

Nos. A06-1940 and A06-1957

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State of Minnesota  
**In Court of Appeals**

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Margaret A. Brickner, Margaret A. Brickner as Trustee of  
the Thomas E. Brickner Credit Trust, and Braam Investment, Inc.,  
*Respondents,*

vs.

One Land Development Company,  
*Defendant (A06-1940),*  
*Appellant (A06-1957),*  
and

John Andrew Duckwell,  
*Appellant (A06-1940),*  
*Defendant (A06-1957).*

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**REPLY BRIEF OF APPELLANT ONE LAND DEVELOPMENT COMPANY**

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## INTRODUCTION

As noted in numerous sections of Appellant One Land Development Company's ("One Land") Principal Brief (One Land's "Brief"), this appeal rests predominantly upon the terms and conditions of the parties' Asset and Real Property Purchase Agreement (the "Agreement") in this matter.<sup>1</sup> (*See* TE 24, J. App. - 60). Respondents accordingly rely upon extra-contractual fact and statutory<sup>2</sup> challenges, seeking to misdirect attention away from the Agreement's unfavorable disposition of Respondents' legal position. This reliance by Respondents necessarily requires a wealth of parole evidence, contradictory of the parties' Agreement.

Article XII of the parties' Agreement clearly provides, at paragraph 12.2:

**12.6 Entire Agreement.** This Agreement (including the exhibits hereto), supercedes all prior agreements and understandings, oral and written, including, without limitation, between the parties hereto with respect to the subject matter hereof and cannot be changed or terminated orally, and this

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Respondents begin their Brief with attempting to highlight the approximate number of times One Land cites to its principal owner's testimony in its Statement of Facts (significantly over-estimating the number of times counted by this writer). Respondents then apparently seek to create some intrigue regarding the facts being offered by One Land. To provide a fair and balanced Statement of Facts, One Land also approximately cites Respondents and their counsel (21times, at least 4 times in Mr. Gambucci's quotes) and supporting Trial Exhibits in Mr. Gambucci's cites (31 times), in its Statement of Facts. Most, if not all of One Land's Statements of Fact disputed by Respondents are supported by the Agreement and trial exhibits, or are not in dispute in this matter. Incidentally, Respondents cite Mr. Gambucci's trial testimony over 20 times in their own Statement of Facts, using Mr. Gambucci's statements as truthful.

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This is why Respondents' argue: "[a]s such, Respondents focus on the cancellation on the Purchase Agreement." (Respondents' Brief at P. 19-20, fn 7).

Agreement, together with related agreements or ancillary documents related hereto executed in connection herewith, constitute the entire agreement of the parties as to the matters set forth herein. There are no warranties, representations or agreements among the parties in connection with the subject matter hereof, except as set forth or referred to herein.

(TE 24, J. App.- 60). The undisputed existence of this common “merger clause” is one reason why One Land dedicated a significant amount of its Brief to a discussion of the well-settled Parole Evidence Rule. The Respondents’ continuing reference to parole facts and extra-contractual procedures only serves to highlight the depth and extent of the Trial Court’s improper reliance thereon in its decision. If Respondents wished the parole terms to be in the Agreement, they should have placed them in the written Agreement.<sup>3</sup> Examples of terms not contained in the Agreement but sought to be included by parole include alleged reliance upon Mr. Gambucci being a real estate agent,<sup>4</sup> Mr. Johnson’s personal speculations on the meaning and intent of the parties’ Agreement, (*see, e.g.*, April 27, 2005 TT (J. Johnson) at

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Ms. Brickner has significant experience in real estate and the drafting of Purchase Agreements, working for “Fireside” and Number One Mortgage for approximately ten years. (April 26-27th, 2005 TT (M. Brickner) at P. 162, 179).

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Throughout these proceedings, Respondents’ counsel strived to make this case about Mr. Gambucci personally, and not One Land and the parties’ transaction/Agreement. In so doing, Respondents’ counsel produced a default Order over ten years old claiming the Order evidence of serious, impeachable fraud. (*See* R. App. 90). Respondents’ counsel does not point out that the default Judgment, granted upon no appearance by Mr. Gambucci, found that the subject conveyance (to his father) simply did not legally satisfy the statutory requirement for consideration. *Id.* As such, the court granted the default request for ‘statutory fraudulent conveyance’, significantly short of Respondents’ counsel’s claims of a “smoking gun” for intentional, fraudulent wrong-doing. *See Id.*

pp. 13, 15, 23, 27, 29, 30, 32, 34, 35 and 52) and Mr. Johnson's personal opinions and ruminations regarding a host of other opinions as to the meaning, compliance with and operation of the parties' Agreement, including improper opinions on the ultimate liability issues of the case for the fact finder<sup>5</sup> (*See, e.g.*, April 27, 2005 TT (J. Johnson) at pp. 24, 25, 31, 34, 35, 36, 42, 43 and 54).

