

Case No. 30244-0-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

SCHREINER FARMS, INC.,
a Washington Corporation,

Plaintiff / Appellant,

v.

AMERICAN TOWER, INC., a Delaware Corporation; NEXTEL WEST CORPORATION, INC. d/b/a NEXTEL COMMUNICATIONS, a Delaware Corporation; TOWER ASSET SUB, INC., a Delaware Corporation; SPECTRASITE COMMUNICATIONS, INC., a Delaware Corporation; and WESTERN OREGON WIRELESS COMMUNICATIONS, INC., an Oregon Corporation; and WASHINGTON OREGON WIRELESS, a Washington Limited Liability Company,

Defendants / Respondents.

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I. INTRODUCTION

The record and points offered in this brief show that Plaintiff¹ (hereinafter "Schreiner") filed this civil action October 5, 2007, over seven years after entering a Communications Site Lease on August 28, 1999, over seven years after receiving multiple notices of assignment and timely rent from the assignee, and over seven years after giving written consent for licensing tower, ground space and easements on March 10, 2000. They also show that Schreiner accepted and cashed the rent checks for over seven years, without objection or reservation of rights. Respectfully, Schreiner's belated claims are an attempt to renegotiate rent, contrary to the established time limit on breach of contract claims, and well-settled precedent against adding restrictions to a lease that are not expressly stated in it. In sum, the statute of limitations, real property rules for lease terms, and accepting rent provide alternative bases to affirm the trial court's grant of summary judgment.

The Plaintiff's Notice of Appeal seeks review of the trial court's Order Denying Plaintiff's Motion for Reconsideration and the Order Granting Defendants' Motion for Summary Judgment. (CP 848-849.)

¹ In an effort to promote clarity, and as recommended in RAP 10.4(e), the party "designations used in the lower court" will be utilized throughout this brief.

Defendants understand that Schreiner seeks review of portions of the Order entered by the Honorable Brian Altman on July 19, 2011, which granted the Defendants' Joint Motion for Reconsideration and granted Summary Judgment, dismissing Schreiner's claims for breach of lease based on the statute of limitations. (CP 734-738.)

Defendants agree that Schreiner's claims were time barred by application of the six-year contract statute of limitations. However, Defendants seek cross-review of a separate order, which denied their alternative bases for summary judgment, i.e., that Schreiner's claims of breach and requests for relief should be dismissed as a matter of law because no breach had occurred. (CP 857-864.) Additionally, consistent payment and unqualified cashing of rent checks supports dismissal. Defendants' arguments and authorities supporting their cross-appeal are found in this brief after the response to Schreiner's arguments.

II. IDENTIFICATION OF DEFENDANT PARTIES

The named Defendants are American Tower, Inc., Nextel West Corporation, Inc., Tower Asset Sub, Inc., SpectraSite Communications, Inc., and Washington Oregon Wireless, LLC.

A. American Tower, Inc.

American Towers, Inc. was incorrectly named in the Complaint and First Amended Complaint as American Tower, Inc. This was pointed

out to the trial court and in response to written discovery. American Towers, Inc. was converted to a limited liability company and is now American Towers, LLC. American Towers, LLC is a subsidiary of American Tower Corporation. (CP 4, 90, 112, 137, 259, 435, 443, 453-454.)

B. Nextel West Corporation, Inc. d/b/a Nextel Communications.

Nextel West Corporation, Inc. (“Nextel”) is a wholly owned subsidiary of Sprint Nextel Corporation. Nextel was the original Lessee, which assigned to Tower Asset Sub, Inc. in January 2000. (CP 112, 117, 131, 132, 187, 371, 443.)

C. Tower Asset Sub, Inc.

Nextel assigned to Tower Asset Sub, Inc. in January 2000. It subsequently converted to a limited liability company. (CP 112, 117, 187, 259, 435, 439, 443.)

D. SpectraSite Communications, Inc.

SpectraSite Communications, Inc. was the parent company of and a d/b/a for Tower Asset Sub, Inc. SpectraSite served as site manager for Tower Asset Sub. SpectraSite Communications, Inc. subsequently converted to a limited liability company. SpectraSite merged with

American Tower Corporation (a non-party) in 2005. (CP 112, 188, 435, 443.)

E. Western Oregon Wireless Communications, Inc. & Washington Oregon Wireless, LLC.

Western Oregon Wireless was a name that was inadvertently included in a March 3, 2000 letter from SpectraSite to Schreiner, and undisputedly was a typographic mistake. The letter is addressed in detail below. The correct licensee name that was intended, and the entity that has been the licensee at the subject communications site since April 2000, is Washington Oregon Wireless. Washington Oregon Wireless, LLC (“WOW”) is a wholly owned subsidiary of Sprint Nextel Corporation, and an affiliate of Nextel. WOW occupies space on the subject site under its Tower Attachment License. (CP 112-113, 132, 142, 189, 190-202, 371, 380.)

III. COUNTER-STATEMENT OF THE CASE

RAP 10.3(a)(5) provides that the Statement of the Case should be “[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument.” Instead of following this rule, Schreiner's opening sentence states: “This case is about an absurd and inequitable result attained through the guise of precedent.” (Appellant’s Brief at 3.) Schreiner goes on to offer other argument that is not supported

by the record, and Defendants respectfully object based on RAP 10.3(a)(5). The Defendants' submit the following Counter-Statement of the Case in conformity with the appellate rule.

A. Substantive Facts: History of Notices of Assignment; Consent; Performance.

The Communications Site Lease Agreement (Ground) between Nextel West Corporation, doing business as Nextel Communications ("Nextel"), as lessee and Schreiner Farms Inc. ("Schreiner"), as lessor, was negotiated between July 1998 and August 1999. It was effective August 28, 1999. (CP 158, 172, 177-186; App. 1.)

Schreiner's president, Joe Schreiner, had experience with leasing and access to legal expertise. (CP 151-156.) For example, The Schreiner Group of title insurance companies had owned and operated title companies for over 100 years. (CP 152.) Joe Schreiner holds a bachelor's degree in accounting; was a managing member of Pioneer Building, LLC, a company that built and leased space to 24 or 25 businesses as of 1999; was president of Title Management, Inc., a Schreiner family company that owned 15 title companies in Washington and Oregon; owned and operated Seeder Tree Company, a company that buys and holds timberland in Washington and Idaho; had a 25 year relationship with his current law

firm, and would go to lawyer Peter Witherspoon or a member of his firm when he had a leasing or legal question. (CP 151-156.)

On January 20, 2000, Nextel notified Schreiner it had assigned the Lease to Tower Asset Sub, Inc., a Nextel affiliate doing business as SpectraSite Communications, which assumed and agreed to perform all tenant obligations under the lease.² (CP 159-160, 187; App. 2.) Nextel also informed Schreiner that it was restructuring its tower assets. (CP 160; Schreiner Dep. 42:15-18.) Schreiner was requested to write to Nextel if it had any questions. (CP 160; Schreiner Dep. 42:22-24; App. 2.) Joe Schreiner testified that his impression was that he was being notified that Nextel had assigned to Tower Asset Sub and SpectraSite Communications. (CP 160; Schreiner Dep. 43:22-25.) Schreiner did not write to or contact Nextel or any other Defendant in connection with this or any of the subsequent notices of assignment. (*E.g.*, CP 160, 166-170; Schreiner Dep. 42:25-43:2, 69:2-70:4, 73:15-17, 76:4-17, 80:11-23, 81:1-82:21.)³

² Schreiner erroneously asserts that the lease required that any assignment transfer "all" the assignee's "rights and obligations." (Appellant's Br. at 9-10, 12). For assignment, the lease only required the assumption of "all obligations" of the existing lessee. (CP 179; App. 1, § 14).

³ The SF Bates number in the bottom right corner of each notice or letter indicates the document was in the file of and produced by Schreiner. (CP 160-161; Schreiner Dep. 41:22-42:1.)

On February 14, 2000, SpectraSite Communications again notified Schreiner of Nextel's assignment to Tower Asset Sub, Inc., doing business as SpectraSite. SpectraSite was described as "a leading owner and operator of communications towers for the wireless telecommunications industry." (CP 160-161, 188; Schreiner Dep. 44:19-47:7; App. 2.) Schreiner was requested to phone a toll-free number if it had any questions, including site administration or contract matters. (CP 161, 188; Schreiner Dep. 46:11-15; App. 2)

On March 3, 2000, SpectraSite requested Schreiner's consent to license tower, ground space, and easements to Washington Oregon Wireless.⁴ (CP 161-163, 171, 189; App. 2.) In his deposition, Joe Schreiner testified that the consent was a license for tower and ground space and easements. (CP 161, 162; Schreiner Dep. 48:10-49:6, 51:21-23.) Schreiner gave written consent on March 10, 2000. (CP 161-163, 171, 189; App. 2.) In April 2000, Washington Oregon Wireless, LLC and SpectraSite Communications, Inc. signed a tower attachment license agreement. (CP 161-162, 190-202.) Washington Oregon Wireless placed a

⁴ Although this notice actually refers to "Western Oregon Wireless, Inc.," it was uncontested that this was a typographical error and that the actual entity was Washington Oregon Wireless. (CP 111-113, 171; *See* Appellant's Memorandum of Points and Authorities in Response to Court's Motion to Determine Appealability, dated October 25, 2011, on file with this Court; Appellant's Br. at 14.) Schreiner erroneously asserts that the license consent request represented that the licensee was taking over the lease. (Appellant's Br. at 13.)

second array on the tower in May 2000, pursuant to the March 10, 2000 consent to license. (CP 161-163, 171, 189, 443-444.) In response to a question from his lawyer, Joe Schreiner testified that he received a copy of the actual tower attachment license in connection with a request for a memorandum of lease. (CP 162; Schreiner Dep. 51:1-53:9.) The license described Washington Oregon Wireless' and Nextel's use and illustrated both entities' antennas and equipment. (CP 190-192 (Recitals, §§ 1, 2, 8, 11), 198-200 (Ex. A-1); App. 2.)

In an April 27, 2000 letter, 48 days after Schreiner consented to the Washington Oregon Wireless license, SpectraSite requested that Schreiner execute an enclosed memorandum of lease, confirming Schreiner's status as lessor and Tower Asset Sub, Inc. as the lessee. (CP 203.) Joe Schreiner made a handwritten notation on the letter that he had already signed one. (CP 162-163, 203; App. 2.)

On May 23, 2001, SpectraSite again requested that Schreiner sign an enclosed memorandum of lease, which referenced and attached the January 2000 assignment documentation between Nextel and Tower Asset Sub. (CP 164-165, 204, 205-235; Schreiner Dep. 61:20-63:10; App. 2.) Mr. Schreiner again made a notation that one had already been signed. (CP 163-164, 204.) In part, the assignment states that it "contemplates, inter alia, the conveyance, assignment, transfer and delivery of Nextel's tower

assets, and the continuing lease by Nextel of certain ground and/or platform space on such tower assets ... ” (CP 224.) Schreiner admits it was likely read. (CP 165; Schreiner Dep. 63:5-10.)

In April 2004 and April 2005, SpectraSite contacted Schreiner about purchasing perpetual easements in lieu of existing leases. (CP 165-166, 236-237.)

In September 2005, SpectraSite Communications and American Tower notified Schreiner that they had merged, that the “combined company [was] poised to be the industry leader for wireless infrastructure solutions with the largest site portfolio in the industry,” and provided contact information in the event Schreiner “ever [had] questions about your lease agreement, rent payment, etc.” (CP 238-239.) Schreiner did not contact any of the Defendants nor raise a question about the way the communications site was being used. (CP 166-167.)

In a September 2006 letter, American Tower Corporation (a non-party) requested that Schreiner sign an enclosed document provided by its lender in connection with a mortgage that it was obtaining. (CP 167-168, 240.)

In October 2006, American Tower Corporation again requested Schreiner's confirmation concerning the parties to the lease (Tower Asset Sub, LLC, was referred to as the lessee and a subsidiary of American

Tower Corporation or one of its affiliates) and the status of the lease. (CP 168, 243-245.) By this time, Tower Asset Sub, Inc. had been converted to Tower Asset Sub, LLC. (CP 452.)

On January 18, 2007, American Tower Corporation requested that Schreiner execute and return a memorandum of lease referring to Tower Asset Sub, LLC as the current lessee. (CP 246-252.) Joe Schreiner made a handwritten note on the letter, stating that a copy of the original memorandum of agreement, dated August 28, 1999, was sent in response. (CP 169, 246, 253-258.)

On February 23, 2007, American Tower Corporation notified Schreiner it was reorganizing "the companies that own this group of towers," and as "part of this reorganization process, your Lease Agreement will be assigned to American Tower Asset Sub, LLC." American Tower Asset Sub, LLC was described as a wholly-owned subsidiary of SpectraSite Communications, Inc. (CP 169, 259-260; Schreiner Dep. 81:1-14.) This assignment between the two related subsidiaries (Tower Asset Sub and American Tower Asset Sub) was signed by the same person, with the same job title, on the same date, on behalf of both entities. (CP 464-470.) This assignment did not change "the nature of the use" at the site. (CP 443.)

On April 25, 2007, Schreiner's attorney wrote to American Tower Corporation for the first time, attempting to renegotiate rent, taking issue with the assignment and licensing in 2000, and asserting that "defaults" had occurred. (CP 160-161, 164, 167-168, 388-390.) In July 2007, Schreiner's attorney reiterated that the January 2000 assignment and April 2000 license "breached" the Lease.⁵ (CP 394.)

Schreiner admits regularly receiving and cashing the rent checks, without protest or reservation of rights through at least July 10, 2010. (CP 149, 160, 168, 241-242; Schreiner Dep. 43:3-18, 75:15-76:1.) It continued to do so after its recognition in October 2006 that Nextel and Washington Oregon Wireless both had antennas on the monopole and both had equipment within the leased Premises. (*Id.*; CP 173-174, 261; Schreiner Dep. 96:9-99:16.) The lease was for "approximately" 2,000 square feet. (CP 177; App. 1.) The license was for a "345 square foot portion" of the Premises. (CP 190 (§ 1); App. 2.)

B. Schreiner's Allegations.

Schreiner's Complaint was filed on October 5, 2007, ostensibly seeking declaratory relief based upon the January 2000 assignment and March and April 2000 consent and license. It was amended in July 2009. (CP 3-7, 89-94.)

⁵ See footnote 3 regarding the erroneous reference to Western Oregon wireless.

As it pertains to the issues on appeal, Schreiner's First Amended Complaint submits three theories. They are: (1) Defendant Nextel was not authorized to assign the Lease to Defendant Tower Asset Sub in January 2000 because Tower Asset Sub did not provide radio communications services (CP 92:15-21, 93:15-18); (2) Defendant Tower Asset Sub's parent company and manager, SpectraSite Communications, was not authorized to sublease/license to Washington Oregon Wireless in March/April 2000 (CP 92:22-30, 93:19-27); and (3) Schreiner did not consent to a sublease/license to Washington Oregon Wireless (*Id.*). Schreiner had a fourth claim that was dismissed on summary judgment and not appealed. (CP 93:5-11, 93:28-94:4.)⁶

Schreiner's Complaint does not allege fraud or submit a prayer for relief based upon principles of equity. It does not allege a claim or submit a request for relief based upon a failure to cure a default.

C. Post-Complaint Procedural History.

Schreiner's recitation of procedural facts is basically adequate. However, it bears noting that the June 19, 2011 summary judgment order was vacated by the court on July 19, 2011 (in connection with entering

⁶ Schreiner's fourth claim alleged failure to comply with requirements of the Columbia River Gorge Commission when Washington Oregon Wireless installed antennas and equipment under its license. (CP 93:5-11, 93:28-94:14.) Schreiner did not appeal the trial court's dismissal of the fourth claim. (Appellant's Br. 16, n. 2.)

orders on the Defendants' summary judgment and reconsideration motions) because of the absence of notice to Defendants that Schreiner's order was being presented to the court. (CP 567-576, 727-728; RP Hr'g Tr. 30:12-21, July 19, 2011.)

Defendants' summary judgment motion argued, in part, that the six-year statute of limitations barred Schreiner's claims, whether or not the discovery rule was applicable. (CP 126-128, 490-491; RP Hr'g Tr. 33:25-34:14, May 17, 2011.)

Schreiner's response argued that the alleged 2000 "breaches"/"defaults" (assignment to Tower Asset Sub and the license to Washington Oregon Wireless) were not discovered until 2006 and, in turn, the discovery rule precluded application of the six-year statute of limitations for "breach of contract." Schreiner argued, "Even if the 6 year statute did apply, a question of fact exists as to whether Plaintiff knew or should have known of the breaches before October 5th, 2001 (six years before filing of complaint [on October 5, 2007])." (CP 269-274.)

In the course of its oral ruling on the motion for summary judgment, the trial court initially stated that, absent the discovery rule, Schreiner's "entire action is time-barred and a dismissal of all the claims, in my view, would have to be granted." However, the trial court initially denied the motion on the ground that the discovery rule applied to breach

of contract cases. Defendants offered to provide additional authority, and the trial court agreed to entertain a motion for reconsideration on the issue of whether the discovery rule applied to breach of contract cases. (RP Hr'g Tr. 7-9, 12-13, June 7, 2011.)

On reconsideration, Defendants reargued that the discovery rule for breach of contract was limited to latent construction defects, and cited the Washington Supreme Court case of *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006).⁷ (CP 552-556.) Defendants also reiterated that fraudulent concealment/nondisclosure was not a basis to apply the discovery rule for breach of contract, and recapped Washington precedent that includes *Cornell v. Edsen*, 78 Wash. 662, 139 P. 602 (1914) and *Vertecs*. Defendants also reiterated that Schreiner had not pled an independent action for fraud. (CP 557-559.)

Schreiner's response was that the assignment and licensing was "a latent breach (factually and legally no different than a latent defect)," that *Vertecs'* reasoning was not limited to latent construction defects, and for the first time claimed that in any event, the 2007 assignment between Tower Asset Sub and American Tower was within the six years. (CP 636-639.) In the course of reconsideration, Schreiner conceded that no

⁷ In an effort to remain consistent with briefing below, the Defendants will refer to this decision as *Vertecs*.

independent claim for fraud had been pled and that its claim "is an action that sounds in contract and breach of contract" (CP 643:22-23; RP Hr'g Tr. 15:9-12, July 19, 2011.)

