2017 Business Law Institute

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STATE BAR of NEW MEXICO
CENTER FOR LEGAL EDUCATION

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Presenter Biographies

Presenter Biographies

Shavon M. Ayala, Esq. is the sole-shareholder of Ayala P.C., a law practice that serves the entrepreneurial and nonprofit communities, focusing on Business Law with an emphasis on Entity, Contract, Tax, and IP issues. She especially values working with tech-based and socially conscious companies. She volunteers regularly as an attorney, and generally, and is involved in a number of community projects and local nonprofits. Ayala aims to foster social enterprise, community development, and economic growth through service to her clients and within the community.

Julia Broggi, an Associate at Holland & Hart, LLP, has both trial-level and appellate litigation experience in a wide range of civil matters before state and federal courts. She practices primarily in the areas of commercial litigation, oil and gas law, employment law, and personal injury defense. She has successfully obtained dismissal of cases on dispositive motion and appealed matters to the New Mexico Court of Appeals. Broggi maintains an active pro bono practice and is a member of the Federal Court Pro Bono Panel She also serves on the Board of Directors for Court Appointed Special Advocates, First Judicial (CASA).

Anne P. Browne is a shareholder in the law firm of Sutin, Thayer & Browne A Professional Corporation. She practices primarily in the areas of real estate and banking law. She advises local, regional and national clients in the acquisition, development, sale, and leasing of commercial and residential properties. She represents lenders in structuring, negotiating and documenting commercial real estate and asset based loans. She also has significant experience in loan workouts, particularly in complex forbearance agreement and deed-in-lieu transactions. She also frequently acts as local counsel in multistate loan transactions. Before joining Sutin, Thayer & Browne she was Vice President and General Counsel at The First National Bank in Albuquerque.

John P. (Jack) Burton has a multi-disciplined practice involving transactions, alternative dispute resolution, and litigation in federal and state courts. Burton's practice involves business, real property, and personal property, including financings. He deals with the UCC and has participated in its revisions. Burton has helped obtain enactment of more than 40 uniform law bills as a public service. He has practiced with the Rodey Law Firm since graduating from law school in 1968. He is a full-time director/shareholder. Burton is a Uniform Law Commissioner and a member of the American Law Institute. He is author of the New Mexico Commercial Lending Law chapter in Commercial Lending Law: A Jurisdiction-by-Jurisdiction Guide (ABA 2d ed. 2016). Burton was named Business Lawyer of the Year in 2004 by the State Bar Association's Business Law Section. He is listed by Best Lawyers in America in Banking and Finance Law and other areas.

Bruce Castle, in his over thirty years of private practice in New Mexico, has represented a wide variety of clients in major commercial real estate transactions including multi-million dollar sales, purchases, 1031 tax-exempt exchanges, leasing transactions, and financings, both conventional and tax-exempt. He has authored numerous opinions on all aspects of commercial real estate transactions and published nationally on unique aspects of real estate development and finance. Castle has been a speaker at the Business Law Institute and the Real Property Institute in New Mexico on a variety of corporate and real estate topics. Castle has a broad commercial real estate practice. He is a primary real estate counsel for a major international wireless communications company in its nationwide operations. He also has hands-on experience in major mixed-use, master planned developments. He frequently represents real estate developers. He has worked extensively on governmental aspects of real estate development, including industrial revenue bonds, public improvement districts and other governmental financing vehicles, both on behalf of developers and governmental agencies. From 2002-2009, Castle served as General Counsel for two large, Albuquerque-based businesses. He was Vice President, General Counsel and Secretary of SBS Technologies, Inc. (and a division of GE as its successor by acquisition), a NASDAQ-listed company with worldwide operations. More recently, Castle was Vice President and General Counsel of Eclipse Aviation Corporation, a ground-breaking jet aircraft manufacturer that raised more than $1 billion in a series of complex debt, equity and industrial revenue bond transactions. After the dramatic demise of Eclipse, Castle returned to private practice.

Mark Fidel, co-founder of RiskSense, Inc, is responsible for advocating and growing RiskSense in the State of New Mexico, where RiskSense was founded and remains headquartered. He is also responsible for corporate development, including all company contracts and third-party partnerships, ensuring alignment within the market. Fidel is also a licensed New Mexico attorney, and brings more than 14 years experience in law and litigation. Fidel began his career selling commercial insurance, before holding a series of financial positions at the New Mexico Institute of Mining and Technology as well as Intel Corporation. Fidel was admitted to the New Mexico Bar in 2002 and became an associate at one of New Mexico's largest law firms, Modrall Sperling, where he specialized in commercial litigation. Fidel is a former litigator, who founded Applied Records Management (ARM) in 2004. ARM is a records management and litigation support consulting firm. Fidel holds a Bachelor of Arts and Economics degree with a major in Finance from New Mexico State University. He earned an Executive Master of Business Administration from the University of New Mexico and his law degree from the University of Denver. Former Board Member and Chair of the St. Martin's Hospitality Center Board of Directors, Former Board Member, Vice-Chair and Chair of the Law Access New Mexico Board of Directors.

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Stephen B. Waller is a solo practitioner and a member of the Board of Directors of the Business Law Section. He previously practiced with Miller Stratvert P.A. in Albuquerque and Foley & Lardner LLP in Milwaukee. While attending Harvard Law School, he was a member of the Harvard Law Review and served as editor of The Bluebook. Prior to entering the legal profession, he served as a nuclear-trained U.S. Navy submarine officer and obtained his M.B.A. from the University of Minnesota-Twin Cities.

Little V. West, Of Counsel at Holland & Hart, LLP, counsels new and established businesses on development and implementation of best practices to comply with labor and employment laws and regulations. When issues evolve into disputes before administrative agencies or courts, Little effectively guides clients through dispute resolution or litigation. Clients benefit from Little's previous experience representing employees, allowing him to understand the other side and predict how situations may play out. Little has experience representing health care providers, particularly with matters involving allegations of drug use, testing, and retaliation. Prior to joining Holland & Hart, Little was an associate at a Santa Fe based law firm. Before beginning to practice, he clerked for the Hon. Terrance L. O'Brien of the United States Court of Appeals for the Tenth Circuit and the Hon. Bruce D. Black of the United States District Court for the District of New Mexico.

Helping Your Non-Target/Non-Party Client Respond to Criminal Investigations or Civil Subpoenas

Helping Your Non-Party Client Respond to a Civil Subpoena

Stephen B. Waller

November 16, 2017

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Two general types of civil subpoenas

- Production or inspection or documents or premises
- Deposition of non-party witnesses

2

Examples regarding your client ABC

- Home Purchaser sues Home Seller, alleging failure to disclose pre-existing damage to the subject property. ABC previously performed repairs to that property.
  - Home Purchaser subpoenas ABC for documents relating to the property.
  - Home Purchaser subpoenas the deposition of an ABC representative.

3

- Property Owner alleges that Property Management Co. failed to make required payments to Property Owner. ABC provided accounting services to Property Management Co.
  - Property Owner subpoenas ABC for documents relating to its management of the subject property.
  - Property Owner subpoenas ABC for copies of Property Management Co.'s tax returns for the past ten years.
  - Property Owner subpoenas the deposition of an ABC representative.

4

- Plaintiff sues Defendant for personal injuries. ABC provided medical treatment to Plaintiff prior to the alleged injuries.
  - Defendant subpoenas ABC for its pre- and post-injury records regarding Plaintiff.
  - Defendant subpoenas the deposition of a representative of ABC (such as Plaintiff's treating physician).

5

- Plaintiff and Defendant are set for trial.
- An ABC employee is a recognized expert in the relevant field.
- Plaintiff subpoenas that ABC employee to testify at trial.

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- Plaintiff and Defendant are litigating a contract dispute.
- ABC is in the same industry and has contracts with ABC's own clients.
- Defendant subpoenas ABC for copies of ABC's own contracts, to obtain evidence of what contract terms of reasonable in the industry.

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Applicable Rules

- NMRA
  - District Court
    - Rule 1-045 – Subpoenas
    - Rule 1-045.1 – Interstate Subpoenas
  - Magistrate Court - Rule 2-502
  - Metropolitan Court – Rule 3-502
- FRCP 45 - Subpoenas

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Why must a non-party comply with a subpoena?

- Rule 1-045(E): "Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. . . ."
- *State v. Klempt*, 1996-NMCA-004 (affirming order of criminal contempt for failure to comply with an "on-call" subpoena for trial testimony)

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Key Questions when ABC receives a subpoena

- When was the subpoena served on ABC?
  - Service date is key for calculating the following:
    - Expiration of New Mexico's required 14-day waiting period.**
    - Deadline to serve objections (or else they are waived)
    - Deadline to file motion to quash or motion for protective order
- Is ABC a potential future defendant?
- Clients should bring any subpoenas or other legal process to your immediate attention.

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Wait 14 days before responding

- Rule 1-045(C)(2)(a)(ii) requires that the recipient of a subpoena (for production or inspection) wait at least 14 days before responding.
  - A court order can shorten the waiting period.
  - However, any agreement of counsel regarding extension of Rule-imposed deadlines may not be binding on the court.
- If any objections or motions to quash are served on the subpoena-recipient, the production or inspection must be withheld.

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Was the subpoena properly issued?

- A civil subpoena must identify the case title, case number, and court where the action is pending. [Rule 1-045(A)(1)]
- A civil subpoena can only be issued in a pending case.
  - *Matter of Chavez*, 2017-NMSC-012, ¶ 15
- A subpoena can be issued by a court or attorney, but not by a pro se party.
  - *U.S. v. Meredith*, 182 F.3d 934 (1999) (unpublished)
- A New Mexico state subpoena is required to be in a form approved by the New Mexico Supreme Court.

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Is there jurisdiction over your client?

- If a subpoena is issued by a state court outside New Mexico, that court does not *necessarily* have jurisdiction over the recipient.
  - If ABC does not have any contacts with the foreign jurisdiction, a subpoena to ABC may be valid only if the subpoena has been domesticated (and reissued by a New Mexico court) pursuant to Rule 1-045.1, Interstate Subpoenas.
  - If ABC has contacts with the foreign jurisdiction, further analysis may be needed.
- Under FRCP 45(a)(2) as amended in 2013, a federal subpoena can be served nationwide.
  - However, FRCP 45(d)(3) provides that motions to quash a subpoena can be brought in the District where compliance is required.

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Should ABC notify its customer/client regarding the subpoena?

- Absent a court order, there is no prohibition on disclosure of receipt of a civil subpoena.
- Rule 1-045(C)(2)(b)(1) NMRA allows "a person who has a legal interest in" the material to file an objection or motion to quash.
- Depending on the relationship (if any) between ABC and its current or former customer/client, it may be prudent to notify the customer/client regarding ABC's receipt of the subpoena.
  - Timely notification will support ABC's position that ABC acted promptly to enable the customer/client to timely assert its own legal rights.

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Informal resolution of initial concerns

- The issuer and recipient of a subpoena for production/inspection can agree to:
  - Extend the deadline for production/inspection.
  - Time and place of production/inspection.
  - Narrow the scope of the subpoena.
- Written confirmation is recommended.
- Be careful not to disclose too much information about documents and materials in the recipient's possession.

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Caution when seeking extension of Rule-imposed deadlines

- An agreement (between issuer and recipient) regarding extension of Rule-imposed deadlines may not be binding on the court.
  - FRCP 45(d)(2)(B) states that "[t]he objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served."
  - Form 4-505A NMRA provides that a production/inspection subpoena recipient has until "fourteen (14) days after service of the subpoena[.]"
- What to do instead of requesting an extension?
  - Request formal withdrawal of the original Subpoena, without prejudice to the future issuance of a different Subpoena.
  - Obtain written confirmation of withdrawal.

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Some grounds for objection to a production/inspection subpoena

- Outside permissible scope of Rule 1-026
  - *Wallis v. Smith*, 2001-NMCA-017, ¶ 20: "All discovery, including discovery under Rule 1-045, is limited by Rule 1-026 to the acquisition of information 'regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action.'"

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Some grounds for motion to quash subpoena

- Per Rule 1-045(C)(3)(a), the court shall quash or modify if:
  - Subpoena does not allow reasonable time for compliance
  - Subpoena requires non-party travel of more than 100 miles (other than or trial)
  - Subpoena requires "disclosure of privileged or other protected matter and no exception or waiver applies"
  - Subpoena subjects a person to undue burden

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- Per Rule 1-045(C)(3)(b), the court may modify or quash if:
  - Subpoena "requires disclosure of a trade secret or other confidential research, development or commercial information."
  - Subpoena "requires disclosure of an unretained expert's opinion" (etc.)
  - Subpoena requires a non-party to incur substantial expense to travel more than 100 miles to attend trial (subject to exceptions)

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Special issues for HIPAA-protected records

- 45 C.F.R. § 164.512 prohibits a "covered entity" from disclosing Protected Health Information in response to a subpoena unless a Qualified Protective Order (QPO) is entered or the covered entity has received "satisfactory assurance" that reasonable efforts have been made to secure a QPO.
- Section 164.512 describes the required contents of a QPO.

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Special issues for tax returns

- Court have afforded "quasi-privileged" status to tax returns.
  - *See Breen v. State Taxation and Revenue Dept.*, 2012-NMCA-101.

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Cost of production

- Rule 1-045(C)(2)(a)(iv) provides that a subpoena recipient may "condition the preparation of any copies upon payment in advance of the reasonable cost of inspection and copying."
- However, those costs must be reasonable. *In re Application of Michael Wilson & Partners*, 520 Fed. Appx. 736, 739.

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Description of privileged material

- Rule 1-045(D)(2)(a) states that "[w]hen information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim."
- FRCP 45(e)(2)(a) requires that "a person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material" must "(i) expressly make the claim; and (ii) describe the nature of the withheld documents . . . in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim."

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- A general objection on grounds of privilege, without describing the information withheld, is insufficient. *Navajo Nation v. Urban Outfitters, Inc.*, 2015 WL 11109396 (D.N.M. May 15, 2015).

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Some grounds for objection to a deposition or trial subpoena

- Geographic limitations (detailed in each Rule)
- Failure to consult regarding deposition dates
  - Rule 1-030(A) requires that "[a] party serving a notice of deposition shall make a good faith effort to avoid scheduling conflicts of parties, witnesses, and counsel."
- Inadequate notice
  - *Attorney General v. Montoya*, 1998-NMCA-149, ¶ 8 (24 hours' notice to witness not reasonable where party expressed need for witness 12 days earlier)
- Failure to include required witness and mileage fees

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- Unreasonable or oppressive "on-call" subpoena
  - While an "on-call" subpoena is not necessarily, a witness "may seek a protective order if the arrangement for an on-call subpoena becomes unreasonable or oppressive." *State v. Klempt*, 1996-NMCA-004, ¶ 13.
- "Unretained expert" issues
- Trade secret or confidential research, development, or commercial information
- Outside timeframe of scheduling order

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Procedural requirements for objections

- A person who receives a production/inspection subpoena may "file a written objection or a motion to quash the subpoena." [Rule 1-045(C)(2)(b)(i)]
  - The term "file" appears to mean "serve" in the context of written objections.
  - *See* Form 4-505A NMRA (providing that a production/inspection subpoena recipient "may, within fourteen (14) days after service of the subpoena . . . serve . . . written objection . . . ."
  - FRCP 45(d)(2)(B) similarly allows written objection to be "served."
- Any objections not timely made are waived. *Creative Gifts, Inc. v. UFO*, 183 F.3d 568, 570 (D.N.M. 1998); *Wang v. Hsu*, 919 F.2d 130 (1990).

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- Under FRCP 34 as applied to FRCP 45, "a non-party's . . . objections to discovery requests in a subpoena are subject to the same prohibition on general or boiler-plate objections and requirements that the objections must be made with specificity and that the responding party must explain and support its objections." *American Federation of Musicians v. Skodam Films, LLC*, 313 F.R.D. 39, 46 (N.D. Tex. 2015).

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Procedural requirements for motion to quash or motion for protective order

- A motion to quash or motion for protective order requires appearing in the court action and filing the motion.
- The movant bears the burden of showing that the subpoena is unreasonable or oppressive. *Blake v. Blake*, 1985-NMCA-009, ¶ 21.

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Notice of non-appearance is required if refusing to appear for a deposition

- Rule 1-030(G)(3) provides that "the failure of a deponent or managing agent or a party to appear at the time and place designated shall not be considered . . . contemptible conduct under [Rule 1-045(E)]" if "a motion for protective order and notice of non-appearance are filed and actual notice of the non-appearance is given to all parties at least [three days] before the scheduled deposition[.]"

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Reminder: motion practice requires seeking parties' concurrence

- Rule 1-007.1(C) requires that each motion "recite that the movant requested the concurrence of all parties [or] specify why no such request was made."
- Rule 1-007.1(C) contains exceptions for certain types of motions, but a motions to quash and a motion for protective order are not among the listed exceptions.
- *See also* D.N.M.LR-Civ. 7.1(a) ("Movant must determine whether a motion in opposed, and a motion that omits recitation of a good-faith request for concurrence may be summarily denied.")

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NOTES

NOTES

UCC Financing Statements and UCC Security Agreements

UCC FINANCING STATEMENTS AND UCC SECURITY AGREEMENTS

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1. UCC Practice Can Be Tedious and Dull, Resulting in Mistakes, That Then Result in Billion-Dollar Litigation and Malpractice Claims

1.2 Facts: Debtor had two entirely separate loans. A small loan and a big loan. The small loan was for $300,000. The big loan was for $1.5 billion (with a "b"). The debtor was General Motors. JPMorgan was administrative agent for separate lenders on both loans. Debtor wanted to pay off small loan. Everyone, debtor, JPMorgan, and their respective lawyers, agreed to terminate financing statements securing small loan. Debtor's lawyers mistakenly included a financing statement securing the big loan in the list of financing statements to be terminated. Later they included the termination statement for that financing statement in the closing documents to be reviewed, approved and delivered at closing. The small loan was paid off and all of the financing statements were terminated. No one caught the problem until the General Motors filed for bankruptcy several years later.

1.3 The unsecured creditors naturally took the position that JPMorgan was unsecured. JPMorgan argued that the filing of the termination statement for the big loan was not authorized. The lawyer who supervised the preparation and filing of the termination statement, and who represented the debtor, filed an affidavit to that effect. ("I was never authorized to terminate that financing statement." Or words to that effect.) The bankruptcy judge accepted this argument and ruled that the filing of the termination statement was unauthorized and therefore the termination statement was ineffective. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank N.A. (In re Motors Liquidation Co.)*, 486 B. R. 596 (Bankr. S.D.N.Y. 2013) (Motors I). But the bankruptcy judge certified the question for direct appeal.

1.4 On appeal the Second Circuit certified the question to the Delaware Supreme Court. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank N.A. (In re Motors Liquidation Co.)*, 755 F.3d 78 (2d Cir. 2014) (Motors II).

1.5 The Delaware Supreme Court ruled that if JPMorgan had reviewed the termination statement and if it had authorized it to be filed, then JPMorgan had authorized the filing of the termination statement, whether or not it understood or intended to terminate the financing statement on the big loan. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank N.A.*, 103 A.3d 1010 (Del. 2014) (Motors III).

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1.6 The Court of Appeals for the Second Circuit then decided that this was exactly what had happened, and reversed the bankruptcy court, ruling that the filing was authorized. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank N.A. (In re Motors Liquidation Co.)*, 777 F.3d 100 (2d Cir. 2015) (Motors IV).

1.7 But that was not to be the end of the story. Two of the bondholders sued the lawyers who had prepared the mistaken termination statement. They filed a class action on behalf of all of the other bond holders against Mayer Brown, the lawyers for General Motors, the debtor. The Seventh Circuit ruled in favor of the Mayer Brown on the ground that they, as lawyers for the debtors, owed the lenders no duty, because the lenders had been represented on the termination of the financing statements by their own lawyers, Simpson Thatcher. *Oakland Police & Fire Ret. Sys. v. Mayer Brown, LLP*, 861 F.3d 644 (7th Cir. 2017).

1.8 You may ask what happened to Simpson Thatcher and to JPMorgan. They undoubtedly owed the lenders duties, but they pointed out that the lenders are fully secured by fixture filings, which were not released, and they argue that the collateral is worth more than the secured debt, so the lenders have suffered no injury. To be continued . . . .

1.9 How could this mistake have been prevented? How could the lawyers or law firms have kept from terminating the financing statement on the wrong loan?

1.10 If the parties had caught the error before General Motors filed bankruptcy, what could they have done to ameliorate or cure the mistake?

2 What We Can Learn From Recent Cases about Our Own Filings and Agreements

2.1 Naming the Debtor on the Financing Statement.

2.1.1 The basics for the most common types of debtors: (§ 55-9-503(a))

2.1.1.1 If the debtor is an individual, use the name on the debtor's unexpired driver's license, even if misspelled.

2.1.1.2 If the debtor is a "registered organization," such as an LLC, an LP, or a corporation, use the name on the "public organic record" most recently filed with or issued by the registered organization's jurisdiction of organization, which purports to state, amend, or restate the registered organization's name.

2.1.1.3 What do these rules mean for filings against individuals with these driver's licenses and registered organizations? They mean you do not add nicknames, or trade names, DBAs, AKAs, or things like, "a NM LLC." Doing so is unnecessary at best and materially misleading at worse, leading to an invalid financing statement. This is a hard concept for us belt-and-suspenders lawyers to understand.

2.1.1.4 You know of course that the debtor no longer has to sign the financing statement. Within the past two weeks I have had to explain to a very good, very experienced

lawyer why that has happened and why the world has not ended because of it. Old habits die hard.

2.1.1.5 The financing statement can be filed before the security agreement is made or the security interest has attached. § 55-9-502(d). But if you think you really need to do this, you should have written authorization from the debtor to file it. If you don't, get an express ratification afterwards.

2.2 Real-world problems with naming a debtor on a financing statement

2.2.1 *Lanser v. First Bank Fin. Ctr. (In re Voboril)*, 568 B.R. 797 (Bankr. E.D. Wisc. 2017). (Name of individual debtor placed in placed in box on financing statement for name of debtor that is an organization.). Held: Financing statement was ineffective. Why?

2.2.2 *SEC v. ISC, Inc.*, 2017 U.S. Dist. LEXIS 139258 (W.D. Wis., Aug. 30, 2017). (Extra space added between name of organization and "Inc." following that name). Held: Financing statement was ineffective. Why?

2.2.3 Under former law the courts went in "all directions" in deciding which name of an individual should be used on a financing statement. Barkley Clark & Barbara Clark, 29 Clark's Secured Transaction Monthly 2 (2013) (collecting cases); *Bloom v. Behles Law Firm, P.C. (In re Green*, 212 Bankr. Lexis 5347 (Bankr. D. N.M. Nov. 4, 2012) (Debtor's "legal name" was name on birth certificate, not name on driver's license). Cases like these are the reasons for the change in the law.

2.3 Indicating the Collateral on the Financing Statement

2.3.1 *In re Baker*, 511 B.R. 41 (Bankr. N.D.N.Y. 2014) Financing statement described dairy cows by name and ear tag number. Some tags had either fallen off or did not match one of the listed numbers. Held financing statement deficient as to those cows and lender unperfected as to them.

2.3.2 *In re 11 East 36th, LLC*, No. 13-11506 (RG), 2015 WL 397799 at * 3 (Bankr. S.D.N.Y. Jan 29, 2015). Pledge agreement described debtor's membership interest in a subsidiary LLC that owned several condominium units. Both entities filed for bankruptcy protection. The court ruled that the parent did not own the subsidiary's units, so the security interest could not attach to those units even though the lender filed a financing statement identifying some of those units as collateral. Lender had a security interest only in the parent's interest in its subsidiary.

2.3.3 § 55-9-504. The financing statement may state that it covers "all assets or all personal property" if the security agreement covers all or substantially all of the debtor's property.

2.4 Describing the Collateral in the Security Agreement

2.4.1 § 55-9-108(c). You cannot describe the collateral in a security agreement as "all personal property" or "all assets." Even if that is what the collateral consists of.

2.4.1.1 Why not?

2.4.2 § 55-9-108 Comment 1. The description of the collateral does not have to be exact and detailed. The so-called "serial-number" test is rejected.

2.4.3 § 55-9-108(A). The description must "reasonably identify" the collateral. §55-9-108(B) gives examples of how to do this: by specific listing, category, type defined in the UCC, quantity, or formula.

2.4.4 The description of the following collateral cannot be by category or type or quantity, but must be specific:

2.4.4.1 Commercial tort claims. § 55-9-108(e)(1). See Comment 5 for guidance on how to describe commercial tort claims.

2.4.4.2. In a consumer transaction: § 55-9-108(e)(2)
Consumer goods.
A security entitlement
A securities account
A commodities account

2.5 The Problem of After-Acquired Property in the Security Agreement and the Financing Statement

2.5.1 *In re Salander-O'Reilly Galleries, LLC*, 2014 WL 789901 (S.D.N.Y. 2014). (Security interest in "assets and rights now owned or hereafter acquired or arising . . . all personal and fixture property of every kind and nature including without limitation all goods (including inventory)." Later the gallery accepted numerous works of art on consignment, including a Botticelli painting entitled *Madonna and Child.* The court held that the security interest did not cover the after-acquired consigned goods.

2.5.2 Other cases come out the same way. Consternation among people who work in this field. Concerns about the use of the traditional formula: "now owned or hereafter acquired."

2.5.3 Possible Solutions – Discussion still ongoing -- no consensus yet

2.5.3.1 ABA UCC Committee Form of Security Agreement in Cindy J. Chernuchin ed., Forms under Article 9 of the UCC 70 (3d. ed. 2016) suggests this as a granting clause in a security agreement:

"The Grantor hereby grants to the Secured Party, to secure the prompt payment and performance in full of all of the Obligations when due, a security interest in all of the Grantor's right, title and interest in, to and under the following properties, assets and rights, and in all similar properties, assets and rights that the Grantor is deemed by law to have rights in or the power to convey rights in, in each case wherever located, whether now owned or hereafter acquired or arising and whether governed by Article 9 of the UCC or other law (the 'Collateral'):"

2.5.3.2 One commentator is concerned that the phrase in the clause quoted above, "whether now owned or hereafter acquired or arising," is ambiguous because it could be read to apply only to "rights." Not sure his concern is well taken

2.5.3.3 But if it is well taken, perhaps any ambiguity could be removed by replacing the following lines of the granting clause with the following (new language is underlined and deleted language is shown with a strike through):

"a security interest in all of the Grantor's right, title and interest in, to and under the following properties, assets and rights (the "Properties"), and in all similar Properties~~, assets and rights~~ that the Grantor is deemed by law to have rights in or the power to convey rights in, in each case (a) wherever the Properties are located, (b) whether the Grantor now has or hereafter acquires ownership rights in the Properties, and (c) whether the Properties are governed by Article 9 of the UCC or other law (the 'Collateral'):"

2.5.3.4 But very often you do not have the luxury (or the burden) of drafting your own security agreement. You are marking up somebody else's form. One commentator suggested the following formula:

"whether a Debtor now has or hereafter acquires ownership or other rights therein"

2.5.3.5 The same commentator reminds that if you use a formula like this in the security agreement, you must also use it in the financing statement.

2.5.3.6 What do you think about these suggestions? Are they overkill? Are they ambiguous? Do they go far enough? How could they be improved?

2.6 Where do we file the financing statement?

2.6.1 In which state? (For principal types of debtors only)

2.6.1.1 In the state where the individual debtor has his or her principal residence.

2.6.1.2 In the state where the registered organization is organized.

2.6.2 In which filing office?

2.6.2.1 For as-extracted collateral and timber to be cut and for fixtures when the financing statement is filed as a fixture filing, in the county clerk's office. § 55-9-501(a)(1).

2.6.2.2 For all other collateral, including fixtures, when the financing statement is not filed as a fixture filing, in the Secretary of State's office. §55-9-501(a)(2).

2.6.3 Special rule for transmitting utilities: All financing statements, including fixture filings, filed in the Secretary of State' office. §55-9-501(b). More about them later.

3. What Can We Learn About Fixture Filings

3.1 Why file a fixture filing?

3.2 What is a fixture filing? § 55-9-502.

3.3 If you record a mortgage, do you need a separate fixture filing or can you just include the fixtures in the mortgage and have an effective fixture filing?

3.4 New Mexico enacted optional language in § 55-9-502(b)(3). In a fixture filing the description of the real estate must be sufficient to give constructive notice of a mortgage if the description were contained in a mortgage.

4. Traps for the Unwary.

4.1 Public Finance Transactions.

4.1.1 Short story. Public finance transactions are excluded from Article 9 in New Mexico. § 55-9-109(d)(14). A number of other states also exclude these transactions from Article 9.

4.1.2 *Delphi Automotive Systems, LLC v. Automotive Systems, LLC v. Capital Community Economic/Industrial Development Corp.*, 434 S.W. 3d 484, 487 (Ky. 2014). This type of provision applies only to transactions in which the government is a *debtor*, not to transactions where the government is a *secured party*.

4.1.3 The reference to "public-finance transaction" was deleted from § 55-9-515(b). The reference is retained in Official Comment to that section. The Official Comment is published in the NMSA, leading to a conflict between the comment and the text of the statute. More about that later.

4.1.4 The box for Public Financing Transaction remains on the Financing Statement form available from the NM SOS office. It is a national form. Ignore that box and the instructions for filling it in.

4.1.5 For good measure, New Mexico omits the definition of Public Finance Transaction from § 55-9-102, the definitions section for Article 9

4.2 Transmitting Utilities

4.2.2 The proper place to file for all collateral of a transmitting utility is in the SOS office. § 55-9-501(b). This includes fixture filings.

4.2.3 The definition of "transmitting utility" is not entirely intuitive. § 55-9-102(a)(80).

4.3 Collateral excluded from Article 9 § 55-9-108(d)

4.3.1 *Wheeling & Lake Erie Ry. Co. v. Keach (In re Montreal, Me. & Atl. Ry., Ltd.)* 799. F. 3d 1, 6-8, 10-11(1st Cir. 2015).Creditor had security interest in debtor railroad's accounts and payment intangibles. Article 9 did not apply to business interruption insurance because Article 9 does not apply to an interest in or a claim under an insurance policy unless the claim is for loss or damage to collateral. When the claim is settled the resulting promise by the insurer to pay is still excluded. See §§ 55-9-9-102(a)(64)(E), 55-9-109(8) (2013).

4.3.2 *Overton v. Art Finance Partners, LLC*, 166 F. Supp. 3d 388 (S.D.N.Y. 2016). Expensive art works delivered to broker for sale, who was "generally known by his creditors to be substantially engaged in selling the goods of others." *See* § 55-9-102(a)(20)(A)(iii) (2013). Thus, the transaction did not meet the Article 9 definition of "consignment," and was outside of Article 9, and the secured lenders had no interest in the art work.

4.3.3 What do you do if your collateral is excluded from Article 9?

5. Filing Tips from the New Mexico Secretary of State's Office

5.1 Use the SOS forms. They are available on the SOS website.

5.2 Follow the filing instructions on the forms including the back of the forms. But ignore the box and instructions about Public Finance Transactions. There is no such thing in New Mexico.

5.3 File electronically.

5.4 Consult the filing rules. 12.6.2.1 et seq. NMAC.

5.5 Useful Contact Info:

5.5.1 Brittany O'Dell in the Operations Department of the SOS office handles UCC filings. Her telephone number is 505-827-3609. Her email address is brittany.odell@state.nm.us

5.5.5.2 Christina Espinoza is the Director of Operations, which oversees the UCC program. Her telephone number is 505-827-3637. Her email address is christina.espinoza@state.nm.us

5.6. The Secretary of State's Office does not perform UCC searches. You must do them yourself or hire someone else to do them. Whichever you do, you may get a report that a termination statement has been filed.

5.6.1 *Monroe Bank & Trust v. Chie Contractors, Inc.*, 2013 WL 1629300 at *3 (Mich. Ct. App. No. 320226, Apr. 16, 2015). Bank had previously filed an "all assets" financing statement. Bank filed an amended financing statement that purported to both delete a specific item of its collateral and to terminate its previously filed all-assets financing statement. Specifically, the bank checked the "Termination" Box *and* the "Amendment (Collateral Change)" Box on the UCC-3 Financing Statement Amendment Form. Held, error not seriously misleading, but should have put a searcher on notice "that further inquiry was required." As a result, the bank remained perfected as to the collateral that had not been released.

5.6.2 This case reminds that it is a good idea to read the termination statement itself to make sure that there is nothing in it that puts the searcher on notice that further inquiry is required.

6. Effect of Official Comments

6.1 In New Mexico comments are "persuasive" but not "conclusive." *See, e.g., First State Bank v. Clark*, 1977-NMSC-088, ¶ 5, 91 N.M. 117, 570 P.2d 1140.

6.2 "When using an Official Comment, the reader should be sure that the section of the statute to which the comment refers has been adopted uniformly or, if it was not, that the non-uniform amendment does not affect the application of the comment to the section." Jack Burton, *New Uniform Legislation You Should Know About*, 53 NM Bar Bulletin 8 (January 22, 2014).

7. Writing Amounts in Both Words and Numbers

7.1 *Charles R. Tips Family Trust v. PB Commercial LLC*, 2014 WL 4085496 (Tex. Ct. App. 2014).

7.1.1 Facts: A promissory note, deed of trust, and guaranty all described the debt as "ONE MILLION SEVEN THOUSAND AND NO/100 ($1,700,000.00) DOLLARS." Notice that the documents contained a $693,000 discrepancy between the written words and the amount depicted by the Arabic numerals.

7.1.2 Ruling: Looking to UCC § 3-114, the court ruled that the words in the promissory note controlled over the numerals. The court then concluded that, under the common law of Texas, the same was true for the deed of trust and the guaranty. Based on this, the court then ruled that the documents were unambiguous. As a result, the creditor was not permitted to

use parol evidence to show that the amount actually loaned was $1.7 million and was limited to recovering $1.007 million. The court cited a Tenth Circuit case, *Dawson v. Andrus*, 612 F.2d 1280 (10th Cir. 1980) in support of its ruling.

7.1.3 Review: This case was reviewed in Charles Nichols, *The Danger of Writing Amounts in Both Words and Figures*, 4 Transactional Lawyer 1 (October, 2014). The author argues against writing amounts in both words and figures and provides additional authorities.

8 What's New in UCC Legislation?

8.1 There are three developments. The first is a treaty that went into effect on April 1 of this year. The second are amendments to the Official Comments to Articles 1, 8, and 9 of the UCC that are also in effect. And the third is a drafting project that is going on right now.

9. Hague Securities Convention. Effective April 1, 2017.

9.1 "The Convention applies to a broad range of issues affecting securities held with an intermediary, in any case or transaction involving a choice between the law of different nations. The Convention may apply to transactions that are not obviously or initially international in character. It applies even to transactions completed before the Effective Date, but it takes care to preserve the intended effect of pre-Effective Date account agreements under most circumstances." Permanent Editorial Board (PEB) Commentary No. 19 ("PEB Comm. No. 19) 3(April 11, 2017).

9.2 "The Hague Securities Convention meshes very well with UCC Articles 8 and 9, and in most instances will not lead to different results." PEB Comm. No. 19 1.

9.3 The Convention enforces a choice-of-law agreement made between the account holder and the intermediary if certain conditions are met

9.4 The convention provides default rules if no choice-of-law agreement is made or if agreement is invalid

9.5 Is a treaty of the USA and prevails over the UCC because of the Supremacy Clause of the Constitution. Only two other countries are parties to the Convention: Switzerland and Mauritius.

9.6 "The Convention applies broadly to all instances involving a choice between the laws of different States (i.e. nations), and can accordingly apply by reason of any of many elements, including without limitation a non-U.S. location of a party involved in the transaction, a non-U.S. party asserting an adverse claim, non-U.S. securities being credited to the securities account, or non-U.S. law being specified by the account agreement or other transaction document. Indeed one may wish to plan all indirect holding system transactions with the Convention as well as UCC Article 8 in mind, because even in transactions that appear wholly domestic, international factors may in fact be present (for example, if the securities intermediary

holds securities for the entitlement holder through a non-U.S. intermediary) or may later become present (for example, if a non-U.S. party acquires an interest in or asserts an adverse claim to assets credited to the account)." PEB Comm. No. 19 2-3. (Internal quotation marks and footnotes omitted.)

9.7 Permanent Editorial Board Commentary No. 19 Hague Convention's Effect on Determining Applicable Law for Indirectly Held Securities. https://www.ali.org/media/filer_public/3b/f0/3bf0bba2-d0cf-48d7-aaac-54d4132e111a/peb-commentary-19.pdf

9.8 The Convention is available at http://hcch.e-vision.nl

10. Amendments to Comments to Articles 1, 8, and 9 Effective April 11, 2017

10.1 PEB Commentary No. 19 also amended the Official Comments to Sections 8-110, 9-305, 9.301 and 1-301 of the UCC in order to give notice of the Hague Securities Convention. *See* Appendix A to the PEB Commentary No. 19, which contains the amendments. The amendments became effective on April 17, 2017.

11. Drafting Committee on Amendments to UCC Articles 1, 3, and 9

11.1 A joint Committee composed of members of the Uniform Law Commission and the American Law Institute is drafting revisions to Articles 1, 3, and 9 of the Uniform Commercial Code to provide the substantive commercial law rules to support an electronic registry for residential mortgage notes on a national basis with minimal displacement of state laws.

11.2 If successful, this project would solve a number of perceived problems such as the difficulty of keeping track of paper notes, sending paper notes around the country, lost notes, standing to foreclose mortgages, borrowers not knowing where to send their payments.

11.3 All of this work is complicated and is not far enough along for me to be able to predict whether the committee's work will be approved by the Uniform Law Commission and the American Law Institute or whether the National Mortgage Note Repository Act will be enacted by Congress and approved by the President.

11.4 As with any other amendments to a uniform law, these amendments, even if approved by the Uniform Law Commission and the American Law Institute, would have no force of law until enacted by a state or states.

12. Special Choice-of-Law Rules in the UCC, to the Extent Not Preempted by Hague Securities Convention

12.1 "Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the

law either of this state or of such other state or nation shall govern their rights and duties." § 55-1-301(A).

