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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 348288

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION THREE**

CORNERSTONE EQUITIES, LLC, a Washington Limited Liability
Company, and **KEITH SCRIBNER and JANE DOE SCRIBNER**,
husband and wife
Plaintiff-Respondents,

v.

MAHLEN INVESTMENTS, INC., a Washington Corporation, and
CRAIG L. MAHLEN and KAREN L. MAHLEN, husband and wife,
Defendants-Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SPOKANE COUNTY

The Honorable John O. Cooney, Judge

BRIEF OF APPELLANT

NIKALOUS O. ARMTAGE, WSBA #40703
Layman Law Firm, PLLP
601 S. Division St.
Spokane, WA 99202
(509) 455-8883 Telephone
(509) 624-2902 Facsimile
narmitage@laymanlawfirm.com
Attorneys for Appellants

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APPENDIX

- A. Plaintiff's Exhibit 1: Lease
- B. Plaintiff's Exhibit 5: February 24, 2014 Lease Amendment
- C. Defendants' Exhibit 116, Mahlen__00313
- D. Defendants' Exhibit 116, Mahlen__00316
- E. Text of the challenged findings of fact
- F. Amended Findings of Fact and Conclusions of Law (CP 859-82)

I. INTRODUCTION

This is a commercial landlord-tenant case. Cornerstone Equities, LLC (hereinafter “CORNERSTONE”) is the landlord. The tenant was Mahlen Investments Inc., and Craig and Karen Mahlen (hereinafter collectively referred to as “MAHLEN”). The tenancy was consummated based on CORNERSTONE’s covenant to build a drive-thru for MAHLEN’s dry cleaning business. CORNERSTONE later added a covenant to build MAHLEN a pylon sign. The dispute between the parties arose when CORNERSTONE failed to construct the promised drive-thru and signage and thereby breached the parties’ lease agreement. Based on CORNERSTONE’s failures in this respect, and in accord with the lease terms, MAHLEN terminated the tenancy and vacated.

Although the law abhors rewarding a party who fails to live up to its promises, that is exactly what the trial court did in this case. Despite CORNERSTONE’s breach, the trial court determined that MAHLEN was the party liable for damages. The trial court reached that determination in this contract case by employing a tort analysis whereby it excused CORNERSTONE’s failures based upon unforeseen circumstances. The trial court’s analysis was flawed. The law does not relieve a party from its contract obligations because those obligations become difficult. As such, Judgment should be reversed and entered for MAHLEN in all respects.

II. ASSIGNMENTS OF ERROR & LEGAL ISSUES

A. Assignments of Error

1. The trial court erred in entering Judgment for CORNERSTONE instead of MAHLEN.
2. The trial court erred in denying in part MAHLEN's motion for reconsideration and for amended findings of fact and conclusions of law.
3. The trial court erred by deciding the case based on a tort-like reasonableness analysis rather than simply enforcing the terms of the parties' contract. (Conclusions of Law 13, 14, 17, 49).
4. The trial court erred in concluding that CORNERSTONE made reasonable progress toward performance of its lease obligations after the parties' February 2014 lease amendment. (Conclusion of Law 49).
5. The trial court erred in concluding that *Lano v. Osberg*, 67 Wn.2d 659, 663, 409 P.2d 466 (1965) required the court to consider whether the actions of CORNERSTONE were reasonable given the circumstances. (Conclusion of Law 13).
6. The trial court erred in concluding that CORNERSTONE was acting in good faith and reasonably given the circumstances faced after the February 2014 lease amendment. (Conclusions of Law 14, 17).
7. The trial court erred in concluding that CORNERSTONE did not materially breach the contract. (Conclusion of Law 18).
8. The trial court erred in concluding that MAHLEN anticipatorily breached the lease and was required to provide notice before moving out. (Conclusions of Law 21, 22, 23, 31, 32).
9. The trial court erred in concluding that MAHLEN failed to pay rent and common area expenses from May 2014 forward and thereby materially breached the contract. (Conclusions of Law 26, 31, 32).

10. The trial court erred in concluding that CORNERSTONE's drive-thru representations were in accord with the facts. (Conclusion of Law 30).
11. The trial court erred in concluding that the MAHLEN is liable to CORNERSTONE for breach of contract and awarding damages to CORNERSTONE. (Conclusion of Law 32, 41)
12. The trial court erred in concluding that MAHLEN failed to meet the requisite elements of negligent and intentional misrepresentation. (Conclusions of Law 39, 40).
13. Finding of Fact 58 is not supported by substantial evidence.
14. Finding of Fact 60 is not supported by substantial evidence insofar as it fails to clarify that vacation of the alley requires approval of only landowners holding a majority of the land abutting the alley.
15. Finding of Fact 70 is not supported by substantial evidence.
16. Finding of Fact 97 is not supported by substantial evidence.
17. The trial court erred in refusing MAHLEN's proposed findings of fact 12, 14, 19, 24, 25, 28, 30, 31, 32, 37, 38, 39, 41, 47, 50, 51, 52, 53, 54, 55, 56.
18. The trial court erred in refusing MAHLEN's proposed conclusions of law 5, 10, 11, 12, 15, 16, 17, 19, 21, 22, 23, 24.
19. Finding of Fact 59 is not supported by substantial evidence.

B. Legal Issues Pertaining to the Assignments of Error

1. Can CORNERSTONE be excused from performing its contract obligations based upon unforeseen obstacles? (Errors 1, 2, 3, 6, 7, 11)
2. Did CORNERSTONE make reasonable progress toward performance of its lease obligations after the parties amended the

- lease in February 2014? (Errors 1, 2, 3, 5, 6, 7, 11, 13, 14, 16, 17, 18)
3. Did CORNERSTONE materially breach the lease? (Errors 1, 2, 3, 4, 5, 6, 7)
 4. Did CORNERSTONE commit misrepresentation? (Errors 10, 12, 17, 18, 19)
 5. Did MAHLEN anticipatorily repudiate the contract and terminate without required notice? (Error 8)
 6. Is MAHLEN liable for rent and common area maintenance fees? (Errors 1, 2, 3, 4, 5, 6, 7, 9, 15, 17)
 7. If CORNERSTONE is entitled to damages, should an award for CAM charges be included? (Error 9)

III. STATEMENT OF THE CASE

A. Tenancy Background Facts

CORNERSTONE owns the real property commonly known as 1101 N. Division, Spokane, WA. CORNERSTONE is comprised of members: Keith Scribner, Harlan Douglass, and their respective spouses. (RP: 243:1-3). At all material times, Mr. Scribner ran CORNERSTONE's day to day operations and was the point of contact for its tenants, including MAHLEN. (RP 243:22-244:2).

In 2013, Mr. Scribner was convicted on felony counts of insurance fraud—a crime involving dishonesty. (RP 241:20-24; *see also* CP 868, Finding 74). Mr. Scribner's criminal case in this respect came to this

Court and was affirmed. *See State v. Scribner*, 2015 WL 4386323 (2015). Additionally, Mr. Scribner has a medical condition affecting his memory that plagued him at all points relevant to this case. (RP 371:17-20; *see also* CP 868, Finding 75).

These facts are not included for flair or to cast gratuitous aspersions toward Mr. Scribner. Rather, as will be detailed below, these facts are necessarily included because they are the reason this case exists.

The defendants/appellants are Mahlen Investments, Inc., and Craig and Karen Mahlen (herein after “MAHLEN”). Mahlen Investments, Inc. was formed in May 2013. (RP 31:14-16). Shortly thereafter, MAHLEN purchased the assets of a Spokane dry cleaning business called M Pressed. (RP 31:17-19). At that time, M Pressed had established locations on the north side of Spokane at the 12000 block of North Division in the Wandermere area, and another on Spokane’s South Hill on 57th Ave. (RP 31:20-25). The Wandermere location was a plant where all actual dry cleaning was performed, whereas the South Hill location was only a “drop-site” for customers. (RP 81:25-82:15).

Almost immediately after purchasing the M Pressed business, MAHLEN began investigating the possibility of opening a third location to take advantage of the downtown Spokane market. (RP 87:7-9). MAHLEN surveyed its competition and found that Clark’s Cleaners had

two downtown locations, both with drive-thrus. (RP 93:20-23). In choosing a downtown location, MAHLEN also consulted with Lorrie Ferris, an employee at M Pressed who had over ten years of experience in the local dry cleaning market. (RP 84:8-10). Ms. Ferris thought the convenience of a drive-thru was important for a downtown location based on her experience in the market and her relationships with employees at Clark's. (RP 437:2-20). MAHLEN thus determined that a drive-thru was the "main thing" it wanted in a downtown location. (RP 89:24-90:5).

MAHLEN next investigated space available in the downtown area and created a list of properties it would consider. (RP 87:17-24; P73). MAHLEN listed five such properties. (P Ex. 73). Three were eliminated because they could not support a drive thru, and a fourth was eliminated because it offered much greater square footage than was necessary. (RP 89:6-90:11). MAHLEN thus began to focus attention on 1101 N. Division ("Subject Property") being offered for lease by CORNERSTONE.

MAHLEN made special note of the Subject Property because of its capacity for a drive-thru. (P. Ex. 73). MAHLEN learned of said capacity based on discussions and meetings with Mr. Scribner. (RP 90:15-91:1). In fact, Mr. Scribner represented that CORNERSTONE was already planning on developing the drive-thru at the Subject Property (RP 91:5-8). This is corroborated by Mr. Scribner's timeline of events, (D. Ex. 102, p. 1), and

plans he had drawn up by a designer and former architect, Martin Hill. (See P. Ex. 4; P. Ex. 82). On top of that, in their initial dealings Mr. Scribner emphasized the importance of a drive-thru for a downtown dry cleaner, and referenced Clark's where he frequented because of the ability to drop off and pick up clothes without having to get out of his car and unhook his kids from their car seats. (RP 93:9-19). In these initial discussions, Mr. Scribner further informed MAHLEN that the Subject Property would make a great location for a drive-thru dry cleaner given its presence on a main thoroughfare near large office parks. (RP 94:8-20). MAHLEN knew that Mr. Scribner owned 25 to 30 commercial properties and therefore placed stock in Mr. Scribner's aforementioned representations. (RP 94:21-95:22). Based on MAHLEN's investigation and diligence, and Mr. Scribner's representations, MAHLEN decided to move forward toward a lease agreement.

CORNERSTONE made at least three sets of written promises in this case, all of which obligated CORNERSTONE to install a drive-thru. The first of those written promises came in a letter of intent dated July 17, 2013 (P. Ex. 2). In that letter of intent, it was agreed that the base rent would be \$20 per square foot. (P. Ex. 2). It was also agreed that CORNERSTONE would perform certain tenant improvements. (RP 100:19-101:12). Those improvements included "drive thru installation," a

“drive thru window,” and “permitting and expenses of all work done to the premises.” (P. Ex. 2). In conjunction with the letter of intent, CORNERSTONE represented that the drive-thru improvement would be complete by August 31, 2013. (RP 103:3-9).

CORNERSTONE’s second written promise for the drive-thru came on August 2, 2013 in the parties’ lease (“Lease”). (P. Ex. 1). A copy of the lease is included in the appendix to this brief. Exhibit C to the Lease contains a list of the work CORNERSTONE promised to perform, including the drive-thru work. (P. Ex. 1, p. 1-44).

CORNERSTONE’s third written promise to install a drive-thru came February 24, 2014 in a lease amendment (hereinafter “Amendment”). (P. Ex. 5). As Mr. Mahlen explained in providing context for this Amendment, it was signed in order to reduce the rent by half consistent with the fact that CORNERSTONE had failed to install the promised drive-thru. (RP 116:14-19). The Amendment also added a written promise consistent with CORNERSTONE’s prior oral promises to build and install a pylon sign. (P. Ex. 5). The letter of intent, Lease, and the Amendment were all drafted by CORNERSTONE. (RP 247:7-9; RP 299:13-23).

The drive-thru contemplated by these written promises was to be installed on the far west side of the Subject Property in an alley between

the Subject Property and property owned by Boone Court, LLC. (P. Ex. 1, 1-44). An aerial of the Subject Property and the referenced alley taken from a south facing position is included in the Appendix at C for ease of reference. The location of MAHLEN's business was on the far right side of the building. A close up of the alley where the drive-thru was to be built is also included in the Appendix at D for easy reference. As it turned out, the alley in which the drive-thru was promised was owned by the City of Spokane.

B. Lease Performance Facts

On July 17, 2013, the same day as the letter of intent was signed, CORNERSTONE secured a bid for improvements, including the drive-thru work. (P. Ex. 64; *see also* P. Ex. 74). This bid came from Kofmehl, Inc. As the bid outlines, completing the drive-thru would require excavation and haul off, curbing and concrete work, installation of a retaining wall, installation of a window, and planning and permitting. (*Id.*). The total cost was estimated at \$37,477.56. (*Id.*). Of that total, more than \$30,000.00 was attributed to work necessary for the drive-thru. (*Id.*).

Five days later, on July 22, 2013, CORNERSTONE obtained a bid from Arrow Concrete & Asphalt Specialties, Inc. to see if he could get a better deal on the necessary concrete work. (P. Ex. 62). This bid also called for curbing and necessary excavation. (*Id.*). Unfortunately, this is

where CORNERSTONE's pursuit of the drive-thru work first came to an unexplained and inexcusable halt.

Between July 22, 2013 and October 10, 2013, CORNERSTONE did nothing to keep its drive-thru promise despite knowing that the drive-thru was the most important factor in MAHLEN's choice of the Subject Property. Indeed, for three months, CORNERSTONE did not sign any contracts for drive-thru work, did not obtain any permitting for drive thru-work, did not put up the retaining wall it knew to be necessary based on the July 17, 2013 bid, installed no curbing, and did no excavating. No facts in the record show otherwise.¹

On October 10, 2013, more than two months after the lease was signed, and at least three months after it knew that excavating would be necessary, CORNERSTONE secured a bid for the excavation work from All Star Excavating Inc. (P. Ex. 58). The excavation work started later in October, but on November 4, 2013, the City of Spokane stopped the work because it was being performed without a permit. (P. Ex. 75). Of course, ultimately it was CORNERSTONE's responsibility to ensure that the work was done in accordance with law. CORNERSTONE recognized that fact, but did not ultimately get its grading plan approved for more than

¹ These facts being undisputed, the trial court should have entered MAHLEN's proposed finding 25.

three additional months. Specifically, SCRIBNER's grading plan was approved February 10, 2014. (P. Ex. 41). Even then, SCRIBNER did not see to it that the permit was paid for which ultimately resulted in its expiration. (P. Ex. 76; *see also* P. Ex. 77)².

The November 4, 2013 grading violation also served as a reminder to CORNERSTONE that the alley in which it was intending to install a portion of the drive-thru was owned by the City of Spokane. (RP 378:16-20, CP 870, Finding 89). In other words, CORNERSTONE had promised to install a drive-thru for MAHLEN on property CORNERSTONE did not own. Mr. Scribner unsuccessfully attempted to explain this away. First, he claimed ignorance as to the location of the property line (RP 378:16-23) despite having testified to the Subject Property's history dating back 50 to 60 years (RP 378:13-15), and despite having testified with great precision that the curb on the southeast corner of Division St. extends out exactly 15 feet, four inches. (RP 253:20-254:4). Mr. Scribner explained that he could be so precise because he had seen the architectural drawings. (RP 253:24-254-2). The problem is that the drawings also show the location of the property line in question at 10 feet from the edge of the building. (P. Ex. 82, *see* site plan note 19 and 5' note next to it).

² Again, these facts are not in dispute and should, therefore have resulted in the trial court entering MAHLEN's proposed finding 28.

This means that CORNERSTONE was either ignorant to its property line and promised MAHLEN a drive-thru without investigating, or SCRIBNER knew where the property line was and nonetheless promised a drive-thru knowing it could create issues with trespass which would open its tenant to action by the City to enjoin use of the drive-thru.

Given the referenced problem with the property line, it was necessary for CORNERSTONE to pursue a process to vacate the alley. CORNERSTONE knew, in essence, that this simply meant that it needed to purchase the alley from the City. (RP 388: 15-19). Mr. Scribner admitted that he knew it was necessary to pursue this vacation process by November 2013 or December 2013. (RP 387:13-388:10).

Eric Johnson, an engineering tech employed by the City of Spokane, testified about the process CORNERSTONE was required to follow to vacate the alley. As Mr. Johnson explained, the first step is to submit an application for the vacation and pay the required fee. (RP 186:9-13). The application then gets routed through the City internally, and then goes to the private utility companies for comment. (RP 186:15-18). Finally, there is a public hearing and the City Council votes on the application. (RP 187:4-15). The entire process typically takes three to six months. (RP 186:22-25).

Of course, the process cannot start at all until the vacation application form is filed. (RP 192:10-25). The application form itself, as Mr. Scribner admitted, is not complicated. (RP 389:5-16). It is only one page and does not require an engineer's stamp or architectural approvals. (RP 193:4-11). To the extent an applicant has questions about filling out the form, City employees are available to help. (RP 193:12-14). The forms are available on both the second and third floors of Spokane City Hall. (RP 184:2-11). If for some reason the forms cannot be located on those floors, a city employee can easily print one for the applicant. (RP 184:5-8; 184:24-25). Moreover, if an applicant called by phone and asked for the form to be mailed, the City could certainly do that. (RP 194:14-16). The City could also e-mail a copy of the form to an applicant. (RP 194:7-13). Indeed, when Mr. Mahlen learned of Mr. Scribner's alleged difficulties in obtaining an application form, he called the City and had one in his e-mail inbox within 20 minutes. (RP 195:3-19).

In January 2014, Mr. Scribner learned that he needed agreement from those owning a majority of the property adjacent to the alley in order to obtain approval on the application to vacate. (D. Ex. 102, p. 6; RP 283:18-284:20). Knowing he only needed agreement from the ownership majority, Mr. Scribner obtained information from Stewart Title to determine who the relevant property owners were. (P. Ex. 24). This

information was sent to Mr. Scribner on January 23, 2014, and contained a map, parcel numbers, and the identities of the relevant owners. (P. Ex. 24).

Stewart Title's packet of information showed that CORNERSTONE and Boone Court LLC held the required ownership majority. (RP 393:4-8).

This last point is critical. That is because by that same point in time, Boone Court LLC had already expressed that it would agree to the alley vacation. Indeed, on December 19, 2013, Mr. Scribner had a telephone conversation with Boone Court's attorney, Brian Hipperson. (P. Ex. 31). During that telephone discussion, Mr. Hipperson shared with Mr. Scribner that Boone Court had no objections to vacating the alley. (RP 333:1-6). In turn, Mr. Scribner promised to give Boone Court an easement for its fire exit, install a retaining wall to stabilize the embankment supporting Boone Court's property that had eroded during the October/November 2014 grading work, and pay all of the associated costs. (P. Ex. 31; RP: 331:22-332:18).

In sum, by January 23, 2014 CORNERSTONE knew the following key facts:

- It needed to file an application to vacate the alley west of the Subject Property to install the promised drive-thru;
- It needed only a majority of the owners adjacent to the alley to agree to the vacation; and
- It had the agreement of said majority.

In other words, by January 23, 2014, despite any of CORNERSTONE's previous failings and derelictions, it had everything that was needed to move forward on the application to vacate. However, Mr. Scribner failed to even obtain the application from until April 2014. (D. Ex. 102, CP 867, Finding 62). Even with the form in hand, CORNERSTONE never got around to filing it before MAHLEN vacated five months later on August 31, 2014. (RP 418:22-25).

On the subject of the retaining wall CORNERSTONE promised to install at his own expense such that Boone Court LLC could maintain lateral support for its property and cooperate in the alley vacation, CORNERSTONE was again dilatory. CORNERSTONE had been aware since July 17, 2013 when it received a bid from Kofmehl Inc. that such a retaining wall would be necessary. (P. Ex. 64). CORNERSTONE further knew as of December 19, 2013, that Boone Court LLC would also require a retaining wall as a condition to its cooperation in the alley vacation. (P. Ex. 31). Nonetheless, CORNERSTONE failed to secure plans for such a wall until March 2015 (P. Ex. 29)—more than six months after MAHLEN had vacated, more than 14 months since promising such a wall to Boone Court, and more than 18 months since first learning such a wall would be necessary for the drive-thru.

The signage promised to MAHLEN received a similar lack of attention from CORNERSTONE. Mr. Scribner represented to Mr. Mahlen in July 2013 that he was obligated to install a sign for the liquor store tenant at the Subject Property. (RP 68: 18-24; RP 96:10-97:9). By February 2014 though, CORNERSTONE had installed no such sign. CORNERSTONE then agreed to obligate itself to the sign in writing in the February 2014 amendment. (P. Ex. 2). By April 2014, CORNERSTONE had bids for the sign. (P14, 16, 17,19, 22, 23). However, as MAHLEN discovered in June 2014, CORNERSTONE did not obtain any permits to build the sign (P. Ex. 77), and as is evident from its absence in the record, CORNERSTONE never signed a contract to move forward on any of the bids.

In sum, as part of the Lease, CORNERSTONE made a promise to build MAHLEN drive thru at a cost estimated between \$30,000.00 (P. Ex. 74) and \$100,000.00 (RP: 326:2-7). CORNERSTONE later promised to build MAHLEN sign for which all estimates exceeded \$25,000.00 (P. Ex. 14). A year after first making these promises, none of this required work was accomplished.

C. Termination of the Tenancy

The Lease included two important clauses relevant to CORNERSTONE's aforementioned failures. The first is at Article 20 and

is entitled “Delaying Causes.” (P. Ex. 1, p. 1-25). That clause excused delayed performance of the Lease covenants if due to war, riot, labor dispute, a shortage of labor or material, transport delays, or “any other cause beyond the reasonable control of the party so obligated.” (*Id.*). That clause does not excuse performance based on greater than anticipated expense, effort, or ignorance about the process necessary to install the drive-thru.

The second vital clause related to this dispute comes at section 5.3. That section is entitled “Cancellation,” and states that if the Landlord has not substantially completed its work (including by reference the drive-thru) by December 1, 2013, then the Tenant is entitled to deem the Lease automatically canceled with no further force or effect. (P. Ex. 1, p. 1-11).

These two important provisions went unchanged by the parties’ February 2014 Amendment. Indeed, the Amendment specifically states that except as to the specific terms stated therein, all other terms of the Lease “shall be the same and remain in full force and effect.” (P. Ex. 5).

With these Lease and Amendment terms in mind, we come to June 2014. It was then that Mr. Mahlen discovered a notice attached to the Subject Property stating that CORNERSTONE owed back taxes. (RP 124:8-125:1). Those unpaid taxes dated back to 2011 (RP 422:9-13) and totaled more than \$44,000.00. (P. Ex. 81). Given that CORNERSTONE

had not paid for the most expensive promised improvements (drive-thru and signage), and owed significant taxes dating back several years, Mr. Mahlen became justifiably concerned about CORNERSTONE's financial position. (RP 131:1-12).³

After seeing the tax foreclosure notice, Mr. Mahlen talked to other tenants of CORNERSTONE, and then performed a Google search of Mr. Scribner which revealed his 2013 conviction for insurance fraud. (RP 129:12-16). Naturally, this further increased Mr. Mahlen's concerns about his landlord's truthfulness and intentions to build the drive-thru and sign that were promised.

Mr. Mahlen decided to dig further. He visited the City of Spokane to check on the status of CORNERSTONE's permits and approvals for the drive-thru and sign work. (RP 125:18-128:25). This was a reasonable step considering that, when questioned about the status of the promised improvements, Mr. Scribner consistently responded that he was just waiting on the City and the permits. (RP 131:20-132:11). What Mr. Mahlen found though, was that CORNERSTONE had not even applied for further permitting or approvals beyond the grading permit which had not been paid for and ultimately expired. (RP 125:18-23; P. Ex. 76, 77).

³ Mr. Mahlen did not know that one of the partners in CORNERSTONE was Harlan Douglas, a local developer with resources. (RP 222:14-16)

Having discovered the above in June 2014, and being convinced that his tenancy was in trouble, Mr. Mahlen called Mr. Scribner and told him that if things did not change, MAHLEN was moving out. (RP 133:9-20). On August 1, 2014, there being no further action from CORNERSTONE, Mr. Mahlen, through counsel, gave formal notice that MAHLEN would vacate by August 31, 2014 (P. Ex. 27). That is, in fact, what MAHLEN did.

D. Procedural Posture

CORNERSTONE filed suit against MAHLEN alleging breach of lease and seeking rent and common area expenses and fees. MAHLEN answered and alleged counterclaims including breach and misrepresentation. Both parties sought attorney fees under the terms of the Lease. The case proceeded to a bench trial before the honorable John O. Cooney. Judge Cooney entered findings of fact and conclusions of law, determined that MAHLEN was the breaching party, and entered judgment for CORNERSTONE. (CP 728-749; CP 883-887). MAHLEN filed a motion for reconsideration and for amended findings and conclusions. (CP 750-772). In response, Judge Cooney authored a written decision granting MAHLEN's motion in part and denying MAHLEN's motion in part. (CP 796-798). However, Judge Cooney's written decision exacerbated the defects in his findings, conclusions, and ultimate verdict

which the parties and the trial court addressed at a hearing on September 23, 2016 and which will be discussed at greater length below. (RP 479-511). Judge Cooney thereafter entered a formal order granting the motion for reconsideration in part and denying it in part. (CP 853-858). Judge Cooney also entered Amended Findings of Fact and Conclusions of Law (CP 859-882), and Judgment for CORNERSTONE (CP 883-887). MAHLEN filed a timely notice of appeal.

IV. ARGUMENT

A. Standard of Review

Conclusions of law are reviewed de novo. *Hegwine v. Longview Fibre Co. Inc.* 132, Wn. App. 546, 555, 132 P.3d 789 (2006). “Contract interpretation is a matter of law.” *Intern’l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 282, 313 P.3d 395 (2013). The endeavor of construing a contract involves determining a contract’s legal effect. *Id.* at 288. Absent disputed facts, the construction or legal effect of a contract is determined as a matter of law. *Yeats v. Estate of Yeats*, 90 Wn. 2d 201, 204, 580 P.2d 617 (1987). De novo review is also applied to a “trial court’s conclusions of law pertaining to contract interpretation.” *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn.App. 706, 712, 334 P.3d 116 (2014). The application of the law to the facts is a question of law that is also reviewed de novo. *Id.* The findings of fact must be supported by

substantial evidence, and the findings must support the conclusions of law. *Savioano v. Westport Amusements, Inc.*, 144 Wn.App. 72, 78, 180 P.3d 874 (2008). Evidence is substantial if it is sufficient to persuade a fair-minded person that the declared premise is true. *Id.*

B. Legal Issues

1. Legal Issue 1: Can CORNERSTONE be excused from performing its contract obligations based upon unforeseen obstacles?

The trial court concluded that because the amendment to the parties' lease lacked a date for completion of the drive-thru and pylon sign, that "the Court must consider whether the actions of Plaintiff were reasonable given the circumstances." (CP 873-874, Conclusion 13). For this legal conclusion, the Court cited *Lano v. Osberg*, 67 Wn.2d 659, 663, 409 P.2d 466 (1965). Ignoring the fact that *Lano* says no such thing, the court went on to conclude that CORNERSTONE was, in fact, acting reasonable given "unforeseen circumstances" (CP 874, Conclusion 14; CP 875, Conclusion 17). This kind of tort analysis has no place in a contract case.

Indeed, parties are not relieved of their contractual obligations because a contract becomes "more difficult or expensive than originally anticipated." *Public Utility Dist. No. 1 of Lewis Cnty v. Wash. Public Power Supply Sys.*, 104 Wn.2d 353, 364, 705 P.2d 1195 (1985). The

Supreme Court left little doubt as to the folly involved in bringing foreseeability into the contract analysis when it said:

If he agrees to erect a house upon a spot where it cannot be done without driving piles, he must drive them, because he has agreed to do everything necessary to erect and complete the building. **If the difficulties are apparent on the surface, he must overcome them. If they are not, but become apparent by excavation, or the sinking of the building, the rule is the same. He must overcome them,** and erect the building simply because he had agreed to do so--to do everything necessary for that purpose.

White v. Mitchell, 123 Wn. 630, 635, 213 P. 10 (1923) (quoting *Superintendent and Trustees of Public Schools v. Bennett*, 27 N.J. Law, 513, 72 Am. Dec. 373 (1859) (emphasis added). In *White*, the Court went on to explain:

It is conceded that, under the common-law rule, a contractor who undertakes an entire contract for erecting a building is presumed, in the absence of an express provision to the contrary, to have assumed the risk of **unforeseen** contingencies arising during the course of the work, unless performance is rendered impossible by the act of God, the law, or the other party.

Id. at 635-36 (quoting *Cramp & Co. v. Central Realty Corp.*, 268 Pa. 14, 110 Atl. 763 (1920) (emphasis added)).

Thus, as opposed to engaging in a tort analysis and excusing performance based on unforeseen contingencies, the trial court here was required to give effect to the terms of the parties' contract. *Ball v. Stokley Foods, Inc.*, 37 Wn.2d 79, 83, 221 P.2d 832 (1950). In doing so, the terms

of the contract were to be construed by the court so as to determine its legal implications. *Intern'l Marine Underwriters*, 179 Wn.2d at 288.

The contract here required CORNERSTONE to build a drive-thru (P Ex. 1, p. 1-44). Exhibit C to the contract stated that the drive-thru work would be completed within 90 days after the possession date. (*Id.*). The trial court found that MAHLEN took possession sometime between October 5 and October 18, 2013. (CP 866, Finding 54). Consistent with CORNERSTONE's conduct throughout, due to construction delays, this date of possession was more than a month later than the parties had agreed on in the Lease. In any event, the 90th day after possession thus came and went sometime between January 5, 2014 and January 18, 2014. By then, it is undisputed that CORNERSTONE had not built the drive-thru. As a consequence, CORNERSTONE agreed to cut MAHLEN's rent in half until completion. (P. Ex. 5). Critically, this February Amendment made clear that all other terms of the Lease shall remain the same and have full force and effect. (*Id.*). This meant that Article 20, "Delaying Causes," along with section 5.3, "Cancellation," were left unaltered. Thus, delays beyond the 90 days promised in section 8 of Exhibit C would be excused only upon war, riot, labor dispute, a shortage of labor or material, transport delays, or "any other cause beyond the reasonable control of the party so obligated." (CP 864, Finding 40; P1, 1-25, Article 20). Even if such a

delay arose implicating an extension under Article 20, that extension was not indefinite as the trial court concluded. Rather, Article 20 made clear that performance would be excused only for a period equivalent to such an excusable delay. (P. Ex. 1, 1-25). This is far different than what the trial court did here in extending CORNERSTONE's deadline so long as it acted reasonably under the circumstances.