Defendants' reply was that the only "American Tower" referenced in the Complaint was "American Tower, Inc.," that Schreiner's Complaint contained no allegation that any alleged assignment to "American Tower, Inc." constituted a breach, and that Schreiner's own summary judgment materials demonstrated that "American Tower, Inc." had never held any interest in the lease. (CP 450, 453 (no interest in the lease), 662-663.)

As to the February 2007 assignment and assumption of lease between Tower Asset Sub, LLC and American Tower Asset Sub, LLC, Defendants argued that American Tower Asset Sub, LLC was not a party to the litigation, its assignee's interest had not been alleged in the Complaint as a breach, and that Schreiner could not amend its Complaint to assert unpleaded claims through arguments in a brief opposing summary judgment reconsideration, citing *Kirby v. City of Tacoma*, 124 Wn. App. 454, 98 P.3d 827 (2004), *review denied*, 154 Wn.2d 1007 (2005) and *Johnson v. Community College of Allegheny County*, 566 F. Supp. 2d 405, 236 Ed. Law Rep. 473 (W.D. Pa. 2008). (CP 663-665.)

Additionally, Defendants pointed out that Schreiner admitted to receiving notice of this assignment, and that Schreiner's own summary

judgment materials demonstrated that the 2007 assignment did not change "the nature of the use" at the site, the assignment (signed by the same individual on behalf of both entities) was between two related subsidiaries as part of a reorganization, and additionally, as assignee, American Tower Asset Sub, LLC acquired all rights and defenses available to its assignor, Tower Asset Sub, LLC, including statute of limitations defenses. (CP 664-665.) The final order granting reconsideration and dismissing Schreiner's remaining claims was filed July 19, 2011. (CP 734-738.)

Schreiner timely moved for CR 59 reconsideration, rearguing its interpretation of *Vertecs* and the discovery rule for "breach" and "default," the alleged 2007 breach, and for the first time alleged a "continuing breach" since 2000. "Defendants began breaching the use provision of the lease in 2000 and continued to breach the use provision through to the present." (CP 746-747.)

Defendants reiterated their previous position on *Vertecs* and the inapplicability of the discovery rule, and objected to, and in any event refuted, the new issue of "continuing breach." (CP 779-792.) The court denied Schreiner's reconsideration motion on August 16, 2011. (CP 846-847.) Schreiner's timely appeal followed.

IV. STANDARD OF REVIEW

When reviewing an order granting summary judgment, an appellate court engages in the same inquiry as did the trial court. *Barr v. Day*, 124 Wn.2d 318, 324, 879 P.2d 912 (1994). The summary judgment must be affirmed 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 a judgment as a matter of law. CR 56(c). All facts and reasonable inferences are considered in the light most favorable to the nonmoving party, and all questions of law are reviewed *de novo*. *Caritas Servs., Inc. v. Department of Social & Health Servs.*, 123 Wn.2d 391, 402, 869 P.2d 28 (1994).

“The purpose of a summary judgment is to avoid a useless trial when no genuine issue of material fact remains to be decided.” *Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). Only the evidence and issues timely called to the attention of the trial court may be considered on appeal of a summary judgment. RAP 9.12. Issues raised for the first time on appeal will not be considered. “The purpose of this limitation is to effectuate the rule that the appellate court engages in the same inquiry as the trial court.” *Mithoug v. Apollo Radio of Spokane*, 128 Wn.2d 460, 462, 909 P.2d 291 (1996) (quoting *Washington*

Fed'n of State Employees v. Office of Financial Mgt., 121 Wn.2d 152, 157, 849 P.2d 1201 (1993)).

V. SUMMARY OF ARGUMENTS IN RESPONSE TO SCHREINER'S APPEAL

Schreiner asserts one assignment of error with five sub-issues, but the ultimate question presented by Schreiner's appeal is:

Does the six-year statute of limitations for a written contract bar Schreiner's claims filed against the Defendants in 2007, which are based on a Communications Site Lease Agreement that was breached, if at all, in 2000?

Based on settled and binding Washington Supreme Court precedent, the trial court correctly held that the claims in Schreiner's Complaint are barred by the six-year statute of limitations. RCW 4.16.040(1).

Schreiner asks this Court to ignore binding Washington precedent on accrual of a contract-based cause of action by citing authority having no application to the undisputed material facts of this case. Schreiner also presents two new theories, failure to cure and equitable estoppel, which are improperly raised for the first time on appeal. Schreiner raises a third issue, continuing breach, which was not timely raised below. In any event, these three theories are inapposite. The decision below should be affirmed.

VI. ARGUMENT

Schreiner presents five issues relating to its one assignment of error that dismissal based on the six-year contract statute of limitations

was improper. Three of these issues were not properly raised below, and therefore should not be considered by this Court: Issue 1 (statute of limitations triggered at point of failure to cure), issue 4 (continuing breach), and issue 5 (equitable estoppel). "CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision." *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005) (citation omitted). An issue not raised before the trial court cannot be raised for the first time on appeal. *Seattle-First Nat. Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978); RAP 2.5(a); RAP 9.12.

Furthermore, because Schreiner's appeal arises from the trial court's entry of summary judgment in favor of the Defendants, the real issue before this Court is whether there is any ground supported by the record upon which to affirm the superior court's decision. *Allstot v. Edwards*, 116 Wn. App. 424, 430, 65 P.3d 696 (2003). As shown herein, because of binding precedent on accrual of a cause of action for breach of contract, untimeliness in raising new theories, real property rules governing leases, and acceptance of rent, the summary judgment dismissal should be affirmed.

A. Schreiner's failure to cure theory was not previously argued and is not to be considered; in any event, the argument is erroneous.

Schreiner's first issue is: "The statute of limitations for Schreiner Farms' declaratory relief claims is triggered at the point of failure to cure and not the point of first default." (Appellant's Br. at 19.) This issue was not raised before the trial court, either in the pleadings or the summary judgment/reconsideration proceedings, and cannot be considered on appeal. *Seattle-First, supra*. Schreiner's position below was always that material "breaches," or "defaults," occurred in 2000 when the assignments to Tower Asset Sub and the license to Washington Oregon Wireless were made, but were not discovered until later. (CP 274, 388-390, 394-395, 634, 636-637.)

Schreiner's first issue (failure to cure) and its fourth issue (continuing breach) are partially based on Section 10 of the Lease (the "Termination" clause). In part, it provides:

This Agreement may be terminated without further liability on thirty (30) days prior written notice as follows: (i) by either party upon a default of any covenant or term hereof by the other party, which default is not cured within sixty (60) days of receipt of written notice of default[.]

(CP 329; App. 1.)

Even if the failure to cure issue is considered, Schreiner confuses "what" relief is available (e.g., termination) with "when" the right to relief

accrues and is barred by the statute of limitations. Professor DeWolf describes the distinction in Washington Practice.

The terms “breach” and “default” are sometimes used interchangeably, but in some contexts (such as construction suretyship law) each has a distinct meaning. Default is a conclusive term that triggers the right of the party not in default to terminate the contract. On the other hand, a breach may or may not result in default, depending upon the materiality and magnitude of the breach.

25 David K. DeWolf et al., *Wash. Prac., Contract Law and Practice* § 10:2 (2011) (footnotes omitted). Respectfully, Schreiner's reliance on the “default” term that is found in the termination clause in § 10 of the Lease is misplaced, as “breach” and “accrual” are the operative terms for purposes of a statute of limitations analysis.

Schreiner erroneously equates its right to “terminate” the lease to “accrual,” or the right to seek relief from the court. The Washington State “Supreme Court ‘has consistently held that accrual of a contract action occurs on breach.’” *Kinney v. Cook*, 150 Wn. App. 187, 193, 208 P.3d 1 (2009) (citing *Vertecs*). “It accrues at the moment he has a legal right to maintain an action to enforce it and the statute of limitations is then set in motion.” *Howard v. Equitable Life Assur. Soc. of U.S.*, 197 Wash. 230, 239-240, 85 P.2d 253 (1938) (citations omitted). A material breach of contract gives the promisee an election to terminate the contract or sue for damages. *Colorado Structures, Inc. v. Insurance Co. of the West*, 161

Wn.2d 577, 588-589, 591-592, 167 P.3d 1255 (2007). The statute of limitations on a written contract is six years. RCW 4.16.040(1). In this regard, Schreiner has always asserted that the 2000 "breaches" were "defaults" (i.e., "material") and, in fact, the provisions of § 10 obviate any distinction between material and nonmaterial breaches by providing that termination can occur for noncompliance with "any covenant or term hereof." Thus, under the Lease, an event of default (i.e., any breach) is not conditioned upon fulfillment of a condition precedent, i.e., a demand, but accrues immediately upon breach of "any covenant or term" of the Lease.

Upon breach, one cannot extend the contract statute of limitations by delaying a demand. *Lehman Bros. Holdings, Inc. v. Evergreen Moneysource Mortg. Co.*, 793 F. Supp. 2d 1189, 1193-94 (W.D. Wash. 2011) (claim for breach of contract covenant accrued upon breach, not when later demand for indemnity derivative of the covenant breach was made); *Harris v. Puget Sound Bridge & Dredging Co.*, 179 Wash. 546, 552-553, 38 P.2d 354 (1934) (analyzing Washington cases, "[I]t is not the policy of the law to put it within the power of a party to toll the statute of limitations."). "Where the condition precedent to bringing an action is the making of a demand, the period runs from the time when it could first have been made." *Fruit and Vegetable Packers and Warehousemen Local 760 v. Morley*, 378 F.2d 738, 746 (9th Cir. 1967) (citing Washington

cases). Washington rejects authority from other states that the statute of limitations runs from the date a demand for performance was made (as opposed to the date of breach). *Harris*, 179 Wash. at 553.

Under Schreiner's use, assignment and licensing theories, Schreiner first could have issued a notice of default and termination, or alternatively sued for damages, in 2000 when it received written notice of assignment, restructuring of tower assets, and licensing of tower, ground space and use of easements. Schreiner cites no authority for its theory that it first needed a declaration of default from a court before the notice of termination could be given. Rather, if for the purpose of analysis Schreiner's theories are treated as viable, Schreiner had the right to issue a notice of default and declare termination upon failure to cure in 2000. Then it could have brought a declaratory action to establish termination of the lease, based upon the default that had allegedly accrued, or alternatively, immediately sued for damages.

Schreiner's citation of *Colwell v. Eising*, 118 Wn.2d 861, 827 P.2d 1005 (1992) is inapposite. *Colwell* did not address the issue of a delayed demand. In any event, it is consistent with Defendants' position of accrual upon breach, because *Colwell* held that the plaintiff's cause of action for unpaid management fees for the years 1978-1986, under a 1977 agreement, accrued "at the latest" in 1978 when a demand was made. *Id.* at

864-869. *Colwell* did not hold that the demand was necessary to start the running of the statute of limitations. *Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348, 997 P.2d 353 (2000) is also distinguishable. *Schwindt* notes that the rule of accrual for claims under insurance policies is different than the situation involving a delayed demand after a breach has occurred. *Id.* at 357-58. *Panorama Residential Protective Association v. Panorama Corporation*, 28 Wn. App. 923, 627 P.2d 121 (1981) did not involve any issue of a declaratory action involving breaches outside the six-year statute of limitations, but involved a declaratory action over "prospective" imposition of a cost-of-living rent increase. *Bailie Communications, Ltd. v. Trend Business Systems*, 53 Wn. App. 77, 765 P.2d 339 (1988) does not involve any issue of accrual for statute of limitations purposes, but only whether a material breach had occurred to establish causation of fraud damages. *Fowler v. A&A Co.*, 262 A.2d 344 (D.C. 1970) involved failure to honor a defect repair guarantee (i.e., future performance), not a claim for initial breach of the construction contract resulting in defects. *Cary Oil Co., Inc. v. MG Refining and Marketing, Inc.*, 90 F. Supp. 2d 401 (S.D.N.Y. 2000) involved breaches outside the statute of limitations (failure to maintain hedges), which did not result in contract termination, but the subsequent breaches sued upon (collusive deal with CFTC) occurred within the statute of limitations.

Schreiner's styling the action as one for declaratory judgment instead of asserting a direct action for breach of a written contract, does "not avoid the statute of limitation," because where a statute of limitation applies, "a declaratory judgment action is subject to the same statutory limitation." *Reid v. Dalton*, 124 Wn. App. 113, 122, 100 P.3d 349, 354 (2004); 15 Karl B. Tegland, *Wash. Prac., Civil Procedure* § 42:12 (2011). The "right to declaratory relief should be barred when [the] right to coercive relief is barred." *City of Federal Way v. King County*, 62 Wn. App. 530, 537, 815 P.2d 790 (1991) (citing 15 Lewis H. Orland & Karl B. Tegland, *Wash. Prac., Trial Practice-Civil* § 613 (4th ed. 1986)); *Tostevin v. Douglas*, 160 Cal. App. 2d. 321, 325 P.2d 130, 135 (1958). Declaratory judgments may not be used to obtain greater relief than under an action for breach of contract. *Jacobsen v. King County Medical Service Corp.*, 23 Wn.2d 324, 327, 160 P.2d 1019 (1945).

Accordingly, Schreiner cannot toll the statute of limitations through a delayed demand for cure and styling the action as one for declaratory judgment instead of for breach of contract. Schreiner suggests that it is merely seeking a declaration that Nextel breached the Lease with its assignment in 2000, and following that decision, "Schreiner Farms will provide Nextel notice of said default for which Nextel will have sixty days to cure. If Nextel does not do so, then Schreiner Farms[] will terminate

the agreement, upon which point its breach of contract claim will accrue.” (Appellant’s Br. at 25 (footnote omitted).) While it is nowhere cited in this section of Schreiner's brief, Defendants presume that Schreiner's “sixty days to cure” argument is derived from § 10 of the Lease, governing “Termination.” This section of the Lease certainly provides a remedy (i.e., termination), assuming default and failure to cure, but it has no bearing on accrual for statute of limitations purposes, as the right to terminate is based upon, and derivative of, “a default of any covenant or term” of the lease. *Lehman*, 793 F. Supp. 2d at 1193-94 (contractual right of indemnity based on “a breach of any of the representations, warranties, or covenants” accrued upon breach, not when the indemnity demand was made). The six-year statute of limitations for written contracts required dismissal of Schreiner's claims arising out of the alleged breaches from the assignment and license in 2000.

B. Schreiner’s theory that *Vertecs* is not limited to latent construction defects is not supported by *Vertecs* or precedent.

Both parties cite *Vertecs*, 158 Wn.2d 566 (2006), but arrive at different conclusions regarding its application in this case. The trial court’s order provides that “[the Defendant’s m]otion for reconsideration is granted based on the holding in *1000 Virginia*, 158 Wn.2d 566 (2006), that the ‘discovery rule’ does not apply in contract cases, outside of the

context of ‘latent defect’ construction cases.” (CP 737.) The Defendants agree with the trial court in this respect.

Schreiner argues, “The Supreme Court was not creating a narrow exception for applying the discovery rule only in cases involving claims of latent construction defects.” (Appellant’s Br. at 27 (emphasis original).) The *Vertecs* court’s holding is contrary to Schreiner’s position, and was preceded by an admonition against what Schreiner advocates in this appeal:

Because the Court of Appeals is bound to follow precedent established by this court and this court’s precedent established that a cause of action for breach of contract accrued upon breach rather than discovery, the Court of Appeals erred in adopting the discovery rule in *Architectonics*. However, we agree that the discovery rule should apply to actions on construction contracts involving allegations of latent construction defects and therefore adopt the rule for such actions. Accordingly, we hold that the discovery rule applies in these cases.

Vertecs, 158 Wn.2d at 590 (emphasis added). Based on the clear language of the *Vertecs* decision, the discovery rule was extended to “such actions” and “these cases” involving “latent construction defects.” The instant case is not such an action. Therefore, the discovery rule as adopted in *Vertecs* does not apply to the instant case.

This limitation was reaffirmed by this Court in *Kinney v. Cook*, 150 Wn. App. 187 (2009):

[T]he Kinneys apparently seek to extend the rule announced in *1000 Virginia Limited Partnership* beyond the construction contract context. This we decline to do. Under *1000 Virginia Limited Partnership*, accrual of a contract action occurs on breach.

...

In sum, the Kinneys' claims accrued in January 2000[.] ... The Kinneys' action filed on August 1, 2007 was time barred. Accordingly, the trial court did not err in granting summary dismissal of the Kinneys' claims.

Kinney at 193-94. This limitation was illuminated by the dissenting opinion of Justice J.M. Johnson in *Vertecs*, 158 Wn.2d at 590-603, and authors 15A Karl B. Tegland & Douglas J. Ende, *Wash. Prac., Handbook Civil Procedure* § 2.5 (2012).

Traditionally, the discovery rule did *not* apply to breach of contract claims. That doctrine changed briefly in 2002, when the Court of Appeals expressly held that the reasons for applying the rule in tort claims apply equally in contract actions. *Architectonics Const. Mgmt, Inc., v. Khorram*, 11 Wn. App. 725, 45 P.3d 1142 (2002). But the line of authority was overruled in 2006 in *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 575-78, 146 P.3d 423 (2006).

(Citations omitted.)

Schreiner's contract-based claims accrued, if at all, in 2000 and its action filed October 5, 2007 is time barred. Labeling the Complaint as one for declaratory judgment instead of for direct relief cannot avoid the statute of limitations. *Reid*, 124 Wn. App. at 122. "It is elementary that we must examine 'the nature of the right sued upon, it is not the form of

action or the relief demanded, which determines the applicability of the statute of limitations.'" *Colwell*, 118 Wn.2d at 866 (citations omitted). In determining the true nature of an action, "the essence of the case controls, not particular words in the pleadings." *Martin v. Patent Scaffolding*, 37 Wn. App. 37, 39, 678 P.2d 362 (1984) (essence of allegations was product liability claim subject to three-year statute of limitations, notwithstanding allegations of breach of warranty subject to a four-year statute of limitations). A party may not recharacterize a claim to gain the benefit of a longer limitations period. *Eastwood v. Cascade Broadcasting Co.*, 106 Wn.2d 466, 469, 722 P.2d 1295 (1986); *Seely v. Gilbert*, 16 Wn.2d 611, 615, 134 P.2d 710 (1943) (plaintiff could not avoid assault and battery two-year statute of limitations by also alleging a conspiracy claim to accomplish the same result). The trial court did not err by summarily dismissing Schreiner's claims as a matter of law.