12.2. "In the absence of an agreement effective under Subsection A of this section, and except as provided in Subsection C of this section, the Uniform Commercial Code applies to transactions bearing an appropriate relation to this state." § 55-1-301(B)

12.3 "If one of the following provisions of the Uniform Commercial Code specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:

*****

(6) Section 55-8-810 NMSA 1978;
(7) Sections 55-9-301 through 55-9-307 NMSA 1978." § 55-1-301(C).

12.4 This is an Official Comment illustrating the UCC choice of law rule; and using New Mexico as example. (The only Official Comment I've found that mentions New Mexico!)

12.4.1 Official Comment 9, Example 4: A Belgian governmental unit grants a security interest in its equipment to a Swiss secured party. The equipment is located in Belgium. A dispute arises and, for some reason, an action is brought in a New Mexico state court. Inasmuch as the transaction bears no "appropriate relation" to New Mexico, New Mexico's UCC, including its article 9, is inapplicable. See Section 1-105(1). New Mexico's Section 9-109(c) on excluded transactions should not come into play. Even if the parties agreed that New Mexico law would govern, the parties' agreement would not be effective because the transaction does not bear a "reasonable relation" to New Mexico. See Section 1-105(1).

12.5 The UCC choice-of-law rules apply only to agreements governed by an article of the UCC. In a typical transaction you may have a promissory note, a security agreement and a financing statement governed by the New Mexico UCC and a mortgage, a guaranty and perhaps other contracts governed by other New Mexico law. It is rare in my experience that a New Mexico transaction will be limited to a note, security agreement, and financing statement.

13 Conflict of Laws Rules Applicable to New Mexico Contracts Outside of the UCC

13.1 New Mexico generally follows the Restatement of Conflict of Laws (1934).

13.1.1 A contract is governed by law of state where last act necessary for formation of contract occurred. (Usually state where last person signed contract). *State Farm Mut. Ins. Co. v. Conyers*, 1989-NMSC-071, ¶ 15, 109 N.M. 243, 784 P.2d 986.

13.1.2 By 2008 New Mexico was one of only eleven states that still adhered to the Restatement of Conflict of Laws rule for contracts not governed by the UCC. *Id.*

13.1.3 Parties can agree to choose governing law. *Strausberg v. Laurel healthcare Providers, LLC*, 2013-NMSC-032, ¶26, 304 P.3d 409.

13.2 Effect or violation of fundamental New Mexico public policy.

13.2.1 A court will not apply the law chosen by the parties if that law would violate a fundamental public policy of New Mexico. *Fiser v. Dell Computer Corp.*, 2008-NMSC-046, ¶ 6, 144 N.M. 464, 188 P3d 1215.

13.3 Takeaway:

13.3.1 Include a governing law clause in your agreement. If you make it simple and reasonable, a New Mexico court is more likely to interpret and enforce it the way you hoped it would be.

14. The Trustee in Bankruptcy Is Not All-Powerful

14.1 *In re Colony Beach & Tennis Club, Inc.*, 508 B.R. 468, 480 (Bankr. M.D. Fla. 2014). The post-petition lapse of a financing statement did not result in the loss of the security interest. Nor did it make the lien avoidable by the trustee because the lapse makes the security interest retroactively unperfected against only "purchasers for value," not lien creditors. See 55-9-515(c).

14.2 You will find that a number of other sections of Article 9 protect only purchasers for value and not lien creditors. "Purchase" includes taking by "sale, lease, . . . negotiation, mortgage, pledge, lien, security interest, ..." § 55-1-201(a)(29).

15. **Selected Resources for Article 9 of the UCC**

15.1 The New Mexico Secretary of State's website has approved UCC forms for filing, with instructions.

15.1.1 These are national forms, prepared by IACA (International Association of Commercial Administrators), so do not check the box for "Municipal Finance Transaction." New Mexico excluded those transactions from Article 9 at the request of the municipal-bond bar.

15.2 §§ 55-1-101 through 55-1-310 and 55-9-101 through 55-9-628 NMSA.

14.3 12.6.2.1 through 12.6.2.397 NMAC. (Filing rules for Article 9 of the UCC).

14.4 Cindy J. Chernuchin, ed., *Forms under Article 9 of the UCC*, (3d ed. 2016).

14.5 Stephen L. Sepinuck, ed., *Practice under Article 9 of the UCC*, (2d ed. 2013).

14.6 The Business Lawyer. Quarterly publication of the Business Law Section of the American Bar Association. One issue each year has an excellent survey of the UCC, Article-by-Article.

14.7 UCC List Serve:
UCCLaw-L mailing list
UCCLaw-L@lists.washlaw.edu
http://lists.washlaw.edu/mailman/listinfo/ucclaw-l

14.8 The Transactional Lawyer. Free monthly newsletter edited by Steven Sepinuck. https://www.law.gonzaga.edu/files/Transactional-Lawyer-2017-04.pdf

14.9 Commercial Law Newsletter. Joint newsletter of the Commercial Finance and Uniform Commercial Code Committees of the Business Law Section of the American Bar Association. Published three times each year.

14.10 Permanent Editorial Board Commentary No. 19 Hague Convention's Effect on Determining Applicable Law for Indirectly Held Securities.
https://www.ali.org/media/filer_public/3b/f0/3bf0bba2-d0cf-48d7-aaac-54d4132e111a/peb-commentary-19.pdf

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Recent Developments in New Mexico Employment Law

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Cybersecurity: Preventing and Remedying Breaches of Client Data

American Bar Association

Cloud Ethics Opinions Around the U.S.

ALABAMA Opinion 2010-02	Yes	Reasonable Care	• Know how provider handles storage/security of data. • Reasonably ensure confidentiality agreement is followed. • Stay abreast of best practices regarding data safeguards.
ARIZONA** Opinion 09-04	Yes	Reasonable Care	• "Reasonable security precautions," including password protection, encryption, etc. • Develop or consult someone with competence in online computer security. • Periodically review security measures.
CALIFORNIA Opinion 2010-179	Yes	Reasonable Care	• Evaluate the nature of the technology, available security precautions, and limitations on third-party access. • Consult an expert if lawyer's technology expertise is lacking. • Weigh the sensitivity of the data, the impact of disclosure on the client, the urgency of the situation, and the client's instructions.
CONNECTICUT Informal Opinion 2013-07	Yes	Reasonable Care	• Lawyers ownership and access to the data must not be hindered. • Security policies and processes should segregate the lawyer's data to prevent unauthorized access to the data, including by the cloud service provider.
FLORIDA Opinion 12-3	Yes	Reasonable Care	• Ensure provider has enforceable obligation to preserve confidentiality and security, and will provide notice if served with process. • Investigate provider's security measures • Guard against reasonably foreseeable attempts to infiltrate data.
			•

IOWA Opinion 11-01	Yes	Reasonable Care	• Ensure unfettered access to your data when it is needed, including removing it upon termination of the service. • Determine the degree of protection afforded to the data residing within the cloud service.
MAINE Opinion 207	Yes	Reasonable Care	• Ensure firm technology in general meets professional responsibility constraints. • Review provider's terms of service and/or service level agreements. • Review provider's technology, specifically focusing on security and backup.
MASSACHUSETTS Opinion 12-03	Yes	Reasonable Care	• Review (and periodically revisit) terms of service, restrictions on access to data, data portability, and vendor's security practices. • Follow clients' express instructions regarding use of cloud technology to store or transmit data. • For particularly sensitive client information, obtain client approval before storing/transmitting via the internet.
NEW HAMPSHIRE Opinion #2012-13/4	Yes	Reasonable Care	• Have a basic understanding of technology and stay abreast of changes, including privacy laws and regulations. • Consider obtaining client's informed consent when storing highly confidential information. • Delete data from the cloud and return it to the client at the conclusion of representation or when the file must no longer be preserved. • Make a reasonable effort to ensure cloud providers understand and act in a manner compatible with a lawyer's professional responsibilities.
NEW JERSEY** Opinion 701	Yes	Reasonable Care	• Vendor must have an enforceable obligation to preserve confidentiality and security. • Use available technology to guard against foreseeable attempts to infiltrate data..

NEW YORK Opinion 842	Yes	Reasonable Care	• Vendor must have an enforceable obligation to preserve confidentiality and security, and should notify lawyer if served with process for client data. • Use available technology to guard against foreseeable attempts to infiltrate data. • Investigate vendor security practices and periodically review to be sure they remain up-to-date. • Investigate any potential security breaches or lapses by vendor to ensure client data was not compromised.
NEVADA Opinion 33	Yes	Reasonable Care	• Chose a vendor that can be reasonably relied upon to keep client information confidential. • Instruct and require the vendor to keep client information confidential.
NORTH CAROLINA 2011 Formal Ethics Opinion 6	Yes	Reasonable Care	• Review terms and policies, and if necessary re-negotiate, to ensure they're consistent with ethical obligations. • Evaluate vendor's security measures and backup strategy. • Ensure data can be retrieved if vendor shuts down or lawyer wishes to cancel service.
OHIO Informal Advisory Opinion 2013-03	Yes	Reasonable Care	• Competently select appropriate vendor. • Preserve confidentiality and safeguard client property. • Provide reasonable supervision of cloud vendor. • Communicate with the client as appropriate.
OREGON Opinion 2011-188	Yes	Reasonable Care	• Ensure service agreement requires vendor to preserve confidentiality and security. • Require notice in the event that lawyer's data is accessed by a non-authorized party. • Ensure adequate backup. • Re-evaluate precautionary steps periodically in light of advances in technology.
PENNSYLVANIA Opinion 2011-200	Yes	Reasonable Care	• Exercise reasonable care to ensure materials stored in the

			cloud remain confidential. • Employ reasonable safeguards to protect data from breach, data loss, and other risk. • See full opinion for 15 point list of possible safeguards.
VERMONT Opinion 2010-6	Yes	Reasonable Care	• Take reasonable precautions to ensure client data is secure and accessible. • Consider whether certain types of data (e.g. wills) must be retained in original paper format. • Discuss appropriateness of cloud storage with client if data is especially sensitive (e.g. trade secrets).
VIRGINIA Legal Ethics Opinion 1872	Yes	Reasonable Care	• Exercise care in selection of the vendor. • Have a reasonable expectation the vendor will keep data confidential and inaccessible. • Instruct the vendor to preserve the confidentiality of information.
WASHINGTON** Advisory Opinion 2215	Yes	Reasonable Care	• Conduct a due diligence investigation of any potential provider. • Stay abreast of changes in technology. • Review providers security procedures periodically.
WISCONSIN Opinion EF-15-01	Yes	Reasonable Care	• Consider the sensitivity of the data, the impact of the disclosure, the client's circumstances and instructions • Consult an expert if lawyer's technology expertise is lacking. • Understand/know the experience and reputation of the service provider and the terms of their agreement.

* Note that in most opinions, the specific steps or factors listed are intended as non-binding recommendations or suggestions. Best practices may evolve depending on the sensitivity of the data or changes in the technology.

** These opinions address issues which aren't directly labled cloud computing or software as a service, but which share similar technology (e.g.. online backup and file storage).

CLE Presentation for the Business Law Institute

Cyber Security and Technology for Attorneys: Preventing and Remedying Breaches of Client Data

William Slease, Esq.
Chief Disciplinary Counsel
New Mexico Disciplinary Board

Mark J. Fidel, Esq.
Co-Founder, Corporate Development, RiskSense

Best Practices to Protect Client Files and Data: Agenda

A. Ethical Obligations – Rule 16-106 NMRA and ABA Resolution 109

B. Legal Obligations

C. What Types of Information Do Law Firms Hold?

D. Narrow to Broad Approach

E. Narrow: Person

F. Narrow: Personal Computing Devices

RISKSENSE

Best Practices to Protect Client Files and Data: Agenda

G. Narrow: Home <-> Mobile <-> Work

H. Broad: Law Firm

I. Broad: Clients

J. Social Engineering

K. Where is your clients' data?

L. How to Fulfill Significant Aspects of ABA Resolution 109

  RISKSENSE

Best Practices to Protect Client Files and Data: Agenda

M. Vulnerability Assessment

N. Penetration Testing

O. Threat Assessment

P. Remediation Management

Q. Cyber Risk Management

  RISKSENSE

A. Ethical Obligations – Rule 16-106 NMRA

- Client-Lawyer Relationship
- Rule 16-106 Confidentiality Of Information
  - (a) A lawyer shall not reveal information relating to the representation of a client ***unless*** the client gives ***informed*** consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (B) of this rule.

A. Ethical Obligations – Rule 16-106 NMRA

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
  - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

A. Ethical Obligations – Rule 16-106 NMRA

- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (6) to comply with other law or a court order; or
- (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

- (C) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

A. Ethical Obligations – Rule 16-106 NMRA

- (C) A lawyer shall make reasonable efforts to **prevent** the ***inadvertent*** or ***unauthorized disclosure*** of, or ***unauthorized access*** to, information relating to the representation of a client.

A. Ethical Obligations – Rule 16-106 NMRA

- Rule 16-106 Confidentiality Of Information
  - (A) A lawyer shall not reveal information relating to the representation of a client ***unless*** the client gives ***informed*** consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
  - ...
  - (C) A lawyer shall make reasonable efforts to ***prevent*** the ***inadvertent*** or ***unauthorized disclosure*** of, or ***unauthorized access*** to, information relating to the representation of a client.

 9 RISKSENSE

A. Ethical Obligations – ABA Resolution 109

- That the American Bar Association encourages all private and public sector organizations to develop, implement, and maintain an appropriate security program, including:
  - (1) conducting regular assessments of the threats, vulnerabilities, and risks to their data, applications, networks, and operating platforms, including those associated with operational control systems; and
  - (2) implementing appropriate security controls to address the identified threats, vulnerabilities, and risks, consistent with the types of data and systems to be protected and the nature and scope of the organization;

 10 RISKSENSE

A. Ethical Obligations – Resolution 109

- That the American Bar Association encourages these organizations to develop and test a response plan for possible cyber attacks, including disclosure of data breaches, notification of affected individuals, and the recovery and restoration of disrupted operations; and

- That the American Bar Association encourages these organizations to
  - (1) engage in partnerships or cooperative relationships, where appropriate, to address the problem of cyber attacks by sharing information on cyber threats, and
  - (2) develop points of contact and protocols to enable such information sharing.

B. Legal Obligations

- HIPAA Data Security Regulations and Privacy Regulations
  - Requires that covered entities (CEs) and business associates (BEs) have a data security plan setting out reasonable steps to be taken to ensure the security of Personal Health Information (PHI).
  - As a result of the 2013 Amendments, the definition of BA expanded to included law firms performing legal services for a CE.
  - Law firms that possess and use protected health information (PHI) are required to handle that information in conformance with the HIPAA data security and privacy regulations.
  - Law firms with such information must "protect against *"reasonably anticipated uses or disclosures* of the protected information," but are given the leeway to do so in ways that take into account the probability and criticality of potential risks to the protected health information, the complexity and capabilities of the business and the costs of security measures.

B. Legal Obligations

- State Statutes
  - A number of states have enacted statutes that protect the personally identifiable information (PII) of their citizens and specifically require individuals and any business that does business in the state to encrypt, under certain circumstances, PII used by the business.
  - In 2008 and 2009, Nevada and Massachusetts , became the first states to pass such provisions. The Massachusetts data security regulation requires encryption of PII that is transmitted over the Internet. Law firms having offices in or otherwise doing business in Massachusetts must comply with this regulation or face potential civil and/or criminal penalties.

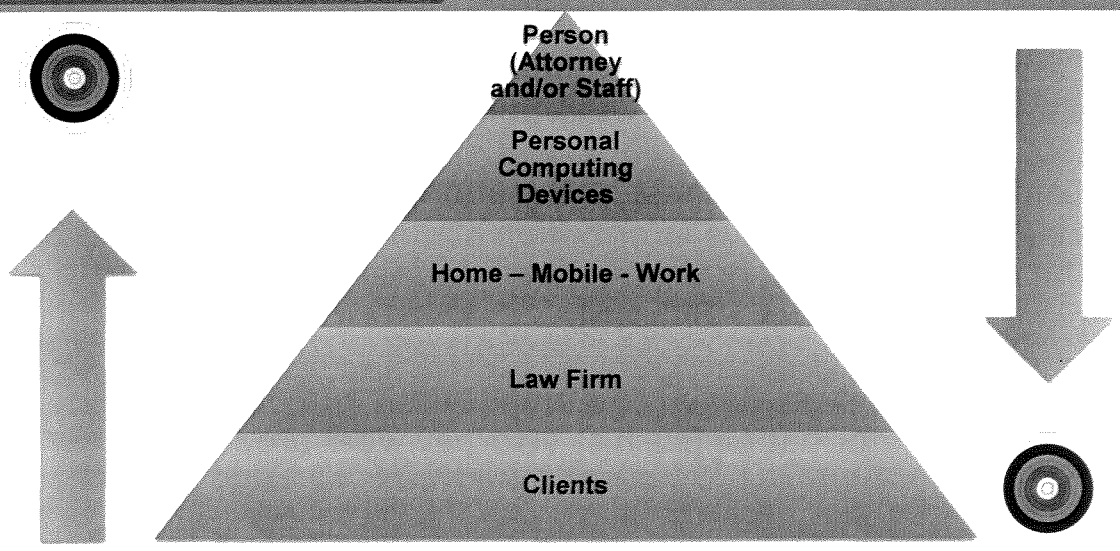
C. What Types of Information do Law Firms Hold?

- Case and/or litigation strategy information, including settlement parameters and argument weak points;
- Confidential client business information (this information may be either retrospective information about the circumstances of the matter at hand, or *prospective* information about future plans and initiatives – or both);
- Attorney-client privileged communications and other legally privileged information (such as attorney work product);

C. What Types of Information do Law Firms Hold?

- Client intellectual property, such as patent, copyright and trade secret information;
- A range of personally identifiable information (PII) of all kinds for employees, clients and third parties, such as personal health information and various account and account-access information that include customers' name and address information; and
- Payment card information, including card numbers and PIN numbers.

D. Narrow to Broad Approach

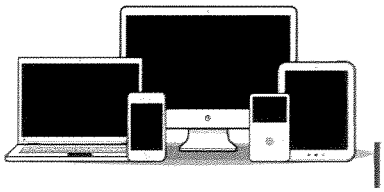


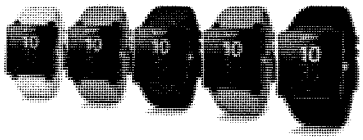
E. Narrow: Person

- Personally Identifiable Information (PII):
  - "...[I]nformation which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc., alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc." – Federal Office of Management and Budget
- Credit Cards, Driver's License, Social Security Card, Checks, Passport, other forms of identification.
- Your PII: Everywhere. What is it worth? It depends.

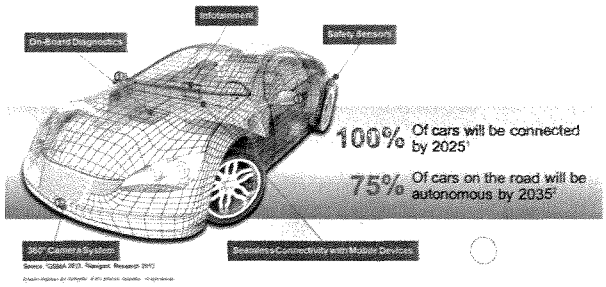
F. Narrow: Personal Computing Devices

- Smart Phones: Very powerful computers that can sometimes make a phone call.
- Tablets
- Laptops





- Other devices
  - Watches
  - Fitness trackers
  - Your vehicle
  - Pacemakers
  - Insulin Pumps



G. Narrow: Home ← → Mobile ←→ Work

- How do we access client data and information?
  - As often as we like and typically in the way that it is most convenient.
- Where?
  - Home: Personally owned computing devices
  - Mobile (personal or firm-owned): Smart phones, tablets, laptops, public computers, personal vehicles, public transportation
  - Work (personal or firm-owned): Desktops, laptops, tablets, smartphones
- Format: Typically electronic, but do not forget about paper!

H. Broad: Law Firm

- What does the law firm's computing environment consist of?
  - Traditional computing devices
    - Desktops, Laptops, smartphones, printers/copiers
  - Non-Traditional computing devices (Internet of Things)
    - Environmental control systems, access control systems, VOIP Phones, Video Conferencing Systems
  - All aspects of the network that can store, process, transmit and receive data
    - Routers, Switches, Firewalls, Intrusion Detection, Intrusion Prevention, Data Storage Systems, Backup Systems.
  - Web-based applications (For internal use and client/public facing)
  - Third party hosted solutions – Email, case management systems, others?
- Where can client data reside?
  - See above. 

J. Social Engineering

- An attack vector that relies heavily on human interaction and often involves tricking people into breaking normal security procedures.
  - Baiting, Phishing, Spear Phishing, Pretexting, Scareware, Ransomware
- Common scenarios:
  - In Person – Gain trust, get info, get access
  - Via Email – Pretending to be someone else in order to get target to behave in a certain way.
- Examples

From: "Srinivas Mukkamala" <srinivas.mukkamala@risksense.com (mailto:srinivas.mukkamala@risksense.com)>
Date: December 28, 2015 at 9:40:17 AM PST
To: raj.matthew@risksense.com (mailto:raj.matthew@risksense.com)
Subject: Re: Transfer Inquiry
Reply-To [redacted]

Raj, I need you to process a wire for $19,970 to the Account details below,and code it to professional expenses

Beneficiary Bank: Suntrust Bank
Bank Address: Atlanta, GA
Beneficiary Name: Olawale James
Account Number: 1000184728631
Routing: 061000104

Kindly mail me back with the confirmation as soon as it's been completed

Thanks.
Srinivas

Sent from my iPhone

raj.matthew@risksense.com <raj.matthew@risksense.com> Mon, Dec 28, 2015 at 10:52 AM
To: Donna Smith <donna.smith@risksense.com>
Cc: mark.fidel@risksense.com

Please have this wire out today as discussed, see details below.

Thanks a lot

Begin forwarded message:

From: "Srinivas Mukkamala" <srinivas.mukkamala@risksense.com (mailto:srinivas.mukkamala@risksense.com)>
Date: December 28, 2015 at 9:40:17 AM PST
To: raj.matthew@risksense.com (mailto:raj.matthew@risksense.com)
Subject: Re: Transfer Inquiry
Reply-To: "Srinivas Mukkamala" <ceo44636@gmail.com (mailto:ceo44636@gmail.com)>

Raj, I need you to process a wire for $19,970 to the Account details below,and code it to professional expenses

Beneficiary Bank: Suntrust Bank
Bank Address: Atlanta, GA
Beneficiary Name: Olawale James
Account Number: 1000184728631
Routing: 061000104

J. Social Engineering

- The Conference

K. Where is your clients' data?

- Logical locations
  - Physical files
  - Your desk
  - Your credenza
  - Chairs in your office
  - The floor between your desk, chairs and credenza
  - Your car
  - Your home
  - Computer (Laptop, desktop, tablet, smartphone)
  - File server
  - Software as a Service (Dropbox, Google Drive, Case management systems)
    - End User License Agreements

L. How to Fulfill Significant Aspects of ABA Resolution 109

- That the American Bar Association encourages all private and public sector organizations to develop, implement, and maintain an appropriate security program, including:
  - (1) conducting regular assessments of the threats, vulnerabilities, and risks to their data, applications, networks, and operating platforms, including those associated with operational control systems; and
  - (2) implementing appropriate security controls to address the identified threats, vulnerabilities, and risks, consistent with the types of data and systems to be protected and the nature and scope of the organization;

M. Vulnerability Assessment

- A Vulnerability Assessment consists of several steps:
  - Defining and classifying network or system resources
  - Assigning relative levels of importance to the resources
  - Identifying weaknesses or vulnerabilities in each resource
  - Identifying potential threats to each resource
  - Developing a strategy to deal with the most serious potential problems first
  - Defining and implementing ways to minimize the consequences if an attack occurs.

N. Penetration Testing

- Penetration testing (also called pen testing) is the practice of testing a computer system, network or Web application to exploit the vulnerabilities found in the vulnerability assessment in the same manner an attacker would do so.
- Testing Strategies include:
  - **Targeted** – IT Team is aware the pen test is occurring
  - **External** – Targets externally visible network and/or Web applications
  - **Internal** – Mimics an attack from within the network carried out by an authorized user; how far can the user get without additional permissions being granted?
  - **Blind** – Attacker is provided very limited information about the target network or Web application; IT Team is aware of the testing.
  - **Double-Blind** – Same as blind testing but a very limited number of the IT team is aware of the testing.

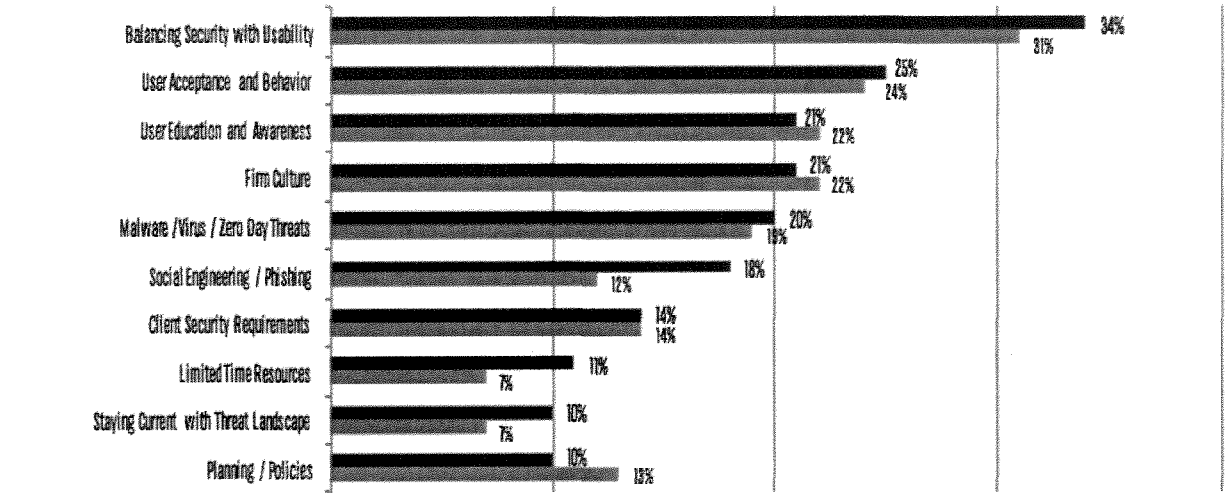
O. Threat Assessment

- Determine what outside threats can take advantage of the known vulnerabilities.
- This is accomplished by first understanding what comprises the totality of known threats.
- The next step is to correlate the known threats against the known vulnerabilities.
- The severity of the vulnerability-threat combination will help determine the priority by which the vulnerabilities must be remediated.

P. Remediation Management

- Once the threat assessment has occurred, those vulnerabilities that prove to be the highest risk to the organization should be fixed or remediated.
- Remediation consists of:
  - Updating or Patching software
  - Adjusting configuration of network devices
  - Removing devices which cannot be patched
  - Leaving a vulnerability as-is because the relative risk to the organization is acceptable

What are your three biggest law firm security challenges? (three responses allowed)



Source: International Legal Technology Association 2016 Technology Survey – Executive Summary

Q. Cyber Risk Management

1. Identify the firm's IT Manager. If you have an IT Manager, know who it is!
   - Implements, administers and enforces your cyber security policy.
   - Conducts regularly scheduled cyber security audits
   - Installs and maintains security software
   - Establishes and implements a system for operating system and software updates
   - Application whitelisting

Q. Cyber Risk Management

2. Create a data classification framework
   - General Classifications
     - Confidential Data
     - General Use Data
     - Internal Use Data
   - Confidential Classification
     - Data subject to specific statutes or regulations
     - Commercially sensitive information
     - Data you are contractually obligated to protect
     - Confidential data not otherwise categorized

Q. Cyber Risk Management

3. Encrypt your Data
   - Data at Rest
     - PCs: Bitlocker
     - Apple: FileVault
     - Many others
   - Data in Transit
     - Email: Secure Email Systems
     - Portable Devices: External Hard Drives, USB devices
   - Data in Use
     - The only time data should be unencrypted is when it is being used.

Q. Cyber Risk Management

4. Require Strong Passwords
   - Any device that interfaces with your client data MUST be password protected.
   - Any password must be strong.
     - 8 characters is a minimum length, 12 or more is recommended
     - A combination of character types
     - NOT a common word or phrase
     - Changed regularly.
   - Employ Password Management Software (1Password, LastPass, etc.)

Q. Cyber Risk Management

5. Implement a Bring Your Own Device (BYOD) policy
   - Personal Computing Devices that access client data
     - Must use passwords
     - Must use encryption
     - Consider Application Whitelisting
     - Consider Mobile Device Management/Security Applications
   - Alternative: The firm purchases and deploys mobile devices for those employees needing to access client data away from the office.
     - End result: Affected employees will be carrying two devices; one owned by the firm, one owned by the employee.

Q. Cyber Risk Management

6. Create and Regularly Update a Network Map
7. Audit Third Party Contracts
   - Who has access to firm/client data?
   - How do you get your firm/client data back from the vendor, when necessary?
   - Will the vendor return or destroy all data on demand?
   - How does the vendor keep your firm/client data secure?
   - What is their data backup system/policy?
8. Establish and Maintain a Data Backup System
   - Understand the data backup Schedule
   - Where is the backup data stored?

Q. Cyber Risk Management

9. Ensure the Physical Security of Systems and Facilities
   - Environmental Threats
   - Human Threats
   - Supply System Threats
10. Provide Meaningful Education and Training
    - Awareness is key
    - Take Training Seriously
11. Schedule Cyber Security Audits and Evaluate:
    - Compliance
    - Effectiveness
    - Cyber Security Policy

Q. Cyber Risk Management

12. Prepare a Response Plan (specific to a breach of firm/client data and specific to each type of confidential data)
    - Who will be notified?
    - What is the notification timeframe?
    - What documentation must be kept regarding the breach?
    - Who is authorized to speak about the breach?
    - Who is authorized to make critical decisions?

NOTES

NOTES

A Big-Picture View of Emerging Technology in the Legal Profession, and the Practical Implications for Your Practice

NOTES

NOTES

Negotiation of Commercial Leases

In ***Safeway, Inc. v. Rooter,* 2016-NMSC-009, 368 P.3d 389**, the plaintiffs alleged they had suffered injuries due to the collapse of a baby changing table in a Safeway grocery store and that the collapse of the baby changing table was due to the negligence of Safeway, Inc. and Rooter 2000 Plumbing and Drain SSS ("Rooter"). Rooter installed the allegedly defective table in the Safeway grocery store. Safeway filed a cross-claim against Rooter seeking defense, indemnification, contribution and damages pursuant to New Mexico common law, and an agreement signed by Safeway and Rooter ("Agreement"). The Agreement stated that Rooter was to name Safeway as an additional insured under Rooter's its insurance policy, and the indemnity provision of the Agreement provided as follows:

> [Rooter] shall indemnify, defend and hold [Safeway] harmless from and "against;" any and all claims, losses, damages, liabilities, and expenses (including the costs of investigation and attorney's fees) in connection with any claim or cause of action arising from any act or omission of [Rooter;], its employees, agents, and representatives, in the performance of its obligations under this Agreement, except where the claim, loss or damage is caused by the sole negligence of [Safeway].

Rooter and its insurer refused to defend or indemnify Safeway. Rooter argued that New Mexico's anti-indemnification statute, NMSA 1978, Section 56-7-1, voided any obligation Rooter had to Safeway. Prior to trial, the plaintiffs settled all of their claims against Rooter. Prior to trial, the district court entered summary judgment in favor of Rooter and against Safeway, finding that the Agreement's contractual indemnification requirements were void and unenforceable as a matter of New Mexico law. The trial court also dismissed Safeway's claim for common law indemnity as a matter of summary judgment. The matter proceeded to trial, after which the jury returned a verdict against Safeway, awarding $450,000 to the plaintiffs in damages and comparing the fault of Safeway and Rooter at 40% and 60%, respectively.

Safeway appealed the trial court's entry of summary judgment in favor of Rooter for both common law and contractual indemnity. The Court of Appeals reversed the district court's grant of summary judgment on common law indemnity based on the existence of a genuine issue of material fact. With respect to contractual indemnity, the Court of Appeals held that the applicable statute was the 1971 version of Section 56-7-1, and that the statute voided Rooter's agreement to indemnify, but not its agreement to defend and insure.

Rooter appealed to the Supreme Court arguing: (1) the Court of Appeals erred when it held there were genuine issues of material fact precluding summary judgment on Safeway's common law indemnity claims; and (2) the Court of Appeals erred when it held that Rooter owed Safeway defense fees and costs, even though the contractual indemnification provision of the Agreement is void and unenforceable as a matter of law. The Supreme Court reversed the Court of Appeals and affirmed the district court's grant of summary judgment in favor of Rooter. After reviewing the genesis of traditional indemnification and the adoption of contribution and comparative negligence, the Supreme Court concluded that traditional indemnity does not apply when the jury finds a

tortfeasor actively at fault and apportions liability using comparative fault principles. The Supreme Court also concluded that the duty to insure and defend provision of the Agreement was void and unenforceable under NMSA 1978, Section 56-7-1 (1971, amended 2005).

The 1971 version of the anti-indemnity statute has been rewritten and significantly revised. The statute now provides an express saving clause which states that a construction contract "***shall be enforced*** to the extent it: requires one party to . . . indemnify, hold harmless, or insure . . . the other party . . . against liability . . . only to the extent that the liability . . . are caused by, or arise out of, the acts or omissions of the indemnitor . . . ." NMSA 1978, 56-7-1(B)(1). *See also*, *Holguin v. Fulco Oil Servs., LLC*, 2010-NMCA-091, 149 N.M. 98 (enforcing an indemnity provision to the extent the provision did not violate Section 56-7-1).

In ***United Rentals NW., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, 148 N.M. 426**, the plaintiff ("United") sued one of its subcontractors ("Yearout") for defense and indemnity related to a wrongful death claim filed against United by the estates of two Yearout employees who were fatally injured while working for Yearout installing duct work in the Eclipse Aviation hangar at the Albuquerque International Airport.

Yearout rented a scissor lift ("Lift") from United for use in the installation of the duct work along a 50-foot high ceiling. The rental contract provided Yearout was not to perform any maintenance or repairs on the Lift, and if any were needed, Yearout was required to immediately cease using the Lift, and notify United. United performed repairs on the Lift twice. After the second repair, two Yearout employees boarded the Lift to install duct work. While attempting to descend after completing the work, the Lift malfunctioned, causing both workers to fall resulting in their deaths.

The estates of the two employees filed a wrongful death claim against United and the manufacturer of the Lift. United settled with the employees' estates, and then sued Yearout in federal court for indemnity, arguing that Yearout, agreed to "indemnify, defend and hold United harmless from and against any and all liability ... relating to wrongful death" caused by (1) the operation "of the equipment, including ... [liability founded upon any] negligent act or omission of United," (2) the provision of any "defective product by United," or (3) any claims "based upon strict or product liability...."

The federal court dismissed the complaint on the ground that the indemnity clause was unenforceable under Section 56–7–1's provisions invalidating indemnification clauses in contracts related to construction that would shift responsibility for wrongdoing from a culpable party to an innocent party. United appealed to the Tenth Circuit Court of Appeals, on the issue of whether a rental contract is within the purview of 56-7-1. The Tenth Circuit certified the issue to the New Mexico Supreme Court.

The issue before the New Mexico Supreme Court was whether a contract for the rental of equipment to be used in a construction project is a "contract or agreement

relating to construction" within the scope of 56-7-1 NMSA 1978. The Supreme Court held that such an agreement is within the scope of Section 56-7-1 NMSA 1978, stating: "[i]n order to enforce the protections of Section 56–7–1 and to honor the legislative purpose embodied in the statute, we answer the certified question by holding that the statute's anti-indemnity protections apply to rental contracts for construction equipment because they are contracts 'relating to construction.'" *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 40, 148 N.M. 426.

In ***Sierra v. Garcia*, 1987-NMSC-116, 106 N.M. 573**, the plaintiff, the estate of a deceased employee of a subcontractor, filed suit against a general contractor ("Cook") for a street construction project after the employee died as a result of injuries suffered while working on the project. The general contractor filed a third-party complaint for indemnity against the subcontractor ("Universal") based on a contract provision between the parties which provided:

> [Universal] shall defend at its own cost and indemnify and hold harmless [Cook] and Owner, their agents and employees from any and all liability, damages, losses, claims and expenses, however caused resulting directly or indirectly from or connected with the performance of this subcontract.

Id. ¶ 4. The Court dismissed Cook's third-party complaint on the grounds Section 56-7-1 (1971) voided the contract. Cook appealed.

The interpretation of Section 56-7-1 (1971) was an issue of first impression for the New Mexico Supreme Court. The question before the Court was whether Section 56-7-1 (1971) voided the indemnity agreement between Universal and Cook. Cook argued the indemnity provision was only void insofar as it would require Universal to indemnify Cook for Cook's own negligence. Universal argued the entire provision was void and unenforceable because it failed to state any of the exceptions expressly provided by the statute. The Court ultimately held that the 1971 statute voided the indemnity agreement.

The Court first described the two differences of Section 56-7-1 (1971) from anti-indemnity statutes in other jurisdictions:

> First, unlike the statutes in most jurisdictions, which void indemnification agreements attempting to indemnify the indemnitee for the indemnitee's sole negligence, [56-7-1(1971)] voids agreements which attempt to indemnify the indemnitee for liability resulting, *in whole or in part*, from the indemnitee's negligence. Second, no other statute contains the exceptions provided for in subsections (A) and (B) of our statute, which remove an indemnity agreement from the statute's ban against enforceability if the agreement provides that it shall not extend to losses arising from the situations specified in those subsections.

Id. ¶ 3. The Court then applied the statute to the indemnity provision at issue, holding that "[o]ur statute states . . . that liability arising in whole or in part from an indemnitee's

negligence (implying that the other 'part' arises from the indemnitor's negligence), may not be contracted away by an indemnity agreement[,]" and because the indemnity provision could not be reformed by excision of any terms to make it clearer that the provision only applied to Universal's negligence, the entire provision was void and unenforceable. *Id.* ¶ 10.

Section 56-7-1 was amended in 2003 and 2005, and now permits enforcement of an indemnity provision to the extent it does not violate 56-7-1, instead of the all-or-nothing approach of the 1971 statute. *See* NMSA 1978 56-7-1(B)(1) (2005); *see also Holguin v. Fulco Oil Servs., LLC*, 2010-NMCA-091, 149 N.M. 98 (enforcing an indemnity provision to the extent the provision did not violate Section 56-7-1).

