From: Luke Kosters (KIG) <luke@kellyinvestmentgroup.com>
Sent: Wednesday, May 8, 2024 4:33 PM
To: Ott, Jennifer @ Las Vegas; jts@pisanellibice.com
Cc: Ted Baker; Bill Dunbar (bill@dunbarcommercial.com)
Subject: RE: Appraisal Panel question

External

Good afternoon Ms. Ott,

We believe the lease language is requesting restaurant use land comparables for several reasons.

First, the plain language of the lease section uses the phrase "comparable use of land" which is important. The word "comparable" indicates that the parties did not intend for just *any* use of the land to be considered in determining the PMR. Comparable use in this case would be as a ground lease to a restaurant tenant.

Second, the permitted use of the land under this lease is as a Claim Jumper or similar style restaurant. The PMR should be determined by the use allowed by the lease and the manner in which the tenant will continue to use the property. We believe it would be contradictory to assess the PMR in a manner of use that is not permitted under the lease. As a result, the comparable use of land that should be assessed is as a single use restaurant tenant.

Third, both appraisers agreed that the highest and best use of the land as a restaurant. CBRE, on page 52, stated that the highest and best use of the land is as currently improved. The DiFederico Group, on page 59, stated that the highest and best use of the land is its "current use." Accordingly, since both appraisers agree the highest and best use of the land is its current use as a restaurant, any comparable use of land analysis done here should use restaurant comparables in determining the PMR.

Lastly, we have supported our lease rates in our appraisal and supplemental submission with restaurant lease comparables. The landlord is relying on an assumption that they are entitled a 10% return. This assumption of a 10% return is not indicated in the lease nor is it supported by comparables. In fact, restaurant leases are selling for 5-6% cap rates.

Please let me know if you have any questions or comments.

Thank you,
Luke

Luke Kosters
Senior Vice President
General Counsel

K E L L Y INVESTMENT GROUP

853 Camino Del Mar, Suite 200
Del Mar, CA 92014
luke@kellyinvestmentgroup.com
619.687.5000 x1140 Office
619.687.5010 Fax
www.kellyinvestmentgroup.com

From: Ott, Jennifer @ Las Vegas <Jennifer.Ott@cbre.com>
Sent: Wednesday, May 8, 2024 9:48 AM
To: Luke Kosters (KIG) <luke@kellyinvestmentgroup.com>; jts@pisanellibice.com
Cc: Ted Baker <tbaker@newmarketadvisors.com>; Bill Dunbar (bill@dunbarcommercial.com) <bill@dunbarcommercial.com>
Subject: Appraisal Panel question

You don't often get email from jennifer.ott@cbre.com. Learn why this is important

Good morning –
Can someone please confirm how the following lease language should be interpreted? There was some confusion/disagreement by the panel following the hearing.
Are we considering all uses of the land and what it could achieve on a ground lease or the same use (single, restaurant tenant ground lease)?

b. As used herein, the term "*PMR*" s
expressed as a rate per square foot, inclusive of percenta
non-equity tenant would pay for comparable use of land,
reasonable business judgment, would accept, at arms-len
comparable business park environment and/or retail co
evidenced where possible, by leases that commence o
commencement of the applicable Extension Term ("*Compa*

Jennifer F. Ott, CCIM
First Vice President
License No. BS.0054344
CBRE | Retail
8548 Rozita Lee Avenue, Suite 200 | Las Vegas, NV 89113
T +1 702 369 4806 | F +1 702 794 0144 | C +1 702 682 3151
jennifer.ott@cbre.com | LinkedIn

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EXHIBIT 10

From: Craig Dunlap <Craig.Dunlap@greenspuncorp.com>
Sent: Friday, May 10, 2024 7:43 AM
To: Ott, Jennifer @ Las Vegas; Bill Dunbar; tbaker@newmarketadvisors.com; Luke Kosters (KIG)
Cc: Jordan T. Smith; Phil Ralston
Subject: Appraisal panel question from Jennifer Ott

External

We disagree with the interpretation proposed by Claim Jumper. The relevant inquiry is the rental value of a ground lease generally. First, the underlying document and amendments are entitled, and repeatedly referred to as, a "Ground Lease." The building wasn't yet constructed when the parties entered the Ground Lease. Also, both appraisals refer to highest and best use and the lease refers to "comparable use of land in a comparable business park environment and/or retail corridor." It is what a willing tenant would pay and a willing landlord would accept for a comparable use of land, it is not restricted to a restaurant or this specific location. If the intent was to value it only as a single user restaurant lease at this location, or in this building, the value definition would be expressly restricted to that interpretation. No one knows when they sign a commercial ground lease what the site's best use will be 20 years later.

It is up to the panel to rely on their experience and judgment to interpret the Lease to determine the best valuation for this commercial ground lease.

Craig S. Dunlap, Esq.
General Counsel
The Greenspun Corporation
2360 Corporate Circle, Ste. 330
Henderson, NV 89074
craig.dunlap@greenspuncorp.com

Office: 702 990 2113
Cell: 702 379 3764

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EXHIBIT 11

From: Ted Baker <tbaker@newmarketadvisors.com>
Sent: Wednesday, May 15, 2024 11:38 AM
To: Bill Dunbar
Cc: Craig S. Dunlap (craig.dunlap@greenspuncorp.com); jennifer.ott@cbre.com; Luke Kosters (KIG); Jordan T. Smith; Phil Ralston
Subject: Re: Appraisal panel question from Jennifer Ott

CAUTION: This message is from an EXTERNAL SENDER.
I also cast my vote for the LL in this matter. Thank you.

Ted Baker

NewMarket Advisors Commercial Real Estate

License: NV S.16378

Office: 702-221-2500 Ext. 300

Cell: 702-768-8682

tbaker@newmarketadvisors.com

newmarketadvisors.com

5245 South Durango, Las Vegas, NV 89113

Current Listings

On May 13, 2024, at 9:45 PM, Bill Dunbar <bill@dunbarcommercial.com> wrote:

Ted/Jennifer- With Ted and I ready to vote, I wanted to go ahead and cast my vote for Green Valley Development Limited Partnership, the Landlord in this arbitration. I ask that you respond on this email thread so we can bring this matter to conclusion.

Thanks

Bill Dunbar
Dunbar Commercial
120 S. Green Valley Pkwy # 274
Henderson, NV 89012
O: 702.740.0044 | C: 702.596.3440
Visit Our Website | View Our Listings

On May 13, 2024, at 2:32 PM, Ted Baker <tbaker@newmarketadvisors.com> wrote:

Seems that we have contradictory guidance on what constitutes FMV in this instance. If it is up to individually to interpret, then yes, I ready

Ted Baker
Newmarket Advisors

Sent from my iPhone

> On May 13, 2024, at 1:28 PM, Bill Dunbar <bill@dunbarcommercial.com> wrote:
>
> Ted/Jennifer – Checking in here. Are you ready to vote?
>
> Thanks
>
> Bill Dunbar
> **Dunbar Commercial**
> 120 S. Green Valley Pkwy # 274
> Henderson, NV 89012
> O: 702.740.0044 | C: 702.596.3440
> Visit Our Website | View Our Listings
>
> 
>
> > On May 10, 2024, at 7:42 AM, Craig Dunlap <Craig.Dunlap@greenspuncorp.com> wrote:
> >
> > We disagree with the interpretation proposed by Claim Jumper. The relevant inquiry is the rental value of a ground lease generally. First, the underlying document and amendments are entitled, and repeatedly referred to as, a "Ground Lease." The building wasn't yet constructed when the parties entered the Ground Lease. Also, both appraisals refer to highest and best use and the lease refers to "comparable use of land in a comparable business park environment and/or retail corridor." It is what a willing tenant would pay and a

willing landlord would accept for a comparable use of land, it is not restricted to a restaurant or this specific location. If the intent was to value it only as a single user restaurant lease at this location, or in this building, the value definition would be expressly restricted to that interpretation. No one knows when they sign a commercial ground lease what the site's best use will be 20 years later.

It is up to the panel to rely on their experience and judgment to interpret the Lease to determine the best valuation for this commercial ground lease.

Craig S. Dunlap, Esq.
General Counsel
The Greenspun Corporation
2360 Corporate Circle, Ste. 330
Henderson, NV 89074
craig.dunlap@greenspuncorp.com

Office: 702 990 2113
Cell: 702 379 3764

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To ensure compliance with the requirements imposed by the IRS, we inform you that any federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for purposes of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing or recommending to another party any transaction or tax-related matter addressed herein.

EXHIBIT 12

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American Nevada

c o m p a n y

A Greenspun Company

May 17, 2024

VIA FEDEX OVERNIGHT DELIVERY & E-MAIL

14528 Henderson, LLC
853 Camino Del Mar, Ste 200
Del Mar, CA 92014
Attn: Legal Department

DocuSign Envelope ID: F8719FDD-AE72-4976-8CB9-D5D7FDC52032

RE: Lease dated August 8, 2002, by and between CORPORATE CTR. RESTAURANT, LLC, a Nevada limited liability company **("Landlord"),** as successor-in-interest to GREEN VALLEY DEVELOPMENT LIMITED PARTNERSHIP, a Nevada limited partnership **("Original Landlord"),** and **14528 Henderson, LLC** as successor-in-interest to CLAIM JUMPER ACQUISITION COMPANY, LLC, a Nevada limited liability company **("Tenant"),** as successor-in- interest to CLAIM JUMPER RESTAURANTS, LLC, a Delaware limited liability company **("CJR"),** as successor-in-interest to CLAIM JUMPER ASSOCIATES, LTD., a California limited partnership **("Original Tenant"), as amended on May 13, 2009, November 30, 2010, and on August 7, 2020** (collectively ***"the Lease").***

On May 15, 2024, we received from the Arbitration Panel a second vote in favor of the market valuation advanced by Landlord in the Arbitration hearing. Pursuant to Section 3.3.4 of the Lease, the Arbitration Panel has, "by majority vote," selected Landlord's Determination of value. Pursuant to Section 3.3.3(a), within ten (10) business days following the decision of the Arbitrators the Tenant shall pay the deficiency owing in the Base Rent to Landlord.

Also set forth is the current amount owing as Tenant has paid nothing for rent or CAM charges for the month of May. The May charges are overdue. Attached is a breakdown of the deficiency and rent owing the Landlord.

Specifically, Rents are due on the first day of each calendar month during the term of the Lease and any applicable extensions or renewals thereof, as outlined more fully in Section 4.1 of the Lease. Payments due have not been received by the Landlord as of the date of this letter.

Landlord reserves all rights and remedies under the Lease and applicable law including, but not limited to (i) late charges and administrative charges and (i) attorneys' fees pursuant to Section 20.2 of the Lease; and nothing contained or omitted herein shall waive any of Landlord or Landlords' agents' rights, remedies or positions under the Lease or applicable law, all of which rights, remedies and positions are hereby expressly reserved.

Should you have any questions, please feel free to contact me at 702-990-2187 or via email at Phil.Ralston@amnev.com please note that Landlord reserves all rights in equity and under the law relative to the Lease and the Premises.

American Nevada Company, LLC, a Nevada Limited Liability Company
2360 Corporate Circle, Ste. 330 | Henderson, NV 89074
(702) 896-6353 | www.AmericanNevada.com

CORPORATE CTR. RESTAURANT, A Nevada limited liability company,

By: American Nevada Company, LLC, a Nevada limited liability company, its Manager

DocuSigned by:
By: _____
5E0EA2EA75464D5...
Phillip Ralston, President

Enclosure

C: Corporation Services Company
Registered Agent for 14528 Henderson, LLC
112 N. Curry St.,
Carson City, NV 89703

Claim Jumper

Original	Base Rent Charged	Add'l Base Rent due per Appraisal	CAM	2023 CAM Reconciliation	Total Due	Total Paid	Balance
							$ (21,394.47)
March	$ 33,960.27		$ 3,845.46		$ 37,805.73	$ 37,805.73	$ (21,394.47)
April	$ 33,960.27		$ 3,845.46	$ (4,158.00)	$ 33,647.73	$ 12,253.26	$ -
May	$ 33,960.27		$ 3,845.46		$ 37,805.73	$ -	**$ 37,805.73**

REVISED	Base Rent Charged	Add'l Base Rent due per Appraisal	CAM	2023 CAM Reconciliation	Total Due	Total Paid	Balance
							$ (21,394.47)
March	$ 33,960.27	$ 36,539.73	$ 3,845.46		$ 74,345.46	$ 37,805.73	$ 15,145.26
April	$ 33,960.27	$ 36,539.73	$ 3,845.46	$ (4,158.00)	$ 70,187.46	$ 12,253.26	$ 73,079.46
May	$ 33,960.27	$ 36,539.73	$ 3,845.46		$ 74,345.46	$ -	**$ 147,424.92**

	Annual	Monthly
Base Rent per Appriasal	$ 846,000.00	$ 70,500.00

ORIGIN ID:LASA (702) 990-2162
NATALIE ALLRED
AMERICAN NEVADA COMPANY
2360 CORPORATE CIRCLE
SUITE 330
HENDERSON, NV 89074
UNITED STATES US

SHIP DATE: 17MAY24
ACTWGT: 0.50 LB
CAD: 100044452/INET4535

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TO **CORPORATION SERVICES COMPANY**
REG. AGENT 14528 HENDERSON LLC
112 N. CURRY ST.,

CARSON CITY NV 89703
(702) 458-8855 REF:
INV:
PO: DEPT:

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EXHIBIT 13

Electronically Filed
8/9/2024 9:06 AM
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DISTRICT COURT

CLARK COUNTY, NEVADA

14528 HENDERSON, LLC, Plaintiff, vs. CORPORATE CTR. RESTAURANT, LLC, Defendant.	CASE#: A-24-894355-B DEPT. XXXI

BEFORE THE HONORABLE JOANNA S. KISHNER
DISTRICT COURT JUDGE
THURSDAY, AUGUST 8, 2024

RECORDER'S TRANSCRIPT OF MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANT'S COUNTERMOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER ON ORDER SHORTENING TIME

APPEARANCES

For the Plaintiff:	JOHN S. DELIKANAKIS, ESQ.
For the Defendant:	TODD BICE, ESQ. BRIANNA SMITH, ESQ.

RECORDED BY: LARA CORCORAN, COURT RECORDER

Las Vegas, Nevada, Thursday, August 8, 2024

[Case called at 8:23 a.m.]

THE COURT: Okay. We're calling page three first. Okay. Page 3, 14528 Henderson LLC v. Corporate Center Restaurant, case 894355. Counsels, please.

MR. DELIKANAKIS: John Delikanakis from Snell Wilmer, bar number 5928, on behalf of the Plaintiff. With me here today is client representative Eric Lofgren, the general counsel of the Plaintiff.

MR. BICE: Good morning. Todd Bice and Bri Smith, on behalf of the Defendant. And also with us is Craig Dunlap, the client's representative. Thank you, Your Honor.

THE COURT RECORDER: Can we get spellings on the representatives names, please?

MR. KOSTERS: L-U-K-E K-O-S-T-E-R-S.

MR. DELIKANAKIS: It's Kosters, not Lofgren. I apologize.

THE COURT RECORDER: Okay. I'm like -- okay. And is this one Dunlap, D-U-N-L-A-P?

MR. BICE: Yes.

THE COURT: Okay.

MR. BICE: So, Your Honor, this is. This is our motion for reconsideration on two issues that you -- although the case is assigned to you, you did not here because you were not available and Judge Ellsworth heard them in your stead.

So we're presenting this back to the Court because we just

believe this is just plain error. The parties here entered into what is known as a baseball arbitration. And the great thing about baseball arbitrations are, is that they encourage both sides to be reasonable, because if you're completely unreasonable, you leave the arbitrators really with no choice but to take the other side's position. It's either one or the other. There's no ability for the panel to split the baby or, you know, come up with some alternative compromise. So that's what it's designed to do.

