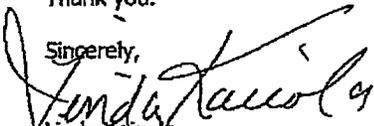
Our correspondence to you dated August 16, 2006 and August 22, 2006 states an incorrect date for the Holdover rental rate increase. The current lease term for Stat Medical expired on 7/31/06 and the Holdover rate at twice the rate of the Base Rent in effect on the expiration or termination of the Lease term is effective as of 8/1/06. All other terms of the Master Lease remain unchanged.

Upon receipt of this correspondence, please remit the past due monthly base rent amounts for August and September 2006.

We appreciate your tenancy at Kirkland 405 Corporate Center. Please feel free to contact us with any questions.

Thank you.

Sincerely,

  
Linda Kaivola

Sr. Real Estate Business Manager  
Colliers International, Inc.

Cc: File  
Mark Isner, General Manager Puget Sound, Colliers International, Inc.  
Ed Turpin, Managing Director, Colliers International, Inc.