In ***Windham v. L.C.I.2, Inc.*, 2012-NMCA-001, 268 P.3d 528**, the plaintiff, an employee a roofing subcontractor, filed suit against a general contractor ("Contractor") of a construction project for injuries allegedly sustained while working on the project when the employee fell through a hole in a roof designated for a skylight. The contract between the roofing subcontractor ("Roofing") and the Contractor provided that Roofing agreed to indemnify Contractor against and save it harmless from any and all claims, suits or liability for injuries to persons "on account of any act or omission of [Roofing], or any of [its] officers, agents, employees or servants[;]" and further required Contractor be named as an additional insured on Roofing's commercial general liability insurance policy.

The Contractor demanded a defense and indemnification from Roofing's insurer ("Insurer"). Insurer tendered a defense under a reservation of rights based on the fact that it was unclear whether the plaintiff's injuries arose from the plaintiff's work for Roofing, or Contractor's individual negligence. Eventually, Insurer intervened and filed for a declaratory judgment that it had no duty to defend or indemnify Contractor because the plaintiff's complaint only alleged that Contractor was negligent and that an indemnification of Contractor for Contractor's own negligence was against public policy as stated in Section 56-7-1. The Court denied the Insurer's motion for summary judgment in the declaratory judgment action. Insurer appealed.

The Court applied the 2003 version of the statute, as that was the version in effect at the time the parties entered the subcontract, and affirmed the trial court's ruling. Insurer appealed to the New Mexico Supreme Court. The issue before the Court was whether the statute required an indemnitor's insurance carrier to defend *and* indemnify the indemnitee when a plaintiff files suit against an indemnitee, and only alleges negligence of the indemnitee, not the indemnitor.

The Court only partially answered the question. First, the Court noted that the duty to defend is distinct from the duty to indemnify, and that the duty to defend is broad such that, so long as the Plaintiff's complaint shows that an accident or occurrence conceivably comes within coverage under an insurance policy, the insurer must tender a defense. The Court divided the duties in question because "[w]hether there is a duty to defend does not necessarily depend on there being a duty to indemnify." *Id.* ¶ 17.

The Court held that the Insurer had a duty to defend because an additional insured provision of Roofing's policy required defense "with respect to liability *arising out of* [Roofing's] ongoing operations performed for [Contractor]." *Id.* ¶ 18 (emphasis in original). The phrase "arising out of" is given broad interpretation in New Mexico; thus, the Court held Plaintiff's injuries arose out of Roofing's operations. The Court did not reach the issue of indemnification, as there was not yet a judgment for which Contractor could seek indemnity from Roofing.

In ***Holguin v. Fulco Oil Servs., LLC*, 2010-NMCA-091, 149 N.M. 98**, the plaintiff filed suit against Fulco Oil Services, LLC ("Fulco") for injuries allegedly sustained while working on Fulco's gas plant. Fulco hired several subcontractors ("Contractors") to perform work at the Company's gas plant. The subcontracts between Fulco and the Contractors were generic and did not specify the type of work to be performed, and contained an indemnity provision by which Contractors agreed to indemnify Fulco:

> against all claims, damages, losses, liens, causes of action, suits, judgments[,] and expenses, including attorney fees ... of any person ... arising out of, caused by or resulting from the performance of the work ... caused in whole or in part by any act or omission, including negligence, of the contractor ... even if it is caused in part by the negligence or omission of any indemnitee.

The plaintiff was an employee of one of the Contractors. After the employee filed suit, Fulco filed claims for indemnity against the Contractors. The trial court dismissed Fulco's action finding that the indemnity provision of the subcontracts was void and unenforceable pursuant to Sections 56-7-1 and 56-7-2 NMSA 1978 (oil field indemnity). Fulco appealed.

The issue before the New Mexico Court of Appeals was whether the contract and/or the work performed by the Contractors was within the scope of Section 56-7-1, and if so, whether the statute voided the indemnity provision.

First, the Court grappled with the generic nature of the contracts at issue. The Court recognized that "generic contracts exist and are common in the . . . industries that [New Mexico's] anti-indemnity statutes are designed to address[.]" *Id.* ¶ 16. Therefore, the Court noted, "it would not further the Legislature's intent . . . to exclude an agreement from the scope of those statutes simply because the agreement did not specifically define the type of work to be performed." *Id.* Instead, the Court stated that "where a contract is so generic in nature that it is not possible to determine the type of work to be performed from the contract itself" the Court will "look past the contract to the nature of the work being performed at the time of the accident in order to resolve whether the circumstances of a given case are within the scope of the anti-indemnity statutes." *Id.*

In accordance with its analytical instruction, the Court looked to the nature of the work performed by the Contractors and held Section 56-7-1 applied because the work-

cleaning a large pressurized system that was part of the gas processing production facility-was maintenance of a structure on real property, thereby bringing the subcontracts within the definition of "construction contract" under the statute as an "agreement relating to . . . maintenance of any real property in New Mexico . . . [including] agreements for ... other improvement to real property, including buildings, shafts, wells and structures, whether on, above or under real property." *Id.* ¶¶ 31, 35; NMSA 1978, 56-7-1(E) (2005).

With respect to whether the statute voided the indemnity provision of the contract, the Court held that the last segment of indemnity provision ("even if it is caused in part by the negligence or omission of any indemnitee") violated Section 56–7–1(A) by requiring the Contractors to indemnify Fulco for Fulco's own negligence, and therefore the statute rendered that segment void and unenforceable. However, the Court held that the remainder of the indemnity clause which provided that the Contractors will indemnify Fulco for claims based on the Contractors' negligence was enforceable because Section 56–7–1(B) specifically permits enforcement of an indemnity clause to the extent that it provides for indemnification from the indemnifying party's negligence.

In ***City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*** **2009-NMCA-081, 146 N.M. 717**, a pedestrian filed suit against the City of Albuquerque ("City") and a contractor hired by the city to perform architectural and construction services ("Contractor") after allegedly suffering an injury at a newly opened facility on which the Contractor had provided construction services. The pedestrian alleged the curb was negligently designed by the Contractor, and that the City failed to properly construct the curb such that it was too high, and caused him injury. The City filed a cross-claim against the Contractor for defense and indemnification. The indemnity provision in the contract between the City and the Contractor provided:

> [Contractor] agrees to defend, indemnify, and hold harmless the City ... against all suits ... brought against the City because of any injury or damage received or sustained by any person ... arising out of or resulting from any negligent act, error, or omission of [Contractor] ... arising out of the performance of this Agreement
>
> . . . .
>
> Nothing in the Agreement shall be construed to require [Contractor] to defend indemnify and hold harmless the City ... from and against liability ... caused by or resulting from in whole or in part the negligence, act or omission of the City ... [1] arising out of the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications by the City ... or [2] the giving or failure to give directions or instructions by the City ... where such giving or failure to give directions or instructions is the primary cause of bodily injury to persons or damage to property.

The district court found the Contractor had a duty to defend, and awarded the City attorneys' fees for the City's defense of the pedestrian's claims. The Contractor appealed.

On appeal, the Contractor argued it did not have a duty to defend the City under the contract because the City approved all of the designs for the project and because the curb in question complied with the City's design specifications, and therefore the pedestrian's cause of action fell within the exception in the indemnity clause that relieved the Contractor of its duty to defend the city if the cause of action arises out of the City's negligence in approving designs or providing design specifications. Neither party disputed that the pedestrian's allegations against the City were that the City itself, not the Contractor, was negligent.

Nonetheless, the Court upheld the trial court's ruling, holding that the exclusionary language of the contract evidenced that the parties specifically intended for the Contractor to defend the City from any lawsuit alleging that the City itself was negligent, as long as the cause of action arose from the Contractor's alleged negligence, unless the claim arose from the City's negligent approval or preparation of a design or specification. Necessarily, the Court analyzed the pedestrian's allegations to determine whether they arose from the Contractor's alleged negligence. The Court employed a broad definition of "arising out of" such that the Contractor had a contractual duty to defend the city "for all claims that originate from, have their origin in, grow out of, or flow from the negligent performance of [the Contractor's] contract with the City." *Id.* ¶ 22. Thus, because the undisputed facts indicated that the Contractor was responsible for the design and supervision of the construction of the curb which pedestrian alleged caused his injury, the allegations arose from the Contractor's allegedly negligent performance of the contract and therefore fell within the duty to defend.

Furthermore, in response to the Contractor's argument that requiring it to defend the City for the City's alleged negligence violated the public policy expressed in Section 56–7–1, the Court stated:

> [r]equiring [Contractor] to fulfill its contractual obligation to defend the City against any suit against the City arising out of [Contractor's] alleged negligence in the performance of the contract does not violate Section 56–7–1 or the policy behind it. Instead, this interpretation of the contract is fully consistent with the requirements of the statute. It promotes safety in the construction project because it ensures that [Contractor] will be accountable for any harm caused by its performance of the agreement.

Id. ¶ 20.

Finally, the Court held that the exclusionary language of the indemnity clause did not relieve the Contractor of its duty to defend. The Contractor argued that the exclusionary provisions of the indemnity clause relieved it of its duty to defend because the curb was built and designed in accordance with standard design specifications provided by the City and because the City approved the plans prior to the construction

of the project. Pursuant to the terms of the exclusionary provision, the Court looked to the allegations of the pedestrian's complaint to determine whether the allegations arose out of the City's preparation or approval of maps, drawings, designs, or specifications. The Court held that because the pedestrian alleged negligent placement of the curb and not negligent design of the curb itself, the exclusionary language of the indemnity clause did not relieve the Contractor of its duty to defend.

The Court did not address the question of whether Contractor had a duty to indemnify the City, because there were unresolved issues of material fact on the issue, and because "the duty to indemnify is distinct from the duty to defend, and resolution of whether a party has a duty to defend does not necessarily depend on there being a duty to indemnify." *Id.* ¶ 32 (internal quotation marks, alterations and citation omitted).

In ***J.R. Hale Contracting Co., Inc. v. Union Pacific R.R.*, 2008-NMCA-037, 143 N.M. 574**, a subcontractor on a construction project sued its general contractor to enforce a claim of lien for monies the subcontractor alleged it was owed by the general contractor. The general contractor moved to dismiss the complaint because the subcontractor had released certain lien rights for labor and materials when subcontractor submitted applications for payment to the general contractor. The lien releases submitted with the applications for payment contained an indemnity provision that stated the subcontractor:

> agrees to defend and hold harmless the [O]wner, [C]ontractor and/or [L]ender, and/or the [P]rincipal and [S]urety from any claim or claims hereinafter made by the undersigned and/or its material suppliers, subcontractors or employees, servants, agents or assigns of such persons against the project.

Id. ¶ 62 (alterations in original). The trial court heard several motions for summary judgment filed by the general contractor, including a motion relevant to Section 56-7-1, in which the general contractor argued the subcontractor had released all claims for payments and lien rights for labor and materials, and that subcontractor was required to indemnify the general contractor and hold it harmless from the claims asserted in subcontractor's complaint. The trial court granted this motion and ordered that the release required the subcontractor to indemnify the general contractor for its attorney fees and costs incurred in the action. The subcontractor appealed, arguing, *inter alia*, that the clause, covering "any and all claims," was too broad because it failed to differentiate by the type of claim or cause of harm, and, in particular, did not exclude indemnification prohibited under Section 56–7–1.

The question before the Court of Appeals relevant to Section 56-7-1 was whether the indemnification clause of the lien release was so broad that its enforcement could violate Section 56-7-1. The Court held that the indemnification clause was not so overly broad. The Court stated that the subcontractor proposed an "application [of Section 56-7-1(A)] to circumstances clearly outside of the prohibition in [the statute]" because Section 56–7–1(A) relates only to indemnification for claims "arising out of bodily injury

to persons or damage to property caused by, or resulting from... the negligence, act or omission of the indemnitee." *Id.* ¶¶63-64. Thus, the Court held, there was "no basis on which to hold that the indemnification clause in question is invalid as against public policy because it fails to expressly exclude such claims." *Id.* ¶ 63.

Finally, while the subcontractor relied on *Sierra v. Garcia*, 1987-NMSC-116, 106 N.M. 573 (above) in its attempt to void the indemnity clause, the Court noted that the agreement in *Sierra* was declared void because it could not be reformed to eliminate the indemnity for loss arising from the indemnitee's own negligence, and that such a defect did not exist in the subcontractor's contract with the general contractor. *J.R. Hale Contracting Co., Inc. v. Union Pacific R.R.*, 2008-NMCA-037, ¶ 64. Instead, the Court held that the subcontractor's agreement was capable of parsing, such that it could be read or reformed in a way to eliminate the indemnity for any loss arising in whole or in part from the indemnitee's own negligence. *Id.*

FORM OF LEASE

LEASE

[This is provided as a typical, non-New Mexico landlord-oriented office lease form]

THIS LEASE AGREEMENT, made and entered into on _____, 201__, by and between the Landlord and Tenant hereinafter named.

WITNESSETH:

1. DEFINITIONS AND BASIC PROVISIONS: The following definitions and basic provisions shall be used in conjunction with and limited by the reference thereto in the provisions of this Lease:

A. "Landlord": _____

B. "Tenant": _____

C. "Premises": Shall mean the space on the plan attached hereto as Exhibit A, said Premises consisting of approximately _____ square feet of net rentable area. (In determining net rentable area, all measurements are from the outer surfaces of walls, whether exterior walls and/or hallway walls, except party walls where measurements are from centerline.) The Premises are located within the _____ project (the "Project") located at _____, in the county of _____, in the State of New Mexico. The net rentable area of the Project is _____ square feet.

D. "Lease Term": The period commencing on _____the Commencement Date and continuing for _____ calendar months thereafter; provided, however, if the term of this lease commences on a date other than the first day of a calendar month, the Lease Term shall consist of _____ calendar months in addition to the remainder of the calendar month during which this lease is deemed to have commenced. The "Commencement Date" is the date commencing on the earlier of (i) the date Tenant commences business operations from the Premises or (ii) the date Landlord delivers the Tenant Improvements are substantially complete (as such terms are defined in Exhibit B). Tenant may, subject to all the provisions of this Lease Agreement, occupy the Premises upon successful completion of the Tenant Improvements outlined in Exhibit B: provided that Tenant's occupancy prior to the commencement of the term shall be limited to the purpose of installation of phone lines, furniture and otherwise preparing the premises for full time occupancy. Tenant may add additional term to the lease by providing Landlord notice of Tenant's desire for such term.

E. "Basic Rental": Per month - See Paragraph 1, Addendum to Lease.

F. "Security Deposit": $_____.

G. "Permitted Use": Office in connection with Tenant's business and for no other purpose whatsoever.

2. LEASE GRANT: Landlord, in consideration of the rent to be paid and the other covenants and agreements to be performed by Tenant and upon the terms and conditions hereinafter stated, does hereby Lease, demise and let unto Tenant the Premises (as defined in paragraph 1 (c) hereof) commencing on the commencement date (as defined in paragraph 1 (d) hereof, or as adjusted as hereinafter provided) and ending on the last day of the Lease Term, unless sooner terminated as herein provided. If this Lease is executed before the Premises become vacant, or otherwise available and ready for occupancy, or if any present tenant or occupant of the Premises holds over, and Landlord cannot acquire possession of the Premises prior to the commencement date of this Lease, Landlord shall not be deemed to be in default hereunder, and Tenant agrees to accept possession at such time as Landlord is able to tender the same; with the Tenant Improvements substantially completed therein and such date shall be deemed to be the commencement date and this Lease shall continue for the Lease term described in paragraph 1 (d) hereof, Landlord hereby waives payment of rent covering any period prior to the tendering of possession of the Premises to Tenant hereunder. Likewise, should Tenant occupy the Premises prior to the commencement date specified in paragraph 1 (d), the commencement date shall be altered to coincide with said occupancy with the ending date of the Lease remaining unchanged. By occupying the Premises, Tenant shall be deemed to have accepted the same as suitable for the purpose herein intended and to have acknowledged that the same comply fully with Landlord's covenants and obligations, except for punch list items which shall be completed by Landlord pursuant to Exhibit B.

3. RENT: In consideration of this Lease, Tenant promises and agrees to pay Landlord the basic rental (as defined in paragraph 1 (e) hereof) without deduction or set off, for each month of the entire Lease term. One such monthly installment together with the security deposit (as defined in paragraph 1 (f) hereof) shall be payable by Tenant to Landlord contemporaneously with the execution hereof, and a like monthly installment shall be due and payable without demand on or before the first day of each succeeding calendar month during the term hereof. Rent for any fractional month at the beginning or end of the Lease shall be prorated. The security deposits shall be held by Landlord without liability for interest and as security for the performance by Tenant of Tenant's covenants and obligations under this Lease, it being expressly understood that such deposits shall not be considered an advance payment of rental or a measure of Landlord's damages in case of default by Tenant. Upon the occurrence of any event of default by Tenant, with any applicable cure period remaining expired, Landlord may, from time to time, without prejudice to any other remedy, use such deposit to the extent necessary to make good any arrearages of rent and any other damage, injury, expense or liability caused to Landlord by such event of

default. Following any such application of the security deposit, Tenant shall pay to Landlord on demand the amount so applied in order to restore the security deposit to its original amount. If Tenant is not then in default hereunder, any remaining balance of such deposit shall be returned by Landlord to Tenant upon termination of this Lease. If Landlord transfers its interest in the Premises during the Lease term, Landlord may assign the security deposit to the transferee and thereafter shall have no further liability for the return of such security deposit.

4. ADDITIONAL RENTAL:

A. In addition to monthly installments of basic rental, Tenant shall pay to Landlord without deduction or offset on the first day of each month during the Lease Term as additional rental Tenant's proportionate share _____%, of all operating expenses for the Project. Tenant's proportionate share is defined to mean a fraction, the numerator of which is the square footage of the Premises set out in paragraph 1 (c), and the denominator of which is the total net rentable area of the Project also set out in paragraph 1(c). The product resulting from the application of such fraction to the operating expenses shall constitute the amount of additional rent Tenant shall pay.

B. Additionally, beginning January 1 of any calendar year following the first year of the Lease Term, the basic rental per month set out in paragraph 1(e) shall be increased by an amount equal to the additional rent payable during the immediately preceding year, (determined in accordance with subparagraph 4 (a) above) divided by twelve. Any such additional rent collected, pursuant to this paragraph 4 (b), shall be a credit against the amount of additional rental, if any, due from Tenant pursuant to paragraph 4 (a) for such calendar year. After the end of every calendar year Landlord will deliver to Tenant a statement including (i) the previous calendar years operating expenses (as defined in this paragraph 4), (ii) Tenant's proportionate share of the operating expenses, (iii) the net additional rent due pursuant to paragraph 4(a), if any, after crediting to Tenant amounts paid as additional rent under 4(b) or the amount due to be reimbursed to Tenant; provided, however, in no event shall the monthly rental ever be less than the basic rental specified in paragraph 1(e).

Notwithstanding any expiration or termination of this Lease prior to the Lease expiration date (except in the case of a cancellation by mutual agreement) Tenants obligation to pay any and all additional rent under this Lease shall cover all periods up to the Lease expiration date. Landlord shall be entitled to estimate the amount of additional rent which shall be due from Tenant during the last year or a portion of a year of the Lease term at any time within thirty (30) days prior to the expiration of the Lease term, and Tenant shall pay such amount to Landlord upon demand, (subject to adjustments when actual expenses are known). Tenant's obligation to pay any and all additional rent under this Lease and Landlord's and Tenant's obligation to make the adjustments referred to in this paragraph 4 shall survive any expiration or termination of this Lease Landlord shall be entitled to make.

The term "operating expenses" shall mean all expenses, costs and disbursements of every kind and nature which Landlord shall pay or become obligated to pay because of or in connection with the ownership, operation, maintenance, repair, replacement, protection and security of the Project, determined on an accrual basis in accordance with generally accepted accounting principles, including, without limitation, the following: (i) Salaries and wages of all employees engaged in the operation, maintenance and security of the Project, including taxes, insurance and benefits (including pension, retirement and fringe benefits) relating thereto; (ii) Cost of all supplies and materials used in the operation, maintenance and security of the Project; (iii) Cost of all water, power and sewage service supplied to, and all heating, lighting, air conditioning and ventilating of, the Project, with the sole exception of electrical energy supplied to tenants of the Building at their respective premises and paid for by such tenants; (iv) Cost of all maintenance and service agreements for the Project and the equipment therein, including, without limitation, alarm service, parking facilities, security (both on-site and off-site), janitorial service, landscaping, fire protection, sprinklers, window cleaning and elevator maintenance; (v) Cost of all insurance relating to the Project, including the cost of casualty, rental and liability insurance applicable to the Project and Landlord's personal property used in connection therewith; (vi) All taxes, assessments and governmental charges (foreseen or unforeseen, general or special, ordinary or extraordinary) whether federal, state, county or municipal and whether levied by taxing districts or authorities presently taxing the Project or by others subsequently created or otherwise, and any other taxes and assessments attributable to the Project or its operation, and all taxes of whatsoever nature that are imposed in substitution for or in lieu of any of the taxes, assessments or other charges herein defined; provided, however, operating expenses shall not include taxes paid by tenants of the Project as a separate charge on the value of their leasehold improvements, death taxes, excess profits taxes, franchise taxes and state and federal income taxes; (vii) Cost of repairs and general maintenance, including, without limitation, reasonable depreciation charges applicable to all equipment used in repairing and maintaining the Project, but specifically excluding repairs and general maintenance paid by proceeds of insurance or by Tenant or by other third parties; (viii) Cost of capital improvement items, including installation thereof, which are acquired primarily for the purpose of reducing operating expenses; (ix) Management fees paid by Landlord to third parties or reasonable management fees (not to exceed the then prevailing market rate for management of buildings comparable to and located in the same general geographical area as the Project) paid to management companies owned by, or management divisions of, Landlord; and (x) Any and all increases in ground rental and/or mortgage debt service requirements on the Project in accordance with the terms and conditions of any ground leases, mortgages or deeds of trust now or hereafter encumbering the Project; excluding, however, any and all increases in debt service caused by a refinancing which enables Landlord to net any proceeds or additional debt placed upon the Project to finance additional capital improvements, additions or alterations. To the extent that any operating expenses are attributable to the

Project and other projects of Landlord, a fair and reasonable allocation of such operating expenses shall be made between the Project and such other projects.

Notwithstanding anything to the contrary in the definition of operating expenses in this Lease, operating expenses shall not include the following:

(1) Costs of items considered capital repairs, replacements, improvements and equipment under generally accepted accounting principles consistently applied or otherwise ("Capital Items"), except for (1) the annual amortization (amortized over the useful life) of costs, including financing costs, if any incurred by Landlord for any capital improvements installed or paid for by Landlord and required by any new (or change in) laws, rules or regulations of any governmental authority; or (2) the annual amortization (amortized over the useful life) of costs, including financing costs, if any, of any equipment, device or capital improvement purchased or incurred as a labor-saving measure or to affect other economics in the operation or maintenance of the Building (provided the annual amortized costs do not exceed the actual costs savings realized and such savings do not redound primarily to the Benefit of any particular tenant;

(2) Any and all cost arising from the presence of Hazardous Materials (as defined by applicable laws in effect on the date the Lease is executed) in or about the Premises, the Building, or the Project including without limitation, Hazardous Materials in the ground water or soil, not placed in the Premises, the Building, or the Project by Tenant; or

(3) Costs arising from latent defects in the base, shell or core of the building or improvements installed by the Landlord or repair thereof.

5. SERVICES:

A. Landlord agrees to make available to the Premises at Landlord's sole cost and expense (i) electric service and (ii) electrical lighting service for all common areas in the manner and to the extent deemed by Landlord to be standard.

B. Landlord agrees to furnish or cause to be furnished to the Premises, the following utilities or services:

(1) Electric current sufficient for routine lighting and the operation of general office machines.

(2) Water for drinking, cleaning and lavatory purposes.

C. Tenant shall pay for the electricity, gas and water utilized in operating any and all facilities serving the Leased Premises. Tenant's use of

electric current shall not exceed the capacity of the feeders to the Building or cause an imbalance in the electric load therein.

D. Failure to any extent to furnish or any stoppage or interruption of these defined services resulting from any cause except the gross negligence of Landlord, its contractors, agents, employees or assigns shall not render Landlord liable in any respect for damages to either person, property or business, nor be construed as an eviction of Tenant or work an abatement of rent, nor relieve Tenant from fulfillment of any covenant or agreements hereof. Tenant shall have no claim for abatement of rent or damages of any interruptions in service occasioned thereby or resulting therefrom.

6. LEASEHOLD IMPROVEMENTS: Landlord has made no representations as to the conditions of the premises or the Building or to remodel, repair or decorate, except as expressly set forth herein. See Exhibit B titled "Tenant Improvements" attached hereto. By taking occupancy, Tenant accepts the Premises in its "AS IS" condition with no warranty of representation of any kind.

7. SIGNS: Tenant shall have the right to install signs, at Tenant's cost, upon the exterior of said building only when first approved in writing by Landlord in Landlord's sole discretion and subject also to building sign criteria as determined by Landlord from time to time, and any applicable governmental laws, ordinances, regulations and other requirements. Tenant shall remove all signs no later than thirty (30) days prior to the expiration of this Lease. In the event Tenant fails to remove all such signs within the above time period, Landlord shall be authorized to remove such signs on Tenant's behalf and at Tenant's sole expense, and Tenant hereby agrees to indemnify and hold Landlord harmless from and against any and all costs, expenses, claims and other liabilities of any type arising out of such sign removal. All sign installations and removals by Tenant shall be made in such a manner as to avoid injury to or defacement of the Building and other improvements.

8. USE: Tenant shall use the Premises only for the permitted use (as defined in paragraph 1(g) hereof) and for the purpose of receiving, storing, shipping and selling (other than retail) products, materials and merchandise made and/or distributed by Tenant and for such other lawful purposes as may be incidental thereto. Tenant will not occupy or use the Premises, or permit any portion of the Premises to be occupied or used, for any business or purpose other than the permitted use or for any use or purpose which is unlawful in part or in whole or deemed to be disreputable in any manner or extra hazardous on account of fire, nor permit anything to be done which will in any way increase the rate of fire insurance on the Building or contents; and in event that, by reason of acts of Tenant, there shall be any increase in rate of insurance on the Building or contents created by Tenant's acts or conduct of business then such acts of Tenant shall be deemed to be an event of default hereunder and Tenant hereby agrees to pay to Landlord the amount of such increase on demand and

acceptance of such payments shall not constitute a waiver of any of Landlord's other rights provided herein. Tenant will conduct its business and control its agents, employees and invitees in such a manner as not to create any nuisance, nor interfere with, annoy or disturb other tenants or Landlord in management of the Building. Tenant will maintain the Premises in a clean, healthful and safe condition and will comply with all laws, ordinances, orders, rules and regulations (state, federal, municipal and other agencies or bodies having any jurisdiction thereof) with reference to use, condition or occupancy of Premises, including, without limitation, Title III of the Americans With Disabilities Act of 1990, as amended from time to time, and all rules and regulations promulgated pursuant thereto. Tenant will not, without the prior written consent of Landlord, paint, install lighting or decoration, or install any signs, window lettering or advertising media of any type on or about the Premises or any part thereof. Should Landlord agree in writing to any of the foregoing items in the preceding sentence, Tenant will maintain such permitted item in good condition and repair at all times. Outside storage, including without limitation, trucks and other vehicles and the washing thereof at any time, is prohibited without Landlord's prior written consent. Tenant shall, at its own cost and expense, obtain any and all licenses and permits necessary for any such use including a Certificate of Occupancy and any required inspections related to Tenant's occupancy of the premises. Tenant shall comply with all governmental laws, ordinances and regulations applicable to the use of the premises, and shall promptly comply with all governmental orders and directives for the correction, prevention and abatement of nuisances in or upon, or connected with, the premises, all at Tenant's sole expense. In addition, any tenant improvements shall be constructed and installed in compliance with Title III of the Americans with Disabilities Act of 1990 and all rules and regulations promulgated thereunder (collectively, with "ADA"). Tenant, at Tenant's sole cost and expense, shall be responsible for compliance with all provisions of the ADA, as amended from time to time, with respect to the use, occupation or alteration of the Leased Premises. Landlord, at Landlord's sole cost and expense, shall be responsible for compliance with Title III of the ADA, as amended from time to time, with respect to all common areas of the Building to the extent that such compliance is not caused by Tenant's use, occupation or alteration of the Leased Premises.

9. REPAIRS AND MAINTENANCE:

A. By Landlord: Tenant understands and agrees that this Lease is intended to be a "net" lease, and as such, Landlord's maintenance, repair and replacement obligations are limited to those set forth in this paragraph 9(a). Landlord shall at its expense maintain only the roof, foundation, underground or otherwise concealed plumbing, and the structural soundness of the exterior walls (excluding all windows, window glass, plate glass, skylights and all doors) of the Building in good repair and condition, except for reasonable wear and tear. Landlord shall not be responsible for termite eradication. Tenant shall give immediate written notice to Landlord of the need for repairs or corrections, which are the responsibility of the Landlord and Landlord shall proceed promptly

to make such repairs or corrections and shall have a reasonable time to complete same. Landlord's liability hereunder shall be limited to the cost of such repairs or corrections.

Landlord represents that at the beginning of this Lease the plumbing, and any fire protection sprinkler system, heating system, air-conditioning equipment, and elevators are in good operating condition. In addition, Landlord shall maintain the paving outside the Building, the landscaping and regular mowing of grass and any railroad siding.

B. By Tenant: Tenant shall at its expense and risk maintain all other parts of the Premises and other improvements on the demised Premises in good repair and condition, including but not limited to repairs (including all necessary replacements) to the interior plumbing, windows, window glass, plate glass doors, heating system, air-conditioning equipment, fire protection sprinkler system, elevators, and the interior of the Premises in general. Tenant shall, at its own expense enter into a regularly scheduled preventive maintenance, service contract with a maintenance contractor for servicing all heating and air conditioning systems and equipment within or serving the Premises. The maintenance contractor and the contract must be approved by Landlord. The service contract must include all services suggested by the equipment manufacturer within the operations/maintenance manual and must become effective and a copy thereof delivered to Landlord within thirty (30) days of the term commencement date. All warranties and guarantees in effect on any of the items mentioned above will be for Tenant's or Landlord's use as applicable.

In the event Tenant should neglect reasonably to maintain the Premises, Landlord shall have provided written notice to Tenant of such disrepair and Tenant has not commenced to cause repairs to be completed within ten (10) days of Landlord's notification, Landlord shall have the right (but not the obligation) to cause repairs or corrections to be made and any reasonable cost therefor shall be payable by Tenant to Landlord as additional rental on the next rental installment date. In the case of such disrepair creating an emergency situation, in Landlord's sole opinion, notification to Tenant is not required.

10. ALTERATIONS AND IMPROVEMENTS: At the end or other termination of this Lease, Tenant shall deliver up the Premises with all improvements located thereon (except as otherwise herein provided) in good repair and condition, reasonable wear and tear excepted, and shall deliver to Landlord all keys to the Premises. The cost and expense or any repairs necessary to restore the condition of the Leased Premises to said condition in which they are to be delivered to Landlord shall be borne by Tenant. Tenant will not make or allow to be made any alterations or physical additions in or to the Premises without the prior written consent of Landlord, which consent shall not be unreasonably withheld as to nonstructural alterations. All alterations, additions or improvements (whether temporary or permanent in character) made in or upon the Premises, either by Landlord or Tenant, shall be Landlord's

property on termination of this Lease and shall remain on the Premises without compensation to Tenant. All furniture, moveable trade fixtures and equipment installed by Tenant may be removed by Tenant at any time during the lease term and shall be removed by Tenant at the termination of this Lease if Tenant so elects, and shall be so removed if required by Landlord, or if not so removed shall, at the option of Landlord, become the property of Landlord. All such installments, removals and restoration shall be accomplished in a good workmanlike manner so as not to damage the Premises or the primary structure qualities of the Building or the plumbing, electrical lines or other utilities.

11. COMMON AREAS: The use and occupation by Tenant of the Leased Premises shall include the use in common with others entitled thereto of the common area, parking areas, service roads, loading facilities, sidewalks, and other facilities as may be designated from time to time by Landlord, subject, however, to the terms and conditions of this agreement and to reasonable rules and regulations for the use thereof as prescribed from time to time by Landlord.

All common areas described above shall at all times be subject to the exclusive control and management of Landlord, and Landlord shall have the right from time to time to establish, modify and enforce reasonable rules and regulations with respect to all facilities mentioned in this Article. Landlord shall have the right to construct, maintain, and operate lighting facilities on all said areas and improvements; to police same; from time to time to change the area, level, location and arrangement of parking areas and other facilities hereinabove referenced to; and to restrict parking by tenants, their officers, agents and employees to employee parking areas.

All common areas and facilities not within the Leased Premises, which Tenant may be permitted to use and occupy, are to be used and occupied under a revocable license, and if the amount of such areas be diminished, Landlord shall not be subject to any liability nor shall Tenant be entitled to any compensation or diminution or abatement of rent, nor shall such diminution of such areas be deemed constructive or actual eviction.

12. ASSIGNMENT AND SUBLETTING:

A. Tenant shall not, without Landlord's prior written consent, which consent will not reasonably be withheld, assign, sublease, transfer, or encumber this Lease or any interest therein. Any attempted assignment or sublease by Tenant in violation of the terms and covenants of this paragraph shall be void. Notwithstanding the foregoing to the contrary, Tenant may assign the Lease or sublease the Premises to its parent subsidiary, affiliate, or successor entity provided such assignee or sublessor has a net worth equal to or greater than Tenant's net worth as of commencement of the Term.

B. If Tenant requests Landlord's consent to an assignment of the Lease or subletting of all or a part of the Premises. Landlord shall have the

option (without limiting Landlord's other rights hereunder) of terminating this Lease upon thirty (30) days notice and of dealing directly with the proposed assignee or sublessee. Landlord will notify Tenant in writing of its acceptance or rejection of the proposed subleasing or assignment within fourteen (14) days after Landlord's receipt of any and all information Landlord requests regarding the proposed sublessee or assignee. If Landlord should fail to notify Tenant in writing of its decision within a thirty (30) day period after Landlord shall be deemed to have refused to consent to any assignment or subleasing, and to have elected to keep this Lease in full force and effect.

C. All cash or other proceeds of any assignment, sale or sublease of Tenant's interest in this Lease, whether consented to by Landlord or not, shall be paid to Landlord notwithstanding the fact that such proceeds exceed the rentals called for hereunder, unless Landlord agrees to the contrary in writing, and Tenant hereby assigns all rights it might have or ever acquire in any such proceeds to Landlord. This covenant and assignment shall run with the land and shall bind Tenant and Tenant's heirs, executors, administrators, personal representatives, successors and assigns. Any assignee, sublessee or purchaser of Tenant's interest in this Lease (all such assignees, sublessee and purchasers being hereinafter referred to as "Successors"), by assuming Tenant's obligations hereunder shall assume liability to Landlord for all amounts paid to persons other than Landlord by such Successor in consideration of any such sale, assignment or subletting, in violation of the provisions hereof.

13. INDEMNITY: LANDLORD SHALL NOT BE LIABLE FOR AND TENANT WILL INDEMNIFY AND SAVE HARMLESS LANDLORD OF AND FROM ALL FINES, SUITS, CLAIMS, DEMANDS, LOSSES AND ACTIONS (INCLUDING ATTORNEY'S FEES) FOR ANY INJURY TO PERSON OR DAMAGE TO OR LOSS OF PROPERTY ON OR ABOUT THE PREMISES CAUSED BY THE NEGLIGENCE OR MISCONDUCT OR BREACH OF THIS LEASE BY TENANT, ITS EMPLOYEES, SUBTENANTS, INVITEES OR BY ANY OTHER PERSON ENTERING THE PREMISES OR THE BUILDING UNDER EXPRESS OR IMPLIED INVITATION OF TENANT OR ARISING OUT OF TENANT'S USE OF THE PREMISES. LANDLORD SHALL NOT BE LIABLE OR RESPONSIBLE FOR ANY LOSS OR DAMAGE TO ANY PROPERTY OR DEATH OR INJURY TO ANY PERSON OCCASIONED BY THEFT, FIRE, ACT OF GOD, PUBLIC ENEMY, INJUNCTION, RIOT, STRIKE, INSURRECTION, WAR, COURT ORDER, REQUISITION OR OTHER GOVERNMENTAL BODY OR AUTHORITY, BY OTHER TENANTS OF THE BUILDING OR ANY OTHER MATTER BEYOND CONTROL OF LANDLORD, OR FOR ANY INJURY OR DAMAGE OR INCONVENIENCE WHICH MAY ARISE THROUGH REPAIR OR ALTERATION OF ANY PART OF THE BUILDING, OR FAILURE TO MAKE REPAIRS, OR FROM ANY CAUSE WHATEVER EXCEPT LANDLORD'S GROSS NEGLIGENCE OR MISCONDUCT.

14. LIABILITY INSURANCE: Tenant shall procure and maintain throughout the Lease Term a policy or policies of public liability insurance, at its

sole cost and expense, relating to its respective use and/or occupancy of the Premises, with limits of not less than $2,000,000 with respect to injuries to or death of any one person, and in an amount not less than $2,000,000 with respect to any one accident or disaster, and of not less than $2,000,000 with respect to property damaged or destroyed. Tenant shall obtain a written obligation from each insurance company issuing the insurance required to be maintained by Tenant pursuant to this paragraph to notify Landlord at least ten (10) days prior to the expiration or cancellation of such insurance. Such policies or duly executed certificates of insurance shall be promptly delivered to Landlord and renewals thereof, as required , shall be delivered to Landlord at least thirty (30) days prior to the expiration of the respective policies. The policies shall be issued by companies licensed to do business in New Mexico; such companies shall have a Best rating acceptable to the Landlord and shall name Landlord as an additional insured.