And here that process was invoked by both sides. It was invoked when they sought to extend the term of the lease. So under the terms of the agreement, they go into -- there's an appraisal done. We did one that we proposed as the amount. They disputed that, which then entitled them to present their own appraisal. And then it goes to a three panel arbitration to pick whose appraisal is most appropriate. And that's what happened here. They didn't claim that there was any breach of the contract or anything like that until they lost. And then they lost.

And now they say, well, we're going to ignore what the agreement says, and we're going to come to Court, we're going to seek a TRO. We're going to claim it's a breach of contract because your appraisal wasn't good. It didn't qualify, whatever. Those are all issues, of course, that should be in front of the arbitrators and were able to be presented by them.

So under the law in the State of Nevada -- you know, the only question is, did they make an agreement to arbitrate here? And they clearly did, because in section -- you know, throughout Section 3.34 --

point 4 -- it discusses -- yes, they refer to them as an arbitration or as an appraisal panel. They use that as a defined term. But it's the three arbitrators that they specifically define as the appraisal panel. And then the agreement specifies that their decision shall be "final and binding upon the parties and may be enforced in accordance with the provisions of Nevada law."

And here they -- the way this agreement worked is each side got to appoint one of the arbitrators, and then the two arbitrators have to pick a third, neutral, fairly standard provision. So they're here in front of you now saying, well, we want to enjoin the arbitration's decision. We don't want to have to follow it, and we want you to let us entertain a breach of contract action. They have not brought any Chapter 38 challenge to the arbitrator's decision, nor could they, quite frankly, because it's valid on its face.

So, you know, Judge --

THE COURT: Ellsworth.

MR. BICE: -- yes. Seemed to think that the Nevada law had somehow changed in 2000 because the statute was amended. But that statutory amendment did not eliminate -- in fact, it didn't narrow the scope of arbitration to that, it expanded. Because what the statute now provides is that any agreement to arbitrate, it doesn't matter whether it's about an appraisal to arbitrate, it doesn't matter whether it's about a rent increase, it doesn't matter what it's about. Any agreement to arbitrate is now enforceable and binding under Nevada law. And that's what they did here.

So all we're asking is, is that the law be followed. The Nevada Supreme Court has made this clear. There is favorability, you know, a preference for arbitration. And this is a commercial case. This isn't some unsophisticated party who, you know, didn't have any bargaining power and somehow didn't know what they were entering into. They knew what they were entering into by the evidence of the fact that they invoked the process and just as soon as it went south on them because they were unreasonable, which is one of the consequences in baseball arbitration. If you're the unreasonable one, then you lose. And that's what happened here. And that's all that happened here.

So we asked that the Court dismiss this case. If they want to bring a Chapter 38 challenge to the arbitration, that's fine, but we don't believe the District Court has jurisdiction to enjoin -- enter an injunction against the arbitration decision.

THE COURT: Okay. Let's walk through -- because, you know, you're here for a motion for reconsideration.

MR. BICE: Yeah.

THE COURT: While, I appreciate it's in your -- both sides, very well done briefs, including dead fish and references to cigarette cases and sorts of other things --

MR. BICE: Yes.

THE COURT: -- but let's walk through the first prong, right.

MR. BICE: Right.

THE COURT: Does it meet the first standard of a motion for reconsideration? And get your second part here. I mean, basically, I

Maukele Transcribers, LLC, Email: maukele@hawaii.rr.com / Tel: (808)298-8633

understand you're saying it's clear error of law, but walk through how this Court can do what you're asking versus, as you can appreciate, any time somebody gets a senior judge --

MR. BICE: Yeah.

THE COURT: -- a number of motions for reconsideration pop up on that -- at least it pops up on my docket afterwards.

MR. BICE: Well, Your Honor, I don't -- I don't -- I've been through this a lot in a lot of other cases with other judges. And I just give you an example where this became an issue in a sort of somewhat famous case with Judge Gonzalez, where the case got reassigned to her. Someone -- a prior judge had entered some orders that, frankly, just on their face weren't valid, and Judge Gonzalez, you know, wasn't able to address those because the time period for challenging them had passed. And then the case went up on appeal to the Nevada Supreme Court, and the Nevada Supreme Court enters a decision highly critical of the District Court. And, of course, it's got her name on it, which she had nothing to do with those rules. So I --

THE COURT: That's part of our job, I have an opinion.

MR. BICE: I know.

THE COURT: I have been reversed on a case that I had nothing to do with.

MR. BICE: Exactly.

THE COURT: And not even one that is assigned to me.

MR. BICE: But your name is on it --

THE COURT: It never was in my Department.

MR. BICE: -- right?

THE COURT: I've been --

MR. BICE: Exactly.

THE COURT: Another judge has been affirmed on a case which was only my case. It happens.

MR. BICE: Yeah.

THE COURT: That's part of the job.

MR. BICE: So my point, Your Honor -- I do not think it is -- I think the Court should be eager to reconsider motions, especially where it goes to a jurisdictional question, when -- because ultimately this is -- if not dismissed, it's going to end up at the Supreme Court and it's going to have to be reviewed because we just believe it's fundamentally wrong.

And if you look at the standard, right, you can hear reconsideration if there is just a clear legal error.

THE COURT: Okay.

MR. BICE: And here we don't think that there's any real argument that there's just clear and plain legal error under Nevada law. It's an arbitration agreement. It binds the parties. They specifically said they were going to be back, and that simply is being disregarded by Judge Ellsworth saying, well, you know, they amended the statute about arbitration in 2000, and they dropped those words about appraisal and other things. Well, yes, they did, because they dropped all the words about the types of agreements and they now said any agreement.

So it wasn't that they were narrowing the scope of arbitration

with the 2000 Act, they were actually expanding the scope of arbitration. And the Nevada Supreme Court had previously addressed this issue and ruled that, in fact, an appraisal process that is intended to be binding was in fact an arbitration. And that's all we are asking here.

So with respect to the grounds for reconsideration, Your Honor, we believe they are met here. This motion is timely. It is -- in fact, I think there's a little contradiction in what they're arguing about this. They're saying, well, you first have to move the Court for leave to file a motion for reconsideration, and then you have to file reconsideration -- a separate motion if the Court grants it.

Well, the problem with that, Your Honor, is that's not how -- number one, how the rule works in practice, nor how it is phrased, because the way the statute is structured is you have to seek reconsideration within 14 days. If you had to file a motion for leave in advance, right, the Court -- that motion ordinarily wouldn't be heard prior to the deadline to file for reconsideration.

So we believe we have met that standard. It is timely and we ask the Court to vacate that prior order and to dismiss this case. And if they want to file a Chapter 38 challenge to the arbitrator's decision, they can do so.

THE COURT: Okay. Can you refer the Court again, when you say there was -- because, you know, there's a dispute between you all about whether or not appraisals are an open issue in Nevada versus --

MR. BICE: Yes.

THE COURT: -- other jurisdictions and your contention that

it's already actually been decided.

MR. BICE: Yes, Your Honor. So I apologize. I thought I had that case with me.

THE COURT: Which is why I was flipping through the --

MR. BICE: But I have it here, I just didn't pull it out.

THE COURT: No worries. here that I have it here. I just didn't pull it up.

MR. BICE: So that case, Your Honor, is -- it's a 1980 decision, and this was before the statute was amended and -- here I go.

THE COURT: And that's what I wanted to confirm here, because I thought it was an interpretation of the plain language of the statute because it had the word appraisal in it at the time.

MR. BICE: Yeah. So it's *Silverman v. Fireman's Fund*, Your Honor, which is the 96 Nev at page 30.

And, yes, so back then -- this is a 1980s decision. Back then, NRS 38.0251 --

THE COURT: Got it.

MR. BICE: -- had a special definition of agreement, and that agreement includes agreements providing for valuations, appraisal or similar proceedings. So in 2000, when they adopted the Uniform Act, which is based on the Federal Act, what ultimately happened is it now just says any agreement. They deleted the various types of specific agreements and they just said any act or any agreement now to arbitrate.

And so, therefore, if the definition didn't contract, Nevada

didn't restrict the types of arbitrations that parties could enter into. The statute now says that it's any agreement to arbitrate. And parties have agreed all the time to arbitrate disputes about appraisals or valuations or, you know, amounts owed under lease or under any agreement. And that's why, Your Honor, again, under the -- and interestingly, Your Honor, the Nevada Supreme Court says, obviously, when there is -- when the Nevada Supreme Court has made a pronouncement and the legislature wants to change that, ordinarily the legislature would say something about that. And there's nothing from the 2000 Amendment to suggest that the legislature intended to dispense with prior supreme Court precedent.

THE COURT: Okay, I appreciate it. Thank you so much.

MR. BICE: Thank you very much, Your Honor.

THE COURT: Okay. Counsel, you have a different view?

MR. DELIKANAKIS: I do.

THE COURT: I shouldn't say that. It appears from your pleadings you have a different view.

MR. DELIKANAKIS: Yes, Your Honor. I want to address the smaller point in terms of procedure, and I'll explain the rationale.

Reconsideration. The very word reconsideration assumes that it is a reconsideration by the same judge that considered the motion the first time. Now I understand the fiction of the Court, the idea that the Court and that judges sitting within a Court are fungible. I don't believe that's the case, and I think there's an argument to be made that decisions, orders and opinions -- I'll keep this brief, Your Honor.

THE COURT: Yes, sorry. Somebody who -- the Nevada Supreme Court has said differently because it's been years in between when I've had a senior judge.

MR. DELIKANAKIS: Yeah.

THE COURT: The last time I actually got reversed on a case by a senior judge, and they treat it totally as me, regardless. I mean, I'm more than glad to hear you. Let me let you do the record.

MR. DELIKANAKIS: No, no. I --

THE COURT: I'm just saying that's an interesting position in light of what ends up happening as far as parties names on things. I've gotten reversed on cases I've taken over from Judge Gonzalez before I even had the case because I'm taking over -- it just might be treated any different. Let's put it this way. Talk to the Supreme Court and the Appellate Court. Here at the District Court, we have one viewpoint.

MR. DELIKANAKIS: Exactly. That's why I'm bringing the point up now.

THE COURT: Sure.

MR. DELIKANAKIS: The reality is, is that this is judge shopping. Look, I'm sorry, all these motions for reconsideration, there's no new precedent. There's no new controlling precedent. There's no new precedent at all. There is no new fact that suddenly popped up that would merit this sort of reconsideration. All they do is they wave the flag that this is clear error.

But, you know, the *Silverman* case is instructive because -- which my colleague Todd, who's very experienced, cited to.

THE COURT: Okay.

MR. DELIKANAKIS: *Silverman*, hit the nail on the head. The legislative intent is clearly expressed, and there is no room for construction. That's the best thing that you can get out of *Silverman*. Because what it highlights is under the statute, since it was changed, eliminating this very specific language that constrained a District Court for making a decision of statutory construction.

Here, this is exactly what Judge Ellsworth did. She not only made a decision as to statutory construction, what is contained within the purview of Chapter 38, but if this is the only thing that my colleague and the landlord believe is controlling, it's not. In fact, it helps attempt.

In other words, I haven't seen a single case yet in Nevada that said, you know, there's this difference of opinion around the United States as to whether these arbitral panels, these appraisal panels, really are a thing that should come under the Arbitration Act, which, of course, is an alternative adjudicative process. I'll note that an appraisal is not so much an adjudicative process, it's a qualitative process. It's a process by which professionals in the real estate field don't interpret contracts, don't make decisions of law, don't call witnesses, don't weigh evidence. They simply are presented with facts, and then they use their experience in the real estate field to pick one or the other.

So I can get into the argument later if you want that -- is this really an arbitration that would fit under the Arbitration Act? I would say it's not. But we're not in a vacuum here, because Nevada actually does have a few cases, and there are cases in other jurisdictions, most

importantly Oregon, which really is interesting, because Oregon's adoption of Oregon's Uniform Arbitration Act, is much like Nevada's. It doesn't define what an arbitration is.

In fact, if you take a look at Oregon's statute, this is why it's persuasive. This is why the Portland case is so persuasive. Oregon Statute 36.110, actually, 36.110.36238 arbitration is defined, and I'll quote it. "Arbitration means any arbitration, whether or not administered by a permanent arbitral panel." Nevada, likewise, has not actually, since the 2000 amendment, defined arbitration in any particular way.

So you have this very broad sentence that says an arbitration comes before an arbitration panel. The reason why *Portland Cement* is so interesting is that Oregon Courts have interpreted that same lack of definition and said, you know what? These appraisal panels don't fit the description of a traditional arbitration. So, therefore, we find that these appraisal panels are not arbitrations as contemplated under our statute.

Now, we briefed all this before Judge Ellsworth, and we pointed out, in fact, that there really is no controlling authority in Nevada and that other jurisdictions have found the other way. Some have found in favor of the tenants interpretation. Some jurisdictions have found in favor of our interpretation of that statute. And she made a call.

I don't think it's clear error to make a call like that when we presented in the briefs ample evidence and precedent from other jurisdictions, and even in Nevada with Judge Du's decision in *Herrera*, which is also instructive, that this is somehow clear error. I mean, if you take a look at Herrera, and I'll pull it up, Your Honor. *Herrera* is a 19 --

2013 case. There was a motion filed by Defendants to compel an appraisal. Plaintiff argued that this appraisal process, which was two appraisers and an umpire, it was a three kind of panel. Two people selected, one neutral. To come up with a valuation, much like this case. And the Plaintiff argued, you know, this is an arbitration. And I guess the arguments below were there, before it came up to Du, was they were arguing that this is an arbitration, therefore improper.

And they relied upon the *Silverman* case. And Judge Du wrote, NRS 38.0251 defined the word agreement as used in the act to cover, "agreements provided for valuations, appraisal, and similar proceedings." The legislature clearly intended for the act to cover appraisals. Thus, *Silverman* does not support Plaintiff's argument that an appraisal provision is akin to binding arbitration. Moreover, 38.0251 was repealed in 2001. And as Defendants pointed out, Nevada's Uniform Arbitration Act of 2000 governs an agreement to arbitrate.

In other words, it's not as clear as I would hope, but, Judge Du made a very clear determination here, at least as to statutory construction, that she was not buying the very argument that the landlord is making in this case for a very similar proceeding.

So at the end of the day, Your Honor, they just don't meet the standard that there was stinking fish unrefrigerated for five days error here. This was a call by a fellow judge of statutory construction, and if they do want to challenge, which I suspect they will, or we will at some point, before the Supreme Court, that really is the place to do that. This is an improper use of the reconsideration motion. I think they failed

to meet the standard. Give me one second look at money notes.

There was ample briefing, ample authority before Judge Ellsworth when she made this decision, ample briefing on the factual structure of this process, the appraisal or the arbitration, whatever you want to call it, that occurred in this case. The *St. Paul* case is also instructive as well because *St. Paul* talks about, excuse me, the structure of an arbitration, and we briefed that before the judge saying this really doesn't smell like a sort of alternative adjudicative proceedings.

But -- and I don't want to get too far ahead of myself, but even, Your Honor, if this Court were to improvidently grant the dismissal, I have to say that the dismissal, if it is granted, improbably so, should only be partial because the lease contains an express provision that either party has the right, regardless of any arbitration or appraisal panel, to seek injunctive relief. And that's what we've done.

And that portion of the claim, if you do choose to dismiss it, should not be dismissed because we have a right to bring injunctive relief, to enjoin them while they pursue whatever appeal they want, or during the pendency of a motion to vacate the arbitration award, which I'm very confident, under the facts, which are fairly -- which are undisputed, not fairly undisputed. They are undisputed.

There were two appraisals submitted to the appraisal panel pursuant to the four corners of the arbitration agreement. The rules under this baseball arbitration were that they had to submit certain things. That was something that was negotiated 20 years ago. And one of those certain things, in fact, a key aspect of one of those certain things

was leases, ground leases. And the purpose, of course, is because it comports with the other plain language of the lease when you read it as a whole, that we're going to compare apples to apples, not apples to raw land, which has increased substantially over 20 years. And it is undisputed that the landlord did not submit any leases to the arbitral panel, the appraisal panel, the arbitrary panel, whatever, they didn't do it.