Also left unaffected by the Amendment were MAHLEN's cancellation rights under section 5.3. Under a proper construction of the contract, this meant that MAHLEN was entitled to "automatic" cancellation of the lease where the drive-thru was not substantially complete 90 days after possession plus any period of extension resulting from excusable delay.

With that construction in mind, we can then turn to the facts. The trial court found that CORNERSTONE did not achieve substantial completion. (CP 870, Finding 95). The trial court did not find nor conclude that CORNERSTONE's delay implicated any excuse offered under Article 20. Rather, the trial court found only that CORNERSTONE was acting reasonably given unforeseen circumstances. (CP 874, Finding 14; CP 875, Finding 17). Even if that were true, which it was not, acting reasonably given unforeseen circumstances has no corresponding legal effect under Article 20. In other words, article 20 does not excuse delay

and give an extension simply because CORNERSTONE was acting reasonably.

The record otherwise makes clear that the delay here principally arose because CORNERSTONE failed to follow through on its promises to Boone Court, LLC (*See* P. Ex. 31) and thereupon file the application to vacate the alley. In this way, CORNERSTONE failed to take even the first step necessary to perform its drive-thru obligation. No facts support excusing CORNERSTONE's failure to take that first step under Article 20.

Under a proper contractual construction then, we see that by the time MAHLEN exercised its cancelation rights (either June or August 2014), the period within which CORNERSTONE was required to achieve substantial completion had come and gone. Thus, under section 5.3, as MAHLEN's sole remedy, the Lease was automatically canceled.⁴ This of course, means that MAHLEN did not breach and cannot be liable to CORNERSTONE for rent, common area maintenance charges, attorney fees, or other damages. Judgment for CORNERSTONE must therefore be reversed.

2. Legal Issue 2: Did CORNERSTONE make reasonable progress toward performance?

⁴ MAHLEN's proposed Conclusion 17 should have been granted.

The trial court concluded that because the February 2014 Amendment omitted a date for completion, performance was required within a reasonable time and the court was required to “consider whether the actions of [CORNERSTONE] were reasonable given the circumstances.” (CP 873, Conclusion 13). As indicated above, proper construction of the contract makes it unnecessary to insert this legal gap filler in the Amendment given the unaltered terms of the Lease. However, in the alternative, even if the Court concludes that the February Amendment left the deadline for CORNERSTONE’s work indefinite, reversal is still necessary.

Where no time for performance is stated in a contract, performance must be rendered within a reasonable time. *Birkenwald Dist. Co. v. Heublein, Inc.*, 55 Wn.App. 1, 6, 776 P.2d 721 (1981). What may be considered a reasonable time is usually a mixed question of law and fact. *Jarstad v. Tacoma Outdoor Recreation Inc.*, 10 Wn.App. 551, 558, 519 P.2d 278 (1974). Additionally, there must be reasonable progress toward performance. *Lano*, 67 Wn.2d at 663.⁵

In written closing arguments, CORNERSTONE knew with that it could not, with a straight face, argue that reasonable progress toward the drive-thru and/or pylon sign had been made subsequent to the February

⁵ MAHLEN’s proposed Conclusion 5 should have been granted.

2014 Amendment. After all, post February 2014 CORNERSTONE spent only \$430.00 of the roughly \$55,000-\$100,000.00 that was necessary toward completing this work.⁶ Recognizing this, CORNERSTONE urged instead that it was actually MAHLEN that was required to build the drive-thru. (CP 669-71).

The trial court rejected that position and instead opted to invent the error filled foreseeability analysis discussed in the preceding section. In doing so, the trial court initially entered no findings or conclusions concerning *Lano's* requirement of reasonable progress. (CP 728-749). When confronted with this problem on MAHLEN's motion for reconsideration, the trial court authored a confounding written decision which muddied the waters even further. (*See* CP 796-798). The trial court wrote that CORNERSTONE did, in fact, make progress after the February 2014 Amendment because CORNERSTONE secured a permit to vacate the alley in mid-April 2014. (*Id.*). This was the only evidence of post February 2014 progress offered by the trial court in its written decision. (*Id.*).

The problem, of course, is that there was no such permit. The parties proceeded to a presentment hearing wherein the trial court was

⁶ These funds were spent on engineered plans for the pylon sign. (P Ex. 12, P. Ex. 13). No funds went toward the drive-thru.

forced to acknowledge that the cited permit did not exist. (RP 491:21-492:2). Although the trial court's written decision was explicit and without equivocation that in any way indicated a mistake, the trial court said that it had simply used unintended language. (*Id.*). The trial court explained that what it actually meant was that CORNERSTONE made progress after the February 2014 amendment based on the fact that it obtained the permit application form in April 2014. (RP 492:11-15). With due respect to the trial court, this entire course of events made clear that it did not understand the relevant legal and factual issues presented by this case.

The trial court subsequently added two additional findings of fact, numbers 96 and 97, in an effort to bolster its progress conclusion. (CP 870-871). Those findings state that after the February 2014 Amendment, CORNERSTONE talked by phone with fire department officials about exiting the building to the west of the subject property (owned by Boone Court, LLC), and also talked with neighbors to inquire as to their thoughts on the vacation. (*Id.*). The trial court then also added conclusion of law 49 stating that CORNERSTONE made reasonable progress toward performance after the 2014 amendment. (CP 882).

MAHLEN has not found Washington cases which provide further definition for or a set of factors by which the requirement of reasonable

progress should be measured, except to say that contractors are required to keep their work in a “a state of forwardness.” *Byrne v. Bellingham Consol. School Dist. No. 301, Whatcom County*, 7 Wn.2d 20, 32, 108 P.2d 791 (1941). Otherwise, Webster’s Dictionary tells us that “progress” means “to move forward: proceed,” or “to develop a higher, better, or more advanced stage.” *Progress, Webster’s New Collegiate Dictionary* (7th ed. 1970). The trial court’s findings do not support a conclusion that this kind of progress was achieved by CORNERSTONE subsequent to the February 2014 Amendment (or before for that matter).

Rather, the facts show that post February 2014 Amendment, no construction work was performed to erect the drive-thru or the pylon sign. No dirt was moved. Not a single nail was hammered, nor a screw fastened. No contracts for construction were signed. No permits or approvals were obtained. No applications for permits or approvals were even filed. The grading permit expired for non-payment. No plans for the required retaining wall were drawn up (not at least until 2015 long after MAHLEN was gone, D. Ex. 113). No attorney was retained to draft up the required easement for CORNERSTONE’s neighbor. (RP 416:18-22). To the extent CORNERSTONE was in touch with neighbors, it did not talk to the only one it needed to—Boone Court, LLC. (P Ex. 31). Importantly, not one

dollar was spent by CORNERSTONE toward the \$30,000.00-\$100,000.00 necessary for the drive-thru. (P64; *see also* P74;RP: 326:2-7)⁷⁸.

All findings of fact that can be conceivably offered in support of a conclusion of reasonable progress will be addressed in turn. In doing so, one sees that they amount to no progress at all.

As stated, critical to the trial court was CORNERSTONE obtaining the application to vacate the alley in mid-April 2014. (RP 492:11-15). Filing this application was the first step toward vacating the alley and ultimately creating the drive-thru. (RP 186:9-13). CORNERSTONE knew it needed to pursue this vacation process by November or December 2013 (RP 387:13-388:10), but failed to secure the necessary application for five or six months. When it did finally secure the brief and uncomplicated application, CORNERSTONE took no action to fill it out or pay the required fee. (RP 418:22-25).⁹ In this way, CORNERSTONE failed to take even the first step toward performance of its drive-thru obligations.

⁷ MAHLEN's proposed findings 14 and 24 should have been granted based on Kofmehl Inc.'s bids at P. Ex. 64 and P. Ex. 74, combined with Mr. Scribner' cited testimony.

⁸ There is no evidence in the record that CORNERSTONE did construction work, obtained permits, or signed contracts for purposes of the drive-thru and sign work between February 24, 2014 and August 1, 2014. As such, the trial court should have granted Mahlen's proposed findings 37, 38, 39.

⁹ Again, there is no dispute that CORNERSTONE failed to file the application to vacate. As such, the trial court should have granted MAHLEN's proposed finding 31.

Certainly no conclusion of reasonable progress can stand where the first step toward performance is left incomplete.

The next finding that can be conceivably offered to support a conclusion of reasonable progress comes at number 58. (CP 866). There, the trial court found that between February 2014 and April 2014, Mr. Scribner obtained architectural designs from Martin J. Hill Architecture, Inc. In reality, the designs Mr. Hill drew up for CORNERSTONE came long before February 2014. One such design was drawn up July 22, 2013. (P. Ex. 4). The other came even earlier—October 17, 2012. (P. Ex. 82; RP 452: 14-24). Mr. Hill's invoices also confirm that his work was limited to the period between April 1, 2013 through January 20, 2014. (P. Ex. 9; P10). In short, there is simply no evidence in the record that Mr. Hill or his company provided any work to advance the drive-thru after the February 2014 amendment. Instead, this evidence supports granting MAHLEN's proposed finding 12.¹⁰

Also in finding of fact 58, the trial court states that between February 2014 and April 2014 CORNERSTONE obtained structural

¹⁰ Proposed Finding 12 states: "Mr. Scribner represented to MAHLEN that it was already planning on developing the drive-thru at the Subject Property (RT 91:5-8). This is corroborated by Mr. Scribner's timeline of events. (D. Ex. 102, p. 1). This is also corroborated by Plaintiff's Exhibit 82, a plan drawn by former architect, Martin Hill. This plan showed the location of the property line. This plan was reviewed by Mr. Scribner before he entered into any agreement with MAHLEN.

calculations from Inland Northwest Engineering, Inc. (CP 866). However, what the trial court fails to appreciate or make clear is that Inland Northwest Engineering, Inc.'s April 2014 work had nothing to do with the drive-thru. (*See* P. Ex. 12; P. Ex. 13). Rather, that work was for a sign and totaled only \$490.00 (*Id.*), less than 2% of the total cost necessary to build the sign. Indeed, CORNERSTONE obtained various bids (at no cost) for the pylon sign. (P. Ex. 16-17; P. Ex. 19; P. Ex. 22-23). Those bids all estimated that the work would exceed \$25,000.00. (P. Ex. 14). However, CORNERSTONE did not enter into any contracts with the sign companies that submitted them. With the bids for sign work exceeding \$25,000.00 (P. Ex. 14), an expenditure of \$490.00 on corresponding engineering cannot, without further action, support a conclusion of reasonable progress.

At finding 96, the trial court stated that after the February Amendment, Cornerstone talked to the fire department by phone about the requirements for exiting the building directly west of the leased premises. (CP 870). Even accepting *arguendo* that such a phone call happened, it certainly does not support a conclusion of reasonable progress even when combined with the other proffered findings. Indeed, whatever occurred during that alleged conversation failed to translate into any tangible action or advancement of the necessary work. If that call occurred, all it

illustrates is that CORNERSTONE was willing to take only those steps requiring little to no effort or cost.

The same can be said for finding 97. There, the trial court found that after the February 2014 Amendment, Cornerstone contacted various neighbors seeking to inquire as to their thoughts on the vacation. (CP 871). That finding does not support a conclusion of progress because the one neighbor CORNERSTONE actually needed to talk to was Boone Court, LLC. Yet Boone Court inarguably went ignored after December 19, 2013. On that date, Mr. Scribner had a telephone conversation with Boone Court's attorney, Brian Hipperson. (P. Ex. 31). During that discussion, Mr. Hipperson told Mr. Scribner that Boone Court had no objections to vacating the alley. (RP 333:1-6). Mr. Scribner promised to give Boone Court an easement for its fire exit, promised to install a retaining wall to stabilize the embankment supporting Boone Court's property, and promised to pay the associated costs. (P. Ex. 31; RP 331:22-332:18).

On January 23, 2014, about one month later, Mr. Scribner learned that CORNERSTONE and Boone Court owned a majority of the property adjacent to the alley. (RP 393:4-8). This was important because agreement of only such a majority was required for the application to vacate—a fact Mr. Scribner also knew in January 2014. (D. Ex. 102, p. 6). With the only evidence in the record being that a simple ownership

majority was necessary, finding of fact 60 is not supported by substantial evidence to the extent it suggests that something more than a majority was required. (*See* CP 867, Finding 60).

Thus, by January 2014, CORNERSTONE had all the information it needed from and about its neighbors to move the project forward. Reasonable progress would have been made at that juncture had CORNERSTONE promptly: i) drafted Boone Court's easement; ii) filed the application to vacate; and iii) obtained engineering plans for the retaining wall. CORNERSTONE did none of those things.

Indeed, on August 7, 2014, Boone Court's lawyer wrote CORNERSTONE and stated that after the December 19, 2013 phone call, Boone Court had "not heard back from either you or your attorney," and made clear that none of CORNERSTONE's promised action had been undertaken. (P. Ex. 31)¹¹. In this way, Plaintiff's Exhibit 31 shines a bright light. It reveals that finding 97 is unsupported by substantial evidence and that there can be no conclusion of reasonable progress post

¹¹ P24, P31, Mr. Scribner's admission that he knew or should have known he had the required majority (RT 393:4-8), and the undisputed testimony of Brian Hipperson (RT333: 1-6, RT: 331:22-332:18) should have resulted in the trial court granting MAHLEN's proposed finding 32.

February Amendment. Without such findings and conclusions, the trial court must be reversed.¹²

3. Legal Issue Three: Did CORNERSTONE materially breach the Lease?

A material breach excuses the other party's further performance. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 647, 211 P.3d 406 (2009). A breach is material when it goes to the root or essence of the contract. *DC Farms, LLC v. Conagra Foods Lamb Weston, Inc.*, 179 Wn.App. 205, 220, 317 P.3d 543 (2014). The party injured by the material breach may treat the contract as terminated. *Campbell v. Hauser Lumber Co.*, 147 Wn. 140, 145, 265 P. 468 (1928). Substantial performance is the antithesis of a material breach. *DC Farms, LLC*, at 220. A party can maintain an action on a contract where it has substantially performed. *Id.* The materiality of a breach and the issue of substantial performance is a question of fact. *Id.* at 221.

There is no question that the drive-thru was a material issue that went to the root of the contract. Mr. Mahlen testified that the ability to put a drive-thru at the Subject Property was the main reason it was selected. (RP 87:25-88:5). Lorrie Ferris corroborated such testimony. (RP 438:2-24; RP 443) Ms. Ferris further testified that MAHLEN delayed its grand

¹² Pursuant to the discussion on issue 2, MAHLEN's proposed Conclusions 10, 11, 12, and 15 should have been granted.

opening because it wanted the drive-thru in place for that purpose. (RP 443:19-444:6). Moreover, MAHLEN has not re-opened a downtown location for M Pressed because it has not found another suitable location where a drive-thru is possible. (RP 80:10-21). In light of such evidence, the trial court found that a drive-thru was the “main thing” MAHLEN wanted in a downtown location. (CP 869, Finding 79).¹³

The trial court also found that CORNERSTONE did not substantially perform the work that was required of it by the parties’ Lease and the February 2014 Amendment. (CP 870, Finding 95). This finding creates an irreconcilable conflict with the trial court’s conclusion that CORNERSTONE did not materially breach the contract and was entitled to damages. (CP 875, Conclusion 18). Indeed, by definition, a failure to render substantial performance is a material breach. *DC Farms, LLC*, 179 Wn.App. at 220. Because CORNERSTONE materially breached by failing to render substantial performance, CORNERSTONE was precluded from thereafter insisting on performance from MAHLEN and collecting damages. Judgment for CORNERSTONE must therefore be reversed.

¹³ In light of this finding, MAHLEN’s proposed Conclusion 16 should have been granted.

4. Legal Issue 4: Did CORNERSTONE commit misrepresentation?

a) Negligent Misrepresentation

A party establishes negligent misrepresentation by proving 1) that a party supplied false information for the other party's guidance in its business transactions; 2) that the speaker knew or should have known that the information was supplied to guide the other party in a business transaction; 3) that the speaking party was negligent in obtaining or communicating false information; 4) that the other party relied on the false information the speaker supplied; 5) that the other party's reliance was reasonable and justified; and 6) that the false information was the proximate cause of damages. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002). "If a party's manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient." Restatement (Second) of Contracts § 164(1) (1981); *Yakima County (West Valley) Fire Protection Dist. No. 12*, 122 Wn.2d at 390.

The trial concluded that that no negligent misrepresentation occurred. (CP 878-79, Conclusions 39-40). However, in the same breath, the trial court concluded that "Mr. Scribner underestimated the substantial

amount of work that was required in order to complete the drive-thru.” (CP 879, Conclusion 39). This is just another way of saying that CORNERSTONE was negligent in determining whether or not it could install the drive-thru and what the process was to make that happen. CORNERSTONE’s lack of understanding, if that is truly what it was, caused it to first communicate to MAHLEN that the drive-thru work would be completed by August 31, 2013 (RP 103:3-9), when, in fact, CORNERSTONE did not even own the property on which it promised to build the drive-thru. When the Lease was signed after an opportunity for further diligence, CORNERSTONE nonetheless represented that the drive-thru work would be complete within 90 days of possession. (P. Ex. 1, 1-44). In this way, CORNERSTONE used false information to induce MAHLEN to sign the Lease, consummate the tenancy, and incur expenses (D. Ex. 115) toward operating the downtown location, all of which would have been avoided completely with correct information. (RP 141:22-25).

In later explaining the delay and inducing MAHLEN to continue, CORNERSTONE represented that it was waiting on the City and corresponding permits. (RP 131:20-132:11). In truth, the only permit CORNERSTONE applied for expired for non-payment. (P. Ex. 77). Under the Restatement rule cited in *Yakima County*, such misrepresentation entitled MAHLEN to void the contract and terminate.

b) Intentional Misrepresentation

To establish intentional misrepresentation, a party must prove: 1) that there was a representation of an existing fact; 2) that the fact was material; 3) that the representation of the material fact was false; 4) that the speaker knew the representation was false; 5) that the speaker intended that the representation should be acted upon by the other party; 6) that the other party was ignorant of the falsity of the representation; 7) that the other party relied on the truth of the representation; 8) that the other party had the right to rely on the representation; and 9) that the other party sustained damages as a result. *West Coast, Inc. v. Snohomish County*, 112 Wn.App. 200, 206, 48 P.2d 997 (2002). Again, fraud renders a contract voidable. Restatement (Second) of Contracts § 164(1) (1981); *Yakima County (West Valley) Fire Protection Dist. No. 12*, 122 Wn.2d at 390.

Before these parties ever met, Mr. Scribner knew he did not have the 12 plus feet necessary to build the drive-thru because he had reviewed Martin Hill's plan. (P. Ex. 82). Thus, Finding 59 is not supported by substantial evidence as to the timing stated. Moreover, before November 2013, Martin Hill, while acting on CORNERSTONE's behalf, spoke to Patty Kels, a traffic engineer assistant with the City of Spokane. (RP 148:1-7; RP 148:13-19). The subject of the conversation was the installation of a drive-thru. (RP 397: 7-9). At that time, Ms. Kels told Mr.

Hill that the alley in which the drive-thru was contemplated would need to be improved, and that there were traffic implications to consider relative to the drive-thru exiting to Division St. (RP 397:24-398:5). In response, Mr. Hill made clear that because of the scope of the necessary improvements, CORNERSTONE would not pursue the drive-thru (RP 411:20-412:9).¹⁴ Out of the other side of its mouth, CORNERSTONE was busy representing to MAHLEN that it was working to build the drive-thru and just waiting on permits. (RP 125:18-128:25). Indeed, in November 2013, and thus after the Hill-Kels discussion, CORNERSTONE put its drive-thru representations to writing. (P. Ex. 60). It did so again in February 2014 when the parties executed the Amendment and CORNERSTONE falsely wrote that due to unforeseen circumstances it had not received the necessary permits. (P. Ex. 5). In August 2014, CORNERSTONE doubled down with false representations yet again when Mr. Scribner wrote to MAHLEN's counsel and stated that "We are actively working on installing the drive thru on the west side of the building. We have spent a significant amount of money having engineers, consultants, and architects work on this process." (P. Ex. 28).

¹⁴ Based on Patty Kels' testimony, the trial court should have granted MAHLEN's proposed findings 51, 52.

The record makes clear that there was no such active pursuit of the drive-thru and there had not been a significant amount of money spent towards that end. More importantly, the Hill-Kels discussion illustrates that CORNERSTONE had ruled out pursuit of the drive-thru by November 2013 based on the scope of the work necessary. Nonetheless, CORNERSTONE falsely promised it would build a drive-thru to induce MAHLEN into continuing the Lease.¹⁵ MAHLEN justifiably relied on the false drive-thru representations and only learned of their falsity upon visiting the City in June 2014. (RP 125:18-128:25); (RP125:18-23, P76-77); (RP 49:7-21)¹⁶. Upon doing so, MAHLEN was entitled under the Restatement rule to treat the contract as void and terminate the tenancy.

c) Misrepresentation Damages

The victim of misrepresentation¹⁷ is entitled to damages to put them back into the position they would have been in had the misrepresentation never occurred. *Turner v. Enders*, 15 Wn. App. 875, 879, 552 P.2d 694 (1976). Here, MAHLEN is thus entitled to a return of the reasonable costs incurred in connection with the Lease and running its

¹⁵ MAHLEN's proposed Conclusion 19 and 21 should have been granted.

¹⁶ Mr. Mahlen's testimony about his visit to the City in June 2014, his discoveries on that visit are not refuted in the record and are otherwise corroborated by the testimony of Patty Kels. Therefore, the trial court should have granted MAHLEN's proposed finding 47.

¹⁷ Based on the record regarding misrepresentation, the trial court should have granted MAHLEN's proposed findings 52-55.

business at the Subject Property, less revenue earned. Mr. Mahlen created a summary of those costs, less revenue. (D. Ex. 115, MAHLEN_00158)¹⁸. That summary was derived from the source documents otherwise included in Defense Exhibit 115. (RP 140:24-141:8). All told, \$65,404.53 is required to restore MAHLEN to pre-lease status.¹⁹ The trial court should be ordered to enter Judgment for MAHLEN in this amount on remand.

5. Legal Issue Five: Did MAHLEN anticipatorily repudiate the contract and terminate without required notice?

a) Anticipatory Repudiation

Anticipatory repudiation occurs when a party expressly or impliedly repudiates the contract prior to the time for performance. *Grant Cnty. Port Dist. No. 9 v. Wash. Tire Corp.*, 187 Wn.App. 222, 231, P.3d 889 (2015). “The repudiation must consist of a positive statement or action by the promisor indicating distinctly and unequivocally that he will not or cannot substantially perform any of his contract obligations.” *Id.* at 232. “A party’s doubtful and indefinite statements suggesting only that it may not perform do not demonstrate repudiation.” *Id.* Importantly, for there to be an anticipatory repudiation, the repudiation must come before the other party’s performance is due. *Id.* at 231.

¹⁸ Mr. Mahlen’s testimony about MAHLEN’s costs combined with D Ex. 115 should have resulted in the trial court granting MAHLEN’s proposed finding 56.

¹⁹ MAHLEN’s proposed Conclusion 22 and 23 should have been granted.

Here, the trial court found that in June 2014, MAHLEN gave verbal notice that it would be terminating the lease due to lack of progress on the drive-thru and pylon sign. (CP 867, Finding 68). The trial court concluded that this amounted to anticipatory breach. (CP 875, Conclusion 21). The problem, of course, is that assuming *arguendo* that MAHLEN made a definite and unequivocal repudiation in June 2014, any such repudiation cannot be deemed “anticipatory.” That is because by June 2014, CORNERSTONE’s performance *was* due. It was required by then to have built the drive-thru and pylon sign, or in the alternative, to at least have made reasonable progress toward those ends. *See Lano, supra*. Thus, because CORNERSTONE’s performance was due and not rendered, the anticipatory repudiation doctrine was no longer available and cannot support the trial court’s conclusion that MAHLEN breached.

b) Notice

The trial court concluded that MAHLEN breached the Lease when it moved out without giving notice under Article 37.1. (CP 876, Conclusions 22, 23). Here again, the trial court failed to give effect to the cancelation clause at section 5.3. That clause made termination “automatic” where the work was not substantially complete when due. (P. Ex. 1). To require notice under Article 37.1 for failure to achieve substantial completion reads the word “automatic” out of section 5.3 of the

contract. Such a reading would violate the time honored rules of contract construction. To wit, in construing a contract “every word and phrase must be presumed to have been employed with a purpose and must be given meaning and effect whenever reasonably possible...” *Ball*, 37 Wn.2d at 83. Courts cannot “disregard contract language which the parties have employed nor revise the contract under a theory of construing it.” *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). Moreover, “Courts should not adopt a contract interpretation that renders a term ineffective or meaningless.” *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 486, 209 P.3d 863 (2009). Additionally, specific contract terms control over boilerplate language. *Adler v. Fred Linda Manor*, 153 Wn. 2d 331, 354, 103 P.3d 773 (2004).

Section 5.3 of this contract is specifically tailored toward the very heart of the parties’ agreement—construction of a drive-thru for MAHLEN’s business. On the other hand, Article 37.1 is broad, general, and part of the boilerplate recitals included at the end of the contract. Section 5.3 must therefore control over Article 37.1. Moreover, to the extent these competing clauses create ambiguity, that ambiguity must be construed against CORNERSTONE as the party that drafted the Lease. *V. Van Dyke Trucking, Inc., v. “The Seven Provinces” Ins., Limited, of the Hague, Holland*, 67 Wn.2d 122, 128, 406 P.2d 584.

Any way you look at it, MAHLEN was not required to give any notice before exercising its cancellation rights in these circumstances. The question then, circles back to whether MAHLEN exercised those rights before CORNERSTONE's performance was due. As explained *infra*, there is no question in that regard—by the time MAHLEN canceled, CORNERSTONE's was required to have built the drive-thru, or at least have made reasonable progress toward completion of the drive-thru and pylon sign. Therefore, the Court erred in concluding that MAHLEN breached by terminating the lease without providing notice.

Even if notice had been required, it is clear that whatever occurred during the June 2014 phone call between Mr. Scribner and Mr. Mahlen, Mr. Scribner came away from that conversation with the understanding that MAHLEN considered CORNERSTONE to be in breach. (RP 325:2-10). MAHLEN then waited more than 30 days and stated its intentions in writing through an August 1, 2014 letter from its former counsel. (P. Ex. 27).²⁰ To conclude that compliance with Article 37.1 was lacking under those facts puts form over substance and improperly deems material a deviation that was trivial if existing at all. *See White*, 123 Wn. at 637.

6. Legal Issue 6: Is MAHLEN liable for rent and common area maintenance fees?

²⁰ Based on this letter, the trial court should have granted MAHLEN's proposed finding 49.

For the reasons already explained, MAHLEN cannot be liable to CORNERSTONE for breach. MAHLEN was relieved from continuing to pay rent based upon CORNERSTONE's failure to substantially complete the promised work, or in the alternative, upon CORNERSTONE's failure to make reasonable progress toward completion. Moreover, Article 37.2 of the Lease expressly permitted MAHLEN to "abate or withhold any rent or any other charges or sums payable by Tenant under this Lease" upon default of the Landlord. Thus, the trial court erred in concluding that MAHLEN breached the contract by failing to pay rent from May 2014 forward. (CP 876, Conclusion 26).

Additionally, as to Finding 70 (CP 868), to the extent that finding limits the period in which MAHLEN paid rent to June 2014, that finding is not supported by substantial evidence. Rather, the trial court should have granted MAHLEN's proposed finding number 50 which states, "MAHLEN had sufficient funds on deposit with [CORNERSTONE] to cover rent for July and August 2014. (CP 767, Proposed Finding 50).

At the outset of the tenancy, MAHLEN deposited \$5,744.00 with CORNERSTONE. (RP 136:13-23; CP 863, Finding 32). Under the contract, the first month's rent was free. (P. Ex. 1, 1-8)²¹. At the end, Mr.

²¹ Based on the plain language of the Lease in this respect, the trial court should have granted MAHLEN's proposed finding 19.

Mahlen went back and reconciled his payment obligations compared to what remained on deposit. (RP 138:16-139:15). The only evidence offered by either party at trial was that Mr. Mahlen's reconciliation left MAHLEN with sufficient funds on deposit to cover its obligations for July and August 2014. (RP 139:9-13). In fact, MAHLEN should have received \$200.00 back from the deposit. (*Id.*). Thus, conclusion of law 41 awarding CORNERSTONE damages for July 2014 and August 2014 is not supported by substantial evidence.

7. Legal Issue Seven: If CORNERSTONE is entitled to damages, should an award for CAM charges be included?

The trial court also concluded that CORNERSTONE's damages include common area maintenance ("CAM") expenses from July 2014 to May 2016, and a six percent fee for the administration of the common area. (CP 880, Conclusion 41). This totaled \$10,533.55 for CAM charges and \$644.21 for the CAM administration fee. It bears repeating that CORNERSTONE is not entitled to damages at all based on its breach, but in any event, awarding CAM charges plus an additional six percent fee runs contrary to the holding in *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn.App. 706, 334 P.3d 116 (2014).

Viking Bank stands for the proposition that a landlord is not entitled to a management fee it unilaterally incurred for its own benefit

and convenience in a triple net situation. *Id.* at 711. Like here, the *Viking Bank* lease required the tenant to pay rent, insurance premiums, taxes, utilities, and a prorated share of common area maintenance (CAM) expenses. *Id.* at 714. However, the Court of Appeals ruled that the landlord could not double dip and collect both the aforementioned charges and fees related to collecting those charges:

But payment of the expenses for *collecting* rent, taxes, and utility payments is not necessary for continued use and occupancy, and did not benefit [the tenant]. Instead hiring a management company to collect these payments was for [the landlord's] own benefit and convenience. Therefore, expenses relating to the management company's activities are not within the scope of [the lease].