A. The Parties' Purchase Agreement.

(1) **Governmental Approvals, Article 1, Paragraph 1.3.**

Respondents cite Article I, paragraph 1.3 of the Agreement in their Statement of the Facts and suggest that One Land's failure to obtain government approvals or pay some fictional additional \$20,000 to Respondents somehow breached the parties' Agreement. These alleged breaches of the Agreement were (1) never alleged or even referenced in any capacity by Respondents in their Complaint, (2) never raised by Respondents in any communications with either Appellant, at trial or at any time herein relevant, and (3) are both conspicuously missing from the attempted contract cancellation which cited Respondents' grounds for cancellation. (*See* TE 44, J. App.- 113). As such, Respondents' continuing reference to any failure by One Land to observe this provision is knowingly inappropriate and without any merit.

Aside from this fact, One Land was not required to obtain any governmental approvals

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Even Respondents' counsel agreed that legal opinions elicited and offered by Mr. Johnson were not proper. (*See, e.g.*, April 27, 2005 TT (J. Johnson) at P. 25).

or pay any more money to Respondents that it did. The full text of Article I, paragraph 1.3 (including language omitted by Respondents underscored) provides:

**ARTICLE I  
BUSINESS ACQUISITION**

**1.3 Governmental Approval.** Within one hundred twenty (120) days of the execution of this Agreement, Buyer shall have obtained any and all necessary governmental approvals, including without limitation necessary approvals from any environmental agencies and the City of Fridley to enable Buyer to construct a senior citizens apartment on the Property near the existing restaurant structure (“Approval Period”). Seller shall cooperate with Buyer in attempting to obtain any such approvals and shall execute any documents necessary for this purpose, provided that Seller shall bear no expense in connection therewith. Buyer may waive the conditions contained in this Section 1.3 and proceed to closing without such approvals. Buyer shall provide written notice of such waiver to Seller.

(TE 24, J. App.- 60)(emphasis added). As noted in its Brief, One Land determined that the intended project, based upon the favorable C-1 and C-2 Fridley zoning requirements, did not require city approval, and therefore none was obtained. (May 12-13 , 2005 TT (T. Gambucci) at pp. 86-87; TEs 153, 154 and 155). No city approval was needed for One Land’s parking plans. *Id.* One Land sent a letter to Seller waiving the governmental approvals as provided in Article I, paragraph 1.3 of the Agreement. (May 12-13 , 2005 TT (T. Gambucci) at pp. 88-89; TE 19; J. App.- 52).

One Land also successfully extended the closing date in this matter pursuant to Article V, paragraph 5.1 of the Purchase Agreement, at the same time paying to Seller the \$20,000 Respondents admitted at trial, but now apparently claim was not paid. (May 12-13, 2005 TT (T. Gambucci) at P. 89; April 26-27, 2005 TT (C. Braam) at P. 4; *see* TEs 18, 19 and 31, J.

App.- 50, 51 and 52). One Land respectfully submits that this court of review may draw future negative inferences from Respondents' apparent bad faith in arguing now, for the first time, inappropriate claims which not only have never been alleged, but are contradicted by the Trial Record and are otherwise clearly false.

**(2) Termination Clause, Article IX, Paragraph 9.1.**

Respondents next cite Article IX, paragraph 9.1, and, as noted above and more fully discussed below, rely heavily upon statutory cancellation in their defense of this appeal, to the abbreviation or outright disregard of Appellants' list of Respondents' numerous breaches of the parties' Agreement.

Article IX, paragraph 9.1 provides:

**ARTICLE IX  
TERMINATION**

**9.1 By Seller.** If Buyer defaults in the performance of this Agreement, Seller may cancel this Agreement upon thirty (30) days notice given pursuant to Minnesota Statutes Section 559.21, and the payments made by Buyer to Seller shall be deemed the liquidated damages hereunder, and may be retained by Seller free of any claim by Buyer. This provision shall not deprive Seller of any other remedies provided by law, including enforcement of specific performance.

(TE 24, J. App.- 60).

As evidenced by this Paragraph, the parties agreed upon *contractual* cancellation terms, to the written exclusion of statutory cancellation procedures. (TE 24, J. App.- 60)(emphasis added). The only language incorporated from any statute is a thirty (30) day notice requirement. The parties could have just as effectively chosen the thirty (30) day

notice provision of any statute. The balance of section 559.21, however, was not incorporated into the contractual cancellation procedures by the parties. Paragraph 9.1 does not otherwise permit statutory cancellation, and Respondents' employment of same is void, as is the cancellation itself.