C. Schreiner's fraudulent concealment theory was admittedly never pled. Furthermore, fraudulent concealment does not toll the contract statute of limitations.

Schreiner argues that, "[u]nder principles of equity, the discovery rule applicable to tort actions applies to declaratory judgment claims involving a fraudulent[ly] concealed default of a contract" (Appellant's Br. at 34), relying upon *Brutsche v. City of Kent*, 78 Wn. App. 370, 898 P.2d 319 (1995) to support its argument that "[w]hen there is more than

one analogous period, ‘the longer of two ... periods should be applied.’” (Appellant’s Br. at 34 (quoting *Brutsche*, 78 Wn. App. at 377).)

Fraud as an independent cause of action was never pled by Schreiner (and in fact was affirmatively disclaimed). It cannot be considered for the first time on appeal.⁸ *Mithoug*, 128 Wn.2d at 462. Furthermore, fraudulent concealment or non-disclosure of material facts does not provide a basis for applying the discovery rule in a breach of contract action. *Cornell v. Edsen*, 78 Wash. 662 (1914) (reaffirmed in *Taylor v. Puget Sound Power & Light Co.*, 64 Wn.2d 534, 537-538, 392 P.2d 802 (1964), and *Vertecs*, 158 Wn.2d at 577-578). A cause of action for breach of contract accrues upon breach, not discovery. *Vertecs*, 158 Wn.2d at 577-78; *Taylor*, 64 Wn.2d at 538; *Cornell*, 78 Wash. at 665; and *Kinney*, 150 Wn. App. at 193. In sum, a contention that actions constituting breach of contract were concealed does not invoke the discovery rule.

Additionally, the statute of limitations for declaratory judgment concerning the lease is the six-year statute of limitations for breach of contract, as the gravamen of the dispute between the parties is based on an alleged breach of a written contract, as acknowledged by Schreiner before

⁸ Judge Altman correctly noted at the Plaintiff’s reconsideration hearing that “fraud was not pled.” (RP Hr’g Tr. 33:25, August 16, 2011.) Schreiner has admitted fraud was not pled. (CP 643:21-23 (“the complaint does not seek such relief”); Appellant’s Br. at 35 (“Here, Schreiner Farms did not plead the nine elements of a traditional fraud action.”).)

the trial court. (RP Hr’g Tr. 15: 9-12, July 19, 2011.) *Reid*, 124 Wn. App. at 122 (“Where ... a special statute of limitation applies, even a declaratory judgment action is subject to the same statutory limitation.”); *Federal Way*, 62 Wn. App. at 537. There is not more than one analogous statute of limitations in this case. Judge Altman acknowledged as much in the portion of his order that provides that, “This case sounds in contract.” (CP 737:20.)

Brutsche is distinguishable, as it involved a declaratory judgment challenge to zoning amendments that did not have a clearly applicable statute of limitations. The court applied by analogy a 30-day period for appeals from land-use decisions. *Brutsche*, 78 Wn. App. at 376-380. Unlike *Brutsche*, there is no need to fashion a limitations period by analogy in this case, as Schreiner's claims of breach based upon the January 2000 assignment by Nextel to Tower Asset Sub or the April 2000 license agreement by Tower Asset Sub/SpectraSite to Washington Oregon Wireless, are based on the Communications Site Lease Agreement, a written contract. The limitations period for written contracts is six years. RCW 4.16.040(1).

Similarly, Schreiner's reliance upon *Crisman v. Crisman*, 85 Wn. App. 15, 931 P.2d 163 (1997) is misplaced. In *Crisman*, the court correctly noted that, “Courts apply the discovery rule to two categories of

cases,” i.e., fraud (in which case the Legislature has memorialized the discovery rule in RCW 4.16.080(4)) and tort actions. *Crisman*, 85 Wn. App. at 20-21. Neither cause of action has been pled in this case. *Crisman* is inapposite.

D. Schreiner’s continuing breach theory was not timely raised below, and in any event is not applicable to these facts, nor is it otherwise supported by Schreiner’s authority.

Schreiner argues that Defendants’ acts constitute a continuing breach of contract that should serve to extend the six-year statute of limitations. (Appellant’s Br. at 39.) Schreiner did not raise this legal theory, either in opposition to Defendants’ motion for summary judgment (CP 267-280) or in opposition to Defendants’ motion for reconsideration (CP 633-639). Schreiner first raised this theory in its CR 59 Motion for Reconsideration (CP 745-748), which was improper. *Wilcox*, 130 Wn. App. at 241.

Even if considered, the continuing breach theory has no application to this case. Schreiner argued that "Defendants **began breaching** the use provision of the lease in 2000 and continued to breach the use provision through to the present." (CP 747 (emphasis added).) The rule is that a promise (or contract covenant) once breached commences the statute of limitations, notwithstanding the fact that the same alleged breach remains uncured. *E.g., Vertecs*, 158 Wn.2d at 578 (“a claim arising out of a

contract accrued on breach and not on discovery”); *Taylor*, 64 Wn2d at 538 (uncured breach for 21 years, 1940-1961).

A similar attempt to skirt settled precedent regarding accrual of contract-based claims was asserted in *Pinnacle Pizza Co., Inc. v. Little Caesar Enterprises, Inc.*, 598 F.3d 970 (8th Cir. 2010). In that case, plaintiff claimed Little Caesars had taken and used franchise material (the marketing concept of “Hot-N-Ready”) for more than six years, in breach of a franchise agreement. Little Caesars prevailed under Michigan’s six-year contract statute of limitations. Like Washington’s case law, “Under Michigan law, a breach of contract claim accrues when the breach occurs – even if the plaintiff is unaware of the breach.” *Id.* at 975.

Like Schreiner, Pinnacle argued that each day Little Caesars used the franchise material constituted a new breach and reset the statute of limitations. The *Pinnacle* court determined that a continuous breach would not reset the statute of limitations, but rather there would need to be subsequent distinct breaches. *Id.* at 974-975. The court further held:

Each subsequent use of “Hot-N-Ready” is merely more evidence of the original breach but not a new, distinct breach.

...

We thus conclude that if [Little Caesar] breached the franchise agreement, it did so once – the first time [Little Caesar] appropriated “Hot-N-Ready.” Pinnacle’s action for breach of contract, therefore, accrued when [Little Caesar] allegedly materially breached the contract. This breach

would have occurred before October 25, 1998. ““The fabric of the relationship once rent is not torn anew with each added use or disclosure, although the damage suffered may thereby be aggravated.””

Id. at 978-79 (citation omitted).

The Nebraska Supreme Court applied the same analysis in *Cavanaugh v. City of Omaha*, 580 N.W.2d 541 (Neb. 1998), where the City of Omaha allegedly breached a collective bargaining agreement by not giving the plaintiff notice of an opportunity for promotion. The plaintiff contended that there were four successive breaches, which reset the statute of limitations each time there was an alleged breach. The court held that “a cause of action in contract accrues at the time of the breach or failure to do the thing agreed to, irrespective of any knowledge on the part of the plaintiff or of any actual injury occasioned to him or her.” *Id.* at 544 (citation omitted). Further emphasizing the point, the court instructed that:

It is the nonperformance of the specific affirmative duty contained in the CBA which constituted the breach in this case, not the actions taken by the City subsequent to the breach and as a result of the breach. To hold otherwise would mean that every time the City acted with respect to the promotion examination and the list generated from that examination, there would be a new breach of the CBA. Such a holding would, in effect, obviate the occurrence rule.

Id. at 545-46.

To the same effect is *Liptrap v. City of High Point*, 496 S.E.2d 817 (N.C. App. 1998), which involved a November 1996 claim alleging that a

June 1992 city resolution freezing longevity payments violated a 1966 ordinance. The court held that the claim was barred by the two-year statute of limitations and rejected the plaintiffs' argument that "the 1966 ordinance imposed a continuing obligation" to make payments and that each failure to pay following the 1992 resolution "constituted separate breaches of contract, each of which triggered a new statute of limitations period." *Id.* at 818.

Generally, a cause of action accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises. ... In an action for breach of contract, the statute begins to run on the date the promise is broken. ... Plaintiff's cause of action accrued on 4 June 1992, the day the City Council passed the resolution freezing the amount of longevity pay and breached their contracts with plaintiffs, despite the fact that the 1966 ordinance imposed on the City the obligation to make increased payments in accordance with the schedule contained in that ordinance. We do not consider the subsequent refusals of the City to pay additional amounts to those plaintiffs reaching greater increments of service as a series of multiple breaches. The effect of the subsequent refusals "is only aggravation of the original injury."

...

Once plaintiffs' cause of action accrued, plaintiffs had two years within which to file suit. Since they failed to do so, their action is barred by the statute of limitations.

Id. at 819, 822.

Here, Schreiner's cause of action for breach of contract accrued, if at all, in early 2000 when the assignment, licensing and installation of the second array occurred.

Schreiner's cited authority of *James S. Black & Co., Inc. v. F.W. Woolworth Co.*, 14 Wn. App. 602, 544 P.2d 112 (1975) is factually and legally distinguishable.

First, *Black* did not purport to decide any issue of the statute of limitations for continuing breach under Washington law. Rather, *Black* (in allowing a claim for contract damages incurred more than six years before the suit was brought) specifically noted that the tenant had failed to take exception to a jury instruction “that under the lease plaintiff’s claim for failure to keep in repair may be brought within six years after the time for surrender of the premises,’ ... [thus] it became the law of the case.” *Black*, 14 Wn. App. at 610, n.6. The “law of the case” doctrine limits the application of the legal principles announced to the parties to that litigation. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). *Black* involved breaches causing damages outside the six-year statute of limitations, where the defendant failed to take exception to the jury instruction, making it liable for damages outside the statute of limitations. *Black* does not hold or establish, as a matter of Washington case law, that actions for breach of contract need not be brought within six years of when the breach first occurs. Nor has *Black* been cited by any subsequent Washington case for that proposition.

Second, *Black* involved a covenant to repair where, "The general rule is that a covenant to make repairs is not breached until the expiration of the term." *Black*, 14 Wn. App. at 610 (citing *Nelson v. City of Seattle*, 180 Wash. 1, 33, 38 P.2d 1034 (1934)). *Black* does not purport to establish when contract breaches accrue outside the context of covenants to repair and surrender of leased premises.

Here, no claim was pled for a breach of a covenant to repair. Rather, Schreiner's claims of breach arise from actions that occurred in 2000.

E. Schreiner's equitable estoppel theory is improperly argued for the first time on appeal. Furthermore, Schreiner does not support the argument by citation to the record.

Schreiner argues for the first time on appeal that Defendants are "equitably estopped from asserting the statute of limitations" defense. (Appellant's Br. at 41.) Only the evidence and issues timely called to the attention of the trial court may be considered on appeal of a summary judgment; issues raised for the first time on appeal will not be considered. *Mithoug*, 128 Wn.2d at 462; *City of East Wenatchee v. Douglas County*, 156 Wn. App. 523, 530, 233 P.3d 910 (2010); RAP 2.5(a); RAP 9.12.

A search of the 864 pages that comprise the Clerk's Papers for the words "estoppel" and "estopped" reveals that they cannot be found in any context related to an issue raised by Schreiner. Notwithstanding,

Defendants provide the following limited response to Schreiner's equitable estoppel argument.

After citing the cases defining its equitable estoppel argument, Schreiner further argues that the Defendants “induced Schreiner Farms not to inspect the property or otherwise inquire whether there had been a default by secretly assigning rights” and that “‘consent’ was superficially obtained,” merely referring to the record at CP 339 (Appellant’s Br. 41-42.). This document, the letter from SpectraSite to Schreiner dated March 3, 2000, is not a secret inducement of any kind. This letter provides that, “By signing below, Landlord approves the licensing of tower and ground space and easement(s) by SpectraSite to [WOW]” (emphasis added) and, “If you have any additional questions, please do not hesitate to call me” The signature space is headed, “ACKNOWLEDGEMENT AND CONSENT.” (Capitalization in original.) Immediately below this header, the signature line is prefaced, “Consent to the License Agreement is hereby acknowledged.” (CP 339.) Schreiner points to no other evidence in the record supporting the inducement or equitable estoppel argument.

Defendants respectfully submit that there is no basis for this Court to consider Schreiner's newly raised equitable estoppel argument as part of this appeal, given that it was not raised below, the dearth of supporting evidentiary proof, and the express terms of Schreiner's consent. The seven

plus years of notices, requests for a replacement memorandum of lease and enclosures that include the actual assignment documents and license to Washington Oregon Wireless are far from secret.

VII. DEFENDANTS' CROSS-APPEAL

A. Defendants' Assignment of Error on Cross-Appeal.

The trial court erred in finding that there were material issues of fact concerning Schreiner's claims of breach. (CP 732.) Given the claims pled, Schreiner's requests for relief, and real property rules, summary judgment should alternatively have been granted on the ground that there was no breach of the lease. (CP 92, 93, 732:10-14.) Each of the issues presented are based on Schreiner's claims in its First Amended Complaint and its Request for Relief (hereafter collectively the "Claim" or "Claims"). (CP 92, 93-94.)

B. Issues Pertaining to Assignment of Error for Cross-Appeal.

1. Use.

Whether Schreiner's Claim that Nextel's assignee Tower Asset Sub did not provide radio communication services should have been dismissed as a matter of law. ("Unauthorized use" Claim.) (CP 92:15-18, 93:15-18.)

2. Assignment.

Whether Schreiner's Claim that Nextel was not authorized to assign to Tower Asset Sub, Inc. under the lease should have been dismissed as a matter of law. ("Unauthorized assignment" Claim.) (CP 92:19-21, 93:15-18.)

3. Consent; License.

Whether Schreiner's Claim that it did not consent to Defendant SpectraSite Communications licensing tower and ground space to Washington Oregon Wireless should have been dismissed as a matter of law. ("Unknowing consent" Claim.) (CP 92:22-30, 93:19-23.)

4. Acceptance of Rent.

Whether timely payment of rent and Schreiner cashing rent checks for over seven years supports dismissal as a matter of law. (CP 120:4-6.)

VIII. SUMMARY OF ARGUMENT

Schreiner's three Claims (use, assignment, and unknowing consent) are subject to dismissal based on settled Washington real property law, timely payment of rent, and Schreiner cashing the checks for over seven years without protest or a reservation of rights.

IX. ARGUMENT

A. Washington law on lease provisions forecloses claims of breach.

1. Real property rules.

Restraints on alienation or restraints on use, assignment, and licensing are disfavored and strictly construed. Washington courts do not enforce them beyond their express terms. William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 6:24 (3d ed. 2000); and *Noon v. Mironski*, 58 Wash. 453, 455-56, 108 P. 1069 (1910).

The authorities are numerous to the effect that stipulations against an assignment of a lease, or against a subletting, are to be strictly construed. ... “Covenants of this description are construed by courts of law with the utmost strictness, to prevent the restraint from going beyond the express stipulation.” ... “Restrictions of this character ... are, it is said, to be construed strictly and a particular mode of alienation is ... not to be regarded as prohibited, unless it is ‘by words which admit of no other meaning.’” Accordingly, a covenant or condition not to assign is not broken by the making of a sublease, and ... the weight both of reason and authority is to the effect that a covenant not to sublet is not broken by an assignment.” A marked and well-recognized distinction exists between a covenant against an assignment of the entire lease, and a covenant against the subletting of a portion of the premises. An expressed covenant against the one privilege will not restrain the lessee from enjoying or exercising the other.

Burns v. Dufresne, 67 Wash. 158, 161, 121 P. 46 (1912) (emphasis added) (citations omitted). Affirming precedent, *Burns* cited *Cuschner v. Westlake*, 43 Wash. 690, 86 P. 948 (1906). *Cuschner* held that a lease that

prohibited subletting of the entire premises without written consent of the lessor did not limit or prevent subletting of a portion of the premises. *Cuschner*, 43 Wash. at 695-696. Given the precedent established in *Burns* and *Cuschner*, the Washington State Supreme Court subsequently ruled that Washington has “adopted the generally accepted view that prohibitions in leases against assignments and against subletting are not looked upon with favor by the courts, and will be strictly construed; and a prohibition in one of these respects will not amount to a prohibition in the other respect.” *Willenbrock v. Latulippe*, 125 Wash. 168, 172, 215 P. 330 (1923) (citation omitted).

Washington has retained its “strong policy against restraints on the alienation of property interests.” *E.g.*, *Ernst Home Center, Inc. v. Sato*, 80 Wn. App. 473, 486, 910 P.2d 486 (1996) (landlord declined to consent to assignment of commercial lease by Ernst Home Center to Value Village).

As shown below, the foregoing precedent supports dismissal of each of Schreiner's remaining three claims, related to use, assignment and licensing, as a matter of law.