Id. at 716 (emphasis in original).

Here we have the same problem. CORNERSTONE wants to collect all of the triple net costs, but also wants to charge an arbitrary six percent management fee, and yet another "Man/Admin fee" (P. Ex. 26) for the related administration and collection efforts. In fact, this case may be more egregious because of the incestuous nature of the relationship between CORNERSTONE and NRE, the management company it used. Indeed, NRE is really just another arm of Mr. Scribner. (RP 176:17-20). This kind of double dipping is not permitted under *Viking Bank*.

Even if we put the *Viking Bank* rule to the side for a second, there is not substantial evidence to find or support a conclusion that

CORNERSTONE or anyone acting on its behalf actually performed the common area work. Indeed, the evidence in the record shows that when it came to performing any of the tasks that could conceivably warrant a CAM charge (snow shoveling, weed pulling, parking lot maintenance, etc.), it was CORNERSTONE's tenants that actually did the work. (RP 442:5-443:3).²² Thus, CORNERSTONE should not receive CAM charges and fees as such an award is not grounded in fact or law.

8. MAHLEN seeks attorney fees

The prevailing party is entitled to attorney fees and costs on appeal if requested in the opening brief and if applicable law grants to a party the right to recover. RAP 18.1(a)-(b). Here, the parties' contract calls for an award of fees to the prevailing party. MAHLEN therefore requests fees on appeal and on remand as the ultimate prevailing party.

V. CONCLUSION

Based on the foregoing, MAHLEN seeks the following relief:

1. That judgment for CORNERSTONE be reversed.
2. That this case be remanded to the trial court with

instructions to enter judgment for MAHLEN with return of property, restitution, and an award of damages to MAHLEN totaling \$65,404.53.

²² Moreover, the Lease required CORNERSTONE to supply MAHLEN with documentation to reconcile the CAM charges (P1, Section 7.7), something CORNERSTONE also never did. (RT 143:19-20).

3. That MAHLEN be awarded attorney fees on appeal and that this case be remanded for an award of attorney fees to MAHLEN as the ultimate prevailing party.

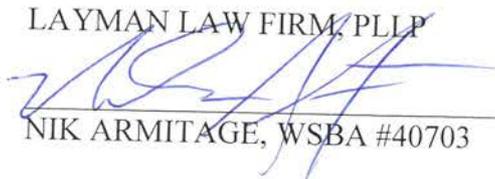
4. That this case be remanded with instructions to the trial court to enter MAHLEN's proposed findings of fact: 12, 14, 19, 24, 25, 28, 30, 31, 32, 37, 38, 39, 41, 47, 50, 51, 52, 53, 54, 55, 56.

5. That this case be remanded with instructions to the trial court to enter MAHLEN's proposed conclusions of law: 5, 10, 11, 12, 15, 16, 17, 19, 21, 22, 23, 24.

6. To the extent CORNERSTONE is entitled to damages, that this Court remand with instructions to reduce those damages by \$3,102.70 by virtue of MAHLEN's deposit covering rent/fees for July-August 2014.

7. To the extent CORNERSTONE is entitled to damages, that this Court remand with instructions to reduce those damages by \$10,533.55 for the CAM charges to which CORNERSTONE is not entitled, and to also reduce by \$644.21 for the CAM administration fee to which CORNERSTONE is not entitled.

DATED this 6th day of January 2017.

LAYMAN LAW FIRM, PLLP

NIK ARMITAGE, WSBA #40703

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of January 2017, I served a true and correct copy of the foregoing Brief of Appellant by delivering the same to the following attorneys of record, by the method indicated below, addressed as follows:

<input type="checkbox"/> Via Hand Delivery	Steve Hassing 425 Calabria St. Roseville, CA 95747 Fax: 916-677-1770 Email: sjh@hassinglaw.com
<input checked="" type="checkbox"/> Via Overnight Mail	
<input type="checkbox"/> Via U.S. Mail	
<input type="checkbox"/> Via Facsimile	
<input checked="" type="checkbox"/> Via Email	


HILARY HOFFMAN

APPENDIX A
Case No. 348288

RETAIL CENTER LEASE

BETWEEN

CORNERSTONE EQUITIES LLC, a Washington limited liability company

LANDLORD

AND

MAHLEN INVESTMENTS INC., a Washington Corporation, DBA M Pressed Dry Cleaning

TENANT

P 1-1

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RETAIL CENTER LEASE

THIS RETAIL CENTER LEASE (this "Lease") is made as of July 29th, 2013 ("Effective Date") between **CORNERSTONE EQUITIES LLC**, a Washington limited liability company ("Landlord"), and **MAHLEN INVESTMENTS Inc.**, a Washington Corporation, DBA M Pressed Dry Cleaning ("Tenant").

ARTICLE 1

BASIC LEASE PROVISIONS

- A. Lease Date: September 1st 2013
- B. Landlord: Cornerstone Equities LLC
- C. Tenant: Mahlen Investments Inc., a Washington Corporation
- D. Tenant's Trade Name: M Pressed Dry Cleaning
- E. Retail Center: The retail project on property particularly described and depicted on Exhibit "A-1" (the "Retail Center"), located at 1101 N Division, City of Spokane, Spokane County, Washington and depicted on the drawing attached as Exhibit A-2
Address of Premises:
1101 N Division Suite D
Spokane Wa, 99202
Attn: Craig Mahlen
- A. Premises: The area shown by hash-marks on Exhibit "B-1", containing approximately 1311 square feet of floor area.
- B. Use of Premises: Solely for use as Dry Cleaning in any capacity pertaining to pick up and Drop off retail location and Washing and Drying clothes for Households and for no other use or purpose whatsoever. Under no circumstances should this location actually dry clean in any way any clothes other than a drop off and pick up location. All Dry cleaning will be done off the premises and brought in after the Dry Cleaning has been done.
- C. Initial Term: Options Five (5) years
And with two (2) options of Five (5) years each

D Minimum Monthly Base Rent: Minimum monthly base rent will increase as follows:

Months 2 thru 12 is \$2185 each month

Months 13 thru 24 is \$2228 each month

Months 25 thru 36 is \$2273 each month

Months 37 thru 48 is \$2318 each month

Months 49 thru 60 is \$2365 each month

The First Months Minimum Monthly Rent due at signing to be applied to the second month when rent becomes due hereunder. For the first month of the lease, September, 2013, minimum monthly rent will not be charged, however, common area expense charges will be charged.

Initial Capped Common Area Expense Charges. During the period of possession until the earliest to occur of 1) first anniversary date of the commencement date, 2) the date the tenant shall cease performing the tenant common area maintenance obligations, 3) when the annual expenses are reconciled within 120 days after the end of the year, tenants prorate share of the common area expense charges shall be capped at \$458.85. Thereafter, tenant shall pay common area expense charges as provided in this lease.

D. Initial Security Deposit:

\$5744 due at signing which includes \$458 for common area expense charges for September 2013, \$2643 for minimum and common area expense charges for October 2013, and \$2643 to applied toward a deposit.

E. Tenant's Pro-Rata Share:

Fifteen percent (15%)

F. Landlord's Address for Notices and Payment:

Cornerstone Equities LLC
P.O. Box 8262
Spokane, Washington 99223

G. Tenant's Address for Notices:

At the Premises and a copy to:

Mahlen Investments Inc.
6483 Saddle Mountain Way
Deer Park, Wa 99006
Attn: Craig L. Mahlen

H. Landlord's Broker:

None

I. Tenant's Broker:

None

23,598³/₁₂ 1966

J. Guarantor: Craig L. Mahlen
Karen L. Mahlen

As to their marital and community and separate property

ARTICLE 2 LEASE OF PREMISES

Landlord hereby leases to Tenant and Tenant hereby leases and accepts from Landlord the Premises described in the Basic Lease Terms set forth in this Lease.

ARTICLE 3 PREMISES

3.1 Construction; Suitability.

(a) The improvements to the Premises leased to Tenant shall be constructed pursuant to and upon the timeframe set forth on Exhibit "C" attached hereto (the "Landlord's Work"), subject to extension as provided for in Paragraph 3.1(b), below. Landlord shall have no other obligation to perform any construction or other work to the interior or exterior of the Premises, which work is not set forth on Exhibit "C". Except as expressly provided herein, Tenant acknowledges that neither Landlord, nor any agent or representative of Landlord, has made any representation or warranty with respect to the suitability of the Premises for the use set forth in the Basic Lease Provisions, and that Tenant has entered into this Lease based solely upon its own investigation and inspection of the Retail Center, the Retail Center and the Premises. Landlord does not represent, and Tenant does not rely on the fact that any specific tenant or tenants will occupy space in the Retail Center during the term of this Lease. The Parties agree that the exterior walls (except as expressly provided to the contrary herein), foundation, bearing walls, and roof system of the building of which the Premises is a part are excluded from the Premises and shall be maintained by Landlord as provided for in Paragraph 10.1 hereof. Landlord further reserves the right in, over and upon the Premises as may be reasonably necessary or advisable for the servicing of the Premises or of other portions of the Retail Center.

(b) Promptly upon delivery of possession on or after the Possession Date, Tenant shall forthwith commence and complete all Tenant's work as described in Exhibit D and all other work required to fully open the Premises for business fully fixtured, stocked, and staffed ("Tenant's Work").

(c) Changes to the Center. Tenant acknowledges that Landlord may in its sole discretion increase, decrease or change the number, location, and dimensions of the buildings, the premises therein, driving lanes, driveways, walkways, parking places and other improvements in the Common Areas and/or any other portion of the Retail Center, and Landlord reserves the right to (a) make additions and alterations to all buildings constructed in the Retail Center and to change the name of the Retail Center and the address or designation of the Premises or the building in which the Premises are located; (b) install, maintain, alter and remove signs on or about the exterior and interior of the Retail Center, (c) add land, easements or other interests to or eliminate the same from the Retail Center, and grant easements and other interests and rights in the Retail Center to other parties, (d) add, alter, expand, reduce, eliminate, relocate or change the shape, size, location, character, design, appearance, use, number or height of any permanent or temporary buildings, structures, improvements, surface parking, subterranean and multiple level parking decks, kiosks, planters, parking areas, driveways, landscaped areas and other Common Areas, change the striping of parking areas and direction and flow of traffic, and convert Common Areas to leasable areas and leasable areas to Common Areas or any other portion of the Retail Center, (e) redesignate, modify, alter, close, restrict, expand, reduce and change the Common Areas; and (f) enclose any mall or other area, or remove any such enclosure, or add one or more additional levels or stories to the Retail Center or any portion thereof, whether or not the Premises are contained therein, and add structural support columns that may be required within the Premises or Common Areas. Nothing herein shall affect or impair the Tenant Common Area Maintenance Obligations. If Landlord shall add land to the Retail Center or develop additional land of which the Retail Center is a part and if Landlord shall operate such added or additionally developed land and the Retail Center and shall hold the same out to the public as one singularly designated and integrated project, or if Landlord shall add, expand, reduce, eliminate the total occupied rentable ground floor area of the Retail Center, thereafter, starting on the

first day of the first calendar month after substantial completion of any such event, Tenant's Pro-Rata Share shall be adjusted to take into account any such addition or reduction in rentable ground floor area.

3.2 Exhibits. The following drawings and special provisions are attached as exhibits and made a part of this Lease:

- Exhibit "A-1" - Legal Description
- Exhibit "A-2" - Retail Center Drawing
- Exhibit "B" - Premises
- Exhibit "C" - Landlord's Work
- Exhibit "D" - Lessee's Work
- Exhibit "X" - Guaranty
- Exhibit "Y" - Sign Criteria
- Exhibit "Z" - Restricted / Pre-Existing Uses

References to "this Lease" include all exhibits and matters incorporated by reference as part of this Lease.

ARTICLE 4 BUSINESS RIGHTS AND RESTRICTIONS

4.1 Use. The Premises shall be used continuously and uninterrupted solely for the specific use set forth in the Basic Lease Provisions and under the Trade Name set forth in the Basic Lease Provisions and for no other purpose or use whatsoever. Outdoor eating areas are prohibited without Landlord's express prior written consent.

4.2 Restrictions. Tenant shall not, without Landlord's prior written consent, which consent Landlord may withhold in its sole discretion: (a) conduct or permit to be conducted in the Premises, any of the uses described on the attached Exhibit Z; (b) conduct any auction or bankruptcy sales; (c) conduct any fire sale except as a result of a fire on the Premises; (d) conduct any close-out sale except at the expiration of the Lease term; (e) sell any so-called "surplus", "Army and Navy", or "secondhand" goods, as those terms are generally used at this time and from time to time hereafter; (f) permit anything to be done on the Premises which will in any way obstruct, interfere with or infringe on the rights of other occupants or invitees of the Retail Center; (g) cause, maintain or permit any nuisance on the Premises or cause or permit any waste to be committed on the Premises; (h) install or erect any satellite dish or other roof- or building-mounted equipment; (i) install any ATMs or video rental machines; (j) install appliances, video games, arcade games, pinball machines, or pay telephones in or about the Premises; or (k) bring or keep on the Premises any item or thing or permit any act thereon which is prohibited by any law, statute, ordinance or governmental regulation now in force or hereinafter enacted or promulgated, or which is prohibited by any Standard form of fire insurance policy. Furthermore, no portion of the Premises shall be used for (1) a place of amusement or recreation including the use of video, electronic, mechanical, or other gaming machines other than as offered for sale and Washington State Lottery gaming machines, (2) a massage parlor, adult bookstore or adult video store, (3) a health spa or dance studio or aerobic studio, (4) a church or other religious institution, (5) a day care center, (6) a warehouse facility, (7) a car wash or automobile or motorcycle sales, maintenance or service facility, (8) a dry cleaner, or (9) a training or educational facility.

P 1-10

ARTICLE 5 TERM

5.1 Duration. This Lease shall be effective as of the Effective Date. The initial term of this Lease shall commence on the date (the "**Lease Commencement Date**") which is the earlier of (a) September 1st 2013; provided, however, that such date and the term of this Lease shall each be extended on a day-for-day basis for each day that Landlord's Work is not completed pursuant to and upon the timeframe set forth on Exhibit "C" attached hereto, subject to extension as provided for in Paragraph 3.1(b), above; or (b) the day Tenant takes possession of the property. The initial term of this Lease shall continue for the period of years set forth in the Basic Lease Provisions, unless sooner terminated as provided in this Lease or extended in accordance with any option to extend which may be provided in this Lease. Commencing on the Possession Date, Tenant and Landlord shall comply with each and every term, covenant, condition and provision of this Lease, excepting only those provisions pertaining to Tenant's obligation to pay Minimum Monthly Rent, which obligation shall commence in accordance with Article 6 below. In connection therewith, Tenant acknowledges and agrees that certain obligations under various Articles hereof shall commence prior to the Lease Commencement Date (i.e., hold harmless, liability insurance, etc.), and the parties agree to be bound by these Articles prior to the Lease Commencement Date.

5.2 Option to Extend. Subject to the provisions of this lease and provided that on the date of the Option Notice (as hereafter defined) and on the scheduled date of the commencement of the Extended Term (as herein defined below): (1) tenant shall not then be in default under the terms of this lease; (2) the original Tenant shall be in direct occupancy of the entire Premises; and (3) this lease shall be in full force and effect; then, the term of this lease may be extended by Tenant for two (2) additional terms of five (5) years each (the "Extended Terms"), upon the same terms and conditions as contained in this lease, except that (x) there shall be no additional Extended Terms upon expiration of the final Extended Term; (y) Minimum Monthly Rent shall be adjusted in the manner set forth elsewhere in this lease; and (z) there shall be no abated/free rent periods or tenant improvement allowances. Tenant shall exercise its options, if at all, only with respect to the immediately succeeding Extended Term, by delivering written notice of its election thereof to Landlord, sent certified mail, return receipt requested, (the Option Notice), not less than 180 days prior to the expiration of the then current Term. The option to extend the term of this lease is only exercisable by the original Tenant named in the Basic Lease Provisions, and an assignee or sublessee pursuant to a Permitted Transfer is not assignable or Transferable, and once delivered the Option Notice cannot be cancelled or revoked. All references in this lease to the term shall be deemed to include a reference to the then effective Extended Term, if such Extended Term shall have commenced.

5.3 Cancellation. If for any reason whatsoever Landlord has not delivered the Premises to Tenant with Landlord's Work substantially complete on or before December 1st 2013, and as Tenant's sole and exclusive remedy, this Lease shall be deemed automatically cancelled, and shall have no force or effect, and Landlord shall return to Tenant any prepaid rent and other sums paid to Landlord upon execution and delivery of this Lease; subject, however, to Landlord's right to apply the Security Deposit as provided in Paragraph 5.4, below if Tenant shall have received occupancy of the Premises for any reason.

5.4 Security Deposit. Tenant has deposited with Landlord the Security Deposit set forth in the Basic Lease Provisions above, to be held by Landlord during the Term as set forth below. The Security Deposit shall be held by Landlord without liability for interest and as security for the performance by Tenant of Tenant's covenants and obligations hereunder, it being expressly understood that the Security Deposit shall not be considered as a measure of Tenant's damages in case of default by Tenant. Landlord may, in its sole discretion, from time to time without prejudice to any other remedy, use the Security Deposit to the extent necessary to make good any default under this Lease or to satisfy any other covenant or obligation of Tenant hereunder. Following any such application of the Security Deposit, Tenant shall pay to Landlord on demand the amount so applied in order to restore the Security Deposit to its original amount. If Tenant is not in default at the termination of this Lease, the balance of the Security Deposit remaining after any such application shall

be returned to Tenant within a reasonable period after such termination, after deducting therefrom any unpaid obligation of Tenant to Landlord as may arise under this Lease, including, without limitation, the obligation of Tenant to restore the Premises upon termination of this Lease. If Landlord transfers its interest in the Premises during the term of this Lease, Landlord may assign the Security Deposit to the transferee provided that such transferee accepts, in writing, to be bound by the terms of this Lease as the landlord hereunder.

ARTICLE 6 RENT

6.1 Payment. Tenant shall pay to Landlord without prior demand, abatement, deduction, set-off, counter claim or offset, for all periods during the Lease term, all sums provided in this Paragraph 6.1 and all other additional sums as provided in this Lease, at the address set forth in the Basic Lease Provisions, payable in lawful money of the United States of America on the first day of each month, except that the Minimum Monthly Rent due for the first month after the Lease Commencement Date shall be prepaid on the date of execution of the Lease by Tenant. All sums of money required to be paid pursuant to the terms of this Lease are hereby defined as "rent", whether or not the same are designated as such. Landlord's acceptance of Tenant's bank check or other funds shall not be deemed a waiver of Landlord's right to thereafter demand and receive timely payment in immediately available funds.

(a) Minimum Monthly Rent. Tenant shall pay to Landlord, on a "full net" basis, Minimum Monthly Rent at the initial monthly rate provided in Paragraph "D" of the Basic Lease Provisions. Minimum Monthly Rent will increase as set forth in such Paragraph "D".

(b) Late Fee. If Tenant shall fail to pay when due any installment of Minimum Monthly Rent or Additional Rent within 5 days after the date when due under this Lease, a late charge equal to the greater of ten percent (10%) of the overdue amount shall be payable by Tenant to reimburse Landlord for costs relating to collecting and accounting for said late payment(s), and shall bear interest at the rate of twelve percent (12%) per annum.

6.2 First Partial Month. If the Lease Commencement Date occurs on a day other than the first day of a calendar month, Minimum Monthly Rent for such partial month ending on the last day of the calendar month in which the Lease Commencement Date occurs shall be prorated based on a 30-day month, and as so prorated shall be paid on the first day of the third month after the Lease Commencement Date.

6.3 Additional Rent. As used herein, the term "Additional Rent" shall mean all Minimum Monthly Rent, Common Area Expenses, and all other charges, prorations and other amounts payable by Tenant pursuant to this Lease of whatever kind or nature, all of which shall constitute rental for the Premises.

ARTICLE 7 COMMON AREA

7.1 Definition. The "Common Area" is that area within the Retail Center which is neither occupied by buildings (excluding roof overhangs and canopies, columns supporting roof overhangs and canopies, and subsurface foundations) nor devoted permanently to the exclusive use of a particular tenant, except that areas containing pylon signs and buildings or subsurface utilities which are used with respect to the operation of the Common Area shall be deemed to be a part of the Common Area.

7.2 Use. During the Lease term Tenant, its subtenants, concessionaires, licensees, invitees, customers, and employees shall have the nonexclusive right to use the Common Area with Landlord, other owners of portions of the Retail Center, other tenants, and their respective subtenants, concessionaires, licensees, invitees, customers, and employees, subject to the provisions of this Lease.

7.3 Operation and Control. Landlord shall have sole and exclusive control and non-exclusive possession of the entire Common Area and may from time to time adopt rules and regulations pertaining to the use thereof. Landlord shall, except as otherwise expressly provided herein, operate and maintain the Common Area during the Lease term. Landlord reserves the right to use the Common Area for such promotions, exhibitions and similar uses as Landlord reasonably deems in the best interests of the Retail Center and its tenants. Landlord may temporarily close parts of the Common Area for such periods of time as may be

necessary for (i) temporary use as a work area in connection with the construction of buildings or other improvements within the Retail Center or contiguous property; (ii) repairs or alterations in or to the Common Area to any utility facilities; (iii) preventing the public from obtaining prescriptive rights in or to the Common Area; (iv) emergency or added safety reasons; (v) temporary use of the Common Area for a "farmers' market" or comparable entertainment or shopping events; or (vi) performing such other acts as in Landlord's reasonable judgment are appropriate for the proper operation or maintenance of the Retail Center. Landlord's rights shall include, but not be limited to, the right to (vii) restrain the use of the Common Area by unauthorized persons; (viii) utilize from time to time any portion of the Common Area for promotional, entertainment and related matters; (ix) place permanent or temporary kiosks, displays, carts and stands in the Common Area and to lease same to tenants; (x) temporarily close any portion of the Common Area for repairs, improvements or alterations, to discourage non-customer use, to prevent dedication or an easement by prescription, or for any other reason deemed sufficient in Landlord's judgment; and (xi) change the shape and size of the Common Area, add, eliminate or change the location of improvements to the Common Area, including, without limitation, buildings, lighting, parking areas, roadways and curb cuts, and construct buildings on the Common Area. Landlord may determine the nature, size and extent of the Common Area and whether portions of the same shall be surface, underground or multiple-deck; as well as make changes to the Common Area from time to time which in Landlord's opinion are deemed desirable for the Retail Center. The manner in which the Common Area shall be operated and maintained and the expenditures therefor shall be in Landlord's sole discretion. Landlord reserves the right to appoint a substitute operator, including but not limited to, any tenant in the Retail Center, to carry out any or all of Landlord's rights and duties with respect to the Common Area as provided in this Lease; and Landlord may enter into a contract either by a separate document or in a Lease agreement with such operator on such terms and conditions and for such period as Landlord shall deem proper.

7.4 Employee Parking. Landlord may designate from time to time what part of the Common Area, if any, shall be used for vehicle parking by Tenant, employees of owners and employees of tenants, occupants, and licensees. No Tenant or employee of any such owner, tenant, occupant, or licensee shall use any part of the Common Area for parking except such area or areas as may be so designated. The right to use such area may be redesignated, at any time by Landlord.

7.5 Obstructions. No fence, wall, structure, division, rail or obstruction shall be placed, kept, permitted or maintained upon the Common Area or any part thereof by Tenant. Tenant shall not conduct any sale, display, advertising, promotion, or storage of merchandise or any business activities of any kind whatsoever in or upon the Common Area without Landlord's prior written consent. Tenant shall not use the Common Area for solicitations, demonstrations or any other activities that would interfere with the conduct of business in the Retail Center, or which might tend to create civil disorder or commotion.

7.6 Maintenance and Operation.

(a) "Common Area Expenses" shall include, but not be limited to, the costs and expenses of operating, managing, lighting, repairing, replacing (when repairing will be uneconomic), painting, and maintaining the Common Area and the Retail Center in good and sanitary order, condition, and repair, including without limitation, the costs and expenses of the following: (1) management costs at then-prevailing market rates, if applicable; (2) cleaning and removing graffiti, rubbish and dirt; (3) labor costs for personnel performing services in connection with the operation, repair and maintenance of the Common Area or Retail Center and the payroll taxes and benefits related thereto; (4) all utility services utilized in connection with the Common Area and Retail Center which are not separately metered to the tenants, including but not limited to heating, ventilation, and air conditioning, electricity, gas, water charges, sewer charges, hook-up fees, and cost of installing, maintaining and repairing the Retail Center's intrabuilding network cabling, repair and/or installation of any fire protection systems, security alarm systems, lighting systems, electrical systems and any other utility systems; (5) maintaining, repairing, replacing, and re-marking paved and unpaved surfaces, curbs, signs, landscaping, lighting and electrical facilities, drainage, elevators, meters, breakers, security systems, life safety systems, irrigation systems, fences and gates, wiring, and repairs, modifications, additions and replacements to the foregoing whether or not necessitated by any present or future law, statute, regulation, or directive of any governmental agency, and other similar items; (6) all premiums on, deductibles, retentions, and claims not covered by, worker's compensation, casualty, public liability, property damage, loss of rent, fire

and extended coverage, and other insurance on the Common Area and Retail Center obtained by Landlord pursuant to **Article 11**, or otherwise; (7) rental of or cost of tools, machinery, and equipment used in connection with managing and maintaining the Common Area; (8) all real property and personal property taxes and assessments levied or assessed against the Retail Center or the Common Area, including without limitation, transport fees, trip fees, monorail, light rail, and other metro-rail fees or assessments, transportation management fees, business improvement district fees, school fees, fees assessed by air quality management districts or any governmental agency regulating air pollution or commercial rental taxes; (9) the cost of all janitors, gardeners, security personnel and equipment performing services on the Common Area; (10) any regulatory fee or surcharge or similar imposition imposed by governmental requirements based upon or measured by the number of parking spaces or the areas devoted to parking in the Common Area; (11) the cost of other capital improvements to the Retail Center that are not reserved to the exclusive use of any tenant, including, without limitation, the cost of utility services to the outside perimeter of the building located in the Retail Center; (13) all of the foregoing expenses relating to any larger property of which the Retail Center is a part and that are allocated or are reasonably allocable to the Retail Center; and (14) any charges, costs, or assessments imposed pursuant to any covenants, restrictions, or declarations binding upon the property of which the Retail Center is a part; and (15) a fee to Landlord for administration of the Common Area in an amount equal to six percent (6%) of the expenses incurred by Landlord pursuant to this **Paragraph 7.6**. Notwithstanding the foregoing, following shall be excluded from Common Area Expenses: depreciation and amortization, except as provided herein and except on materials, tools, supplies and vendor-type equipment purchased by Landlord to enable Landlord to supply services Landlord might otherwise contract for with a third party where such depreciation and amortization would otherwise have been included in the charge for such third party's services and when depreciation or amortization is permitted or required, the item shall be amortized over its reasonably anticipated useful life.

7.7 Tenant's Contribution.

(a) During the Lease term, and any extended terms, Tenant shall pay to Landlord on the first day of each month, Tenant's Pro-Rata Share of the amount of all Common Area Expenses based on, at Landlord's election, either: (a) the amount of such expenses actually incurred during the billing period; or (b) equal periodic installments which have been estimated in advance by Landlord for a particular period. Landlord may revise such estimates upward or downward at any time without prior notice to Tenant. If Landlord elects to bill Tenant based upon estimates, Landlord shall, within one hundred twenty (120) days after the end of the calendar year, or as soon thereafter as possible, forward to Tenant a written statement (the "**annual reconciliation statement**") which adjusts the estimated expenses to reflect the actual expenses incurred for such year. If the annual reconciliation statement shows the actual expenses to have exceeded the estimated expenses, then Tenant's share of such additional amount shall be paid by Tenant to Landlord within ten (10) days of receipt of the annual reconciliation statement; if the annual reconciliation statement shows the actual expenses to have been less than the estimated expenses, Landlord shall credit Tenant's share against the sums next due hereunder from Tenant to Landlord (or against any outstanding sums then due).

(b) Gross-Up Clause: If less than an average of ninety-five percent (95%) of the rentable area of the Retail Center is occupied by tenants during all or any portion of any year during the Lease term, Landlord shall make an appropriate adjustment of Common Area Expenses for such year, including for purposes of calculating estimated payments of Tenant's Pro-Rata Share of the amount of all Common Area Expenses, employing sound accounting and property management principles, to determine the amount of Common Area Expenses that would have been expended or incurred had ninety-five percent (95%) of the rentable area of the Retail Center been occupied during the entire year.

ARTICLE 8 TAXES

8.1 Personal Property Taxes. Tenant shall pay before delinquency all license fees, public charges, taxes and assessments on the furniture, fixtures, equipment, inventory and other personal property of or being used by Tenant in the Premises, whether or not owned by Tenant.

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8.2 Real Property Taxes.

(a) Definition: Payment. Tenant shall pay to Landlord as Additional Rent, in the manner set forth in Paragraph 7.7, Tenant's Pro-Rata Share all "Taxes" (as defined below). As used herein, Taxes shall mean any and all real property taxes, excises, license and permit fees, utility levies and charges, business improvement districts, metropolitan improvement districts, and other governmental charges and assessments, general and special, ordinary and extraordinary, unforeseen as well as foreseen, of any kind and nature whatsoever, and installments thereof (including any business and occupation tax imposed on Landlord or the Retail Center, and any tax imposed on the rents collected therefrom or on the income generated thereby, whether or not substituted in whole or in part for real property taxes, as well as assessments and any license fee imposed by a local governmental body on the collection of rent), which shall be levied or assessed against all or any portion of the Premises, or imposed on Landlord for any period during the term of this Lease. Said Taxes attributable to the years that this Lease commences and terminates shall, if necessary, be prorated and apportioned between Landlord and Tenant to coincide with the commencement and expiration of the Lease Term.