So the entire process was corrupted and skewed. That's one reason why I believe the arbitration award should be vacated or the injunction should issue, and you should -- please understand, the injunction that we're seeking is positive injunctive relief. We're not seeking damages at this point. We're just saying go back and do it right. This is what the contract says under these undisputed facts. Here are the two appraisals. The contract says this. I as a judge will make an interpretation of law and grant the positive injunctive relief. You got to go do it right.

Because what's also undisputed and will come out in the preliminary injunction hearing -- I'm not sure it's really disputed is that they interpreted the contract. These very well meaning real estate appraisers made a legal interpretation of the four corners of the arbitration agreement and came to a decision and that is outside of their mandate. It's outside the scope of what the parties agreed they would do. So I'm just trying to get to the end of the day in the most proper and efficient -- judicially efficient way.

So the motion to reconsider should be denied. And

moreover, I'm not sure we need two days of a preliminary injunction hearing to take evidence because the evidence before the Court is fairly undisputed. It is undisputed. We have two appraisers and an agreement. I would ask the Court to look at the two appraisals, read the contract, read the arbitration agreement and make a determination as to whether they breached that --

THE COURT: The injunction is not on today.

MR. DELIKANAKIS: -- arbitration provision.

THE COURT: I'm sorry. You're referencing the injunction. People are looking -- it's not on for today.

MR. DELIKANAKIS: Yeah, I'm sorry. No, no, it's not on for today. It's on the 19th and the 20th. But earlier counsel opined that we needed two days to take evidence and you look at this and it's like what evidence? The evidence -- this is summary adjudication land. That's where we are.

So I'm not sure we need to waste any more money or time or resources of this Court taking evidence for two days when it's undisputed that the landlord's appraisal doesn't contain any leases and, therefore, the entire process is skewed.

So does the Court have any questions for me? I'll stop talking now.

THE COURT: I need a point of clarification because you all seem to have a very different viewpoint, and it's kind of blended in and out as to whether you both concede it was an arbitration process or whether or not the appraisal was a distinct process from an arbitration

process. Because whether or not appraisals are included in the State of Nevada because of your assertion that's changed in the statutory language in 2000, means one thing, it's broader. So from a point of clarity, because I went back -- because as you know, I signed one of the two orders, right? You all submitted competing orders. And I went back when I was looking at the orders in the proposed order from your firm, right, is sometimes it called it arbitration, sometimes it called it appraisal.

So I just need a clear -- and then in the pleadings, the same thing. Sometimes it's kind of referred to as an arbitration, sometimes as an appraisal process. So can I just get a clarity of --

MR. DELIKANAKIS: I will.

THE COURT: -- what the position is?

MR. DELIKANAKIS: Absolutely.

THE COURT: Please. Thanks.

MR. DELIKANAKIS: And the reason for the use of both those words it's a matter of candor of the Court and honesty as to what is in the document --

THE COURT: Yeah.

MR. DELIKANAKIS: -- because it does use both appraisal -- it uses both.

THE COURT: That's why I'm asking.

MR. DELIKANAKIS: Exactly. But the reason we filed our complaint the way we did, it is tenant's position that this is not an arbitration that was contemplated under the Uniform Arbitration Act as adopted by Nevada, and that's why. That is the central issue.

And so that's why the Court, in considering whether the motion -- and they filed a motion to dismiss to bring that issue to the forefront --

THE COURT: Right.

MR. DELIKANAKIS: -- saying, look, this is an arbitration that is covered by this Act. You have to go back and start all over again. Our position has always been, this is an appraisal panel, and we have a common law right to bring an action for an injunctive relief, but also for breach of contract with the intent of we just want them to do it right.

So our position is very clear. This is not an arbitration as contemplated under the Nevada Arbitration Act.

THE COURT: Okay. Thank you so very much. Okay.

MR. DELIKANAKIS: Thank you.

THE COURT: Counsel, you get last word.

MR. BICE: Yes, thank you, Your Honor. So, Your Honor, I mean, procedurally, this matter is properly before the Court. The fact that a senior judge was sitting in this Court's stead does not deprive this Court of jurisdiction. And I appreciate --

THE COURT: And signed the order. I signed the order. You're reconsidering my order with my signature.

MR. BICE: And I appreciate the argument they want to make, but I think that argument is a bit of a tell, that they don't want to get to the merits of our motion because it, under Nevada law, should be granted. Here's what Nevada --

THE COURT: No. Well, counsel, isn't it really just the fact

that you are experienced litigators and you're going to raise every single point so that you want to preserve whatever side wants to do --

MR. BICE: Well, but I think the --

THE COURT: -- in the real world. Go ahead.

MR. BICE: I think the Nevada Supreme Court has addressed that, though I don't really think there's any debate that you have jurisdiction and this motion is timely.

THE COURT: My name's on the order.

MR. BICE: Yeah. What's happening --

THE COURT: But, realistically, though --

MR. BICE: -- what's happening here is it is an arbitration. The word appraisal panel is a defined term in the agreement. That's why. And what is the defined term of the appraisal panel? It is the three arbitrators. That's the defined term in Section 3.3.4. And in fact, the independent arbitrator is the third person appointed by the other two, which is a baseball arbitration.

Now I heard this argument that, well, we have a claim for breach of contract because we dispute that the landlord supplied sufficient information to the arbitration -- during the arbitration. Well, that's an interesting argument. The problem is, of course, it violates the contract itself. If you're going to claim breach, you have to give notice and an opportunity to cure. You don't get to sit on your hands, wait for this arbitration to go forward, and then when it goes bad for you, jump forward and say, oh, we claim that was a breach of the contract. This agreement has a specific provision in there that you must give notice

and an opportunity to cure, which they never did.

And so now they've come running into Court saying, well, let's disregard the contract. I now want to claim they didn't give the right information to the arbitrators. Well, guess what? Number one, the agreement required notice and an opportunity to cure before you could make that claim. And, number two, that should have been raised with the arbitrators, if that was his theory. They didn't raise any of that with the arbitrators. They went forward, lost, and now just come in and want to complain about something that they have never addressed before coming into Court, which the agreement specifically required them to do so.

THE COURT: But does the Court, on a reconsideration, on a motion to dismiss on jurisdictional issues, really get to -- I mean, I'm hearing what you're saying.

MR. BICE: Yeah.

THE COURT: I understand each side's different arguments, but is that really similar to counsel trying to raise the injunction? I appreciate everyone trying to educate the Court for what additional factors you may want to do, but is that really before this Court today on a motion for reconsideration, on a ruling on a motion to dismiss as to whether or not procedurally something should not be in Court --

MR. BICE: Yeah.

THE COURT: -- it should have been before the panel. Because isn't it --

MR. BICE: No, but the answer to that is yes, Your Honor --

THE COURT: Okay.

MR. BICE: -- because it's a prerequisite. It's a prerequisite, right, to filing a lawsuit. And our whole point about the Court -- the case -- the claim for breach of contract has to be dismissed because you're not allowed to make a claim when you didn't give notice and an opportunity to cure. And so, yeah, I believe it is properly before this Court on reconsideration of a motion to dismiss because that's one of the very grounds for why this case should be dismissed.

With respect to -- you know, they want -- you know, they want to preview for -- or they want to preview their motion for preliminary injunction. Well, again, you don't even get to that issue. If this case -- this case should not be in front of the Court. They've got a Rule 30 or an NRS Chapter 30 process if they want to follow it. And they, you know, Mr. Delikanakis, I can appreciate his -- it's a slam dunk claim, according to him. Well, then one would have assumed they would have asserted it, but they didn't, and I think that's another one of these tells. They didn't assert it because it's not a slam dunk. They have a process. They went through the process until it went south for them, and now they want to disregard it.

So let me deal, Your Honor, if I could just briefly, with these cases. He wants to rely upon Oregon law and tell the Court that while Oregon says -- and they rely upon this *Portland General Electric v. U.S. Bank*, which is from the 9th Circuit. And it's very interesting, Your Honor, because in that particular case, there was no agreement to arbitrate. There was just an -- there was just an appraiser. And they

said, well, that doesn't constitute an agreement to arbitrate because here's what Nevada law now provides, which is NRS Chapter 38.219. It says an agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable, except and otherwise provided in NRS 597.995.

So does this meet the definition of an agreement to submit a subsequent controversy arising between the parties to arbitration? Yes, it does. They agreed to this very process. And the Plaintiff went through the process and is only now complaining because they made the classic mistake in baseball arbitration, which is, you were the unreasonable party, so you left the arbitrators with little choice but to rule in favor of the landlord.

So this is an agreement to arbitrate under Nevada law. The case he cites from Oregon is fundamentally different. And his attempt to rely upon Judge Navarro or Judge Du's decision in *Herrera*, I think, is also interesting because what she was recognizing there is, there's a difference between just a party who has an appraisal provision as opposed to it covers all appraisals or only arbitration agreements that contemplate an appraisal. That's the language that they were seizing on.

This is plainly an arbitration agreement that contemplates an appraisal. That's why they're called arbitrators. That's why there are three of them. That's why it is declared to be final and binding unless they can show under the grounds of Chapter 38, a basis for setting aside the arbitrator's decision. And they didn't do that. They chose not to do

that, despite the bravado today that it's just black and white, because under Nevada law, this agreement is binding. They are bound to it. The Court does not have the, you know, jurisdiction that we have articulated to enjoin an arbitration panel's decision absent compliance with the grounds in Chapter 38 for setting it aside. And that's why we maintain that the claim should be dismissed, Your Honor.

THE COURT: Since you're asserting clear error of law --

MR. BICE: yeah.

THE COURT: --3.3.4, right, page 5 of the agreement, right, but page 13 on the Bate stamp number of Exhibit A.

MR. BICE: Right.

THE COURT: Can you just clarify for the Court your viewpoint, similar to what I had asked opposing counsel, since it does use appraisal panel and it used arbitrators make up an appraisal panel. So the bold part, right after the 3.3.4 calls it an appraisal panel.

MR. BICE: Defines the arbitrators as an appraisal panel, correct. And that's -- and the parties, of course, are free to define the arbitrators as anything they would like, but they are clearly arbitrators. And the parties clearly contemplated that this was an arbitration.

THE COURT: But --

MR. BICE: Now, Mr. Delikanakis has argued, well, there was no opportunity for discovery. There was no opportunity to cross-examine witnesses. Well, number one, they didn't ask. They never sought to do any of the things that he now says they didn't have an opportunity to do. And you can't now go through the process, lose, and

then complain about something you didn't ask for. And that's all we're really hearing here. But it doesn't -- but, again, the parties can agree to a process -- and when you have baseball arbitrations, Your Honor, it's not at all unusual for the -- for there to be no cross-examination or discovery because baseball arbitration is, both sides stake out their position and whichever one the arbitrators think is the most reasonable is the one that gets chosen.

There is no middle ground. There is no way to shave off a little here or shave off a little there. That's why parties enter into this. This process is supposed to be quick, efficient, and inexpensive, and they are turning it into the exact opposite.

THE COURT: Then what does the Court do with the email that was referenced in the underlying briefs --

MR. BICE: Okay.

THE COURT: -- which was partly relied on by Judge Ellsworth? And just so we're being clear on which email I am referring to; I'm going to circle back to said email. It was the email of one of the individuals selected on the "panel," right --

MR. BICE: Right.

THE COURT: -- about -- it was the one that said, if we agree on this, I'm ready, or words to that effect. Let me find the language.

MR. BICE: Is this Exhibit G? Is that right?

THE COURT: The Ted Baker May 13th, 2024. It seems we have contradictory guidance on what constitutes FM, fair market value, although it says FMV in this instance.

MR. BICE: Right.

THE COURT: If it is up to, and then there was a bracket, the word us in bracket, individually to interpret, then yes, I am, bracket, am in bracket ready.

So not sounding very baseball arbitration-ish, okay, because that part is being viewed, right, that it's asking the scope of what they're looking at rather than number A versus number B in a traditional baseball arbitration. I mean, you can go back to --

MR. BICE: Well, just -- Your Honor, just because you have --

THE COURT: I just want -- I'm giving you a chance to --

MR. BICE: Yeah.

THE COURT: -- you can appreciate --

MR. BICE: Just because you have a baseball arbitration doesn't mean that the arbitrators can't ask questions.

THE COURT: I'm not suggesting that.

MR. BICE: Yeah. Well, that's how -- I just want to make it clear on that. They can certainly ask questions and they can -- they can think -- they could ask either side to modify their proposals based upon their different view of what the agreement contemplates. They have every right to do that. But what's happening, that was never something that -- again, you have -- it's a majority decision. You had two here who made the decision in our favor.

This arbitrator is their chosen arbitrator, who, he's in communication with them. And, by the way, that's not wrong. They're allowed to do that.

THE COURT: Right.

MR. BICE: You only have one neutral, and you have two that were chosen by the other parties. So they may very well be feeding him information to try and persuade the neutral to side with their position, and we're not saying that's wrong, but that doesn't negate the arbitration and doesn't negate the arbitration when one of the arbitrators, particularly their chosen arbitrator, has questions. They're entitled to have questions, and they're entitled to say, I can't -- I don't think this qualifies.

If they wanted to say, I don't think that this qualifies for an arbitration, I don't think we have sufficient information to make the decision, they were free to do that as long as it was a majority that said that, not their handpicked arbitrator. And that's what we have going on here. So the majority decision is what matters, and that's what's binding on the parties.

THE COURT: Okay. Well, I think the fair thing is, since I asked you the question about that email, I give opposing counsel --

MR. BICE: Oh, yeah.

THE COURT: -- an opportunity to answer that question as well, and then you want final, final word.

MR. BICE: Thank you, Your Honor.

MR. DELIKANAKIS: Yes. That email is ample evidence that the appraisal panel composed of arbitrators. The appraisal panel composed of arbitrators exceeded their mandate. They started interpreting the provision, the rules in the contract that guided what

information would come before the panel. But, more importantly, they were interpreting the contract. They were engaging in contractual interpretation as non-lawyers and, certainly, they were never asked to do that. They were confused, they asked for help, and there was a battle at issue.

But I also wanted to speak to the issue of the notice. Judge Ellsworth asked that we separately brief that. In the form of order that Your Honor signed, there was no indication as to when you wanted the brief. So I reached out to my colleague, Mr. Jared Smith, a couple days ago, and I said, hey, when do you want to do this? Should we do this on the 15th? And he said, how about the 16th? And I said, sure. But I realized the 16th is the Friday before the hearing, and at 5:00 p.m. we agreed. And so --

THE COURT: And remember, there's no way that anybody ever is going to present things to the Court in anything less than the standard EDCR seven days before a hearing, folks. There's one of me, there's hundreds of you all. Sorry. And you appreciate -- let's put it this way. There's multiple --

MR. DELIKANAKIS: Okay.

THE COURT: -- your firms have enough cases before this department to know how much I'm reading each night in a -- now, some may have a few less cases than they had before. Sorry, I was supposed to be in trial recently with opposing counsel's firm on a case that they knew took a long -- a lot of time.

MR. DELIKANAKIS: So let me look at my --

MR. BICE: Just a little time, Your Honor.

MR. DELIKANAKIS: -- let's look at our calendar.

MR. BICE: We took up just a little of your time.

THE COURT: And how many hours -- yeah. How many hours did you bill? Yeah. My ratio is hours that the firm's bills in total versus what you're asking.

MR. BICE: I understand. You're not going to hear an argument from me.

MR. DELIKANAKIS: Okay.

THE COURT: There's 24 hours in a day. I mean, even my working 23 of those 24 hours, anyway -- but that's not the point. The point here is for your statement, are you saying that the Court should not be ruling on the reconsideration today because of outstanding issues?

MR. DELIKANAKIS: Oh, absolutely not.

THE COURT: Okay. That's what I was trying --

MR. DELIKANAKIS: Absolutely not.

THE COURT: -- okay.