The balance of Respondents' Statement of Facts was sufficiently factually addressed in One Land's Statement of Facts, and is incorporated herein by reference. As applicable, Respondents' legally relevant statements of fact will be addressed below.

### **ARGUMENT**

#### **I. RESPONDENTS' PURPORTED "STATUTORY CANCELLATION OF CONTRACT" WAS VOID AT ITS INCEPTION.**

##### **A. Respondents' Purported Statutory Cancellation was Void.**

##### **(1) Article IX, Paragraph 9.1 Provides a Contractual Cancellation Procedure in Lieu of any Statutory Cancellation Procedures.**

"Parties are free to limit remedies for non-performance and to provide for the annulment of the contract on the occurrence of certain conditions." *Space Center, Inc. v. 451 Corp.*, 298 N.W.2d 443, 448 (Minn. 1980), *citing with approval, Raymond v. McKenzie*, 220 Minn. 234, 237, 19 N.W.2d 423, 424-25 (1945). As noted above, the parties fashioned their contractual remedy for contract cancellation. (TE 24, J. App.- 60). At no time did the Trial Court rule or otherwise determine that any term or condition of the Agreement was ambiguous or susceptible of more than one meaning. The plain and unambiguous meaning and terms of the Agreement must therefore prevail: when a contractual provision is clear and

unambiguous, courts should not rewrite or modify the contract. *Telex Corp. v. Data Products Corp.*, 271 Minn. 288, 295, 135 N.W.2d 681, 687 (1965)(citations omitted). In this regard, Respondents assume that they may ignore the clear terms of paragraph 9.1 and proceed with whatever contradictory statutory remedies they may wish to employ to serve their own interests.

According to paragraph 9.1, the first thing Seller (all three Respondents) was required to show was *a default* on the part of Buyer (One Land) which never occurred. Respondents cannot show any default upon the Agreement by One Land. This is why Respondents attempt to create one at this late date under Article I, paragraph 1.3. The contract cancellation is fatally defective for failure to satisfy the first requirement.

Even if Respondents were able to satisfy the default requirements of paragraph 9.1, which they cannot do, their remedy is to invoke contractual cancellation based upon paragraph 9.1 by giving thirty (30) days notice thereof. The thirty (30) day provision of Minnesota Statute §559.21 is the only term of §559.21 adopted into paragraph 9.1. Nowhere does the Agreement state that Seller (or Buyer) are to utilize the terms and conditions of §559.21 to cancel the Agreement.

Paragraph 9.1 further states: “[t]his provision shall not deprive Seller of any other remedies provided by law, including enforcement of specific performance.” (TE 24, J. App.-60)(emphasis added). According to Webster’s Dictionary, a plain and ordinary meaning of “other” is: “1a : being the one (as of two or more) remaining or not included <held on with

one hand and waved with the *other* one> b: being the one or ones distinct from that or those first mentioned or implied <taller than the *other* boys.” The Merriam-Webster Dictionary, Eleventh Edition (on-line). The contractual cancellation procedures of the Agreement are not distinct from Minnesota Statute §559.21 cancellation, and deal with the same subject matter and notice period. Paragraph 9.1 is self-contained and complete as to cancellation of the Agreement. Specific performance, which Seller specifically reserved to themselves in paragraph 9.1 of the Agreement, is essentially the legal opposite of cancellation, further revealing the intent of the parties as to what “other” remedies have not been contractually agreed to. If the parties wished to reserve their rights to cancel under Minnesota Statute §559.21, they would have inserted language to do so. Respondents could have included in paragraph 9.1 a simple provision stating that “nothing in this paragraph shall be construed to limit and/or abridge Seller’s right to pursue any and all remedies at law or in equity”, or words to that effect. Respondents’ legal counsel, Jeffrey Johnson, a “real estate specialist” who drafted the Agreement, certainly knew this, and could have provided the language. He did not. Respondents’ attempt to now subject Appellant(s) to extra-contractual statutory remedies specifically limited by paragraph 9.1 can only be void *ab initio*.