(b) Tenant's Use. Notwithstanding any other provisions of this Paragraph 8.2, in the event that Tenant's use of the Premises or any action undertaken by Tenant causes an increase in Taxes assessed against the Retail Center or the Premises as a result of any tax reassessment or reappraisal, Tenant shall be solely liable for, and shall pay, in addition to all other sums payable under this Paragraph 8.2 or elsewhere in the Lease, the entire amount of the increase in Taxes over the amount of Taxes for the Retail Center or the Premises had such reassessment or reappraisal not occurred.

8.3 Business Taxes. Tenant shall pay (a) all special taxes and assessments or license fees now or hereafter levied, assessed or imposed by law or ordinance, by reason of the use of the Premises, and (b) any business and occupation tax and any tax, assessment, levy or charge assessed on the rent paid under this Lease.

8.4 Substitute and Additional Taxes. If, at any time during the Term, the methods of taxation prevailing on the execution date hereof shall be altered so that in lieu of, or as a supplement to, or a substitute for, the whole or any part of the Taxes now levied, assessed or imposed on the Premises or the Retail Center, there shall be levied, assessed or imposed a tax, assessment, levy, imposition or charge, wholly or partially as a capital levy or otherwise, on the rents received therefrom, or a tax, assessment, levy (including but not limited to any municipal, state, or federal levy), imposition or charge measured by or based in whole or in part upon the Premises and imposed upon Landlord, or a license fee measured by the rent payable under this Lease or by expenditures made by Tenant on Landlord's behalf in connection with this Lease, then all such taxes, assessments, levies, impositions, charges of the part thereof so measured or based, shall be deemed to be included within the term "Taxes" as defined in Article 6 hereof, and Tenant shall pay and discharge the same in the manner provided for the payment of Taxes herein, it being the intention of the parties hereto that the rent to be paid hereunder shall be paid to Landlord absolutely net, without deduction of any kind or nature whatsoever.

8.5 Commercial Rent Tax. Tenant shall pay to Landlord, in addition to and together with any and all installments of Minimum Monthly Rent and Additional Rent payable pursuant to this Lease, the excise, transaction, sales, privilege, or other tax (other than net income and/or estate taxes) now or in the future imposed by the city, county, state or any other government or governmental agency upon Landlord and attributable to or measured by the Minimum Monthly Rent or Additional Rent payable by Tenant pursuant to this Lease.

ARTICLE 9 UTILITIES

In addition to all other sums Tenant is required to pay pursuant to this Lease, Tenant shall be solely responsible for and shall pay as Additional Rent prior to delinquency all charges for electricity, telephone, water, gas (if any), heat and any other utilities used or consumed on the Premises from and after the date Tenant first takes possession of the Premises. If the Premises are separately metered, Tenant agrees to pay all charges therefor attributable to the Lease term directly to the appropriate utility service company before

delinquency, whether the statement or invoice therefor is delivered to Tenant during, or after expiration of, the Lease term. Tenant shall pay to Landlord before delinquency its Pro-Rata Share of the costs of any utility services that are not separately metered. Nothing contained in this Lease shall limit Landlord in any way from granting or using easements on, across, over, and under the Retail Center for the purpose of providing utility services for Tenant or others. In no event shall Landlord be responsible for any loss, cost, liability or expense of any person or entity resulting from any interruption of utility services to Tenant and/or the Premises, nor shall rent be offset as a result of any such interruption.

ARTICLE 10 REPAIRS AND ALTERATIONS

10.1 Landlord's Repairs. Landlord shall keep in good condition and repair the exterior walls (except that Tenant shall at its own expense maintain and keep in good repair (ordinary wear and tear excepted unless and until replacement is necessary), all exterior installations, signs, and advertising devices which it is permitted or required by Landlord to install or maintain and except for Tenant's obligation to restore the building or fascia surface to its original condition as expressly provided for in this Lease), structure, foundation, bearing walls, and roof system of the Premises, the cost of which shall be included in Common Area Expenses unless the repair or replacement relates solely to the Premises or is necessitated by the act or negligence of Tenant, its agents, employees, invitees, licensees, representatives or contractors, in which case Tenant shall pay the cost of all such repairs. In addition to the foregoing, Landlord may, at its election, employ qualified companies to provide regular inspection, maintenance and repair of the roof, fire sprinklers and HVAC system, the costs of which shall be included in Common Area Expenses pursuant to Paragraph 7.6, and paid by Tenant in accordance with Paragraph 7.7. Nothing contained in this Paragraph 10.1 shall limit Landlord's right to reimbursement from Tenant for maintenance, repair costs and replacement costs provided elsewhere in this Lease.

10.2 Tenant's Repairs. Except as expressly provided in Paragraph 10.1, Tenant shall, at its sole cost, keep in first-class appearance, in a condition at least equal to that which existed when Tenant initially opened the Premises for business, and in good order, condition, cleanliness and repair (ordinary wear and tear excepted unless and until replacement is necessary) the exterior installations, signs, and advertising devices which it is permitted or required by Landlord to install or maintain and interior of the Premises and every part thereof, including without limitation, the interior surfaces of the exterior walls, the exterior and interior portion of all doors, door frames, door checks, entrances, windows, window frames, plate glass, storefronts, grease traps, swamp coolers, all plumbing and sewage facilities within the Premises, including free flow up to the main sewer line, fixtures, HVAC and electrical systems serving solely the Premises (whether or not located in the Premises), sprinkler systems, walls, floors, ceilings and any mechanical systems or equipment installed for the sole use by Tenant. All equipment, facilities or fixtures shall, at Tenant's sole expense, be kept, repaired, maintained, replaced or added to by Tenant at all times in accordance with all governmental requirements. Tenant shall cause all grease traps, if any, serving the Premises to be cleaned and serviced as often as may be required by law, ordinance or regulation or in order to keep the grease traps safe, sanitary and in good working order, and shall, within five (5) days of receipt, furnish to Landlord true copies of all receipts or other evidence of service from outside vendors who empty, clean or service the grease traps. In the event that Tenant fails to comply with the obligations set forth in this Paragraph 10.2, Landlord may, but shall not be obligated to, perform any such obligation on behalf of, and for the account of Tenant, and Tenant shall reimburse Landlord for all costs and expenses paid or incurred on behalf of Tenant in connection with performing the obligations set forth herein. Tenant expressly waives the right to make repairs at Landlord's expense under any law, statute or ordinance now or hereafter in effect.

10.3 Alterations.

(a) Tenant's Alterations. Tenant shall not make any alterations, decorations, changes, installations or improvements (collectively, "Tenant Changes") in, to, or about the interior or exterior of the Premises without obtaining the prior written consent of Landlord. Tenant's request for Landlord's consent to perform any Tenant Changes which may affect the HVAC system or cause penetration through the roof of the building, must be accompanied by plans and specifications (to be prepared by Tenant at Tenant's sole cost) for the proposed Tenant Change in detail reasonably satisfactory to Landlord, together with notice of the identity of the licensed contractor which Tenant has or will engage to perform such work, plus a review fee not to

exceed \$300.00. Landlord shall grant or withhold its approval of such plans and specifications within fifteen (15) business days after Tenant makes request therefor in the manner provided herein; provided, however, if Landlord needs to consult with an outside consultant or expert with respect thereto, Landlord's consent shall be granted or denied within a reasonable time after the expiration of such 15-day period. All such work shall be accomplished at Tenant's sole risk, and Tenant shall indemnify, defend and hold harmless Landlord from and against any and all loss, cost, liability and expense (including consequential damages) relating to or arising from the Tenant Changes. All Tenant Changes shall become a part of the realty upon installation thereof.

(b) Approval Not Required. Notwithstanding Paragraph 10.3(a), with respect to carpeting and painting and other Tenant Changes which (i) are non-structural in nature (i.e., do not involve changes to the structural elements of the building or the Retail Center); (ii) do not involve changes to the building's systems, including without limitation, the roof, electrical, plumbing, and HVAC systems (the Tenant Changes described in clauses (i) and (ii) hereof are collectively called "Non-Structural Changes"); and (iii) in the aggregate would not cost in excess of \$3,000.00 when added together with the cost of all other Non-Structural Changes made during the prior 12 month period, Tenant need not obtain Landlord's prior written consent, but must notify Landlord in writing within ten (10) days prior to the commencement of such Non-Structural Changes.

10.4 General Conditions. Tenant shall at all times comply with the following requirements when performing any work pursuant to Paragraphs 10.2 and 10.3:

(a) Contractors. Tenant shall use the contractors and mechanics then appearing on Landlord's approved list if the Tenant Changes involve changes to the building's systems and/or structural elements. With respect to Non-Structural Changes, Tenant shall use such contractors and mechanics which Landlord approves of in writing prior to their use, which approval shall not be unreasonably withheld. All contractors used by Tenant shall be licensed contractors who are experienced in the type of work to be performed.

(b) Compliance With Laws. All Tenant Changes shall at all times comply with all laws, rules, orders and regulations of governmental authorities having jurisdiction thereof and all insurance requirements of this Lease, shall comply with the rules and regulations for the Retail Center now or hereafter in existence, and shall comply with the plans and specifications approved by Landlord.

(c) Tenant's Responsibility. All Tenant Changes shall be made and completed at Tenant's sole cost and expense, and the Retail Center and the Premises shall be kept lien-free at all times by Tenant. Tenant has no authority to cause Landlord's interest in the Premises or Retail Center to become subject to any liens or encumbrances of any kind.

(d) Compliance with Americans With Disabilities Act. Tenant shall comply with all provisions of the Americans With Disabilities Act of 1990 and all regulations promulgated to implement the provisions of such act. In this regard, in connection with any improvement or alteration to the Premises done by Tenant, Tenant shall insure that the Premises is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

ARTICLE 11 INSURANCE

11.1 Use Rate. Tenant shall not carry any stock of goods or do anything in or about the Premises which will cause an increase in insurance rates or premiums on the building in which the Premises are located. In no event shall Tenant perform any activities which would invalidate any insurance coverage on the Retail Center or the Premises. Tenant shall pay on demand any increase in premiums that may be charged as a result of Tenant's use or activities or vacating or otherwise failing to occupy the Premises. In no event shall the limits of insurance required to be maintained by Tenant pursuant to this Lease be deemed to limit the liability of Tenant hereunder.

11.2 Liability Insurance. Tenant shall, during the Lease term, at its sole expense, maintain in full force a policy or policies of Commercial General Liability (CGL) insurance including contractual, on an

occurrence basis, with coverage at least as broad as the most commonly available ISO Commercial General Liability policy CG 00 01, at least Two Million Dollars (\$2,000,000) per occurrence limit, Two Million Dollars (\$2,000,000) general aggregate limit, including any necessary and appropriate endorsements to comply with the additional requirements of this Lease. Tenant shall also maintain Business Automobile coverage, One Million Dollars (\$1,000,000) per accident limit, covering all owned, non-owned, scheduled and hired autos. In addition, if the use of the Premises includes the sale of alcoholic beverages, Tenant shall obtain Host Liquor and/or a Liquor Liability policy with coverages and liability limits as reasonably determined by Landlord.

11.3 Worker's Compensation Insurance. Tenant shall at all times maintain worker's compensation insurance in compliance with federal, state and local law including Employer's Liability coverage (contingent liability/stop gap) in the amount of \$1,000,000.

11.4 Property Insurance/Business Income.

(a) Landlord's Insurance. Landlord shall pay for and shall maintain in full force and effect during the term of this Lease an extended form of Property insurance in an amount equal to the greater of (i) full replacement cost value of the Retail Center, including the Premises, if such coverage shall be reasonably available at commercially reasonable rates and with commercially reasonable deductibles; or (ii) if the coverage in the preceding clause (i) shall not be available at commercially reasonable rates and with commercially reasonable deductibles, 90% of the replacement cost value of the Retail Center, including the Premises. All such coverage may include, at Landlord's sole option, earthquake, sprinkler leakage coverage, boiler and machinery, difference in conditions, Ordinance or Law, flood, terrorism, and excess rental value). In addition, Landlord shall pay for and shall maintain in full force and effect during the term of this Lease, loss of business income/loss or rents coverage equal to Minimum Monthly Rent for up to eighteen months and, at Landlord's option, a policy of Commercial General Liability (CGL) insurance including contractual, on an occurrence basis, with coverage at least as broad as the most commonly available ISO Commercial General Liability policy CG 00 01, in such coverage amounts and including any necessary and appropriate endorsements as Landlord shall, in its sole discretion, determine. During the Lease term, and any extended terms, Tenant shall pay Tenant's Pro-Rata Share for the costs incurred by Landlord for such insurance, at Landlord's election, either in accordance with the payment provisions set forth in Article 77.7 above or within ten (10) days after delivery to Tenant of Landlord's statement therefor.

(b) Tenant's Insurance. Tenant shall pay for and shall maintain in full force and effect, during the term of this Lease, Property insurance covering its leasehold improvements to the Premises as well as its furniture, fixtures, equipment, inventory and other personal property located on the Premises in an amount of not less than one hundred percent (100%) replacement cost value, "Special Form—Causes of Loss", with Flood Insurance and earthquake if Landlord or its lender deems such insurance to be necessary or desirable), with an Ordinance or Law endorsement. Tenant shall also obtain and maintain Business Income and Extra Expense coverage for a period of at least twelve (12) months.

11.5 Waiver of Subrogation. Except as hereafter provided, and except for any insurance deductible amounts, whether the loss or damage is due to the negligence of either Landlord or Tenant, their agents or employees, or any other cause, Landlord and Tenant do each hereby release and relieve the other, their agents or employees, from responsibility for, and waive their entire claims of recovery for (i) any loss or damage to the real or personal property of either party located anywhere in the Retail Center, including the Premises itself, or the Common Areas, arising out of or incident to the occurrence of any of the perils which are covered by their respective property and related insurance policies, and (ii) any loss resulting from business interruption at the Premises, arising out of or incident to the occurrence of any of the perils which may be covered by any Business Income insurance policy by Tenant. If needed, each party shall use its best reasonable efforts to cause its insurance carriers to consent to the foregoing waiver of rights of subrogation against the other party. Notwithstanding the foregoing, no such release shall be effective unless and to the extent the aforesaid insurance policy or policies shall expressly permit such a release or contain a waiver of the carrier's right to be subrogated.

11.6 General Requirements. All policies of insurance required to be carried hereunder by Tenant shall:

(a) Licensed in State. Be written by companies reasonably satisfactory to Landlord and licensed to do business and admitted in the state in which the Premises are situated. All policies of insurance required to be maintained by Tenant shall be issued by insurance companies with an A.M. Best's financial strength rating of "A-" or better and an A.M. Best's Financial Size Category of Class "IX" or higher; shall not contain a deductible greater than \$5,000 or any self-insured retention unless expressly approved in writing by Landlord; and coinsurance shall not be permitted (alternatively, an agreed-value endorsement waiving coinsurance penalties may be provided).

(b) Primary. Contain a clause that such policy and the coverage evidenced thereby shall be primary and non-contributing with respect to any policies carried by Landlord, and that any coverage carried by Landlord shall be excess insurance. All insurance coverage must be on an "occurrence basis"; "claims made" forms of insurance are not acceptable.

(c) Additional Insured. Liability policies shall name Landlord and the manager of the Retail Center as additional insureds utilizing ISO Endorsement CG 20-26 or its equivalent ("certificate holder" status is not acceptable); Landlord shall be listed as a "loss payee" on property policies. Landlord's lender(s) shall be provided a lender's loss payable form (438BFU or equivalent).

(d) Notice of Cancellation. Not be subject to cancellation, reduction in coverage, or material amendment affecting coverage except upon at least thirty (30) days prior written notice to Landlord and each additional insured and loss payee. The policies of insurance containing the terms specified herein, or duly executed certificates evidencing them (ACORD Form 27 or its equivalent for liability policies; ACORD Form 28 or its equivalent for property policies), together with copies of all required endorsements and satisfactory evidence of the payment of premiums thereon, shall be deposited with each additional insured at least 30 days prior to the Lease Commencement Date and subsequently not less than thirty (30) days prior to the expiration of the original or any renewal term of such coverage. If Tenant fails to comply with the insurance requirements set forth in this Lease, Landlord shall have the right, but not the obligation, at any time and from time to time, without notice, to procure such insurance to protect Landlord's own interests and for Landlord's sole benefit, in which event Tenant shall repay Landlord, immediately upon demand by Landlord, as Additional Rent, all sums so paid by Landlord together with interest thereon and any costs or expenses incurred by Landlord in connection therewith, without prejudice to any other rights and remedies of the Landlord under this Lease.

ARTICLE 12 DAMAGE AND RESTORATION

12.1 Damage and Destruction of the Premises. If the Premises are at any time destroyed or damaged by a casualty insured against by Landlord pursuant to Article 11 hereof or otherwise insured against by Landlord, and if as a result of such occurrence:

(a) the Premises are rendered untenantable only in part, this Lease shall continue in full force and effect and, provided Tenant shall have been open for business and operating in the entire Premises for the permitted use set forth in the Basic Lease Provisions at the time of the casualty and shall covenant in writing to Landlord that Tenant shall reopen in the entire Premises for such permitted use and will comply with the provisions of Paragraph 12.3 below upon completion of Landlord's reconstruction, rebuilding or repair of the Premises, Landlord shall, subject to the provisions of Paragraph 12.4 below, commence diligently to reconstruct, rebuild or repair the Premises to the extent only of Landlord's Work set forth in Exhibit "C" (Landlord shall have no obligation to construct any of Tenant's Work). In such event, Minimum Monthly Rent, Common Area Expenses and Taxes shall abate proportionately to the portion of the Premises rendered untenantable from the date of the destruction or damage until the entire Premises have been restored by Landlord to the extent only of Landlord's Work set forth in Exhibit "C";

(b) the Premises are rendered totally untenantable, provided Tenant shall have been open and operating in the entire Premises for the permitted use set forth in the Basic Lease Provisions at the

time of the casualty and shall covenant in writing to Landlord that Tenant shall reopen in the entire Premises for such use and will comply with the provisions of Paragraph 12.3 below upon completion of Landlord's reconstruction, rebuilding or repair of the Premises, Landlord shall, subject to Paragraph 12.4 hereof, commence diligently to reconstruct, rebuild or repair the Premises to the extent only of Landlord's Work set forth in Exhibit "C" (Landlord shall have no obligation to construct any of Tenant's Work)]. In such event, Minimum Monthly Rent, Common Area Expenses and Taxes shall abate entirely from the date of the destruction or damage until the Premises have been restored by Landlord to the extent only of Landlord's Work set forth in Exhibit "C"].

12.2 Damage or Destruction of Retail Center.

(a) If 25% or more of the Leasable Area of the Retail Center or 25% or more of the Common Area of the Retail Center, or any combination of Leasable Area and Common Area which aggregate 25% or more of the total square footage of Retail Center land, is at any time destroyed or damaged (including, without limitation, by smoke or water damage) as a result of fire, the elements, accident, or other casualty, whether or not the Premises are affected by such occurrence, Landlord may, at its option (to be exercised by written notice to Tenant within ninety (90) days following any such occurrence), elect to terminate this Lease. In the case of such election, the term and tenancy created hereby shall expire on the thirtieth (30th) day after such notice is given, without liability or penalty payable or any other recourse by one party to or against the other; and Tenant shall, within such 30-day period, vacate the Premises and surrender them to Landlord. All rent shall be due and payable without reduction or abatement subsequent to the destruction or damage and until the date of termination, unless the Premises shall have been destroyed or damaged, in which event the terms of Paragraph 12.1(a) or (b), as applicable, of this Lease shall apply to determine the obligations of Tenant to pay rent.

(b) If Landlord does not elect to terminate this Lease in accordance with the terms of Paragraph 12.2(a), Landlord shall, following such destruction or damage, commence diligently to reconstruct, rebuild, or repair, if necessary, that part of the Retail Center which is necessary, in Landlord's sole judgment, to create an economically viable unit. However, Landlord shall reconstruct, rebuild, or repair the Premises and the Retail Center to the extent only of proceeds received by Landlord from its insurers. Further, if Landlord elects to repair, reconstruct, or rebuild the Retail Center, or any part thereof, Landlord may use plans, specifications, and working drawings other than those used in the original construction of the Retail Center.

12.3 Tenant's Work. If this Lease has not been terminated after damage or destruction as provided above, then upon receipt by Tenant of written notice that Landlord's Work has been substantially completed, Tenant shall forthwith complete all Tenant's Work as described in Paragraph 3.1(b) and Exhibit D and all other work required to fully restore the Premises for business fully fixtured, stocked, and staffed. If the Premises have been closed for business, Tenant shall reopen for business to the public in the entire Premises for the permitted use set forth in the Basic Lease Provisions, but no later than thirty (30) days after notice that Landlord's Work is substantially completed.

12.4 Limitation of Obligations. Notwithstanding anything set forth to the contrary herein, in the event the Premises or Retail Center are damaged as a result of any cause in respect of which there are no insurance proceeds available to Landlord, or the proceeds of insurance are insufficient to pay for the costs of repair or reconstruction, or any mortgagee or other person entitled to the proceeds of insurance does not consent to the payment to Landlord of such proceeds to fully restore the Premises or Retail Center, or if the Premises or Retail Center cannot be fully restored to its prior condition under land use and building codes in force at the time of the casualty, then Landlord may, without obligation or liability to Tenant, terminate this Lease on thirty (30) days' written notice to Tenant and all rent shall be adjusted as of the effective date of such termination, and Tenant shall vacate and surrender the Premises on the date set forth in Landlord's termination notice.

12.5 Damage or Destruction at End of Term. Notwithstanding anything to the contrary contained herein, Landlord shall not have any obligation to repair, reconstruct, or restore the Premises or Retail Center when the damage or destruction occurs during the last eighteen (18) months of the term of this Lease.

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12.6 Waiver. Tenant hereby waives any statutory and common law rights of termination which may arise by reason of any partial or total destruction of the Premises which Landlord is obligated to restore or may restore under any of the provisions of this Lease.

ARTICLE 13 FLOOR AREA DEFINED

"Floor Area" or "floor area" means: (a) as to each building or part thereof within the Retail Center, including Tenant's Premises, the actual number of square feet of ground floor space measured to the exterior faces of exterior walls and to the center of party walls, including columns, stairs, elevators and escalators, excluding exterior ramps and loading docks; and (b) the actual number of square feet of any area in the Retail Center exclusively used by a particular tenant, measured from the exterior faces of outside walls, fences, or boundary markers.

ARTICLE 14 EMINENT DOMAIN

14.1 Definition. If there is any taking or condemnation of or transfer in lieu thereof for a public or quasi-public use of all or any part of the Retail Center or the Premises or any interest therein because of the exercise of the power of eminent domain or inverse condemnation, whether by condemnation proceedings or otherwise (all of the foregoing being hereinafter referred to as "taking") before or during the term hereof, the rights and obligations of the parties with respect to such taking shall be as provided in this Article 14.

14.2 Total Taking. If there is a taking of all of the Premises, this Lease shall terminate as of the date of such taking. All Minimum Monthly Rent and Additional Rent and other amounts due under this Lease shall be paid by Tenant to the date of such termination.

14.3 Partial Taking of Premises. If any part of the Premises shall be taken, and a part thereof remains which is reasonably susceptible of occupation hereunder for the use permitted herein, this Lease shall, as to the part so taken, terminate as of the date title shall vest in the condemnor or transferee, and the Minimum Monthly Rent payable hereunder shall be reduced by the proportion which the floor area taken from the Premises bears to the total Floor Area of the Premises immediately before the taking; but in such event Landlord shall have the option to terminate this Lease as of the date when title to the part so condemned vests in the condemnor or transferee. All Minimum Monthly Rent and Additional Rent shall be paid by Tenant to the date of any such termination.

14.4 Common Area Taking. If so much of the Common Area is taken that in the commercially reasonable judgment of Landlord the Retail Center will be rendered unsuitable for the continued use thereof for the purposes for which it was intended, Landlord may elect to terminate this Lease by giving Tenant written notice of such election within sixty (60) days after the date that title to the portion so taken vests in the condemnor or transferee. If Landlord fails to give such notice, this Lease shall remain in full force and effect. If any part of the Retail Center is taken, but no part of the Premises is taken, and Landlord does not elect to terminate this Lease, the rent payable hereunder shall not be reduced, nor shall Tenant be entitled to any part of the award made therefor. In the event of termination, all Minimum Monthly Rent and Additional Rent shall be paid by Tenant to the date of any such termination.

14.5 Repair and Restoration. If this Lease is not terminated as provided in this Article 14, Landlord shall, at its sole expense, restore with due diligence the remainder of the improvements occupied by Tenant so far as is practicable to a complete unit of like quality, character, and condition as that which existed immediately prior to the taking, provided that the scope of the work shall not exceed the scope of the work to be done by Landlord originally in construction of the Premises, and further provided that Landlord shall not be obligated to expend an amount greater than that which was awarded to Landlord for such taking. Tenant, at its sole cost and expense, shall restore its furniture, fixtures and other allowed leasehold improvements to their condition immediately preceding such taking.

14.6 Award. In the event of any taking, Landlord shall be entitled to the entire award of compensation or settlement in such proceedings, whether for a total or partial taking or for diminution in the value of the leasehold or for the fee. Any such amounts shall belong to and be the property of Landlord.

Without in any way diminishing the rights of Landlord under the preceding sentence, Tenant shall be entitled to recover from the condemnor such compensation as may be separately awarded by the condemnor to Tenant or recoverable from the condemnor by Tenant in its own right for the taking of trade fixtures and equipment owned by Tenant (meaning personal property, whether or not attached to real property, which may be removed without injury to the Premises) and for the expense of removing and relocating them, and for loss of goodwill, but only to the extent that the compensation awarded to Tenant shall be in addition to and shall not diminish the compensation awarded to Landlord as provided above.

14.7 Waiver. Tenant hereby waives any statutory and common law rights of termination which may arise by reason of any partial taking of the Premises under the power of eminent domain.

ARTICLE 15 INDEMNITY; WAIVER

15.1 Indemnification and Waivers.

(a) Indemnity. To the fullest extent permitted by law, and commencing on the first day Tenant or any of its employees, agents, or contractors first enters onto the Retail Center for any reason relating to this Lease or the Premises, Tenant shall, at Tenant's sole cost and expense, Indemnify Landlord Parties against all Claims arising from (i) any Personal Injury, Bodily Injury or Property Damage whatsoever occurring in or at the Premises; (ii) any Bodily Injury to an employee of a Tenant Party arising out of and in the course of employment of the employee and occurring anywhere in the Retail Center; (iii) the use or occupancy, or manner of use or occupancy, or conduct or management of the Premises or of any business therein; (iv) subject to the waiver of subrogation provisions of this Lease, any act, error, omission or negligence of any of the Tenant Parties in, on or about the Premises or the Retail Center; (v) the conduct of Tenant's business; (vi) any alterations, activities, work or things done, omitted, permitted or allowed by Tenant Parties in, at or about the Premises or Retail Center, including the violation of or failure to comply with, or the alleged violation of or alleged failure to comply with any applicable laws, statutes, ordinances, standards, rules, regulations, orders, or judgments in existence on the date of the Lease or enacted, promulgated or issued after the date of this Lease including Hazardous Materials Laws (defined below); (vii) any breach or default by Tenant in the full and prompt payment of any amount due under this Lease, any breach, violation or nonperformance of any term, condition, covenant or other obligation of Tenant under this Lease, or any misrepresentation made by Tenant or any guarantor of Tenant's obligations in connection with this Lease; (viii) all damages sustained by Landlord as a result of any holdover by Tenant or any Tenant Party in the Premises including, but not limited to, any claims by another tenant resulting from a delay by Landlord in delivering possession of the Premises to such tenant; (ix) any liens or encumbrances arising out of any work performed or materials furnished by or for Tenant; (x) commissions or other compensation or charges claimed by any real estate broker or agent with respect to this Lease by, through or, under Tenant or, (xi) any matter enumerated in Paragraph 15.1(b) below.

(b) Waivers. To the fullest extent permitted by law, Tenant, on behalf of all Tenant Parties, Waives all Claims against Landlord Parties arising from the following: (i) any Personal Injury, Bodily Injury, or Property Damage occurring in or at the Premises; (ii) any loss of or damage to property of a Tenant Party located in the Premises or other part of the Retail Center by theft or otherwise; (iii) any Personal Injury, Bodily Injury, or Property Damage to any Tenant Party caused by other tenants of the Retail Center, parties not occupying space in the Retail Center, occupants of property adjacent to the Retail Center, or the public or by the construction of any private, public, or quasi-public work occurring either in the Premises or elsewhere in the Retail Center; (iv) any interruption or stoppage of any utility service or for any damage to persons or property resulting from such stoppage; (v) business interruption or loss of use of the Premises suffered by Tenant; (vi) any latent defect in construction of the Building; (vii) damages or injuries or interference with Tenant's business, loss of occupancy or quiet enjoyment and any other loss resulting from the exercise by Landlord of any right or the performance by Landlord of Landlord's maintenance or other obligations under this Lease, or (viii) any Bodily Injury to an employee of a Tenant Party arising out of and in the course of employment of the employee and occurring anywhere in the Retail Center.

(c) Definitions. For purposes of this Article 15: (i) the term "Tenant Parties" means Tenant, and Tenant's officers, members, partners, agents, employees, sublessees, licensees, invitees and independent contractors, and all persons and entities claiming through any of these persons or entities; (ii) the

term "Landlord Parties" means Landlord and the members, partners, venturers, trustees and ancillary trustees of Landlord and the respective officers, directors, shareholders, members, parents, subsidiaries and any other affiliated entities, personal representatives, executors, heirs, assigns, licensees, invitees, beneficiaries, agents, servants, employees and independent contractors of these persons or entities; (iii) the term "Indemnify" means indemnify, defend (with counsel reasonably acceptable to Landlord) and hold free and harmless for, from and against; (iv) the term "Claims" means all liabilities, claims, damages (including consequential damages), losses, penalties, litigation, demands, causes of action (whether in tort or contract, in law or at equity or otherwise), suits, proceedings, judgments, disbursements, charges, assessments, and expenses (including attorneys' and experts' fees and expenses incurred in investigating, defending, or prosecuting any litigation, claim, or proceeding); (v) the term "Waives" means that the Tenant Parties waive and knowingly and voluntarily assume the risk of; and (vi) the terms "Bodily Injury", "Personal Injury" and "Property Damage" will have the same meanings as in the form of commercial general insurance policy issued by Insurance Services Office, Inc. most recently prior to the date of the injury or loss in question.