2. Assignee Tower Asset Sub's activities were not an "unauthorized use".

A use that is not expressly prohibited is permitted. *Stoebuck & Whitman*, *supra* §6.24, citing *Noon v. Mironski*, 58 Wash. at 454-55. The

express terms of the Lease use provision in the instant case are: “The Premises *may* be used by Lessee for *any activity* in connection with the provision of a radio communications facility from which Lessee can provide radio communications services specific to Lessee’s operations.” (CP 328 (emphasis added); and App. 1.) The use of “may” and “any activity in connection” is dispositive of Schreiner's use Claim. (CP 92:15-18, 93:15-18, 328.) “May” is considered “permissive.” *Yesler Estate, Inc. v. Continental Distributing Co.*, 99 Wash. 480, 482, 169 P. 967 (1918) (“May” in a use clause creates “permissive” and not “restrictive” use.). *See also Benjamin Franklin Thrift Stores v. Jared*, 192 Wash. 252, 73 P.2d 525 (1937) (holding that nothing in the lease expressly prohibited operating a competing meat market within 200 feet of the premises and competing with the landlord, therefore opening a meat market within 200 feet was permitted). “[C]ourts ... limit the scope of [use] restrictions by strict or literal reading.” Stoebuck & Whitman, *supra* § 6.24. Given the disfavor for restricting a lessee’s use, Professor Stoebuck instructs, “Thus, a landlord who would limit uses to, say, a grocery and delicatessen should insure that the tenant covenants to use the premises ‘only’ for those purposes ... ‘and no other purposes.’” *Id.*

Schreiner admits changing terms in the use provision, but not changing or asking that the permissive terms be removed. (CP 172;

Schreiner Dep. 93:8-17.) Schreiner also admits that it did not investigate Nextel's operations in 1998 or 1999, the time period in which the Lease was negotiated and signed. (CP 172; Schreiner Dep. 93:23-94:13.) At the trial court level, Defendants proved that Nextel's operations included ownership, operation and maintenance of radio communications facilities in 1998 and 1999, just like the subject site has been utilized throughout the term of the Lease. (CP 130-132; and 443.)

Defendants also established that the only named Defendant-assignee, Tower Asset Sub, provided radio communications services. (CP 131-132, 137, 141, 439, 528.) Defendants also affirmatively proved that the non-assignee Defendants provided radio communication services. (CP 130-132, 137, 141-142, 371 (Nextel, original lessee, and WOW), 525 (American Tower, Inc., alleged parent of SpectraSite), 531 (SpectraSite Communications, parent of Tower Asset Sub).) In response to summary judgment, Schreiner did not controvert with competent evidence that Tower Asset Sub (the Defendant-assignee in Schreiner's first Claim) did not provide "radio communications services." (CP 92:15-21, 93:15-18, 131-132, 137, 141-142 439, 528.)

In sum, owning, operating, and managing a radio communications facility are radio communications services and within the permissive use terms of § 2 of the Lease. Respectfully, it was error for the trial court to

conclude that questions of material fact remained as to the Claim for unauthorized use. (CP 92:15-18, 93:15-18, 732.)

3. The assignment to Tower Asset Sub was not "unauthorized"; "Assignment" and "Notice" terms.

Schreiner argues that “[e]ach of the ‘assignments’⁹ was in violation of the Ground Lease in that Nextel did not actually assign ‘all’ of ‘its *rights* and obligations’ but only licensed or subleased, without the knowledge and consent of Schreiner Farms, the Power Pole .”¹⁰ (Appellant’s Brief at 12 (emphasis added).) In its First Amended Complaint, Schreiner claims that, “A controversy exists between Plaintiff and Defendants as to whether Defendant Nextel was authorized to assign the lease to Defendant Tower Asset [referring to Tower Asset Sub], which does not provide radio communication services.” (CP 92:19-21.) Schreiner requests that the court declare that, “Defendant Nextel was not authorized to assign the lease to Defendant Tower Asset because Defendants American Tower, SpectraSite [Communications] and Tower Asset do not provide radio communication services ... ” (CP 93:15-18.)

⁹ The assignments Schreiner identifies here were simultaneous, successive assignments by Nextel to "Tower Parent Corp." then to "Tower Asset Sub, Inc." (CP 423-431.)

¹⁰ By way of clarification, “Power Pole” is the Plaintiff’s term, which the Defendants respectfully submit does not accurately describe the leased Premises, which is defined in § 1 of the Lease Agreement (CP328.).

The express terms of § 14 of the Lease provide, “Lessee may assign this Agreement to an entity upon written notification to Lessor by Lessee, subject to the assignee assuming all of Lessee’s obligations herein.” (CP 330 (emphasis added); App. 1.)

a. Restraint requiring assignment of all rights: While this is a new and untimely Claim, there is no §14 lease term that Lessee is obligated to assign “all of its *rights* and obligations,” as Schreiner now argues. (Appellant’s Br. at 12 (emphasis added).)¹¹ Schreiner acknowledged this in its First Amended Complaint, when it submitted that the Lessee could assign, subject to the assignee assuming the obligations under the lease. (CP 91:16-18.) A covenant not to assign all parts of the premises will not prevent assignment of only one part. *Burns v Dufresne*, 67 Wash. at 161; *Cuschner v. Westlake*, 43 Wash. at 695-96; and *Willenbrock v. Latulippe*, 125 Wash. at 172. In sum, in the absence of an express term requiring the lessee to assign all of its rights, in addition to “the assignee assuming all of Lessee’s obligations,” Washington real property law forecloses Schreiner from imposing an added restraint or term limiting alienation. Relatedly,

¹¹ Defendants object and do not concede that Plaintiff can add a new claim such as this. Defendants have consistently maintained that Plaintiff may only advance claims and requests for relief pled in its First Amended Complaint. This claim was not pled, and by pointing out the legal futility of this new claim, Defendants do not intend to waive the lack of pleading and untimeliness.

the assignee's acceptance of obligations under the Lease has never been questioned by Schreiner.

b. Use: Defendant Tower Asset Sub's operations, as well as those of other Defendants, is addressed in § IX.A.2. above. Tower Asset Sub's operations were radio communications services and the services it provided from the Premises were specific to its operations.

c. Notice: The First Amended Complaint makes no claim that there was a breach of the notice provision. (CP 92-94.) The only assignment-based Claim is whether Nextel was authorized to assign to Defendant Tower Asset Sub, given the argument that Tower Asset Sub did not provide radio communications services. (CP 92:15-21, 93:15-18.) As shown, Schreiner was provided with an abundance of notices of assignment.

For example, Schreiner was notified by letter on January 20, 2000 that the lease was assigned to Tower Asset Sub, which did business as SpectraSite Communications, and that Tower Asset Sub was an affiliate of Nextel. (CP 159-160, 187; Schreiner Dep. 41:13-43:11; App. 2.) The notice also informed Schreiner that, "You should experience little change, if any, as a result of this restructuring of Nextel's tower assets," and that the name on the rent checks would change to SpectraSite. (*Id.*) "The contract [sic] information of [Tower Asset Sub] for the purpose of the

giving of notices under the Lease is ... ” (*Id.*) Additionally, Schreiner was notified, “If you have any questions or concerns regarding this notice, please send a letter to Nextel at” (*Id.*)

Within a month, Schreiner was given a notice directly from SpectraSite Communications, again describing its relationship as a d/b/a for Tower Asset Sub and explaining that SpectraSite Communications was “a leading owner and operator of communications towers for the wireless telecommunications industry.” (CP 160-161, 188; Schreiner Dep. 44:15-47:11; App. 2.)

On March 3, 2000, SpectraSite Communications again wrote to Schreiner, recapped the prior assignment, and requested consent to license “tower and ground space and easement(s)” to Washington Oregon Wireless, under § 14 of the Lease.¹² (CP 161, 189; Schreiner Dep. 47:15-49:21; App. 2.) On March 10, 2000, Schreiner signed and gave written consent. This was within seven months of having signed the lease (August 1999) and seven days after being requested to provide consent. (*Id.*) Schreiner had no questions about any part of the notice and consent. (*Id.*)

On May 23, 2001, SpectraSite wrote to Schreiner and requested a replacement memorandum of lease, as SpectraSite had not been able to

¹² Washington Oregon Wireless was inadvertently referred to as Western Oregon Wireless. See footnote 4, *supra*.

locate the original. (CP 164, 204-235; Schreiner Dep. 58:2-59:12; App. 2.) The May 23rd letter noted an enclosure. (CP 164, 165; Schreiner Dep. 58:2-60:21, 62:21-63:18.) The enclosure included a copy of the actual assignment to Tower Asset Sub (as distinguished from simply notice of assignment). (CP 212-235; App. 2.) In part, the assignment states that it “contemplates, inter alia, the conveyance, assignment, transfer and delivery of Nextel’s tower assets, and the continuing lease by Nextel of certain ground and/or platform space on such tower assets ... ” (CP 224.) Schreiner admits it was likely read. (CP 165; Schreiner Dep. 63:5-10.)

The notices and consent highlighted above are only a portion of the numerous notices provided to Schreiner over the seven plus years that elapsed before it first raised a question in April 2007. From August 1999 to April 2007, Schreiner was repeatedly given a toll free number and asked to call or write if there was a question. (CP 187, 188, 189, 203, 204, 205; App. 2.) Schreiner acknowledges that, at the same time, it timely received and cashed every rent check, with out objection, protest or a call to any of the Defendants. (*Id.*, CP 160, 161, 165, 166, 168, 170, 241-242; Schreiner Dep. 43:11, 47:3-7, 49:4-21, 65:1-13, 67:13-16, 69:3-17, 75:15-76:25, 82:1-21.)

In sum, Washington real property lease rules foreclose imposing a non-express restraint. (CP 92:19-21, 93:15-18.)

4. Schreiner gave written consent to the license to Washington Oregon Wireless; “License” and “Consent” terms.

Section 14 of the Lease expressly allows subletting or licensing of all or a portion of the leasehold with consent. (CP 330.) In deposition, Joe Schreiner admitted that the Lessee can sublet or license a portion of the premises if the Lessor gives consent. (CP 171; Schreiner Dep. 86:6-18, 87:4-8.) With that admitted understanding, Schreiner signed, gave written consent, and specifically “approve[d] the licensing of tower and ground space and easement(s) by SpectraSite Communications to [Washington] Oregon Wireless, Inc.” (CP 161, 169, 189 (emphasis added); Schreiner Dep. 48:14-19, 81:21-25.)

The “subletting” and “licensing” terms of Section 14 make no distinction between consent for subletting and consent for a license. (CP 330; App. 1). There is also no express term for the form or content of a request for consent to sublet or license. (*Id.*) One hundred years of precedent disfavoring restraints on alienation and forbidding restrictions that are not express forecloses the contention that a landlord is entitled to a particular type of information where the lease did not expressly provide for it. *Ernst Home Center v. Sato*, 80 Wn. App. at 482 n.8, 486. It deserves further emphasis that SpectraSite Communications’ March 3, 2000 letter requesting Schreiner's consent invited, “If you have any additional

questions, please do not hesitate to call me.” (CP 189.) Contrary to the arguments presented in Schreiner's appeal, Schreiner admitted that it had no questions about the consent to license that was being requested and which it provided on March 10, 2000. (CP 161; Schreiner Dep. 47:12-49:3.)

Moreover, in response to a question from its lawyer, Schreiner admitted to receiving the actual Tower Attachment License (as distinguished from the March 3, 2000 request for consent to license) and likely reading it. (CP 162; Schreiner Dep. 51:1-53:9.) The license Schreiner received described Washington Oregon Wireless' use, and illustrated both its antennas and equipment and those of Nextel by name. (CP 190-192 (Recitals, §§ 1, 2, 8, 11), 198-200 (Ex. A-1); App. 2.) In sum, based on real property rules, Schreiner's Claims relating to licensing and consent should have been dismissed as a matter of law. Respectfully, the trial court erred when it found that questions of material fact remained concerning Schreiner's claim of unknowing consent to the license. (CP 92:22-30, 93:19-28, 732:10-14.)

B. Washington law on past performance and acceptance of lease payments forecloses claims of breach.

For over seven years after Schreiner's March 10, 2000 Acknowledgement and Consent, the Lessees/assignees performed by

remitting rent as provided in § 4 of the Lease. (CP 149, 160, 168, 241-242; Schreiner Dep. 43:3-18, 75:15-76:1.) Schreiner cashed the rent checks without protest or a reservation of rights. (CP 149, 168, Schreiner Dep. 75:19-22.)

For over seven years, Defendants wrote to Schreiner about the assignments and use of the leased premises. (See § III.A., *supra*; App. 2.) Schreiner gave no notice and did not raise a question until its counsel wrote to American Tower Corporation on April 25, 2007, in an attempt to obtain increased rent. (CP 388-390.) From August 1999, when the Lease commenced, to 2007, Defendants relied on the Lease terms as written, invested in the site, relied on Schreiner's signed consent that was given March 10, 2000, and contracted with users of radio communications services.

Under Washington case law, “When one party performs under contract, and the other party accepts his performance without objection, it is assumed that such performance was the performance contemplated by the contract.” *Evans v. Laurin*, 70 Wn.2d 72, 76, 422 P.2d 319 (1966) (citing 17A C.J.S. *Contracts* §590, at 1144). A plaintiff cannot accept over seven years of performance under a contract and then assert a breach of contract claim based upon a provision that was allegedly not performed according to its letter during the course of performance. *Douglas*

Northwest, Inc. v. Bill O'Brien & Sons Const., Inc., 64 Wn. App. 661, 675-76, 828 P.2d 565 (1992). When a plaintiff does not mention or seek to enforce certain provisions of a contract during an extended period of time and the defendant timely pays, the plaintiff is deemed to have waived a breach of contract claim. *Id.* at 676-77; *see also Field v. Copping, Agnew & Scales*, 65 Wash. 359, 362, 118 P. 329 (1911).

Respectfully, the trial court erred when it ordered that there were questions of material fact concerning the Schreiner's claims of breach. (CP 92:15-30, 93:15-27, 732:10-14.) Schreiner's more than seven years of acceptance of performance and cashing of rent checks provide an additional basis to affirm dismissal of this case.

X. COSTS

Without presuming the outcome of the subject appeal, the Defendants respectfully request an award of costs and recoverable fees in accordance with and pursuant to the court rules, which provide, in relevant part, that “the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2; *see also Kirby v. City of Tacoma*, 124 Wn. App. at 475. The Defendants further reserve the opportunity to file a cost bill to set forth their costs and fees that are

recoverable under Washington law and the relevant rules of appellate procedure.

XI. CONCLUSION

Based on the foregoing argument and authority, the Defendants respectfully submit that the trial court's order granting summary judgment dismissal of Schreiner's claims against the Defendants (CP 734-38) was appropriate because they were time-barred by the six-year statute of limitations for written contracts.

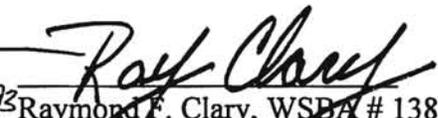
Alternatively, Defendants respectfully submit that long-standing Washington precedent in the area of real property and lease jurisprudence provides an additional basis for affirming the trial court's decision. The express language of the Lease does not restrain or prohibit assignment, licensing, and use of the premises, as challenged by Schreiner in its First Amended Complaint. Because of this, Defendants respectfully ask this Court to find that the trial court erred when it ordered that “[t]here are questions of fact concerning Plaintiff’s claims of breach of the lease as pled in the Complaint ... ” (CP 732:11-12), and hold that real property rules provide an alternative basis to affirm the grant of summary judgment.

Finally, well-settled Washington case law governing principles of payment and acceptance require that this Court dismiss Schreiner's claims of breach.

DATED this 13 day of April, 2012

MEYER, FLUEGGE & TENNEY, P.S. ETTER, M^cMAHON, LAMBERSON, CLARY & ORESKOVICH, P.C.


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APPENDIX 1 – ENLARGED EXCERPTS OF LEASE

The following Appendix is provided to the Court as a means of facilitating review of Lease excerpts and other portions of the Clerk's Papers. The selected Lease provisions below consist of actual reproductions of the Clerk's Papers which are unfortunately of fairly poor quality and are followed by a more legible typed version.

COMMUNICATIONS SITE LEASE AGREEMENT (GROUND)

This Communications Site Lease Agreement (Ground) ("Agreement") is entered into this 28 day of NOV, 1999.

...

1. Premises. Lessor is the owner of a parcel of land (the "Land") located in the County of Klickitat, State of Washington, commonly known as Assessor's Parcel No. 02-13-0900-0000. The Land is more particularly described in Exhibits A-1 and A-2 annexed hereto. Lessor hereby leases to Lessee and Lessee leases from Lessor, approximately two-thousand (2,000) square feet of the Land and all access and utility easements, if any (the "Premises"), as described in Exhibit B annexed hereto.

(CP 177, 328.)

1. Premises. Lessor is the owner of a parcel of land (the "Land") located in the County of Klickitat, State of Washington, commonly known as Assessor's Parcel No. 02-13-0900-0000. The Land is more particularly described in Exhibits A-1 and A-2 annexed hereto. Lessor **hereby leases to Lessee and Lessee leases from Lessor, approximately two-thousand (2,000) square feet of the Land and all access and utility easements, if any (the "Premises"), as described in Exhibit B annexed hereto.** (Emphasis added).

2. Use. The Premises may be used by Lessee for any activity in connection with the provision of a radio communications facility from which Lessee can provide radio communications services specific to Lessee's operations. Lessor agrees to cooperate with Lessee, at Lessee's expense, in making application for and obtaining all licenses, permits and any and all other necessary approvals that may be required for Lessee's intended use of the Premises.

(CP 177, 328.)

2. Use. The Premises **may** be used by Lessee for **any activity** in connection with the provision of a **radio communications facility** from which Lessee can provide **radio communications services specific to Lessee's operations**. Lessor agrees to cooperate with Lessee, at Lessee's expense, in making application for and obtaining all licenses, permits and any and all other necessary approvals that may be required for Lessee's intended use of the Premises. (Emphasis added).

6. Facilities; Utilities; Access.

(a) Lessee has the right to erect, maintain and operate on the Premises radio communications facilities including, without limitation, a monopole and foundation, utility lines, transmission lines, air conditioned equipment shelter, electronic equipment, radio transmitting and receiving antennas, supporting equipment, possible future generator, and structures thereto ("Lessee Facilities"). No additional structures beyond those proposed and depicted in Exhibit B can be considered part of this Agreement unless previously approved by Lessor in writing, which approval shall not be unreasonably withheld, but may cause Rent to change. In connection therewith, Lessee has the right to do all work necessary to prepare, maintain and alter the Premises for Lessee's business operations and to install transmission lines connecting the

(CP 177, 328.)