MR. DELIKANAKIS: Look, the Court needs to rule on the reconsideration today one way or the other, because I believe it's. It should be denied for the reasons that we've stated. There's no other issue. These are -- you know, they're forward arguments as to what may come up at a preliminary injunction or a motion to vacate. But, no, they just haven't met the standard of clear error. This is an area of statutory construction. There was ample precedent that would inform Judge Ellsworth as it was was presented to her at the time in assisting her in

making that statutory construction that I don't believe amounts to clear error. And I think the Court would be remiss in granting this motion reconsider.

THE COURT: And I have the opposite [indiscernible]. Okay. I'll let you answer the question the Court had since I -- since you segued into the scheduling, I want to make sure you had a chance to fully respond, taking full into account. Yes, I appreciate other people are waiting on my 8:30 and my 9:00 so.

MR. DELIKANAKIS: Well, Your Honor, if seven days, then it's due Monday, right, Tom.

THE COURT: Well, if we need to change -- let's deal with today's today.

MR. DELIKANAKIS: Understood.

THE COURT: Then we'll deal with scheduling. I just -- in a fairness standpoint, remember this is for part of a reconsideration hearing, for one thing.

MR. DELIKANAKIS: Yes.

THE COURT: I need to ensure, in order to be fully prepared, that's not taking into account, right, be looking up each and every case that you all cite, and your excellent briefs have a lot of cases in them. So we need to make sure everyone can be fully prepared, take into account all docket. So, no, this Court won't agree to people submitting things late on Friday when there's other time periods that would be reasonable in a particular case. I mean, if it's an emergency issue, of course I would do it. But we need to get things scheduled.

But let me rule on today's motion for reconsideration first., okay?

MR. DELIKANAKIS: Of course, Your Honor.

THE COURT: Okay. Here's the Court's ruling.

Okay. The first prong of a motion for reconsideration is you have to evaluate whether or not saying that there's new case law, new facts, or clear error, okay. Well, here, nobody's contending there's new facts. Nobody's contending there's new law. The issue is whether or not there's clear error by the judge that ruled here in Department 31 with regards to the underlying countermotion to dismiss. So when I have to look at that, I have to look on the clear error standard as set forth by the appellate courts.

Here, the Court does not find that there is clear error. Okay. While I appreciate one thing about excellent briefing and excellent moral argument is you all have made it pretty muddy, I'm saying that in a positive manner about really how this should be interpreted. Because really, when you look at the focus here's what you've got. You've got a provision in the lease appraisal panel.

Now the courts fully appreciate the 3.34 calls it an appraisal panel. The courts also are fully appreciative that paragraph 40.1 talks about captions and how the implication of captions with regards to -- I'm sorry, 40.1 says the captions appearing at the commencements of sections hereof are descriptive only and for the convenient reference of this ground lease and in no way whatsoever define, limit, or describe the scope or intent of this ground lease or in any way affect the ground

lease. So, that they're descriptive. That just because it says appraisal panel doesn't necessarily preclude that it could be viewed as something else. But I'm utilizing the language within 3.34.

I look at the language within 3.34, I look at 3.33. When you go to each of those, realistically, I would concur with Judge Ellsworth. So I'm really jumping to the second prong of the motion for reconsideration. I'm evaluating it as if there is an issue potentially of clear error. I'm just going to go to the second prong because that's realistically where you all want me to go, and it's the way that really kind of focuses on what the issue underlying between the two parties is.

So while you have to look at subject matter jurisdiction judgment, right. The Court's authority in the granting of judgment in a particular case.

So, realistically, I have to look at the complaint by the drafter of the complaint and what their issues is. I have to -- while I appreciate the articulation by the landlord with regards to that characterization, but even looking at it, I have to look at what actually was being done. Here, it was a group of three that were doing an appraisal. There's not any of the various language that sets forth that that is "an arbitration." It doesn't have the earmarks, a lot of an arbitration. It is an appraisal panel. It's a group of individuals. And that's really supported by the substance of Sections 3.3.3 and 3.3.4. You then have to look at, there is not a direct case on point in the State of Nevada since the changes in 2000.

So then you have to go to the statutory construction

interpretation. Did the 2000 changes, by eliminating certain language, narrow the statute, broaden the statute, or it says what it says? It says what it says. So in the absence of having the word specifically appraisal, it doesn't mean it's precluded, but it doesn't mean it's still specifically included, so the Court can't rely on a pre-2000 case which used that actual word that was in the statute to somehow be precedent. I can use it for persuasive because it talks about the statute, but I cannot use it for precedent.

So then I go to the various Oregon cases. Realistically, there's informational cases that both sides have presented. When I look at it, the actual underlying issues, I would concur that the characteristics -- the examination of the lease terms and the characteristics of appraisal supports that this was more of an appraisal process. The reason why I say I can look persuasive for *Silverman*, because *Silverman* does discuss about what kind of an appraisal process is.

Now, I am appreciative that 3.3.4 does discuss that you can -- the tenant -- landlord and tenant may each make supplemental oral and/or written presentations with an opportunity for rebuttal by the other party and for questioning by members of the appraisal panel if they so wish, which has maybe some concept of potentially an arbitration. However, I don't see it as clear error. I see that this language realistically can be interpreted either way, and it really is a judgment call of the judge sitting in there. Is it in the full context of all of the language on how it should be interpreted.

And so since there is more indicative in the paragraph, this is

why I'm affirming Judge Ellsworth, more indicative of the concept of an appraisal panel versus a true arbitration that would take it out of the jurisdiction of the Court. The Court needs to affirm and deny the motion for the reconsideration.

With regards to the second prong that was addressed in the order, with regards to whether or not the "appraisal panel" exceeded their scope, but even if you viewed it as an arbitration, did they exceed their scope. Alternatively, even when I look at that, I see it's a legal determination. They're making a legal determination with regards to what was the scope of what they were really needing to do.

The evidence that was presented first to Judge Ellsworth, which this Court has to review without expanding the record, is it was a reasonable interpretation to say that there was a lack of clarity in the scope of what the panel was to do and in the panel determining how they should interpret the lease versus providing, I appreciate you all used your standard baseball arbitration. I did those actually back in the day, but, anyway. I was with the law firm that did them. Paul Hastings did all the Dodger arbitrations.

In any event, so when you look at that, I still would -- I would concur that it could be viewed that they exceeded their scope and made a legal determination. Once again, these are reasonable interpretations that the underlying Court made, and so, therefore, the Court cannot find clear error. So therefore, the Court would need to reaffirm that Defendant Corporate Center Restaurant's countermotion to dismiss for lack of subject matter jurisdiction is denied without prejudice, and that at

that juncture you had to address the outstanding issues. I have to address the preliminary injunction issue. It is so ordered.

So, folks, with regards to a briefing schedule, the Court is going to be fine with regards to if you want a different hearing date. This Court is going to need briefs. But I can appreciate you all might have, on your own schedules, allocated different timeframes for briefs that you may not have anticipated that the Court would want a standard EDCR. But the Court needs a standard EDCR. The EDCR is alive and well for a very good reason as it did give, you know, everybody a fair chance to get fully prepared for different things subject to a specific OST.

So do you all want to keep your current date? What I think probably you want to do is you probably maybe want to talk out in the hall and let me handle my other 8:30 matter, or you want to send me a letter by end of day on a proposal? What do you all want to do?

MR. DELIKANAKIS: I just want a point of clarification, if I may, Your Honor.

THE COURT: Sure.

MR. DELIKANAKIS: The preliminary injunction is fully briefed. Judge Ellsworth asked for separate briefs on the issue of notice, termination, cure, and that's the only brief that's due and owing to the Court, unless Your Honor wants additional briefs. But the preliminary injunction is fully briefed. She asked for specific separate briefing on that specific separate issue, which my colleague raised earlier as to the failure to provide notice of cure and that's why --

THE COURT: But what is that being tied into is really where

this Court -- you know, I'm trying to tie it into a pending matter for the Court's resolution. What was the ripe issue that you're seeking judicial determination on? I will tell you, this Court felt that you all gave me excellent briefing. I had the whole record. I felt perfectly comfortable ruling on a motion for reconsideration based on everything I had. That's not something I need.

The preliminary injunction hearings on 8/19. I have looked at it generally, but I saw it as a preliminary injunction hearing. I will tell you I didn't see some specific reference that was made to me about some additional briefing. That doesn't mean that it's -- I mean --

MR. DELIKANAKIS: No, it was requested by Judge Ellsworth and, frankly, I don't think it --

THE COURT: Tied to what, though?

MR. DELIKANAKIS: The argument that my colleague made at the time of the original TRO hearing was that this was some sort of condition precedent before -- and I don't want to -- if I misstating it, Todd, tell me, but I think his argument was

THE COURT: So the short answer is, if you both agree that there should be additional briefing that the Court needs to take into consideration for the preliminary injunction hearing, I'm going to be fine with it.

MR. BICE: Okay.

THE COURT: Okay. If you're saying that you didn't know -- if both parties are saying, really, Your Honor, we don't think it, that it has any relationship to something pending before the Court, I'm going to be

fine with what I currently have. You know what I mean? Either option is fine with me. If you're wanting to do supplemental briefing, like I said, the Court's going to be fine with it. We just need to get times and dates because we want to make sure that gets -- well, I am going to make sure it gets fully considered and given everything that is going on and is kind of coming a little bit more as a surprise, you know what I mean, I need to make sure I have the time to do it.

So if you want to keep your 8/19 hearing, then I need things by 8/12, if you want me to change the hearing date, then I'll need it seven days before a new hearing date. So what do you all want?

MR. BICE: So we would ask to keep the hearing date, Your Honor. And this is -- we think this is a fairly narrow legal issue. So the 12th is more than ample. We can get it to you before then if you'd like it --

THE COURT: Yeah, I just did need -- in fairness, I don't ask counsel for generally more than if -- unless it's like thousands of pages.

MR. BICE: Well, no, I apologize. I was thinking that the --

THE COURT: Today is Thursday and Monday is the 12th.

MR. BICE: I was --

THE COURT: The person who's drafting is probably saying it might be challenging.

MR. BICE: Right. She's looking at me, like --

MR. DELIKANAKIS: She's looking, like, what?

MR. BICE: -- listen idiot. I mean -- so, actually, could we do the 13th?

THE COURT: Realistically, how busy I am on the 12th, I'm not going to look at it till the evening of the 12th anyway. So the 13th is fine as long as it's by 4:00 p.m. on the 13th.

MR. BICE: Thank you, Your Honor.

MR. DELIKANAKIS: 4:00 p.m., on the 13th.

THE COURT: Yeah.

MR. DELIKANAKIS: That's fine. I want to talk a little bit, if we may, briefly about the preliminary junction hearing.

THE COURT: Counsel --

MR. DELIKANAKIS: Oh, okay.

THE COURT: It's set for the time period it's set for.

MR. DELIKANAKIS: It is.

THE COURT: If you both agree that you want something less, realistically, perfectly fine, because I've got a lot of other things on my plate. If you want something more, that's not a possibility because we have other things scheduled. I would have to pick a different date, right, to do something more. The fact that I'm sure you all are both going to be very efficient. You've both done numerous things in this Court and you're efficient with regards to your thing.

If people try and stretch things out, then I think everybody knows, I will politely ask you to move things along. You being a generic term to any counsel, if it's kind of being super repetitive questions. If there's some emergency that somebody is not saying that implicitly is behind the scenes and they need an accommodation, please tell me directly, not behind the scenes.

MR. DELIKANAKIS: Understood, Your Honor.

THE COURT: Okay. You understand what I'm saying? Sometimes people have -- maybe their client has somebody who's about to do whatever and maybe that's an issue. If that's the issue, just redirect with the Court.

MR. DELIKANAKIS: Absolutely.

THE COURT: If it's just a matter of we don't know how much time everyone's really going to take, and then it was agreed to be scheduled for this time, and I'm not going to cut people's time off without some reason for doing so. And I haven't been told any reason for doing so because I got a difference of --

MR. BICE: Yes. Thank you, Your Honor.

MR. DELIKANAKIS: Thank you.

MR. BICE: And I'll have Mr. Smith address that with Mr. Delikanakis offline and if there needs to be some adjustments we'll get b ack to the Court. He couldn't be here today, Your Honor, because he's up in Carson City on another hearing.

THE COURT: Okay. No worries. It's perfectly fine. Whoever is here, like I said, it's just in fairness, if we agree to a certain amount of time, I'm not going to take it away from you unless I reevaluate that I need to. And right now I don't have that information.

MR. BICE: Understood. Thank you. Thank you again for hearing us.

MR. DELIKANAKIS: Thank you, Your Honor.

THE COURT: Appreciate it. Thank you for your time.

MR. DELIKANAKIS: Have a good day.

THE COURT: Okay. Thank you so very much everyone. Fourteen days, EDCR 7.21, right. DC31 inbox. Administrative orders. Thank you.

MR. DELIKANAKIS: Thank you.

[Proceedings concluded at 9:21 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

Jessica B. Cahill

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Jessica B. Cahill, Transcriber, CER/CET-708

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John S. Delikanakis (Nevada Bar #005928)
Michaela G. Jones (Nevada Bar #15205)
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
Telephone: 702.784.5200
Facsimile: 702.784.5252
Email: jdelikanakis@swlaw.com
mgjones@swlaw.com

Attorneys for Plaintiff

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

14528 HENDERSON, LLC, a Nevada limited liability company, Plaintiff, v. CORPORATE CTR. RESTAURANT, LLC, a Nevada limited liability company, Defendant.	Case No.: A-24-894355-B Dept.: 31 **MOTION TO STAY CONSIDERATION OF PLAINTIFF'S MOTION TO VACATE ARBITRATION AWARD** **[HEARING REQUESTED]**

Plaintiff 14528 Henderson, LLC ("Plaintiff" or "Tenant"), by and through its counsel, Snell & Wilmer L.L.P., moves for a stay of all briefing and decision on its Motion to Vacate Arbitration Award. This motion is based upon the attached memorandum of points and authorities, the attached exhibits, the pleadings and papers on file herein, and such other evidence or arguments as may be presented to the Court on behalf of Plaintiff.

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Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

MEMORANDUM OF POINTS AND AUTHORITIES

In the interest of judicial economy, this Court should stay all briefing and consideration of the Motion to Vacate unless and until the Nevada Supreme Court concludes—as a matter of first impression—that the Nevada Act and/or the Federal Act applies to the appraisal procedure at issue in this action. To explain, Tenant brings the Motion to Vacate to preserve its right to litigate the issues raised in the Verified Complaint within the procedural framework of the Nevada Act and/or the Federal Act. To date, this Court has twice rejected Landlord's argument that the appraisal procedure set forth in the Lease constitutes an agreement to arbitrate subject to the Nevada Act. *See* **Exhibit 1** (June 17, 2024, Hr'g Tr.), at 49:10-13 ("I don't think that this was an arbitration that's contemplated under Nevada's Uniform Arbitration Act. I'm going to deny the motion to dismiss for the reasons and arguments that are stated by the opposition to that motion."); **Exhibit 2** (August 8, 2024, Hr'g Tr.), at 31:4-34:25 (denying Landlord's motion for reconsideration of the Court's denial of the countermotion to dismiss for lack of subject matter jurisdiction).

Tenant has been candid with this Court: notwithstanding Tenant's position that the appraisal provision falls outside the scope of the Nevada Act, Tenant acknowledges that the Nevada Supreme Court has yet to consider the issue following the Legislature's repeal of the 1969 Uniform Arbitration Act in 2001. *See* Opp'n to Mot. for Reconsideration, July 30, 2024, *on file*, at 2:6-8. To be sure, this Court likewise recognized the nuances of the issue in its oral ruling denying Landlord's motion for reconsideration on this issue. *See* **Exhibit 2** (August 8, 2024, Hr'g Tr.), at 31:4-34:25. Therefore, should this matter ultimately be appealed, the Nevada Supreme Court could conclude—as a matter of first impression—that the Nevada Act and/or the Federal Act applies to the appraisal provision at issue.