15. SUBORDINATION: Tenant accepts this Lease subject and subordinate to any mortgage, deed of trust or other lien presently existing or hereinafter arising upon the Premises, or upon the Project and to any renewals, refinancing and extensions thereof, but Tenant agrees that any such mortgagee shall have the right at any time to subordinate such mortgage, deed of trust or other lien of this Lease on such term and subject to such conditions as such mortgagee may deem appropriate in its discretion. Landlord is hereby irrevocably vested with full power and authority to subordinate this Lease to any first lien mortgagee, deed of trust or other first lien now existing or hereafter placed upon the Premises, or the Project as a whole, and Tenant agrees upon demand to execute such further instruments subordinating this Lease or attaining to the holder of any such liens as Landlord may request. The terms of this Lease are subject to approval by the Landlord's lender(s), and such approval is a condition precedent to Landlord's obligations hereunder. Tenant agrees that it will from time to time upon request by Landlord execute and deliver to such persons as Landlord shall request a statement in recordable form certifying that this Lease is unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect as so modified), stating the dates to which rent and other charges payable under this Lease have been paid, stating that Landlord is not in default hereunder (or Tenant alleges a default stating the nature of such alleged default) and further stating such other matters as Landlord shall reasonably require. Landlord agrees to use its best efforts to provide Tenant with commercially reasonable nondisturbance agreements in favor of Tenant from any ground lessor, mortgage holder or lien holder of Landlord who later comes into existence at any time prior to the expiration of the lease term in consideration of, and as a condition precedent to, Tenant's agreement to subordinate the Lease to the lien of any ground lease, mortgage, deed of trust or other lien hereafter arising upon the Project.

16. CASUALTY INSURANCE: Landlord shall, at all times during the term of this Lease maintain a policy or policies thereon fully paid in advance, issued by and binding upon some solvent insurance company, insuring the

Building against loss or damage by fire, explosion, or other hazards and contingencies Landlord's mortgagee may require; provided that Landlord shall not be obligated to insure any furniture, equipment, machinery, goods or supplies not covered by this Lease which Tenant may bring or obtain upon the Premises, or any additional improvements which Tenant may construct thereon.

17. INSPECTION: Landlord or representatives shall have the right to enter into and upon any and all parts of the Premises at reasonable hours to (i) inspect same or clean or make repairs or alteration or additions as Landlord may deem necessary (but without any obligation to do so, except as expressly provided for herein), or (ii) if possible, show the Premises to prospective tenants, purchasers or lenders; and Tenant shall not be entitled to any abatement or reduction of rent by reason thereof, nor shall such be deemed to be an actual or constructive eviction.

18. CONDEMNATION: If, during the term of this Lease, or any extension or renewal thereof, all of the Project should be taken for any public or quasi-public use under any governmental law, ordinance or regulation or by right of eminent domain or by private purchase in lieu thereof, this Lease shall terminate and the rent shall be abated during the unexpired portion of this Lease, effective on the date physical possession is taken by condemning authority, and Tenant shall have no claim against Landlord for the value of any unexpired term of this Lease.

In the event a portion but not all of the Project shall be taken for any public or quasi-public use under any governmental law, ordinance or regulation, or by right of eminent domain, by private sale in lieu thereof and the partial taking or condemnation shall render the Project unsuitable for continued operation, then Landlord or Tenant shall have the option, in its sole discretion, of terminating this Lease or, at Landlord's sole risk and expense, restoring and reconstructing the Project to the extent necessary to make same reasonably tenantable. Should Landlord elect to restore, the Lease shall continue in full force and effect with the rent payable during the unexpired portion of this Lease being adjusted to such an extent as may be fair and reasonable under the circumstances, and Tenant shall have no claim against Landlord for the value of any interrupted portion of this Lease. If a portion greater than twenty percent (20%) of the Premises shall be taken by condemnation and affects Tenant's business, Tenant shall have option to terminate this Lease.

In the event of any condemnation or taking, total or partial, Tenant shall not be entitled to any part of the award or price paid in lieu thereof, Landlord shall receive the full amount of such award or price, and Tenant hereby expressly waives any right or claim to any part thereof.

19. FIRE AND OTHER CASUALTY: In the event that (i) the Premises should be totally destroyed by fire, tornado or other casualty or (ii) in the event the Premises or the Building should be so damaged that rebuilding or repairs

cannot be completed within one hundred eighty (180) days after the date of such damage, or (iii) in the event of a material uninsured loss to the Premises or Project, Landlord may at its option terminate this Lease, in which event the rent shall be abated during the unexpired portions of this Lease effective with the date of such damage. In the event of a casualty which shall not within (i, ii, iii) set forth herein Landlord shall within thirty (30) days after the date of such damage commence to rebuild or repair the Premises and then shall proceed with reasonable diligence to restore the Premises to substantially the same condition in which it was immediately prior to the happening of the casualty, except that Landlord shall not be required to rebuild, repair or replace any part of the furniture, equipment, fixtures and other improvements which may have been placed by Tenant or other tenants within the project or the Premises. A proportionate reduction of the rent shall be allowed Tenant for such portion of the Premises as shall be rendered inaccessible or unusable to Tenant during the period of Landlord's repair. Unless the casualty was a result of Tenant's fault or neglect, Landlord shall allow Tenant a fair diminution of rent during the time the Premises are unfit for occupancy. Any provision herein notwithstanding in the event any mortgagee under a deed of trust, security agreement or mortgage on the Premises should require that the insurance proceeds be used to retire the mortgage debt, Landlord shall have no obligation to rebuild and this Lease shall terminate upon notice to Tenant. Any insurance which may be carried by Landlord or Tenant against loss or damage to the project or to the Premises shall be for the sole benefit of the party carrying such insurance and under its sole control.

20. HOLDING OVER: Should Tenant, or any of its successors in interest, hold over the Premises, or any part thereof, after the expiration of the term of this Lease, unless otherwise agreed in writing, such hold over shall constitute and be construed as tenancy for month to month only, at a rental equal to 200 % the rent payable for the last month of the term of this Lease. The inclusion of the preceding sentence shall not be construed as Landlord's consent for the Tenant to hold over.

21. TAXES ON TENANT'S PROPERTY: Tenant shall be liable for all taxes levied or assessed against personal property, furniture, or fixtures placed by Tenant in the Premises. If any such taxes for which Tenant is liable are levied or assessed against Landlord or Landlord's property and if Landlord elects to pay the same of if the assessed value of Landlord's property is increased by inclusion of personal property, furniture or fixtures placed by Tenant in the Premises, and Landlord elects to pay the taxes based in such increase. Tenant shall pay to Landlord upon demand that part of such taxes for which Tenant is primarily liable thereunder.

22. EVENTS OF DEFAULT: The following events shall be deemed to be defaults by Tenant under this Lease:

A. Tenant shall fail to pay when due any installment of the rent hereby reserved and such failure shall continue for a period of three (3) days.

B. Tenant shall fail to comply with any term, provision or covenant of this Lease, other than the payment of rent, and shall not commence to cure such failure within ten (10) days after written notice thereof to Tenant.

C. Tenant shall make an assignment for the benefit of creditors.

D. Tenant shall desert or vacate any substantial portion of the Premises for a period of forty-five (45) or more days.

23. REMEDIES: Upon the occurrence of any event of default specified in paragraph 22 hereof, Landlord shall have the option to pursue any one or more of the following remedies without any notice or demand whatsoever:

A. Terminate this Lease in which event Tenant shall immediately surrender the Premises to Landlord, and if Tenant fails to do so, Landlord may, without prejudice to any other remedy which it may have for possession or arrearages in rent, enter upon and take possession and expel or remove Tenant and any other person who may be occupying said Premises or any part hereof, by force if necessary, without being liable for prosecution or any claim of damages thereof; and Tenant agrees to pay to Landlord on demand the amount of all loss and damage which Landlord may suffer by reason of such termination, whether through inability to relet the Premises on satisfactory terms or otherwise, including the loss of rental for the remainder of the Lease term.

B. Enter upon and take possession of the Premises and expel or remove Tenant and any other person who may be occupying the Premises or any part thereof, by force if necessary, without being liable for prosecution or any claim for damages therefor, and if Landlord so elects, relet the Premises on such terms as Landlord shall deem advisable and receive the rent thereof; and Tenant agrees to pay to Landlord on demand any deficiency that may arise by reason of such reletting for the remainder of the Lease term.

C. Enter upon the Premises by force if necessary, without being liable for prosecution or any claim for damages therefor, and do whatever Tenant is obligated to do under the terms of this Lease; and Tenant agrees to reimburse Landlord on demand for any expenses which Landlord may incur in thus effecting compliance with Tenant's obligations under this Lease, and Tenant further agrees that Landlord shall not be liable for any damages resulting to the Tenant for such action.

D. Exercise any other remedy available at law or in equity.

No re-entry or taking possession of the Premises by Landlord shall be construed as an election on its part to terminate this Lease, unless a written

notice of such intention be given to Tenant. Notwithstanding any such reletting or re-entry or taking possession, Landlord may at any time thereafter elect to terminate this Lease for a previous default. Pursuit of any of the foregoing remedies shall not prelude pursuit of any of the other remedies herein provided or any other remedies provided by law, nor shall pursuit of any remedy herein provided constitute a forfeiture or waiver of any rent due to Landlord hereunder or of any damages accruing to Landlord by reason of the violation of any of the terms, provisions and covenants herein contained. Landlord's acceptance of rent following an event of default hereunder shall not be construed as Landlord's waiver of such event of default. No waiver by Landlord of any violation or breach of any of the terms, provisions, and covenants herein contained shall be deemed or construed to constitute a waiver of any other violation or breach of any of the terms, provisions, and covenants herein contained. Forbearance by Landlord to enforce one or more of the remedies herein provided upon an event of default shall not be deemed or construed to constitute a waiver of another violation of default. The loss or damage that Landlord may suffer by reason of termination of this Lease or the deficiency from any reletting as provided for above shall include the expense of repossession and any repairs or remodeling undertaken by Landlord following possession. Should Landlord at any time terminate this Lease for any default, in addition to any other remedy Landlord may have, Landlord may recover from Tenant all damages Landlord may incur by reason of such default, including the cost of recovering the Premises broker fees, costs of improvements for a new Tenant, unamortized brokerage fees for the remaining term of this Lease and the loss of rental for the remainder of the Lease term. From and after the Commencement Date, and to the extent required under New Mexico law, Landlord agrees to the reasonable efforts to mitigate any of its damages arising from the occurrence of an event of default by Tenant involving Tenant's abandonment of the Premises. Tenant agrees that this requirement to use reasonable efforts will have been satisfied by Landlord: (i) notifying its leasing agent of its availability of the Premises for rent, and (ii) showing the Premises to prospective tenants who request to see the Premises and to prospective tenants referred to Landlord by Tenant. In no event shall Landlord be deemed not to have mitigated its damages if Landlord chooses to lease some or all of other space in the Project to a prospective tenant, rather than some or all of the Premises.

Landlord shall be in default hereunder in the event Landlord has not begun and pursed with reasonable diligence the cure of any failure of Landlord to meet its obligations hereunder within thirty (30) days of the receipt by Landlord of written notice from Tenant of the alleged failure to perform. In no event shall Tenant have the right to terminate or rescind this Lease as a result of Landlord's default as to any covenant or agreement contained in this Lease or as a result of the breach of any promise or inducement hereof, whether in this Lease or elsewhere. Tenant hereby waives such remedies of termination and rescission and hereby agrees that Tenant's remedies for default hereunder and for breach of any promise or inducement shall be limited to a suit for damages and/or

injunction. In addition, Tenant hereby covenants that, prior to the exercise of any such remedies, it will give the mortgagees holding mortgages on the Project (whose names and addresses shall have been provided to Tenant) notice and a reasonable time to cure any default by Landlord. In no event shall Landlord or Tenant be liable to the other party, and each party releases the other party from, for consequential, speculative or punitive damages. Notwithstanding any provisions of this Lease to the contrary, the liability of Landlord to Tenant for any default by Landlord under the terms of this Lease shall be limited to Landlord's interest in the Project, and Tenant agrees to look solely to Landlord's interest in the Project and for recovery of any judgement from Landlord, it being intended that Landlord shall not be personally liable for any judgement or deficiency.

24. LATE CHARGES: Tenant hereby acknowledges that late payment to Landlord of rent or other sums due hereunder will cause Landlord to incur costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. If any rent or other sum due from Tenant is not received by Landlord or Landlord's designated agent within ten (10) days after its due date, then Tenant shall pay to Landlord a late charge to the maximum amount permitted by law (and in the absence of any governing law, five percent (5%) per month of such overdue amount), plus any attorney's fees incurred by Landlord by reason of Tenant's failure to pay rent and/or other charges when due hereunder. The parties hereby agree that such late charges represent a fair and reasonable estimate of the cost that Landlord will incur by reason of Tenant's late payment. Landlord's acceptance of such late charges shall not constitute a waiver of Tenant's default with respect to such overdue amount or stop Landlord from exercising any of the other rights and remedies granted hereunder.

25. SURRENDER OF PREMISES: No act or thing done by the Landlord or its agents during the term hereby granted shall be deemed an acceptance of a surrender of the Premises unless Landlord expressively so indicated.

26. ATTORNEY'S FEES: In case it should be necessary or proper for either Landlord or Tenant to commence or engage in any action or litigation against the other party arising out of or in connection with the Lease, the Premises or the Building, the prevailing party shall be entitled to have and recover from the losing party reasonable attorney's fees and other costs incurred in connection with the action and in preparation for said action. This provision shall survive the termination of the Lease.

27. LANDLORDS LIEN: In addition to the statutory Landlord's lien, Landlord shall have, at all times, a valid security interest to secure payment of all rentals and other sums of money becoming due hereunder from Tenant, and to secure payment of any damages or loss which Landlord may suffer by reason of the breach by Tenant of any covenant, agreement or condition contained herein, upon all accounts, accounts receivable, goods, wares, equipment, fixtures, furniture, improvements and other personal property of Tenant presently or which

may hereafter be situated on the Premises, and all proceeds therefrom, and such property shall not be removed therefrom without the consent of Landlord until all arrearages in rent as well as any and all other sums of money then due to Landlord hereunder shall first have been paid and discharged and all the covenants, agreements and conditions hereof have been fully complied with and performed by Tenant. Upon the occurrence of any event of default by Tenant, Landlord, may in addition to any other remedies provided herein, enter upon the Premises and take possession of any and all goods, wares, equipment, fixtures, improvements and other personal property of Tenant situated on the Premises, without liability for trespass or conversion and sell the same at public or private sale, with or without having such property at the sale, after giving Tenant reasonable notice of the time and place of any public sale or of the time after which any private sale is to be made, at which sale the Landlord or its assigns may purchase unless otherwise prohibited by law. Unless otherwise provided by law, and without intending to exclude any other manner of giving Tenant reasonable notice, the requirement of reasonable notice shall be met if such notice is given in the manner prescribed in paragraph 30 of this Lease at least five (5) days before the time of sale. The proceeds from any such disposition, less any and all expenses connected with the taking of possession, holding and selling of the property (including reasonable attorney's fees and other expenses), shall be applied as a credit against the indebtedness secured by the security interest granted in this paragraph 27. Any surplus shall be paid to Tenant or as otherwise required by law; and the Tenant shall pay any deficiencies forthwith. Upon request by Landlord, Tenant agrees to execute and deliver to Landlord a financing statement in form sufficient to perfect the security interest of Landlord in the aforementioned property and proceeds thereof under the provisions of the Uniform Commercial Code in force in the State of New Mexico. The statutory lien for rent is not hereby waived, the security interest herein granted being in addition and supplementary thereto. See Paragraph 27, Addendum to Lease Agreement.

28. MECHANIC'S LIENS: Tenant will not permit any mechanic's lien or liens to be placed upon the Premises of the Building or improvements thereon during the term hereof caused by or resulting from any work performed, materials furnished or obligation incurred by or at the request of Tenant, and in the case of the filing of any such lien Tenant will promptly pay same. If default in payment thereof shall continue for twenty (20) days after written notice thereof from Landlord to the Tenant, the Landlords shall have the right and privilege at Landlord's option of paying the same or any portion thereof without inquiry as to the validity thereof, and any such amounts so paid, including expenses and interest, shall be so much additional indebtedness hereunder due from Tenant to Landlord and shall be repaid to Landlord immediately on rendition of bill therefor, together with interest at ten percent (10%) per annum until repaid.

29. WAIVER OF SUBROGATION: LANDLORD AND TENANT EACH HEREBY WAIVES AND RELEASES ANY AND ALL RIGHTS, CLAIMS, DEMANDS AND CAUSES OF ACTION, EACH MAY HAVE AGAINST THE

OTHER, OR AGAINST THE OFFICERS, DIRECTORS, SHAREHOLDERS, PARTNERS, EMPLOYEES, AGENTS, CONTRACTORS OR INVITEES OF EACH OTHER ON ACCOUNT OF ANY LOSS OR DAMAGE OCCASIONED TO LANDLORD OR TO TENANT, OR ITS BUSINESSES, REAL AND PERSONAL PROPERTIES, THE PROJECT, THE BUILDING, THE PREMISES, OR ITS CONTENTS, ARISING FROM ANY RISK OR PERIL COVERED BY ANY INSURANCE POLICY CARRIED BY EITHER PARTY. INASMUCH AS THE ABOVE MUTUAL WAIVERS WILL PRECLUDE THE ASSIGNMENT OF ANY SUCH CLAIM BY WAY OF SUBROGATION (OR OTHERWISE) TO AN INSURANCE COMPANY (OR ANY PERSON), EACH PARTY HERETO HEREBY AGREES IMMEDIATELY TO GIVE TO ITS RESPECTIVE INSURANCE COMPANIES WRITTEN NOTICE OF THE INSURANCE POLICIES PROPERTY ENDORSED, IF NECESSARY, TO PREVENT THE INVALIDATION OF SUCH INSURANCE COVERAGES BY REASON OF SUCH WAIVERS.

30. NOTICES: Each provision of this Agreement, or of any applicable governmental laws, ordinances, regulations, and other requirements with reference to the sending, mailing or delivery of any notice, or with reference to the making of any payment by Tenant to Landlord, shall be deemed to be complied with when and if the following steps are taken:

A. All rent and other payment required to be made by Tenant to Landlord hereunder shall be payable to Landlord, at the address herein below set forth, or at such other address as Landlord may specify from time to time by written notice delivered in accordance herewith:

B. Any notice or documents required to be delivered hereunder shall be deemed to be delivered if actually received and whether or not received when deposited in the United States mail, postage prepaid, certified or registered mail with or without return receipt requested) addressed to the parties hereto at the respective addresses set out opposite their names below, or at such other address as they have theretofore specified by written notice delivered in accordance therewith:

LANDLORD: _____
_____
_____

TENANT: _____
_____
_____

31. FORCE MAJEURE: Whenever a period of time is herein prescribed for action to be taken by Landlord or Tenant, the Landlord or Tenant shall not be liable or responsible for, and there shall be excluded from the computation for any such period of time, any delays due to strikes, riots, Acts of

God, shortages of labor or materials, war, governmental laws, regulations or restrictions or any other causes of any kind whatsoever which are beyond the control of Landlord or Tenant.

32. SEVERABILITY: If any clause or provisions of this Lease is illegal, invalid or unenforceable under the present or future laws effective during the term of this Lease, then and in that event, it is the intention of the parties hereto that the remainder of this Lease shall not be affected thereby, and it is also the intention of the parties to this Lease that in lieu of each clause or provisions of this Lease that is illegal, invalid, or unenforceable, there be added as a part of this Lease a clause or provisions as may be possible and be legal, valid and enforceable.

33. ENTIRE AGREEMENT; AMENDMENTS; BINDING EFFECT: This Lease contains the entire agreement between the parties and may not be altered, changed or amended, except by instrument in writing signed by both parties hereto. No provisions of this Lease shall be deemed to have been waived by Landlord unless such waiver be in writing signed by Landlord and addressed to Tenant, nor shall any custom or practice which may grow up between the parties in the administration of the terms hereof be construed to waive or lessen the right of Landlord to insist upon the performance by Tenant in strict accordance with the terms hereof. The terms, provisions, covenants and conditions contained in this Lease shall apply to, inure to the benefit of and be binding upon the parties hereto, and upon their respective successors in interest and legal representatives, except as otherwise herein expressly provided.

34. QUIET ENJOYMENT: Provided Tenant has performed all of the terms, covenants, agreements and conditions of this Lease, including the payment of rent, to be performed by Tenant. Tenant shall peaceably and quietly hold and enjoy the Premises for the term hereof, without hindrance from Landlord, subject to the terms and conditions of this Lease.

35. RULES AND REGULATIONS: Tenant and Tenant's agents, employees, and invitees will comply fully and all requirements of the rules and regulations of the Building and related facilities which are attached hereto as Exhibit C, and made a part hereof as though fully set out herein. Landlord shall at all times have the right to change such rules and regulations or to promulgate other rules and regulations in such reasonable manner as may be deemed advisable for safety, care, or cleanliness of the Building and related facilities or Premises, and for preservations of good order therein, all of which rules and regulations, changes and amendments will be forwarded to Tenant in writing and shall be carried out and observed by Tenant. Tenant shall further be responsible for the compliance with such rules and regulations by the employees, servants, agents, visitors and invitees of Tenant.

36. BROKER'S OR AGENT'S COMMISSION: Tenant represents and warrants that there are no claims for brokerage commissions or finder's fees in

connection with the execution of this Lease, except as listed below, and Tenant agrees to indemnify and hold harmless Landlord against all liabilities and costs arising from such claims, including without limitation attorney's fees in connection therewith.

37. GENDER: Word of any gender used in this Lease shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, unless the context otherwise requires.

38. JOINT AND SEVERAL LIABILITY: If there be more than one Tenant, the obligations hereunder imposed upon Tenant shall be joint and several. If there be a guarantor of Tenant's obligations hereunder, the obligations hereunder imposed upon Tenant shall be the joint and several obligations of Tenant and such guarantor and Landlord need not first proceed against the Tenant hereunder before proceeding against such guarantor, nor shall any such guarantor be released from its guarantee for any reason whatsoever, including without limitation, in case of any amendment hereto, waivers hereof or failure to give such guarantor any notices hereunder.

39. CAPTIONS: The captions contained in this Lease are for convenience of reference only, and in no way limit or enlarge the terms and conditions of this Lease.

40. TIME OF ESSENCE: Except as otherwise herein expressly provided, time is of the essence of this Agreement.

41. WAIVER: The failure of Landlord to insist at any time upon the strict performance of any covenant or agreement or to exercise any option, right, power or remedy contained in this Lease shall not be construed as a waiver or a relinquishment thereof for the future. No payment by Tenant or receipt by Landlord of a lesser amount than the monthly installment of rent due under this Lease shall be deemed to be other than on account of the earliest rent due hereunder, nor shall any endorsement or statement in any check or any letter accompanying any check or payments as rent be deemed an accord and satisfaction, and Landlord's right to recover the balance of such rent or pursue any other remedy in this Lease provided.

42. HAZARDOUS WASTE: Indemnification. Tenant shall not cause or permit any Hazardous Material (as hereinafter defined) to be brought upon, stored, kept, or stored either on the Premises (except as necessary for Tenant to conduct its business as permitted by Section 1(g) of this Lease) or on the Project, or to be transported through, discharged or disposed in or about the Premises of the Project by Tenant, its agents, employees or contractors (the Premises of the Project being collectively, the Property). Any such Hazardous Material brought upon, transported, used, kept or stored in or about the Property which is necessary for Tenant to operate its business for the use permitted under Section 1 (g) of this Lease will be brought upon, transported, used, kept and stored only

in such quantities as are necessary for the usual and customary operation of Tenant's business and in a manner that complies, and Tenant covenants to so comply, with (i) all laws, rules, regulations, ordinances, codes or any other governmental restriction or requirement of all federal, state and local government authorities having jurisdiction thereof regulating such Hazardous Material; (ii) permits issued for any such Hazardous Material (which permits Tenant shall obtain prior to bringing any Hazardous Material in, on or about the Property); and (iii) all producers' and manufacturers' instructions and recommendations, to the extent they are stricter than laws, rules, regulations, ordinances, codes or permits. If Tenant, its agents, employees or contractors, in any way breached the obligations stated in the preceding sentence, or if the presence of Hazardous Material on the Property caused or permitted by Tenant results in release or threatened release of such Hazardous Material on, from or under the Property of Hazardous Material otherwise arises out of the operation of Tenant's business, then without limitation of any other rights or remedies available to Landlord hereunder or at law or in equity notwithstanding any provisions of this Lease to the contrary, Tenant shall indemnify, defend, protect and hold harmless Landlord (and Landlord's parent Company(ies), subsidiaries, affiliates, employees, partners, agents, mortgagees or successors to Landlord's interest in the Premises and the Project) (collectively, herein the "Indemnity") from any and all claims, sums paid in settlement of claims, judgement, damages, clean-up costs, penalties, fines, costs, liabilities, losses or expenses (including without limitations attorney's consultant's and experts' fees and any fees and any fees incurred by Landlord to enforce the Indemnity) which arise during or after the term of this Lease as a result of Tenant's breach of such obligations or such released or such contamination of the Property, including without limitation, any personal injury or wrongful death, damages for the loss of, or the restriction on the use of rentable or useable space or any amenity of the Property, damage and diminution in value to the Property or other properties, whether owned by Landlord or by third parties. This Indemnity of Landlord by Tenant includes, with limitation, costs incurred in connection with any investigation of site conditions or any clean-up, remedial, removal or restoration work to or on the Property and the transportation and disposal of any such Hazardous Materials (collectively, the "Clean-Up") necessary to complete such Clean-up of the Property to the satisfaction of Landlord, and as may be required by any federal, state or local governmental agency or political subdivision because of any such Hazardous Material present in the sewage or waste water facilities servicing the Project or in the soil or groundwater on, under or originating from the Property. Without limiting the foregoing, if the presence of any Hazardous Material on the Property caused or permitted by Tenant results in any contamination, released or threatened released of Hazardous Material on, from or under the Property of other properties Tenant shall promptly take all actions at its sole cost and expense as are necessary to return the Property and other properties to the condition existing prior to introduction of such Hazardous Material; provided that Landlord's written approval of such actions shall first be obtained, which approval shall not be unreasonably withheld. This Indemnity shall survive the expiration or earlier

termination of this Lease and shall survive any transfer of Landlord's interest in the Property. As used herein, the term "Hazardous Material" means any hazardous, radioactive or toxic substance, material or waste, including, but not limited to, those substances, materials and waste (whether or not mixed, commingled or otherwise combined with other substances, materials or wastes) listed in the United States Department of Transportation Hazardous Materials Table (49 CFR 172.101) or by the Environmental Protection Agency as hazardous substances (440 CFR PART 302) and amendments thereto, or such substances, materials and wastes which are or become regulated under any applicable local, state or federal law including, without limitation, any material, waste or substance which is (i) a petroleum product, crude oil or any faction thereof, (ii) asbestos, (iii) polychlorinated byphenyls, (iv) designated as a "hazardous substance" pursuant to Section 311 of the Clear Water Act. 33 U.S.C. Section 1251. et seq. (33 U.S.C. Section 1321) or listed pursuant to Section 307 of the Clean Water Act (33 U.S.C. Section 1317), (v) defined as a "hazardous substance) pursuant to Section 1004 of the Resource and Recovery Act, 42 U.S.C. Section 6901 et seq. (42 U.S.C. Section 6903), (vi) defined as a "hazardous substance "pursuant to Section 101 of the Comprehensive Environmental Response. Compensation, and Liability Act 42 U.S.C. Section 9601, et seq. (42 U.S.C. Section 9601), or (vii) defined as a hazardous, toxic and/or dangerous material, substance and/or waste in or for the purpose of any other federal, state, local or municipal statutes, ordinances, regulations, rules, or orders relating in the broadest sense to environmental protection.

43. SPECIAL PROVISIONS:

Addendum to the Lease – Basic Rental

Addendum 2 to the Lease – Option To Extend/Right of First Offer

Exhibit "A" – Premises

Exhibit "B" – Tenant Improvements

Exhibit "C" –Legal Description

Exhibit "D" – Acceptance of Premises Memorandum

Exhibit "E" – Rules and Regulations

Exhibit "F" – Sign Specifications

Exhibit "G" – Communications Equipment/Building Rooftop

[Signatures on next page]

EXECUTED as of the date first above written.

LANDLORD: _____

By: _____

Title: _____

Date: _____

TENANT: _____

By: _____

Title: _____

Date: _____

ADDENDUM 1 TO LEASE AGREEMENT

BASIC RENTAL

Year 1	$_____ psf	$_____ per month
Year 2	$_____ psf	$_____ per month
Year 3	$_____ psf	$_____ per month
Year 4	$_____ psf	$_____ per month

ADDENDUM 2 TO LEASE AGREEMENT

1. OPTION TO EXTEND:

Provided Tenant is not in default at the time of its election, Tenant shall have the right to renew the Term of the Lease as hereinafter set forth. If Tenant wishes to renew the Term, Tenant must provide Landlord written notice at least ____ months prior to expiration of the Term. If Tenant elects to extend the Term, the length of the extension shall be _____.

Notwithstanding the foregoing to the contrary, in the event that Landlord has identified a prospective lessee for the Premises at the time it receives Tenant's election to extend the Term, Landlord may deny Tenant's request to extend the Term, and the Term shall expire as provided in Section 1.D of the Lease.

EXHIBIT A

PREMISES

EXHIBIT B

TENANT IMPROVEMENTS

EXHIBIT C

LEGAL DESCRIPTION OF PROPERTY

EXHIBIT D

RULES AND REGULATIONS

1. Sidewalks, doorways, vestibules, halls, stairways and similar areas shall not be obstructed by tenants or their officers, agents, servants, and employees, or used for any purpose other than ingress and egress to and from the Leased Premises and for going from one part of the Building to another part of the Building.

2. Plumbing fixtures and appliances shall be used only for the purpose for which constructed, and no sweeping, rubbish, rags or other unsuitable material shall be thrown or placed therein. Any stoppage or damage resulting to any such fixtures or appliances from misuse on the part of a tenant or such tenant's officers, agents, servants, and employees shall be paid by such tenant.

3. No signs, poster, advertisements, or notices shall be painted or affixed on any of the windows or doors, or other part of the Building, except of such color, size and style and in such places, as shall be first approved in writing by the Landlord. No nails, hooks or screws shall be driven into or inserted in any part of the Building, except by building maintenance personnel or as directed by the Landlord.

4. Directories will be placed by the Landlord, at Landlord's own expense, in conspicuous places in the Building. No other directories shall be permitted.

5. Tenant shall not do anything, or permit anything to be done, in or about the Building, or bring or keep anything therein, that will in any way increase the possibility of fire or other casualty or obstruct or interfere with the rights of, or otherwise injure or annoy, other tenants, or do anything in conflict with the valid pertinent laws, rules and regulations of any governmental authority.

6. Landlord shall have the power to prescribe the weight and position of safes or other heavy equipment, which may over stress any portion of the floor. All damage done to the Building by the improper placing of heavy items which over stress the floor will be repaired at the sole expense of the tenant.

7. A tenant shall notify the Landlord when safes or other equipment are to be taken out of the Building. Moving of such items shall be done under the supervision of the Landlord after receiving written permission from him.

8. Each tenant shall cooperate with Building employees in keeping Premises neat and clean.

9. No birds, animals or reptiles, or any other creatures, shall be brought or kept in or about the building.

10. Should a tenant require telegraphic, telephonic, annunciator or any other communication service, the Landlord will direct the electricians and installers where and how the wires are to be introduced and placed, and none shall be introduced or placed except as the Landlord shall direct.

11. Tenants shall not make or permit any improper noises in the Building, or otherwise interfere in any way with other tenants, or persons having business with them.

12. No equipment of any kind shall be operated on the Leased Premises that could in any way annoy any other tenant in the Building without written consent of the Landlord.

13. Tenant shall not use or keep in the Building any inflammable or explosive fluid or substance, or any illuminating material, unless it is battery powered, UP approved.

14. The Landlord has the right to evacuate the Building in event of emergency or catastrophe.

15. The Landlord reserves the right to rescind any of these Rules and make sure such other and further Rules and Regulations, in the judgement of Landlord, shall from time to time be needed for the safety, protection, care and cleanliness of the Building, the operation thereof, the preservation of good order therein, and the protection and comfort of its tenants, their agents, employees and invitees, which rules when made and notice thereof given to a tenant shall be binding upon him in like manner as if originally herein prescribed. In the event of any conflict, inconsistency, or other differences between the terms and provisions of these Rules and Regulations, as now or hereafter in effect and the terms and provisions of any Lease now or hereinafter in effect between Landlord and any tenant in the Building, Landlord shall have the right to rely on the term or provision in either such Lease or such Rules and Regulations which is most restrictive on such tenant and most favorable to Landlord.

EXHIBIT E

ACCEPTANCE OF PREMISES MEMORANDUM

This Memorandum is an amendment to the Lease for space at _____, dated on the _____ day of _____, 2002, between _____ as Landlord, and _____ as Tenant.

Landlord and Tenant hereby agree that:

1. Except for those items shown on the attached "punch list," Landlord has fully completed the construction work required of Landlord under the terms of the Lease.

2. The Premises are tenantable, the Landlord has no further obligation for construction (except as specified above), and Tenant acknowledges that the Premises are satisfactory in all respects.

3. The Commencement Date of the Lease is hereby agreed to be the ___ day of _____, 201__.

4. The Expiration Date of the Lease is hereby agreed to be the _____ day of _____, 201__.

All other terms and conditions of the Lease are hereby ratified and acknowledged to be unchanged.

Agreed and Executed this ____ day of _____, 201_.

TENANT: _____

By: _____

Print Name: _____

Title: _____

LANDLORD: _____

By: _____

Print Name: _____

Title: _____

EXHIBIT F

SIGN SPECIFICATIONS

A. Type of Sign: Aluminum panel, mounted directly onto the wall. Nonilluminated.

B. Size of Sign: 30" x 108" (2½' x 9'). Lettering dependent upon tenant's name and logo.

C. Style, Colors, & Materials: Aluminum face, dark bronze #8, aluminum returns. Left and right ends, 15" radius.

D. Placement and Installation: Face and returns welded. 1¾" return from face to wall all the way around the edges. Two "L" brackets are attached to the wall. Sign is screwed to brackets through returns along the top and bottom.

E. Number of Signs & Logos: Generally speaking, one sign per tenant. Logos subject to Landlord's and/or architect's approval.

Important: Sign drawings must be submitted for Landlord and/or architect's written approval before fabrication.

Purpose: Our purpose in providing the tenants with these requirements is to create a good business image and give the impression of quality and professionalism.

EXHIBIT G

COMMUNICATIONS EQUIPMENT/BUILDING ROOFTOP

Subject to Landlord's written consent, which shall not be unreasonably withheld, Tenant, at Tenant's expense, may install a satellite dish and/or related communications equipment at a location designated by Landlord on the roof of the building. Any and all roof penetrations shall be approved by Landlord in advance and performed by a contractor acceptable to Landlord, the cost of which shall be solely Tenant's. All other costs of operating and maintaining such satellite dish and related communications equipment, including, without limitation, electricity, shall be paid by Tenant. Tenant shall repair any and all damage caused by installation of the satellite dish and related communications equipment, including, without limitation, such damage as may exist at the time such satellite equipment and related communications equipment is removed. Tenant shall comply with all governmental requirements in connection with such satellite dish and related communications equipment.

Tenant hereby acknowledges that the rooftop manager hired by the Landlord have the exclusive right to negotiate communication services situated upon the rooftop of the building. Therefore, Tenant shall independently contract with said rooftop manager for all communications services utilizing the rooftop of the building. Tenant must coordinate the installation activities, including execution of amendment to Office Lease, with said rooftop manager.

Tenant shall pay Landlord or Landlord's agent, on demand, the cost Landlord typically charges for (i) determining the location of the Dish and its associated wiring, (ii) the cost of reviewing Tenant's plans for installation and monitoring such installation, (iii) the cost of coordinating and obtaining any certification as to the continuation of the roof guarantee, and (iv) any other cost incurred by Landlord resulting from Tenant's installation, use, maintenance or removal of the Dish. Tenant agrees to pay the reasonable market rate for the communications services as determined by Landlord, Landlord's Agent, and rooftop manager.

FORM OF LETTER OF INTENT

_____

_____
_____
_____
_____

RE: LEASE PROPOSAL

Dear _____:

_____ ("Landlord") has authorized us to submit this Letter of Intent to lease space in to _____ ("Tenant") in _____ (the "Project") to finalize proposed business terms and request a lease document. This letter is not meant to be a legally binding document and is expressly contingent upon the full execution of a mutually agreeable lease document. Upon agreement of business terms contained herein, both parties shall agree to work diligently to procure a mutually acceptable lease document within _____ days.

1. Lease Term and Commencement Date. _____ (__) years, commencing _____.

2. Initial Space. _____ rentable square feet ("RSF") located at _____.

3. Base Rent. $___ per RSF on an annual basis for years _____, and $_____ per RSF on an annual basis for years _____, _____.

4. Late Fees. In the event that any payment of rent is more than __ days late [after notice thereof], Tenant shall pay a late fee equal to ____.

5. Operating Expenses and Real Estate Taxes. Tenant shall be responsible for its proportionate share of all operating expenses including monthly estimated payments for property taxes, hazard insurance, and common area maintenance.

6. Management. Landlord shall be responsible for management of the property and the costs of such services shall be paid by Landlord, but passed through in the operating expenses. [List any key conditions that are material to the deal]

7. Building Services. Throughout the lease term or any extension thereof, Landlord, at Landlord's sole cost, shall maintain the foundations, walls, ceiling, plate glass and the Building's mechanical and electrical systems.

8. Utilities and Janitorial Services. Tenant shall be responsible for its own utilities, which shall be separately metered, and all janitorial services.

9. Tenant Improvement Allowance. The Premises be delivered on a "turnkey" basis according to mutually agreeable construction drawings. Landlord will provide a tenant improvement allowance of $___ per RSF. The floor plan and specifications of the Tenant work is attached as Exhibit __.

10. Rent Concession. The first ___ (__) months of Base Rent shall be abated.

11. Moving Allowance.

12. Expansion/Contraction Rights.

13. Rights of First Refusal or Options to Purchase.

14. Lease Renewal Options. Tenant shall have the option to extend the lease term for ___ additional, consecutive terms of _____ (__) years each at [describe nature of rent during renewal terms]. Tenant shall be required to give ___ (__) months advance written notice to exercise any option.

15. Early Termination Rights.

16. Right to Audit. Tenant shall maintain the right to audit and challenge the Landlord's books and records relating to any determination of any additional rent paid for the previous calendar year. Specifics to be defined in the lease.