6. Facilities; Utilities; Access.

(a) **Lessee has the right to erect, maintain and operate on the Premises radio communications facilities including, without limitation,** a monopole and foundation, utility lines, transmission lines, air conditioned equipment shelter, **electronic equipment**, radio transmitting and receiving **antennas, supporting equipment**, possible future generator, and structures thereto ("Lessee Facilities"). No additional structures beyond those proposed and depicted in **Exhibit B** can be considered part of this Agreement unless previously

approved by Lessor in writing, which approval shall not be unreasonably withheld, but may cause Rent to change. In connection therewith, Lessee has the right to do all work necessary to prepare, maintain and alter the Premises for Lessee's business operations ... (Emphasis added).

10. Termination. This Agreement may be terminated without further liability on thirty (30) days prior written notice as follows: (i) by either party upon a default of any covenant or term hereof by the other party, which default is not cured within sixty (60) days of receipt of written notice of default, provided that the grace period for any monetary default is ten (10) days from receipt of notice; or (ii) by Lessee for any reason or for no reason, provided Lessee delivers written notice of early termination to Lessor no later than thirty (30) days prior to the Commencement Date; or (iii) by Lessee if it does not obtain or maintain any license, permit or other approval necessary for the construction and operation of Lessee Facilities; or (iv) by Lessee if Lessee is unable to occupy and utilize the Premises due to an action of the FCC, including without limitation, a take back of channels or change in frequencies; or (v) by Lessee if Lessee determines that the Premises are not appropriate for its operations for economic or technological reasons, including, without limitation, signal interference.

(CP 178, 320.)

10. Termination. This Agreement may be terminated without further liability on thirty (30) days prior written notice as follows: (i) by either party upon a default of any covenant or term hereof by the other party, which default is not cured within sixty (60) days of receipt of written notice of default, provided that the grace period for any monetary default is ten (10) days from receipt of notice; or (ii) **by Lessee** for any reason or for no reason, provided Lessee delivers written notice of early termination to Lessor no later than thirty (30) days prior to the Commencement Date; or (iii) **by Lessee** if it does not obtain or maintain any license, permit or other approval necessary for the construction and operation of Lessee Facilities; or (iv) **by Lessee** if Lessee is unable to occupy and utilize the Premises due to an action of the FCC, including without limitation, a take back of channels or change in frequencies; or (v) **by Lessee** if Lessee determines that the Premises are not appropriate for its operations for economic or technological reasons, including, without limitation, signal interference. (Emphasis added).

14. Assignment and Subletting. Lessee may assign this Agreement to an entity upon written notification to Lessor by Lessee, subject to the assignee assuming all of Lessee's obligations herein. Upon assignment, Lessee shall be relieved of all-future performance, liabilities, and obligations under this Agreement. Lessee shall not have the right to sublet or license the Premises or any portion thereof without Lessor's consent. Lessor may assign this Agreement upon written notice to Lessee, subject to the assignee assuming all of the Lessor's obligations herein, including but not limited to, those set forth in Paragraph 10 ("Waiver of Lessor's Lien") above. This Agreement shall run with the property and shall be binding upon and inure to the benefit of the parties, their respective successors, personal representatives, heirs and assigns. Notwithstanding anything to the contrary contained in this Agreement, Lessee may assign, mortgage, pledge, hypothecate

(CP 179, 330.)

14. Assignment and Subletting. **Lessee may assign this Agreement to an entity upon written notification to Lessor by Lessee, subject to the assignee assuming all of Lessee's obligations herein.** Upon assignment, Lessee shall be relieved of all future performance, liabilities, and obligations under this Agreement. **Lessee shall not** have the right to sublet or **license** the Premises or **any portion thereof without Lessor's consent.** Lessor may assign this Agreement upon written notice to Lessee, subject to the assignee assuming all of the Lessor's obligations herein, including but not limited to, those set forth in Paragraph 10 ("Waiver of Lessor's Lien") above. **This Agreement shall** run with the property **and shall** be binding upon and **inure to the benefit of** the parties, their respective **successors, personal representatives, heirs and assigns. ...** (Emphasis added).

18. Miscellaneous.

(a) This Agreement constitutes the entire agreement and understanding between the parties, and supersedes all offers, negotiations and other agreements concerning the subject matter contained herein. Any amendments to this Agreement must be in writing and executed by both parties.

(c) This Agreement shall be binding on and inure to the benefit of the successors and permitted assignees of the respective parties.

(h) In any case where the approval or consent of one party hereto is required, requested or otherwise to be given under this Agreement, such party shall not unreasonably delay or withhold its approval or consent.

(i) All Riders and Exhibits annexed hereto form material parts of this Agreement.

(CP 179-180, 330-331.)

18. Miscellaneous

(a) This Agreement constitutes the entire agreement and understanding between the parties, and supersedes all offers, negotiations and other agreements concerning the subject matter contained herein. Any amendments to this Agreement must be in writing and executed by both parties.

...

(c) This Agreement shall be binding on and inure to the benefit of the successors and permitted assignees of the respective parties.

...

(h) In any case where the approval or consent of one party hereto is required, requested or otherwise to be given under this Agreement, such party shall not unreasonably delay or withhold its approval or consent.

(i) All Riders and Exhibits annexed hereto form material parts of this Agreement. (Emphasis added).

EXHIBIT B
DESCRIPTION OF PREMISES

Notes:

1. This Exhibit may be replaced by a land survey of the Premises once it is received by Lessee.
2. Setback of the Premises from the Land's boundaries shall be the distance required by the applicable governmental authorities.
3. The type, number and mounting positions and locations of antennas and transmission lines are illustrative only. Actual types, numbers, mounting positions may vary from what is shown above.

(CP 183, 334.)

EXHIBIT B
DESCRIPTION OF PREMISES

[annotated diagram removed]

Notes:

1. This Exhibit may be replaced by a land survey of the Premises once it is received by Lessee.
2. Setback of the Premises from the Land's boundaries shall be the distance required by the applicable governmental authorities.
3. **The type, number and mounting positions and locations of antennas and transmission lines are illustrative only.** Actual types, numbers, mounting positions may vary from what is shown above. (Emphasis added).

APPENDIX 2 – NOTICES TO SCHREINER

The following Appendix is meant to provide citations to the record for portions of Schreiner's Statement of the Case that argue unsubstantiated allegations of fraudulent concealment, despite the absence of a claim for fraud in the First Amended Complaint. The following list of documents shows the notices to Schreiner of the lease assignments and licensing:

1. January 20, 2000 Nextel letter to Schreiner: lease assignment to Tower Asset Sub Inc. DBA SpectraSite. (CP 187)(Emphasis added.)
2. February 14, 2000 SpectraSite letter to Schreiner: lease assignment to Tower Asset Sub Inc. DBA SpectraSite. (CP 188)(Emphasis added.)
3. March 3, 2000 SpectraSite letter to Schreiner: assignment to Tower Asset Sub Inc. and requesting consent to license to Washington Oregon Wireless. (CP 189)(Emphasis added.)
4. March 10, 2000: Schreiner consent to license to Washington Oregon Wireless. (CP 189)(Emphasis added.)
5. April 2000: Tower Attachment License to WOW. (CP 190-193, 195-196, 199-200)(Emphasis added.)
6. April 27, 2000: SpectraSite attorney letter to Schreiner: assignment to Tower Asset Sub Inc. (CP 203)(Emphasis added.)

7. May 23, 2001: SpectraSite letter to Schreiner: referencing and attaching the 2000 assignment documentation from Nextel to Tower parent Corp. to Tower Asset Sub Inc. (CP 204-206, 212-213, 224-225)(Emphasis added.)

8. September 14, 2005: American Tower/ SpectraSite letter to Schreiner: SpectraSite merged with American Tower. (CP 238-239) (Emphasis added.)

9. October 18, 2006: American Tower Corp. letter to Schreiner: Tower Asset Sub LLC is the lessee. (CP 243)(Emphasis added.)

10. January 18, 2007 American Tower Corp. letter to Schreiner: Tower Asset Sub LLC is the lessee. (CP 246)(Emphasis added.)

11. February 23, 2007 American Tower Corp. letter to Schreiner: lease assigned to American Tower Asset Sub LLC. (CP 259-260) (Emphasis added.)



SpectraSite

February 14, 2000

Schreiner Farms, Inc.
105 East 8th
Olympia, WA 98501

Re: Landlord Welcome Letter for Tower Site No.: WA-0022/Site Name:Murdock

Dear Schreiner Farms, Inc.:

Nextel has notified you of the transfer of its interest in the lease, tower and associated equipment to Tower Asset Sub, Inc. an affiliate of Nextel d/b/a SpectraSite. SpectraSite, based in Cary, NC, is a leading owner and operator of communications towers for the wireless telecommunications industry.

For inquiries about Site Administration (e.g. Lease Payments, Contractual Matters, etc.) please contact (8:00am – 5:00pm EDT):

SpectraSite Communications
100 Regency Forest Drive, Suite 400
Cary, NC 27511
(888) 498-3667
Attn: Property Manager

For inquiries about all types of Physical Site Maintenance please contact (8:00am – 5:00pm EDT):

SpectraSite Communications
100 Regency Forest Drive, Suite 400
Cary, NC 27511
(888) 498-3667
Attn: Property Manager

For After Hours and Emergencies (5:00pm – 8:00am EDT weekdays, weekends/holidays) call:

(888) 498-3667

Whenever you have an inquiry, please reference the following:

Tower Site No.: WA-0022
Tower Site Name: Murdock

For tax purposes we will need to have you complete the enclosed W-9 and return to SpectraSite. Since this is a legal requirement, it will ensure payments will not be delayed as well as correct reporting to the IRS.

Sincerely,

Margie Lee
Property Manager- West Region

Cc: Site Operations, A/P, File

SpectraSite Communications, Inc.

100 Regency Forest Drive, Suite 400 • Cary, NC 27511 • Tel 919.468.0112 • Fax 919.468.8522

www.SpectraSite.com

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EXHIBIT

3



WA-0203

SpectraSite

March 3, 2000

VIA OVERNIGHT MAIL

Joc Schreiner
Schreiner Farms, Inc.
105 East 8th
Olympia, WA 98501

Dear Mr. Schreiner,

Recently, you received a notice from Nextel Communications informing you that the Ground Lease ("Lease") between Schreiner Farms, Inc., a Washington corporation ("Landlord") and Nextel Communications of the Mid-Atlantic, was assigned to Tower Asset Sub, Inc ("Tower Sub"). Tower Sub is a wholly owned subsidiary of SpectraSite Communications, Inc. and an affiliate of Nextel Communications. Tower Sub is the current Tenant under the Lease and owner of the communications tower located on the demised premises. SpectraSite Communications is the manager and agent for Tower Sub.

Pursuant to Paragraph 14 of the Agreement, Lessee is required to receive Lessor's consent prior to licensing or subleasing the Premises. SpectraSite Communications is now requesting Landlord's consent to the licensing of the Premises to Western Oregon Wireless, Inc. ("WOW"). SpectraSite Communications will remain liable for rent payments and all terms and conditions of the Lease. WOW will also be subject to the terms and conditions of the Lease and the nature of the Premises will not be affected by such licensing.

By signing below, Landlord approves the licensing of tower and ground space and easement(s) by SpectraSite Communications to Western Oregon Wireless, Inc. Please return one original signed copy of this letter in the enclosed self-addressed envelope within ten business days of receipt. If you have any additional questions, please do not hesitate to call me at (919) 465-6709 or (919) 291-9627. Thank You.

Sincerely,

Jason Catalini, Esq.
SpectraSite Communications

ACKNOWLEDGEMENT AND CONSENT

Consent to the License Agreement is hereby acknowledged:

Schreiner Farms, Inc., a Washington corporation

By: [Signature]

Its: Pres

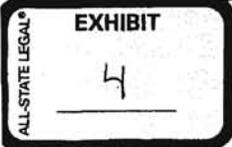
Date: 3/10/2000

SpectraSite Communications, Inc.

100 Regency Forest Drive, Suite 400 • Cary, NC 27511 • Tel 919.468.0112 • Fax 919.468.8522

www.SpectraSite.com

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THIS TOWER ATTACHMENT LICENSE AGREEMENT ("License") is executed this _____ day of _____, 2000 (which date is the date of last execution as between Licensor and Licensee), by and between SpectraSite Communications, Inc., ("Licensor"), and Washington Oregon Wireless, L.L.C. ("Licensee").

WHEREAS, Licensor desires to license unto Licensee certain space on a tower operated by Licensor upon which Licensee intends to mount certain of Licensee's antennas together with related and ancillary equipment, and certain ground space upon real property leased by Licensor upon which Licensee intends to install other equipment and devices; and

WHEREAS, Licensee desires to license from Licensor certain space on a tower operated by Licensor upon which Licensee intends to mount certain of Licensee's antennas together with related and ancillary equipment, and certain ground space upon real property leased by Licensor upon which Licensee intends to install other equipment and devices.

NOW THEREFORE, for and in consideration of the terms and mutual promises herein contained and for other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Licensor and Licensee agree as follows:

1. Premises. Licensor hereby grants to Licensee a License to install, maintain and operate Licensee's wireless communications equipment and appurtenances on a tower owned by Licensor ("Tower"), including antennas at a centerline height of 55' above ground level on the Tower, which is located on certain real property leased by Licensor more particularly described in Exhibit "A" attached hereto ("Property"); and to install, maintain, operate and remove Licensee's equipment cabinet or compound and related devices owned by Licensee on a 345 square foot portion of the Property at a location depicted on Exhibit "A-1" attached hereto (the space occupied by Licensee on the Property and the Tower hereinafter shall be referred to collectively as the "Premises"). Subject to limitations contained in the Prime Lease (as defined below), Licensor also grants Licensee rights of ingress, egress and utilities to the Premises (twenty-four (24) hours per day, seven (7) days per week during the Initial Term and any Renewal Term (as hereinafter defined in paragraphs 3 and 4) of this License over that real property described in Exhibit "B" attached hereto ("Easement").

2. Use. Licensee may use the Premises for the receipt and transmission of wireless communications signals. The use granted Licensee by this License shall be non-exclusive and limited in strict accordance with the terms of this License. Licensor shall have the right to continue to occupy the Property and to enter into lease and license agreements with others for the Property and the Tower in the sole discretion of Licensor. Licensee shall have no property rights or interest in the Premises or the Easement

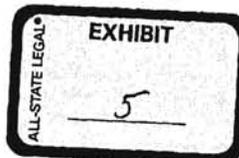
SpectraSite: Mwdoh/WA-0022
WOW: Mwdoh/WA0106

by virtue of this License. This License shall also be subject to the terms and continued existence of that certain Tower Site Lease Agreement for the Premises entered into between Nextel West Corporation, a Delaware corporation dba Nextel Communications, as predecessor-in-interest to Licensor and Shtreiner Farms, Inc., a Washington corporation, which is dated the 23rd day of August, 1999 a copy of which together with all amendments and addenda thereto (but subject to the redaction of financial terms) is attached hereto as Exhibit "C" ("Prime Lease"). Licensee covenants that it shall not commit any act which would result in a default or nonperformance with the Prime Lease. In the event that the Prime Lease requires the consent of the landlord under the Prime Lease to the making of this License, it shall be a condition precedent to the effectiveness of this License that Licensee obtains such consent, as Licensor deems necessary in its sole discretion. In the event that the Prime Lease expires or is terminated, this License shall terminate as between Licensor and Licensee on the effective date of termination of the Prime Lease and Licensor shall have no liability to Licensee as a result of the termination of this License. Licensor is under no obligation to extend the term of the Prime Lease or renew the Prime Lease. Licensor shall give Licensee written notice of such termination or expiration of the Lease as provided herein or as soon as practicable but no later than sixty (60) days prior to the date of an anticipated termination or expiration.

3. Initial Term. The Initial Term of this License shall be for a period of ten (10) years commencing on the date Licensee commences the installation of the Equipment (as defined in paragraph 8(b) below) but no later than thirty (30) days after the date of this License ("Commencement Date") and expiring on the tenth (10th) year anniversary of the Commencement Date ("Initial Term"). Licensee agrees to provide immediate written notice to Licensor of Licensee's commencement of the installation of the Equipment. Following the Commencement Date, the parties may acknowledge in writing their mutual understanding of the precise Commencement Date.

4. Renewal Terms. Licensee shall have the right to extend this License for three (3) additional five (5) year terms (each a "Renewal Term"). This License shall automatically renew for each successive Renewal Term unless Licensee notifies Licensor of Licensee's intention not to renew this License at least six (6) months prior to the end of the then existing term of this License. Each Renewal Term shall be on the same terms and conditions as set forth in this License except that consideration for this License shall increase as provided in paragraph 5(b).

5. Consideration. (a) Initial Term. During the Initial Term, Licensee shall pay, monthly to Licensor as consideration for this License the sum of One Thousand Six Hundred Fifty and No/100 Dollars (\$1,650.00) ("Fee"), subject to increase as provided in the following sentence. The Fee shall increase each year by an amount equal to four percent (4%) over the Fee payable for the immediately



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preceding year. The Fee shall be paid each month in advance. The first monthly payment shall be due on the Commencement Date. The Fee paid by Licensee to Licensor shall be due without set-off notice or demand from Licensor to Licensee. Any Fee or other sum not received by Licensor within fifteen (15) days of the date when due shall be subject to a late penalty of four percent (4%) of the amount which is overdue. (b) Renewal Term. In the event this License is renewed as provided for in paragraph 4, the Fee applicable to such Renewal Term shall be paid monthly in advance beginning on the first day of the respective Renewal Term and shall be subject to the same four percent (4%) annual increase described in paragraph 5(b) for the Initial Term. (c) If at any time during the primary term of this License or any renewal or extension thereof a tax or excise on rents, or other tax however described (except any franchise, estate, inheritance, capital stock, income or excess profits tax imposed upon Licensor) is levied or assessed against Licensor by any lawful taxing authority on account of Licensor's interest in this License or the rents or other charges reserved hereunder, as a substitute in whole or in part, or in addition to the general taxes described herein, Licensee agrees to pay to Landlord upon demand, and in addition to the rentals and other charges prescribed in this License, the amount of such tax or excise. In the event such tax or excise is levied or assessed directly against Licensee, then Licensee shall be responsible for and shall pay the same at such times and in such manner as the taxing authority shall require. (d) Any fee or other payment made by Licensee shall contain a notation of the applicable Licensor site number applicable to this License, which site number is WA-0022.