In response to Landlord's argument that the Nevada Act controls this dispute, Tenant argued in the alternative that the Appraisal Panel's decision cannot withstand scrutiny under the Nevada Act. *See* Opp'n to Countermot. to Dismiss, June 10, 2024, *on file*, at 10:2-17:18; Opp'n to Mot. for Reconsideration, July 30, 2024, *on file*, at 21:21-29:7. This Court agreed with Tenant. *See* **Exhibit 2** (August 8, 2024, Hr'g Tr.), at 34:5-23 (upholding the Court's prior ruling that even assuming the appraisal procedure was an arbitration, the appraisal panel "exceeded their scope and

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

made a legal determination"). However, to protect its right to maintain those arguments on remand should the Nevada Supreme Court disagree, Tenant must satisfy the applicable procedural requirements and deadlines under the Nevada Act and/or Federal Act. That is the sole purpose of the Motion to Vacate.

The Nevada Act requires a litigant to move to vacate an arbitration award "within 90 days after the movant receives notice of the award." NRS 38.241(2). Relatedly, the Federal Act imposes a three-month deadline. 9 U.S.C. § 12. Any motion to vacate an arbitration award filed outside of those limitations periods is subject to summary denial. *See Stevens v. Jiffy Lube Int'l, Inc.*, 911 F.3d 1249, 1250 (9th Cir. 2018) (affirming denial of a petition to vacate arbitral award under the Federal Act filed and served one day late). Accordingly, Tenant brings the Motion to Vacate to perfect the alternative arguments already entertained by this Court. *Cf.* NRCP 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency"); NRCP 8(e) ("Pleadings must be construed as to do justice.").

This Court enjoys broad discretion to manage its docket and stay consideration of motions pending before it. *Maheu v. Eighth Jud. Dist. Ct.*, 89 Nev. 214, 216-17, 510 P.2d 627, 629 (1973). In declining to interfere with a district court's calendaring of the matters before it, the Nevada Supreme Court observed that "'[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *Id*., at 217, 510 P.2d at 629 (quoting *Landis v. North American Co.*, 299 U.S. 248, 254-255 (1936)). Given the express and limited purpose of the Motion to Vacate, Tenant respectfully requests that this Court exercise its broad discretion to stay consideration of the Motion to Vacate in the interest of judicial economy. *See id*.

DATED this 13th day of August, 2024.

SNELL & WILMER L.L.P

By: */s/ John S. Delikanakis*
John S. Delikanakis
Michaela G. Jones
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169

Attorneys for Plaintiff

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **MOTION TO STAY CONSIDERATION OF PLAINTIFF'S MOTION TO VACATE ARBITRATION AWARD** upon the following by the method indicated:

☐ **BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

☐ **BY EMAIL:** by emailing parties at the email addresses as set forth below.

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

Dated August 13, 2024

/s/ Michelle Shypkoski
An employee of Snell & Wilmer L.L.P

Snell & Wilmer L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

INDEX OF EXHIBITS

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2	August 8, 2024, Hearing Transcript	06-13

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

EXHIBIT 1

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6/26/2024 11:15 AM
Steven D. Grierson
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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

14528 HENDERSON, LLC, Plaintiff, vs. CORPORATE CTR. RESTAURANT, LLC, Defendant.	)	CASE NO. A-24-894355-B DEPT NO. XXXI **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

MONDAY, JUNE 17, 2024

TRANSCRIPT OF HEARING RE:

SEE NEXT PAGE FOR MATTERS

APPEARANCES:

FOR THE PLAINTIFF: JOHN S. DELIKANAKIS, ESQ.
MICHAELA G. DAVIES, ESQ.

FOR THE DEFENDANT: JORDAN T. SMITH, ESQ.
TYLER STEVENS, ESQ.

RECORDED BY: LARA CORCORAN, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

Case Number: A-24-894355-B

M A T T E R S

PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION ON ORDER SHORTENING TIME - PARTIES NOTIFIED OF DATE CHANGE VIA EMAIL

CORPORATE CTR. RESTAURANT, LLC'S OPPOSITION TO PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION AND COUNTERMOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

LAS VEGAS, CLARK COUNTY, NEVADA, JUNE 17, 2024, 8:57 A.M.

*** * * * ***

THE COURT: All right. This is Case Number A-24-894355, 14528 Henderson, LLC, versus Corporate Ctr. Restaurant, LLC. And this is our -- the time set for the hearing on the application for a TRO and motion for preliminary injunction. Okay.

So if you'll state your appearances for the record, please.

MR. DELIKANAKIS: Of course. Good morning, Your Honor. John Delikanakis on behalf of 14528 Henderson, LLC. With me today is my colleague Michaela Jones, Bar Number 15205.

And to the right of Michaela is Mr. Eric Lofgran, Senior Vice President of Kelly Companies, Kelly Investment Group, which is an affiliate of the plaintiff.

THE COURT RECORDER: Could you spell his name for us, sir.

MR. DELIKANAKIS: Of course. L-o-f-g-r-a-n.

THE COURT RECORDER: E-r-i-c or K?

MR. DELIKANAKIS: E-r-i-c.

THE COURT RECORDER: Thank you.

MR. DELIKANAKIS: Thanks.

MR. SMITH: Good morning, Your Honor. Jordan Smith of Pisanelli Bice on behalf of defendant Corporate Ctr. Restaurant, LLC. With me in the courtroom is our corporate

to dismiss. They keep saying this is an arbitration. I think the Court disagrees. I hope it does. This was not a final and binding arbitration of the rights and obligations of the people. It was a small, narrow factual finding, and we reserved in the contract our right to bring injunctive relief claims, notwithstanding any other provision of the contract.

THE COURT: Okay. I think you have both done excellent jobs, and, you know, the now the horrible task of making decisions, as usual, is left with the Judge.

And so I don't think that this was an arbitration that's contemplated under Nevada's Uniform Arbitration Act. I'm going to deny the motion to dismiss for the reasons and arguments that are stated by the opposition to that motion.

So we can move on at this point to the TRO.

MR. SMITH: Thank you.

MR. DELIKANAKIS: The tenant is entitled to the issuance of a temporary restraining order to preserve the status quo pending resolution of tenant's claims for breach of contract, but most importantly dec relief. These are matters of law properly before the Court, and I think they can be expeditially -- expeditiously decided on a motion for summary judgment because we're really asking the Court to interpret a few clauses.

What we're asking for is an order enjoining the landowner from enforcing the May 15th, 2024, decision of the

MR. DELIKANAKIS: No. Thank you, Your Honor.

THE COURT: All right. Thank you. Court is in recess.

(Proceedings concluded at 10:42 a.m.)

-oOo-

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Dana L. Williams
Transcriber

EXHIBIT 2

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8/9/2024 9:06 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

14528 HENDERSON, LLC, Plaintiff, vs. CORPORATE CTR. RESTAURANT, LLC, Defendant.	CASE#: A-24-894355-B DEPT. XXXI

BEFORE THE HONORABLE JOANNA S. KISHNER
DISTRICT COURT JUDGE
THURSDAY, AUGUST 8, 2024

RECORDER'S TRANSCRIPT OF MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANT'S COUNTERMOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER ON ORDER SHORTENING TIME

APPEARANCES

For the Plaintiff: JOHN S. DELIKANAKIS, ESQ.

For the Defendant: TODD BICE, ESQ.
BRIANNA SMITH, ESQ.

RECORDED BY: LARA CORCORAN, COURT RECORDER

Case Number: A-24-894355-B

Las Vegas, Nevada, Thursday, August 8, 2024

[Case called at 8:23 a.m.]

THE COURT: Okay. We're calling page three first. Okay. Page 3, 14528 Henderson LLC v. Corporate Center Restaurant, case 894355. Counsels, please.

MR. DELIKANAKIS: John Delikanakis from Snell Wilmer, bar number 5928, on behalf of the Plaintiff. With me here today is client representative Eric Lofgren, the general counsel of the Plaintiff.

MR. BICE: Good morning. Todd Bice and Bri Smith, on behalf of the Defendant. And also with us is Craig Dunlap, the client's representative. Thank you, Your Honor.

THE COURT RECORDER: Can we get spellings on the representatives names, please?

MR. KOSTERS: L-U-K-E K-O-S-T-E-R-S.

MR. DELIKANAKIS: It's Kosters, not Lofgren. I apologize.

THE COURT RECORDER: Okay. I'm like -- okay. And is this one Dunlap, D-U-N-L-A-P?

MR. BICE: Yes.

THE COURT: Okay.

MR. BICE: So, Your Honor, this is. This is our motion for reconsideration on two issues that you -- although the case is assigned to you, you did not here because you were not available and Judge Ellsworth heard them in your stead.

So we're presenting this back to the Court because we just

But let me rule on today's motion for reconsideration first., okay?

MR. DELIKANAKIS: Of course, Your Honor.

THE COURT: Okay. Here's the Court's ruling.

Okay. The first prong of a motion for reconsideration is you have to evaluate whether or not saying that there's new case law, new facts, or clear error, okay. Well, here, nobody's contending there's new facts. Nobody's contending there's new law. The issue is whether or not there's clear error by the judge that ruled here in Department 31 with regards to the underlying countermotion to dismiss. So when I have to look at that, I have to look on the clear error standard as set forth by the appellate courts.

Here, the Court does not find that there is clear error. Okay. While I appreciate one thing about excellent briefing and excellent moral argument is you all have made it pretty muddy, I'm saying that in a positive manner about really how this should be interpreted. Because really, when you look at the focus here's what you've got. You've got a provision in the lease appraisal panel.

Now the courts fully appreciate the 3.34 calls it an appraisal panel. The courts also are fully appreciative that paragraph 40.1 talks about captions and how the implication of captions with regards to -- I'm sorry, 40.1 says the captions appearing at the commencements of sections hereof are descriptive only and for the convenient reference of this ground lease and in no way whatsoever define, limit, or describe the scope or intent of this ground lease or in any way affect the ground

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lease. So, that they're descriptive. That just because it says appraisal panel doesn't necessarily preclude that it could be viewed as something else. But I'm utilizing the language within 3.34.

I look at the language within 3.34, I look at 3.33. When you go to each of those, realistically, I would concur with Judge Ellsworth. So I'm really jumping to the second prong of the motion for reconsideration. I'm evaluating it as if there is an issue potentially of clear error. I'm just going to go to the second prong because that's realistically where you all want me to go, and it's the way that really kind of focuses on what the issue underlying between the two parties is.

So while you have to look at subject matter jurisdiction judgment, right. The Court's authority in the granting of judgment in a particular case.

So, realistically, I have to look at the complaint by the drafter of the complaint and what their issues is. I have to -- while I appreciate the articulation by the landlord with regards to that characterization, but even looking at it, I have to look at what actually was being done. Here, it was a group of three that were doing an appraisal. There's not any of the various language that sets forth that that is "an arbitration." It doesn't have the earmarks, a lot of an arbitration. It is an appraisal panel. It's a group of individuals. And that's really supported by the substance of Sections 3.3.3 and 3.3.4. You then have to look at, there is not a direct case on point in the State of Nevada since the changes in 2000.

So then you have to go to the statutory construction

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interpretation. Did the 2000 changes, by eliminating certain language, narrow the statute, broaden the statute, or it says what it says? It says what it says. So in the absence of having the word specifically appraisal, it doesn't mean it's precluded, but it doesn't mean it's still specifically included, so the Court can't rely on a pre-2000 case which used that actual word that was in the statute to somehow be precedent. I can use it for persuasive because it talks about the statute, but I cannot use it for precedent.

So then I go to the various Oregon cases. Realistically, there's informational cases that both sides have presented. When I look at it, the actual underlying issues, I would concur that the characteristics -- the examination of the lease terms and the characteristics of appraisal supports that this was more of an appraisal process. The reason why I say I can look persuasive for *Silverman*, because *Silverman* does discuss about what kind of an appraisal process is.

Now, I am appreciative that 3.3.4 does discuss that you can -- the tenant -- landlord and tenant may each make supplemental oral and/or written presentations with an opportunity for rebuttal by the other party and for questioning by members of the appraisal panel if they so wish, which has maybe some concept of potentially an arbitration. However, I don't see it as clear error. I see that this language realistically can be interpreted either way, and it really is a judgment call of the judge sitting in there. Is it in the full context of all of the language on how it should be interpreted.

And so since there is more indicative in the paragraph, this is

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why I'm affirming Judge Ellsworth, more indicative of the concept of an appraisal panel versus a true arbitration that would take it out of the jurisdiction of the Court. The Court needs to affirm and deny the motion for the reconsideration.

With regards to the second prong that was addressed in the order, with regards to whether or not the "appraisal panel" exceeded their scope, but even if you viewed it as an arbitration, did they exceed their scope. Alternatively, even when I look at that, I see it's a legal determination. They're making a legal determination with regards to what was the scope of what they were really needing to do.

The evidence that was presented first to Judge Ellsworth, which this Court has to review without expanding the record, is it was a reasonable interpretation to say that there was a lack of clarity in the scope of what the panel was to do and in the panel determining how they should interpret the lease versus providing, I appreciate you all used your standard baseball arbitration. I did those actually back in the day, but, anyway. I was with the law firm that did them. Paul Hastings did all the Dodger arbitrations.

In any event, so when you look at that, I still would -- I would concur that it could be viewed that they exceeded their scope and made a legal determination. Once again, these are reasonable interpretations that the underlying Court made, and so, therefore, the Court cannot find clear error. So therefore, the Court would need to reaffirm that Defendant Corporate Center Restaurant's countermotion to dismiss for lack of subject matter jurisdiction is denied without prejudice, and that at

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that juncture you had to address the outstanding issues. I have to address the preliminary injunction issue. It is so ordered.

So, folks, with regards to a briefing schedule, the Court is going to be fine with regards to if you want a different hearing date. This Court is going to need briefs. But I can appreciate you all might have, on your own schedules, allocated different timeframes for briefs that you may not have anticipated that the Court would want a standard EDCR. But the Court needs a standard EDCR. The EDCR is alive and well for a very good reason as it did give, you know, everybody a fair chance to get fully prepared for different things subject to a specific OST.

So do you all want to keep your current date? What I think probably you want to do is you probably maybe want to talk out in the hall and let me handle my other 8:30 matter, or you want to send me a letter by end of day on a proposal? What do you all want to do?

MR. DELIKANAKIS: I just want a point of clarification, if I may, Your Honor.

THE COURT: Sure.

MR. DELIKANAKIS: The preliminary injunction is fully briefed. Judge Ellsworth asked for separate briefs on the issue of notice, termination, cure, and that's the only brief that's due and owing to the Court, unless Your Honor wants additional briefs. But the preliminary injunction is fully briefed. She asked for specific separate briefing on that specific separate issue, which my colleague raised earlier as to the failure to provide notice of cure and that's why --

THE COURT: But what is that being tied into is really where

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MR. DELIKANAKIS: Have a good day.

THE COURT: Okay. Thank you so very much everyone. Fourteen days, EDCR 7.21, right. DC31 inbox. Administrative orders. Thank you.

MR. DELIKANAKIS: Thank you.

[Proceedings concluded at 9:21 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.



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Steven D. Grierson
CLERK OF THE COURT

Jordan T. Smith, Esq., Bar No. 12097
JTS@pisanellibice.com
Brianna Smith, Esq., Bar No. 11795
BGS@pisanellibice.com
Tyler W. Stevens, Esq., Bar No. 16325
TWS@pisanellibice.com
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Telephone: 702.214.2100
Facsimile: 702.214.2101

Attorneys for Corporate Ctr. Restaurant, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

14528 HENDERSON, LLC, a Nevada limited liability company, Plaintiff, v. CORPORATE CTR. RESTAURANT, LLC, a Nevada limited liability company, Defendant.	Case No.: A-24-894355-B Dept. No.: 31 **SUPPLEMENTAL BRIEF REGARDING NOTICE AND CURE**

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

I. INTRODUCTION

To obtain a preliminary injunction, Plaintiff 14528 Henderson, LLC's ("Tenant") must prove its ability to succeed on the merits of its breach of contract claim. But Tenant cannot meet even this most basic element. It is fundamental that a party asserting a breach of contract must establish its own contractual performance as a prerequisite. But Tenant failed to comply with the conditions precedent to declaring a breach of contract against Corporate Ctr. Restaurant, LLC ("Landlord").