17. Right to Assign or Sublease. [Describe key limitations, including any right of recapture or revenue sharing].

18. Non-Disturbance and Quiet Enjoyment. To be included.

19. Parking. __ parking spaces per 1,000 RSF.

20. Roof Access and Use. Tenant shall have ___-exclusive right to use the roof above its facilities for antennas, dishes, and the like, provided that such use shall not void any roof warranties.

21. Asbestos and Other Environmentally Hazardous Materials. [Describe HazMat status and indemnities]

22. Americans with Disabilities Act (ADA).

23. Security Deposit.

24. End of Term. Tenant shall return the Premises in original condition, reasonable wear and tear excepted. Holdover rent shall ___% of immediately preceding rent.

25. Brokerage: _____, in conjunction with _____, has been retained by Landlord as their exclusive broker for this project. _____, in conjunction with _____, has been retained by Tenant as its broker for this lease. Landlord shall pay all brokerage fees due in connection with this Lease in accordance the listing agreement.

26. Memorandum of Understanding. Notwithstanding the above, this request for proposal is not a binding contract but merely sets for some of the more salient terms of any lease agreement that might result, and is made subject to the mutual agreement of the parties (and the corporate approvals) in the form of a lease agreement.

We appreciate your assistance and cooperation and look forward to finalizing these terms soon.

Sincerely,

FORM OF MEMORANDUM OF LEASE

MEMORANDUM OF LEASE

THIS MEMORANDUM OF LEASE dated as of _____, 20__, by and between _____, a _____ ("Landlord"), and _____, a _____ ("Tenant") pursuant to § 14-9-1 NMSA 1978.

WITNESSETH:

By a lease ("Lease") dated _____, Landlord has demised and leased and Landlord hereby demises and leases to Tenant, and Tenant has leased and hereby leases from Landlord the "Premises" consisting of _____ within the building located at _____ under the following terms and conditions:

1. The Premises is situated upon, and the Lease affects, in the manner and to the extent set forth therein, the land legally described in Exhibit "A", attached hereto and made a part hereof.

2. The initial term of the Lease commences on _____ and terminates on _____, unless sooner terminated or extended as provided for in the Lease.

3. The Lease may be extended for _____ (__) additional terms of _____ (__) years each as described in the Lease.

4. The mailing addresses of the Landlord and Tenant are as follows:

5. The sole purpose of this instrument is to give notice of said Lease and all of its terms, covenants, and conditions to the same extent as if said Lease were set forth herein.

6. In the event of any conflict between the terms and conditions of this instrument and the term and conditions of the Lease, it is agreed that the terms and conditions of the Lease shall control.

7. The Lease does not contain an option to purchase the Premises or any other property [or include option if applicable].

8. This Memorandum of Lease may be executed in multiple counterparts, each of which, when so executed, shall be deemed an original, and all of which shall together constitute one and the same document, and shall be binding on the signatories; and the signature of any party to any counterpart shall be deemed a signature to, and may be appended to, any other counterpart.

[Signatures on next page]

IN WITNESS WHEREOF the parties have executed this Memorandum of Lease as of the day and year first above written.

LANDLORD: By: _____
Name: _____
Title: _____

TENANT: By: _____
Name: _____
Title: _____

STATE OF _____

COUNTY OF _____

This instrument was acknowledged before me on _____, 20__, by _____, _____ of _____, a _____.

_____
Notary Public

My commission expires:

_____

STATE OF _____

COUNTY OF _____

This instrument was acknowledged before me on _____, 20__, by _____, _____ of _____, a _____.

_____
Notary Public

My commission expires:

_____

EXHIBIT A

LEGAL DESCRIPTION

FORM OF SUBORDINATION, NONDISTURBANCE AND ATTORNMENT AGREEMENT

SUBORDINATION, NONDISTURBANCE AND ATTORNMENT AGREEMENT

This Subordination, Nondisturbance and Attornment Agreement (the "Agreement") is dated _____, 20___, by and among _____ (the "Lender"), _____ (the "Tenant") and _____ (the "Landlord").

Recitals. The following Recitals apply to this Agreement.

A. Lender made a loan to Landlord, in the original principal amount of $_____ (the "Loan").

B. Lender is the holder of the following described documents (together with all extensions, renewals and modifications thereof, collectively, "Security Documents") signed by Landlord as security for the Loan and covering, without limitation, that certain parcel of land owned by Landlord and described on Exhibit A attached hereto and made a part hereof, together with the improvements thereon (collectively, the "Premises"):

(1) Mortgage Security Agreement and Financing Statement, dated_____, 20__, and recorded in Book _____, beginning at Page _____, of the records of _____ County, New Mexico (the "Mortgage"); and

(2) Assignment of Leases, Rents and Profits, dated _____, 20__, and recorded in Book _____, beginning at Page _____, of the records of _____ County, New Mexico

C. By a certain _____ Lease (the "Lease") entered into between Landlord and Tenant, dated as of _____, 20__, Tenant leased the Premises.

D. Tenant has requested that Lender agree not to disturb Tenant's possessory rights under the Lease in the event that Lender should foreclose on the Security Documents, provided that Tenant is not in default of the Lease.

Agreement.

E. Subject to the terms and conditions of this Agreement, and for so long as this Agreement remains binding upon Lender, the Lease shall be, in accordance with the terms and conditions hereof, subordinate to the lien of the Security Documents and all voluntary and involuntary advances made thereunder.

F. Provided that Tenant is not in default so as to permit the Landlord to terminate the Lease or Tenant's right to possession of the Premises, Lender or the purchaser at a foreclosure sale pursuant to any action or

proceeding to foreclose the Security Documents, whether judicial or non-judicial, or Lender pursuant to acceptance of a deed in lieu of foreclosure or any assignment of Landlord's interest under the Lease, in the exercise of any of the rights arising, or which may arise, out of the Security Documents or in any other manner: (i) shall not disturb or deprive Tenant in or of its use, quiet enjoyment and possession (or its right to use, quiet enjoyment and possession) of the Premises, or of any part thereof, or any right, benefit or privilege granted to or inuring to the benefit of Tenant under the Lease (including any right of renewal or extension thereof); (ii) shall not terminate or affect the Lease; (iii) shall recognize Tenant's rights, benefits and privileges under the Lease; and, (iv) shall recognize the leasehold estate of Tenant under all of the terms, covenants, and conditions of the Lease for the remaining balance of the term of the Lease with the same force and effect as if Lender were the Landlord under the Lease. Lender hereby covenants that any sale by it of the Shopping Center pursuant to the exercise of any rights and remedies under the Security Documents or otherwise, shall be made subject to the Lease and the rights of Tenant thereunder. However, in no event shall Lender be:

(1) Liable for any act or omission of Landlord arising prior to the date Lender takes possession of Landlord's interest in the Lease, except to the extent such act or omission is of a continuing nature, such as, for example, a repair obligation;

(2) Liable for any offsets or deficiencies which the Tenant might be entitled to assert against the Landlord arising prior to the date Lender takes possession of Landlord's interest in the Lease, except to the extent that Lender has received the benefit of the act of the Tenant giving rise to the right of deduction, such as, for example, relief of an obligation that would otherwise have been paid by Lender as Landlord;

(3) Bound by any payment of rent or additional rent made by Tenant to Landlord for more than one month in advance, which payment was not required under the terms of the Lease;

(4) Bound by any amendment or modification of the Lease executed after the date of this Agreement which: (a) increases Landlord's obligations or reduces Tenant's obligations under the Lease; and (b) is made without Lender's prior written consent (except to the extent that the Lease may specifically contemplate any amendment or modification thereof)

G. In the event of the termination of the Security Documents by foreclosure, summary proceedings or otherwise, and if Tenant is not in default under the terms and conditions of the Lease so as to permit the Landlord thereunder to terminate the Lease, then, and in any such event, Tenant shall not be made a party in the action or proceeding to terminate the Security Documents unless not to do so would be disadvantageous procedurally to Lender, in which case, such joinder of Tenant as a party shall not extinguish or interfere with any

rights of Tenant under the Lease, nor shall Tenant be evicted or moved or its possession or right to possession under the terms of the Lease be disturbed or in any way interfered with, and, subject to the provisions of this Agreement, Tenant will attorn to Lender, such attornment to be effective and self-operative without the execution of any other instruments on the part of any party, and the Lease shall continue in full force and effect as a direct Lease from Lender to Tenant under all the terms and provisions of the Lease (including any rights to renew or extend the term thereof).

H. Tenant hereby confirms that the Lease is in full force and effect.

I. Nothing contained in this Agreement shall be deemed to reduce or abrogate any rights of Tenant to cure any default of the Landlord under the Lease in accordance with and subject to the provisions of the Lease and/or to deduct from rental such amounts which Tenant may be entitled to so deduct under the provisions of the Lease.

J. Unless and until Lender or any subsequent purchaser succeeds to the interest of Landlord under the Lease, Landlord shall continue to perform Landlord's obligations and duties under the Lease.

K. After receipt of notice from Lender to Tenant (at the address set forth below) that and event of default has occurred under the Security Documents and rents under the Lease should be paid to Lender, Tenant shall thereafter pay to Lender all monies thereafter due to Landlord under the Lease. In such event, Tenant shall be entitled to rely solely upon such notice, and Landlord hereby indemnifies and agrees to defend and hold Tenant harmless from and against any and all expenses, losses, claims, damages or liabilities arising out of Tenant's compliance with such notice or performance of the obligations under the Lease by Tenant made in good faith in reliance on and pursuant to such notice. Tenant shall be entitled to full credit under the Lease for any rents paid to Lender in accordance with the provisions hereof. Any dispute between Lender and Landlord as to the existence of a default by Landlord under the provisions of the Mortgage, shall be dealt with and adjusted solely between Lender and Landlord, and Tenant shall not be made a party thereto.

L. If all or part of the Premises is taken or condemned by any competent authority and if the Lease is not terminated as a result thereof, the condemnation award paid or payable with respect to the Premises shall be applied and paid in the manner set forth in the Lease. In all other circumstances, the terms of the Mortgage shall control application of condemnation awards.

M. If all or part of the Premises is destroyed by fire or other casualty, if the Lease is not terminated as a result thereof, and if Lender either receives insurance proceeds sufficient to pay the cost of repair and reconstruction of the Premises or receives evidence satisfactory to Lender in its

reasonable judgment that Tenant has paid all costs of repair and construction of the Premises except for an amount equal to insurance proceeds held by Lender, then Lender will make such proceeds available to pay for such repairs and reconstruction provided that funds shall be advanced by Lender under its normal loan requirements as evidenced by the Security Documents. In all other circumstances, the terms of the Mortgage shall control application of insurance proceeds received by Lender.

Miscellaneous.

N. No modification, amendment, waiver or release of any provision of this Agreement or of any right, obligation, claim or cause of action arising thereunder shall be valid or binding for any purpose whatsoever unless in writing and duly executed by the party against which the same is brought to be asserted.

O. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns. The term "Lender" as used in this Agreement shall include any successor-in-interest to the Lender (including, but not limited to, a purchaser at foreclosure or sale in lieu thereof or a person or entity who takes title from lender by conveyance, assignment or other transfer). Lender shall automatically be released from liability under the Lease and this Agreement upon the recording of a deed conveying the property to a person or entity other than Lender.

P. In the event any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, said provision(s) shall be void and of no further force or effect

Q. 13. This Agreement shall be governed and construed according to the laws of the state where the Shopping Center is located.

R. To be effective, any notice or other communication given pursuant to this Agreement must be in writing and hand delivered or sent postage paid by United States registered or certified mail with return receipt requested. Rejection or other refusal to accept, or inability to deliver because of changed address of which no notice has been given, will constitute receipt of the notice or other communication.

Lender's notice address is: _____

_____

_____

_____

Attn.:_____

Tenant's notice address is: _____
_____
_____
_____
Attn.:_____

Landlord's notice address is: _____
_____
_____
_____
Attn.:_____

At any time(s), each party may change its address for the purposes hereof by giving the other party a change of address notice in the manner stated above.

S. This Agreement (i) contains the entire understanding of Lender. Landlord and Tenant regarding matters dealt with herein (any prior written or oral agreements between them as to such matters being superseded hereby); and (ii) can be modified or waived in whole or in part only by a written instrument signed on behalf of the party against whom enforcement of the modification or waiver is sought.

T. In the event of any litigation arising out of the enforcement or interpretation of any of the provisions of this Agreement, the unsuccessful party shall pay to the prevailing party its reasonable attorneys' fees, including costs of suit, discovery and appeal. The "prevailing party" shall be that party who obtains substantially the relief sought in the action.

U. In the event the Lease is terminated as a result of Landlord's bankruptcy or reorganization, whereby Lender obtains fee title to the Premises, Lender agrees that the Lease shall remain in effect as between Lender (as Landlord) and Tenant, subject to the terms of this Agreement, and, upon Tenant's written request, Lender and Tenant agree to execute a reinstatement agreement documenting that the Lease has been reinstated as between Lender (as Landlord) and Tenant and that the terms and conditions thereof shall be as stated in the Lease, subject to the provisions of this Agreement.

[INSERT TENANT SIGNATURE BLOCK AND NOTARY ACKNOWLEDGMENT]

[INSERT LANDLORD SIGNATURE BLOCK AND NOTARY ACKNOWLEDGMENT]

FORM OF ESTOPPEL CERTIFICATE

ESTOPPEL CERTIFICATE

_____, 20__

[NAME AND ADDRESS OF LENDER]

Re: Lease (the "Lease") dated _____, by and between _____ (the "Tenant") and _____ (the "Landlord") of the premises commonly referred to as _____ comprising _____ sq. feet (the "Leased Premises").

Ladies and Gentlemen:

Landlord and Tenant certify that the above description of the Lease, and the description of the Leased Premises is a true and correct description of the same and that the Lease constitutes the only agreement between Landlord and Tenant with respect to the Leased Premises, including any lease modifications or amendments as noted below.

Tenant hereby certifies, acknowledges and agrees as follows:

1. Tenant's Monthly Base Rent under the Lease is $_____.

2. Tenant's payment to Landlord for operating expenses (taxes, insurance, utilities and maintenance) under the Lease is currently $_____ per month.

3. Tenant's last payment of Rent was made for the rental payment due _____, 20_____.

4. No Rent has been paid by Tenant, in advance.

5. A security deposit of $_____ has been deposited with Landlord.

6. Tenant is entitled to the following renewal options under the Lease: _____.

7. There is no uncompleted tenant improvement work on the Leased Premises required to be performed by either Tenant or Landlord.

8. The Lease is in full force and effect; Tenant has accepted the Leased Premises, presently occupies the same, and is paying Rent on a current basis; to the best of the parties' actual knowledge Tenant has no set-offs,

claims, or defenses to the enforcement of the Lease; and there are no periods of free rental applicable to the term of the Lease.

9. Tenant hereby represents and warrants to Lender that, other than those contained in writing in the Lease, there have been no representations, warranties or covenants made by Landlord to Tenant, either oral or written.

10. Tenant is not in default which is continuing and ongoing beyond applicable cure periods in the performance of the Lease, no notice of default has been given to Tenant, and Tenant is not the subject of any federal or state, bankruptcy, insolvency or liquidation proceeding.

11. Landlord is not in default in the performance of the Lease, has not committed any breach of the Lease, no notice of default has been given to Landlord, and Landlord has fulfilled all representations and warranties.

12. There have been no amendments, modifications, extensions or renewals of the Lease.

13. The Lease contains, and Tenant has, no outstanding options or rights of first refusal to purchase the Leased Premises.

14. The Tenant has not received any notice from any governmental authority that the Property or any portion thereof is subject to any pending or threatened inquiry, investigation or governmental action with respect to environmental laws, rules or regulations.

15. Except as specifically provided in this certificate, nothing herein shall modify the terms and conditions of the Lease.

Very truly yours,

[SIGNATURE BLOCK OF TENANT]

[SIGNATURE BLOCK OF LANDLORD]

FORM OF NOTICE OF NON-RESPONSIBILITY

NOTICE OF NON-RESPONSIBILITY

THIS NOTICE OF NON-RESPONSIBILITY is hereby posted this ___ day of _____, 20__ by _____ (the "Owner").

WHEREAS, the Owner owns that certain property (the "Property") commonly known as [street address], and more specifically described as follows:

[insert legal description or attach as exhibit]; and

WHEREAS, the Owner has obtained knowledge, within three days prior to the date of posting this notice in a conspicuous place upon the Property or upon the building or other improvements situated on the Property, of the construction, alteration or repair, or intended construction, alteration or repair on the Property, more particularly described as follows:

[insert description of work]

(collectively, the "Construction Work"); and

WHEREAS, the Owner wishes to provide notice in accordance with § 48-2-11 NMSA 1978 of Owner's non-responsibility for the Construction Work on the Property;

NOTICE IS HEREBY GIVEN as follows:

1. None of the Construction Work on the Property is at the instance of the Owner.

2. The Owner will not be responsible for any of the Construction Work on the Property, and no mechanics' or materialmen's lien shall attach to the interest of the Owner in the Property.

EXECUTED the date set forth above.

[NAME OF OWNER]

By:

_____

Name: _____

Title: _____

DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND RECIPROCAL EASEMENTS

_____

_____, NEW MEXICO

DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND RECIPROCAL EASEMENTS

THIS DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS, AND RECIPROCAL EASEMENTS ("Declaration") is made and executed as of this _____ day of _____, ____, (the "Date Hereof") by _____, a _____ ("Declarant"), whose address is _____.

WHEREAS, Declarant owns three contiguous tracts of land in _____, New Mexico, one tract consisting of a certain parcel of land designated on Exhibit A as "Lot 1" and more particularly described on Exhibit B attached hereto ("Lot 1") one parcel designated on Exhibit A as "Lot 2", as more particularly described on Exhibit C attached hereto ("Lot 2"); and one parcel designated on Exhibit A as "Lot 3", as more particularly described on Exhibit D attached hereto ("Lot 3"; Lot 1, Lot 2 and Lot 3 are referred to collectively as the "Project"); and

WHEREAS, Declarant wishes to establish for the benefit of each of Lot 1, Lot 2, and Lot 3 (individually a "Lot" and together, the "Lots" or the "Shopping Center") and the current and future Owners (as hereinafter defined) of the Lots certain rights and responsibilities as more fully set forth in this Declaration; and

WHEREAS, Declarant is executing this Declaration in anticipation of constructing new buildings on the Lots, related parking and other improvements as generally indicated on Exhibit A attached hereto (the "Initial Construction").

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Declarant hereby declares and establishes, effective immediately, the following:

1. Definitions.

A. "Building" means any permanently enclosed structure or any portion thereof situated on a Lot, and appurtenances thereto.

B. "CAM Charges" means the actual costs incurred by the Maintenance Owner, plus an administrative fee of ten percent (10%), for maintenance, repair and, as necessary, replacement of Common Area Improvements, and shared water; shared electricity; landscape maintenance and watering; parking lot sweeping, maintenance, resealing, restriping and when necessary, replacement of Drives and Parking Area; parking lot lighting; snow and debris removal; parking lot lighting electricity; plus New Mexico gross receipts taxes, if applicable to the foregoing.

C. "City" means the City of _____, New Mexico.

D. "Common Areas" means all Drives and Parking Area, exterior landscaped areas (including detention ponds) and the location of the Shopping Center sign as designated on Exhibit A attached hereto, as the lay-out of the such items may be revised from time to time by the Owner of Lot 2.

E. "Common Area Improvements" means all improvements located within the Common Areas, including but not limited to Drives and Parking Area, the Shopping Center sign, parking lot lighting, curb and gutter, and stormwater drainage facilities benefiting more than a single Lot.

F. "Declarant" means _____, a _____.

G. "Declaration" means this Declaration of Covenants, Conditions, Restrictions and Reciprocal Easements _____, _____, New Mexico, as may be amended from time to time.

H. "Drives and Parking Area" means the areas indicated for access points, driveways, vehicular traffic lanes, and the parking lot areas within the Lots, as shown on Exhibit A attached hereto.

I. "Eligible Mortgagee" means a mortgagee or beneficiary under or a holder of a deed of trust under any recorded first priority mortgage or deed of trust upon a Lot made in good faith and for value.

J. "Governmental Requirements" means all applicable laws, rules, regulations, ordinances and all orders of any governmental agency with jurisdiction over the Project.

K. "Improvements" means Buildings, roads, driveways, sidewalks, parking areas, exterior walls or fences, stairs, decks, windbreaks, poles, antennas, signs, rocks, plantings, utility or communication installations (whether above or underground) and any structure and excavation of any type or kind and all other structures or landscaping of every type and kind.

L. "Majority of Owners" means one or more Owner of more than 50% of the total area of all Lots.

M. "Owner" means any Person now or in the future having any fee simple estate in a Lot within the Project, excluding any Person who holds such interest as security for the payment of an obligation, but including any Eligible Mortgagee or other security holder in actual possession of a Lot by foreclosure or otherwise, and any Person taking title from any such security holder. If a Lot is owned by more than one (1) Person, the Person or Persons holding at least fifty one percent (51%) of the ownership interest in such Lot (or if no Person holds such percentage, the person holding the greatest percentage)

shall designate in writing to the Owner of the other Lot one (1) Person to represent all such Owners of the Lot, and such designated Person shall be deemed the Person to give consents and/or approvals for such Lot pursuant to this Declaration

N. "Permittees" means the Owners and their respective officers, directors, employees, agents, contractors, subcontractors, patrons, customers, visitors, tenants, subtenants, licensees, concessionaires and invitees.

O. "Person" means both natural persons and legal entities, including but not limited to corporations, partnerships, trusts, and limited liability companies.

P. "Pro Rata Share" means the ratio of the area of the Lot or Lots owned by an Owner to the area of all Lots.

2. Easements. The Declarant hereby declares and establishes the following easements for the Project:

A. Ingress and Egress. A perpetual, nonexclusive easement for ingress and egress of vehicular and pedestrian traffic over and across all Drives and Parking Area within the Lots for use by the Owners and their respective Permittees. Unless caused by applicable Governmental Requirements and after initial construction, no Owner or Permittee of any Lot shall materially redevelop, reconfigure or change the location of such improvements without the prior written consent of the Majority of Owners, such consent not to be unreasonably withheld, conditioned or delayed.

B. Parking. A perpetual, nonexclusive easement over all parking areas now or in the future located within the Lots for the parking of motor and non-motorized vehicles, except for seven nose-in parking spaces on the northeast side of the building to be constructed on Lot 1, which shall be for the exclusive use of the tenant or other part in possession of Lot 1, for use by the Owners and their respective Permittees. Notwithstanding the foregoing, employees of any business on a Lot shall park on the Lot where they are employed to the extent possible.

C. Drainage. A perpetual, nonexclusive easement for storm drainage and detention facilities and the discharge of water from, over, under and across the Lots, provided that such drainage and discharge shall be in compliance with Governmental Regulations; and further provided, that no Owner of a Lot, after initial construction of all exterior improvements, shall take or permit any action that would have the likely effect of materially increasing or re-channeling the storm drainage and discharge of water across or from any other Lot, including any increase in the non-permeable surface area of improvements located on a Lot that results in additional storm drainage leaving such Lot in excess of the conditions as they exist upon full build-out of the improvements as

indicated on Exhibit A, or expanding storm and surface water drainage and detention facilities within any driveways and parking areas on a Lot that would adversely affect parking or vehicular or pedestrian access within or other use by the Owner of any other Lot without the prior written consent of the Owner of each affected Lot, which consent may be withheld in such Owner's sole discretion.

D. Construction. In connection with the Initial Construction, the Owner of the each Lot is hereby granted a temporary, nonexclusive easement for construction over and across the Drives and Parking Area, as may be necessary for the purpose of the Initial Construction; and each Owner is hereby granted a temporary, nonexclusive easement for construction over and across the Drives and Parking Area as may be necessary for the reconstruction of Improvements after casualty, provided that the benefited Owner shall at all times minimize any interference with access, traffic flow and parking on the Drives and Parking Area. The benefited Owner shall promptly restore or repair any and all improvements on the Lots which are removed, damaged or affected by the use of this easement for construction. Notwithstanding the foregoing, no driveways and not more than three (3) parking spaces located within the Drives and Parking Area shall be blocked during business hours of any tenant within the Shopping Center without not less than ten (10) days prior written notice to, and the written consent of, the Owner of the affected Lot, which consent may be withheld or conditioned at the sole discretion of the Owner of the affected Lot.

E. Miscellaneous. Notwithstanding anything in this Declaration to the contrary, the Drives and Parking Area shall be kept open at all times for the free use as intended in this Declaration; provided, however, that an Owner may close or otherwise impair the use of same for brief periods as may be reasonably required for repair or maintenance, or for the Initial Construction as contemplated by this Declaration. Such closure or impairment for repair or maintenance shall require in each instance at least ten (10) days' written notice to the Owner of the affected Lot, shall not exceed more than five (5) days in any calendar year, and without the consent of the Owners of all affected Lots shall in no event affect more than five percent (5%) of the Drives and Parking Area during regular business hours of the Permittees on the Lots. In addition, no access easement area connecting to a public thoroughfare shall be totally closed so as to prevent access from the public thoroughfare to the Project except in an emergency. No Owner shall grant an easement or easements of any type set forth in Section 2 for the benefit of any property not within the Project.

3. Use.

A. Prohibited Uses. No Owner shall use any Lot for any purpose other than retail, or _____ purposes. [Insert any existing applicable exclusives]. For purposes of this Section 3, "brand identified" shall mean coffee or tea that is advertised or marketed within the applicable retail space using its brand name or served in a brand-identified cup.

B. Violations of Law and Insurance. No Owner or Permittee shall permit anything to be done or kept in or upon such Owner's or Permittee's Lot that would result in the cancellation of insurance required by this Declaration or that would be in violation of any Governmental Requirement.

C. Trash Disposal. All garbage and trash must be placed in approved trash bins on the applicable Owner's Lot.

4. Maintenance of Lots.

A. Common Area Maintenance. Unless otherwise agreed by all Owners in writing, the Owner of Lot __ (the "Maintenance Owner") shall maintain, repair and replace, as necessary, the Common Area Improvements, and shall charge the Owner of the other Lots from time to time their Pro Rata Share of CAM Charges, accompanied by an itemized statement of the monies so expended. The minimum standard of maintenance, repair and replacement for the Common Area Improvements shall be comparable to the standard of maintenance followed in other developments of comparable size in the State of New Mexico, in compliance with all Governmental Requirements and the provisions of this Declaration. If any Owner provides notice to the Maintenance Owner of the reasonable need for maintenance, repair or replacement of any Common Area Improvements, the Maintenance Owner shall commence within thirty (30) days (or such longer period if reasonably necessary) to effect such maintenance, repair or replacement. Notwithstanding the foregoing, each Owner shall be solely responsible for replacement of Improvements located on its Lot resulting from eminent domain (Section 7) or fire or other casualty (Section 8). The Maintenance Owner shall have the right to assign its obligations under this Section 4 to a third party property manager, provided that such assignment shall not increase the CAM Charges nor relieve Maintenance Owner of its obligation to comply with this Section 4.

B. Payment for Common Area Maintenance. Each Owner agrees to pay to the Maintenance Owner within thirty (30) days of the receipt of the Maintenance Owner's bill for CAM Charges, the Owner's Pro Rata Share of CAM Charges.

C. Non-Common Area Maintenance. Each Owner shall be solely and directly responsible for repair, maintenance and replacement of improvements located on such Owner's Lot not covered by CAM Charges and all utility charges for uses separately metered for and consumed on such Lot. Each Owner shall be solely responsible for the timely and ongoing maintenance, repair and replacement of all trash enclosures, sidewalks, and the exterior treatments of all Buildings and other Improvements (excluding Common Area Improvements) located on its Lot to ensure that the Lots and the Improvements (excluding Common Area Improvements) thereon are at all times in a good state of maintenance, repair and cleanliness, consistent with a quality retail shopping

center. All such work shall be performed in a workmanlike manner using new, first-class materials. Such work shall include:

(1) Removing within sidewalks, doorways and patios all papers, ice and snow, mud and sand, debris, filth and refuse and thoroughly sweeping in the area to the extent reasonably necessary to keep the areas in a clean and orderly condition;

(2) Placing, keeping in repair and replacing any necessary and appropriate directional signs, markers and lines;

(3) Operating, keeping in repair and replacing, where necessary, such artificial lighting facilities for the sole benefit of the applicable Lot as shall be reasonably required; and

(4) Maintaining all perimeter and exterior building walls including but not limited to all retaining walls in a good condition and state of repair.

5. Demolition and Construction.

A. Review and Approval of Plans and Specifications. The Owner of any Lot other than Lot ___ will submit to the Owner of Lot __ plans and specifications for its construction (the "Plans"). No Initial Construction shall commence without the approval of the Plans by the Owner of Lot 2, which approval shall not be unreasonably withheld, conditioned or delayed. The Owner of Lot __ shall have ten (10) business days to review the Plans. The Owner of Lot __ shall have the right to make reasonable comments or objections to the Plans for the benefit of the Project. Failure of the Owner of Lot 2 to respond to the Plans within such ten-day period shall constitute such Owner's approval of the Plans.

B. Compliance and Reasonable Diligence. All construction shall: (1) be in accordance with approved Plans, all Governmental Requirements, and this Declaration, and (2) shall be prosecuted with reasonable diligence and minimizing disruption of operations of the Common Areas and the other Lots.

C. Construction Staging and Fencing. Any construction staging area located on the Lots shall be in accordance with Section 2.E. above. Industry-standard fencing surrounding the area in which construction activities will occur shall be erected and maintained throughout the Initial Construction.

D. Conduct of Construction. During any construction periods, the Lots shall be kept in a neat and tidy condition, trash and debris shall not be permitted to accumulate and supplies of brick, block, lumber and other building materials shall be piled only in as required for said construction. Reasonable measures shall be taken to minimize dust during construction activities. In

addition, any construction equipment and building materials stored or kept during construction periods shall be in accordance with Section 2.E. above. The Owner of the constructing Lot shall (a) keep the Lot and the rest of the Project, including, without limitation, all parking areas and pedestrian and road rights-of-way and drives, reasonably clean and clear of equipment, building materials, dirt, debris and similar materials in connection with or related to construction activities by or for the benefit of such Owner; and (b) make reasonable efforts to protect from damage, and in any event to promptly repair or rebuild, any Buildings, landscaping or other Improvements that are damaged or destroyed through the act of such Owner or its Permittee in connection with or related to construction activities by or for the benefit of such Owner, whether or not such act is negligent or otherwise culpable.

6. Insurance and Indemnification.

A. General Coverage and Limits. Each Owner shall at all times maintain, or cause to be maintained, a policy or policies of liability insurance issued by an insurer with an A.M. Best Rating of not less than A- (FSC VIII) against claims for bodily injury, death or property damage occurring on, in or about such Owner's Lot with a "Combined Single Limit" (covering bodily injury liability and property damage) with commercially reasonable limits of not less than Two Million Dollars ($2,000,000.00), increased at least every ten (10) years to reflect the increase during such ten-year period in the Consumer Price Index of the Bureau of Labor Statistics of the U.S. Department of Labor for All Urban Consumers, U.S. City Average All Items (1982-84 = 100) ("CPI-U"). At each adjustment, the insurance coverage adjustment shall be calculated as follows: the amount of insurance required for the immediately preceding ten-year term shall be multiplied by a fraction, the numerator of which shall be the CPI-U of the calendar month three (3) months before the adjustment is to take effect (numerator month), and the denominator of which shall be the CPI-U of the calendar month ten (10) years prior to the numerator month. The amount calculated shall constitute the new minimum liability insurance coverage amount for each Owner. At no time shall the minimum insurance coverage amount decrease. If the compilation and/or publication of the CPI-U is transferred to any other governmental department or bureau or agency or discontinued, then the index most nearly the same as the CPI-U shall be used to make such calculation.

B. Construction Insurance. During the term of the Initial Construction or any other construction activities on the Lots, the Owner of the constructing Lot shall carry, or cause each of its contractor to maintain, at its sole expense or at each of its contractor's sole expense, covering each of the other Owners as named insureds, in the minimum limit of not less than _____ Million Dollars ($_,000,000.00) combined single limit during the period of time from the beginning of demolition work on the construction to and including completion of the construction activities . In addition, the Owner of a constructing Lot shall maintain, or cause to be maintained, a completed value, "All-Risk" Builders Risk form or "Course of Construction" insurance policy in non-reporting form and a

workers compensation policy as required by law. The Builders Risk policy shall contain provisions and be in amounts reasonably satisfactory to the other Owners and shall be adequate to protect such other Owners from and against any and all claims for death of, injury to, person or persons, or damage to or loss of property, which may arise upon the Project during the period of construction and shall contain provisions for adequate notice prior to cancellation.

C. Form and Proof of Coverage. Such insurance may be in the form of blanket liability coverage applicable to the Owner's Lot, and such coverage limit may be satisfied with underlying and umbrella policies totaling not less than the amount set forth above. An Owner shall, upon written request, provide the other Owners with evidence of such coverage and a description of any plan of insurance being used.

D. Additional Policy Provisions. Each Owner shall deliver to the other Owners a statement from the applicable insurer that such insurance insures the performance by the Owner insured thereunder of the indemnity agreements to limits not less than those specified above. An Owner shall promptly notify the other Owners of any asserted claim with respect to which the Owner receiving notice is or may be indemnified against hereunder, and shall deliver to such Owners copies of process and pleadings.

E. Indemnification. Each Owner hereby agrees to indemnify, defend and save the other Owners harmless from any and all liability, damage, expense, causes of action, suits, claims or judgments arising from injury to person or property and occurring on the indemnifying Owner's Lot, except to the extent caused by the negligence or intentional misconduct of the other Owners or their Permittees. To the extent applicable, if at all, the indemnification and insurance provisions contained in this Agreement are subject to and limited by the provisions of Section 56-7-1 of the New Mexico Statutes.

7. Eminent Domain.

A. Owner's Right to Award. Nothing herein shall be construed to give any Owner any interest in any award or payment made to the another Owner in connection with any exercise of eminent domain or transfer in lieu thereof affecting another Owner's Lot or giving the public or any government any rights in said Lot. In the event of the exercise of eminent domain or transfer in lieu thereof with regard to any portion of a Lot upon which no Building has been constructed, the award attributable to the land and Improvements of such portion of the Lot shall be payable only to the Owner thereof, and no claim thereon shall be made by the Owner of any other Lot.

B. Collateral Claims. The Owner of any other Lot may file collateral claims with the condemning authority for any losses which are separate and apart from the value of the land area and improvements taken from the other Owner.

C. Tenant's Claim. Nothing in this Section 7 shall prevent a tenant on any Lot from making a separate claim as provided by law or a claim pursuant to the provisions of any lease between tenant and an Owner for all or a portion of any such award or payment.

D. Restoration of Lot. The Owner of any portion of a Lot so condemned shall promptly repair and restore the remaining portion of the Lot as nearly as practicable to the condition of the same immediately prior to such condemnation or transfer, to the extent that the proceeds of such award are sufficient to pay the cost of such restoration and repair and without contribution from any other Owner.

E. Within five (5) days after receipt of notice of any condemnation or threatened condemnation against a Lot or any portion of a Lot, an Owner shall provide written notice of the same to all Owners in the Project. No Owner shall have the right to enter into any agreement with a condemning authority which would likely result in an adverse effect on or limit any rights of another Owner in the Project.

8. Restoration.

In the event any Building or Improvements on a Lot are damaged or destroyed by fire or any other casualty, the Owner of such Lot shall, at its sole cost and expense, either repair or restore, or cause to be repaired or restored, such Improvements to their prior condition with reasonable commercial diligence; or shall demolish all such as are damaged, remove all debris, and restore the affected Lot (or portion thereof) to clean, level grade and shall maintain appropriate ground cover plantings so as to maintain a neat and attractive appearance, in compliance with all Governmental Requirements, but in the event of such demolition, the Owner shall be obligated to reconstruct the Drives and Parking Area on such Owner's Lot to its prior condition with reasonable commercial diligence. In the event any Improvements on a Lot are taken by condemnation or conveyance in lieu thereof, the Owner of such Lot shall, with reasonable commercial diligence and at its sole cost and expense, either restore the remaining Improvements to a functional condition, compatible and integrated with and complementary to the remaining Improvements within the Project; or reconstruct the Drives and Parking Area on such Owner's Lot to its prior condition with reasonable commercial diligence and demolish all other Improvements as are damaged, remove all debris, and restore the affected Lot (or portion thereof) to clean, level grade, and shall maintain appropriate ground cover plantings so as to maintain a neat and attractive appearance, in compliance with all Governmental Requirements.

9. Enforcement.

A. Default and Right to Cure. If an Owner fails to comply with any obligation set forth herein (a "Defaulting Owner"), including, without

limitation, the payment of any sum of money or the performance of any other obligation pursuant to the terms of this Declaration, then any other Owner (each an "Affected Owner"), at its option may send a thirty (30) day written notice (the "Default Notice") detailing the nature of the default (the "Noticed Default") to the Defaulting Owner. Upon the expiration of said thirty (30) day period, if the Defaulting Owner fails to cure the Noticed Default, in addition to any other remedies the Affected Owner may have in law or equity, the Affected Owner may proceed to perform the action necessary to remedy the Noticed Default on behalf of such Defaulting Owner (and shall have a limited license to do so) by the payment of money or other action for the account of the Defaulting Owner. The foregoing right to cure shall not be exercised if within the thirty (30) day notice period (i) the Defaulting Owner cures the Noticed Default, or (ii) if curable, the Noticed Default cannot be reasonably cured within that time period but the Defaulting Owner begins to cure the Noticed Default within such time period and thereafter diligently and continuously pursues such action to completion. The thirty (30) day notice period shall not be required if an emergency exists or if a default causes substantial interference with the operation or use of the Affected Owner's Lot which requires immediate action; and in such event, the Affected Owner shall give such notice (if any) to the Defaulting Owner as is reasonable under the circumstances.

B. Reimbursement. Within twenty (20) days of written demand therefor (including providing copies of invoices reflecting costs) the Defaulting Owner shall reimburse the Affected Owner for any sum reasonably expended by the Affected Owner remedy the Noticed Default, together with interest thereon at the rate of Twelve Percent (12%) per annum, and if such reimbursement is not paid within said ten (10) days and collection is required, the Affected Owner shall be entitled to file suit to recover the amount so expended, as well as interest as provided above and reasonable costs of collection, including without limitation, reasonable attorneys' fees, expenses and costs of court.