6. Conditions Precedent. Licensee's obligation to perform under this License shall be subject to and conditioned upon Licensee securing appropriate approvals for Licensee's intended use of the Premises from the Federal Communications Commission ("FCC"), the Federal Aviation Administration ("FAA") and any other federal, state or local regulatory authority having jurisdiction over Licensee's proposed use of the Premises. Licensee's inability (following all reasonable efforts) to successfully satisfy these conditions shall relieve Licensee from any obligation to perform under this License. Licensee shall act with due diligence to obtain and maintain all governmental approvals necessary for Licensee to perform under this License.

7. Warranty of Title and Quiet Enjoyment; Subordination. Licensor warrants that (i) Licensor leases the Property and operates the Tower, and (ii) Licensor has full right to make and perform this License subject to the terms, covenants and conditions of the Prime Lease. Upon Licensee's payment of the Fee and all other charges due hereunder, and otherwise complying with the terms hereof, Licensor shall ensure that Licensee may have quiet use and enjoyment of the Premises. This License shall be subordinate and inferior to any mortgage or lien which currently or hereafter encumbers the Property or the Tower.

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WOW: Murdoch/WA0106

Upon the request of Licensee, Licensor shall reasonably cooperate with Licensee, at Licensee's expense, in Licensee's efforts to obtain a non-disturbance agreement from the holder of any mortgage or deed of trust on the Property.

8. Improvements by Licensee. (a) Plans, Structural Analysis and RF Analysis. (i) Prior to the commencement of any construction or installation on the Premises by Licensee, Licensee shall furnish, for review and approval by Licensor, which approval may be withheld in Licensor's reasonable discretion, plans and specifications for such construction or installation of the improvements and Licensee shall not commence the construction or installation on the Premises until such time as Licensor has received written approval of the plans and specifications from Licensor. Licensee shall be responsible for paying in advance to Licensor the cost of any structural enhancements to be made to the Tower to accommodate the Equipment. Such structural enhancements shall become part of Licensor's Tower. (ii) Licensee shall conduct at Licensee's sole cost and expense a structural analysis and wind load analysis of the Tower which includes any existing loads (as well as the loads that third-party users have the right to place on the Tower) and the load of Licensee's antennas, cabling and appurtenances. (iii) Upon the written request of Licensor at any time during this License, Licensee shall conduct at Licensee's sole cost and expense a radio frequency interference analysis ("RF Analysis") of the Equipment with all other equipment which is on the Tower as of the Commencement Date. (iv) Licensee shall use the company of Licensor's choice for structural Analysis, RF Analysis and the design and construction of platforms, antenna systems, cable runs and any other modification of any type to the Premises and Licensee shall be solely responsible for and shall indemnify Licensor from all costs and expenses associated with these materials and services. (v) Licensee shall be responsible for securing all building permits from any and all applicable governmental authorities prior to the commencement of any construction or installation on the Premises. Copies of the construction permit issued to Licensee shall be provided to Licensor. (vi) Licensee shall use a construction firm approved by Licensor for any construction activities to be conducted by Licensee on the Property and the Easement and the installation of Licensee's equipment on the Tower. (b) Equipment. Licensee's communications system, including antennas, radio equipment and operating frequency, cabling and conduits, shelter and/or cabinets, and other personal property owned or operated by Licensee, which Licensee anticipates shall be located by Licensee on the Premises, is more particularly described on Licensee's collocation application, a copy of which is attached hereto as Exhibit "D" ("Equipment"). Licensor hereby grants Licensee reasonable access in the Tower and the Premises for the purpose of installing and maintaining the Equipment and appurtenances. Licensee shall be responsible for all site work to be done on the Premises pursuant to this License. Licensee shall provide all materials and shall pay for all

labor for the construction, installation, operation, maintenance and repair of the Equipment. Licensee shall not construct or install any equipment or improvements on the Premises other than which are described in Exhibit "D" or alter the radio frequency or operation of the Equipment without first obtaining the prior consent of Licensor which consent may be withheld by Licensor in Licensor's reasonable discretion. Licensee acknowledges that Licensor may charge additional fees for the installation of any equipment not listed on Exhibit "D". The Equipment shall remain Licensee's exclusive personal property throughout the term and upon termination of the License. Licensee shall have the right to remove all Equipment at Licensee's sole expense on or before the expiration or earlier termination of the License; provided, Licensee repairs any damage to the Property or the Tower caused by such removal. If Licensee does not remove the Equipment on or prior to the expiration or termination of this License or within 30 days thereafter, Licensee shall remove such Equipment within a reasonable period thereafter provided Licensee pays to Licensor 150% of the Fee in effect during such holdover period. (c) Compliance with Governmental Rules. All work shall be performed by Licensee or Licensee's employees, contractors or agents in a good and workmanlike manner. Licensor shall be entitled to require strict compliance with the plans and specifications approved by Licensor pursuant to paragraph 8(a), including specifications for the grounding of Licensee's equipment and antennas. All construction, installations and operations in connection with this License by Licensee shall meet with all applicable Rules and Regulations of the FCC, FAA and all applicable codes and regulations of the city, county, and state concerned. Licensor assumes no responsibility for the licensing, operation and maintenance of the Equipment. Licensee has the responsibility of carrying out the terms of Licensee's FCC license with respect to tower light observation and notification to the FAA if those requirements imposed on Licensee are in excess of those required of Licensor. Licensee covenants that the Equipment and the construction, installation, maintenance and operation thereof shall not denude the Tower or improvements or interfere with the use of the Tower by Licensor or pre-existing users on the Tower. (d) Post-Construction Drawings. Following the installation of its Equipment, Licensee shall provide Licensor with post-construction field drawings satisfactory to Licensor, highlighting any field changes made during installation and verifying the RAD center.

9. Utilities. All utility services installed on the Premises for the use or benefit of Licensee shall be made at the sole cost and expense of Licensee and shall be separately metered from Licensor's utilities. Licensee shall be solely responsible for extending utilities to the Premises necessary to serve its needs and for the payment of utility charges including connection charges and security deposits incurred by Licensee.

SpectraSite: Murdoch/WA-0022
WOW: Murdoch/WA0108

10. Taxes. Except as provided immediately below, Licensor shall pay all real property taxes Licensor is obligated to pay under the Prime Lease. Licensee shall reimburse Licensor for any increases in real property taxes which are assessed as a direct result of Licensee's improvements to the Premises. As a condition of Licensee's obligation to pay such tax increases, Licensor shall provide to Licensee the documentation from the taxing authority, reasonably acceptable to Licensor, indicating the increase is due to Licensee's improvements.

11. Interference. Licensee agrees to install equipment of types and radio frequencies which will not cause interference to communications operations being conducted from the Property or the Tower by Licensor or other occupants of the Property or the Tower which are in place as of the Commencement Date (including permitted modifications to the communications operations of third parties who, by the terms of pre-existing agreements have the right to modify their communication operations). Licensee also covenants that the equipment installed by Licensee shall comply with all applicable laws, ordinances and regulations including but not limited to those regulations promulgated by the FCC. In the event the Equipment causes such interference, Licensee will take the steps necessary to correct and eliminate the interference. If such interference cannot be eliminated within forty-eight (48) hours after receipt by Licensee of notice from Licensor describing the existence of the interference, Licensee shall temporarily disconnect the electric power and shut down the Equipment (except for intermittent operation for the purpose of testing, after performing maintenance, repair, modification, replacement, or other action taken for the purpose of correcting such interference) until such interference is correct. If such interference is not corrected within fifteen (15) days after receipt by Licensee of such prior written notice from Licensor of the existence of interference, this License shall then terminate without further obligation on either part except as may be specifically enumerated herein and Licensee agrees to then remove the Equipment from the Premises. Licensor shall impose upon future licensees a duty to refrain from interfering with Licensee which is similar to that set forth herein.

12. Maintenance and Repairs. (a) Licensee shall perform all repairs necessary or appropriate to the Equipment on or about the Premises or located on any appurtenant rights-of-way or access to the Premises in good and tenable condition, reasonable wear and tear, damage by fire, the elements or other casualty excepted. Damage to the Equipment resulting from the acts or omissions of Licensor shall be repaired by Licensor at Licensor's cost and expense, or at the option of Licensee, Licensor shall reimburse Licensee for the actual costs incurred as evidenced by adequate documentation by Licensee in repairing such damage or replacing such Equipment. (b) Licensor, at Licensor's sole cost and expense, shall maintain the Tower, and any other portions of the Property and improvements thereto to the extent

required to be maintained by Licensor pursuant to the Prime Lease, in good order and repair, wear and tear, damage by fire, the elements or other casualty excepted. Damage to the Tower or the equipment or improvements of Licensor or others located on the Property or the Tower, which results from the acts or omissions of Licensee shall be repaired by Licensee at Licensee's cost and expense, or at the option of Licensor, Licensee shall reimburse Licensor for the actual costs incurred as evidenced by adequate documentation by Licensor in repairing such damage or replacing such equipment or improvements.

13. Tower Marking and Lighting Requirements. Licensor shall be responsible for compliance with any applicable marking and lighting requirements of the FAA and the FCC provided that if the requirement for compliance results from the presence of the Equipment and the Tower, Licensee shall pay the costs and expenses therefor (including any lighting automated alarm system so required).

14. Mechanics' Liens. Licensee shall not permit any mechanics, materialmen, contractors or subcontractors' liens arising from any construction work, repair, restoration or removal or any other claims or demands to be enforced against the Premises or any part thereof. Licensor shall have the right at any time to post and maintain upon the Premises such notices as may be necessary to protect Licensor against liability for all such liens and encumbrances. Licensee shall give Licensor written notice prior to the commencement of any work or the delivery of any materials connected with such work or construction, repair, restoration, or removal of materials on the Premises. Licensor shall assume no liability for the payment of materials or labor which accrue in the installation of Licensee's improvements upon the Premises and no mechanics' or materialmen's liens for Licensee's improvements shall attach to the interest of Licensor in the Premises.

15. Indemnification. Licensor and Licensee each indemnifies the other against and holds the other harmless from any and all costs, demands, damages, suits, expenses, or causes of action (including reasonable attorneys fees and court costs) which arise out of the use and/or occupancy of the Premises by the indemnifying party. This indemnity does not apply to any claims arising from the gross negligence or intentional misconduct of the indemnified party. Except for its own acts of gross negligence or intentional misconduct, Licensor will have no liability for personal injury or death, loss of revenue due to discontinuance of operations at the Premises, or imperfect communications operations experienced by Licensee for any reason.

16. Financial Agreement. Licensee may, upon written notice to Licensor, mortgage or grant a security interest in the Equipment to any such mortgagee or holders of security interests including their successors and assigns (hereinafter collectively referred to as "Secured Parties").

SpecsSite: Murdoch/WA-0022
WOW: Murdoch/WA0106

No such security interest shall extend in any way to the interests or property of Licensor.

17. Disclaimer of Warranties. LICENSOR HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ASSOCIATED WITH THE PREMISES OR THE TOWER. LICENSEE ACCEPTS THE PREMISES "AS IS".

18. Environmental Indemnification. (a) Licensee, its heirs, grantees, successors, and assigns shall indemnify, defend, reimburse and hold harmless Licensor from and against any and all environmental damages, caused by activities conducted on the Premises by Licensee, and (i) arising from the presence of any substance, chemical or waste identified as hazardous, toxic or dangerous in any applicable federal, state or local law or regulation including petroleum or hydrocarbon based fuels such as diesel, propane or natural gas (collectively, "Hazardous Materials") upon, about or beneath the Premises or migrating to or from the Premises, or (ii) arising in any manner whatsoever out of the violation of any environmental requirements pertaining to the Premises and any activities thereon. Licensee covenants that it shall not nor shall Licensee allow its employees, agents or independent contractors to use, treat, store or dispose of any Hazardous Materials on the Premises or the Property. (b) Licensor, its heirs, grantees, successors, and assigns shall indemnify, defend, reimburse and hold harmless Licensee from and against any and all environmental damages arising from (i) the presence of Hazardous Materials upon, about or beneath the Premises or migrating to or from the Premises, or (ii) arising in any manner whatsoever out of the violation of any environmental requirements pertaining to the Premises and any activities thereon, either of which conditions came into existence prior to the execution of this License and are solely attributable to activities conducted on the Property by Licensor.

19. Liability Insurance. (a) Licensee shall carry during the term of this License, at Licensee's own cost and expense, respectively, the following insurance: (i) "All Risk" property insurance which insures Licensee's property for such property's full replacement cost; and (ii) Comprehensive general liability insurance with a commercial general liability endorsement having a minimum limit of liability of \$2,000,000, with a combined limit for bodily injury and/or property damage for any one occurrence, and (iii) excess/umbrella, coverage of \$3,000,000. (b) Licensee shall name the Licensor as an additional insured under Licensee's liability policy, and require Licensee's insurance company to endeavor to give at least thirty (30) days' written notice of termination or cancellation of the policy to Licensor. A certificate of such insurance, together with such endorsement as to prior written notice of termination or cancellation, shall be delivered to Licensor within thirty (30) days from the execution of this License and before the expiration of any

Licensor: Washington Oregon Wireless, LLC
18238 S. Fishers Mill Road
Oregon City OR 97045
Attention: Chairman/CEO

With a copy to:

Duncan Tiger & Tabor
P.O. Box 248
Stayton OR 97383
Attention: Jennifer Niegel

25. **Emissions.** If antenna power output ("RF Emissions") are presently or hereafter become subject to any restrictions imposed by the FCC or other governmental agency for RF Emissions standards on Maximum Permissible Exposure ("MPE") limits, or if the Tower otherwise become subject to federal, state or local rules, regulations, restrictions or ordinances, Licensee shall comply with Licensor's reasonable requests for modifications to Licensee's Equipment which are reasonably necessary for Licensor to comply with such limits, rules, regulations, restrictions or ordinances. The RF Emissions requirements of Licensee shall be subordinate to any prior users of the Tower. Similarly, the RF Emissions of users subsequent to Licensee shall become subordinate to any requirements of Licensee. If Licensor requires an engineering evaluation or other power density study be performed to evaluate RF Emissions compliance with MPE limits, then all reasonable costs of such an evaluation or study shall be shared equally between Licensor, Licensee, and any other users of the Tower. If said study indicates that RF Emissions at the facility do not comply with MPE limits, then Licensor, Licensee, and subsequent tenants shall immediately take any steps necessary to ensure that they are individually in compliance with such limits or shall at the demand of Licensor cease operation until a maintenance program or other mitigating measures can be implemented to comply with MPE.

26. **Relocation of Tower.** Licensor may, at its election, relocate the Tower to an alternative location or property owned or leased by Licensor. Such location will (i) be at Licensor's sole cost, (ii) not result in an interruption of Licensee's communications services. Upon such relocation, the Premises covered herein shall be the new Tower and the new ground area on which the new Tower sits. At the request of either party, Licensor and Licensee shall enter into an amendment of this License, to clarify the rights of Licensee on the new Tower.

27. **Entire Agreement.** This License contains the entire agreement between the parties hereto and supercedes all previous negotiations leading thereto. This License may be modified only by an agreement in writing executed by Licensor and Licensee.

28. **Successors and Assigns.** This License shall be binding upon and inure to the benefit of the legal representatives, heirs, successors, and assigns of Licensor and Licensee. Licensee may assign all or a portion of its

SpecSite: Murdoch/WA-0022
WOW: Murdoch/WA0106

rights, title or interests hereunder only upon Licensor's prior written consent, which consent shall not be withheld or delayed if Licensee's proposed assignee agrees in writing to be bound hereby and maintains at the time of such assignment, as demonstrated by current financial statements provided to Licensor, a financial position reasonably demonstrating the ability of such assignee to meet and perform the obligations of Licensee hereunder through the unexpired balance of the current (Initial Term or Renewal Term, as the case may be) or delivers to Licensor a full guaranty of such obligations by a guarantor that so demonstrates such a financial position. Any purported assignment by Licensee in violation of the terms of this License shall be void. Licensee may not sublease all or any part of the Premises without Licensor's prior written consent. Licensor may assign its rights hereunder to any party agreeing to be bound and subject to the terms of this License.

29. **Limitation of Parties' Liability.** Neither Licensor nor Licensee shall be responsible for any incidental or consequential damages incurred resulting from (i) Licensee's use or Licensee's inability to use the Premises, or from (ii) damage to the other's equipment. If Licensor shall fail to perform or observe any term, condition, covenant or obligation required to be performed or observed by it under this License or is charged with an indemnity obligation hereunder, and if Licensee shall, as a consequence thereof, recover a money judgment against Licensor (whether compensatory or punitive in nature), Licensee agrees that it shall look solely to Licensor's right, title and interest in and to the Building for the collection of such judgment, and Licensee further agrees that no other assets of Licensor shall be subject to levy, execution or other process for the satisfaction of Licensee's judgment, and that Licensor shall not be personally liable for any deficiency.

30. **Rules.** Licensor may, from time to time, establish reasonable rules relating to access to and from the Premises. Licensee agrees to comply with such rules. Such rules shall not materially impede Licensee's access rights described elsewhere in this License.

31. **Miscellaneous.** (a) This License is governed by the laws of the State in which the Property is located. (b) If any provision of this License is invalid or unenforceable with respect to any party, the remainder of this License will not be affected and each provision of this License shall be valid and enforceable to the full extent permitted by law. (c) The prevailing party in any action or proceeding to enforce the terms of this License is entitled to receive its reasonable attorneys' fees and other reasonable expenses from the non-prevailing party. (d) Failure or delay on the part of either party to exercise any right, power or privilege hereunder will not operate as a waiver thereof and waiver of a breach of any provision hereof under any circumstances will not constitute a waiver of any subsequent breach. (e) Each party executing this License acknowledges that it has full power and authority to do so

and that the person executing on its behalf has the authority to bind the party.

IN WITNESS WHEREOF, the Licensor and Licensee have executed this Tower Attachment License Agreement as of the date and year first above written.