Under Section 21 of the Ground Lease, Tenant was required to provide Corporate Ctr. Restaurant, LLC ("Landlord") written notice if any term, covenant, condition or agreement was breached. If Tenant declared a breach, Landlord had thirty days to cure the alleged breach. While Tenant now contends Landlord's appraisal and related information constitute a breach of the Ground Lease, Tenant made no such declaration during ***the ten-month period*** it was aware of this

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appraisal before the arbitration hearing. Instead, Tenant waited to see if it prevailed at the hearing. Only after Tenant lost at the arbitration did Tenant "declare" a breach (*i.e.*, by initiating this action). In any event, Tenant failed to comply with the Ground Lease requirements and its failure to provide notice and an opportunity to cure as Section 21 precludes any likelihood of success.

Moreover, Tenant's failure to object to Landlord's intended evidence constitutes a waiver of any objection. And, its delay in raising any concerns for ten months constitutes laches precluding any injunctive relief. For these reasons, and those stated in Landlord's prior briefing, Tenant's motion for a preliminary injunction should be denied.

II. STATEMENT OF FACTS

A. The Ground Lease Framework.

Tenant and Landlord are successors-in-interest to a 20-year ground lease dated August 8, 2002. (Ex. A, Ground Lease (the "Ground Lease").) Through the Ground Lease, Tenant leased from Landlord a 2.75-acre parcel of land located within the Green Valley Corporate Center in Henderson, Nevada. (*See generally id.*) The Ground Lease established various obligations upon both Landlord and Tenant, including a monthly rent schedule for the premises. (*Id.* §§ 4.1-4.3 ("Base Rent").)

In addition, the parties were obligated to provide notice "in the event either party [] fails or neglects to comply with and perform any term, covenant, condition or agreement . . . ." (*See* Ex. A, Ground Lease, § 21.) If a breach was declared, the Ground Lease mandates the allegedly breaching party be given thirty days to cure any alleged violation. (*Id.*)

Following the initial 20-year term, Tenant had "the right and option to extend th[e] Ground Lease" for a five-year extended term. (*Id.* § 3.3.1 (the "Option").)[1] If Tenant provided timely notice to exercise the Option, Landlord had to provide Tenant a good faith determination of the applicable Base Rent – expressed as the "prevailing market rate for the Premises" – for the upcoming extended term (the "PMR Determination"). (*Id.* §§ 3.3.3–3.3.4.) Landlord could have simply provided a number for its PMR; a full appraisal analysis was not required.

[1] With the exception of the Base Rent, all other terms, provisions, and covenants of the Ground Lease controlled during the extended term. (*Id.* § 3.3.3.)

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

If, within thirty days of Tenant receiving Landlord's PMR Determination, the parties were unable to agree upon the Base Rent/PMR, Tenant could nonetheless proceed with the Option and submit the PMR dispute to binding arbitration. (*Id.* § 3.3.3(a).) Section 3.3.4 governed the binding arbitration proceeding. (*Id.*)

Under this clause, three arbitrators would receive and evaluate the PMR Determinations prepared by Landlord and Tenant. Thereafter, the Appraisal Panel would conduct a binding arbitration and "select either Landlord's Determination or Tenant's Determination as the rent for the Premises." (*Id.* § 3.3.4.) The decision could be based, in part, comparison leases "***where possible***." (*Id.* § 3.3.3(b).) Leases need not be considered if there were not genuine "comparisons" or "comparables." (*Id.*) The decision of the Appraisal Panel would be "***final and binding upon the parties, and may be enforced in accordance with the provisions of Nevada law.***" (*Id.* (emphasis added)).

B. The Parties Submit to Binding Arbitration.

After Tenant timely exercised the Option to extend the Ground Lease, Landlord fulfilled its obligation to submit its PMR Determination by providing an appraisal analysis. Tenant ultimately disagreed with the Landlord's PMR Determination but ***did not object to the methodology or properties used as comparables***. Tenant did not claim that Landlord's PMR Determination breached the Ground Lease or was otherwise improper. ***Tenant did not serve a notice under Section 21*** claiming that the Landlord's appraisal or PMR Determination was a breach of the Ground Lease.

Instead, Tenant initiated the binding arbitration proceeding pursuant to Sections 3.3.3 and 3.3.4 of the Ground Lease. Landlord's and Tenant's PMR Determinations were provided to the arbitrators and the binding arbitration occurred on April 26, 2024. After the arbitration concluded, the Appraisal Panel began their deliberations and, about three weeks later, the Appraisal Panel rendered their decision – Landlord won by majority vote.

C. Tenant's Belated Declaration of "Breach" of the Ground Lease.

After losing at the arbitration, Tenant was obligated to pay the updated rent amount and reconcile any arrearages within ten business days of the decision. (*Id.* § 3.3.3(a).) Instead of paying

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

the amount due, Tenant rushed to court on the deadline for payment. Rather than properly seek to vacate the arbitration award under NRS Chapter 38, Tenant filed a breach of contract claim and request for injunctive relief, asserting that Landlord "breached" the Ground Lease by the *evidence* presented to the arbitration panel. (*See* Compl., May 30, 2024, *on file*; Pltf.'s App. for TRO and Mot. for Prelim. Inj., May 30, 2024, *on file* (the "Application"), at 14:13-15:1 ("Landlord breached the Lease by furnishing to Tenant and presenting to the Appraisal Panel a PMR determination that expressly violated the requirements of Section 3.3.3(b)"); *id.* at 16:12 ("Landlord further breached the Lease by tainting the agreed-upon resolution process").) Notably, this same evidence was provided to Tenant ten months prior, yet Tenant said nothing about any alleged breach.

III. ARGUMENT

In seeking extraordinary equitable relief from this Court, a plaintiff like Tenant must demonstrate: "(1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy." *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 408, 23 P.3d 243, 246 (2001); *see also Envtl. Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020) (noting "[l]ikelihood of success on the merits is a threshold inquiry and is the most important factor"). But Tenant has no chance of success on the merits of its breach of contract claim due to numerous procedural and factual deficiencies. Because Tenant itself failed to comply with Section 21 of the Ground Lease, Tenant is unable to show a likelihood of success on the merits of its claims. Tenant's noncompliance also constitutes a waiver and bars its claim under the doctrine of laches.

A. Tenant Cannot Satisfy the Elements of its Breach of Contract Claim.

Tenant's request for the preliminary injunction is based solely on its claim for breach of contract. (*See generally* Compl., on file.) For such a claim, Tenant is required to prove: "(1) the existence of a valid contract, ***(2) that the plaintiff performed***, (3) that the defendant breached, and (4) that the breach caused the plaintiff damages." *Iliescu, Tr. of John Iliescu, Jr. & Sonnia Iliescu 1992 Family Tr. v. Reg'l Transp. Comm'n of Washoe Cnty.*, 138 Nev. Adv. Op. 72, 522 P.3d 453, 458 (Nev. App. 2022) (emphasis added). Tenant did not perform and breached its own obligations

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

under the Ground Lease, so it cannot succeed on its breach of contract claim. These failures doom its request for injunctive relief from the outset.

Despite being aware of the information contained in Landlord's PMR determination for over ten months, Tenant failed to object to or dispute this methodology in any way. Section 21 of the Ground Lease obligates the parties to provide written notice "in the event either party [] fails or neglects to comply with and perform any term, covenant, condition or agreement . . . ." (*See* Ground Lease, § 21.) If a breach is declared, the allegedly breaching party is to be given thirty days to cure the breach. (*Id.*) Here, Tenant did not declare a breach when it received the appraisal from Landlord and saw the methodology and data Landlord intended to use. During the ten-month period between its receipt of Landlord's appraisal and the arbitration, Tenant also did not declare any breach. In fact, Tenant allowed Landlord to proceed with submitting its PMR Determination to the Appraisal Panel without protest before or during. Because Tenant did not abide by the requirements of the Ground Lease, it cannot succeed on its breach of contract claim against Landlord. And, absent any likelihood of success, Tenant cannot obtain injunctive relief from this Court.

B. Through its Delay, Tenant Waived its Breach of Contract Claim.

"A waiver is the intentional relinquishment of a known right." *Mahban v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 596, 691 P.2d 421, 423 (1984). Waiver can be implied from a party's conduct "which evidences an intention to waive a right, or by conduct which is inconsistent with any other intention than to waive the right." *Id.* To the extent Tenant possessed any enforceable rights under the Ground Lease in connection with Landlord's appraisal, those rights were waived by its failure to raise them prior to the arbitration proceeding. Much like an evidentiary objection, Tenant was required to *timely* raise its objections to Landlord's appraisal and the information contained therein. Tenant was not entitled to try its hand at arbitration and, if unsuccessful, assert it should be given a do-over for alleged errors it was aware of. Waiver prohibits such inconsistent conduct. Tenant did not protest the inclusion of Landlord's methodology or comparables nor comply with the Section 21 breach obligation. Instead, Tenant acted completely inconsistent with any intent to declare a breach under the Ground Lease. Tenant held Landlord's appraisal for over ten months, yet chose to move forward with the arbitration proceeding. Because Tenant's conduct

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

evidenced an intent to waive any alleged breach under the Ground Lease, Tenant's claim is barred and foreclosed

C. Tenant's Claim is Barred by the Doctrine of Laches.

Furthermore, Tenant's delay in bringing its breach of contract claim constitutes laches, prohibiting Tenant from succeeding on its claim and barring preliminary injunctive relief in this instance. "To determine whether a challenge is barred by the doctrine of laches, this court considers (1) whether the party inexcusably delayed bringing the challenge, (2) whether the party's inexcusable delay constitutes acquiescence to the condition the party is challenging, and (3) whether the inexcusable delay was prejudicial to others." *Miller v. Burk*, 124 Nev. 549, 598, 188 P.3d 1112, 1125 (2008). Courts have indicated the doctrine of laches bars a preliminary injunction when a party "acquiesce[s] or participate[s] in the arbitration, or test[s] the waters to gauge its chances of success in the arbitral proceeding." *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 132 (2d Cir. 2003).

Here, Tenant's conduct meets all of the conditions necessary to invoke the doctrine of laches. For example, Tenant's delay in challenging Landlord's appraisal was inexcusable, as Tenant had ***over ten months*** to review the contents of Landlord's report and declare a breach (to the extent it believed a breach occurred). When the Court previously asked why Tenant did not declare a breach under Section 21, Tenant merely responded: "I don't know." (Ex. B, Tr. of Hr'g on App. for TRO and Countermot. at 48:15–19.) Tenant's delay also constitutes acquiescence to challenged condition – *i.e.*, the validity of Landlord's appraisal and arbitrator's decision. The Court need not need assume whether Tenant acquiesced to the validity of Landlord's appraisal because Tenant explicitly conceded that Landlord's appraisal would be effective if the arbitrators agreed with Landlord. (Ex. C, Email from L. Kosters to C. Dunlap, et al., dated April 8, 2024, at 1 ("the rent increase will be applicable to March and April and the deficient in Rent will need to be cured.").)

Finally, the delay in announcing this breach was prejudicial to Landlord. Had Tenant properly and timely declared a breach, Landlord would have thirty days (afforded by contractual right) to review its appraisal and determine if revisions were necessary prior to incurring the significant expenditures associated with the arbitration proceeding. However, Tenant waited until

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

after the completion of the arbitration proceeding to initiate this litigation and "declare" a breach. This delay harms Landlord as it forecloses its bargained-for contractual remedies.

IV. CONCLUSION

For these reasons, Landlord respectfully requests the Court deny Tenant's Motion for Preliminary Injunction.

DATED this 13th day of August, 2024.

PISANELLI BICE PLLC

By: */s/ Jordan T. Smith*
Jordan T. Smith, Esq., #12097
Tyler W. Stevens, Esq., #16325
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Corporate Ctr. Restaurant, LLC

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC and that on this 13th day of August, 2024, I caused to be served via the Court's e-filing/e-service system true and correct copies of the above and foregoing **SUPPLEMENTAL BRIEF REGARDING NOTICE AND CURE** to all parties on the e-service list.

John S. Delikanakis, Esq.
Michaela G. Jones, Esq.
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway Suite 1100
Las Vegas, NV 89169
jdelikanakis@swlaw.com
mgjones@swlaw.com

/s/ Kimberly Peets
An employee of Pisanelli Bice PLLC

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

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Steven D. Grierson
CLERK OF THE COURT

Jordan T. Smith, Esq., Bar No. 12097
JTS@pisanellibice.com
Brianna Smith, Esq., Bar No. 11795
BGS@pisanellibice.com
Tyler W. Stevens, Esq., Bar No. 16325
TWS@pisanellibice.com
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Telephone: 702.214.2100
Facsimile: 702.214.2101

Attorneys for Corporate Ctr. Restaurant, LLC

EIGHTH JUDICIAL DISTRICT COURT

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14528 HENDERSON, LLC, a Nevada limited liability company, Plaintiff, v. CORPORATE CTR. RESTAURANT, LLC, a Nevada limited liability company, Defendant.	Case No.: A-24-894355-B Dept. No.: 31 **APPENDIX TO SUPPLEMENTAL BRIEF REGARDING NOTICE AND CURE**

Ex. No.	Description	Bates Nos.
A	Ground Lease by and between Green Valley Development Limited Partnership and Claim Jumper Associates, Ltd. dated August 8, 2002	001-074
B	Transcript of Hearing dated June 17, 2024	075-154
C	Email exchange between L. Kosters and C. Dunlap dated April 8, 2024	155-167

DATED this 13th day of August, 2024.

PISANELLI BICE PLLC

By: */s/ Jordan T. Smith*
Jordan T. Smith, Esq., #12097
Brianna Smith, Esq., #11795
Tyler W. Stevens, Esq., #16325
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Corporate Ctr. Restaurant, LLC

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

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I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC and that on this 13th day of August, 2024, I caused to be served via the Court's e-filing/e-service system true and correct copies of the above and foregoing **APPENDIX TO SUPPLEMENTAL BRIEF REGARDING NOTICE AND CURE** to all parties on the e-service list.

/s/ Kimberly Peets
An employee of Pisanelli Bice PLLC

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

EXHIBIT A

GROUND LEASE

by and between

GREEN VALLEY DEVELOPMENT LIMITED PARTNERSHIP,
a Nevada limited partnership,

as Landlord,

and

CLAIM JUMPER ASSOCIATES, ~~LLC.,~~ a+b
a California limited ~~liability company.~~ partnership

as Tenant

dated

~~THIS~~ 8-8-2002, **2002**

GROUND LEASE

by and between

GREEN VALLEY DEVELOPMENT LIMITED PARTNERSHIP,
a Nevada limited partnership,

as Landlord,

and

CLAIM JUMPER ASSOCIATES, ~~LLC.~~,
a California limited ~~liability company.~~ partnership

as Tenant

dated

~~This~~ **, 2002**
8/8/2002.

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CLAIM JUMPER 29, LTD.
GROUND LEASE

THIS GROUND LEASE (this "*Ground Lease*") is made this 8th day of August 2002, by and between **GREEN VALLEY DEVELOPMENT LIMITED PARTNERSHIP, a Nevada limited partnership and/or its assignee** ("*Landlord*") and **CLAIM JUMPER ASSOCIATES, ~~LLC.~~, a California limited ~~liability company~~ PARTNERSHIP** ("*Tenant*") with respect to the following facts:

SECTION 1
DEFINITIONS

1.1 ***Definitions.*** The following definitions shall pertain hereto:

1.1.1 **"*Additional Rent*"** shall mean charges payable by Tenant other than Base Rent (including without limitation, Common Area Operating Costs payable pursuant to Section 4.4).

1.1.2 **"*Adjacent Building*"** shall mean the building constructed on the Adjacent Parcel.