C. Creation of Lien. Any claim of an Affected Owner for reimbursement, together with interest accrued thereon and collection costs, shall constitute a personal obligation and liability of the Defaulting Owner and shall be secured by an equitable charge and lien on the Lot of the Defaulting Owner and all improvements located thereon. Such lien shall attach and be effective from the date of recording of the Lien Notice (as hereinafter defined). Upon such recording, such lien shall be superior and prior to all other liens encumbering the Lot involved, except that such lien shall not be prior and superior to any mortgages or deeds of trust of record prior to the recording of such Lien Notice, or any renewal, extension or modification (including increases) of previously recorded mortgages or deeds of trust; and any purchaser at any foreclosure sale, as well as any grantee by deed in lieu of foreclosure under any such mortgage or deed of trust shall take title subject only to liens accruing pursuant to this section after the date of such foreclosure sale or conveyance in lieu of foreclosure.

D. Notice of Lien; Foreclosure. To evidence a lien accruing pursuant to this section, the Affected Owner curing the default of a Defaulting Owner or the Affected Owner performing such maintenance, as the case may be, shall prepare a written notice (a "Lien Notice") setting forth (i) the amount owing and a brief statement of the nature thereof; (ii) the Lot to which the payment(s) relate; (iii) the name of the owner or reputed owner owning the Lot involved; and (iv) reference to this Declaration as the source and authority for such lien. The Lien Notice shall be signed and acknowledged by the Affected Owner desiring to file the same and shall be recorded in the real estate records in San Juan County, New Mexico. A copy of such Lien Notice shall be sent via United States mail, certified, return receipt requested, postage prepaid, to the Defaulting Owner within five (5) days after such recording. Any such lien may be enforced by judicial foreclosure upon the Lot to which the lien attached in like manner as a mortgage on real property is judicially foreclosed under the laws of the State of New Mexico. In any foreclosure, the Lot being foreclosed shall be required to pay the reasonable costs, expenses and attorneys' fees in connection with the preparation and filing of the Lien Notice, as provided herein, and all reasonable costs, expenses and attorneys' fees in connection with the foreclosure. Nothing herein, however, shall disturb the peaceful possession of a Permittee under a lease covering all or a portion of the Defaulting Owner's Lot to which such Permittee is not in default beyond any applicable notice or cure period.

E. Attorneys' Fees and Costs. In the event any Affected Owner shall institute any action or proceeding against another Owner relating to the provisions of this Declaration or any default hereunder or to collect any amounts owing hereunder or in the event an arbitration proceeding is commenced hereunder by agreement of the parties to any dispute, then and in such event the unsuccessful litigant in such action or proceeding shall reimburse the successful litigant therein for such reasonable costs and expenses incurred in connection with any such action or proceeding and any appeals therefrom, including attorneys' fees, expert witness fees and court costs.

F. Cumulative Remedies. Any remedies provided for in this section are cumulative and shall be deemed additional to any and all other remedies to which any party may be entitled in law or in equity and shall include the right to restrain by injunction any violation or threatened violation by any party of any of the terms, covenants, or conditions of this Declaration and by decree to compel performance of any such terms, covenants, or conditions, it being agreed that the remedy at law for any breach of any such term, covenant, or condition is not adequate.

10. Protection of Security Interests.

A. Application of Assessment to Mortgages. Any lien created under this Declaration upon any Lot shall be subject and subordinate to, and shall not affect, the rights of an Eligible Mortgagee, provided that after the foreclosure of any such mortgage or deed of trust the amount of all maintenance

and special assessments, and all delinquent Operating Expenses to the extent such delinquent Operating Expenses relate to Operating Expenses incurred after such foreclosure shall become a lien upon such Lot upon recordation of a notice thereof with the County Clerk of San Juan County, New Mexico.

B. Right to Notice. The Property Manager shall provide each Eligible Mortgagee with timely written notice of any delinquency in the payment of CAM Charges or other amounts due the Affected Owner or the Maintenance Owner by the Owner or Permittee of a Lot that is subject to a first mortgage or deed of trust held by any Eligible Mortgagee and which delinquency remains uncured for a period of sixty (60) days or more.

C. Limitation of Enforcement against Mortgagees. No violation by an Owner or Permittee of this Declaration or enforcement of this Declaration against an Owner or Permittee shall defeat or render invalid the lien of any Eligible Mortgagee against the Lot of such Owner, but this Declaration shall be effective against any Owner whose title is acquired by foreclosure, trustee's sale, voluntary conveyance, or otherwise.

D. Rights of Mortgagee to Information. Any Eligible Mortgagee shall, upon written request be entitled to inspect the Declaration and books and records of the Maintenance Owner upon reasonable prior written notice to the Maintenance Owner.

11. Miscellaneous.

A. Compliance with Laws. All easements provided under this Declaration shall be subject to Governmental Requirements. Each Owner shall comply with all Governmental Requirements with respect such Owner's Lot, and each Owner (for purposes of this paragraph, an "Indemnifying Owner") shall indemnify, defend and hold harmless the other Owner, and such Owner's successors, assigns, heirs, grantees, devisees, and Permittees from any and all loss, cost, damage, claim or liability to the extent arising out of the noncompliance by the Indemnifying Owner with Governmental Requirements applicable to that Owner's Lot, except to the extent such indemnity is prohibited by § 56-7-1 NMSA 1978.

B. Binding Effect; Running with the Land. This Declaration shall bind and inure to the benefit of the Owners and their respective heirs, representatives, lessees, successors and assigns. All the covenants, terms, agreements, conditions, and restrictions set forth in this Declaration are intended to be and shall be construed as covenants running with the land, binding upon, inuring to the benefit of and enforceable by the Owners, their respective successors in interest, grantees and assignees, upon the terms, provisions and conditions herein set forth.

C. Amendment or Modification. Except as expressly permitted by Section 2(A) of this Declaration, this Declaration may be amended or modified only by written instrument executed by all of the Owners and recorded in the real estate records of San Juan County, New Mexico, including any reconfiguration of the improvements on a Lot that differs from Exhibit A attached hereto, such agreement by the Owners not to be unreasonably withheld, conditioned or delayed.

D. Force Majeure. In the event that an Owner shall be delayed or hindered in, or prevented from, the performance of any act required hereunder by reason of inability to procure materials, delay caused by the party seeking enforcement hereof, failure of power or unavailability of utilities, riots, insurrection, war, acts of terrorism or other reason of a like nature not the fault of such Owner or not within the Owner's control, acts of God, governmental laws or regulations without fault and beyond the control of the Owner (financial inability excepted), then performance of such act shall be excused for the period of delay, and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay, but in no event shall the foregoing be construed to excuse or delay the performance of a monetary obligation by an Owner.

E. Effect on Third Parties. Except for Section 10, which is, in part, for the benefit of Eligible Mortgagees, the rights, privileges, or immunities conferred hereunder are for the benefit of the Owners and not for any third party; provided, however, in the event an Owner leases its entire Lot to a single tenant, Owner may assign its enforcement rights under this Declaration to such tenant and said tenant shall have privity to directly enforce the terms and conditions of this Declaration against an Owner.

F. Notice; Delivery. Any notice or other document permitted or required by this Declaration to be delivered may be delivered either personally or by mail. If delivery is made by mail, it shall be deemed to have been delivered seventy-two (72) hours after a copy of the same has been deposited in the United States mail, certified, return receipt requested, postage prepaid, addressed as follows:

If to Declarant: At the address in this Declaration or such other address as the Declarant may deliver to the other Owner in writing.

If to an Owner other than Declarant: At the address on the recorded deed to the Owner, or such other address as the Owner may deliver to the other Owner in writing.

G. No Partnership. Neither this Declaration nor any acts of the Owners hereunder shall be deemed or construed to create the relationship of principal and agent, or of partnership, or of joint venture, or of any association between the Owners.

H. Severability. In the event any term, covenant, condition, provision, or agreement contained in this Declaration is held to be invalid, void, or otherwise unenforceable, by any court of competent jurisdiction, such holding shall in no way affect the validity of enforceability of any other term, covenant, condition, provision, or agreement contained herein.

I. Governing Law. This Declaration and the obligations of the Owners hereunder shall be interpreted, construed, and enforced in accordance with the laws of the State of New Mexico.

J. Captions. Titles or captions contained herein are inserted as a matter of convenience and for reference, and in no way define, limit, extend, or describe the scope of this Declaration.

K. Consent. In any instance in which any Owner shall be requested to consent to or approve of any matter with respect to which such Owner's consent or approval is required by any of the provisions of this Declaration, such consent or approval or disapproval shall be given in writing, and shall not be unreasonably withheld nor delayed, unless the provisions of this Declaration with respect to a particular consent or approval shall expressly provide otherwise.

L. Estoppel Certificate. Each Owner hereby severally covenants that within thirty (30) days of the written request of another Owner, it will issue to such other Owner or to any prospective Eligible Mortgagee or purchaser of such Owner's Property, an estoppel certificate stating: (a) whether the Owner to whom the request has been directed knows of any default under this Declaration and if there are known defaults specifying the nature thereof; (b) whether to its knowledge this Declaration has been assigned, modified or amended in any way (and if it has, then stating the nature thereof); and (c) whether to the Owner's knowledge this Declaration as of that date is in full force and effect.

M. Not a Public Dedication. Nothing herein contained shall be deemed to be a gift or dedication of any portion of the Project to the general public or for the general public or for any public purpose whatsoever, it being the intention of the Owners that this Declaration shall be strictly limited to and for the purposes herein expressed.

N. Release. If an Owner shall sell, transfer or assign its entire interest in all of its Lot, it shall be released from its unaccrued obligations hereunder from and after the date of such sale, transfer or assignment, and by acceptance of the deed to such Lot sold, the successor owner shall become liable for, and shall be deemed to have assumed, all obligations hereunder accruing with respect to the Lot sold from and after the date of such conveyance.

O. Time of Essence. Time is of the essence with respect to the performance of each of the covenants and agreements contained in this Declaration.

P. Entire Agreement. This Declaration and the exhibits hereto contain the entire agreement of the Declarant with respect to the subject matter hereof. Any prior correspondence, memoranda or agreements are superseded in total by this Declaration and Exhibits hereto. The provisions of this Declaration shall be construed as a whole according to their common meaning and not strictly for or against any Owner. This Declaration is not, however, intended to supersede the provisions of any pre-existing lease as between an Owner and its tenant. Headings contained in this Declaration are for convenience of reference only and are not intended for use in construing the intent of this Declaration.

Q. Mechanic's Liens. In the event any mechanic's liens are filed against the Lot of an Owner, including without limitation, any easements granted by this Declaration over the liened Lot, the Owner permitting or causing such lien to be filed hereby covenants either to pay the same and have it discharged of record promptly, or to take such action as may be required to reasonably and legally object to such lien, or to have the lien removed from such Lot, and in all events agrees to have such lien discharged prior to the entry of judgment for foreclosure of such lien. Upon request of the other Owner, the Owner permitting or causing such lien to be filed agrees to furnish at its expense such security or indemnity conforming to this Declaration as may be required, to and for the benefit of such other Owner to permit a title endorsement to such Owner's title policy to be issued relating to such Owner's Lot without showing thereon the effect of such lien.

R. Duration. Unless otherwise cancelled or terminated, this Declaration shall continue in perpetuity.

EXECUTED as of the date set forth above.

[Name]_____

By:

_____

Name: _____

Title: _____

STATE OF _____)

) ss.

COUNTY OF _____)

This instrument was acknowledged before me on _____, _____, by _____ of _____, a _____.

_____
Notary Public

My commission expires:

_____

EXHIBIT A

PROJECT SITE PLAN

EXHIBIT B

LEGAL DESCRIPTION OF LOT 1

EXHIBIT C

LEGAL DESCRIPTION OF LOT 2

EXHIBIT D

LEGAL DESCRIPTION OF LOT 3

UNIQUE NEW MEXICO STATUTORY PROVISIONS AFFECTING COMMERCIAL LEASING

56-7-1. Real property; indemnity agreements; agreements void.

A. A provision in a construction contract that requires one party to the contract to indemnify, hold harmless, insure or defend the other party to the contract, including the other party's employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to persons or damage to property caused by or resulting from, in whole or in part, the negligence, act or omission of the indemnitee, its officers, employees or agents, is void, unenforceable and against the public policy of the state.

B. A construction contract may contain a provision that, or shall be enforced only to the extent that, it:

(1) requires one party to the contract to indemnify, hold harmless or insure the other party to the contract, including its officers, employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, only to the extent that the liability, damages, losses or costs are caused by, or arise out of, the acts or omissions of the indemnitor or its officers, employees or agents; or

(2)requires a party to the contract to purchase a project-specific insurance policy, including an owner's or contractor's protective insurance, project management protective liability insurance or builder's risk insurance.

C. This section does not apply to indemnity of a surety by a principal on any surety bond or to an insurer's obligation to its insureds.

D. The state, a state agency or a political subdivision of the state may enter into a contract for the construction, operation or maintenance of a public transportation system, including a railroad and related facilities, that includes a continuous obligation to procure an insurance policy, including an owner's, operator's or contractor's protective or liability insurance, project management protective liability insurance, builder's risk insurance, railroad protective insurance or other policy of insurance against the negligence of another party to the contract. If the state, a state agency or a political subdivision of the state insured by the risk management division of the general services department enters into a contract to procure insurance as permitted by this section, the cost of any insurance shall be paid by the risk management division of the general services department and shall not be a general obligation of the state, the state agency or the political subdivision of the state.

E. As used in this section, "construction contract" means a public, private, foreign or domestic contract or agreement relating to construction, alteration, repair or maintenance of any real property in New Mexico and includes agreements for architectural services, demolition, design services, development, engineering services,

excavation or other improvement to real property, including buildings, shafts, wells and structures, whether on, above or under real property.

F. As used in this section, "indemnify" or "hold harmless" includes any requirement to name the indemnified party as an additional insured in the indemnitor's insurance coverage for the purpose of providing indemnification for any liability not otherwise allowed in this section.

14-9-1. Instruments affecting real estate; recording.

All deeds, mortgages, leases of an initial term plus option terms in excess of five years, or memoranda of the material terms of such leases, assignments or amendments to such leases, leasehold mortgages, United States patents and other writings affecting the title to real estate shall be recorded in the office of the county clerk of the county or counties in which the real estate affected thereby is situated. Leases of any term or memoranda of the material terms thereof, assignments or amendments thereto may be recorded in the manner provided in this section. As used in this section, "memoranda of the material terms of a lease" means a memorandum containing the names and mailing addresses of all lessors, lessees or assignees; if known, a description of the real property subject to the lease; and the terms of the lease, including the initial term and the term or terms of all renewal options, if any.

48-3-5. Landlords' liens.

A. Landlords have a lien on the property of their tenants that remains in or about the premises rented, for the rent due by the terms of any lease or other agreement in writing, and the property shall not be removed from the premises without the consent of the landlord until the rent is paid or secured. A lien does not attach if the premises rented is a dwelling unit.

B. For purposes of this section, "dwelling unit" means a structure, mobile home and a leased parcel of land upon which it is located, or a part of a structure that is used as a home, residence or sleeping place by one person who maintains a household or by two or more persons who maintain a common household.

48-2-2. Mechanics and materialmen; lien; labor, equipment and materials furnished; definition of agent of owner.

Every person performing labor upon, providing or hauling equipment, tools or machinery for or furnishing materials to be used in the construction, alteration or repair of any mine, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, road or aqueduct to create hydraulic power or any other structure, who performs labor in any mine or is a registered surveyor or who surveys real property has a lien upon the same for the work or labor done, for the specific contract or agreed upon charge for the surveying or equipment, tools or machinery hauled or provided or materials furnished by each respectively, whether done, provided, hauled or furnished at the instance of the owner of the building or other improvement or his agent. Every contractor, subcontractor, architect, builder or other person having charge of any mining or of the

construction, alteration or repair, either in whole or in part, of any building or other improvement shall be held to be the agent of the owner for the purposes of this section.

48-2-11. [Construction with knowledge of owner subjects land to lien; notice by owner of nonresponsibility.]

Every building or other improvement mentioned in the second section [48-2-2 NMSA 1978] of this article, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this article, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon.

HEAVILY NEGOTIATED LEASE TERMS

Anne P. Browne

Sutin, Thayer & Browne

Bruce Castle

Castle & Castle

BACKGROUND CONSIDERATIONS

Lease negotiation is allocation

- Of Cost
- Of Risk
- Of Control

Financeability

Successors

Landlord as Single Purpose Entity (SPE)

Unique Lease Issues by Type of Use

- Office – Operating Expenses
- Retail : Uses, parking, "Go Dark," percentage rent
- Warehouse/industrial: Environmental, improvements

LEASE TYPES BY RENT STRUCTURE

Gross/Full Service Lease – landlord pays taxes, maintenance, insurance and utilities in exchange for a monthly rent payment by tenant.

Net Lease – in addition to monthly rent, tenant pays one or more of the following: taxes, insurance and maintenance (utilities are sometimes included in maintenance). If Tenant directly responsible for all costs, "Triple Net" or sometimes "Absolute Net."

Modified Gross Lease – there is a base year in which costs for operating expenses are paid by Landlord ("Expense Stop"). Tenant is responsible in future years for any increases in operating expenses over the base year.

OPERATING EXPENSES (COMMON AREA MAINTENANCE)

Tenant Perspective

- Calculate Proportionate Share
- Exclusions from Operating Expenses
- Cap on Annual Increases
- Audit Rights

Landlord Perspective

- Recoup All Costs
- Strict Pass-through
- Gross-up Provision for Variable Costs
- Legal Compliance
- CapEx
- Sq Footage Calculation

REPAIRS AND MAINTENANCE

Landlord Perspective

- "As Is"
- Structure, Building Systems
- Replacement Items
- What is Premises?
- Lender/Buyer Influence

Tenant Perspective

- Landlord's obligations
- Tenant's obligations
- Repair versus Replacement
- Warranty for Building Systems

ASSIGNMENT AND SUBLETTING

Tenant Perspective

- Flexibility in Reletting
- Flexibility in Equity and Financing Arrangements
- Use Provision
- Procedure for Release of Tenant
- Concerns when Landlord Assigns
- *Econ. Rentals, Inc. v. Garcia*, 1991-NMSC-092, 112 N.M. 748, 819 P.2d 1306

Landlord Perspective

- Landlord General Goals Regarding Tenant
- Approval Rights
- No Release of Tenant
- No Avoidance by Transfer of Ownership
- Landlord: Broad Rights to Assign

USES

Landlord Perspective

- Prohibited Uses
- Narrow Permitted Use
- Existing Exclusive Uses
- Narrow Exclusive Use
- Compatibility w/ Center
- Control Over Use Changes

Tenant Perspective

- Broad Use Clause
- Preserve Subleasing & Assignment Opportunities
- Expansive Change of Use

INSURANCE AND INDEMNITIES WAIVER OF SUBROGATION

Landlord Perspective

- Landlord Insurance Pass-through
- Broad Tenant Insurance
- AM Best's Ratings: A-/VIII
- Review with Ins. Broker
- Broad Indemnification/ 56-7-1/carve-outs
- Survival

Tenant Perspective

- Check Landlord's Insurance
- Additional Insured
- Carry Insurance on Tenant Property
- Limitation on Indemnities to Landlord

56-7-1 SAVINGS CLAUSE

To the extent, if at all, a court of competent jurisdiction determines that Section 56-7-1 NMSA 1978 applies to any indemnification provisions in this Lease, including certain types of insurance coverage as set forth in Section 456-7-1 NMSA 1978, such provisions shall not extend to liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to persons or damage to property caused by or resulting from, in whole or in part, the negligence, act or omission of the indemnitee or additional insured, as the case may be, its officers, employees or agents, and shall further be limited, if required, by the provisions of Section 56-7-1 NMSA 1978.

DEFAULT AND REMEDIES

Landlord Perspective

- Key Concern: Control
- Broad Defaults; Short Cure Periods
- Late Fees
- Remedies: All Arrows in Quiver

Tenant Perspective

- Notice and Opportunity to Cure
- Avoid Inclusion of Minor Technical Defaults
- No Prohibition on Going Dark
- Landlord Default Provisions

TENANT IMPROVEMENTS

Landlord Perspective

- Market Conditions
- Whether TI's Have General Benefit
- Who Ultimately Pays
- Construction Provisions
  - Notice of Non-Responsibility
- Removal at End of Term

Tenant Perspective

- No Rent While Installing
- Landlord or Tenant to Perform Work
- Drawing on TI Funds - Timing
- Quality of Materials
- Amortization of TI Costs Over Life of Lease

RENEWALS, END OF TERM

Landlord Perspective

- Notice Requirements
- Extensions: Specific v. Process-Determined Rent
- Marketing Rights
- Security Deposit & Removal
- Holdover Rent

Tenant Perspective

- Renewal Option Provides Flexibility
- Process for Setting Renewal Term Rent
- CPI Adjustment Considerations
- Time to Remove TI's and Trade Fixtures
- *United Properties Ltd. Co. v. Walgreen Properties, Inc.*, 2003-NMCA-140, 134 N.M. 725.

SUBORDINATION, ESTOPPEL CERTIFICATES, AND LENDER PROTECTIONS

Tenant Perspective

- Non-disturbance
- What Should be Included in an Estoppel Certificate
- UCC Lien/ Interface with Other Financing
- Statutory Landlord's Lien

Landlord Perspective

- SNDA
- Estoppel Certificates
- Landlord Liens
- Lender Liability for Past Defaults
- Lender Notice & Cure
- Subordination

DESTRUCTION OF PREMISES AND CONDEMNATION

Landlord Perspective

- Rebuild Obligations Limited to Proceeds
- Broad Landlord Termination Rights
- Limited Tenant Termination Rights
- Landlord/Lender Gets All the Money

Tenant Perspective

- Require Landlord to Rebuild
- Termination Right
- Rent Abatement
- Timing of Notice of Condemnation

MULTIPLE SITES – CC&RS

Tenant Perspective

- Parking and Access
- Prohibited/Permitted Uses
- CAM Charges/Audit Rights
- Majority Owner/Approval Requirements

Landlord Perspective

- Preserve Marketability
- Preserve Successor Rights
- May Only Have One Shot
- Necessary Easements
- Management/Control
- Common elements/OpEx
- Indemnities

MISCELLANEOUS

- Memorandum of Lease
- Severability
- Dispute Resolution / Attorneys' Fees
- Broker's Warranties
- Integration

134 N.M. 725
Court of Appeals of New Mexico.

UNITED PROPERTIES LIMITED COMPANY, a New Mexico limited liability company, Plaintiff/Counterdefendant–Appellee,
v.
WALGREEN PROPERTIES, INCORPORATED, an Illinois corporation, and Walgreen of New Mexico, Incorporated, a New Mexico corporation, Defendants/Counterplaintiffs–Third–Party Plaintiffs–Appellants,
v.
Casa Chevrolet, Inc., and Ford Leasing Development, Third–Party Defendants–Appellees.

Nos. 22,159, 22,298.
|
June 11, 2003.

Synopsis

Background: Tenant filed declaratory judgment action against landlord, seeking to renew commercial lease even though it failed to provide timely notice of its intent to renew pursuant to the terms of the lease. The District Court, Bernalillo County, Theresa M. Baca, D.J., awarded summary judgment to tenant. Landlord appealed.

[Holding:] The Court of Appeals, Pickard, J., held that trial court was required to enforce lease as written and, thus, could not require landlord to accept tenant's untimely notice of intent to renew.

Reversed.

Castillo, J., filed dissenting opinion.

Attorneys and Law Firms

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OPINION

PICKARD, Judge.

{1} In this case, we are presented with an issue related to commercial leases: will a late notice to the landlord of intent to renew the lease for another term be given effect when the lateness of the notice is due to the tenant's own negligence? We hold that the late notice was ineffective in the circumstances of this case. Consequently, we reverse.

FACTS AND BACKGROUND

{2} This case concerns commercial property located at 7100 Lomas Boulevard NE in Albuquerque, New Mexico. The property was owned by Walgreen Properties since the 1960s. Initially, Walgreen Properties leased the property to Walgreen of New Mexico, **537 *727 which subleased the property to Walgreen Corporation, which built and operated a discount retail store (Globe Discount City) on the property. The initial term of the lease and sublease was for twenty years, to expire on December 31, 1984, with an option to renew for up to six successive periods of five years each. The lease and sublease also provided that notice of intent to renew for additional five-year terms be given to Walgreen of New Mexico three months before the expiration of the five-year term then in effect.

{3} In 1978, Globe closed its doors and Walgreen Corporation assigned the sublease to K–Mart. When the original term of the lease expired in 1984, K–Mart renewed the lease for three additional terms of five years. In the mid–1990s, the K–Mart store closed. In 1994, United Properties Limited (UPL) bought out

K–Mart's interest in the lease for $700,000. At that time, the rental payments on the lease were $44,640 per year, the term of the lease was due to expire on December 31, 1999, and there were three additional five-year terms remaining. UPL spent over $1.272 million on capital improvements to the property. These capital improvements included remodeling to adapt the property to UPL's use, landscaping, and bringing the existing facilities up to code, as well as enhancing the existing buildings with additional fixtures. Ultimately, UPL subleased various portions of the property to Casa Chevrolet, Ford Leasing Development, and Pacific Eatery. We refer to these three entities collectively as Subtenants. Together, the Subtenants pay a total of $263,500 a year rent to UPL.

{4} When UPL took over the property, the term of the lease was set to expire on December 31, 1999. Thus, if UPL wished to renew for an additional five-year term, it was required to give written notice of its intent to extend the lease for another five years no later than September 30, 1999. As counsel for Walgreen put it, UPL just "plain plumb forgot" to do that. On November 8, 1999, Walgreen notified UPL that the date for giving written notice of intent to renew had passed. The next day, UPL sent Walgreen of New Mexico a written notice that it elected to extend the sublease for an additional five years. However, on November 22, 1999, Walgreen of New Mexico notified UPL that it would not honor the notice and expected UPL and its Subtenants to vacate the premises by December 31, 1999.

{5} On December 2, 1999, while the lease was still in effect, UPL filed an action for injunctive and declaratory relief, acknowledging that it failed to send a timely notice and asking that the district court exercise its equitable powers to order Walgreen of New Mexico to extend the lease for another five-year term. The Subtenants also appeared in the case and made arguments to the district court in support of UPL's requested relief. Ultimately, both sides filed motions for summary judgment. UPL argued that strictly enforcing the three-month notice requirement of the lease would be inequitable and result in a forfeiture. Walgreen Properties and Walgreen of New Mexico argued that under New Mexico law the district court was required to strictly enforce the terms of the option to renew the lease. The Subtenants also argued that they would be harmed by strict enforcement of the three-month notice requirement. The district court granted the relief requested by UPL and its Subtenants. Walgreen Properties and Walgreen of New Mexico appealed to this Court. For the sake of clarity, we refer to Walgreen Properties and Walgreen of New Mexico as Landlord and UPL and its Subtenants as Tenant.

STANDARD OF REVIEW

[1] {6} When the facts are not in dispute and the district court enters summary judgment, we review the district court's application of the law to the facts of the case de novo. *Phoenix Indem. Ins. Co. v. Pulis*, 2000–NMSC–023, ¶ 6, 129 N.M. 395, 9 P.3d 639; *Barncastle v. Am. Nat'l Prop. & Cas. Cos.*, 2000–NMCA–095, ¶ 5, 129 N.M. 672, 11 P.3d 1234. We recognize that in other cases, we have stated that the decision of whether equitable relief should be granted is a matter within the sound discretion of the district court and is reviewed only for abuse of discretion. *See, e.g., Padilla v. Lawrence*, 101 N.M. 556, 562, 685 P.2d 964, 970 (Ct.App.1984). However, as our Supreme Court has observed, "even when we review for an abuse ****538** ***728** of discretion, 'our review of the application of the law to the facts is conducted de novo.' " *N.M. Right to Choose/NARAL v. Johnson*, 1999–NMSC–028, ¶ 7, 127 N.M. 654, 986 P.2d 450 (quoting *State v. Elinski*, 1997–NMCA–117, ¶ 8, 124 N.M. 261, 948 P.2d 1209).

[2] {7} Thus, in cases such as this, the proper standard of review may be expressed as follows. The question of whether, on a particular set of facts, the district court is permitted to exercise its equitable powers is a question of law, while the issue of how the district court uses its equitable powers to provide an appropriate remedy is reviewed only for abuse of discretion. *See, e.g., Amkco, Co. v. Welborn*, 2001–NMSC–012, ¶¶ 8–9, 130 N.M. 155, 21 P.3d 24 (treating the question of the showing necessary to obtain injunction concerning an encroachment and the showing necessary to establish irreparable injury as issues of law and reviewing the district court's balancing of the equities under an abuse of discretion standard); *Nearburg v. Yates Petroleum Corp.*, 1997–NMCA–069, ¶¶ 7–9, 123 N.M. 526, 943 P.2d 560 (reviewing the district court's interpretation of a contract de novo and reviewing equitable relief granted by the district court under an abuse of discretion standard). In this case, Landlord does not contend that there was an abuse of discretion if the trial court had discretion to exercise in the first place. Landlord contends that contract principles preclude any exercise of discretion on these facts.

DISCUSSION

{8} The precise issues raised by this case have been the subject of numerous appellate decisions from across the country. *See* William B. Johnson, Annotation, *Circumstances Excusing Lessee's Failure to Give Timely Notice of Exercise of Option to Renew or Extend Lease*, 27 A.L.R.4th 266, 277–80, 1984 WL 263120 (1984 & 2002 Supp.). At one end of the spectrum are cases that hold that:

> [e]quity will not relieve a lessee of the consequences of his failure to give written notice of renewal of the lease within the time required by the provisions of the lease when the failure resulted from the negligence of the lessee unaccompanied by fraud, mistake, accident or surprise and unaffected by the conduct of the lessor.

Ahmed v. Scott, 65 Ohio App.2d 271, 418 N.E.2d 406, 411 (1979). At the other end of the spectrum are cases that hold that:

> in cases of mere neglect in fulfilling a condition precedent of a lease, [even if the cases] do not fall within accident or mistake, equity will relieve when the delay has been slight, the loss to the lessor small, and when not to grant relief would result in such hardship to the tenant as to make it unconscionable to enforce literally the condition precedent of the lease.

F.B. Fountain Co. v. Stein, 97 Conn. 619, 118 A. 47, 50 (1922).

{9} At oral argument, both parties characterized the differences in the cases as reflecting a true split of authority. Although some cases have held that one view or another is the "majority" rule or the "modern" rule, we believe that such characterizations are not particularly helpful. For example, the court in *Trollen v. City of Wabasha*, 287 N.W.2d 645, 647 (Minn.1979) characterized the *Fountain* rule as the "modern" rule. Yet, the latest two jurisdictions to weigh in on this issue after canvassing the authorities on both sides have squarely sided with the traditional rule favoring definiteness of contracts. *See SDG Macerich Props., L.P. v. Stanek, Inc.*, 648 N.W.2d 581, 587–89 (Iowa 2002); *Utah Coal & Lumber Rest., Inc. v. Outdoor Endeavors Unlimited*, 40 P.3d 581, 583–85 (Utah 2001). Similarly, one California Court of Appeals rejected the reasoning of another California Court of Appeals in language suggesting that the first court failed to follow the "better-reasoned," "majority" rule of *Fountain*, but did so in a case whose facts would have met the traditional rule. *Compare Bekins Moving & Storage Co. v. Prudential Ins. Co.*, 176 Cal.App.3d 245, 221 Cal.Rptr. 738, 741–42 (1985) (rejecting the *Fountain* rule because an option creates no vested rights and therefore the conditions of it must be strictly met), *with Romasanta v. Mitton*, 234 Cal.Rptr. 729, 730–31 (Cal.Ct.App.1987) (unpublished decision) (rejecting *Bekins Moving & Storage Co.* in a case involving an unsophisticated lessee who attempted to give timely oral notice of exercising ****539 *729** option to a sophisticated lessor who seemed to acquiesce in lessee's notice thereby potentially bringing the case within the rule that the lessee's act was not unaffected by the lessor's conduct). Thus, instead of characterizing the cases, we perceive that our task in this case is to decide which view best reflects the law and its policy underpinnings in New Mexico. For the reasons that follow, we conclude that the view that favors the definiteness of contracts is the view most consistent with New Mexico law.

1. General Contract Principles

{10} In *Nearburg*, 1997–NMCA–069, ¶ 31, 123 N.M. 526, 943 P.2d 560, we summed up the governing principles of New Mexico contract law as follows:

> Parties to a contract agree to be bound by its provisions and must accept the burdens of the contract along with the benefits. When a contract was freely entered into by parties negotiating at arm's length, the duty of the courts is ordinarily to enforce the terms of the contract which the parties made for themselves. Although a contract may be declared void where it is unconscionable and oppressive in its terms, nevertheless, the fact that some of the terms of the agreement resulted in a hard bargain

> or subjected a party to exposure of substantial risk, does not render a contract unconscionable where it was negotiated at arm's length, and absent an affirmative showing of mistake, fraud or illegality. A court should thus not interfere with the bargain reached by the parties unless the court concludes that the policy favoring freedom of contract ought to give way to one of the well-defined equitable exceptions, such as unconscionability, mistake, fraud, or illegality.

(Internal quotation marks and citations omitted.) In *Cafeteria Operators v. Coronado–Santa Fe Assocs.*, 1998–NMCA–005, ¶¶ 20, 23, 124 N.M. 440, 952 P.2d 435, we applied the principle that there is broad public interest in protecting the right of private parties to be secure in the knowledge that their contracts will be enforced and affirmed a district court decision requiring an entire commercial building to be torn down because it was built in violation of a restriction contained in the lease between the parties. Both *Cafeteria Operators* and *Nearburg* followed *Winrock Inn Co. v. Prudential Ins. Co.*, 1996–NMCA–113, ¶¶ 17, 36, 122 N.M. 562, 928 P.2d 947, and the case it relied on, *Smith v. Price's Creameries*, 98 N.M. 541, 545, 650 P.2d 825, 829 (1982), for the proposition that "courts may not rewrite obligations that the parties have freely bargained for themselves ... [i]n the absence of fraud, unconscionability, or other grossly inequitable conduct."

[3] [4] [5] {11} Although we referred to the obligation to pay "rent" in *Winrock Inn*, 1996–NMCA–113, ¶ 36, 122 N.M. 562, 928 P.2d 947, what was at issue in that case was the failure to pay common area maintenance charges. *Id.* ¶¶ 8–9. We further recognize that a mere failure to timely pay rent may in some circumstances be cured by late tender, *N.M. Motor Corp. v. Bliss*, 27 N.M. 304, 307, 201 P. 105, 106 (1921), because, as stated in the authority cited in the case relied upon in *New Mexico Motor Corp.*,

> The grounds upon which a court of equity proceeds [in the case of rent that is tendered a few days late together with interest] are, that the rent is the object of the parties, and the forfeiture [of the lease] only an incident intended to secure its payment; that the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete. In respect to other covenants pertaining to leasehold estates, where the elements of fraud, accident, and mistake are wanting, and the measure of compensation is uncertain, equity will not interfere. It allows the forfeiture to be enforced if such is the remedy provided by the contract.

Sheets v. Selden, 74 U.S.(7 Wall) 416, 421–22, 19 L.Ed. 166 (1868), relied on in *Kann v. King*, 204 U.S. 43, 54–55, 27 S.Ct. 213, 51 L.Ed. 360 (1907), which was quoted in *New Mexico Motor Corp.*

{12} Thus, we decide this case against a long-standing backdrop of New Mexico law enforcing contractual obligations as they are written. In doing so, we point out that there is nothing to construe in this case. As in ****540** ***730** similar cases from other jurisdictions, we note that the lease agreement here was clear as can be, and there is no contention that it is ambiguous. *See, e.g., SDG Macerich Props.*, 648 N.W.2d at 587 ("Nothing about this option to renew provision is remotely ambiguous."). There being nothing to construe, we are not persuaded that *Stamm v. Buchanan*, 55 N.M. 127, 132, 227 P.2d 633, 636 (1951), a case Tenant relies on for the proposition that equity will intercede to avoid a forfeiture in the case of commercial leases, applies here. *Stamm* involved a lease that was ambiguous and therefore in need of construction; *Stamm* specifically held that if the language plainly allowed what the lessor wanted to do, "the courts [would be] left [with] no alternative but to enforce it according to the letter." *Id.* at 135, 227 P.2d at 638. We similarly note that there is no contention that the terms of the lease themselves were unconscionable.

2. Options and the Law Governing Them

[6] {13} Landlord argues that New Mexico law holds that an option must be exercised strictly according to its terms and that the failure to exercise an option does not result in a forfeiture. Indeed, this Court and our Supreme Court have held that when the parties enter into an option contract for the purchase of land, the option must be exercised according to the terms of the contract. *Skarda v.*

Davis, 83 N.M. 342, 346, 347, 491 P.2d 1153, 1157, 1158 (1971); *Cillessen v. Kona Co.*, 73 N.M. 297, 301, 387 P.2d 867, 870 (1964); *Master Builders, Inc. v. Cabbell*, 95 N.M. 371, 374, 622 P.2d 276, 279 (Ct.App.1980). The rule has also been applied to an option to increase leased space in the situation where one cotenant leases the commonly owned premises. *See Northcutt v. McPherson*, 81 N.M. 743, 745, 473 P.2d 357, 359 (1970). Under these cases, the person holding the option to purchase has no legal rights in the land unless and until the option is exercised according to its terms. Thus, by definition, the failure to exercise an option does not result in a forfeiture. *See id.* at 746, 473 P.2d at 360; *Cillessen*, 73 N.M. at 301, 387 P.2d at 870.

{14} We recognize that this case could be viewed differently. In *Nearburg* and most other option cases, the owner of the option had not paid the near $2,000,000 that Tenant has expended here. Further, in this case, as is the case with many commercial ground leases, in order to encourage the tenants to spend significant amounts of money in adapting the property to their purposes, the landlord gave the tenants the right to renew the arrangement for a lengthy period of time. *See* Jerome D. Whalen, *Commercial Ground Leases* §§ 1.1 to 1.8 (2d ed.2002); 2 Milton R. Friedman, *Friedman on Leases* Ch. 14 (4th ed.1997).