(d) Scope of Indemnities and Waivers. Except as provided in the following sentence, the indemnities and waivers contained in this Article 15 shall apply regardless of the active or passive negligence or sole, joint, concurrent, or comparative negligence of any of the Landlord Parties, and regardless of whether liability without fault or strict liability is imposed or sought to be imposed on any of the Landlord Parties. The indemnities and waivers contained in this Article 15 shall not apply to the extent of the percentage of liability that a final judgment of a court of competent jurisdiction establishes under the comparative negligence principles of the state in which the Premises are situated, that a Claim against a Landlord Party was proximately caused by the willful misconduct or gross negligence of that Landlord Party, provided, however, that in such event the indemnity or waiver will remain valid for all other Landlord Parties. Solely for the purpose of effectuating Tenant's indemnification obligations under this Lease, and not for the benefit of any third parties (including but not limited to employees of Tenant), Tenant specifically and expressly waives any immunity that may be granted it under applicable federal, state or local Worker Compensation Acts, Disability Benefit Acts or other employee benefit acts. Furthermore, the indemnification obligations under this Lease shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable to or for any third party under Worker Compensation Acts, Disability Benefit Acts or other employee benefit acts. The parties acknowledge that the foregoing provisions of this Paragraph have been specifically and mutually negotiated between the parties.

(e) Duty to Defend. Tenant's duty to defend Landlord Parties is separate and independent of Tenant's duty to Indemnify Landlord Parties. Tenant's duty to defend includes Claims for which Landlord Parties may be liable without fault or may be strictly liable. Tenant's duty to defend applies regardless of whether issues of negligence, liability, fault, default or other obligation on the part of Tenant Parties have been determined. Tenant's duty to defend applies immediately, regardless of whether Landlord Parties have paid any sums or incurred any detriment arising out of or relating, directly or indirectly, to any Claims. It is the express intention of Landlord and Tenant that Landlord Parties will be entitled to obtain summary adjudication regarding Tenant's duty to defend Landlord Parties at any stage of any Claim within the scope of this Article 15.

(f) Obligations Independent of Insurance. The indemnification provided in this Article 15 shall not be construed or interpreted as in any way restricting, limiting or modifying Tenant's insurance or other obligations under this Lease, and the provisions of this Article 15 are independent of Tenant's insurance and other obligations. Tenant's compliance with the insurance requirements and other obligations under this Lease does not in any way restrict, limit or modify Tenant's indemnification obligations under this Lease.

(g) Survival. The provisions of this Article 15 will survive the expiration or earlier termination of this Lease until all Claims against Landlord Parties involving any of the indemnified or waived matters are fully and finally barred by the applicable statutes of limitations.

ARTICLE 16 OPERATION OF BUSINESS

Tenant shall continuously and uninterruptedly, subject only to Article 20, during the entire Lease term:
(a) remain open for business at least six (6) days a week and at least eight (8) hours a day; (b) adequately staff

its store with sufficient employees to handle the maximum business and carry sufficient stock of merchandise of such amount, character and quality to accomplish this purpose; (c) keep the display windows and signs, if any, well lighted during the hours from sundown to 12 midnight; (d) keep the Premises and exterior and interior portions of windows, doors and all other glass or plate glass fixtures in a neat, clean, sanitary and safe condition; (e) warehouse, store or stock only such merchandise as Tenant intends to offer for sale at retail; (f) use for office or other non-selling purposes only such space as is reasonably required for Tenants' business; (g) refrain from burning any papers or refuse of any kind in the Retail Center; (h) store in the area designated by Landlord all trash and garbage in neat and clean containers so as not to be visible to members of the public shopping in the Retail Center and arrange for the regular pick-up and cartage of such trash or garbage at Tenant's expense, or cooperate in the employment of a trash removal contractor designated by Landlord, if Landlord deems it desirable to have all waste materials removed by one contractor; (i) observe and promptly comply with all governmental requirements and insurance requirements affecting the Premises or any part of the Common Area which is under Tenant's exclusive control and promulgated during the term of this Lease; (j) not use or suffer or permit the Premises or any part thereof to be used for any use other than the use set forth in the Basic Lease Provisions or in any manner that will constitute a nuisance or unreasonable annoyance to the public, to other occupants of the Retail Center or to Landlord, or that will injure the reputation of the Retail Center, or for any extra hazardous purpose or in any manner that will impair the structural strength of the building of which the Premises are a part; and (k) refrain from installing and/or operating video game machines within the Premises without the prior express written authorization of Landlord.

ARTICLE 17 SIGNS AND ADVERTISING

17.1 Interior. Tenant may at its own expense erect and maintain upon the interior sales areas of the Premises all signs and advertising matter customary and appropriate in the conduct of Tenant's business, subject to Landlord's right to remove any signs or advertising matter which violates the provisions of Exhibit Y.

17.2 Obligation to Install Exterior Sign. Tenant shall, at its own expense, erect at least one exterior raised letter sign(s) on its store fascia in locations approved by Landlord, which sign(s) shall be in place and operating (if illuminated) concurrent with Tenant opening for business in the Premises and shall be subject to Landlord's right to remove any signs or advertising matter which violates the provisions of Exhibit F.] Right to Install Pole and Pylon Sign. Tenant may, at its own expense, erect at least one and not more than panel on the existing pole sign for the Retail Center and/or on any pylon sign that may hereafter be constructed at the Retail Center, in each case in locations approved by Landlord, which signs shall be subject to Landlord's right to remove any signs or advertising matter which violates the provisions of Exhibit F.]

17.3 Sign Requirements. All signs, decorations and advertising media shall conform in all respects to the sign criteria set forth on Exhibit Y and such other sign criteria as may be established by Landlord for the Retail Center from time to time, and shall be subject to the prior written approval of Landlord as to construction, method of attachment, size, shape, height, lighting, color and general appearance. All signs and other advertising media shall comply with all applicable governmental requirements. Except for signs which comply with the terms of this Article and Exhibit Y, Tenant shall not erect, place, paint, or maintain in or on the Premises, any sign, exterior advertising medium, or any other object of any kind whatsoever, whether an advertising device or not, visible or audible outside the Premises. Tenant shall not change the color, size, location, composition, wording or design of any sign or advertisement on the Premises that may have been theretofore approved by Landlord, without the prior written approval of Landlord and the applicable governmental authorities. Tenant shall at its own expense maintain and keep in good repair all installations, signs, and advertising devices which it is permitted or required by Landlord to maintain. Tenant shall remove Tenant's sign within seven (7) days following Tenant's vacation of the Premises. Such removal shall include removal of the channel lettering and restoration of the building or fascia surface to its original condition at Tenant's sole expense. In the event Tenant fails to so remove its channel lettering within the seven (7) days period provided herein, then Landlord may, at its sole option and at Tenant's cost, remove Tenant's sign without notice to Tenant, cause the restoration of the building or fascia surface, and deduct the costs and expenses necessary to accomplish said work from Tenant's security deposit.

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ARTICLE 18 LIENS

Tenant shall keep the Premises and the Retail Center free of any liens or claims of lien arising from any work performed, material furnished or obligations incurred by Tenant. Notwithstanding the foregoing, in the event that any lien is recorded in connection with Tenant's work or materials, Tenant shall, within seven (7) days after recording thereof, post such bond as will release said property from the lien claimed.

ARTICLE 19 RIGHT OF ENTRY

Landlord and its authorized agents and representatives shall be entitled to enter the Premises at all reasonable times to inspect them, to make the repairs which Landlord is obligated to make under this Lease, to show them to prospective tenants, purchasers or lenders, to cure a default of Tenant, to post any notice provided by law that relieves a landlord from responsibility for the acts of a tenant, to comply with any governmental requirements or insurance requirements, to post ordinary signs advertising the Premises for sale or for lease, and for any other lawful purpose relating to Landlord's rights and obligations under this Lease. Nothing in the preceding sentence shall imply or impose a duty to make repairs which Tenant has agreed to make hereunder. Landlord may erect scaffolding and other necessary structures where reasonably required by the character of the work to be performed, provided that the entrance to the Premises shall not be unreasonably blocked. Landlord shall have the right to install and run conduit and utility lines and cables through portions of the Premises that do not materially affect the usable square footage or use thereof. Landlord shall have the right to use any means which Landlord may deem proper to enter the Premises in an emergency. Landlord's entry to the Premises shall not under any circumstances be construed to be a forcible or unlawful entry into the Premises or an eviction of Tenant from the Premises.

ARTICLE 20 DELAYING CAUSES

If either party is delayed in the performance of any covenant of this Lease because of any of the following causes (referred to elsewhere in this Lease as a "delaying cause"): acts of the other party, action of the elements, war, riot, labor disputes, inability to procure or general shortage of labor or material in the normal channels of trade, delay in transportation, delay in inspections, or any other cause beyond the reasonable control of the party so obligated, whether similar or dissimilar to the foregoing, financial inability excepted, then, such performance shall be excused for the period of the delay; and the period for such performance shall be extended for a period equivalent to the period of such delay, except that the foregoing shall in no way affect Tenant's obligation to pay rent or any other amount payable hereunder, or the length of the term of this Lease.

ARTICLE 21 ASSIGNMENT AND SUBLEASE

21.1 Consent Required. Notwithstanding anything to the contrary contained in this Lease, Tenant shall not assign, encumber or hypothecate this Lease or any interest herein or any right or privilege appurtenant hereto or sublet, license, grant any concessions, or otherwise give permission to anyone other than Tenant to use or occupy all or any part of the Premises (hereinafter sometimes referred to as a "Transfer"), without the prior written consent of Landlord, which consent Landlord shall not unreasonably withhold. Without limiting the generality of the foregoing, it shall be deemed reasonable for Landlord to withhold such consent if (i) the number of retail facilities operated by the proposed Transferee is not comparable to the number operated by Tenant as of the date of this Lease, (ii) the proposed Transferee does not have a tangible net worth and credit standing, calculated in accordance with generally accepted accounting principles consistently applied, that is comparable to the tangible net worth and credit standing of Tenant as of the date of this Lease, (iii) the number of years of business experience of the proposed Transferee is not comparable to that of Tenant as of the date of this Lease, or (iv) there is then in existence an Event of Default with respect to any obligation of Tenant under the Lease. Any actual or attempted Transfer without the Landlord's prior written consent or otherwise in violation of the terms of this Lease shall, at Landlord's election, be void and shall confer no rights upon any third person, and shall be a non-curable default under this Lease which shall entitle Landlord to terminate this Lease upon ten (10) days' written notice to Tenant at any time after such actual or attempted Transfer without regard to Landlord's prior knowledge thereof. The acceptance of rent by Landlord from any person or entity shall not be deemed to be a waiver by Landlord of any provision

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of this Lease or a consent to any Transfer. A consent by Landlord to one or more Transfers shall not be deemed to be a consent to any subsequent Transfer. In addition, the option to extend the term hereunder shall be personal to Tenant, and shall not be Transferred without the prior written consent of Landlord in accordance with the terms of this Article 21.

21.2 Request For Consent. If Tenant shall desire Landlord's consent to any Transfer, Tenant shall notify Landlord in writing, which notice shall include: (a) the proposed effective date (which shall be not less than forty-five (45) days nor more than one hundred eighty (180) days after Tenant's notice); (b) the portion of the Premises subject to the Transfer; (c) all of the terms of the proposed Transfer and the consideration therefor; (d) the name and address of the proposed transferee; (e) a copy of the proposed sublease, instrument of assignment and all other documentation pertaining to the proposed Transfer; (f) current financial statements of the proposed transferee certified by an officer, partner or owner thereof; (g) any information reasonably requested by Landlord to enable Landlord to determine the financial responsibility, character, and reputation of the proposed transferee and the nature of such transferee's business and the proposed use of the Premises; and (h) such other information as Landlord may reasonably request, together with the sum of \$750.00 which shall be applied towards Landlord's review and processing expenses. Such amount shall be subject to change without prior notice from Landlord.

21.3 Recapture. Upon receipt of Tenant's request for consent to any Transfer, Landlord may elect to recapture the affected space by terminating this Lease as to that portion of the Premises covered by the proposed sublease or assignment, effective upon a date specified by Landlord, which date shall not be earlier than thirty (30) days nor later than sixty (60) days after Tenant's request for consent, with a proportionate reduction of all rights and obligations of Tenant hereunder that are based on the area of the Premises.

21.4 General Conditions. If Landlord does not elect to recapture the affected Premises or deny its consent to a Transfer on any reasonable basis, the granting of such consent shall be subject to the following conditions, which the parties hereby agree are reasonable:

(a) Payment of Transfer Premium. Tenant shall pay to Landlord the full amount of any Transfer Premium derived by Tenant from such Transfer. "Transfer Premium" shall mean all rent and any other consideration payable by such transferee in excess of the Minimum Monthly Rent payable by Tenant under this Lease (on a per square foot basis, if less than all of the Premises is Transferred), after deducting therefrom any brokerage commissions in connection with the Transfer actually paid by Tenant to an unaffiliated broker. If any part of the consideration for such Transfer shall be payable other than in cash, Landlord's share of such non-cash consideration shall be in such form as is reasonably satisfactory to Landlord. The Transfer Premium payable hereunder shall be due within ten (10) days after Tenant receives such payments.

(b) Continued Liability of Tenant. Tenant shall remain primarily liable on its covenants hereunder unless released in writing by Landlord. In the event of any assignment or sublease which is consented to by Landlord, the transferee shall agree in writing to perform and be bound by all of the covenants of this Lease required to be performed by Tenant.

21.5 Transfer to a Subsidiary. The sale, assignment, transfer or disposition, whether or not for value, by operation of law, gift, will, or intestacy, of (a) twenty-five percent (25%) or more of the issued and outstanding stock of Tenant if Tenant is a corporation, or (b) the whole or a partial interest of any general partner, joint venturer, associate or co-tenant, if Tenant is a partnership, joint venture, association or co-tenancy, shall be deemed a Transfer and shall be subject to the provisions of this Article 21. Notwithstanding the foregoing, Landlord hereby acknowledges and consents to Tenant's right, without further approval from Landlord but only after written notice to Landlord, to sublease the Premises or assign its interest in this Lease (i) to a corporation that directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with Tenant; (ii) in the event of the merger or consolidation of Tenant with another corporation; provided that immediately following the events enumerated in clauses (i) to (ii) above, the tangible net worth of Tenant, calculated in accordance with generally accepted accounting principles, consistently applied, and the credit standing of Tenant is not less than the tangible net worth, calculated in accordance with generally accepted accounting principles, consistently applied, and credit standing of Tenant immediately prior

to the events described in clauses (i) through (ii) above (collectively, the "Permitted Transfers"). No Permitted Transfer shall relieve Tenant of its liability under this Lease and Tenant shall remain liable to Landlord for the payment of all Minimum Monthly Rent, Common Area Expenses and Additional Rent and the performance of all covenants and conditions of this Lease applicable to Tenant.

21.6 Transfer Pursuant to Bankruptcy Code. Anything to the contrary notwithstanding, if this Lease is assigned (or all or a portion of the Premises is sublet) to any person or entity pursuant to the provisions of the Bankruptcy Code, 11 U.S.C. 101 et. seq. (the "Bankruptcy Code"), any and all monies or other consideration payable or otherwise to be delivered in connection with such assignment or subletting shall be paid or delivered to Landlord, shall be and remain the exclusive property of Landlord and shall not constitute property of Tenant or of its estate within the meaning of the Bankruptcy Code. Any and all monies or other consideration constituting Landlord's property under the preceding sentence not paid or delivered to Landlord shall be held in trust for the benefit of Landlord and be promptly paid or delivered to Landlord. Any assignee pursuant to the Bankruptcy Code shall be deemed to have assumed all of Tenant's obligations under this Lease. Any such assignee shall on demand by Landlord execute and deliver to Landlord a written instrument confirming such assumption.

ARTICLE 22 NOTICES

All notices, requests and demands to be made hereunder shall be in writing at the address set forth in the Basic Lease Provisions, as applicable, by any of the following means: (a) personal service (including service by overnight courier service); (b) electronic communication, whether by telex, telegram or facsimile (if confirmed in writing sent by personal service or by registered or certified, first class mail, return receipt requested); or (c) registered or certified, first class mail, return receipt requested. Such addresses may be changed by notice to the other party given in the same manner provided above. Any notice, request, or demand sent pursuant to clause (a) or (b) of this Article 22 shall be deemed received upon such personal service or upon dispatch by electronic means, and if sent pursuant to clause (c) shall be deemed received three (3) days following deposit in the mail.

ARTICLE 23 SURRENDER OF POSSESSION

23.1 Surrender. At the expiration of the tenancy created hereunder, whether by lapse of time or otherwise, Tenant shall surrender the Premises broom clean and in good condition and repair. This obligation of Tenant shall include the repair of any damage occasioned by the installation, maintenance or removal of Tenant's alterations or Tenant's Changes, furnishings, and equipment, as well as the removal of all wires and cables installed by or for Tenant and any storage tank installed by or for Tenant (whether or not the installation was consented to by Landlord), and the removal, replacement, or remediation of any soil, material or ground water contaminated by Tenant's Permittees, all as may then be required by applicable Laws. Notwithstanding anything to the contrary elsewhere in this Lease, Tenant shall be liable to Landlord for all damages, actual and consequential, for any breach by Tenant hereunder.

23.2 Holding Over. If Tenant fails to surrender the Premises at the expiration or earlier termination of this Lease, occupancy of the Premises after the termination or expiration shall be that of a tenancy at sufferance. Tenant's occupancy of the Premises during the holdover shall be subject to all the terms and provisions of this Lease and Tenant shall pay an amount (on a per month basis without reduction for partial months during the holdover) equal to 150% for the first 90 days of the holdover period and 200% thereafter, in each case, of the greater of: (1) the sum of the Minimum Annual Rent and Additional Rent due for the period immediately preceding the holdover; or (2) the fair market gross rental for the Premises as determined by Landlord. No holdover by Tenant or payment by Tenant after the expiration or early termination of this Lease shall be construed to extend the Term or prevent Landlord from immediate recovery of possession of the Premises by summary proceedings or otherwise. Nothing herein shall be construed as consent to such holding over.

23.3 Landlord's Remedies for Holding Over. In addition to the remedies available at law or equity or under this Lease, Landlord shall be entitled to recover all of its damages from Tenant as a consequence of Tenant's failure to surrender the Premises upon expiration of the Lease Term or sooner termination of this

Lease; to restore the Premises to the condition required by this Lease by the expiration of the Lease Term or earlier termination of this Lease; or to remove all its items of property from the Premises by the expiration of the Lease Term or sooner termination of this Lease. Landlord shall also be entitled to recover from Tenant lost rental or occupancy income resulting from Landlord's inability to timely deliver possession of the Premises to a new tenant or occupant; costs and expenses incurred by Landlord due to Landlord's inability to timely deliver possession of the Premises to a new tenant or occupant including, without limitation, holdover rent payable by such new tenant or occupant to its landlord, additional storage, moving, and relocation expenses incurred by such new tenant or occupant, and the costs and expenses of any temporary premises for such new tenant or occupant; and costs and expenses incurred by Landlord of restoring the Premises to the condition required by this Lease on an expedited basis including, without limitation, loan financing costs, interest, and overtime labor costs.

ARTICLE 24 QUIET ENJOYMENT

Subject to the provisions of this Lease and conditioned upon performance of all of the provisions to be performed by Tenant hereunder, Landlord shall secure to Tenant during the Lease term the quiet and peaceful possession of the Premises and all rights and privileges appertaining thereto, free from hindrance or molestation by Landlord and those claiming by, through or under Landlord.

ARTICLE 25 SUBORDINATION

Unless otherwise required by a lender, this Lease shall be subordinate to any mortgage or deed of trust held by any lender, now or hereafter in force against the Premises or the Retail Center or any part thereof, and to all advances made or to be made upon the security thereof. If any proceedings are brought for foreclosure, or in the event of the exercise of the power of sale under any mortgage or deed of trust made by Landlord, Tenant shall, at the option of the lender or other purchaser at any such foreclosure or sale, attorn to and recognize the purchaser as the Landlord under this Lease. Although the subordination in the immediately preceding sentences shall be self-operating, Tenant agrees, within ten (10) days following the request of Landlord, to execute such documents or instruments as may be requested by Landlord or its lender(s) to confirm such subordination, provided that such mortgagees or beneficiaries agree in writing not to disturb Tenant's possession of the Premises in the event of foreclosure if Tenant is not in default. The failure of Tenant to so timely execute any such instrument or other document shall constitute a default hereunder. If Tenant fails to execute and deliver such instrument or other document within said ten (10) day period, Tenant hereby appoints Landlord as Tenant's attorney-in-fact for the purpose of completing, executing and delivering the same to the person or firm requesting it. This Lease is and shall remain subordinate to any easements, conditions, covenants, restrictions, and declarations, or similar instruments (collectively, the "**Declarations**") now or hereafter affecting the Premises or Retail Center, together with any amendments or modifications thereto; provided, however, if the Declarations are not of record as of the date of mutual execution hereof, then this Lease shall automatically become subordinate to the Declarations upon recordation thereof. Although the provisions of this Paragraph are intended to be self-operative, Tenant shall execute and deliver to Landlord within ten (10) days after Landlord's written request, an agreement in recordable form subordinating this Lease to the Declarations.

ARTICLE 26 ESTOPPEL CERTIFICATE; FINANCIAL STATEMENTS

Tenant shall, at any time and from time to time within ten (10) days after written request therefor by Landlord, without change, deliver a certificate to Landlord or to any person or entity designated by Landlord, certifying the date the Lease term commenced, the date the rent commenced and is paid through, the amount of rent and other charges due under the Lease, the expiration date of the Lease term, that this Lease is then in full force and effect, setting forth the amount and nature of modifications, defenses, or offsets, if any, claimed by Tenant, and any other matter concerning the Lease, the Tenant, or the Premises requested by Landlord or such person or entity. If Tenant fails to deliver such certificate within said ten (10) day period, Tenant hereby appoints Landlord as Tenant's attorney-in-fact for the purpose of completing, executing and delivering the certificate to the person or firm requesting it.

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Tenant acknowledges that it has provided Landlord with certain financial statement(s) as a material inducement to Landlord's agreement to lease the Premises to Tenant, and that Landlord has relied on the accuracy of such financial statement(s) in entering into this Lease. Tenant represents and warrants that the information contained in such financial statement(s) is true, complete and correct in all material respects. Within ten (10) days from request by Landlord, Tenant will make available to Landlord or to any prospective purchaser or lender of the Retail Center, audited financial statements of Tenant and any guarantor, provided, if Tenant is not a publicly traded entity, that Landlord or any such prospective purchaser or lender agrees to maintain such statements and information in confidence, and provided further that if audited financial statements of Tenant are not available at the time of such request, Tenant may deliver unaudited statements prepared in accordance with generally accepted accounting principles consistently applied and certified to be true and correct by Tenant's chief financial officer. Notwithstanding the foregoing, so long as the named Tenant herein is a publicly traded corporation and its financial information is readily available to the public, Tenant will not be required to deliver additional financial statements to Landlord.

ARTICLE 27 DEFAULT

27.1 Default. The occurrence of any or more of the following events shall constitute a material breach and default of this Lease (each, an "Event of Default"):

- (a) Any failure by Tenant to pay Minimum Monthly Rent, Common Area Expenses or other Additional Rent or any other charge when due; or
- (b) Any failure by Tenant to observe or perform any other provision, covenant or condition of this Lease to be observed or performed by Tenant not provided for in Subparagraph (a) above and Subparagraphs (c), (d) and (h) below, where such failure continues for ten (10) days after written notice thereof by Landlord to Tenant, provided that if the nature of such breach is such that although curable, the breach cannot reasonably be cured within a ten (10) day period, an Event of Default shall not exist if Tenant shall commence to cure such breach and thereafter rectifies and cures such breach with due diligence, but in no event later than ten (10) days after the written notice]; or
- (c) Abandonment or vacation of the Premises (which shall include Tenant's failure to take possession of the Premises at the time provided in this Lease) by Tenant or cessation by Tenant of Tenant's business within the Premises for more than five (5) successive days; or
- (d) A general assignment by Tenant for the benefit of creditors, or the filing by or against Tenant of any proceeding under any insolvency or bankruptcy law, or the appointment of a trustee or receiver to take possession of all or substantially all of Tenant's assets located upon the Premises or of Tenant's interest in this Lease; or
- (e) Any three (3) or more failures of the type described in Paragraph 27.1(a) in any twelve month period; or
- (f) Any failure by Tenant to commence construction of Tenant's Work within thirty (30) days after substantial completion of Landlord's Work and to thereafter diligently prosecute such construction to completion, where such failure continues for five (5) days after written notice thereof by Landlord to Tenant; or]
- (g) The conducting by Tenant of a going out of business sale, bankruptcy sale or any similar liquidation sale in violation of the provisions of this Lease where such sale does not permanently cease within twenty-four (24) hours after written notice of such violation by Landlord to Tenant; or
- (h) The occurrence of an Event of Default as defined in any other provision of this Lease; or
- (i) The occurrence of any Event of Default under the terms of any existing or future lease by and between Landlord and Tenant or by and between Tenant and an affiliate of Landlord.

27.2 Remedies.

(a) Reentry and Termination. Upon and during the continuance of an Event of Default, Landlord, in addition to any other remedies available to Landlord at law or in equity, at Landlord's option, may without further notice or demand of any kind to Tenant or any other person:

1. Declare the Lease Term ended and reenter the Premises and take possession thereof and remove all persons therefrom, and Tenant shall have no further claim to the Premises; or
2. Without declaring this Lease ended, reenter the Premises and occupy the whole or any part thereof for and on account of Tenant and collect any unpaid Minimum Monthly Rent, rent, Additional Rent, Common Area Expenses and other charges, which have become payable, or which may thereafter become payable; or
3. Even though Landlord may have reentered the Premises, thereafter elect to terminate this Lease and all of the rights of Tenant in or to the Premises.

(b) Express Termination Required. Should Landlord have reentered the Premises under the provisions of Paragraph 27.2(a)2 above, Landlord shall not be deemed to have terminated this Lease, or the liability of Tenant to pay any Minimum Monthly Rent, Common Area Expenses, Additional Rent or other charges thereafter accruing, or to have terminated Tenant's liability for damages under any of the provisions of this Lease, by any such reentry or by any action, in unlawful detainer or otherwise, to obtain possession of the Premises, unless Landlord shall have notified Tenant in writing that Landlord had elected to terminate this Lease. Tenant further covenants that the service by Landlord of any notice pursuant to the unlawful detainer statutes of the State where the Retail Center is situated and the surrender of possession pursuant to such notice shall not (unless Landlord elects to the contrary at the time of or at any time subsequent to the serving of such notices and such election is evidenced by a written notice to Tenant) be deemed to be a termination of this Lease.

(c) Damages. Should Landlord elect to terminate this Lease pursuant to the provisions of Paragraphs 27.2(a)1 or 27.2(a)3 above, Landlord may recover from Tenant as damages, the following:

1. The worth at the time of award of any unpaid Minimum Monthly Rent, Common Area Expenses, Additional Rent or other charges which had been earned at the time of such termination; plus
2. The worth at the time of award of the amount by which the unpaid Minimum Monthly Rent, Common Area Expenses, Additional Rent or other charges which would have been earned after termination until the time of award exceeds the amount of such loss Tenant proves could have been reasonably avoided; plus
3. The worth at the time of award of the amount by which the unpaid Minimum Monthly Rent, Common Area Expenses, Additional Rent or other charges for the balance of the Lease Term after the time of award exceeds the amount of such loss that Tenant proves could be reasonably avoided; plus
4. Any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform Tenant's obligations under this Lease or which in the ordinary course of things would be likely to result therefrom, including, but not limited to any costs or expenses incurred by Landlord in (i) retaking possession of the Premises, including reasonable attorneys' fees, (ii) maintaining or preserving the Premises after the occurrence of an Event of Default, (iii) preparing the Premises for reletting to a new tenant, including repairs or alterations to the Premises for such reletting, (iv) leasing commissions, and (v) any other costs necessary or appropriate to relet the Premises; plus

5. At Landlord's election, such other amounts in addition to or in lieu of the foregoing as may be permitted from time to time by the laws of the State where the Retail Center is situated.

(d) Alternative Damages. Should Landlord elect to bring an action against Tenant in unlawful detainer or for damages or both or otherwise (and Landlord may bring as many actions as Landlord may elect to bring throughout the Lease Term), without terminating this Lease, Landlord may recover from Tenant as damages the following:

1. The worth at the time of award of any unpaid Minimum Monthly Rent, additional rent, Common Area Expenses or other charges which had been earned at the time Landlord recovered possession of the Premises; plus

2. The worth at the time of award of the amount by which the unpaid Minimum Monthly Rent, Common Area Expenses, Additional Rent or other charges which would have been earned after the date Landlord recovered possession until the time of award exceeds the amount of such loss Tenant proves could have been reasonably avoided; plus

3. Any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform Tenant's obligations under this Lease, including but not limited to, any costs or expenses incurred by Landlord in (i) retaking possession of the Premises, including reasonable attorneys' fees, (ii) maintaining or preserving the Premises after the occurrence of an Event of Default, (iii) preparing the Premises for reletting to a new tenant, including repairs or alterations to the Premises for such reletting, (iv) leasing commissions, and (v) any other costs necessary or appropriate to relet the Premises; plus

4. At Landlord's election, such other amounts in addition to or in lieu of the foregoing as may be permitted from time to time by the laws of the State where the Retail Center is situated.