1.1.3 **"*Adjacent Parcel*"** shall mean the parcel or parcels on which the Adjacent Building and Adjacent Parking Area are to be constructed, as more fully depicted on **Exhibit A-5**, attached hereto and incorporated herein.

1.1.4 **"*Adjacent Parking Area*"** shall mean the portion of the Adjacent Parcel, as more fully depicted on **Exhibit A-5**.

1.1.5 **"*Aggregate Monthly Rent*"** shall mean Base Rent and all Additional Rent.

1.1.6 **"*Allowance*"** is defined in the Work Letter attached hereto as Exhibit E.

1.1.7 **"*Base Rent*"** shall mean the sum of Twenty-Nine Thousand One Hundred Sixty-Six and 67/00 Dollars ($29,166.67) per month during the first sixty (60) months of the Basic Term, which is equal to the sum of Three Hundred and Fifty Thousand and 00/00 Dollars ($350,000.00) per annum, subject to periodic increases pursuant to Section 4.3 below.

1.1.8 **"*Basic Term*"** shall mean the period of time commencing with the Commencement Date and continuing for a period of twenty (20) years; provided, however, that the term of Tenant's and Landlord's rights and obligations hereunder may be extended pursuant to Section 3.3.

1.1.9 **"*Building*"** shall refer to the structure to be constructed by Tenant, pursuant to Tenant's Work Letter, attached hereto and incorporated herein as **Exhibit E.**

1.1.10 **"*Commencement Date*"** shall refer to the earlier of: (i) two hundred ten (210) days after the issuance of a building permit for the Improvements to be constructed on the Land by Tenant, plus one (1) day for each day of delay in the completion of Tenant's Work or the opening of business from the Premises which is caused by a Landlord's Delay (defined below) or by Force Majeure; or (ii) the first day Tenant is opened for business to the public as a Claim Jumper style restaurant.

1.1.11 **"*Common Area*"** shall mean the parking lot(s), passageways and ramps, sidewalks, access roads, landscape, and planted areas which are located on the Land and/or within the business center commonly referred to as Green Valley Corporate Center (defined below), which Common Areas are designated, from time to time, by Landlord in its sole discretion for use by all tenants, their agents, employees, servants, contractors, subtenants, licensees, customers, and business invitees in common with Landlord and all others to whom Landlord has or may hereafter grant rights (collectively, the "*Common Areas*"), subject to such reasonable and non-discriminatory rules and regulations as Landlord may, from time to time, impose.

1.1.12 **"*Green Valley Corporate Center*"** shall mean the business center commonly referred

See attached

CLAIM JUMPER 29, LTD.
GROUND LEASE

THIS GROUND LEASE (this "*Ground Lease*") is made this 15th day of July 2002, by and between **GREEN VALLEY DEVELOPMENT LIMITED PARTNERSHIP, a Nevada limited partnership and/or its assignee** ("*Landlord*") and **CLAIM JUMPER ASSOCIATES, ~~LLC.~~ PARTNERSHIP, a California limited ~~liability company~~** ("*Tenant*") with respect to the following facts:

SECTION 1
DEFINITIONS

1.1 ***Definitions.*** The following definitions shall pertain hereto:

1.1.1 **"*Additional Rent*"** shall mean charges payable by Tenant other than Base Rent (including without limitation, Common Area Operating Costs payable pursuant to Section 4.4).

1.1.2 **"*Adjacent Building*"** shall mean the building constructed on the Adjacent Parcel.

1.1.3 **"*Adjacent Parcel*"** shall mean the parcel or parcels on which the Adjacent Building and Adjacent Parking Area are to be constructed, as more fully depicted on **Exhibit A-5**, attached hereto and incorporated herein.

1.1.4 **"*Adjacent Parking Area*"** shall mean the portion of the Adjacent Parcel, as more fully depicted on **Exhibit A-5**.

1.1.5 **"*Aggregate Monthly Rent*"** shall mean Base Rent and all Additional Rent.

1.1.6 **"*Allowance*"** is defined in the Work Letter attached hereto as Exhibit E.

1.1.7 **"*Base Rent*"** shall mean the sum of Twenty-Nine Thousand One Hundred Sixty-Six and 67/00 Dollars ($29,166.67) per month during the first sixty (60) months of the Basic Term, which is equal to the sum of Three Hundred and Fifty Thousand and 00/00 Dollars ($350,000.00) per annum, subject to periodic increases pursuant to Section 4.3 below.

1.1.8 **"*Basic Term*"** shall mean the period of time commencing with the Commencement Date and continuing for a period of twenty (20) years; provided, however, that the term of Tenant's and Landlord's rights and obligations hereunder may be extended pursuant to Section 3.3.

1.1.9 **"*Building*"** shall refer to the structure to be constructed by Tenant, pursuant to Tenant's Work Letter, attached hereto and incorporated herein as **Exhibit E.**

1.1.10 **"*Commencement Date*"** shall refer to the earlier of: (i) two hundred ten (210) days after the issuance of a building permit for the Improvements to be constructed on the Land by Tenant, plus one (1) day for each day of delay in the completion of Tenant's Work or the opening of business from the Premises which is caused by a Landlord's Delay (defined below) or by Force Majeure; or (ii) the first day Tenant is opened for business to the public as a Claim Jumper style restaurant.

1.1.11 **"*Common Area*"** shall mean the parking lot(s), passageways and ramps, sidewalks, access roads, landscape, and planted areas which are located on the Land and/or within the business center commonly referred to as Green Valley Corporate Center (defined below), which Common Areas are designated, from time to time, by Landlord in its sole discretion for use by all tenants, their agents, employees, servants, contractors, subtenants, licensees, customers, and business invitees in common with Landlord and all others to whom Landlord has or may hereafter grant rights (collectively, the "*Common Areas*"), subject to such reasonable and non-discriminatory rules and regulations as Landlord may, from time to time, impose.

1.1.12 **"*Green Valley Corporate Center*"** shall mean the business center commonly referred

Landlord's Initials Tenant's Initials

to as Green Valley Corporate Center, legally described in **Exhibit A-1** attached hereto and incorporated herein.

1.1.13 "***Improvements***" shall mean all buildings, structures, and improvements constructed upon the Land, during the Basic Term or any applicable Extension Term of this Ground Lease, and any restorations, additions to, or replacements thereof, but excluding therefrom the Land.

1.1.14 "***Land***" shall mean that certain real property located in Henderson, Nevada, as more fully described in **Exhibit A-2**,attached hereto and incorporated herein, and further depicted by cross-hatching on the Site Plan attached hereto as **Exhibit A-3**, and incorporated herein by reference. The Land is located within Green Valley Corporate Center. The Land is a part of a larger parcel of land owned by the Landlord and/or its affiliates within Green Valley Corporate Center. Landlord represents and warrants that upon the mutual execution of this Ground Lease it shall commence the process of creating a separate legal parcel comprising of the Land and shall diligently pursue same to completion. It is anticipated that the creation of the legal parcel should be accomplished within approximately sixty (60) days. The location and configuration of the legal parcel comprising the Land shall be as shown on **Exhibit A-3** and such location and configuration shall not be modified without Tenant's prior written consent.

1.1.15 "***Landlord's Delay***" shall mean any delay in Tenant's completion of the Tenant Improvements or Tenant's move-in into the Premises which is due to any act or omission of Landlord (wrongful, negligent or otherwise), its agents or contractors. The term Landlord's Delay shall include, but shall not be limited to any: (i) delay in the giving of authorizations or approvals by Landlord; and (ii) delay attributable to the acts or failures to act, whether willful, negligent or otherwise, of Landlord, its agents or contractors.

1.1.16 "***Law***" shall mean any applicable local, state and federal law, statute, ordinance, code, rule, regulation, requirement, license, permit, certificate, judgment, decree, order or direction of any governmental or quasi-governmental authority, agency, department, board, panel or court.

1.1.17 "***Lease Year***" shall mean each twelve (12) month calendar year, except that in the event the Commencement Date occurs on a date other than January 1, the first Lease Year hereunder shall be that fractional part of the calendar year from the Commencement Date to December 31 of the same year and the final Lease Year shall be that fractional part of the calendar year from January 1 to the expiration of this Lease.

1.1.18 "***Landlord's Maintenance Area***" shall refer to the Common Areas located within the Land, excepting therefrom those areas designated as Tenant's Maintenance Area, as is more fully elaborated in Section 1.1.21 and the Common Areas located within Green Valley Corporate Center.

1.1.19 "***Minimum Monthly Rent***" shall mean the one month of Base Rent.

1.1.20 "***Premises***" shall mean the Land and the Improvements.

1.1.21 "***Tenant's Maintenance Area***" shall mean the Building, the sidewalks adjacent to the Building, the trash enclosures and the landscaping adjacent to and abutting the Building, as more fully depicted in **Exhibit A-4**, attached hereto and incorporated herein.

1.1.22 "***Tenant's Share***" means: (i) with respect to the Premises, one hundred percent (100%); (ii) with respect to the landscape easement area ("*Landscape Area*") to be maintained by the Landlord pursuant to the Declarations, defined below, 3.229%, calculated based on a fraction of which the denominator is 85.02 acres (representing the Green Valley Corporate Center) and the numerator will be the acres comprising the Land, 2.745 acres; and (iii) with respect to the Adjacent Parking Area, 27.778%, calculated based on a fraction of which the denominator will be the total number of parking spaces allocated to the Adjacent Parking Area (342 spaces) and the numerator will be the number of parking spaces, within the Adjacent Parking Area, allocated to Tenant (95).

SECTION 2
LAND AND COMMON AREAS

2.1 ***Land and Common Areas.*** Upon the conditions, limitations, covenants, and agreements herein set forth, Landlord hereby leases to Tenant, and Tenant hereby accepts, hires, and leases from Landlord the Land, together with the non-exclusive right, which Landlord has granted in common with all others, to use the Common Areas located within Green Valley Corporate Center. In the event that the Common Areas located within Green Valley Corporate Center are modified, such modification(s) shall not: (i) require Tenant to expend money or to take action to make any alterations, additions, improvements, or replacements to implement the modifications, without Tenant's prior written consent; (ii) unreasonably interfere with, or materially impact Tenant's use and enjoyment of, and/or access to the Premises and/or the Adjacent Parking Area; or (iii) reduce Tenant's Parking Allotment. With respect to any site improvements made by Landlord, or an affiliate of Landlord's, to the Land and/or improvements and/or modifications made the Common Areas that abut the Land, Tenant shall have the right to approve such improvements and/or modifications, which approval shall not be unreasonably withheld, delayed, or conditioned.

2.2 ***Conditions, Covenants, and Restrictions.*** Green Valley Corporate Center is subject to those certain Declaration of Covenants, Conditions, and Restrictions recorded on January 25, 1996, in Book 960125, as Instrument No. 01410 and Declaration of Covenants, Conditions, and Restrictions recorded on January 25, 1996, in Book 960125, as Instrument No. 01411, as might be so further amended from or supplemented from time to time, including all utility capacities allocated or reserved to the Land, any right, title, and interest of Landlord in and to the adjacent streets, alleys and right-of-ways, and any adjacent strips or gores of real estate (collectively the "*Declarations*"). The Declarations are enforced and implemented in part by the Green Valley Corporate Center Commercial Association, Inc., a Nevada non-profit corporation (the "*Association*"). Landlord, as an owner under the Declarations, hereby represents to abide by the terms and conditions of the Declarations and agrees to cause the Declarant to abide by the terms and conditions of the Declarations, to the extent that same directly relates to Tenant's use and access to the Premises and/or the Adjacent Parking Area.

2.2.1 ***Modification of Recorded Documents.*** Landlord may consent to modifications of the Declarations regarding Green Valley Corporate Center, without written notification to and approval of Tenant; but in no event shall such modification(s): (i) unreasonably interfere with, or materially impact Tenant's use and enjoyment of, and/or access to the Premises and/or the Adjacent Parking Area; (iii) reduce Tenant's Parking Allotment; (iv) restrict the permitted use of the Premises, as more fully set forth in Section 5; or (v) result in a material increase in Tenant's pro-rata share of Common Area Operating Costs for the Land, Adjacent Parking Area, or any other costs which Tenant would be obligated to pay pursuant to this Lease or pay directly. Tenant agrees that this Ground Lease shall be subordinate to the Declarations, and any approved amendments or supplements thereto.

2.3 ***Title Policy.*** Within twenty (20) days of the mutual execution of this Ground Lease, Landlord shall cause Nevada Title Company (the "*Title Company*")to issue, at Landlord's expense, a Commitment for Title Insurance (the "*Title Commitment*") covering the Land and showing all matters affecting title to the Land, and binding the Title Company to issue to Tenant a title commitment insurance policy (the "*Title Policy*") insuring that fee title to the Land are vested in Landlord and that Tenant has a valid leasehold estate in the Premises, in a form and subject only to such special exceptions as Tenant shall reasonably approve in writing.

2.3.1 ***Objections to Title Commitment.*** Tenant shall have the right to approve or disapprove all matters revealed in the Title Commitment. If Tenant objects to any special exceptions, Tenant shall submit such objections to Landlord in writing no later than five (5) business days following the receipt of the Title Commitment. If Tenant timely objects to a matter revealed in the Title Commitment, Landlord shall have thirty (30) days following receipt of said notice within which to cure such objections. If Landlord has not cured any such objection within such period, then, in such event, Tenant shall, at its option, either (i) terminate this Ground Lease by written notice to Landlord and receive immediate return of any monies paid to Landlord, or (ii) Tenant may

waive any such objection and the Ground Lease shall remain effective, as provided herein without reduction in Rent. If such objections are not served on Landlord within the time so provided, Tenant shall be deemed to have approved the Title Commitment and to have agreed to accept title to the Land in the condition described therein.

2.4 ***Representations of Landlord.*** Landlord represents and warrants to Tenant the following: (i) that it will or has obtained all permits, approvals and licenses required for the construction of the Landlord's Work pursuant to Section 6.1 below; (ii) that the Land is zoned for Community Commercial ("*CC*"), which permits the operation of a restaurant; (iii) that as of the date hereof the Landlord is in compliance with the Declarations; and (iv) that Tenant shall not be financially or otherwise responsible for any off-site work, excepting therefrom those resulting from any Tenant Improvements constructed or to be constructed by Tenant, and Landlord hereby represents and warrants to indemnify and hold Tenant harmless for the cost of any such off-site work, subject to Tenant notifying Landlord, in writing, of said off-site work prior to Tenant having incurred any such costs.

2.5 ***Record Memorandum of Lease.*** Each of the parties hereto will, promptly upon request of the other, execute a memorandum of this Lease in form substantially similar to **Exhibit F**, attached hereto, suitable for recording, in the official records of the county in which the Land is located, setting forth the names of the parties hereto and the term of this Lease, identifying the Premises, and also including such other clauses therein as either party may desire, except the amounts of Rent payable hereunder.

SECTION 3
TERM

3.1 ***Basic Term.*** In the event that the Commencement Date is not the first day of a calendar month, the Basic Term shall be for the aforesaid length of time plus the period between the Commencement Date and the first day of the next-succeeding calendar month. At such time as the Commencement Date shall have been established, Landlord and Tenant shall execute a memorandum confirming said date, in a form substantially similar to **Exhibit B**, attached hereto and incorporated herein.

3.2 ***Holdover.*** If Tenant holds possession of the Premises after the expiration of the Basic Term or any applicable Extension Term, as hereinafter defined, such holding over shall create a tenancy from month-to-month only, upon the same terms and conditions as are herein set forth, except that Minimum Monthly Rent shall be one hundred and percent (150%) of the Minimum Monthly Rent as of the expiration thereof.

3.3 ***Option to Extend.*** Provided no Event of Default exists and remains uncured at the time any Notice of Election to Extend is given, as required below, and on the commencement date of any extension granted hereby, Tenant shall have the right and option to extend the Basic Term of this Ground Lease ("*Option to Extend*").