{15} Nonetheless, the fact remains that the option was required to be exercised in a certain way according to the lease agreement signed by the parties. Other cases in the lease-renewal situation have held that there is no forfeiture calling for equitable intervention in circumstances where a lessee has simply neglected to give timely notice, even when there is a large difference between the rent the lessee pays and the rent that could be demanded or when the lessee has expended considerable sums of money on improvements. *See Trueman–Aspen Co. v. N. Mill Inv. Corp.*, 728 P.2d 343, 344 (Colo.Ct.App.1986); *W. Tire, Inc. v. Skrede*, 307 N.W.2d 558, 562–63 (N.D.1981).

[7] [8] {16} The way the option was required to be exercised in this case was by "send[ing] notice thereof to Landlord at least three months prior to the expiration" of the then term of the lease. When option or other contracts contain specific time limitations, time is of the essence. *See, e.g., SDG Macerich Props.*, 648 N.W.2d at 586; *Rounds v. Owensboro Ferry Co.*, 253 Ky. 301, 69 S.W.2d 350, 354–55 (1934); *Sentara Enters., Inc. v. CCP Assocs.*, 243 Va. 39, 413 S.E.2d 595, 597 (1992). Further, the exercise of an option in the manner spelled out in the contract is a condition precedent to enforcing the option. *Id.*

{17} Tenant has argued that instead of applying the law concerning option contracts, we should apply the law concerning real estate contracts. Under real estate contract law, the courts recognize that the buyer has an equitable right to the land such that equity ****541 *731** will protect the buyer from unwarranted forfeitures or unfairness that would shock the conscience of the courts. *See, e.g., Huckins v. Ritter*, 99 N.M. 560, 562, 661 P.2d 52, 54 (1983); *Miller v. Johnson*, 1998–NMCA–059, ¶ 19, 125 N.M. 175, 958 P.2d 745; *Buckingham v. Ryan*, 1998–NMCA–012, ¶ 7, 124 N.M. 498, 953 P.2d 33. We do not believe that the special case of real estate contracts should be relied on in cases involving the notice provisions of large-scale commercial leases. Our cases recognize that the device of real estate contracts allows many people to become property owners with very small down payments and with payments over many years in a manner likened to rent. *See Bishop v. Beecher*, 67 N.M. 339, 342, 355 P.2d 277, 279 (1960).

{18} In addition, even in real estate contracts, it is not every apparently large loss that amounts to unfairness that shocks the conscience of the court. For example, in *Bishop*, in which the rule was established, the court ruled that the tenant's payments of about one-third of the value of the property over the course of six years could be likened to rent and therefore did not shock the conscience, *id.* at 343, 355 P.2d at 279–80, and in *Buckingham*, the court ruled that loss of a $25,000 down payment ... was not sufficient to shock the conscience of the court. 1998–NMCA–012, ¶ 16, 124 N.M. 498, 953 P.2d 33. To the extent that other cases appear to deny forfeiture on similar facts, *see, e.g., Huckins*, 99 N.M. at 562, 661 P.2d at 54, we believe that applying their reasoning in this case will have a negative impact on the conduct of business in New Mexico, as will be demonstrated below.

3. Equitable Considerations

{19} "Equity jurisdiction has never given the judiciary a roving commission" to do whatever it wishes in the name of fairness or public welfare. *In re Adoption of Francisco A.*, 116 N.M. 708, 730, 866 P.2d 1175, 1197 (Ct.App.1993) (Hartz, J., concurring in part and dissenting in part). In this section, we explain why adherence to the rule of law

requires a decision in favor of Landlord. In so doing, we must also explain why we do not adopt the *Fountain* rule and why we reject some of Tenant's arguments.

a. *F.B. Fountain Co.* Rule

{20} Tenant relies most heavily on *Car–X Serv. Sys., Inc. v. Kidd–Heller*, 927 F.2d 511, 514–17 (10th Cir.1991), and *J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc.*, 42 N.Y.2d 392, 397 N.Y.S.2d 958, 366 N.E.2d 1313, 1317 (1977), both of which relied on the value of improvements made by the tenant and a balancing of the harms visited upon either the landlord or the tenant. Landlord, in turn, relies on the dissent in *J.N.A. Realty Corp.*, 397 N.Y.S.2d 958, 366 N.E.2d at 1321–22. Landlord expresses concern for the "instability and uncertainty" that it contends would ensue if we adopted the rule allowing equity to intervene. Landlord suggests that the rule adopted by the district court would, in the words of Chief Judge Breitel, "allow for *ad hoc* dispensations in particular cases without [the] reliable rule so essential to commercial enterprise." *Id.* at 1321 (Breitel, C.J., dissenting). Landlord also points to another concern expressed in the dissent: allowing relief in these circumstances would allow a tenant, "under the guise of sheer inadvertence, [to] gamble with a fluctuating market, at the expense of his landlord, by delaying his decision beyond the time fixed in the agreement." *Id.* We are most persuaded by the concern of instability and uncertainty. We think that the concern about gambling with the market could easily be remedied by adoption of a rule that excluded such intentional acts from its scope.

{21} We do not perceive that adoption of the rule relied on by the district court is certain enough to provide the necessary stability and predictability for commercial transactions. A few examples will demonstrate. The *Fountain* rule contains three basic elements: (1) that the delay in giving notice be slight, (2) that the loss to the landlord be small, and (3) that the loss to the tenant be so large that it would be unconscionable to enforce the notice provision.

{22} We begin with the length of delay. In *Fountain* itself, the delay was four days and the notice period was supposed to be thirty days. In our case, the delay was ****542** ***732** about forty days and the notice period was supposed to be about ninety days. Thus, in our case, the delay was almost half the notice period. In the jurisdiction deciding *Fountain*, the delay is measured against the notice period to determine whether the delay is slight, and thus Connecticut holds that notice given five and one-half months into a six-month notice provision does not qualify, even if the reason for the late notice is excusable, i.e., terminal illness in the family of the person required to give notice. *See Tartaglia v. R.A.C. Corp.*, 15 Conn.App. 492, 545 A.2d 573, 574 (1988). On the other hand, Hawaii is a jurisdiction that follows *Fountain*, and it measures the notice against the potential term of the lease, such that a four-month late notice for a six-month notice period is not unreasonably long considering that the lease was for a ten-year term that could extend out to fifty years. *See Aickin v. Ocean View Invs. Co.*, 84 Hawai'i 447, 935 P.2d 992, 1000 (1997). In our opinion, the Hawaii rule practically nullifies any reasonable meaning of the word "slight." The difficulties of applying a rule involving "slight" delay indicate to us that the *Fountain* rule is simply too uncertain to apply in a state like New Mexico that highly values the stability of commercial transactions.

{23} Another difficult area concerns the second and third elements of the *Fountain* test, which have to do with the loss to the parties. In our case, Landlord had not changed its position to its prejudice, but once the notice was not forthcoming, it had an expectation that the trial court's ruling frustrated. *See W. Tire, Inc.*, 307 N.W.2d at 562 (indicating that being required to accept lower rental payments amounts to prejudice to landlord). The loss to Tenant appears at first blush to be large if one calculates it at the $2,000,000 Tenant paid to take over the K–Mart lease and build improvements. But the calculation of what Tenant has recouped already (inasmuch as its payments owed to Landlord are much less than what it is taking in from the Subtenants) shows that Tenant's loss is considerably less than its expenditures. *See Rounds*, 69 S.W.2d at 356 (indicating that loss is not great when investment has been recouped). Again, the difficulty of predictably following known standards militates against adopting the *Fountain* rule in New Mexico.

{24} Moreover, we believe that adoption of the *Fountain* rule would allow courts to change the basic nature of the parties' agreements, contrary to what they have bargained for at arm's length. For example, the lease in this case required Tenant to give notice three months prior to the end of the lease term if Tenant wished to extend the lease to another five-year term. In contrast, Tenant on appeal argues that Landlord has failed to do equity because "[Landlord] was required to provide [Tenant] with notice of the breach [i.e., the failure to give the

required notice], demand that [Tenant] cure the breach and provide [Tenant] the opportunity to cure the breach." There was no breach in this case, and to argue as Tenant does stands the lease provision on its head.

{25} We consider the practical effect of Tenant's argument in circumstances like those provided for in the lease in this case. Toward the end of the current lease term, a landlord will wonder whether a tenant will renew. The three-month notice provision is designed to allow the landlord sufficient time to seek other tenants. If the landlord waits until the end of the three-month period and the tenant has still not renewed, the cases are uniform in ruling that the landlord can evict the tenant. *See, e.g., Duffy v. Casady*, 29 Kan.App.2d 549, 28 P.3d 1040, 1042–43 (2001) (applying the *Fountain* rule only if notice is given during the term of the lease). In our case, Landlord waited until about half of the notice period had expired before notifying Tenant of Tenant's failure to give notice. Tenant's argument would have Landlord responsible for giving notice of Tenant's failure to give notice, which would then prompt Tenant to give notice, which again stands the provision of the lease on its head. If the parties had wanted Landlord to be responsible for prompting Tenant, they could have so written the lease. The parties not having done so, the district court should not rewrite the lease for the parties.

{26} Finally, we note that the facts of several of the cases, alleged to stand for the ****543** ***733** proposition that the *Fountain* rule has been adopted in a particular jurisdiction, would call for relief even under the traditional rule. Thus, as was pointed out in *Guy Dean's Lake Shore Marina, Inc. v. Ramey*, 246 Neb. 258, 518 N.W.2d 129, 132 (1994), the landlord in *J.N.A. Realty*, on which Tenant so heavily relies, had regularly informed the tenant in that case of various of its other obligations so that it could be fairly said that the tenant's neglect was to some extent affected by the landlord's behavior. Similarly, in *Duncan v. G.E.W., Inc.*, 526 A.2d 1358, 1365 (D.C.1987), in the court's recap of its holding, the first factor emphasized was that "the failure to give the required notice was the result of an honest mistake, and not mere neglect." Thus, we believe that allowing a court to weigh the equities in cases of mere neglect would allow courts to be roving commissions, engaging in after-the-fact determinations of fairness that would be contrary to the parties' bargains and contrary to the rules of law surrounding equitable intervention in virtually all of the reported cases.

b. Tenant's Other Contentions

{27} Tenant argues that, even if we do not adopt the *Fountain* rule, the judgment should be affirmed under traditional New Mexico law. It relies on two factors. First, it argues that, under *Winrock Inn*, the notice provision must be considered at the "heart of the [parties'] bargain" before equity should not step in and that Landlord knew, from prior negotiations, that Tenant was going to exercise all options to renew. *See* 1996–NMCA–113, ¶ 36, 122 N.M. 562, 928 P.2d 947. Second, it argues that its negligence is no different from mistake and that mistake is a traditional reason for equity to act. We disagree with both arguments.

{28} *Winrock Inn* does say that, "[i]n the absence of fraud, unconscionability, or other grossly inequitable conduct, New Mexico courts do not have discretion either to relieve parties to a commercial lease of their contractual obligations or to interfere with contractual rights and remedies *which go to the heart of the bargain.*" *Id.* (emphasis added). We do not understand how Tenant can claim that the notice period inserted into the lease and which other courts have called a condition precedent indicating that time is of the essence does not go to the heart of the parties' bargain. Moreover, if there were any doubt about it, the parties' prior negotiations, far from showing that Landlord knew that Tenant would exercise the options, indicated that Landlord would require Tenant to adhere to the letter of the lease agreement. When Tenant negotiated with Ford Leasing, it negotiated a long-term lease for nineteen years and six months, and it wished Landlord to agree to a subordination agreement that would, among other provisions, relieve it of the obligation of providing notice at the end of each term. Landlord specifically rejected Tenant's proposal, which left Tenant in the position of having to provide the required notice.

[9] {29} As stated earlier in this opinion, relying on the *Ahmed* case, mistake is one of the traditional exceptions that would allow equity to intervene in a case of late notice. "Mistake, of course, is a fountainhead of equity jurisprudence." *Crown Life Ins. Co. v. Candlewood, Ltd.*, 112 N.M. 633, 637, 818 P.2d 411, 415 (1991). Tenant relies on the language in the *Crown Life Ins. Co.* opinion which appears to equate negligence with mistake. *See id.* at 637–38, 818 P.2d at 415–16. However, since *Crown Life Ins. Co.* involved foreclosure, which is equitable in nature to begin with, *Las Campanas Ltd. P'ship v. Pribble*, 1997–NMCA–

055, ¶ 9, 123 N.M. 520, 943 P.2d 554, we do not read it for the proposition that a party's mere negligence operates the same way as mistake and should always constitute a threshold showing that allows equity to intervene in any case.

[10] [11] [12] [13] {30} Instead, we believe that the mistake that constitutes the threshold showing allowing equity to intervene is the type of mistake that is defined in the cases specifically addressing whether to hold parties to their freely negotiated bargains:

> A mistake within the meaning of equity is a non-negligent but erroneous mental condition, conception, or conviction induced by ignorance, misapprehension, or misunderstanding, resulting in some act or omission done or suffered by one or both parties, without its erroneous character ****544 *734** being intended or known at the time.

[Tenant] does not argue it misunderstood the terms of the contract. It does not contend it was unaware of the notice provision. Rather, the facts before us show [Tenant] failed to exercise its option because of simple forgetfulness. Forgetfulness is not the equivalent of a mistake.

> No one can predicate a mistake on his own negligent omission to perform a legal duty.... When one is charged with a duty, and forgets to do it, it may under certain circumstances constitute excusable negligence, but it cannot be held to be a mistake.... Negligently and inadvertently omitting to perform a duty is far different than to omit it through mistake or accident.

SDG Macerich Props., 648 N.W.2d at 587 (internal quotation marks and citations omitted). This definition comports with our recently decided opinion in *Lovato v. Crawford & Co.*, 2003–NMCA–088, ¶ 25, 134 N.M. 108, 73 P.3d 246 (distinguishing excusable neglect from carelessness or inattention). *See also Duncan*, 526 A.2d at 1365 (distinguishing honest mistake from mere neglect); *Crown Constr. Co. v. Huddleston*, 961 S.W.2d 552, 559 (Tex.Ct.App.1997) (holding that a honest and justifiable mistake was not present when a tenant was aware of the option deadline and method by which the option was to be exercised and utilized another method).

CONCLUSION

[14] [15] [16] [17] [18] {31} The *SDG Macerich Properties* opinion began with the familiar maxim that "[e]quity aids the vigilant." 648 N.W.2d at 583. We recently expressed the same sentiment in *Juarez v. Nelson*, 2003–NMCA–011, ¶ 22, 133 N.M. 168, 61 P.3d 877. *See also Thompson v. Montgomery & Andrews, P.A.*, 112 N.M. 463, 467, 816 P.2d 532, 536 (Ct.App.1991) (stating that equity aids the vigilant, not those who slumber on their rights). This case arose simply because Tenant was not vigilant. We wholeheartedly agree with the conclusions expressed by the *SDG Macerich Properties* court:

> We will not use equitable principles to save a party from the circumstances it created.
>
> [Tenant] would have us weigh the equities of each particular case to achieve the most "just" result. However, the decision of which of two profit-seeking parties is more deserving to prevail is not within the province of the courts. [Tenant] has not offered and we have found no justiciable standards announced in other jurisdictions to assist this court in making such an arbitrary decision. No one factor to be considered in such an equitable analysis is sufficiently compelling to require us to aid [Tenant] or any other party where the parties bargained freely to their contract.
>
> To hold otherwise would do nothing more than create instability in business transactions and disregard commercial realities.... Were we to accept [Tenant]' s argument, "all contracts would be called into question as meaningless and uncertain, dependent upon the whims of a panacean court or a jury." Attempting in vain to balance the equities, especially in a situation where as here the record is devoid of any so-called "equities," will weaken the sanctity and predictability of the written word.
>
> The written words of the contract afford greater certainty of intention, and more accurate compliance with the performance of the terms of the contracts by the parties thereto than do the retrospective, impassive conclusions of a court of equity. A court of equity should not be the first, but the last resort. It is bound by a contract as the parties have made it and has no authority to substitute for it another and different agreement, and should afford relief only where obviously there is fraud, real hardship, oppression, mistake, unconscionable results, and the other grounds of righteousness, justice and morality.

> In sum, application of the *Fountain* rule would result in granting relief for failure to comply with an option provision anytime the "delay is slight, the lessor's loss is small, and the lessee would suffer a hardship." Such a rule would excuse failure to comply with the lease in most cases. This result is directly contrary to our established ****545** ***735** precedent enforcing strict adherence to contractual time limitations.

SDG Macerich Props., 648 N.W.2d at 587–88 (citations omitted).

{32} In summary, we hold that, under the circumstances of this case in which the notice was quite late when measured against the notice period provided in the lease and when the reason for the late notice is simple neglect, a court may not relieve a party of the bargain it made and must enforce the lease as it was written. Accordingly, the trial court erred in awarding summary judgment to Tenant. The judgment of the district court is reversed.

{33} **IT IS SO ORDERED.**

I CONCUR: CYNTHIA A. FRY, Judge.

CELIA FOY CASTILLO, Judge (Dissenting).

CASTILLO, Judge (dissenting).

{34} While I agree with the majority that our task in this case is to decide which line of cases best reflect the law and policy of New Mexico, I respectfully dissent. I believe that equity should be allowed to intervene because this case involves a possible forfeiture. The majority opinion decides as a matter of law that equity cannot be considered in cases where a tenant forgets to timely send a notice of lease renewal. This holding is based on three points: (1) courts may not rewrite obligations that the parties bargain for themselves; (2) in the absence of well-defined equitable exceptions, equity should not intervene; and (3) instability and uncertainty would ensue if we adopted the *Fountain* rule. There is New Mexico law to support these general propositions, but not in cases such as this where forfeiture is a possible result. New Mexico law is clear: equity abhors forfeiture. *Stamm*, 55 N.M. at 132, 227 P.2d at 636.

{35} As early as 1922 our Supreme Court, in recognizing the harshness of forfeiture, held that equity could intervene to relieve a tenant of commercial property from "forfeiting" the lease simply because the tenant was late in paying one month's rent. *N.M. Motor Corp.*, 27 N.M. at 307, 201 P. at 106. The Court in *N.M. Motor Corp.* allowed equity to intervene in this commercial lease situation to prevent a forfeiture *even in the absence of fraud, accident, or mistake. Id.* "[Equity] looks to the substance rather than the form. It will not sanction an unconscionable result merely because it may have been brought about by means which simulate legality." *Ortiz v. Lane*, 92 N.M. 513, 519, 590 P.2d 1168, 1174 (Ct.App.1979) (Hernandez, J., specially concurring) (quoting from *Merrick v. Stephens*, 337 S.W.2d 713, 719 (Mo.Ct.App.1960) (emphasis and internal quotation marks omitted)). This case should not turn on attempts to characterize the failure to give timely notice, but rather on the consequences to both parties that flow from the untimely notice.

{36} In *Nearburg*, the Court described forfeiture as follows:

> The Restatement uses the term forfeiture to mean the denial of compensation to an obligee because of the non-occurrence of a condition after the obligee has relied substantially on the expectation of the bargained-for exchange, either by preparation or performance. [Restatement (Second) of Contracts § 227 cmt. b (1981)]. "When it is said that courts do not favor forfeitures, the meaning is that they do not like to see a party to a contract getting something for nothing." 3A Arthur Linton Corbin, *Corbin on Contracts* § 748, at 465 (1960).

1997–NMCA–069, ¶ 21, 123 N.M. 526, 943 P.2d 560. In *Nearburg*, we held there was no forfeiture. *Id.* Unlike the purchase option cases cited by the majority, this case deals with a notice to renew a long term lease on premises developed at substantial cost to Tenant. In this case, Landlord will receive a fully developed piece of property having paid little or nothing for the development. While we recognize that Tenant has received rents in excess of what is paid to Landlord, the difference is used to recoup the investment. If the lease is terminated now, Landlord is entitled to that rental income, or it may re-let the premises at a higher rate, all without having any substantial investment in the development of the property. This is "getting something for nothing," and is exactly the ****546** ***736** type of situation that requires at least the consideration of equity.

{37} Citing to *Bishop*, 67 N.M. at 342, 355 P.2d at 279, the majority points to the reasoning behind allowing equity to apply to real estate contracts, which is that the buyer has an equitable right to the land and that this type of financing is a special device that allows many people to become property owners with very small down payments and long payment periods in a manner likened to rent. The majority believes that the possible uncertainty in outcome by allowing equity to intervene when late notice is made in commercial lease cases would have a negative impact on the conduct of business in New Mexico. A review of real estate contract cases reveals that not all buyers are individuals; on the contrary, real estate contracts are used in commercial dealings. *See, e.g., Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, Inc.*, 99 N.M. 95, 654 P.2d 548 (1982). Further, I believe we must look to the underlying policy in the real estate contract cases, that is, equity abhors forfeiture, and allow the district court to make a decision under the existing facts of the case. *See id.* at 102, 654 P.2d at 555. Again, each case turns on its own facts, and a trial court weighs the many factors in deciding when and how equity should intervene. In allowing equitable principles to determine whether a forfeiture can be declared by a vendor against a sub-vendee without notice, our Supreme Court summarized New Mexico law as follows:

> the modern view that valuable contractual rights should not be surrendered or forfeitures suffered by a slight delay in performance unless such intention clearly appears from the contract or where specific enforcement [upon the seller] will work injustice after a delayed tender. As we observed in *Martinez* [*v. Martinez*, 101 N.M. 88, 92, 678 P.2d 1163, 1167 (1984)], the courts' disapproval of forfeitures is longstanding; we are not compelled in every case to enforce a real estate contract when fairness and legal principles dictate that we should not. A forfeiture declaration is essentially an equitable remedy. It therefore makes perfectly good sense to apply equitable principles in determining whether a vendor under an installment land sale contract will be permitted to declare a forfeiture.

Yu v. Paperchase P'ship, 114 N.M. 635, 644, 845 P.2d 158, 166 (1992) (internal citations and quotation marks omitted). Absolutely forbidding equity to be considered in this case is contrary to the spirit of New Mexico law.

{38} I disagree that application of the factors in *Fountain* or its progeny will introduce excessive instability or insecurity into commercial transactions. This type of arrangement or series of transactions has become increasingly common as a method of developing commercial property. *See generally* Whalen, supra §§ 1.1 to 1.8; 2 Friedman, supra Ch. 14. The holding in *Fountain* is more consistent with commercial realities and will provide increased stability for those who wish to develop commercial property, with no unexpected losses to the owners of the land on which the development takes place. Normally, when leased premises have been developed and are sublet, landlords expect the lease to be renewed. In those cases, the failure to tender a timely notice is unexpected and in some cases a surprise. It may also result in a windfall for the landlord.

{39} In this case, Tenant asked for an equitable remedy, which was to require Landlord to treat the untimely notice as effective. Landlord did not want the district court to take equity into account. Landlord's attorney argued to the district court that "one way or another someone is going to get the short end of the stick, whether it is [Landlord] or [Tenant], that's the reality."

{40} It is clear from the record that the district court did in fact consider all the equities as set out in *Fountain* before granting relief and that the equities were heavily in favor of Tenant in this case. First, it was undisputed that Tenant did not intentionally fail to give timely notice. Second, while the notice of a desire to extend the lease was not given in a timely fashion, it was still given, and indeed suit was filed, before that term of the lease expired. The majority points to the difficulty in applying a rule involving "slight" delay. According to *Fountain*, the delay is ****547** ***737** measured against the notice. In this case, the tenant was late about forty days out of the ninety-day notice period. The majority is concerned that because the word "slight" is open to interpretation, the parties have nothing concrete to rely on. Each case turns on its own facts. I believe a district court is certainly capable of evaluating the delay as it did in this case. I cannot

say that the district court was wrong in considering this particular delay slight, especially when balanced with the other factors.

{41} Third, the district court considered the substantial hardship to Tenant which in this case is tantamount to forfeiture. Even the majority recognizes the $2,000,000 investment made by Tenant but expresses its concern about the value of the recoupment and difficulty in following known standards. Again, each case turns on its particular facts and I believe that district courts are capable of sorting it all out.

{42} Fourth, the district court considered the extent to which Landlord's interests would be prejudiced by granting the requested relief. In the district court, it was undisputed that Landlord had not changed its position in reliance on the failure to give timely notice. Indeed, the only prejudice to its interests that Landlord could point to was the fact that it would continue to receive rent at a rate set in the 1960s and substantially below what the market would bear today. This, however, is the result of the rental rate and the number of extensions allowed under the lease and has nothing to do with the timeliness or untimeliness of the notice of intent to renew for an additional term.

{43} Lastly, the district court also considered the interests of possible third parties. It was undisputed below that Landlord had not looked for or found a new tenant, nor had Landlord listed the property for sale, so its interests did not implicate those of any third parties or owner whose interests had to be considered. On the other hand, it was equally undisputed that the interests of the Subtenants would also have been significantly harmed if relief was not granted. In short, this was a case in which the equities favored giving relief.

{44} In summary, I believe New Mexico law should allow the exercise of equitable powers and require a Landlord to treat as timely an untimely notice of intent to extend a long term lease for another term of years if, as is true here, the delay in giving notice is not willful or deliberate, the length of the delay is relatively short, the notice of intent to extend is given before the term of the lease expires, and the hardship to the tenant in denying relief clearly outweighs any hardship that will be incurred by the landlord if relief is granted.

{45} For the above reasons, I respectfully dissent.

All Citations

134 N.M. 725, 82 P.3d 535, 2003 -NMCA- 140

End of Document

Negative Treatment

Negative Citing References (1)

The KeyCited document has been negatively referenced by the following events or decisions in other litigation or proceedings:

Treatment	Title	Date	Type	Depth	Headnote(s)
Declined to Extend by	1. J.R. Hale Contracting Co., Inc. v. Union Pacific R.R. MOST NEGATIVE 179 P.3d 579 , N.M.App. COMMERCIAL LAW - Contracts. Issues of material fact existed on whether subcontractor released claims for additional work when it signed releases.	Sep. 12, 2007	Case		—

112 N.M. 748
Supreme Court of New Mexico.

ECONOMY RENTALS, INC., Plaintiff–Counterdefendant–Appellant,
v.
Sheilah P. GARCIA, individually and as Personal Representative of the Estate of Julian N. Garcia, Deceased, Defendant–Counterclaimant–Crossclaimant–Appellee,
v.
AMERICAN TOYOTA, INC., and Beatriz Rivera, Defendants–Crossdefendants–Appellants.

Nos. 19135, 19136.
|
Sept. 24, 1991.
|
Rehearings Denied Oct. 21 and Nov. 21, 1991.

Commercial lessor sought declaration that lease had been properly terminated. Lessee filed counterclaim, alleging that termination was wrongful and seeking damages from both lessor and sublessee. The District Court of Bernalillo County, Burt Cosgrove, D.J., entered judgment generally in favor of lessee and against both lessor and sublessee. Appeals were taken. The Supreme Court, Montgomery, J., held that: (1) lessor breached lease when it withheld consent to sublease motivated primarily by desire to increase economic benefit; (2) lessee was entitled to compensatory damages for sublease period, compensatory damages for holdover period, and prejudgment interest; and (3) evidence supported award of punitive damages but not amount of attorney fees.

Affirmed in part, reversed in part and remanded.

Attorneys and Law Firms

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OPINION

MONTGOMERY, Justice.

{1} The principal issue on this appeal is whether Economy Rentals, Inc., a lessor of real property in Albuquerque, New Mexico, breached its lease by unreasonably withholding consent to its lessee's request for approval of a sublease and then terminating the lease when the lessee failed to cure an alleged default. Resolution of this issue requires us to articulate standards for a determination of what constitutes "reasonable" grounds for withholding consent to a lessee's proposed assignment or sublease. We hold that the trial court properly determined that the lessor's refusal to consent was unreasonable.

{2} This resolution does not, however, dispose of this appeal. Several issues relating to the relief afforded the lessee by the trial court for the lessor's breach, and for the sublessee's concomitant breach of its obligations under the sublease, are raised by the appellants, including issues relating to the compensatory damages awarded the lessee against both the lessor and the sublessee and whether those parties could properly be held "jointly and severally" liable for those damages. In the course of our opinion, we also discuss issues relating to prejudgment interest, punitive damages, and determination of attorney's fees, along with certain other issues of which we dispose summarily. We affirm in part, reverse in part, and remand for further proceedings.

I. *Facts and Issues*

{3} Effective April 1, 1977, Julian Garcia, an automobile dealer in Albuquerque, leased from Economy Rentals, Inc. ("Economy"), certain premises at 725 Wyoming Boulevard, N.E. (the "Economy property"), for a ten-year period at an escalating rent, reaching $3,000 per month from April 1982 through March 1987. Although effective in April 1977, the lease was not actually signed by Economy and Garcia until June 14, 1979. Contemporaneously with executing **1310 *752 the lease, the parties also executed an "amendment" to the document, under which the lessee could not assign or sublet the premises without the written consent of

the lessor, "which consent shall not be unreasonably withheld."

{4} When the lease became effective and for some time before, the Economy property was occupied by American Toyota, Inc. ("American"). American had been formed in 1976 to enable Garcia to acquire a second automobile franchise from Toyota Motors; at that time Garcia already owned and operated another Toyota dealership in Albuquerque. Initially, Garcia owned 90% of the stock in American; the remaining 10% was owned by his cousin, Beatriz Rivera, who was named president and general manager. Pursuant to Toyota Motors' requirement, Rivera also held an option to acquire sufficient additional stock to become the majority stockholder.

{5} Garcia had first acquired a lease on the Economy property in 1976 by assignment (with Economy's consent) from the previous tenant and had placed American in possession under an oral sublease at that time. Thus, when Economy and Garcia executed the new ten-year lease in 1979, American had been occupying the Economy property for at least two years, with Economy's full knowledge and consent. The parties confirmed this arrangement in writing when the lease and the amendment were executed, with Economy consenting to the subleasing of the premises to American on the understanding that Garcia was not relieved of his obligations under the lease.

{6} In 1983 a dispute arose between Rivera and Garcia over Rivera's option to acquire control of American. The dispute apparently was protracted and bitter.[1] It was finally resolved in May 1984 by execution of a series of documents under which Rivera, through American, purchased all of Garcia's stock in American and thereby acquired full ownership of the corporation, and under which Garcia conveyed to American his interest in the Economy leasehold and a related leasehold of adjoining property to the south.[2] This conveyance was effected through a document entitled "Grant of Leaseholds," which provided for American to have possession of each of the two leased tracts for a period of twenty months from May 2, 1984, to December 31, 1985, with the right to extend its possessory interests for not more than an additional six months to June 30, 1986.[3] In exchange **1311 *753 for this transfer of the right to possession, American obligated itself to pay $7,500 per month, with a bonus of an additional $7,500 for the first month, for the period in which it had the right to possession, including any extension. This obligation was represented by a promissory note and provision for another note to cover the extension period. Rivera endorsed both notes as personal guarantor.

{7} The document by which American acquired the Garcias' stock in the corporation, and which outlined the terms of the overall transaction through which the Rivera–Garcia dispute was settled in May 1984, and to which the "Grant of Leaseholds" was an exhibit, was an agreement called the "buy-sell agreement." This document contained various provisions relating to the transaction—setting forth the terms of the promissory notes, describing the Grant of Leaseholds, establishing an escrow, providing for mutual releases, and so forth—most of which are not material to this lawsuit. One paragraph of the buy-sell agreement, however, warranted that American would pay all rents due to the lessors under the Economy and Rogers leases "and will continue to perform all such other obligations of Lessee [Garcia] as are set forth in said leases as it has performed said obligations in the past." American had always paid the monthly rent (by then $3,000) to Economy under the Economy lease, as well as the $540 per month rent to Rogers under the Rogers lease. The same paragraph also warranted that American and Rivera would not compete with the Garcias if the Garcias attempted to lease or purchase at some future time the properties on which American was currently doing business. American also warranted that at the end of the sublease it would assign to the Garcias any interest it might have in a lease with the owner of a third parcel of land, called the "Janpol property," adjoining the Economy property on the north.

{8} Several months after the May 1984 transaction had closed, Rivera advised Economy that she had become the sole stockholder of American and had obtained a written sublease of the property. Economy apparently then reviewed the Grant of Leaseholds and the buy-sell agreement and notified Garcia on November 2, 1984, that the sublease agreement constituted a breach of the primary lease since it had been entered into without Economy's consent. Three weeks before this notification, Julian Garcia died, survived by his wife and sole beneficiary of his estate, Sheilah Garcia.[4]

{9} Sheilah Garcia responded to the notification, stating that Economy's previous written consent to American

as sublessee was still effective, but also asking Economy to reconfirm that consent. Economy refused, without giving any specific reason for its nonconsent at that time. Whether the three reasons ultimately advanced by Economy at trial were reasonable bases for refusing consent is discussed below. Meanwhile, Economy and Garcia remained at loggerheads, and in February 1985 Economy advised Garcia and Rivera that the attempted sublease constituted a breach of the lease and gave Garcia thirty days to cure the alleged default. Garcia insisted that she was not in default; however, on March 13, 1985, Economy declared the lease terminated and informed American that it was in possession of the property as a tenant at sufferance.

{10} One month later, on April 19, 1985, Economy instituted the present action by suing Garcia, American, and Rivera for a declaratory judgment that the lease had been properly terminated. Garcia counterclaimed for a declaration that the termination **1312 *754 was wrongful and crossclaimed for damages from American and Rivera. In June 1986 Garcia amended and supplemented her answer, counterclaim, and crossclaim, seeking damages from Economy as well as American and Rivera. Shortly thereafter, Garcia filed her own action against American and Rivera in an attempt to evict American from the Rogers property and to obtain damages for American's continued occupancy of that property. The two suits were consolidated in April 1988, by which time American had long since vacated both properties and Garcia no longer claimed a right to possession beyond the April 1, 1987, termination date of the original lease.

{11} Meanwhile, after Economy declared the lease terminated in March 1985, American established an escrow account with a local bank, into which it deposited the installment payments due under the promissory notes provided for in the buy-sell agreement as consideration for the Grant of Leaseholds. American expressed concern that it might be exposed to double liability to both Economy and Garcia, so it notified Garcia that she could withdraw the funds on deposit by obtaining Economy's written consent to the sublease. American continued to make the $7,500 monthly payments into the escrow account until June 1986. By then it had deposited a total of $112,500, representing the installments due for the fifteen months (from April 1985 to June 1986) after Economy's purported termination of the lease. During this period, American paid both the primary lease rental of $3,000 per month to Economy and the sublease rental of $7,500 per month to the escrow agent. In July and August 1986, American and Rivera withdrew the funds on deposit and then closed the escrow account.

{12} After expiration of the agreed term of the sublease as provided in the Grant of Leaseholds, American continued to occupy the Economy property under a lease negotiated directly with Economy for the nine-month period beginning July 1, 1986, and ending March 31, 1987. The rent on this lease was $7,000 per month, which American paid directly to Economy. American vacated the Property on March 31, 1987; Garcia was then in the process of locating her businesses elsewhere. Thus, after April 1, 1987, when the Economy–Garcia lease expired and neither Garcia nor American was claiming a right to possession, the only issues remaining among the parties were determination of Garcia's claims for damages against Economy and American/Rivera.

{13} A bench trial of the consolidated actions[5] was conducted in two sessions over six days in November 1988 and August 1989. The court rendered its decision in September 1989, holding generally in favor of Garcia and against both Economy and American/Rivera. The court determined that Economy and American/Rivera were each jointly and severally liable for Garcia's total damages of $271,125, of which $180,000 ($7,500 x 24 months) represented unpaid sublease rent and $91,125 represented prejudgment interest. Prejudgment interest was calculated at the statutory rate of 15 percent annually[6] for each unpaid sublease payment for the period in which the installment was unpaid to the time of trial. The court also awarded punitive damages of $5,000 against Economy and $50,000 against American. In addition to these amounts, the court awarded attorney's fees of $73,000 against American, representing the fees which the court found Garcia had incurred in recovering on the promissory notes, which provided for attorney's fees in the event of default. Rivera, as American's guarantor, was held liable for all amounts awarded against American except the $50,000 punitive damages.

{14} On appeal, Economy and American first join forces to argue that Economy's termination **1313 *755 of the lease was permissible because Economy reasonably withheld consent to the sublease. At first blush, it is not entirely clear why American takes this position, since

it acknowledges liability to Garcia in any event for the delinquent $112,500 in promissory note installments from April 1985 to June 1986. American asserts in its brief, and took the position in its requested findings below, that it had always stood ready, willing and able to pay the $112,500 to Garcia if only she would obtain consent to the sublease. On consideration of the period after June 30, 1986, however, it becomes clearer why American claims that Economy properly terminated the lease: If Economy's grounds for refusing consent were unreasonable and its termination of the lease therefore wrongful, the lease remained in effect until April 1, 1987; and, since American's sublease ended on June 31, 1986 (after the six-month extension) but American remained in possession, American was a holdover subtenant and therefore arguably liable for the sublease rent from July 1, 1986, to March 31, 1987.

{15} Economy also urges on appeal that, even if this Court should hold that its termination of the lease was wrongful, there is no basis for the trial court's holding Economy jointly and severally liable for the same damages as those assessed against American.

{16} Both appellants attack the trial court's awards of prejudgment interest and punitive damages, asserting that the promissory notes to Garcia did not provide for interest and that there was no substantial evidence to support the court's findings that Economy's breach of the lease and American's breach of the sublease were willful, in bad faith, and in reckless disregard of Garcia's rights. Additionally, American challenges the trial court's award of attorney's fees, contending that the court's determination of $73,000 as the amount incurred for enforcing the promissory notes was arbitrary, unsupported by substantial evidence, and not based on the applicable law governing an award of attorney's fees.

{17} Both appellants also claim that the trial judge should have recused himself for reasons set out later in this opinion. In addition to this point, American asserts as errors the court's admission of certain evidence and its refusal to rule that the Garcias' unexecuted assignment of the lease in 1983 divested them of any further interest in the property. These issues will be considered summarily toward the end of this opinion.

{18} We turn first to the question whether Economy unreasonably withheld consent to the 1984 Grant of Leaseholds.