(e) Definitions. As used in Paragraphs 27.2(c)1, 27.2(c)2, and 27.2(d)1 above, the "worth at the time of award" is computed by allowing interest at the rate of eighteen percent (18%) per annum. As used in Paragraphs 27.2(c)3 and 27.2(d)2 above, the "worth at the time of award" is computed by discounting such amount at the discount rate of the Federal Reserve Bank situated nearest to the location of the Retail Center at the time of award plus one (1) percentage point.

(f) Computation of Certain Sums. For all purposes of this Article 27, Common Area Expenses, Additional Rent and other charges shall be computed on the basis of the average monthly amount thereof accruing during the immediately preceding sixty (60) month period, except that if it becomes necessary to compute such amounts before such a sixty (60) month period has occurred then such amounts shall be computed on the basis of the average monthly amounts accruing during such shorter period.

(g) Use of Fixtures. Upon the occurrence of and during the continuation of any Event of Default, Landlord may, at Landlord's option, permit all of Tenant's fixtures, furniture, equipment, improvements, additions, alterations, and other personal property to remain on the Premises and Landlord shall have the right to take the exclusive possession of same and to use same, rent or charge free, until the Event of Default is cured or, at Landlord's option, at any time during the Lease Term, require Tenant to forthwith remove same. In the event of any entry or taking possession of the Premises, Landlord shall have the right, but not the obligation to remove all or any part of the fixtures, furniture, equipment and other personal property located in the Premises and may place the same in storage at a public warehouse at the expense and risk of the owner or owners thereof.

(h) Cumulative Remedies. The remedies given to Landlord in this Article 27 shall be in addition and supplemental to all other rights or remedies which Landlord may have at law, in equity or by

statute and the exercise of any one remedy shall not preclude the subsequent or concurrent exercise of further or additional remedies.

(i) No Waiver. The waiver by Landlord of any breach of any term, covenant or condition herein contained in this Lease shall not be deemed to be a waiver of such term, covenant or condition of any subsequent breach of the same or any other term, covenant or condition of this Lease. The subsequent acceptance of Minimum Monthly Rent, Common Area Expenses, additional rent or other charges due hereunder shall not be deemed to be a waiver of any preceding breach by Tenant of any term, covenant or condition of this Lease, other than the failure of Tenant to pay the particular amount so accepted regardless of Landlord's knowledge of such preceding breach at the time of acceptance of such amount. No covenant, term, or condition of this Lease shall be deemed to have been waived by Landlord unless such waiver shall be in writing and signed by Landlord.

(j) Security Interest. Tenant hereby grants to Landlord a security interest in all of Tenant's fixtures, furniture, equipment, improvements, additions, alterations, inventory and other personal property now or hereafter located within or upon the Premises and any all products and proceeds thereof now owned or hereafter acquired (collectively, the "Collateral"). Upon and after the occurrence of an Event of Default, Landlord shall have all of the rights and remedies of a secured party under the Uniform Commercial Code of the State in which the Retail Center is situated, including without limitation the right and power to sell or otherwise dispose of the Collateral or any part thereof and for that purpose Landlord may take immediate an exclusive possession of the Collateral or any part thereof and, with or without judicial process, Landlord may enter upon the Premises and remove the Collateral, or, at Landlord's option, Tenant shall assemble the Collateral and make it available to Landlord at the place and time designated by Landlord. To the extent permitted by law, Tenant expressly waives any notice of the sale or disposition of the Collateral and any other right or remedy of Tenant existing after the occurrence of an Event of Default, and to the extent any notice is required and cannot be waived, Tenant agrees that for the purposes of this Paragraph 27.2(j) only, if the notice is marked, postage prepaid to Tenant at the address set forth in The Basic Lease Provisions at least ten (10) days before the time of sale or other disposition, the notice shall be deemed commercially reasonable and shall fully satisfy any requirement for the giving of notice. Concurrently with the execution of this Lease, and at any time thereafter, as Landlord may request, Tenant shall execute and deliver to Landlord a Uniform Commercial Code Financing Statement so as to enable Landlord to perfect the security interest granted in this Subparagraph (j). If Tenant fails to execute and deliver same to Landlord, Landlord shall have the express right to execute and file same on Tenant's behalf.

27.3 Interest. Any sum accruing to Landlord under the terms and provisions of this Lease which shall not be paid when due shall bear interest at the interest rate provided herein from the date the same becomes due and payable by the terms and provisions of this Lease until paid, unless otherwise specifically provided in this Lease. The interest rate which shall apply shall be the lesser of (i) eighteen percent (18%) per annum or (ii) the highest rate allowed by applicable law.

ARTICLE 28 INSOLVENCY.

28.1 Breach of Lease. Subject to the applicable United States Bankruptcy Code and other laws, the filing of any petition by or against Tenant under any chapter of the Bankruptcy Act, or any successor statute thereto, or the adjudication of Tenant as a bankrupt or insolvent, or the appointment of a receiver or trustee to take possession of all or substantially all of the assets of Tenant, or a general assignment by Tenant for the benefit of creditors, or any other action taken or suffered by Tenant under any state or federal insolvency or bankruptcy act, shall constitute a default under and breach of this Lease by Tenant, regardless of Tenant's compliance with the other provisions of this Lease; and Landlord at its option by written notice to Tenant may exercise all rights and remedies provided for in Article 27, including the termination of this Lease, effective of such notice, without the necessity of further notice under Article 27.

28.2 Operation of Law. Neither this Lease, nor any interest herein, nor any estate created hereby, shall pass by operation of law under any state or federal insolvency or bankruptcy act to any trustee, receiver, assignee for the benefit of creditors or any other person whatsoever without the prior written consent of Landlord, which shall not be unreasonably withheld. Any purported transfer in violation of the provisions of this

Paragraph 28.2 shall constitute a default under and breach of this Lease, regardless of Tenant's compliance with the other provisions of this Lease; and Landlord at its option by written notice to Tenant may exercise all rights and remedies provided for in Article 27, including the termination of this Lease, effective on service of such notice without the necessity of further notice under Article 27.

28.3 Non-Waiver. The acceptance of rent at any time and from time to time by Landlord from Tenant as debtor in possession or from a transferee of the type mentioned in Paragraph 28.2, shall not preclude Landlord from exercising its rights under this Article 28 at any time hereafter.

28.4 Events of Bankruptcy. The following shall be Events of Bankruptcy under this Lease:

(a) Tenant's becoming insolvent, as that term is defined in Title 11 of the United States Code, entitled Bankruptcy, U.S.C. Sec. 101 et. seq. (the "Bankruptcy Code"), or under the insolvency laws of the State in which the Premises are situated ("Insolvency Laws");

(b) The appointment of a receiver or custodian for any or all of Tenant's property or assets, or the institution of a foreclosure action upon any of Tenant's real or personal property;

(c) The filing of a voluntary petition under the provisions of the Bankruptcy Code or Insolvency Laws;

(d) The filing of an involuntary petition against Tenant as the subject debtor under the Bankruptcy Code or Insolvency Laws, which is either not dismissed within sixty (60) days of filing, or results in the issuance of an order for relief against the debtor, whichever is later; or

(e) Tenant's making or consenting to an assignment for the benefit of creditors or a common law composition of creditors.

28.5 Landlord's Remedies.

(a) Termination of Lease. Upon occurrence of an Event of Bankruptcy, Landlord shall have the right to terminate this Lease by giving written notice to Tenant; provided, however, that this Paragraph 28.5(a) shall have no effect while a case in which Tenant is the subject debtor under the Bankruptcy Code is pending, unless Tenant or its Trustee is unable to comply with the provisions of Paragraph 28.5(d) and 28.5(e) below. At all other times this Lease shall automatically cease and terminate, and Tenant shall be immediately obligated to quit the Premises upon the giving of notice pursuant to this Paragraph 28.5(a). Any other notice to quit, or notice of Landlord's intention to re-enter is hereby expressly waived. If Landlord elects to terminate this Lease, everything contained in this Lease on the part of Landlord to be done and performed shall cease without prejudice; subject, however, to the rights of Landlord to recover from Tenant all rent and any other sums accrued up to the time of termination or recovery of possession by Landlord, whichever is later, and any other monetary damages or loss of reserved rent sustained by Landlord.

(b) Suit for Possession. Upon termination of this Lease pursuant to Paragraph 28.5(a), Landlord may proceed to recover possession under and by virtue of the provisions of laws of any applicable jurisdiction, or by such other proceedings, including re-entry and possession, as may be applicable.

(c) Non-Exclusive Remedies. Without regard to any action by Landlord as authorized by Paragraph 28.5(a) and (b) above, Landlord may at its discretion exercise all the additional provisions set forth in Article 27.

(d) Assumption or Assignment by Trustee. In the event Tenant becomes the subject debtor in a case pending under the Bankruptcy Code, Landlord's right to terminate this Lease pursuant to Paragraph 28.5(a) shall be subject to the rights of the Trustee in Bankruptcy to assume or assign this Lease. The Trustee shall not have the right to assume or assign this Lease unless the Trustee (i) promptly cures all defaults under this Lease, (ii) promptly compensates Landlord for monetary damages incurred as a result of

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such default, and (iii) provides adequate assurance of future performance on the part of Tenant as debtor in possession or on the part of the assignee Tenant.

(e) Adequate Assurance of Future Performance. Landlord and Tenant hereby agree in advance that adequate assurance of future performance, as used in Paragraph 28.5(a) above, shall mean that all of the following minimum criteria must be met: (i) Tenant's gross receipts in the ordinary course of business during the thirty-day period immediately preceding the initiation of the case under the Bankruptcy Code must be at least two times greater than the next payment of rent due under this Lease; (ii) both the average and median of Tenant's gross receipts in the ordinary course of business during the six-month period immediately preceding the initiation of the case under the Bankruptcy Code must be at least two times greater than the next payment of rent due under this Lease; (iii) Tenant must pay its estimated pro rata share of the cost of all services provided by Landlord (whether directly or through agents or contractors and whether or not previously included as part of the base rent), in advance of the performance or provision of such services; (iv) the Trustee must agree that Tenant's business shall be conducted in a first class manner, and that no liquidating sales, auctions, or other non-first class business operations shall be conducted on the Premises (v) the Trustee must agree that the use of the Premises as stated in this Lease will remain unchanged and that no prohibited use shall be permitted; and (vi) the Trustee must agree that the assumption or assignment of this Lease will not violate or affect the rights of other tenants in the Retail Center.

(f) Failure to Provide Adequate Assurance. In the event Tenant is unable to (i) cure its defaults, (ii) reimburse the Landlord for its monetary damages, (iii) pay the rent due under this Lease and all other payments required of Tenant under this Lease on time (or within three (3) days), or (iv) meet the criteria and obligations imposed by Paragraph 28.5(d) above, Tenant agrees in advance that it has not met its burden to provide adequate assurance of future performance, and this Lease may be terminated by Landlord in accordance with Paragraph 28.5(a) above.

(g) Retail Center Lease. This Lease shall be deemed a "shopping center lease" under applicable provisions of federal bankruptcy/insolvency law.

ARTICLE 29 REMEDIES CUMULATIVE

The various rights, elections, and remedies of Landlord contained in this Lease shall be cumulative, and no one of them shall be construed as exclusive of any other, or any right, priority, or remedy allowed or provided for by law.

ARTICLE 30 ATTORNEY'S FEES

If either party hereto shall file any action or bring any proceeding against the other party arising out of this Lease or for the declaration of any rights hereunder, the prevailing party therein shall be entitled to recover from the other party all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party as determined by the court. If either party ("secondary party") without its fault is made a party to litigation instituted by or against the other party, the primary party shall pay to the secondary party all costs and expenses, including reasonable attorneys' fees, incurred by the secondary party in connection therewith.

ARTICLE 31 WAIVER OF DEFAULT

The waiver by either party of any default in the performance by the other of any covenant contained herein shall not be construed to be a waiver of any preceding or subsequent default of the same or any other covenant contained herein. The subsequent acceptance of rent or other sums hereunder by Landlord shall not be deemed a waiver of any preceding default other than the failure of Tenant to pay the particular rent or other sum or portion thereof so accepted, regardless of Landlord's knowledge of such preceding default at the time of acceptance of such rent or other sum.

ARTICLE 32 NO PARTNERSHIP

Landlord shall not in any way for any purpose be deemed a partner, joint venturer or member of any joint enterprise with Tenant.

ARTICLE 33 SUBTENANCIES

The voluntary or other surrender of this Lease by Tenant or a mutual cancellation of this Lease shall not effect a merger and shall, at Landlord's option, terminate all existing subtenancies or operate as an assignment to Landlord of any or all of such subtenancies.

ARTICLE 34 SUCCESSORS

This Lease shall be binding upon and shall inure to the benefit of the parties hereto and their successors and permitted assigns. The term "**successors**" is used herein in its broadest possible meaning and includes, but is not limited to, every person succeeding to any interest in this Lease or the premises of Landlord or Tenant herein whether such succession results from the act or omission of such party. Every covenant and condition of this Lease shall be binding upon all assignees, subtenants, licensees, and concessionaires of Tenant.

ARTICLE 35 REMOVAL OF TENANT'S PROPERTY

Upon the expiration of the term of this Lease or upon any earlier termination thereof, Tenant shall remove at its own expense all trade fixtures, equipment, merchandise and personal property (collectively called "**Tenant's property**") in this Lease which were installed by Tenant or any subtenant, concessionaire or licensee in or upon the Premises; but if Tenant is in default, Tenant shall not remove Tenant's property unless notified by Landlord to do so. In case of any injury or damage to the building or any portion of the Premises resulting from the removal of Tenant's property, Tenant shall promptly pay to Landlord the cost of repairing such injury or damage. Tenant shall also remove at its own expense all alterations, additions, and improvements made to the Premises if directed by Landlord pursuant to a notice to Tenant given concurrently with Landlord's approval thereof or consent thereto, and shall repair, or promptly reimburse Landlord for the cost of repairing, all damage done to the Premises or the Building by such removal. Tenant shall complete all of the foregoing repairs, restoration and removal by the time provided in the first sentence of this **Article 35** unless prevented from so doing by a delaying cause, or Landlord may, at Landlord's option, retain any or all of Tenant's property, and title thereto shall thereupon vest in Landlord without the execution of documents or sale or conveyance by Tenant; or Landlord may remove any or all items of Tenant's property from the Premises and dispose of them in any manner Landlord sees fit, and Tenant shall pay upon demand to Landlord the actual expense of such removal and disposition together with interest from the date of payment by Landlord until repayment by Tenant.

ARTICLE 36 EFFECT OF CONVEYANCE

If, during the term of this Lease, Landlord conveys its interest in the Retail Center, the Premises or this Lease, then, from and after the effective date of such conveyance, Landlord shall be released and discharged from any and all further obligations and responsibilities under this Lease, and the transferee shall be deemed, without any further agreement between the parties or their successors in interest or between the parties and any such transferee, to have assumed and agreed to carry out any and all of the covenants and obligations of the Landlord under this Lease. Any security given by Tenant to secure performance of its obligations hereunder may be transferred and assigned by Landlord to such transferee.

ARTICLE 37 LANDLORD'S DEFAULT; NOTICE TO LENDER

37.1 Landlord's Default. In the case of a default by Landlord, Landlord shall commence promptly to cure such default immediately after receipt of written notice from Tenant specifying the nature of such default and shall complete such cure within thirty (30) days thereafter, provided that if the nature of such default is such that it cannot be cured within said thirty (30) day period, Landlord shall have such additional

time as may be reasonably necessary to complete its performance, so long as Landlord has proceeded with diligence after receipt of Tenant's notice and is then proceeding with diligence to cure such default.

37.2 Independent Covenants; Limitation of Remedies and Landlord's Liability. The obligations of Landlord and Tenant, respectively, under this Lease are expressly agreed by the parties to be independent covenants. If Landlord fails to perform any obligation under this Lease required to be performed by Landlord, Tenant shall have no right to: (i) terminate this Lease; (ii) avail itself of self-help or to perform any obligation of Landlord except as expressly permitted in **Paragraph 37.1** above; (iii) abate or withhold any rent or any other charges or sums payable by Tenant under this Lease; or (iv) any right of setoff. If Landlord is in default hereunder, and as a consequence Tenant recovers a money judgment against Landlord, such judgment shall be satisfied only out of the proceeds of sale received on execution of the judgment and levy against the right, title and interest of Landlord in the Premises, and out of rent or other income from the Premises receivable by Landlord or out of the consideration received by Landlord from the sale or other disposition of all or any part of Landlord's right, title and interest in the Premises. No owner, trustee, beneficiary, partner, member, manager, agent, or employee of Landlord (or of any mortgagee or any lender) shall ever be personally or individually liable to Tenant or any person claiming under or through Tenant for or on account of any default by Landlord or failure by Landlord to perform any of its obligations hereunder, or for or on account of any amount or obligations that may be or become due under or in connection with this Lease or the Premises; nor shall it or they ever be answerable or liable in any equitable judicial proceeding or order beyond the extent of their interest in the Retail Center. No deficit capital account of any member or partner of Landlord shall be deemed to be a liability of such member or partner or an asset of Landlord.

ARTICLE 38 CONSENT

In consideration of each covenant made elsewhere under this Lease wherein one of the parties agrees not to unreasonably withhold its consent or approval, the requesting party hereby releases the other and waives all claims for any damages arising out of or connected with any alleged or claimed unreasonable withholding or consent or approval, and the requesting party's sole remedy shall be to have the consent granted.

ARTICLE 39 INTERPRETATION

The captions by which the Articles and Paragraphs of this Lease are identified are for convenience only, and shall not affect the interpretation of this Lease. Wherever the context so requires, the singular number shall include the plural, the plural shall refer to the singular and the neuter gender shall include the masculine and feminine genders. If there is more than one signatory hereto as Tenant, the liability of such signatories shall be joint and several. If any provision of this Lease shall be held to be invalid by a court, the remaining provisions shall remain in effect and shall in no way be impaired thereby.

ARTICLE 40 ENTIRE INSTRUMENT

It is understood that there are no oral agreements between the parties hereto affecting this Lease, and this Lease supersedes and cancels any and all previous negotiations, arrangements, brochures, agreements and understandings, if any, between the parties hereto or displayed by Landlord to Tenant with respect to the subject matter thereof, and none thereof shall be used to interpret or construe this Lease. All of the agreements heretofore and contemporaneously made by the parties are contained in this Lease, and this Lease cannot be modified in any respect except by a writing executed by Landlord and Tenant.

ARTICLE 41 EASEMENTS

This Lease is made expressly subject to:

(a) any conditions, covenants and restrictions and/or easements of record on the Premises and/or the Retail Center; and

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(b) any easements for utilities or ingress and egress which now or hereafter may be placed of record by Landlord for purposes of the common benefit of the occupants of the Retail Center. Tenant agrees to execute such documents necessary to subordinate its interest hereunder to such easements.

ARTICLE 42 SALE BY LANDLORD

The Premises and/or Landlord's interest under this Lease may be freely sold or assigned by Landlord, and in the event of any such sale or assignment, the covenants and obligations of Landlord herein shall be binding on each successive "landlord," and its successors and assigns, only during their respective periods of ownership.

ARTICLE 43 WAIVER OF TRIAL BY JURY

Tenant hereby waives trial by jury in any action, proceeding or counterclaim brought by either of the parties hereto on any matters whatsoever arising out of or in any way connected with this Lease, including without limitation, the relationship of Landlord and Tenant, Tenant's use or occupancy of the Premises, or any claim of injury or damage, or the enforcement of any remedy under any law, statute, or regulation.

ARTICLE 44 HAZARDOUS SUBSTANCES

44.1 Indemnity. Tenant shall be solely responsible and liable for, and shall indemnify, defend and hold harmless Landlord for, from and against any and all Hazardous Substances existing on the Premises or the Retail Center or any other property, or present in or on the air, ground water, soil, buildings or other improvements or otherwise in, on, under or about the Premises or the Retail Center or any other property, resulting from the Handling by Tenant's Permittees of any Hazardous Substance during the period of Tenant's occupancy or use of the Premises. Without limiting the generality of the foregoing, Tenant shall, at any time during the term of the Lease and at the end of the term of the Lease, perform all work necessary to render the Premises or any other property "clean" and free of all Hazardous Substances, in accordance with all present and then-applicable Laws.

44.2 Covenant. Tenant shall not cause or permit any Hazardous Substance to be Handled in, upon, under or about the Premises (or any part thereof) or any part of the Retail Center by Tenant's Permittees without the prior written consent of Landlord. Notwithstanding the foregoing, Tenant shall promptly deliver to Landlord true copies of all governmental permits and approvals relating to the Handling of Hazardous Substances and all correspondence sent or received by Tenant's Permittees regarding any Handling of Hazardous Substances in or about the Premises, including, without limitation, inspection reports and citations.

44.3 Definitions. As used in this Article 44, the following terms shall have the following definitions:

(a) "Hazardous Substance" means any chemical, compound, material, substance or other matter that: (i) is a flammable explosive, asbestos, radioactive material, nuclear medicine material, drug, vaccine, bacteria, virus, hazardous waste, toxic substance, petroleum product, or related injurious or potentially injurious material, whether injurious or potentially injurious by itself or in combination with other Substance; (ii) is controlled, designated in or governed by any Hazardous Substance Law; (iii) gives rise to any reporting, notice or publication requirements under any Hazardous Substance Law; or (iv) gives rise to any liability, responsibility or duty on the part of Tenant or Landlord with respect to any third person under any Hazardous Substance Law.

(b) "Handle" or "Handled" or "Handling" means generated, produced, brought upon, used, handled, stored, treated or disposed of.

(c) "Tenant's Permittees" means and includes Tenant, Tenant's employees, licensees, contractors, subcontractors, representatives, agents, officers, partners, directors, subtenants, sub-subtenants and invitees.

(d) "Laws" means all applicable present and future laws, ordinances, rules, regulations, statutes, requirements, actions, policies, and common law of any local, state, Federal or quasi-governmental agency, body, board or commission.

ARTICLE 45 AUTHORITY

If Tenant is other than a natural person, each person executing this Lease on behalf of Tenant hereby covenants and warrants to Landlord that: such person is duly authorized to execute this Lease on behalf of Tenant; Tenant is duly qualified in all respects; all steps have been taken prior to the date hereof to qualify Tenant to do business in the state in which the Premises are situated; all franchise and other taxes have been paid to date; and all forms, reports, fees and other documents necessary to comply with applicable laws will be filed when due. Tenant will furnish to Landlord promptly upon demand, a corporate resolution, proof of due authorization of partners, or other appropriate documentation reasonably requested by Landlord evidencing the due authorization of Tenant to enter into this Lease.

ARTICLE 46 BROKERS

Tenant hereby represents and warrants that Tenant has not employed any broker with regard to this Lease and that Tenant has no knowledge of any other broker being instrumental in bringing about this Lease transaction. Tenant shall indemnify Landlord against any expense incurred by Landlord as a result of any claim for brokerage or other commissions made by any other broker, finder, or agent, whether or not meritorious, employed by Tenant or claiming by, through or under Tenant. Tenant acknowledges that Landlord shall not be liable for any representations of Landlord's leasing agent or other agents of Landlord regarding this Lease transaction except for the representations and covenants of Landlord expressly set forth in this Lease.

ARTICLE 47 TENANT REPRESENTATION

Neither Tenant nor any of its constituent partners, members or shareholders, nor any beneficial owner of Tenant or of any such partner, member or shareholder (i) is listed on the Specially Designated Nationals and Blocked Persons List maintained by the Office of Foreign Asset Control, Department of the Treasury ("OFAC") pursuant to the Executive Order No. 13224, 66 Fed. Reg. 49079 (Sept. 25, 2001) ("Order"); (ii) is listed on any other list of terrorists or terrorist organizations maintained pursuant to the Order, the rules and regulations of OFAC or any other applicable requirements contained in any enabling legislation or other Executive Orders in respect of the Order (the Order and such other rules, regulations, legislation or orders are collectively called the "Orders"); (iii) is engaged in activities prohibited in the Orders; or (iv) has been convicted, pleaded nolo contendere, indicted, arraigned or custodially detained on charges involving money laundering or predicate crimes to money laundering.

ARTICLE 48 GUARANTY

The effectiveness of this Lease is contingent upon execution by the Guarantor(s) (if any) of a Guaranty in the form attached hereto as Exhibit E.

ARTICLE 49 INDEMNITY

49.1 Tenant shall pay, indemnify, defend, and hold harmless Landlord, its directors, officers, employees, agents, contractors, licensees, successors and assigns, tenants, invitees or guests (the "Indemnitees") and the Premises and the Retail Center from and against all claims and liabilities for personal injury, property damage, or liens arising by virtue of or relating to construction of the Tenant's Work and any other alterations or improvements or repairs made at any time to the Premises or the Retail Center by Tenant, including repairs, restoration and rebuilding, and all other negligent or intentionally wrongful acts or omissions of Tenant on or with respect to the Premises or the Retail Center, including, but not limited to, the use or occupancy of the Premises, the Common Area, or any improvement on the Premises and the Retail Center. The foregoing indemnity shall be inapplicable to any gross negligence or intentional misconduct on the part of Landlord and/or its Indemnitees.

(a) For purposes of this Article and this Lease, the action or omissions of Tenant shall include all acts and omissions of all parties for whom Tenant is otherwise legally responsible and any directors, officers, employees, agents, contractors, licensees, successors and assigns, sublessees or invitees or guests of Tenant.

(b) Tenant's indemnity obligations in this Lease shall survive any termination of this Lease.

(c) If Tenant is required to defend any action or proceeding pursuant to this section to which action or proceeding Landlord or its Indemnitee is made a party and Landlord or its Indemnitee reasonably believes that the interests of Tenant and Landlord or its Indemnitee conflict or are divergent, then Landlord or its Indemnitee shall also be entitled to appear, defend, or otherwise take part in the matter involved, at its election, by counsel of its own choosing, and to the extent Landlord or its Indemnitee is indemnified under this section, Tenant shall bear the cost of such separate defense, including reasonable attorneys' fees.

49.2 Waiver of Worker's Compensation Immunity The indemnification obligations contained in this Section shall not be limited by any worker's compensation, benefit or disability laws, and each indemnifying party hereby waives (solely for the benefit of the indemnified party) any immunity that said indemnifying party may have under the Industrial Insurance Act, Title 51 RCW and similar worker's compensation, benefit or disability laws. Tenant specifically and expressly waives any immunity that may be granted it under the Washington State Industrial Insurance Act, Title 51 RCW. Tenant's indemnity obligations under this Lease shall not be limited by any limitation on the amount or type of damages, compensation, or benefits payable to or for any third party under the Worker Compensation Acts, Disability Benefit Acts or other employee benefit acts.

49.3 Provisions Specifically Negotiated. LANDLORD AND TENANT ACKNOWLEDGE BY THEIR EXECUTION OF THIS LEASE THAT EACH OF THE INDEMNIFICATION PROVISIONS OF THIS LEASE (SPECIFICALLY INCLUDING BUT NOT LIMITED TO THOSE RELATING TO WORKER'S COMPENSATION BENEFITS AND LAWS) WERE SPECIFICALLY NEGOTIATED AND AGREED TO BY LANDLORD AND TENANT.

[No further text on this page. Signatures follow.]

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

LANDLORD:

CORNERSTONE EQUITIES LLC, a Washington limited liability company

By: [Signature]
Name: Keith Scribner
Its: member

TENANT:

Mahlen Investments Inc., a Washington Corporation, DBA M Pressed Drycleaning

By: [Signature]
Name: Craig L. Mahlen
Its: President

STATE OF WASHINGTON
COUNTY OF Spokane

ss.

I certify that I know or have satisfactory evidence that Keith Scribner is the person who appeared before me, and said person acknowledged that said person signed this instrument, on oath stated that said person was authorized to execute the instrument and acknowledged it as a member of **CORNERSTONE EQUITIES LLC**, a Washington limited liability company, to be the free and voluntary act of such limited liability company for the uses and purposes mentioned in the instrument.

Dated this 2nd day of August, 2013.



[Signature]
(Signature of Notary)

Tanasha McCray
(Legibly Print or Stamp Name of Notary)

Notary public in and for the state of Washington, residing at

7404 N. Division St.

My appointment expires Feb. 27, 2014

STATE OF WASHINGTON

ss.

COUNTY OF Spokane

I certify that I know or have satisfactory evidence that Craig L. Mahlen is the person who appeared before me, and said person acknowledged that said person signed this instrument, on oath stated that said person was authorized to execute the instrument and acknowledged it as the managing member of Mahlen Investments Inc., a Washington Corporation to be the free and voluntary act of such limited liability company for the uses and purposes mentioned in the instrument.

Dated this 2nd of August, 2013.