3.3.1 ***Extension Term.*** Tenant shall have the right and option to extend this Ground Lease for four (4) consecutive terms of five (5) years each (hereinafter referred to as the "*Extension Term(s)*"). The initial Extension Term shall commence at the expiration of the Basic Term and the subsequent Extension Terms shall commence at the expiration of any applicable Extension Term(s).

3.3.2 ***Notice to Exercise Extension Term.*** The election to exercise the Option to Extend shall be exercised, if at all, at least nine (9) months prior to the date of commencement of the applicable Extension Term(s) (the "*Notice of Election to Extend*").

3.3.3 ***Adjustment of Base Rent.*** Each Extension Term(s) shall be on the same terms, covenants, and conditions as provided for herein for the Basic Term, except that Base Rent shall be determined in accordance with this Section. Base Rent payable by Tenant during any Extension Term(s) shall be equal to the prevailing market rate for the Premises ("*PMR*"), as defined below, as of the commencement date of the applicable Extension Term.

a. Within thirty (30) days following Landlord's receipt of a Notice of Election to Extend, in compliance with Section 3.3, the Landlord shall furnish Tenant with Landlord's good faith determination of the PMR for the Premises for the applicable Extension Term ("*Landlord's Determination*"). If Landlord and Tenant are unable to agree upon the PMR for the Premises for the Extension Term, within thirty (30) days following Tenant's receipt of Landlord's Determination, Tenant may: (i) proceed with the exercise of its Option to Extend, in which case the determination of the PMR for the Premises for the applicable Extension Term shall be submitted to an Appraisal Panel in accordance with the procedures set forth in Section 3.3.4 below; or (ii) elect not to proceed with its exercise of its Option to Extend, in which case Tenant's rights under this Lease shall expire at the end of the current Term. Until the matter is resolved by agreement between the parties or a decision is rendered by the Appraisal Panel commenced pursuant to this Section, Tenant's monthly payments of Base Rent shall be in an amount equal to the average of Landlord's Determination and Tenant's Determination, as defined below. Within ten (10) business days following the resolution of such dispute by the parties or the decision of the arbitrators, as applicable, Tenant shall pay the Landlord, or Landlord shall pay the Tenant (or, at Tenant's election, Tenant may offset the excess against amounts next coming due), the amount of any deficiency or excess, as the case may be, in the Base Rent theretofore paid.

b. As used herein, the term "*PMR*" shall mean the average annual rental, expressed as a rate per square foot, inclusive of percentage rent, which a willing, comparable, non-equity tenant would pay for comparable use of land, and that a willing landlord, exercising reasonable business judgment, would accept, at arms-length for comparable use of land, in a comparable business park environment and/or retail corridor within Las Vegas, Nevada, as evidenced where possible, by leases that commence or are to commence on or about the commencement of the applicable Extension Term ("*Comparison Leases*"), adjusted to account for variations between this Ground Lease and the Comparison Leases with respect to all relevant terms and conditions, including, without limitation, the brokerage commissions, and tenant improvements or tenant allowances, and the relative credit worthiness, and financial strength of Tenant as compared to the tenants under Comparison Leases.

3.3.4 ***Appraisal Panel.*** If the determination of the PMR for the Premises for an Extension Term is submitted to an Appraisal Panel as provided in this Section, then within fifteen (15) days thereafter, Tenant shall deliver to Landlord its good faith estimate of the PMR for the Premises for the applicable Extension Term ("*Tenant's Determination*"). Landlord and Tenant agree to be bound by the Landlord's Determination and Tenant's Determination, respectively, and such determinations shall establish the only two (2) choices available to the Appraisal Panel, as hereinafter defined. Within ten (10) days after delivery to Landlord of Tenant's Determination, the parties shall each appoint an arbitrator who shall be a licensed real estate broker (who shall not be paid a commission) with at least five (5) years experience in the leasing of retail space in the vicinity of the Premises and be familiar with the rentals then being charged for comparable retail use. The parties may appoint the real estate brokers who assisted them in making their determinations as their respective arbitrators. If either Landlord or Tenant fails to appoint an arbitrator, then the PMR for the Premises for the applicable Extension Term shall be the determination of the other party. Within fifteen (15) days following their appointment, the two (2) arbitrators so selected shall appoint a third (3rd) similarly qualified, independent arbitrator who has not had any prior business relationship with either party (the "*Independent Arbitrator*"). If an Independent Arbitrator has not been so selected by the end of such fifteen (15) day period, then either party, on behalf of both, may request such appointment by the local Office of the Clark County Association of Realtors or the American Arbitration Association (or any successor thereto), or in the absence, failure, refusal, or inability of either of such entities to act, then either party may apply to the presiding judge of the District Court in Clark County, Nevada. Within five (5) days following notification of the identity of the Independent Arbitrator so appointed, Landlord and Tenant shall submit copies of Landlord's Determination and Tenant's Determination to the three arbitrators (the "*Appraisal Panel*"). The Appraisal Panel shall conduct a hearing, at which Landlord and Tenant may each make supplemental oral and/or written presentations, with an opportunity for rebuttal by the other party and for questioning by the members of the Appraisal Panel, if they so wish. Within a reasonable time following the hearing, the Appraisal Panel, by majority vote, shall select either Landlord's Determination or Tenant's Determination as the rent for the Premises, and shall have no right to

propose a middle ground or to modify either of the two proposals or the provisions of this Lease. The Appraisal Panel shall attempt to render a decision within fifteen (15) business days after appointment, but in any case, the Appraisal Panel shall render a decision within forty-five (45) days after its appointment. The decision of the Appraisal Panel shall be final and binding upon the parties, and may be enforced in accordance with the provisions of Nevada law. In the event of a failure, refusal, or inability of any number of the Appraisal Panel to act, a successor shall be appointed in the manner that applied to the selection of the member being replaced. Each party shall pay the fees and expenses of the arbitrator designated by such party and one-half of the fees and expenses of the Independent Arbitrator and the expenses incident to the proceedings (excluding attorneys' fees and similar expenses of the parties which shall be born separately by each of the parties). Notwithstanding anything contained herein to the contrary, in the event that the parties hereto cannot agree on a PMR and the discrepancy between Landlord's Determination and Tenant's Determination regarding the PMR for the Premises is five percent (5%) or less, the parties may either: (i) average the discrepancy between Landlord's Determination and Tenant's Determination; or (ii) proceed to an Appraisal Panel as outlined above. In the event that either party elects to proceed to an Appraisal Panel, under the circumstances outlined in the preceding sentence, the electing party shall bear and pay directly, the entire cost for fees and expenses of all arbitrators designated by the non-electing party, for the Independent Arbitrator and all expenses incident to the proceedings (inclusive of reasonable attorneys' fees).

3.3.5 ***Termination of Option to Extend.*** The Option to Extend shall automatically terminate and become null and void upon the earlier to occur of: (i) the termination of Tenant's right to possession of the Premises; (ii) the assignment by Tenant of this Ground Lease, in whole or in part, excepting therefrom to Permitted Assignees; (iii) the recapture by Landlord of all of the Premises as set forth in Section 20; or (iv) the failure of Tenant to timely or properly exercise the Option to Extend.

SECTION 4
RENT

4.1 ***Rent Commencement.*** Tenant shall begin to pay Aggregate Monthly Rent on the Commencement Date, payable in advance, at the address of the Landlord set forth in this Ground Lease, unless the Landlord designates another address in writing in accordance with this Ground Lease. If the Commencement Date is a day other than the first day of a calendar month, Tenant shall pay on the first day of the subsequent calendar month, an amount equal to a pro-rata portion of the monthly rent, pro-rated on the basis of the number of days from the Commencement Date to the end of the month in which the Commencement Date occurs.

4.2 ***Minimum Monthly Rent.*** Concurrent with the execution of this Ground Lease, Tenant shall deliver to Landlord the sum of Twenty-Nine Thousand One Hundred Sixty-Six and 67/00 Dollars ($29,166.67), representing Tenant's first (1st) month's rental obligation hereunder.

4.3 ***Base Rent Increases.*** Base Rent shall be increased as follows:

i. From month 61 (2068) of the Basic Term through month 120 of the Basic Term, Base Rent shall be equal to the sum of $32,083.33 per month, which is equal to the sum of $385,000.00 per annum;

ii. From month 121 (2013) of the Basic Term through month 180 of the Basic Term, Base Rent shall be equal to the sum of $35,291.67, which is equal to the sum of $423,500.00 per annum; and

iii. From month 181 (2018) of the Basic Term through month 240 of the Basic Term, Base Rent shall be equal to the sum of $38,820.83, which is equal to the sum of $465,850.00 per annum.

4.4 ***Additional Rent.*** In addition to Base Rent, Tenant shall pay to Landlord, at the time and in the manner herein set forth, the following Additional Rent, such Additional Rent shall be an

obligation of the Tenant commencing on the Commencement Date of the Basic Term:

4.4.1 ***Tenant's Share of Common Area Operating Costs.*** Landlord shall estimate the initial Lease Year's Common Area Operating Costs, as that term is more fully defined below, and shall notify Tenant, in writing, on or about the Commencement Date and within one hundred and twenty (120) days after the beginning of each successive Lease Year of Tenant's Share of Common Area Operating Costs, applying the current Lease Year's estimated Common Area Operating Costs ("*Estimated Tenant's Share*"). The Estimated Tenant's Share shall be pro-rated on a monthly basis for the applicable Lease Year, and such pro-rated amount (i.e., one-twelfth of the Estimated Tenant's Share for the subject Lease Year) shall be remitted by Tenant, in advance, commencing on the Commencement Date, and continuing on the first day of each month thereafter, without further demand or any deduction or setoff, except as may otherwise be provided in this Lease. Until such time as Landlord notifies Tenant of the current Lease Year's Estimated Tenant's Share, Tenant shall continue to pay the Estimated Tenant's Share for the previous Lease Year.

4.4.2 ***Notification of Common Area Operating Costs.*** Within one hundred and twenty (120) days following the end of each Lease Year, Landlord will ascertain the actual Common Area Operating Costs for the current Lease Year then ending, and shall compute the difference thereof from the Estimated Tenant's Share paid by Tenant for the applicable Lease Year. Landlord shall notify Tenant, in writing, within said one hundred and twenty (120) day period of such difference, if any (the "*Statement*"). In no event, however, shall failure to deliver the Statement within said one hundred and twenty (120) day period prevent Landlord from collecting the difference, if any, from Tenant. Notwithstanding the foregoing, Landlord's right to collect said difference shall terminate on the second (2nd) anniversary of the end of the subject Lease Year, except with respect to the last Lease Year, with respect to which Landlord's right to collect said difference shall terminate six (6) months following the expiration date of the Ground Lease Term. Tenant shall pay to Landlord, within thirty (30) days following receipt of the Statement, the amount, if any, due to Landlord (inclusive of the last year of the Basic Term or any applicable Extension Term). In the event that the Statement reflects an amount due to Tenant, then same shall be credited and applied to the next monthly payment of Base Rent and Additional Rent (and any other amounts payable by Tenant to Landlord pursuant to this Lease), until such amount has been fully exhausted, provided that in the last year of the Basic Term or any applicable Extension Term, any excess shall be refunded to Tenant concurrently with Landlord's delivery of the Statement, or any shortfall shall be paid by Tenant within thirty (30) days of its receipt of the Statement. In no event shall Landlord or Tenant be entitled to receive interest on any amounts due to the respective party as shown on the Statement. The obligation of Tenant to pay Landlord Tenant's Pro-Rata Portion of the Common Area Operating Costs, or Landlord's obligation to refund any excess paid by Tenant shall survive the early termination or expiration of this Ground Lease. In addition to the Common Area Operating Costs of the Land, Tenant shall remit to Landlord its pro-rata share of the Common Area Operating Costs for the Adjacent Parking Area, as more fully elaborated in Section 1.1.22. Notwithstanding anything contained herein to the contrary, any increases in Common Area Operating Costs shall not exceed five percent (5%) compounded annually following the initial Lease Year, for a period of five (5) years, excluding therefrom utility and janitorial services provided to the Common Areas of the Property, Impositions and insurance for the Property (the "*Cap*"). Commencing as of the sixth (6th) year of the Lease Term, Common Area Operating Costs shall no longer be subject to the Cap.

4.4.3 ***"Common Area Operating Costs"*** shall mean the total cost and expense incurred, during each Lease Year, in managing, operating, equipping, lighting, repairing, replacing and maintaining the Landlord's Maintenance Area, as well as any owners association's common area assessments which are established and which are allocable to the Land as reasonably determined by the Landlord, annualized over a Lease Year. Such operating and maintenance costs shall include all costs and expenses of operating and maintaining such areas and facilities in such manner as Landlord may, from time to time, deem appropriate and for the purpose of enhancing and protecting the value, attractiveness, and desirability of Landlord's Maintenance Area, and each part thereof, including, without limitation, all Impositions, to the extent such Impositions, as that term is defined below, pertain to the Common Areas of Green Valley Corporate Center, providing private police protection, security patrol, or night watchmen (including, but not limited to uniforms), fire protection, labor compensation insurance, payroll taxes, materials, supplies, and all other costs of operating and

repairing, lighting, cleaning, sweeping, painting, striping, removing of rubbish or debris, policing and inspecting, depreciation on or rentals of machinery and equipment, all utility expenses not separately metered, Landlord's insurance including fire and extended coverage, liability, property damage, rent loss, vandalism, malicious mischief, insurance against liability for defamation and claims of false arrest, and such other insurance in such amounts, and covering hazards deemed reasonable appropriate by Landlord, fidelity bonds, and all costs of repairs, maintenance, or replacement of paving, curbs, walkways, remarking, directional or other signs, landscaping, drainage, lighting facilities, repair and maintenance of the parking areas, costs and expenses of planting, replanting and replacing flowers, shrubbery and other landscaping, and the cost to Landlord of servicing and maintaining any sprinkler system, all as they relate to the Landlord's Maintenance Area. There shall also be included in the cost of leasing and operating the Premises an administrative fee not to exceed fifteen percent (15%) of the direct Common Area Operating Costs, which fee shall be payable to Landlord or to any other entity which is managing or administering the Premises.

4.4.4 ***Common Area Operating Costs Exclusions.*** Notwithstanding anything contained herein to the contrary, Tenant shall not be obligated to pay any of the following and Common Area Operating Costs shall not include any expenditures by Landlord in connection with:

a. capital costs, improvements, alterations and/or replacements to any part of the Premises, the Adjacent Parcel, or Common Areas within Green Valley Corporate Center, which shall include without limitation any cost or expense which, in accordance with generally accepted accounting principles, is not fully chargeable to current expenses in the year in which the cost or expense is incurred;

b. costs incurred by Landlord for goods, services, repairs, replacements and/or restoration to or of the Green Valley Corporate Center to the extent that Landlord is reimbursed by insurance or condemnation proceeds or by Tenant, other tenants, warrantors, or other third persons;

c. costs, including permits, licenses and inspection costs, incurred with respect to the installation of a tenant or other occupants' improvements to the Premises or Green Valley Corporate Center or incurred in renovating or otherwise improving, decorating, painting or redecorating vacant space for another tenant or other occupants of the Premises or Green Valley Corporate Center;

d. leasing commissions, attorneys' and other professional fees, advertising expenses and other costs incurred in leasing or attempting to lease space in the Green Valley Corporate Center, including without limitation the negotiation and preparation of letters, deal memos, letters of intent, leases, subleases and/or assignments, space planning costs, and other costs and expenses incurred in connection with lease, sublease and/or assignment negotiations and transactions with present or prospective tenants or other occupants of the Premises or Green Valley Corporate Center;

e. costs incurred by Landlord, due to the violation by Landlord or any tenant of the terms and conditions of any lease of space in the Premises or Green Valley Corporate Center;

f. interest, principal, points and fees or other amounts due with respect to debts or amortization of any mortgage or mortgages or any other debt instrument encumbering the Premises or of Green Valley Corporate Center;

g. Landlord's general corporate overhead and general and administrative expenses;

h. costs of other tenants' signs or any pylon or monument signs;

i. tax penalties incurred as a result of Landlord's negligence, inability or