LICENSOR:
SPECTRASITE COMMUNICATIONS, INC.,
a Delaware corporation

By: Scot Lloyd

Name: Scot Lloyd

Title: Vice President, Collection Management

Date: 4-19-00

LICENSEE:
WASHINGTON OREGON WIRELESS, L.L.C.,
an Oregon limited liability company

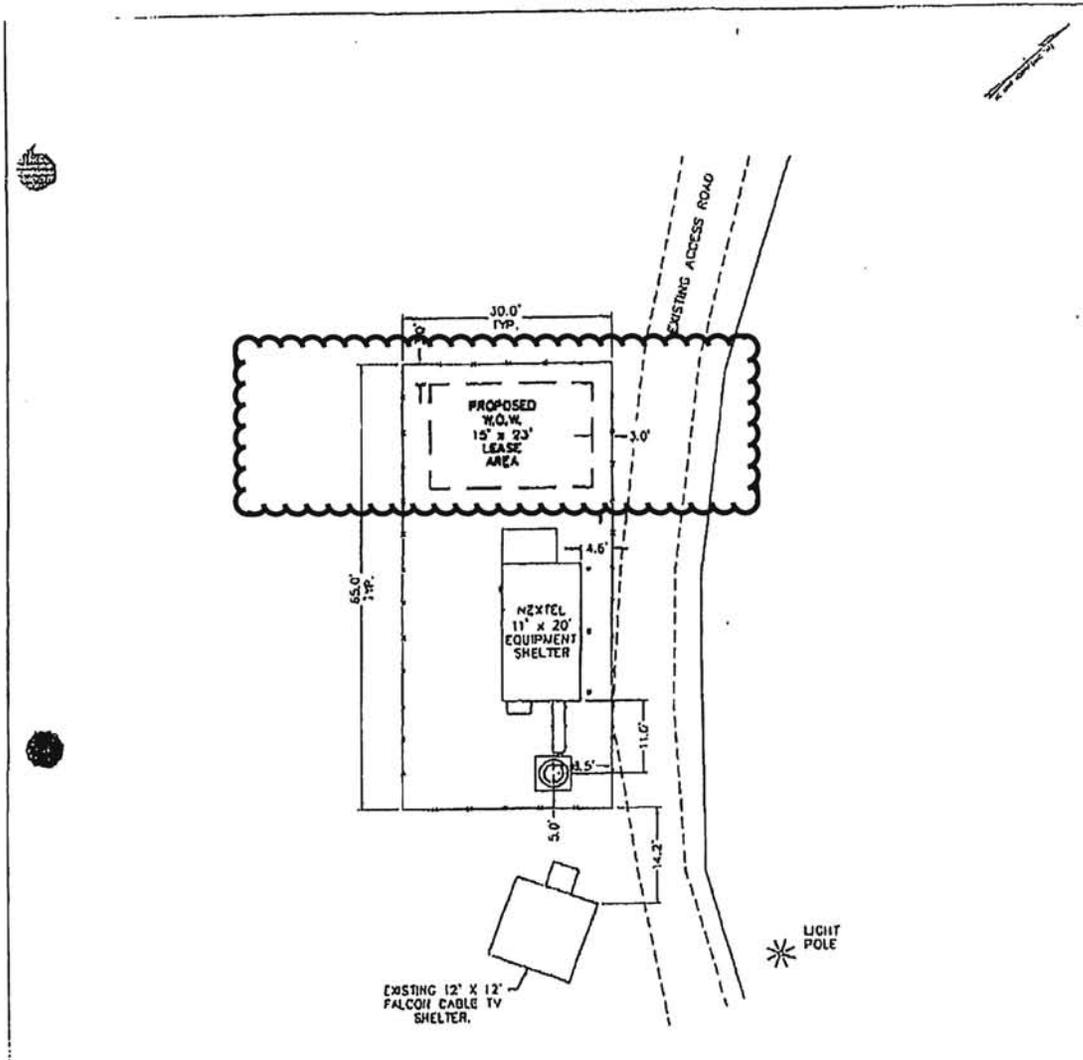
By: Mitchell Moore

Name: MITCHELL MOORE

Title: CHAIRMAN/CEO

Date: 4-8-00

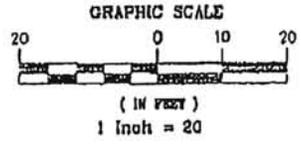
SpectraSite: Murdock/VA-0022
WOW: Murdock/WA0106



*** THIS SITE PLAN AND ELEVATION WERE PREPARED FROM PREVIOUS CONSTRUCTION DRAWINGS AND DETAILS HAVE NOT BEEN FIELD VERIFIED. ***

PLAN VIEW

SPECTRASITE No.	WA-0022
TOWER HEIGHT	60'
LATITUDE	45°-40'-45.2" N
LONGITUDE	121°-11'-23.9" W
FCC REGISTRATION NO.	



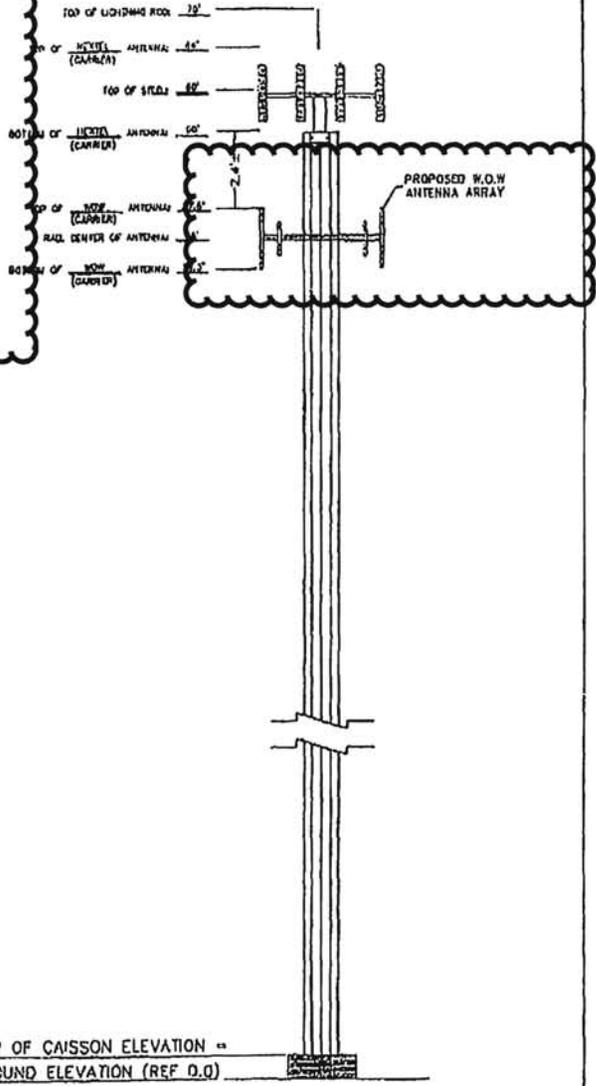
PROPOSED W.O.W. COLLOCATION

DRAWING No. WA-0022 DATE 3/26/00 REV. 0 DRAWN 03/20/00 CHK -	SPECTRASITE COMMUNICATIONS 8000 AGENCY PARKWAY, SUITE 510 CARY, NC 27511	MURDOCK WA-0022	SITE LAYOUT PLAN SHEET 1 OF 2
--	---	--------------------	----------------------------------

SF 076

CARRIER - BYZUL			
ANTENNA/MOUNT TYPE/CABLE SCHEDULE			
LEVEL	1	2	3
HEIGHT			
CABLE SIZE			
NO. OF CABLES			
ANTENNA TYPE	PANEL	PANEL	PANEL
ANTENNA TYPE	CORNER	CORNER	CORNER
NOTE: No. of ANTENNA PER SECTOR .../...			

PROPOSED W.O.W.			
CARRIER W.O.W.			
ANTENNA/MOUNT TYPE/CABLE SCHEDULE			
LEVEL	1	2	3
HEIGHT			
CABLE SIZE	7/8"	7/8"	7/8"
NO. OF CABLES	3	3	3
ANTENNA TYPE	PANEL	PANEL	PANEL
ANTENNA TYPE	CORNER	CORNER	CORNER
NOTE: No. of ANTENNA PER SECTOR .../...			



ENTRY/EXIT PORTS					
HEIGHT (INCH)	ENTRY	EXIT	ENTRY	EXIT	HEIGHT (INCH)
110"					
110"					
110"					
110"					
110"					
110"					

TOP OF CAISSON ELEVATION =
GROUND ELEVATION (REF. D.Q.)

MONOPOLE TOWER ELEVATION
NOT TO SCALE

*** THIS SITE PLAN AND ELEVATION WERE PREPARED FROM PREVIOUS CONSTRUCTION DRAWINGS AND DETAILS HAVE NOT BEEN FIELD VERIFIED. ***

This document, together with the contracts and designs presented hereto, is an instrument of service to the client for the tower, property and content thereof. It is the property of Spectrasite Communications Inc. and shall remain the property of Spectrasite Communications Inc. without liability to the client.

PROPOSED W.O.W. COLLOCATION

DRAWING No.	WA-0012
DATE	3/22/00
REV.	0
DATE	03/20/00
BY	

SPECTRASITE COMMUNICATIONS
8000 BROADWAY PARKWAY, SUITE 670
CANTON, MA 01911

MURDOCK
WA-0022

TOWER ELEVATION
SHEET 2 OF 2

SF-077

LAW OFFICES OF MICHAEL J. YOUNG

1931 SAN MIGUEL DRIVE, SUITE 220
WALNUT CREEK, CA 94596-5358

E-Mail
younglaw@prodigy.net



April 27, 2000

Schreiner Farms, Inc.
108 East 8th
Olympia, WA 98501
Attn.: Joe Schreiner

RE: Memorandum of Lease-Nextel Lease Assigned to Tower Asset Sub, Inc.
Our File: Murdock WA 0022

Dear Mr. Schreiner:

I am an attorney representing SpectraSite Communications. SpectraSite Communications is the managing agent for Tower Sub, Inc., who has been assigned the Communications Site Lease Agreement (Ground) between Schreiner Farms, Inc., and Nextel Communications.

Enclosed you will find three original Memorandums of Lease referencing you as the lessor and Tower Asset Sub, Inc., as the new lessee (pursuant to the Assignment attached to the Memorandum of Lease). Please sign the enclosed Memorandum of Lease before a Notary Public and return the executed originals to my office. I will have someone from Tower Asset Sub, Inc., sign and return an original to you for your files.

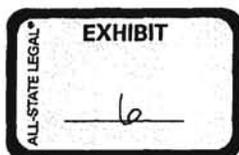
If you have any questions feel free to call my office.

Thank you, in advance, for your cooperation.

Very truly yours,
Michael J. Young
Michael J. Young
Attorney for SpectraSite Communications

*See file
we already signed one.*

MJY:kg
Enclosure



SF 003



May 23, 2001

Joe Schreiner
Schreiner Farms, Inc.
105 East 8th Street
Olympia, WA 98501

Re: SCI Tower No. WA-0022
SCI Tower Name: Murdock
Original Lessee: Nextel West Corporation
Request for Memorandum of Ground Lease

Dear Mr. Schreiner:

As part of the customary review of our tower portfolio we have been examining the real estate records relative to our site located on your property in the County of Klickitat, State of Washington. During this review, we learned that a memorandum of ground lease was not recorded when you signed the original ground lease with Nextel West Corporation.

In order to correct this omission, we have prepared a memorandum of lease. Please review this document and if it meets with your approval, have it executed in the presence of a notary public and return it to me in the enclosed self-addressed stamped envelope. Once the memorandum has been completely executed, we will record the document and provide you with a copy. If you have difficulty finding a notary public, please contact me and we will attempt to find one in your area.

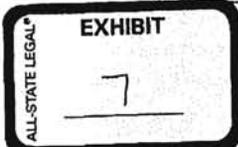
If you have any questions regarding this document, please feel free to contact me. Thank you in advance for your cooperation.

Sincerely,

Kirsten J. Sexton
Title Paralegal
Phone: 919-466-5681
Kirsten.sexton@spectrasite.com

Enclosure

*See file
we already signed*





May 23, 2001

Joe Schreiner
Schreiner Farms, Inc.
105 East 8th Street
Olympia, WA 98501

Re: SCI Tower No. WA-0022
SCI Tower Name: Murdock
Original Lessee: Nextel West Corporation
Request for Memorandum of Ground Lease

Dear Mr. Schreiner:

As part of the customary review of our tower portfolio, we have been examining the real estate records relative to our site located on your property in the County of Kllickitat, State of Washington. During this review, we learned that a memorandum of ground lease was not recorded when you signed the original ground lease with Nextel West Corporation.

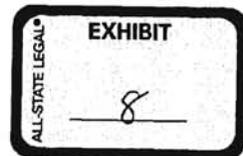
In order to correct this omission, we have prepared a memorandum of lease. Please review this document and if it meets with your approval, have it executed in the presence of a notary public and return it to me in the enclosed self-addressed stamped envelope. Once the memorandum has been completely executed, we will record the document and provide you with a copy. If you have difficulty finding a notary public, please contact me and we will attempt to find one in your area.

If you have any questions regarding this document, please feel free to contact me. Thank you in advance for your cooperation.

Sincerely,

Kirsten J. Sexton
Title Paralegal
Phone: 919-466-5681
Kirsten.sexton@spectrasite.com

Enclosure



SpectraSite Communications, Inc.

100 Regency Forest Drive, Suite 400 • Cary, NC 27511 • Tel 919.468.0112 • Fax 919.468.8522

www.SpectraSite.com

Prepared by and Return to:
FILE & RECORDATION DEPARTMENT
Site No.: WA-0022
SpectraSite Communications, Inc.
100 Regency Forest Drive, Suite 400
Cary, North Carolina 27511

Send tax bills to:
PROPERTY MANAGEMENT DEPARTMENT
Site No.: WA-0022
SpectraSite Communications, Inc.
100 Regency Forest Drive, Suite 400
Cary, North Carolina 27511

(Recorder's Use Above this Line)

STATE OF WASHINGTON

COUNTY OF KLICKITAT

MEMORANDUM OF AGREEMENT

THIS MEMORANDUM OF AGREEMENT ("Memorandum") is made and entered into this ___ day of _____, 2001, by and between Schreiner Farms, Inc., a Washington corporation, ("Lessor"), and Tower Asset Sub, Inc., a Delaware corporation, successor-in-interest to Nextel West Corp., a Delaware corporation, d/b/a Nextel Communications, with an office at 100 Regency Forest Drive, Suite 400, Cary, North Carolina 27511 ("Lessee").

1. Lessor and Nextel West Corp. ("Nextel") entered into that certain Communications Site Lease Agreement (Ground) dated August 28, 1999 (the "Lease"), for certain real property and easements as described in Exhibit B attached hereto (collectively, the "Premises"), which are a portion of that certain parcel of real property owned by Lessor located in the County of Klickitat, State of Washington, described in Exhibit A attached hereto (the "Land").
2. The Lease was assigned by Nextel to Tower Parent Corp., then subsequently assigned by Tower Parent Corp. to Lessee by Assignments of Leases dated January 10, 2000 ("Assignment"), copies of which are attached as Exhibit C-1 and C-2, whereupon Lessee succeeded to the original rights and obligations of Nextel under the Lease.
3. The Lease commenced on September 3, 1999, for an initial term of five (5) years, with options to renew for five (5) additional five (5) year terms.
4. Notwithstanding anything to the contrary in the Lease, the description of the Premises shall be as shown on Exhibit B attached hereto and incorporated herein by reference.
5. The purpose of this Memorandum is to give record notice of the Lease and the Assignment and of the rights created thereby, all of which are hereby confirmed. In the event of a conflict between the terms of this Memorandum or the addition of any terms in this Memorandum which are not contained in the Lease, such conflicting or additional terms shall be deemed to be a part of the Lease and shall otherwise amend the Lease and be controlling. The terms of the Lease are incorporated herein by reference.
6. Notwithstanding anything previously recorded pertaining to the subject property, this Memorandum is recorded to assure that a true, complete and correct memorandum of the rights and obligations of the current Lessor and Lessee is of record.

[SIGNATURE PAGE FOLLOWS]

Site No.: WA-0022
Site Name: MURDOCK

Exhibit C-1

This document was prepared by:
Nextel Communications, Inc.
2003 Edmund Halley Dr., 6th Floor
Reston, Virginia 20191

Return Document and
Future Tax Statements to:
SpectraSite Communications, Inc.
100 Regency Forest Drive, Suite 400
Cary, North Carolina 27511
Attn: Manager, Property Mgt.

Klickitat County, Washington
Site ID WA-0203 / Name Murdock

ASSIGNMENT OF LEASES

This Assignment of Leases ("Assignment") is made and entered into effective as of the 10th day of January, 2000, by and between Nextel West Corp., a Delaware corporation, d/b/a Nextel Communications ("Nextel") and Tower Parent Corp., a Delaware corporation and affiliate of Nextel ("Parent Co.").

WITNESSETH:

WHEREAS, Nextel, Parent Co., Tower Asset Sub, Inc., a Delaware corporation and affiliate of Nextel and Parent Co. ("Tower Sub"), and certain other parties designated therein have entered into an Agreement and Plan of Merger dated February 10, 1999, as amended (the "Merger Agreement"), which, together with the related Master Site Commitment Agreement dated April 20, 1999 between the parties hereto, Nextel Parent, and certain other parties designated therein, and the related Nextel Master Site Lease Agreement dated April 20, 1999 between the parties hereto and certain other parties designated therein, contemplate, *inter alia*, the conveyance, assignment, transfer and delivery of Nextel's tower assets;

WHEREAS, Nextel is either the tenant or the successor in interest to the tenant, as the case may be, to that certain August 28, 1999 lease by and between Schreiner Farms, Inc., a Washington corporation as landlord and Nextel West Corporation, a Delaware corporation, d/b/a Nextel Communications as tenant (as the same may have heretofore been assigned, modified or supplemented, the "Prime Lease"), which Prime Lease is unrecorded in the Office of the Clerk of Klickitat County, Washington.