Tanasha McCray
(Signature of Notary)

Tanasha McCray
(Legibly Print or Stamp Name of Notary)

Notary public in and for the state of Washington, residing at

7404 N. Division St.

My appointment expires Feb. 27, 2016



EXHIBIT "A-1"

(Legal Description)

1101 N Division Street

Central Add and STP E of ADJ L3-4 B70

Parcel 35181.1402

EXHIBIT "B-1"
(Premises)

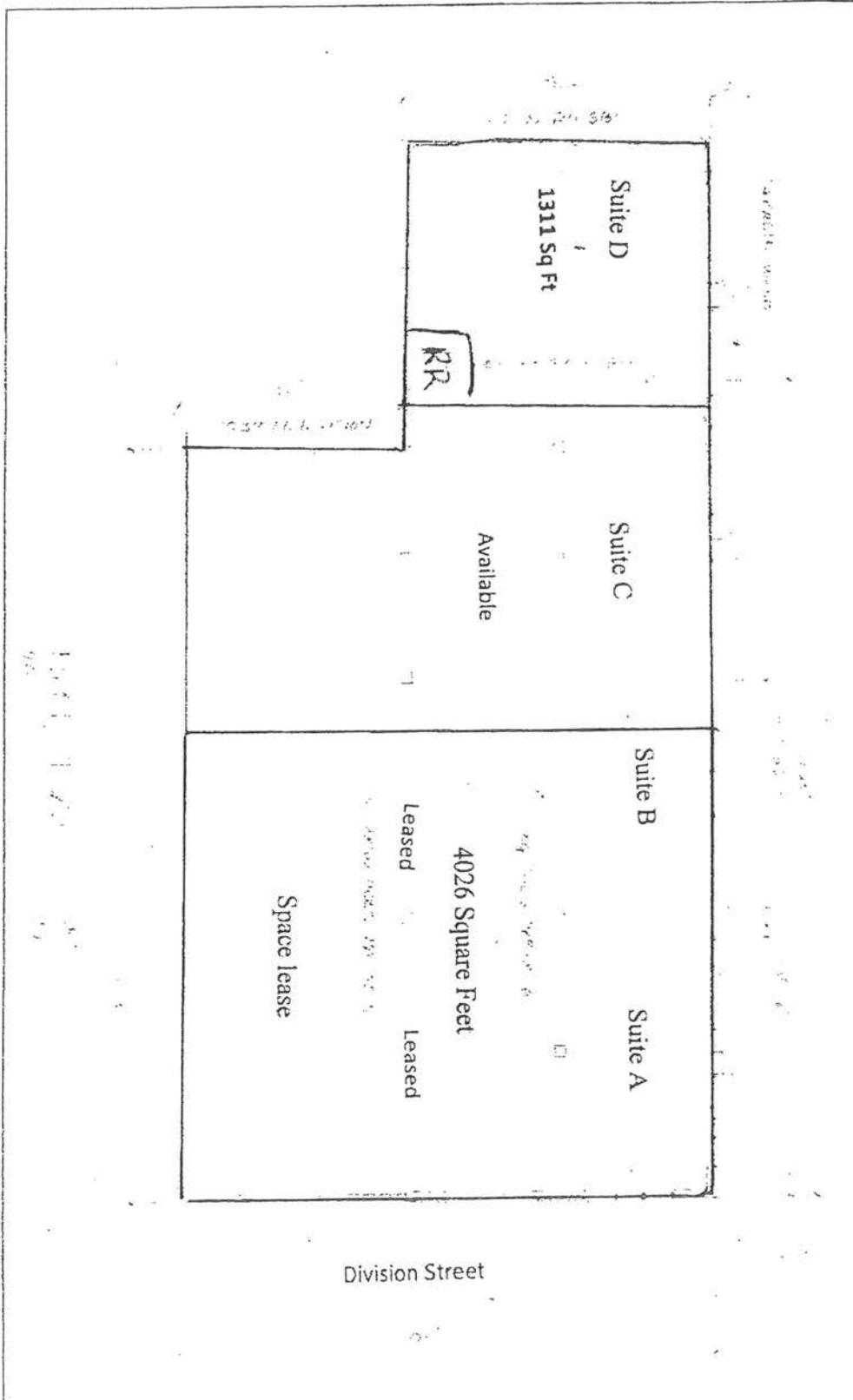


EXHIBIT "C"
(Landlord's Work)

Landlord agrees to complete the following:

- 1) Install ADA restroom. Restroom to be completed with handicapped bars but does not include towel, toilet and soap dispensers
- 2) Sheet rock exterior walls inside space, tape mud and prime ready for paint
- 3) Provide electrical box every 12 feet in exterior walls
- 4) Install grid ceiling
- 5) Install Ceiling tile and lighting
- 6) Install back door approx. 3ft by 7ft in rear of space next to bathroom (South wall)
- 7) Add a 5ft by 5ft window in rear side of space approximately 10 feet from the rear west wall
- 8) Pave or asphalt around west side of building approximately 12 feet wide from the front of building to rear of building (This item cannot be completed possession date but will be completed within 90 days after the possession date)
- 9) Provide washer dryer hookup in east wall next to restroom with hot and cold water, gas supply, 110 outlet for washer, 230 volt outlet for dryer, dryer vent, gas vent and gas line for dryer, and a gas or electric 40 gallon hot water heater.

EXHIBIT "D"
(Tenant's Work)

Tenant shall be responsible for all work of improvements in the premises not specifically allocate to Landlord in Exhibit D, together with the following work which shall be provided by tenant at tenants sole cost and expense, all of which is called collectively "Tenants Work". Tenants work shall be performed by a licensed, bonded, and third party contractors identified by tenant in a written notice to landlord prior to commencement of tenants work and shall include, but not limited to, the purchase of and/or installation and/or performance of any and all of the following items including all applicable architectural, engineering fees, permitting costs, governing agency fees, utility charges, connection fees, etc.

All interior partitions and curtains within the premises

All electrical work

Internal communications systems and alarms

Store fixtures

Plumbing and plumbing fixtures, (All water lines must be above the slab)

Show window platforms

Special lighting fixtures

All floor and interior finishes including show windows and interior signs

Tenants exterior signs, including manufacture, installation, and connections to a tenant installed J box on the building or fascia

Any other items required by Tenant, including governmental requirements necessary for tenants operation of business, including, without limitation, requirements under the American Disabilities Act of 1990.

Tenant shall make no roof installations and no roof openings without Landlords prior written consent.

It is understood and agreed that any special-use tenant (such as a restaurant, etc.) will, to the satisfaction of Landlord, seal the entire length of the Tenant's demised premises pursuant to plans prepared by Tenant's engineers and architects. Tenant must comply with all governing agency requirements, including local, county, state, and federal agencies.

Within 30 days of opening for business, Tenant shall provide Landlord with a reproducible "as built" plans for Tenant's total improvement within the premises.

EXHIBIT "X"
(Form of Guaranty)

IN CONSIDERATION OF and as a material inducement to Cornerstone Equities LLC (the "Landlord"), executing the within lease dated July 29th, 2013 (which with all amendments is the "Lease"), with Craig L. Mahlen and Karen L. Mahlen ("Tenant"), for store premises Suite D in the building located at 1101 N Division in Spokane, Washington, 90202 (the "Retail Center"), and in further consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration paid by Landlord, the receipt and sufficiency of which is hereby acknowledged to the undersigned, Craig L. Mahlen and Karen L. Mahlen, whose residence is 6483 Saddle Mountain Way, Deer Park, Wa 99006-5083 (the "Guarantors") do hereby on behalf of themselves, their successors and assigns, unconditionally covenant and agree with Landlord, their successors and assigns, that if default shall at any time under the Lease be made by Tenant, their successors and assigns, in the payment of any monthly installment of rent, or additional rent, or in the performance of any of the terms, covenants and conditions of the Lease, and if the default shall not have been cured within the time specified in the Lease for curing the same, then Guarantors will well and truly pay on demand in cash the monthly installment of rent and additional rent and cure such other default together with such costs and expenses (including without limitation attorney fees) incurred by Landlord as a result of or arising out of the default for which Tenant, its successors and assigns are obligated to Landlord pursuant to the terms of the Lease. This Guaranty shall include any liability of Tenant that shall accrue under the Lease for any period preceding as well as any period following the term of the Lease.

THIS GUARANTY is an absolute and unconditional guaranty of payment and performance. It shall be enforceable against Guarantors, the Guarantors' marital community and separate property, and their successors and assigns, without the necessity for any suit or proceedings by Landlord against Tenant, its successors and assigns, and without the necessity of any notice of non-payment, non-performance or non-observance or any notice of acceptance of this Guaranty or any other notice or demand to which Guarantors might otherwise be entitled, all of which Guarantors hereby expressly waive, Guarantors agree that the validity of this Guaranty and the obligations of Guarantors shall in no way be terminated, affected or impaired by reason of the assertion or the failure or delay to assert by Landlord against Tenant, or Tenant's successors and assigns, any of the rights or remedies reserved to Landlord pursuant to the provisions of the Lease. The single or partial exercise of any right, power or privilege under this Guaranty shall not preclude any other or the further exercise thereof or the exercise of any other right, power or privilege by Landlord.

THIS GUARANTY shall not be affected and the liability of the undersigned shall not be extinguished or diminished by Landlord's receipt, application or release of security given for the performance and observation of the covenants and conditions in the Lease to be performed or observed by Tenant, its successors and assigns; by the cessation from any cause whatsoever of the liability of Tenant, its successors and assigns; by reason of sums paid or payable to Landlord from the proceeds of any insurance policy or condemnation award; by any non-liability of Tenant under the lease for any reason, including any defect or defense which may now or hereafter exist in favor of Tenant; or by any extensions, renewals, amendments, indulgences, modifications, transfers or assignments in whole or in part of the Lease by Landlord, whether or not notice thereof is given to Guarantors. This Guaranty is of payment and not of collection; it is one of active performance and not one of suretyship for damages or otherwise. This Guaranty extends to any and all liability that Tenant has or may have to Landlord by reason of matters occurring before the execution of the Lease or the commencement of the term of the Lease, or by matters occurring after the expiration of the term of the Lease. Guarantors agree that they shall have no rights of indemnification or subrogation against Tenant and agree that Guarantors shall subordinate their rights of recourse against Tenant by reason of any indebtedness or sums due to Guarantors, unless and until the Lease is performed to the satisfaction of Landlord. Guarantors agree that they shall not assert any claim that they have or may have against Tenant, including any claims under this Guaranty, until the obligations of Tenant under the Lease are fully satisfied and discharged. The liability of Guarantors is co-extensive with that of Tenant and also joint and several.

LANDLORD'S ACCEPTANCE of a note or additional collateral of Tenant or of Guarantors shall not be the full cash payment or the active and primary performance required herein. This Guaranty is given in addition to all other guaranties that may pertain to Tenant's indebtedness, and is not subordinate to any other guaranties. Landlord's rights under all guaranties, including this Guaranty, shall be cumulative and independently enforceable. It shall not be a condition to the enforcement of this Guaranty that any other guaranties be resorted to by Landlord.

GUARANTORS AGREE that they will, at any time and from time to time, within ten (10) business days following written request by Landlord, execute, acknowledge and deliver to Landlord a statement certifying that this Guaranty is unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect as modified and stating such modifications). Guarantors agree that such certificate may be relied on by anyone holding or proposing to acquire any interest in the Shopping Center from or through Landlord or by any mortgagee or lessor or

prospective mortgagee or lessor of the Shopping Center or of any interest therein. Should Landlord be obligated by any bankruptcy or other law to repay to Tenant or to Guarantors or to any trustee, receiver or other representative or either of them, any amounts previously paid to Landlord, its successors and assigns, this Guaranty shall be reinstated in the amount of such repayments.

GUARANTORS REPRESENT and warrant that:

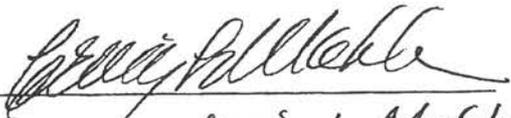
- (a) They are not insolvent, and there are no limitations or prohibitions to the enforcement of this Guaranty; and
- (b) They are immediately benefited by the indebtedness.

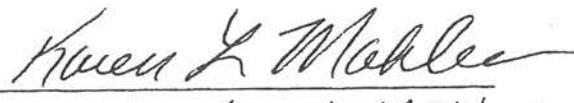
AS A FURTHER inducement to Landlord to make and enter into the lease and in consideration thereof, Landlord and Guarantors covenant and agree that in any action or proceeding brought on, under or by virtue of this Guaranty, Landlord and Guarantors shall and do hereby waive trial by jury. Without regard to principles of conflicts of laws, the validity, interpretation, performance and enforcement of this Guaranty shall be governed by and construed in accordance with the internal laws of the state in which the Shopping Center is located.

IF ANY PORTION or application of this Guaranty is invalid, unenforceable or illegal for any reason, the parties agree that such invalid, unenforceable or illegal portion or application shall not be deemed to affect the remainder of this Guaranty.

IN WITNESS WHEREOF, Guarantors acting herein in their own personal and individual capacities have executed this Guaranty this 2nd day of August, 2013.

GUARANTORS:

By: 
Print Name: Craig L. Mahlen

By: 
Print Name: Karen L. Mahlen

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EXHIBIT "Y"
(Sign Criteria)

1. Tenant Signage Submittal

a. Not less than twenty-one (21) days prior to fabricating any exterior sign intended to be placed on the building of which the Premises are a part, Tenant shall submit sign manufacturer's shop drawings to Landlord depicting sign, lettering dimensions, overall dimensions, color, materials, mounting details, quantities and location of the sign in relation to each elevation. Signs, permits and related or resulting construction shall be done only by licensed third party contractors and shall be at Tenant's sole cost and expense and shall be Tenant's responsibility. All signs shall be installed under the supervision of Landlord. The sign contractor shall repair any damage caused by its work.

b. Landlord's final written approval is required prior to sign fabrication. Tenant shall not be permitted to open for business in the Premises without a sign that has been approved in writing by Landlord and which conforms to applicable building and electrical codes.

2. Interior Signage Requirements

a. No signage shall be applied to storefront or hung within 4'-0" from the lease line without Landlord's written approval.

b. No signs shall be allowed beyond the lease line without Landlord's written approval.

c. No flashing, action, moving or audible signs are permitted.

d. No television or projection screens are permitted within 15 feet of the lease line without Landlord's written approval.

e. Signs may be vertical, horizontal, and be illuminated. Multiple signing may be permitted on multi-directional storefronts but only with Landlord's prior written approval.

f. The length of horizontal lettering shall not exceed 50% of the horizontal storefront length. The proportional ratio of the proposed signage length to the overall horizontal storefront length shall be left to the sole discretion of Landlord.

g. Landlord reserves the right to regulate signage location throughout the Retail Center.

h. Wording is limited to the trade name of the store. Landlord shall review logos on a case-by-case basis.

i. No sign manufacturer's identification, decals or registered trademark shall be permitted.

j. Tenant shall keep the sign in good repair at all times.

All signage related costs shall be paid by Tenant.

APPENDIX B
Case No. 348288

LEASE AMENDMENT #1

THIS AGREEMENT made this 24th day of February, 2014, between Cornerstone Equities LLC, as Lessor, and Mahlen Investments Inc., as Lessee.

WITNESSETH:

WHEREAS, by that certain lease dated the 1st day of September, 2013, hereinafter referred to as the said Lease, Cornerstone Investments LLC, Lessor, leased to Mahlen Investments LLC., Lessee, for a term of 5 years commencing October 5th, 2013, and expiring October 31st, 2018. The address is 1101 N Division, Suite D, Spokane Wa.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, the parties hereto do hereby covenant and agree as follows:

FIRST: Under Exhibit C of this lease, Lessors Work, number 8, states Lessor will pave or asphalt around west side of building. Due to unforeseen circumstances, Lessor, to date, has not yet received the necessary permits from the City of Spokane to complete this improvement. Therefore, Lessor has agreed to lower the total base rent to half of the base rent to \$1092.50 (\$2185 divided by 2 equals \$1092.50) each month beginning March 1st 2014, until the proper permits are issued and this improvement is completed. This shall include the pylon sign as well. The month this improvement and the pylon sign referred in second paragraph of this addendum are completed, rent shall be prorated for the month and Lessor will provide Lessee an accounting of that prorated month. Common area expense charges each month shall remain the same per the lease agreement.

SECOND: Lessor agrees to provide, at Lessor's expense, a temporary sign mounted on the current pylon sign for the Lessee. Lessor also agrees to provide, at Lessor's expense, a new pylon sign and a new sign plate for Lessee on that sign when it is completed.

THIRD: That except as herein modified, all terms and conditions of said Lease dated September 1st, 2013, shall be the same and remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year first above written.

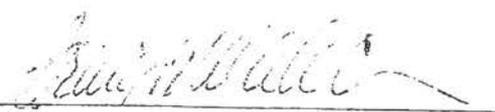
Lessor:

Cornerstone Equities LLC

BY: 

Lessee:

Mahlen Investments LLC

BY: 

LIMITED LIABILITY COMPANY ACKNOWLEDGMENT

STATE OF WASHINGTON
County of Spokane

On this 27th day of February, 2014, before me personally appeared Keith Sebastian to me known to be one of the partners of Cornerstone Equities LLC, the Limited Liability Company that executed the foregoing instrument, and acknowledged it to be the free and voluntary act and deed of said Limited Liability Company for the uses and purposes therein mentioned; and on oath stated that he/she is authorized to execute said instrument for and on behalf of said Limited Liability Company.

WITNESS my hand and official seal hereto affixed the day and year first above written.

Notary Public
State of Washington
Karen M Wilson
Commission Expires 07-31-2017

Karen M. Wilson
NOTARY PUBLIC in and for the State of
Washington, Residing at Spokane, WA 99207
My Commission Expires: July 31, 2017

CORPORATE ACKNOWLEDGMENT

STATE OF WASHINGTON
County of Spokane) ss.

On this 27th day of February, 2014, I certify that I know or have satisfactory evidence that Craig Mahlen, is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as the President of Mahlen Investments Inc and to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

WITNESS my hand and official seal hereto affixed the day and year first above written.

Notary Public
State of Washington
Karen M Wilson
Commission Expires 07-31-2017

Karen M. Wilson
NOTARY PUBLIC in and for said County and State, residing
at Spokane, WA 99207
My appointment expires July 31, 2017

APPENDIX C
Case No. 348288

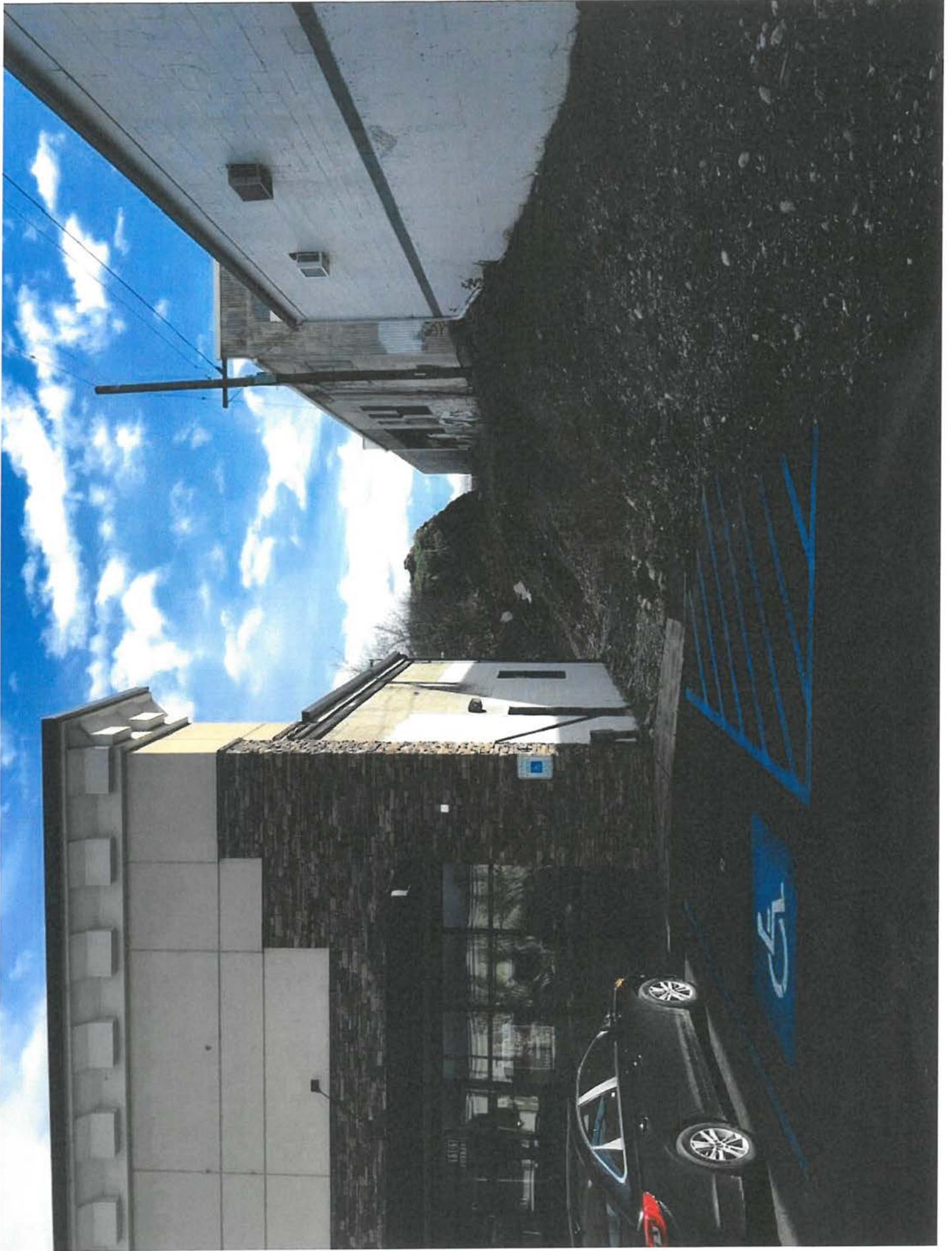


Google earth

feet
meters



APPENDIX D
Case No. 348288



APPENDIX E
Case No. 348288

Finding of Fact 58: In addition to obtaining the grading plan, between February 2014 and April 2014, Mr. Scribner obtained architectural designs from Martin J. Hill Architecture, Inc., and structural calculations from Inland Northwest Engineering, Inc.

Finding of Fact 59: *Sometime between November 2013, and January 2014*, Mr. Scribner learned that Cornerstone owned only 10 feet between the building and west property line, not the 12 feet required for the drive-thru. (emphasis added to highlight challenged portion of the Finding).

Finding of Fact 60: Mr. Scribner realized the alley would have to be vacated before any additional work could continue. *Vacation of the alley would require approval from the landowners abutting the alley and from the Spokane City Council.* Once submitted, it would take the City between three to six months to either approve or reject the vacation of the alley. (emphasis added to highlight the challenged portion of the finding).

Finding of Fact 70: Mr. Mahlen paid rent and common area expenses through June 2014.

Finding of Fact 97: In conjunction with efforts to vacate the alley, after the February 14, 2014 Amendment was executed, Cornerstone contacted various neighbors seeking to inquire as to their thoughts on the vacation.

APPENDIX F
Case No. 348288

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HONORABLE JOHN O. COONEY

FILED

OCT 17 2016

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

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

CORNERSTONE EQUITIES, LLC, a
Washington Limited Liability Company

Plaintiffs,

vs.

MAHLEN INVESTMENTS, INC., a
Washington Corporation, CRAIG L.
MAHLEN and KAREN L. MAHLEN,
husband and wife and DOES 1-10,

Defendants,

Case No. 14-2-04657-4

--AMENDED--

**FINDINGS OF FACT &
CONCLUSIONS OF LAW -
FOLLOWING BENCH TRIAL**

MAHLEN INVESTMENTS, INC., a
Washington Corporation, CRAIG L.
MAHLEN and KAREN L. MAHLEN,
husband and wife,

Third Party Plaintiffs,

vs.

KEITH SCRIBNER and JANE DOE
SCRIBNER, husband and wife,

Third Party Defendants.



1 4. Defendant and Third Party Plaintiff Craig Mahlen is an individual residing in Spokane
2 County Washington.

3
4 5. Defendant and Third Party Plaintiff Karen Mahlen is an individual residing in Spokane
5 County Washington.

6 6. Prior to working full time in real estate, Mr. Scribner worked in the banking industry. He
7 left banking after suffering carbon monoxide poisoning, resulting in him having, among other
8 ailments, memory problems.

9
10 7. Currently, Mr. Scribner manages more than 50 commercial properties.

11 8. Mr. Scribner and Harlan Douglas are partners in Cornerstone.

12 9. Cornerstone owns the real property located on the corner of Boone Avenue and Division
13 Street, commonly referred to as 1101 N. Division Street, Spokane, Washington.

14 10. The property located at 1101 N. Division Street consists of a relatively small strip mall that
15 sits on the south end of the property. The strip mall is made up of four suites. The storefront
16 entrances to these suites face north.
17

18 11. Behind the building, to the south, is a narrow driveway that runs east and west. To the
19 south of the driveway sits vacant land. A north and south alley runs along the west side of the
20 property. The alley is owned by the City of Spokane (hereinafter "City"). On the west side of
21 the alley to the north is a building and to the south a vacant lot. Division Street parallels the east
22 side of the property and Boone Avenue the north side.
23

24 12. The two most eastern suites of the strip mall are occupied by a liquor store. The third suite
25 from the east sits vacant. The most western suite is the subject at issue in this matter.
26
27
28

1 13. In the north-eastern portion of the parking lot sits an espresso stand. The espresso stand
2 markets certain days as topless, presumably meaning that on the selected days the baristas serve
3 customers without covering their chests.

4
5 14. At 1101 N. Division, Division Street (Hwy. 395) is a one-way southbound road with four
6 lanes of travel. The northbound one-way, Ruby Street, sits one block east of Division Street.
7 Like Division Street, Ruby Street consists of four lanes of travel, only to the north rather than
8 south.

9
10 15. The nearest traffic light for traffic traveling east and west across Division Street and Ruby
11 Street is Sharp Avenue, located two blocks north of 1101 N. Division Street.

12 16. In May 2013, Mahlen formed Mahlen Investments.

13
14 17. Shortly thereafter, Mahlen Investments purchased the assets of a dry cleaning business
15 called M Pressed Dry Cleaning.

16 18. Prior to Mahlen Investments purchasing M Pressed Dry Cleaning, Mr. Mahlen did not have
17 any experience in the dry cleaning industry, although he had previously owned a laundromat.

18 19. Mr. Mahlen had experience with commercial property, having previously rented property
19 in other states. Mr. Mahlen currently owns a 46,000 square foot business park in Indiana.

20
21 20. At the time of purchase, M Pressed Dry Cleaning had two locations, one in north Spokane
22 and the other on Spokane's South Hill.

23 21. The north Spokane location is where the dry cleaning occurs. The South Hill location is
24 only used as a drop off and pick up site for customers.

25
26 22. Within one week of purchasing M Pressed Dry Cleaning, Mr. Mahlen determined he had
27 sufficient staffing and equipment to process additional clothing items with only a minimal
28 increase in costs.

1 23. Mr. Mahlen was aware that a dry cleaning service called U-Save had recently closed its
2 store leaving a void in Spokane's downtown market.

3 24. Mr. Mahlen realized he could open a store in the downtown area for customer pick up and
4 drop off. He could then incorporate the downtown store into his daily deliveries between the
5 north Spokane store and South Hill store.

6 25. Mr. Mahlen hired longtime U-Save employee, Lorrie Ferris.

7 26. Mr. Mahlen was also aware that Clark Cleaners had two downtown locations, both with
8 drive-thru windows.

9 27. In addition to consulting with others, Mr. Mahlen read an article in *Dry Cleaning Magazine*
10 that provided the two most critical factors in determining a location for a dry cleaning store is
11 convenience and visibility.

12 28. On July 17, 2013, Mr. Mahlen signed a letter of intent for the 1101 N. Division property.

13 29. The letter of intent was intended to outline the business points under which the parties
14 would consider a lease. The letter of intent was not binding on either party.

15 30. As evidence by the letter of intent, a drive-thru window was contemplated by the parties in
16 July 2013.

17 31. On August 2, 2013, Cornerstone, through Mr. Scribner, executed the Retail Center Lease
18 (hereinafter "Lease") as did Mr. Mahlen on behalf of Mahlen Investments.

19 32. Subsequent to the execution of the Lease, Mr. Mahlen paid Cornerstone \$5,744 which
20 constituted a \$2,643 as a deposit with the rest being applied to common area expenses.

21 33. On August 2, 2013, both Mr. Mahlen and Ms. Mahlen executed a personal guarantee of the
22 Lease.

1 34. The term of the Lease was five years, commencing September 1, 2013. The first month's
2 rent was not charged, only the common area expense.

3 35. Rent was due the first day of each month pursuant to Article 6.1 of the Lease.

4 36. Article 27.1(a) of the lease provided that a failure to pay the minimum monthly rent when
5 due is a material breach and constitutes a default.

6 37. Rent for 2013 was set at \$2,185. For the second year of the Lease monthly rent was set at
7 \$2,228. For the third year of the Lease monthly rent was set at \$2,273. For the fourth year of the
8 Lease monthly rent was set at \$2,318. For the final year of the Lease monthly rent was set at
9 \$2,365.

10 38. In addition to monthly rent, Mahlen Investments was required to pay a monthly common
11 area expense capped at \$458.85 per month.

12 39. The Lease included Article 5.3 which provides:

13 If for any reason whatsoever landlord has not delivered the Premises
14 to Tenant with Landlord's Work substantially complete on or before
15 December 1st, 2013, and as Tenant's sole and exclusive remedy, this
16 Lease shall be deemed automatically cancelled.

17 40. The Lease contained "Article 20: Delaying Causes," which provides:

18 If either party is delayed in the performance of any covenant of this Lease because
19 of...acts of the other party,...or any other cause beyond the reasonable control of
20 the party so obligated... then such performance shall be excused for the period of
21 the delay; and the period for such performance shall be extended for a period
22 equivalent to the period of such delay, except that the foregoing shall in no way
23 affect Tenant's obligation to pay rent or any other amount payable hereunder, or
24 the length of the term of this Lease.

25 41. Article 22 of the Lease mandates that all notices, requests, and demands be in writing.

26 42. The Lease constitutes the entirety of the parties' agreement as it contains Article 30, an
27 integration clause.

1 43. The Lease contains Article 37.1, requiring Mr. Mahlen to provide written notice to
2 Cornerstone of any default and allowing Cornerstone 30 days to cure such default.

3 44. The Lease contains Article 6.1(b) authorizing the imposition of late fees should rent not be
4 paid within five days of the due date and interest up to twelve percent per annum.
5

6 45. The Lease contains Article 7.7(b) which allows for an increase in the common area expense
7 should Mahlen Investments use less than 95% of the available square footage of the leased
8 premises.

9 46. The Lease contains an attorney fee provision under Article 30 entitling the prevailing party
10 in any action reasonable attorney fees, costs, and expenses.
11

12 47. Exhibit C to the Lease designated nine areas of improvement Cornerstone was required to
13 perform. In part, Exhibit C to the Lease provided that the:

14 Landlord agrees to complete the following:

15 8) Pave or asphalt around west side of building approximately
16 12 feet wide from the front of building to rear of building
17 (This item cannot be completed [sic] possession date but will be
18 completed within 90 days after the possession date).

19 48. With the exception of paving the west side of the building, Cornerstone completed all of its
20 obligations under Exhibit C by the third week of October, 2013.