II. *Breach*

{19} Economy's claimed reasons for withholding consent were based on the fact that the sublease ended on June 30, 1986—nine months before the prime lease terminated on April 1, 1987—and on two provisions in the buy-sell agreement: the provision obligating American to refrain from competing with Garcia if the latter attempted to lease or purchase either the Economy property or the Rogers property and the provision requiring American to assign to Garcia at the end of the sublease any interest it might have in the adjoining Janpol property. We shall consider the reasonableness of these objections to the terms of the sublease shortly; first, we examine the law in New Mexico on the subject, with an eye toward any standards of reasonableness it may provide.

{20} In *Boss Barbara, Inc. v. Newbill*, 97 N.M. 239, 638 P.2d 1084 (1982), this Court first considered a lease provision obligating the tenant not to assign or sublease the leased premises without the landlord's consent. We held, following the minority rule in this country, that even though the lease might not require the landlord's reasons for withholding consent to be reasonable, such a requirement would be read into the lease as part of each party's obligation to deal with the other in good faith and in a commercially reasonable manner. *See id.* at 241, 638 P.2d at 1086. The landlord in **1314 *756 that case admitted that the proposed subtenant was commercially reasonable and no other reason for the landlord's refusal to consent to the sublease appears in the opinion. We did not articulate any standard of reasonableness except to say, in dictum, that "consent is not to be withheld unless the prospective tenant is unacceptable, using the same standards applied in the acceptance of the original tenant." *Id.*

[1] {21} Shortly after deciding *Boss Barbara*, we issued our opinion in *Cowan v. Chalamidas*, 98 N.M. 14, 644 P.2d 528 (1982). As in *Boss Barbara*, we held in *Cowan* that the lessor's withholding of consent to a transfer of the lessee's leasehold interest (there, a proposed assignment) was unreasonable. In *Cowan*, the lease expressly provided that the lessor's consent should not be unreasonably

withheld, and we reiterated that consent was not to be withheld unless the prospective tenant was unacceptable under the standards applied in entering into the original lease. *Id.* at 17, 644 P.2d at 531. Although in *Cowan* the lessor claimed that the proposed assignees were financially unstable, we noted that the lessor directly leased the premises to the same "unstable" party within one week of the lessee's abandonment of the premises. Accordingly, the case stands as authority for the proposition that if a claimed reason for refusing consent is merely pretextual, the court will look through the asserted reason to the true motivation and assess the reasonableness of that motivation in light of the facts in the case.

[2] {22} Economy earnestly contends that its claimed reasons for refusing consent were reasonable. It argues that the termination date in the "Grant of Leaseholds" presented it with the very real possibility that American would vacate the premises nine months before the prime lease was to expire, with the result that the property almost certainly would have ceased being used as the site for a new-car dealership. The premises had always (since before the lease began in April 1977) been used for that purpose, and the lease itself provided that "[t]he premises are rented for an automobile showroom, sales and service facility." Economy maintains that it derived maximum economic benefit from the property by devoting it to this use and that the value of the property was jeopardized by the near certainty that, once the sublease ended, the property's use as the location for a new-car dealership would be discontinued.

{23} American reinforces Economy's arguments in this regard, and both appellants join in advancing similar arguments with respect to the other two objectionable (from Economy's standpoint) features of the sublease, found in the buy-sell agreement. The value of the property to Economy, say appellants, was threatened by the non-competition provision in the buy-sell agreement, because American was the most likely party to occupy the property after Garcia's lease had expired. To prevent American from competing with Garcia for a new lease deprived Economy of the opportunity to lease the property to a likely lessee on the most favorable terms. Similarly, the value of Economy's property was enhanced by its proximity to the Janpol property adjoining it on the north; American's agreement to transfer its interest in this property to Garcia at the end of the sublease deprived Economy of the opportunity to consolidate its property with the adjoining tract and thereby assure itself of this enhanced value.

{24} The trial court was not persuaded by these reasons. It found: "Economy had no right in its lease or otherwise to withhold consent for these reasons.... Economy Rentals was not entitled to any of the three privileges or rights ... under its original lease to Garcia * * *." Although the court did not expressly find that Economy's three "reasons" were pretextual, it did find: "A substantial motivation in Economy's refusal to consent to the 1984 sublease was its resentment that the Garcias were to receive $7,500 per month in excess sublease **1315 *757 rental over and above the base rental payable to Economy; Economy wanted to share in the sublease rental." Accordingly, it found, "Economy's attempt to withhold consent to the 1984 sublease was unreasonable and its termination of the Garcia lease was wrongful."

{25} We are required on appeal to indulge all reasonable inferences in support of the verdict or (in a nonjury case) the decision below. *Cowan*, 98 N.M. at 15, 644 P.2d at 529; *Tapia v. Panhandle Steel Erectors Co.*, 78 N.M. 86, 89, 428 P.2d 625, 628 (1967). We think that a reasonable inference in support of the trial court's decision is that Economy's predominant motive for refusing consent was to share in the increased rental value of its property—it wanted to improve its economic position and increase the return it was receiving on the value of the property. Contrary to Economy and American's position on appeal, this inference was supported by substantial evidence. Although the new, direct nine-month lease between Economy and American did not become effective until July 1, 1986, it was negotiated at an earlier time, and something like it could well have been contemplated when Economy terminated the Garcia lease. During the period from Economy's purported termination of the Garcia lease until June 30, 1986, American was paying Economy $3,000 and another $7,500 into escrow. But thereafter, Economy more than doubled its rent from the property and received $7,000 per month directly from American. Economy's president, Mrs. Kelly, testified that she "always felt [the Garcia lease] was too low a lease." When she offered to settle with Garcia in November 1985, she proposed a new lease, under which Garcia's rent would be increased from $3,000 per month to $6,000 per month and then to $7,200 per month. Clearly there was no objection to American as the subtenant; Economy had unconditionally consented to the oral sublease in 1979 and

had consented again to a proposed (but unconsummated) assignment of the lease from Garcia to American in 1983. Economy did not inquire into the terms of the arrangement between Garcia and American on these occasions, and Economy's three professed reasons for objecting to the sublease in 1984 may have appeared to be after-the-fact justifications of its action. In any event, the question is not whether on this record we would have arrived at the same conclusion concerning the operative facts as did the trial court; we must decide whether there was substantial evidence to support the court's findings, and we hold that there was.

[3] {26} This does not mean that we agree with all of the trial court's reasons for finding that Economy's objections to the sublease were unreasonable. In noting that Economy was not entitled under the prime lease to any of the three "rights" or "privileges" on which it relied in objecting to the sublease, the trial court appears to have adopted the view, vigorously pressed on us by Garcia, that the lease itself defines what is a reasonable ground for objecting to an assignment or sublease, and only when a proposed transfer of the lessee's interest would be in violation of the basic lease can the lessor object to the transfer. Garcia relies on our statements in *Boss Barbara* and *Cowan* that consent is not to be withheld unless the prospective tenant is unacceptable under the same standards as were applied in accepting the original tenant. She also relies on the following statement from an important case in this area, *1010 Potomac Associates v. Grocery Manufacturers of America, Inc.*, 485 A.2d 199, 210 (D.C.App.1984):

> [I]t is unreasonable for a landlord to withhold consent to a sublease solely to extract an economic concession or to improve its economic position. The purpose of the consent clause is protection of the landlord in its ownership and operation of the particular property, not protection of the landlord's general economic condition. The landlord has no reasonable basis for withholding consent if the landlord remains assured of all the benefits bargained for in the prime lease.
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> ****1316** ***758** [Citations omitted.]

{27} Although we agree with much of the language in the foregoing quotation, we think Garcia's proposed limitation on the right to withhold consent is too narrow. The statement in *Boss Barbara*, reiterated in *Cowan*, that a tenant's acceptability must be gauged by the same standards as were applied when the original lease was entered into was not meant to limit all bases for refusing consent to those expressed or implied in the original lease. Many circumstances may change; many conditions originally unforeseen may arise; many facts may develop from the time the original lease is signed to the time of a proposed assignment or sublease that may well justify a lessor's withholding of consent in light of the circumstances obtaining at the time of the proposed transfer and in light of the terms of the transfer itself.

{28} We know of no authority expressly holding that the reasonableness of a refusal to consent to a proposed transfer can only be measured by looking at the terms of the original lease. *1010 Potomac* certainly does not so hold. In that case one of the lessors admitted that the sole basis for withholding consent was "essentially economic in nature"—*i.e.*, a desire that the lessee split with them the difference between the rent due under the prime lease and that to be received by the lessee under the proposed sublease. 485 A.2d at 204. It was entirely understandable, then, that the court would hold:

> In refusing to consent to the sublease, the landlord sought merely to improve upon the bargain negotiated in the prime lease. The original negotiations having established the balance of risks accepted by both the landlord and [the tenant] * * *, the landlord cannot reasonably demand that [the tenant] alter that balance to the landlord's advantage and [the tenant's] disadvantage as the price for the landlord's consent to a sublease to an admittedly suitable subtenant, under conditions that fully protect the landlord's bargain under the prime lease.

Id. at 210.

{29} However, when the landlord refuses consent, not because of a desire to "extract an economic concession or to improve its economic position," but to avoid some threatened economic injury—to guard against some deterioration in its economic position—the refusal might well be justified and reasonable. Just as there are numerous cases holding, consistently with *1010 Potomac*,

that securing an economic benefit is not a proper reason for withholding consent—*e.g., Kendall v. Ernest Pestana, Inc.*, 40 Cal.3d 488, 220 Cal.Rptr. 818, 709 P.2d 837 (1985) (in bank); *Ringwood Assocs., Ltd. v. Jack's of Route 23, Inc.*, 153 N.J.Super. 294, 379 A.2d 508 (1977); *Krieger v. Helmsley–Spear, Inc.*, 62 N.J. 423, 302 A.2d 129 (1973)—so also are there many cases holding that the landlord's interest in protecting itself from economic disadvantage is legitimate and may furnish a reasonable basis for withholding consent. *E.g., United States v. Toulmin*, 253 F.2d 347 (D.C.Cir.1958) (insolvent tenant would retain legal title to fixtures already partially paid for by landlord); *Fourchon Docks, Inc. v. Milchem, Inc.*, 849 F.2d 1561 (5th Cir.1988) (lessor would sustain economic loss from lessee's termination of lease on adjoining property and possible devaluation of leased property from short-term sublease); *Warmack v. Merchants Nat'l Bank of Ft. Smith*, 272 Ark. 166, 612 S.W.2d 733 (1981) (shopping center lessor's acceptance of bank tenant's proposed substitution of savings and loan association would have been to shopping center's disadvantage); *Time, Inc. v. Tager*, 46 Misc.2d 658, 260 N.Y.S.2d 413 (1965) ("Balkanization" of leased premises through multiple subtenancies could have been to landlord's disadvantage).

[4] {30} Economy and American rely on *Kendall v. Ernest Pestana, Inc.* as support for a general standard of "commercial reasonableness" in deciding whether the lessor has unreasonably withheld consent. *See Kendall*, 40 Cal.3d at 502, 220 Cal.Rptr. at 827, 709 P.2d at 846 (referring to rule that lessor may refuse consent on any commercially reasonable ground). In *Kendall*, the California Supreme Court followed ****1317 *759** *Boss Barbara* in adopting the minority rule that consent, even apart from a clause in a lease, may not be unreasonably withheld and relied in part, as we did in *Boss Barbara*, on the covenant of good faith and fair dealing implied in a lease. As we have seen, the court held it was not reasonable for the landlord to deny consent in order to charge a rent higher than that originally contracted for. *Id.* at 501, 220 Cal.Rptr. at 826, 709 P.2d at 845. The court also took note, however, of another implied covenant in leases—that " 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.' " *Id.* at 500, 220 Cal.Rptr. at 825, 709 P.2d at 842 (quoting *Universal Sales Corp. v. California Press Mfg. Co.*, 20 Cal.2d 751, 771, 128 P.2d 665, 677 (1942)). The court in *Kendall* enumerated several factors to be considered in deciding whether a refusal to consent is reasonable, *sceid.* at 501–02, 220 Cal.Rptr. at 826–27, 709 P.2d at 845–46, such as the proposed assignee or subtenant's financial responsibility, the suitability of the proposed use, the need for alteration of the premises, and the nature of the occupancy. The court did not, however, attempt to formulate a comprehensive test.

{31} The test proposed by Economy and American—that a reasonable ground for refusing consent is any ground which is commercially reasonable—is obviously unsatisfactory; not only does it beg the question, it also is too broad. Under the decided cases and in light of the applicable implied covenants in a commercial lease, we believe a fair formulation of an appropriate test is the following: A lessor may refuse consent when the proposed assignment or sublease would injure or impair the lessor's interest in the leased property, such as by devaluing it (and thereby reducing the benefits bargained for in the original lease), but not when the lessor seeks to improve its economic position, such as by sharing in the sublease rent or by securing a benefit not bargained for in the original lease. And, in light of existing caselaw and considering the disfavor in which restraints on alienation are viewed, [7] the lessor's interest to be protected by refusing consent must relate to the ownership and operation of the leased property, not the lessor's general economic interest. *See Kendall*, 40 Cal.3d at 501, 220 Cal.Rptr. at 826, 709 P.2d at 845 (" '[T]he clause is for the protection of the landlord in its ownership and operation of the particular property —not for its general economic protection.' ") (emphasis omitted) (quoting *Ringwood Associates*, 153 N.J.Super. at 303, 379 A.2d at 512, and *Krieger*, 62 N.J. at 423, 302 A.2d at 129).

{32} It is not necessary for us to decide whether any of Economy's professed reasons for refusing consent to the Garcia–American sublease were reasonable under the foregoing standard. At least one of those reasons —the short term of the sublease in relation to the remaining term of the prime lease, along with the probable discontinuation of a new-car dealership on the premises —would appear to fall within the concern reflected in the standard for the lessor's legitimate interests in maintaining the value of the leased property. However, the trial court found, as we read its findings, that this was not the real or predominant motivation behind Economy's refusal; the real or primary motivation was the forbidden one of increasing the economic benefit from the lease. As such,

it was unreasonable. Economy's consequent termination of the lease was therefore wrongful, and Economy thereby breached the lease. We affirm the trial court's decision on this point. [8]

**1318 *760 III. *Relief*

A. *Compensatory Damages for the Sublease Period*

{33} Economy vehemently argues that, even if the trial court properly ruled that it had unreasonably withheld consent to the sublease, there was no basis for the court's award of damages to Garcia of $180,000, which represented the monthly sublease rent of $7,500 for the twenty-four months from April 1985 through March 1987. Economy particularly attacks the court's imposition of a judgment decreeing that Economy was jointly and severally liable with American for this $180,000 (plus, as will be discussed below, $91,125 of prejudgment interest). Its argument, however, on this point is rather scant; its sum and substance is: "The Court's Conclusions of Law Nos. 4 and 9 [holding Economy jointly and severally liable for Garcia's compensatory damages] transform the admitted liability of American Toyota on its promissory notes into a joint and several liability of Economy Rentals along with American Toyota. Strange alchemy!"

[5] {34} Analytically, the court may have incorrectly measured the damages sustained by Garcia from Economy's breach of the lease. In the absence of other elements of damage, the tenant is entitled to recover from the landlord the reasonable rental value of the leased premises, less the rent payable to the landlord. *See Barfield v. Damon*, 56 N.M. 515, 523, 245 P.2d 1032, 1037 (1952); *Restatement (Second) of Property* § 10.2(1) (1976). Here, the reasonable rental value of the premises was not the $7,500 per month payable by American under the sublease (plus the $3,000 per month that American agreed to pay directly to Economy), because the sublease covered *both* the Economy property and the Rogers property. Thus, the trial court arguably should have determined the reasonable rental value of the Economy property alone and used that as the measure of the rental value of which Garcia was deprived by Economy's wrongful termination of the lease. [9]

[6] {35} However, the trial court found that Garcia suffered an additional element of damage besides the loss of the property's rental value—namely, "American's nonpayment of sublease rental to Garcia." The court found that Economy's termination of the Garcia lease and its later direct lease with American were proximate causes of American's refusal to vacate the property when its sublease expired on June 30, 1986, and proximate causes of American's withholding the sublease rent. The court also found that Economy and American acted "in concert with one another." These findings invoke the additional rule as to measure of damages in *Barfield v. Damon* that "special damages which are within the contemplation of the parties and resulting directly and proximately from the breach, are recoverable if they can be established with reasonable certainty." 56 N.M. at 523, 245 P.2d at 1037. The rule as stated in the *Restatement* is that, when the leased property is used for business purposes, damages include "loss of anticipated business profits proven to a reasonable degree of certainty, which resulted from the landlord's default, and which the landlord at the time the lease was made could reasonably have foreseen would be caused by the default[.]" *Restatement (Second) of Property* § 10.2(5). Although there was no explicit finding that, when the lease was executed in 1977, the parties contemplated that a breach by Economy would result in **1319 *761 American's withholding its sublease (then an oral sublease) payments to Garcia, such a finding would have been well within the evidence; Economy knew from the outset that American occupied the property as Garcia's subtenant, and it was easily foreseeable that a termination by Economy of Garcia's right to possession could result in American's ceasing to pay rent to its sublessor Garcia.

{36} The trial court's finding that Economy's breach proximately caused American's nonpayment of sublease rent was supported by substantial evidence. Among other things, Rivera testified that American withheld the rent because of Economy's termination of the lease, and a statement to the same effect appeared in the escrow agreement between American and the bank. Had Economy not declared the lease terminated, American would have had no excuse for failing to honor the promissory notes and comply with the Grant of Leaseholds obligating it to pay Garcia $7,500 per month. Economy was therefore liable for this item of "special damage" or "loss of profits."

B. *Compensatory Damages for the Holdover Period*

[7] [8] [9] {37} Both Economy and American argue that the trial court had no basis for awarding

compensatory damages of $67,500 against them. This amount represents the monthly sublease rental of $7,500 times the nine months during which American remained in possession after termination of the sublease (from July 1, 1986, to March 31, 1987). American, however, does not seriously dispute that the relationship between it and Garcia after the sublease ended (assuming the primary lease was still in effect) was a holdover tenancy, continuing from month to month. *See Hofmann v. McCanlies*, 76 N.M. 218, 413 P.2d 697 (1966). As a holdover sublessee, American was obligated to pay the reasonable rental value to its sublessor, Garcia, for the time it held over. *Strauss v. Boatright*, 160 Colo. 581, 587, 418 P.2d 878, 881 (1966); *see T.W.I.W., Inc. v. Rhudy*, 96 N.M. 354, 359, 630 P.2d 753, 758 (1981) (owner entitled to fair rental value of leased premises during holdover period). To determine the reasonable rental value, a court can properly use the rental payment in a lease. *Didamo v. Tyrol Sport Arms Co.*, 680 P.2d 1328 (Colo.App.1984). Here, the sublease rental was $7,500 per month, and the court found that this was in fact the fair rental value of the property.[10] American, therefore, was obligated to Garcia for this amount until it vacated the property it previously had subleased.

{38} As to Economy, the same analysis applies to its liability to Garcia for this nine-month period as has been applied above to its liability for the sublease period. That is, the trial court found that a proximate result of Economy's attempted termination of the lease was American's withholding rental payments that otherwise would have gone to Garcia. This finding—together with the fact that Garcia was entitled to possession under the lease and to the reasonable rental value of the leased property until termination of the lease on March 31, 1987—supports the trial court's award of compensatory damages of $67,500 against Economy.

C. *Prejudgment Interest*

[10] {39} Economy and American attack the trial court's award of prejudgment interest at the statutory rate of 15 percent from the date each $7,500 payment was due to the date of trial. Both appellants base their argument primarily on the fact that the promissory notes under which American was to pay $7,500 per month to Garcia provided for no interest. They contend ****1320** ***762** that "when an express provision of a contract stipulates that a payment obligation is to bear no interest, there can be no implied contract to pay the interest under [the] statute[.]" citing NMSA 1978, Section 56–8–3 (Repl. Pamp.1986), and *Murdock v. Pure–Lively Energy 1981–A, Ltd.*, 108 N.M. 575, 775 P.2d 1292 (1989).

{40} The difficulty with this argument is that the obligation to pay prejudgment interest, at least in a case like this, is not based on a contract; it arises by operation of law and consists of damages "to compensate a plaintiff for injuries resulting from the defendant's failure to pay and the loss of use and earning power of plaintiff's funds expended as a result of the defendant's breach." *Kueffer v. Kueffer*, 110 N.M. 10, 12, 791 P.2d 461, 463 (1990); *see also United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 488, 709 P.2d 649, 657 (1985); *Shaeffer v. Kelton*, 95 N.M. 182, 187–88, 619 P.2d 1226, 1231–32 (1980); C. McCormick, *Handbook on the Law of Damages* § 50 (1935) (" 'Interest as damages' is allowed by law, in the absence of any promise to pay it, as compensation for delay in the payment of a fixed sum or delay in the assessment and payment of damages.").

[11] {41} The fact that Section 56–8–3(A) fixes a statutory rate of 15 percent for interest "on money due by contract" does not preclude use of that rate in computing prejudgment interest as damages; the same rate is fixed for interest "on money received to the use of another and retained without the owner's consent expressed or implied[.]" Section 56–8–3(B). Interest as damages is computed at the statutory rate, C. McCormick, *supra*, § 52, and finding an implied contract to pay interest is not necessary in order to apply Section 56–8–3(B).

{42} The trial court found that the $7,500 monthly payments under the promissory notes were readily ascertainable at the time each became due, which they clearly were. Garcia was therefore entitled to prejudgment interest as a matter of right from American. *Kueffer*, 110 N.M. at 12, 791 P.2d at 463; *Bill McCarty Constr. Co. v. Seegee Eng'g Co.*, 106 N.M. 781, 783, 750 P.2d 1107, 1109 (1988). Since we have held that Economy was liable for the same damages as American, and since those damages were equally ascertainable by Economy as by American, it follows that the prejudgment interest award against Economy should also be sustained.

D. *Joint and Several Liability*

[12] {43} Economy objects to the trial court's adjudication of its liability to Garcia as joint and several with that of American. Economy's cryptic comment,

however, about this adjudication ("Strange alchemy!") does not enlighten us as to the basis for the objection. In any event, we conclude that the court's declaration of joint and several liability, while perhaps technically not strictly correct, has no practical consequence, at least at present, and provides no basis to upset the court's judgment.

[13] **[14]** **[15]** {44} "Joint and several liability" is a term that is used most often in tort law and denotes the kind of liability imposed against multiple actors who, for public policy reasons, are held liable to a victim for all of the victim's damages. *See, e.g.,* NMSA 1978, § 41–3A–1(C) (Repl. Pamp.1989) (imposing joint and several liability for intentional harm, in situations involving vicarious liability or strict liability for a defective product, or for other public policy reasons). Each actor, however, shares that liability with all other actors, so that the victim may proceed against any of the actors for all of his or her damages but may not have more than a single recovery. *Powell v. Powell,* 370 P.2d 909, 911 (Okla.1962). In the law of contracts, joint and several liability usually arises when two or more promisors in the same contract promise the same or different performances to the same promisee. *See Restatement (Second) of Contracts* §§ 288, 289 (1981). In New Mexico, contractual obligations which ****1321** ***763** by the common law would be joint only are now by statute joint and several obligations, NMSA 1978, Section 38–4–3 (Repl. Pamp.1987), and so it may not make much practical difference whether an obligation is described as "joint," "several," or "joint and several."

{45} In the present case, the promises of Economy and American to Garcia appeared in different contracts and promised different performances. Economy promised Garcia the right to possession of the Economy property; American promised, by the Grant of Leaseholds and the promissory notes, to pay sublease rent of $7,500 per month. These promises therefore probably gave rise, technically, to the "several" liability of each promisor, not "joint and several" liability. However, from a nontechnical standpoint, the judgment adjudicating the liability of each promisor established that both parties shared the same liability, and that while Garcia could proceed against either to enforce its liability, she could have but a single satisfaction. From that standpoint, the judgment can be correctly described as adjudicating the joint and several liability of each defendant.

[16] **[17]** {46} A practical consequence of classifying each defendant's liability could be to determine whether either of them will have the right of contribution or indemnity from the other if one pays all or a portion of the judgment. At common law, parties who are jointly and severally liable on a judgment have no right of contribution; any right of indemnity arises from a suretyship relation established by contract or imposed by law. *See Rio Grande Gas Co. v. Stahmann Farms, Inc.* 80 N.M. 432, 434, 436, 457 P.2d 364, 366, 368 (1969); *see also Restatement of Restitution* § 102 & comment a (1937) (tortfeasor cannot obtain contribution from another tortfeasor). Because neither party raises this point, we shall not deal with it, except to express some doubt that Economy could properly be held to pay the entire judgment without a right of indemnity from American. American had the benefit of the sublease, including the holdover tenancy; it seems only fair that it should pay not only the $112,500 as to which it admits liability but also the $67,500 for the holdover rent and the prejudgment interest obligation attached to both amounts.

E. *Punitive Damages*

[18] {47} The trial court made identical findings with respect to Economy and American's respective breaches of the lease and the sublease—that each breach was "willful, in bad faith, and done in reckless disregard of Garcia's rights, thereby entitling Garcia to an award of punitive damages" of $5,000 from Economy and $50,000 from American. Appellants attack these findings as unsupported by substantial evidence.

{48} We have already reviewed the court's findings that a substantial motivation of Economy's refusal to consent to the sublease was its "resentment" that Garcia was to receive $7,500 per month over and above the base rental payable to Economy and that Economy wanted to share in this increased rent. We have also reviewed the court's finding that Economy's termination of the prime lease and new direct lease with American after the sublease expired were proximate causes of American's refusal to vacate at the end of the sublease and of American's nonpayment of the sublease rental and the finding that Economy and American wrongfully acted "in concert" with one another. In addition, the court was entitled to infer from all these facts and from the new direct lease following the sublease, under which American reduced its monthly obligation for occupancy of the Economy property from $10,500 to $7,000, that American had a motive similar to Economy's

—to improve its economic position. The court did not expressly find that Economy and American colluded to cut Garcia out of the middle and to increase the rent (in Economy's case) or decrease the rental expense (in American's case), but this inference follows readily from the facts it did find.

[19] **1322 *764 {49} As noted above, we indulge on appeal all reasonable inferences in support of the trial court's decision. An award of punitive damages is discretionary and will be upheld if substantial evidence supports the award. *Thompson v. Ruidoso–Sunland, Inc.*, 105 N.M. 487, 493, 734 P.2d 267, 273 (Ct.App.1987). Of course, the trial court's factual findings must satisfy the legal standard or standards for a punitive damage award.

{50} We recently canvassed the standards in New Mexico for punitive damages in a breach of contract case. *Construction Contracting & Management, Inc. v. McConnell*, 112 N.M. 371, 375, 815 P.2d. 1161, 1165 (1991). We shall not reiterate those standards here. As we observed there, an intention to inflict harm on the nonbreaching party or conduct which violates community standards of decency (usually manifested by a culpable mental state such as malice, reckless disregard of another's rights, etc.) is a prerequisite for imposition of punitive damages, even when the breach is intentional. Here, there is no evidence that Economy and American breached their respective contracts out of a desire to harm Garcia, but their conduct—acting in collusion to improve their economic position—can be said to violate community standards of decency, involving as it did the lessor and sublessee's joining forces to exclude the lessee. The trial court acted within its discretion and within the law in awarding punitive damages.

F. *Attorney's Fees*

[20] {51} The trial court correctly found that Garcia was entitled to recover attorney's fees from American under the promissory notes embodying the sublease rental obligation. The court found that approximately half of the fees incurred by Garcia in the case were necessary to recover the withheld note payments. It therefore halved Garcia's total attorney's fees through the trial, which equaled $146,000 and consisted of $136,000 actually expended plus an estimated $10,000 for preparation and trial. The amount of fees awarded was thus $73,000.

{52} American challenges this award as unsupported by any evidence. American points to cases in which we have enumerated the factors (the so-called "*Fryar*" factors, from *Fryar v. Johnsen*, 93 N.M. 485, 488, 601 P.2d 718, 721 (1979)) to be applied in determining the reasonableness of a fee awarded a party in litigation. *See, e.g., Lenz v. Chalamidas*, 109 N.M. 113, 118, 782 P.2d 85, 90 (1989); *Ulibarri v. Gee*, 106 N.M. 637, 639, 748 P.2d 10, 12 (1987); *Budagher v. Sunnyland Enters. Inc.*, 93 N.M. 640, 641, 603 P.2d 1097, 1098 (1979). American correctly asserts that the court's determination must be based on substantial evidence, citing *Maynard v. Western Bank*, 99 N.M. 135, 138, 654 P.2d 1035, 1038 (1982), and argues that the trial court's fee award in the present case was arbitrary and capricious for essentially two reasons: First, there was no evidence addressing the *Fryar* factors and, second, there was no correlation between the amount awarded and the services necessary to collect on the promissory notes. On the latter point, American insists that it has always acknowledged liability on the notes and that, therefore, very little if any of Garcia's actual fees were incurred in order to enforce payment of the notes.

{53} Garcia responds, first, that the trial court had before it everything necessary to consider the appropriate factors —the voluminous record of the pretrial proceedings and the record of the six-day trial itself—and, second, that American's acknowledgment of liability rings hollow because Garcia has yet to collect any of the money promised in the notes. Litigation to enforce payment of the notes was necessary, says Garcia, because American had steadfastly refused to pay.

{54} In our view, both parties' positions have some merit. We are reluctant to foster satellite litigation over attorney's fees, and we certainly are prepared to defer to the trial court's discretion in fixing amounts **1323 *765 based on the court's observations of the attorneys before it and the conduct of the trial itself. However, merely halving the total amount of fees incurred in litigation and assigning one of those halves to collection of the promissory notes, without any further explanation, smacks of an arbitrary, "eyeball" estimate. The trial court need not hold an extensive hearing for the purpose of taking evidence on factors already known to it from the trial, such as the time and labor required and the novelty and difficulty of the questions involved; but the court should receive evidence, if offered, on other factors that may not have emerged from the trial, such as

the likelihood that the particular employment precluded the lawyer's other employment and the fee customarily charged in the locality for similar services.

[21] {55} Similarly, when the attorney's services are rendered in pursuit of multiple objectives, some of which permit an award of fees and some of which do not, the court must make a reasoned estimate, based either on evidence or on its familiarity with the case at trial, of the proportion or quantum of services that are compensable and award fees only for those services. *See Ulibarri,* 106 N.M. at 639, 748 P.2d at 12 (award of fees associated with counterclaims and other questions collateral to enforcement of lien for which fees are recoverable must be closely scrutinized and is the exception, not the rule). In this case, the trial court might have found that American's payment of promissory notes was not forthcoming until the reasonableness of Economy's refusal to consent to the sublease was determined; on the other hand, the court might have found that payment of the notes to Garcia would have been made in all events once the possibility of duplicate liability to Economy was eliminated. Some of the issues, such as American's liability for rent during the holdover period, had nothing to do with its liability under the notes. Despite the potential for satellite litigation, such issues cannot be cursorily treated and decided by stroking with a broad brush.

{56} Finally, to ensure that the court does indeed base its determination on evidence adduced or on factors brought out at the trial, to enable the parties to understand the basis for the award, and to permit this Court to perform its reviewing function, the trial court should make findings of fact on those factors established by evidence or developed at trial. *See Lenz,* 109 N.M. at 118, 782 P.2d at 90. The court's "finding" in this case was too cursory, and too much unrelated to anything developed at trial, to facilitate meaningful review. Accordingly, we reverse the award of attorney's fees and remand to the trial court for a new hearing on the issue of reasonable fees to be awarded Garcia for the services of her attorneys in enforcing the promissory notes. *See id.* at 119, 782 P.2d at 91. In this hearing, the trial court should also receive evidence on the amount of a reasonable fee to be awarded Garcia for the services of her attorneys on this appeal, insofar as those services relate to enforcement of the notes.

IV. *Other Issues*

[22] {57} American raises two issues on which it claims to be entitled to reversal. The first relates to the trial court's admission of "parol evidence" on the subject of who was supposed to obtain Economy's consent to the Grant of Leaseholds. The subject arose at the closing of the buy-sell agreement in 1984, when one of American's attorneys allegedly stated that American would "take care" of obtaining Economy's consent to the sublease, despite the provision in the agreement that Garcia would obtain the consent. The trial court made several findings to the effect that American waived this requirement, relying in part on the alleged statement by American's attorney. We, however, have not relied on these findings for our conclusion that Economy, not Garcia, breached the lease. The fact that, as between Garcia and American, Garcia was obligated to obtain Economy's consent does not mean that when Garcia failed to do so—*i.e.,* failed to ****1324** ***766** obtain a consent which Economy was not, on these facts, legally entitled to withhold—Garcia thereby breached the lease. The issue is irrelevant to our disposition of this appeal; and if there was error in the admission of this "parol evidence"—which we doubt—the error was harmless. *See* SCRA 1986, 1–061.

[23] {58} American's second issue relates to the effect of the 1983 "assignment" of Garcia's interest in the Economy property. This was the document, signed by Economy but not by Garcia, under which Economy consented for a second time to American's possession of the Economy property. American contends that the document, though not signed by Garcia, was nevertheless effective, based in part upon one of Garcia's attorney's statements that Garcia's failure to sign the document did not affect the substantial rights of the parties. However that may have been, the subsequent 1984 transaction, in which the parties' (Garcia and American's) antecedent claims were compromised and released, clearly superseded their prior dealings and negotiations. By the Grant of Leaseholds, both parties—Garcia and American—reaffirmed the *status quo ante:* that Garcia was lessee and sublessor and American was sublessee of the Economy property. As with the question of who was to obtain Economy's consent, the question on the effectiveness of the 1983 "assignment" is irrelevant.

[24] {59} Finally, both Economy and American assert error because the trial judge refused to recuse himself when, after the trial, Garcia remarked to the judge that he might acquire an interest in some property involved in another case over which the judge was presiding and to which Garcia was a party. After this incident, Economy and American moved that the judge recuse himself; the court then held a hearing and entered findings of fact and conclusions of law, ruling that Garcia's remark was intended by her to be, and was understood by the judge to be, facetious. The court ruled that under all of the circumstances surrounding the remark—an informal posttrial conference, the presence of adverse parties, the understanding on the part of everyone who heard it that the remark was intended as facetious and part of the good-natured bantering in which everyone was engaged—the remark did not create an appearance of impropriety and that there would be an unnecessary waste of judicial resources if the court's decision, which had already been announced, were vacated.

{60} The court did not abuse its discretion. *See State v. Fero*, 105 N.M. 339, 343, 732 P.2d 866, 880 (1987); *Martinez v. Carmona*, 95 N.M. 545, 550, 624 P.2d 54, 59 (Ct.App.1980), *cert. quashed*, 95 N.M. 593, 624 P.2d 535 (1981).

{61} The judgment is affirmed in part and reversed in part, and the cause is remanded to the district court for further proceedings in conformity with this opinion.

{62} IT IS SO ORDERED.

SOSA, C.J., and RANSOM, J., concur.

All Citations

112 N.M. 748, 819 P.2d 1306, 1991 -NMSC- 092

Footnotes

1 In connection with the parties' efforts to resolve the dispute, American and Rivera in June of 1983 submitted to Garcia a proposed assignment of Garcia's interest in the Economy lease, consented to by Economy. However, Garcia refused to execute this assignment and subsequently notified Rivera that the rent on the oral sublease would be increased. The dispute continued, with Garcia terminating American's oral sublease in March 1984. Shortly thereafter, the dispute was resolved by execution of the documents described in the text.

2 This related leasehold on the south existed by virtue of another lease to Garcia from the owners of the premises at 707 Wyoming Boulevard, N.E., Mr. and Mrs. Rogers (the "Rogers property"). Garcia had leased the Rogers property in 1976 for approximately a ten-year period (expiring simultaneously with the Economy lease on April 1, 1987) for $540 per month. American's Toyota dealership occupied both the Economy property and the adjoining Rogers property.

3 The parties disagree over the proper characterization of this "Grant of Leaseholds"—*i.e.*, whether it was a transfer of the Garcias' leasehold rights in exchange for the "business loan" reflected in the promissory notes, or whether it was a sublease of the premises with the rent payable as stipulated in the promissory notes. The trial court held that the document created a sublease, and we think this was clearly correct. Since the Garcias transferred less than their entire leasehold interest in each property, by granting American the right to possession for less than the full term of the primary lease, the transfer was a sublease, not an assignment. *See* R. Schoshinski, *American Law of Landlord and Tenant* § 8.11 (1980). The consideration for the transfer was the first promissory note (for $157,500), which was payable in installments, the first installment being $15,000 and each of the remaining nineteen installments being $7,500, for the duration of the initial twenty-month period of the grant. The installment payments did not bear interest. The "Grant of Leaseholds" provided for an extension of the leasehold estate for up to six months for an additional price equal to $7,500 times the number of months of the extension, the additional price also payable in monthly installments of $7,500 each, without interest. The substance of the transaction was clearly to confer on American the Garcias' right to possession under the Economy lease; as such (and not being an assignment), it was a sublease. The parties' briefs do not explain why the transaction was structured in this particular way.

4 References in this opinion to "Garcia" are either to Julian, before his death on October 11, 1984, or to Sheilah thereafter, as the context may require.

5 Garcia's claims in the second action, involving her claimed right to possession of the Rogers property, were moot at this point.

6 Under NMSA 1978, § 56–8–3 (Repl. Pamp.1986).

7 *See Boss Barbara,* 97 N.M. at 241, 638 P.2d at 1086 (reasonable restraints upon alienation of property are to be strictly construed).

8 This disposition makes it unnecessary for us to rule on the trial court's other reasons, argued at some length in the parties' briefs, for its holding that Economy improperly withheld consent to the sublease.

9 There was evidence that that rental value was probably about $7,000 per month. The sublease rent was $7,500 per month, and the rent payable for the Rogers property was $540 per month. In her settlement proposal to Garcia in November 1985, Mrs. Kelly proposed that the rent on the Economy property be increased over time to $7,200 per month. And in the agreement negotiated directly between Economy and American for the nine months after June 30, 1986, the rent was fixed at $7,000 per month. The evidence easily would have supported a finding that Garcia's damages flowing from Economy's breach were $4,000 per month ($7,000 rental value less $3,000 rent payable), rather than the $7,500 per month actually awarded by the trial court.

10 Once again, since the sublease covered both the Economy property and the Rogers property, it is not entirely accurate to say that $7,500 was the fair rental value for American's holdover on the Economy property. However, the parties make no mention of this distinction and, in any event, American's right to possession derived from the preexisting sublease with Garcia; the rent under that sublease was $7,500 per month.

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