P:\ARCHIVE 3 ASSIGNMENT\ASSIGN_1.DOC

Name: WA-0022A-BW.TIF
Dimensions: 2688 x 3333 pixels

WHEREAS, pursuant to the Prime Lease, Nextel's tower assets include without limitation rights, title and interests in and to a certain parcel of real property in Klickitat County, Washington (the "Property"), and all subleases and sublicenses between Nextel or its predecessor in interest as sublessor or sublicensor and third party sublessees and sublicensees, if any (collectively, the "Tenant Leases");

WHEREAS, in connection with the conveyance, assignment, transfer and delivery of Nextel's tower assets, Nextel desires to assign to Parent Co., and Parent Co. desires to assume all of Nextel's rights, title and interests in and to the Prime Lease, the Property and the Tenant Leases, if any;

NOW, THEREFORE, for and in consideration of the foregoing, the sum of Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which is acknowledged, the parties hereto agree as follows:

1. Recitals. The recitals set forth above are incorporated herein by reference and made a part of this Assignment.

2. Incorporation of Exhibits. The Property, and/or the underlying parcel of real property owned by landlord of which the Property is a part, is more particularly described on Exhibit A hereto which is incorporated by this reference. The Tenant Leases, if any, are listed on Exhibit B hereto which is incorporated by this reference.

3. Assignment. Nextel does hereby assign, transfer, set over, and deliver to Parent Co. all of Nextel's rights, title and interests in and to the Prime Leases, including without limitation all related easements, ancillary agreements and other appurtenant rights pertaining to and running with the real property subject to the Prime Leases, the Property, and the Tenant Leases. Parent Co. does hereby accept, assume and agree to be bound by all the terms and conditions which are the responsibility of the lessee or tenant under the Prime Lease, all the terms and conditions of all related easements and ancillary agreements, and all the terms and conditions which are the responsibility of the sublessor or sublicensor under each of the Tenant Leases, and which arise, are incurred, or are required to be performed from and after the date of this Assignment.

4. Further Assurances. The parties hereby agree to perform, execute and/or deliver or cause to be performed, executed and/or delivered any and all such further acts and assurances as may reasonably be required to confirm the transfers made pursuant to this Assignment.

5. Counterparts. This Assignment may be executed in two or more counterparts, all of which taken together shall constitute one and the same instrument.

6. Governing Law. This Assignment shall be governed and construed in accordance with the laws of the State of Delaware without reference to its conflicts of laws principles.

F:\CORP\8 3 ASSIGNMENTS\AETION_3.DOC

Exhibit C-2

This document was prepared by:
Nextel Communications, Inc.
2003 Edmund Halley Dr., 6th Floor
Reston, Virginia 20191

Return Document and
Future Tax Statements to:
SpectraSite Communications, Inc.
100 Regency Forest Drive, Suite 400
Cary, North Carolina 27511
Attn: Manager, Property Mgt.

Klickitat County, Washington
Site ID WA-0203 / Name Murdock

ASSIGNMENT OF LEASES

This Assignment of Leases ("Assignment") is made and entered into effective as of the 10th day of January, 2000, by and between Tower Parent Corp., a Delaware corporation and affiliate of Nextel, as hereinafter defined, ("Parent Co."), and Tower Asset Sub, Inc., a Delaware corporation and affiliate of Nextel and Parent Co. ("Tower Sub").

WITNESSETH:

WHEREAS, Nextel West Corp., a Delaware corporation, d/b/a Nextel Communications ("Nextel"), Parent Co., Tower Sub, and certain other parties designated therein have entered into an Agreement and Plan of Merger dated February 10, 1999, as amended (the "Merger Agreement"), which, together with the related Master Site Commitment Agreement dated April 20, 1999 between the parties hereto, Nextel Parent, and certain other parties designated therein, contemplates, inter alia, the conveyance, assignment, transfer and delivery of Nextel's tower assets, and the continuing lease by Nextel of certain ground and/or platform space on such tower assets pursuant to that certain Master Site Lease Agreement dated April 20, 1999 (the "Master Lease");

WHEREAS, Nextel is either the tenant or the successor in interest to the tenant, as the case may be, to that certain August 28, 1999 lease by and between Schreiner Farms, Inc., a Washington corporation as landlord and Nextel West Corporation, a Delaware corporation, d/b/a Nextel Communications as tenant (as the same may have heretofore been assigned, modified or supplemented, the "Prime Lease"), which Prime Lease is unrecorded in the Office of the Clerk of Klickitat County, Washington.

F:\SCHEDULE 3 ASSIGNMENTS\ASSIGN-1.DOC

Name: WA-0022-BW.TIF
Dimensions: 2688 x 3335 pixels

WHEREAS, pursuant to the Prime Lease, Nextel's tower assets include without limitation rights, title and interests in and to a certain parcel of real property in Klickitat County, Washington (the "Property"), and all subleases and sublicenses between Nextel as sublessor or sublicensor and third party sublessees and sublicensees, if any (collectively, the "Tenant Leases"), being the same Property and Tenant Leases assigned to Parent Co. from Nextel by Assignment of Leases of even date herewith, intended to be filed immediately prior to this instrument.

WHEREAS, in connection with the conveyance, assignment, transfer and delivery of Nextel's tower assets, Parent Co. desires to assign to Tower Sub, and Tower Sub desires to assume all of Nextel's rights, title and interests in and to the Prime Lease, the Property and the Tenant Leases, if any;

NOW, THEREFORE, for and in consideration of the foregoing, the sum of Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which is acknowledged, the parties hereto agree as follows:

1. Recitals. The recitals set forth above are incorporated herein by reference and made a part of this Assignment.
2. Incorporation of Exhibits. The Property, and/or the underlying parcel of real property owned by landlord of which the Property is a part, is more particularly described on Exhibit A hereto which is incorporated by this reference. The Tenant Leases, if any, are listed on Exhibit B hereto which is incorporated by this reference.

3. Assignment and Assumption. Parent Co. does hereby assign, transfer, set over, and deliver to Tower Sub all of Parent Co.'s rights, title and interests in and to the Prime Lease, including without limitation all related easements, ancillary agreements and other appurtenant rights pertaining to and running with the real property subject to the Prime Lease, the Property, and the Tenant Leases. Tower Sub does hereby accept, assume and agree to be bound by all the terms and conditions which are the responsibility of the lessee or tenant under the Prime Lease, all the terms and conditions of all related easements and ancillary agreements, and all the terms and conditions which are the responsibility of the sublessor or sublicensor under each of the Tenant Leases, and which arise, are incurred, or are required to be performed from and after the date of this Assignment.

4. Reconveyance. Notwithstanding anything to the contrary contained herein, in the event Nextel exercises its option pursuant to the terms of the Master Lease to re-acquire from Tower Sub its rights, title and interests in the Property, then all of Tower Sub's interest therein shall automatically re-convey to Nextel. The parties hereby agree to execute any instrument or other documents required to evidence any such re-conveyance.



VIA CERTIFIED MAIL, RETURN RECEIPT
ARTICLE NUMBER: 7160 3901 9848 7129 0153

Schreiner Farms, Inc.
105 East 8th
Olympia, WA 98501

Re: Lease Agreement with Spectrasite and/or its affiliates, sublessors, subsidiaries and/or predecessors in interest ("Spectrasite")

Dear Valued Landlord:

We are pleased to inform you that on August 8, 2005, Spectrasite merged with American Tower. Our combined company is poised to be the industry leader for wireless infrastructure solutions with the largest site portfolio in the industry today, along with the best people, processes and systems behind everything we do.

Please be advised that effective September 15, 2005, our notice address will change to:

AMERICAN TOWER
ATTN: LAND MANAGEMENT
10 PRESIDENTIAL WAY
WOBURN, MA 01801

All correspondence should be mailed to this address. After September 15, 2005, we cannot ensure that a communication sent to any other address will be received by the proper department. Therefore, we unfortunately cannot consider any communication sent to any other address as being legally effective under our lease agreement with you.

Please be assured that the merger does not affect the terms of your lease agreement or our contractual obligations to you. Should you ever have questions about your lease agreement, rent payment, etc., please contact our Landlord Relations Department at:

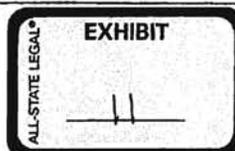
E-mail: Landlord.Relations@americantower.com
Toll-free: 1-866-586-9377
Fax: 1-781-926-4555

Landlord Relations Specialists are available Monday-Friday during normal business hours to assist you on all inquiries.

We are continuously striving to provide our landlords with 'best in class' service and hope you share in the excitement of becoming part of the American Tower family.

Sincerely,
American Tower Land Management

310462



SF 014

VIA CERTIFIED MAIL, RETURN RECEIPT
 ARTICLE NUMBER: 7160 3901 9848 7129 0153

Schreiner Farms, Inc.
 105 East 8th
 Olympia, WA 98501

Re: Lease Agreement with SpectraStar and/or its affiliates, successors, subsidiaries and/or

2. Article Number  7160 3901 9848 7129 0153		3. Service Type CERTIFIED MAIL	
4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		5. Signature <i>S. Schreiner</i>	
1. Article Addressed to: 2. 105 East 8th Schreiner Farms, Inc. Olympia, WA 98501		6. Reference Information American Tower. structure solutions processes and change to: 005, we cannot be printed on next to any other	
PS Form 3811, July 2001 Domestic Return Receipt			

Please be assured that the merger does not affect the terms of your lease agreement or our contractual obligations to you. Should you ever have questions about your lease agreement, rent payment, etc., please contact our Landlord Relations Department at:

E-mail: LandlordRelations@americantower.com
 Toll-free: 1-866-586-9377
 Fax: 1-781-926-4555

Landlord Relations Specialists are available Monday-Friday during normal business hours to assist you on all inquiries.

We are continuously striving to provide our landlords with 'best in class' service and hope you share in the excitement of becoming part of the American Tower family.

Sincerely,
 American Tower Land Management 310462



October 18, 2006

VIA UPS COURIER SERVICE

Schreiner Farms, Inc.
105 East 8th
Olympia, WA 98501

Re: Lease with Tower Asset Sub, LLC with respect to certain real property (the "Property") located at MURDOCK Windy Point Jeep Trail/P.O. box 449 LYLE WA 98635 (the "Lease");
American Tower Site Name: Murdock
American Tower Site Number: 310462

Dear Landlord:

Tower Asset Sub, LLC, a subsidiary of American Tower Corporation, or one of its affiliates ("Tenant") is obtaining a loan (the "Loan") from a lender (together with its successors and assigns, the "Lender"), relating to, among other things, Tenant's interest in the Lease on the Property.

1. We have been asked to obtain from you certain representations for the Lender about the current status of the Lease. We request that you confirm to us and to the Lender that the statements below are true as of the date of this letter:

- (a) Tenant is the current Tenant under the Lease (which, together with all amendments, is attached as Exhibit A), and the Lease is in full force and effect and contains the entire agreement between you ("Landlord") and Tenant about the Property.
- (b) Tenant is not in default of the Lease, and, to Landlord's knowledge, nothing has occurred or exists which, with notice or the passage of time or both, would be a default by Tenant under the Lease.
- (c) Landlord owns the fee interest in the Property.
- (d) The person signing this letter on behalf of Landlord is authorized to do so and has the full power to bind Landlord.
- (e) The Lender may rely on the information confirmed in this letter.
- (f) Landlord agrees to cooperate with Tenant in signing any documents necessary to confirm the existence of the Lease (such as a Memorandum of Lease) and to answer any questions that Tenant or the Lender may have about the Lease or the Property.

2. By signing this letter, you agree that the following provisions apply to the Lease:



SE 016



January 18, 2007

VIA UPS COURIER SERVICE

SCHREINER FARMS, INC.
105 East 8th
Olympia, WA 98501

Re: Lease with Tower Asset Sub, LLC with respect to certain real property (the "Property") located at MURDOCK Windy Point Jeep Trail/P.O. box 449 LYLE WA 98635 (the "Lease");
American Tower Site Name: Murdock
American Tower Site Number: 310462

Dear Landlord:

We recently reviewed the records on your tower site. During this review we learned that a Memorandum of Lease was not recorded when you signed the Lease with Nextel West Corp., a Delaware corporation, d/b/a Nextel Communications. The purpose of this Memorandum of Lease is simply to confirm that the Lease was signed, is for a term of years and is on the Property described in the Lease. It does not change the terms of the Lease-it just confirms that the Lease exists.

In order to complete our records, please sign the enclosed Confirmatory Memorandum of Lease and have your signatures witnessed and notarized where shown by the flags on the document. Please keep one for your records and return the other three originals in the enclosed pre-paid UPS envelope.

If you have any questions about the enclosed document, please call us toll-free at 877.220.2861. Thank you in advance for your cooperation.

Sincerely,

Neil L. Crocker
Project Manager
American Tower Corporation

Enclosures

Sent Ken
copies of orig
agreement Memo
Dated 28 Aug 99
on 1/25/07

ALL-STATE LEGAL®
EXHIBIT
15



AMERICAN TOWER
CORPORATION

February 23, 2007

VIA CERTIFIED MAIL, RETURN RECEIPT
ARTICLE NUMBER: 7160 3901 9849 9986 5578

Schreiner Farms Inc
105 East 8th
Olympia, WA 98501-1300

Re: Lease Agreement with SpectraSite, its affiliates, sublessors, subsidiaries or predecessors in interest ("SpectraSite"); ATC Site Number: 310462

Dear Valued Landlord:

I am excited to share some significant news about our company. Over the past months, we may have contacted you about a loan that American Tower is obtaining on a group of our towers. We are pleased to inform you that we expect to close on that loan in the upcoming months. To prepare for that closing,

American Tower is reorganizing the companies that own this group of towers. As part of this reorganization process, your Lease Agreement will be assigned to American Tower Asset Sub, LLC.
American Tower Asset Sub, LLC is a wholly-owned subsidiary of SpectraSite Communications, Inc. Please be assured that this assignment does not affect the terms of your Lease Agreement or our contractual obligations to you.

Our notice address and contact information for all lease and payment related inquiries will remain the same:

AMERICAN TOWER
ATTN: LAND MANAGEMENT
10 PRESIDENTIAL WAY
WOBURN, MA 01801
E-mail: Landlord.Relations@americantower.com
Toll-free: 1-866-586-9377
Fax: 1-781-926-4555

In addition, in the event of a default under the terms of your Lease Agreement, please also provide a copy of any notice letter to the Bank of New York on behalf of our Lender at:

Bank of New York, as Servicer
600 East Las Colinas Blvd.
Suite 1300
Irving, TX 75039

Again, this assignment will not change the features and benefits of your existing Lease Agreement or impact your relationship with us. If you have any questions about the loan or the assignment, please do not hesitate to call the Refinance Project Team at 877.220.2861.

Sincerely,

Jason D. Hirsch
Vice President, Land Management

ALL-STATE LEGAL
EXHIBIT
116

<p>2. Article Number</p>  <p>7160 3901 9849 9986 5578</p>	<p>COMPLETE THIS SECTION ON DELIVERY</p> <table border="1"> <tr> <td data-bbox="802 821 1089 869">A. Received by (Please Print Clearly)</td> <td data-bbox="1089 821 1263 869">B. Date of Delivery</td> </tr> <tr> <td data-bbox="802 869 1089 940">C. Signature Karen R. Stafford</td> <td data-bbox="1089 869 1263 940"> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee </td> </tr> <tr> <td data-bbox="802 940 1089 1060"> <input checked="" type="checkbox"/> X D. Is delivery address different from item 1? If YES, enter delivery address below: </td> <td data-bbox="1089 940 1263 1060"> <input type="checkbox"/> Yes <input type="checkbox"/> No </td> </tr> </table>	A. Received by (Please Print Clearly)	B. Date of Delivery	C. Signature Karen R. Stafford	<input type="checkbox"/> Agent <input type="checkbox"/> Addressee	<input checked="" type="checkbox"/> X D. Is delivery address different from item 1? If YES, enter delivery address below:	<input type="checkbox"/> Yes <input type="checkbox"/> No
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<input checked="" type="checkbox"/> X D. Is delivery address different from item 1? If YES, enter delivery address below:	<input type="checkbox"/> Yes <input type="checkbox"/> No						
<p>3. Service Type CERTIFIED MAIL</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	<p>1. Article Addressed to:</p> <p>Schreiner Farms Inc 105 East 8th Olympia, WA 98501-1300</p> <p>Reference Information 310462</p>						

Case No. 30244-0-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

SCHREINER FARMS, INC.,
a Washington Corporation,

Plaintiff / Appellant,

v.

AMERICAN TOWER, INC., a Delaware Corporation; NEXTEL WEST
CORPORATION, INC. d/b/a NEXTEL COMMUNICATIONS, a
Delaware Corporation; TOWER ASSET SUB, INC., a Delaware
Corporation; SPECTRASITE COMMUNICATIONS, INC., a Delaware
Corporation; and WESTERN OREGON WIRELESS
COMMUNICATIONS, INC., an Oregon Corporation; and
WASHINGTON OREGON WIRELESS, a Washington Limited Liability
Company,

Defendants / Respondents.

PROOF OF SERVICE OF BRIEF OF RESPONDENTS
and CROSS-APPELLANTS

Robert C. Tenney, WSBA No. 9589
Mark D. Watson, WSBA No. 14693
MEYER, FLUEGGE & TENNEY, P.S.
230 S. Second St. – P.O. Box 22680
Yakima, WA 98907-2680
Phone: (509) 575-8500

Attorneys for Defendants /
Respondents Nextel West
Corporation, Inc. d/b/a Nextel
Communications and Washington
Oregon Wireless

Raymond F. Clary, WSBA No. 13802
ETTER, M^cMAHON, LAMBERSON,
CLARY & ORESKOVICH, P.C.
618 W. Riverside Ave., Suite 210
Spokane, WA 99201-0602
Phone: (509) 747-9100

Attorneys for Defendants /
Respondents American Tower, Inc.,
Tower Asset Sub, Inc., and SpectraSite
Communications, Inc.

PROOF OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 13th of April, 2012, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

Michael F. Cressey
Workland & Witherspoon, PLLC
714 Washington Mutual Financial Ctr.
601 West Main
Spokane, WA 99201-0677

- Personal Service
- U.S. Mail
- Hand-Delivered
- Overnight Mail
- Facsimile (624-6441)

Dated this 13th day of April 2012, signed at Spokane, Washington.



Diana Renee Schwartz