21 49. Exhibit D to Lease designated Mahlen Investment's obligations. Under Exhibit D, Mahlen
22 Investments was responsible for:

23 Any other items required by Tenant, including governmental requirements
24 necessary for tenant operation of business, including, without limitation,
25 requirements under the American Disabilities Act of 1990.

26 50. Perhaps due to the letter of intent, on or about July 17, 2013, Mr. Scribner enlisted
27 contractor Gerald Kofmel to provide a bid to Mr. Mahlen regarding a drive-thru.
28

1 51. July 22, 2013, Mr. Scribner received bid from Arrow Concrete & Asphalt concerning the
2 construction of the drive-thru.

3
4 52. In July 2013, Mr. Scribner was aware that a retaining wall on Boone Court, LLC's,
5 property line would be necessary for completion of the drive-thru.

6 53. October 12, 2013, Cornerstone received a bid from All Star Excavation to excavate drive-
7 thru.

8 54. Mr. Mahlen took possession of premises sometime between October 5 and October 18,
9 2013.

10
11 55. In late October 2013, All Star Excavation began work on the drive-thru area. However, on
12 November 4, 2013, the City issued a Notice of Violation which stayed the project because All
13 Star Excavation needed additional permits (in addition to Cornerstone's remodel permit) to grade
14 near the property line and to grade on City property.

15
16 56. The City would not issue a permit to grade next to the property line without Cornerstone
17 first procuring a grading plan.

18 57. As such, in November 2013, Mr. Scribner enlisted Joel Lee, of Metro Engineering, to
19 prepare a grading plan. The grading plan was completed on February 3, 2014, and was promptly
20 submitted to the City. The City approved of the grading pan on February 10, 2014.

21
22 58. In addition to obtaining the grading plan, between February 2014 and April 2014, Mr.
23 Scribner obtained architectural designs from Martin J. Hill Architecture, Inc., and structural
24 calculations from Inland Northwest Engineering, Inc.

25 59. Sometime between November 2013, and January 2014, Mr. Scribner learned that
26 Cornerstone owned only 10 feet between the building and west property line, not the 12 feet
27 required for the drive-thru.
28

1 60. Mr. Scribner realized the alley would have to be vacated before any additional work could
2 continue. Vacation of the alley would require approval from the landowners abutting the alley
3 and from the Spokane City Council. Once submitted, it would take the City between three to six
4 months to either approve or reject the vacation of the alley.
5

6 61. On January 23, 2014, Mr. Scribner received information from Stewart Title of Spokane
7 providing information as to who all of the property owners were with land abutting the alley.
8

9 62. Mr. Scribner obtained an application to vacate the alley in mid-April 2014.
10

11 63. On November 20, 2013, Rose Krug, Mr. Scribner's agent, emailed Mr. Mahlen and stated
12 that rent would be reduced by 10 percent "[u]ntil the drive thru is completed...After the drive
13 thru is completed, the base rent will resume...."
14

15 64. The November 20, 2013, email notice did not contain a completion date for the drive-thru
16 paving.
17

18 65. By February, 2014, Mr. Mahlen and Mr. Scribner were negotiating a larger rent reduction
19 because the drive-thru had yet to be completed.
20

21 66. On or about February 24, 2014, the parties signed Lease Amendment #1 (hereinafter
22 "Amendment"), in which Mr. Scribner agreed to provide pylon signage at no expense to Mr.
23 Mahlen and reduce the rent by one-half until completion of the drive-thru. Once the drive-thru
24 was completed, rent would resume as to the figure listed in the Lease.
25

26 67. Although Mr. Mahlen attempted to negotiate a completion date for the drive-thru in the
27 February 24, 2014, Amendment, the parties chose to omit one from the Amendment.
28

68. In June of 2014, Mr. Mahlen gave Mr. Scribner verbal notice via telephone that Mahlen
Investments, Inc., would be terminating the Lease due to lack of progress on the drive-thru and
the pylon signage.

1 69. Prior to terminating the Lease, Mr. Mahlen received complaints from customers regarding
2 the topless espresso stand, the difficulty in accessing the store, and the presence of transients
3 near the store.

4
5 70. Mr. Mahlen paid rent and common area expenses through June 2014.

6 71. On July 16, 2014, Cornerstone emailed, through agent Rose Krug, a default letter to Mr.
7 Mahlen regarding non-receipt of rent due July 1, 2014.

8 72. On August 1, 2014, Mr. Mahlen's attorney, Steven Ford, sent Cornerstone a formal letter
9 stating that M Pressed Drive Cleaning would "be vacating the premises on or before August 31,
10 2014."
11

12 73. Mr. Mahlen vacated the premises on August 31, 2014.

13
14 **The Following Findings Are Added Pursuant To The Court's
August 19 Decision Following Mahlen's Motion For Reconsideration**

15 74. On March 13, 2013, Keith Scribner was convicted of insurance fraud, a crime involving
16 dishonesty. Mr. Scribner admitted the conviction at trial, along with the fact that it involved two
17 felonies.

18 75. Keith Scribner has cognitive deficiencies that affect his memory. These deficiencies
19 affected him during the entire course of MAHLEN's tenancy and have not resolved.

20 76. In May 2013, Craig Mahlen formed Mahlen Investments, Inc. Shortly thereafter,
21 MAHLEN purchased the assets of a Spokane dry cleaning business called M Pressed. At that
22 time, M Pressed had established locations on the north side of Spokane at the 12000 block of
23 North Division in the Wandermere area, and another on Spokane's South Hill on 57th Ave. The
24 Wandermere location was a plant where all actual dry cleaning was performed, whereas the
25 South Hill location was only a "drop-site".

26 77. Almost immediately after purchasing the M Pressed business, MAHLEN began
27 investigating the possibility of opening a third location to take advantage of the downtown
28 Spokane market.

1 78. MAHLEN learned that U-Save closed about two years earlier when its owners retired, and
2 that no other dry cleaning businesses had opened in the same relative location. In MAHLEN's
3 analysis, this left a hole in the market with a book of customers loyal to Ms. Ferris that M
4 Pressed could draw upon in a similar locale.

5 79. Based on its competition, namely Clark's Cleaners, MAHLEN determined that a drive thru
6 was the "main thing" it wanted in a downtown location.

7 80. MAHLEN next investigated space available in the downtown area and created a list of five
8 properties it would consider.

9 81. Three were eliminated because they could not support a drive thru, and a fourth was
10 eliminated because it offered much greater square footage than was necessary. MAHLEN thus
11 began to focus attention on 1101 N. Division ("Subject Property") being offered for lease by
12 SCRIBNER.

13 82. On July 22, 2013, SCRIBNER obtained a bid from Arrow Concrete & Asphalt Specialties,
14 Inc. to see if he could get a better deal on the necessary concrete work. This bid also called for
15 curbing and necessary excavation.

16 83. The parties entered into a lease dated August 2, 2013. #16

17 84. Exhibit C to the lease contains a list of the work SCRIBNER promised to perform.

18 85. Section 5.3 of the Lease required substantial completion of the Landlord's work, including
19 the drive-thru, on or before December 1, 2013. Under the lease, failure to achieve substantial
20 completion by December 1, 2013 caused, as the tenant's sole and exclusive remedy, automatic
21 cancelation of the lease.

22 86. The lease contained an attorney's fees and costs provision for the prevailing party in an
23 action arising out of the lease.

24 87. MAHLEN took possession of the subject property on October 18, 2013.

25 88. The excavation work started later that October but was stopped on November 4, 2013 by
26 the City of Spokane because no approval of a grading plan had been obtained.

1 89. The City of Spokane owns an alley that runs directly west of the Subject Property. Because
2 SCRIBNER's promised drive-thru extended over his property line and into said alley, it was
3 necessary that SCRIBNER pursue a vacation process to purchase the alley from the City.

4 90. On February 24, 2014, the parties signed a Lease Amendment. The amendment reduced
5 rent by half until the drive-thru was built and a pylon sign was erected. The amendment stated
6 that all other terms of the Lease would remain in full force and effect.

7 91. By April 2014 SCRIBNER had obtained several bids for installation of the pylon sign.

8 92. In June 2014, Mr. Mahlen discovered a notice attached to the Subject Property stating that
9 SCRIBNER owed back taxes. Those unpaid taxes dated back to 2011 and totaled more than
10 \$44,000.00.

11 93. Given that SCRIBNER had not paid for the most expensive promised improvements
12 (drive-thru and signage), and owed taxes dating back several years, Mr. Mahlen became
13 justifiably concerned about SCRIBNER's financial position.

14 94. On August 1, 2014, having seen no further action from SCRIBNER, Mr. Mahlen, through
15 counsel, gave formal notice that MAHLEN would vacate by August 31, 2014 and that is, in fact,
16 what MAHLEN did.

17 95. The Court does not find that Plaintiff substantially performed the work that was required of
18 it by the parties' Lease and their February 2014 amendment.

19 **The Following Findings Are Added Pursuant To The Court's Verbal**
20 **Instruction Issued in Open Court Following Presentment of Amended**
21 **Findings And Conclusions on September 23, 2016**

22 96. In conjunction with efforts to vacate the alley, after the February 14, 2014 Amendment
23 was executed, Cornerstone engaged in a telephone conversation with the an official of the
24 Spokane City Fire Department to inquire as to the requirements for exiting the building directly
25 west of the leased premises.
26
27
28

1 97. In conjunction with efforts to vacate the alley, after the February 14, 2014 Amendment was
2 executed, Cornerstone contacted various neighbors seeking to inquire as to their thoughts on the
3 vacation.
4

5 After entering the foregoing Findings of Fact, the Court hereby enters the following:

6 **CONCLUSIONS OF LAW**

7 1. This Court has jurisdiction over the parties and subject matter of this action. The entities to
8 this action are located in Spokane County, Washington. The individuals to this action reside in
9 Spokane County, Washington. The contract at issue was entered into in Spokane County,
10 Washington. The subject at issue is located in Spokane County, Washington.

11 2. Both Mr. Scribner and Mr. Mahlen are experienced in negotiating and executing commercial
12 leases.
13

14 3. The essential elements to a contract are subject matter, parties, promise, terms and
15 conditions, and price or consideration. DePhillips v. Zolt Constr. Co., 136 Wn.2d 26, 31, 959
16 P.2d 1104 (1998) (*quoting Family Med. Bldg., Inc. v. Dep't of Soc. & Health Servs.*, 104 Wn.2d,
17 105, 108, 702 P.2d 459 (1985)).
18

19 4. Parties to a contract must objectively manifest their mutual assent and the terms assented to
20 must be sufficiently definite. Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 177-
21 78, 94 P.3d 945 (2004).
22

23 5. The party asserting the existence of a contract bears the burden of proving each essential
24 element. Johnson v. Nasi, 50 Wn.2d 87, 91, 309 P.2d 380 (1957).

25 6. The Lease executed by the parties on August 2, 2013, sufficiently defines the subject matter,
26 the parties, the promise, the terms and conditions, and the price or consideration. By negotiating
27

1 and executing the Lease, both parties have objectively manifested their assent to the terms. The
2 Lease executed on August 2, 2013, is a valid contract.

3
4 7. Once a contract is formed, it may be modified provided there is a manifestation of the
5 objective intention of the parties mutuality of assent, the modification is supported by new
6 consideration independent of the consideration involved in the original contract, and the
7 modification is clear. Columbia Park Golf Course, Inc. v. City of Kennewick, 160 Wn.App. 66,
8 82, 248 P.3d 1067 (2011); Rafel Law Group PLLC v. Defoor, 176 Wn.App. 210, 224, 308 P.3d
9 767 (2013); Wagner v. Wagner, 95 Wn.2d 94, 103, 621 P.2d 1279 (1980).

10
11 8. The email of November 20, 2013, constituted a valid modification of the Lease. The email
12 of November 20, 2013, memorialized in writing, expresses the parties' mutual assent to amend
13 the Lease per Article 22 of the Lease. There existed mutual consideration in that the Plaintiff
14 received an extension of time for completion of paving in exchange for the Defendant receiving
15 a ten percent reduction in rent until the paving was completed.

16
17 9. The amendment executed by the parties on February 24, 2014, constituted a valid
18 modification of the Lease. There existed mutual consideration in that Plaintiff received an
19 extension of time for completion of paving in exchange for Defendant receiving a fifty percent
20 reduction in rent until paving was completed and the installation of pylon signage at no cost to
21 the Defendant.

22
23 10. The parties to the Lease executed on August 2, 2013, and the Amendment executed on
24 February 24, 2014, had equal opportunity to negotiate the particular terms and conditions of the
25 contracts. "Courts are loath to interfere with the rights of parties to contract as they please
26 between themselves." Salewski v. Pilchuck Veterinary Hospital, Inc., 189 Wn.App. 898, 910,
27 359 P.3d 884 (2015) (*citing* Mgmt., Inc. v. Schassberger, 39 Wn.2d 321, 326, 235 P.2d 293
28

1 (1951)). Nevertheless, when a court is needed to interpret a contract, it looks to the parties'
2 intent. "During interpretation, a court's primary goal is to ascertain the parties' intent at the time
3 they executed the contract." Int'l Marine Underwriters v ABCD Marine, LLC, 179 Wn.2d 274,
4 313 P.3d (2013). When courts interpret the contract the, "primary goal is to discern the intent of
5 the parties, and such intent must be discovered from viewing the contract as a whole."

6
7 Weyerhaeuser Co. v. Commercial Union Inc. Co., 142 Wn.2d 654, 669-70, 15 P.3d 115 (2000).

8
9 11. Washington follows the "objective manifestation theory" of contract interpretation, under
10 which the focus is on the reasonable meaning of the contract language to determine the parties'
11 intent, rather than the unexpressed subjective intent. Hearst Communications, Inc., v. Seattle

12 Times Co., 154 Wn.2d 493, 503, 115P.3d 262 (2005). When interpreting a contract, courts
13 "generally give words in a contract their ordinary, usual, and popular meaning unless the entirety
14 of the agreement clearly demonstrates a contrary intent." *Id.* At 504.

15
16 12. The parole evidence rule provides that, "parole or extrinsic evidence is not admissible to
17 add to, subtract from, vary or contradict written instruments which are contractual in nature and
18 which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake."

19 Buyken v. Ertner, 33 Wn.2d 334, 341, 205 P.2d 628 (1949). This rule is applicable here because
20 the parties included an integration provision into the terms and conditions of the Lease, as
21 evidenced by Article 40 of the Lease.
22

23 13. Neither the November 20 2013, email modification nor the February 24, 2014, Amendment
24 provide a definite completion date for the paving. When no time for performance is stated, the
25 performance must be rendered within a reasonable time. Birkenwald Dist. Co. v. Heublein, Inc.,
26 55 Wn.App. 1, 6, 776 P.2d 721 (1989). Without an established completion date, the Court must
27

28

1 consider whether the actions of Plaintiff were reasonable given the circumstances. Lano v.
2 Osberg, 67 Wn.2d 659, 663, 409 P.2d 466 (1965).

3
4 14. The Amendment was executed on February 24, 2014. Within four months of the execution
5 of the Amendment, Mr. Mahlen thought the drive-thru would never be completed and notified
6 Mr. Scribner that he was moving out. The evidence shows that Plaintiff was acting reasonable
7 given the circumstance. Certainly, at times the Plaintiff was slow in discharging its obligations,
8 but the evidence does not suggest by a preponderance of the evidence that Plaintiff was not
9 reasonable in its actions considering the unforeseen obstacles.

10
11 15. Substantial performance is an equitable doctrine and is intended to protect and relief those
12 who have faithfully and honestly attempted to perform their contracts. Mortimer v. Dirks, 57
13 Wash. 402, 405, 107 P. 184, 185 (1910) (quoting Gillespie Tool Co. v. Wilson, 123 Pa. 19, 16 A.
14 36 (1888)).

15
16 16. Washington law provides that the doctrine of substantial performance is only available to
17 one that has:

18 Faithfully and honestly endeavored to perform their contracts in all
19 material and substantial particulars.... It is incumbent upon him who
20 invokes its protection to present a case in which there has been no
willful omission or departures from the terms of his contract.

21 Id. At 405. The burden of proof is on the party who claims to have rendered substantial
22 performance. White v. Mitchell, 123 Wash. 630, 213 P. 10 (1923). If performance is not
23 rendered within a time that is reasonable under the circumstances, the other party may
24 terminate following a reasonable time. Birkenwald Dist. Co. v. Heublein, Inc., 55 Wn.App. 1,
25 776 P.2d 721 (1989). Determining those circumstances the court looks to the nature of the
26 contract, the position of the parties, their intent, and the circumstances surrounding performance.
27
28 Pepper & Tanner, Inc. v. Kedo, Inc., 13 Wn.App. 433, 435, 535 P.2d 857 (1975).

1 17. Here, the Plaintiff established that it was operating in good faith and reasonably. What
2 started out as simply anticipating paving a 12 x 45-foot strip of land turned into a project that
3 required the design and construction of a retainer wall, the vacation of an alley (subject to the
4 approval of the City Council), a traffic flow study, special permitting, engineering, and the
5 construction of a fire escape. While the time frame in the eyes of the Defendant may have
6 seemed too long, given the unforeseen circumstances, the additional planning and processes that
7 resulted, the Plaintiff's behavior was not unreasonable.
8

9 18. The Court concludes the Plaintiff did not materially breach the contract through a failure to
10 complete the paving project and the pylon signage in a reasonable time.
11

12 19. An "anticipatory breach occurs when one of the parties to a bilateral contract either
13 expressly or impliedly repudiates the contract prior to the time of performance". Wallace Real
14 Estate Inv., Inc., v. Groves, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994). An anticipatory breach
15 is a "positive statement or action by the promisor indicating distinctly and unequivocally that he
16 either will not or cannot substantially perform any of this contractual obligations." Lovric v.
17 Dunatov, 18 Wn.App. 274, 282, 567 P.2d 678 (1977). Hence, a party's intent to not perform
18 cannot be "implied from doubtful and indefinite statements that performance may or may not
19 take place." Wallace at 881.
20

21 20. "One who is ready, willing and able to tender performance is relieved of that duty when the
22 other party by word or act indicates that he will not perform." Sherman v. Lunsford, 44
23 Wn.App. 858, 863, 723 P.2d 1176 (1986) (citing Kreger v. Hall, 70 Wn.2d 1002, 425 P.2d 638
24 (1967).
25

26 21. The Defendant anticipatorily breached the Lease in June 2014 when Mr. Mahlen informed
27 Mr. Scribner that he was moving out. Prior to this phone call, Mr. Mahlen had not expressed his
28

1 frustration with the delays in constructing the drive-thru. In light of Mr. Mahlen signing the
2 Amendment and receiving a fifty-percent reduction in rent approximately four months prior to
3 the June 2014 phone call, Mr. Scribner was unaware of Mr. Mahlen's frustrations.

4
5 22. Prior to the anticipatory breach by Mr. Mahlen, the Plaintiff was not provided written
6 notice of the alleged default as required under Article 37.1 of the Lease. As such, the Plaintiff
7 was deprived of the opportunity to cure any alleged default within 30 days.

8
9 23. Even if the Defendants did not anticipatorily breach the Lease, the Lease was breached
10 when the Defendant moved out without first adhering to the requirements of Article 37.1 of the
11 Lease.

12 24. A breach is material when it goes to the root or essence of the contract. DC Farms, LLC v
13 Conagra Foods Lamb Weston, Inc., 179 Wn.App. 201, 220, 317 P.3d 543 (2014). If a party has
14 materially breached the contract, then, by definition, substantial performance has not been
15 rendered. Id. At 220.

16
17 25. Under the terms of the Lease, Defendant was obligated to pay rent on the first of each
18 month. Per Article 27.1(a) of the Lease, a failure to pay as agreed is considered a material
19 breach.

20
21 26. The Defendant failed to pay rent and common area expenses from May 2014 forward.
22 Based upon the failure to pay rent and common area expenses, the Defendant materially
23 breached the contract.

24 27. A material breach of contract excuses the other party's further performance City of
25 Woodville v. Northshore United Church of Christ, 166 Wn.2d 633, 647, 211 P.3d 406 (2009). A
26 party injured by a material breach may treat the contract as terminated. Campbell v. Hauser
27 Lumber Co., 147 Wash. 140, 145, 265 P. 468 (1928).
28

1 28. In defense of the alleged breach of contract, the Defendants raise the affirmative defense of
2 misrepresentation. The affirmative defense of misrepresentation differs from the stand-alone
3 torts of negligent and intentional misrepresentation. Washington Federal Sav. & Loan Ass'n v.
4 Alsager, 165 Wn.App. 10, 18, 266 P.3d 905 (2011), *review denied*, 173 Wn.2d 1025, 272 P.3d
5 851 (2012); *Dewar v. Smith*, 185 Wn.App. 544, 342 P.3d 328 (div. 1 2015).

7 29. There are four elements to the affirmative defense of misrepresentation: (1) an assertion or
8 representation not in accord with the facts; (2) the assertion is either fraudulent or material; (3)
9 the assertion was relied upon in manifesting assent; and (4) the reliance was justified.

10 30. Here, the Plaintiff's representation that a drive-thru would be constructed is in accord with
11 the facts. From the time the letter of intent was signed through the Defendant vacating the
12 property, the Plaintiff worked, albeit slowly, towards having the drive-thru constructed. On
13 February 24, 2014, the parties agreed to extend the deadline for construction, but, after
14 negotiations, failed to include a deadline. The minimal period of time between the Amendment
15 and the vacation of the premises by the Defendant, coupled with the progress the Plaintiff was
16 making in having the drive-thru constructed, shows the representations made by the Plaintiff
17 were in accord with the facts.

18 31. Once Mr. Mahlen breached the contract in June 2014, the Plaintiff was excused from any
19 further performance under the contract.

20 32. Based upon the foregoing, the Defendants are liable to the Plaintiff for breach of contract.

21 33. On August 2, 2013, both Mr. Mahlen and Ms. Mahlen, concurrent with the execution of the
22 Lease, executed a personal guarantee.

23 34. Defendants did not directly challenge the validity of the personal guarantee, nor offer any
24 evidence directly on the enforceability of the guarantee.

1 35. The Court concludes that the personal guarantees of the Lease are valid.

2 36. In addition to the affirmative defense of misrepresentation, the Defendants brought a
3 counterclaim against Cornerstone and a third party complaint against Mr. Scribner for torts of
4 misrepresentation. The torts of intention and negligent misrepresentation differ from the
5 affirmative defense of misrepresentation in numerous regards; each have separate elements and
6 differing burdens of proof. See Washington Federal Sav. & Loan Ass'n v. Alsager, 165
7 Wn.App. 10, 18, 266 P.3d 905 (2011), review denied, 173 Wn.2d 1025, 272 P. 3d 851 (2012);
8 Dewar v. Smith, 185 Wn.App. 544, 342 P.3d 328 (Div. 1 2015).

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11 37. To prevail on the tort of negligent misrepresentation the claimant must prove by clear,
12 cogent, and convincing evidence that:

- 13 (1) the defendant supplied information that was false for the guidance of the
14 plaintiff in a business transaction, (2) the defendant knew or should have
15 known that the information was for the purpose of guiding the plaintiff in a
16 business transaction, (3) the defendant was negligent in obtaining or
17 communicating the false information, (4) the plaintiff relied on the
information, (5) the plaintiff's reliance was reasonable, and (6) the false
information proximately caused the plaintiff damages.

18 Dewar v. Smith, 185 Wn.App. 544, 342 P.3d 328 (2015) (*citing* Donatelli v. D.R. Strong
19 Consulting Engineers, Inc., 179 Wn.2d 84, 312 P.3d 620 (2013)).

20
21 38. To prevail on the tort of intentional misrepresentation, or fraud, a claimant must prove by
22 clear, cogent, and convincing evidence that:

- 23 (1) representation of an existing fact; 2) materiality; 3) falsity; 4) the speaker's
24 knowledge of its falsity; 5) intent of the speaker that the representation should
25 be acted upon by the other party; 6) ignorance of the falsity of the
26 representation; 7) reliance on the truth of the representation; 8) the right to
27 rely on the representation; and 9) resulting damages.

28 West Coast, Inv. V. Snohomish County, 112 Wn.App 200, 206, 48 P.2d 997 (2002).

39. Here, the Defendants are unable to meet the requisite elements under both causes of

1 action. Mr. Scribner never provided false information to the Defendants. Rather, Mr. Scribner
2 underestimated the substantial amount of work that was required in order to complete the drive-
3 thru. Once the degree of work was realized, Mr. Mahlen acquiesced to the delay by negotiating
4 and executing the Amendment without the addition of completion date. More compellingly, not
5 only did Mr. Scribner complete eight of the nine obligations contained in "Exhibit C" to the
6 Lease, in attempting to complete the drive-thru, and prior to Mr. Mahlen's anticipatory breach,
7 Mr. Scribner enlisted contractor Gerald Kofmehl to provide a bid regarding a drive-thru,
8 received a bid from Arrow Concrete & Asphalt concerning the construction of the drive-thru,
9 realized the need for a retaining wall on Boone Court, LLC's, property line, received a bid from
10 All Star Excavation to excavate drive-thru, authorized All Star Excavation to begin work on the
11 drive through area, , enlisted Metro Engineering to create a grading plan, submitted the grading
12 plan to the City, obtained architectural designs from Martin J. Hill Architecture, Inc., obtained
13 structural calculations from Inland Northwest Engineering, Inc., received information from
14 Stewart Title of Spokane on who all of the property owners were with land abutting the alley,
15 contacted all of the property owners to seek approval for the vacation, and obtained an
16 application to vacate the alley from the City.

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20 40. The Court concludes that the Defendant did not meet its burden of proving by clear, cogent,
21 and convincing evidence that Plaintiff is liable for negligent misrepresentation or intentional
22 misrepresentation regarding the inducement of the Lease, neither at the time of the execution of
23 the Lease, nor at the time of either of the subsequent amendments of the Lease. Therefore, the
24 Lease was valid and enforceable at the time of Defendant's anticipatory breach. By extension,
25 the personal guarantee is valid and enforceable.
26
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1 41. The Plaintiff has been damaged by the Defendants' breach of the Lease. Pursuant to the
2 Amendment, the Plaintiff is awarded unpaid rent of \$1,092.50 per month for the months of July,
3 August, September and October of 2014. Plaintiff is awarded unpaid rent of \$1,114.00 per
4 month for November 2014 through October, 2015 and \$1,136.50 per month from November
5 2015 through May 2016. The Plaintiff is awarded a ten percent late fee for each month rent was
6 past due. (Lease Article 6.1(b)), monthly common area expenses from July 2014 through May
7 2016 (Lease Article 7.6), a six percent common area expense fee for the administration of the
8 common area (Lease Article 7.6), interest at 12% (Lease Article 6.1(b)), and reasonable attorney
9 fees, costs, and expenses (Lease Article 30).
10
11

12 **The Following Conclusions Are Added Pursuant To The Court's**
13 **August 19 Decision Following Mahlen's Motion For Reconsideration**

14 42. The Court has jurisdiction over the parties and the subject matter of the action.

15 43. The parties entered into a valid contract for the Lease of commercial property at 1101 N.
16 Division St.

17 44. The parties validly modified the Lease on February 24, 2014 with MAHLEN receiving a
18 50% reduction in rent until the drive-thru and pylon sign were completed.

19 45. The February 24, 2014 amendment did not include a date for completion of the drive-thru
20 or pylon sign. In this circumstance, the work was required to be completed within a reasonable
21 time, Byrne v. Ackerlund, 108 Wn.2d 445, 455, 739 P.2d 1138 (2001).

22 46. A material breach of contract excuses the other party's further performance. City of
23 Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 647, 211 P.3d 406 (2009).

24 A breach is material when it goes to the root or essence of the contract. DC Farms, LLC v.
25 Conagra Foods Lamb Weston, Inc., 179 Wn.App. 205, 220, 317 P.3d 543 (2014). The party
26 injured by the material breach may treat the contract as terminated. Campbell v. Hauser Lumber
27 Co., 147 Wn. 140, 145, 265 P. 468 (1928).
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1 47. To prevail on the tort of intentional misrepresentation, or fraud, the claimant must prove by
2 clear, cogent, and convincing evidence: 1) the representation of an existing fact; 2) materiality;
3 3) falsity; 4) the speaker's knowledge of its falsity; 5) intent of the speaker that the representation
4 should be acted upon by the other party; 6) ignorance of the falsity of the representation; 7)
5 reliance on the truth of the representation; 8) the right to rely on the representation; and 9)
6 resulting damages. West Coast, Inc. v. Snohomish County, 112 Wn.App. 200, 206, 48 P.2d 997
7 (2002).
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9 48. To prevail on the tort of negligent misrepresentation, the claimant must prove by clear,
10 cogent, and convincing evidence that: 1) the defendant supplied information that was false for
11 the guidance of the plaintiff in a business transaction, 2) the defendant knew or should have
12 known that the information was for the purpose of guiding the plaintiff in a business transaction,
13 3) the defendant was negligent in obtaining or communicating the false information, 4) the
14 plaintiff relied on the information, 5) the plaintiff's reliance was reasonable, and 6) the false
15 information proximately caused the plaintiff damages.
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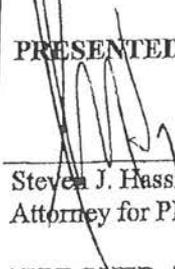
The Following Conclusion is Added Pursuant To The Court's Verbal
Instruction Issued in Open Court Following Presentment of Amended
Findings And Conclusions on September 23, 2016

49. Plaintiff made reasonable progress toward performance after the 2014 amendment.



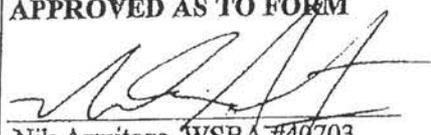
John O. Cooney, Judge

PRESENTED BY



Steven J. Hassing, WSBA #6690
Attorney for Plaintiff, Cross Defendant and Third Party Defendants

APPROVED AS TO FORM



Nik Armitage, WSBA #40703
The Layman Law Firm
601 S. Division Street
Spokane, WA 99202
Attorney for Defendants