Respondents have never alleged, nor pursued, any *contractual* cancellation of the Agreement. The proper analysis of the rights and obligations of the parties is *contractual*, not statutory. Further, as a contractual remedy, Respondents are subject to the legal principles of “pre-breach” and the consequences of having been the admitted breaching

parties (and first breaching party) in this action. As such, Respondents are prohibited from enforcing contractual remedies against a non-breaching party, and at the very minimum, against the party who did not breach first. *See Nakdimen v. Baker*, 111 F.2d 778, 781 (8<sup>th</sup> Cir. 1940)(citations omitted); *Greer v. Kooiker*, 312 Minn. 499, 512, 253 N.W.2d 133, 142 (Minn. 1977); *MTS Co. v. Taiga Corp.*, 365 N.W.2d 321, 327 (Minn. App. 1985), *review denied*, (Minn. June 14, 1985). Respondents' choice in their Brief to sidestep the contractual ramifications of their breaches of the Agreement, and rely solely upon the validity of their statutory cancellation, renders the multiple breaches issue uncontested by Respondents and speaks for itself with regard to Respondents' confidence in directly addressing their breaches of the Agreement.

**(2) One Land did not Waive any of its Rights under the Contract.**

In brief, Respondents argue in various sections of their Brief that One Land has “waived” Respondents’ breaches of the Agreement, found by the Trial Court to have occurred. (*See, e.g.*, Respondents’ Brief at P. 20, fn 7). In this regard, the Agreement provides:

**ARTICLE XII  
GENERAL**

**12.3 Waivers.** No action taken pursuant to this Agreement, including any investigation by or on behalf of either party, shall be deemed to constitute a waiver by the party taking such action of compliance with any representation, warranty, covenant or agreement contained herein, and/or in any ancillary documents. The waiver by either party hereto of a breach of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach. The waiver by either party hereto of any condition to its obligations hereunder which is not fulfilled shall

not preclude such party from seeking redress from the other party hereto for breach of the terms of this Agreement, except to the extent any such waiver specifically includes any agreement to the contrary.

(TE 24, J. App.- 60). Accordingly, One Land possessed, at all times, the right to “(seek) redress from the other party (thereto) for breach of the terms of (the) Agreement.” *Id.* Waiver, as applied by the Trial Court and as argued by Respondents in their Brief, is clearly misplaced and must be reversed.

**(3) Respondents’ Statutory Cancellation was Void for Failure of All Persons Constituting “Seller” to Authorize.**

Notwithstanding the above, One Land submits that Respondent Ms. Brickner did not, in fact, authorize and take part in the statutory cancellation. According to Ms. Brickner’s own sworn testimony, she clearly did not. Respondents were missing authorization from two of the parties necessary for cancellation to be valid under paragraph 9.1 of Article IX at the time of the purported statutory cancellation. With the Court’s indulgence, it bears repeating that Respondents’ counsel Mr. Jeffrey Johnson acknowledged that if there is a party missing from the cancellation procedure, the cancellation is invalid. (April 27, 2005 TT (J. Johnson) at P. 386). In this case, Ms. Brickner and the Thomas E. Brickner Credit Trust (the “Trust”) were absent from Mr. Johnson’s cancellation action.

In deposition testimony dated September 2, 2004, elicited in the Trial Court Record, Ms. Brickner (and on behalf of the Trust) indicated that she did not speak directly with Mr. Johnson or anyone from Mr. Johnson’s law firm. (April 26-27, 2005 TT (M. Brickner) at pp. 174, 196). Ms. Brickner never received any letters from Mr. Johnson or anyone from his law

firm. *Id.* There is no written retainer agreement with Mr. Johnson or his law firm. *Id.* Attorney Jeffrey Johnson did not provide any legal services to the Trust. (April 26-27, 2005 TT (M. Brickner) at P. 193). Ms. Brickner never saw any cancellation documents prior to the law suit, did not provide any information contained in the cancellation documents, and had no idea what was even contained in the cancellation documents. (April 26-27, 2005 TT (M. Brickner) at pp. 187-188). Ms. Brickner had no idea to whom the cancellation documents were sent. (April 26-27, 2005 TT (M. Brickner) at P. 189). Ms. Brickner, as Trustee for the Thomas E. Brickner Credit Trust, had no agreements with Respondent Cynthia Braam to provide services on behalf of the Trust, and Ms. Braam does not make any decisions on behalf of Ms. Brickner or the Trust. (April 26-27, 2005 TT (M. Brickner) at P. 191-192).

About a month after giving this deposition testimony, Ms. Brickner and her attorney met and created an Errata sheet affidavit, which substantially and substantively changed many answers from yes to no, no to yes, and added substantial new text to the previous answers. (April 26-27, 2005 TT (M. Brickner) at pp. 194-203; *see* TE 125). “Clarification” was cited as justification for the substantive changes and additions. *Id.*

“A self-serving affidavit that contradicts earlier damaging deposition testimony is not sufficient to create a genuine issue of material fact.” *Banbury v. Omnitriton Intern, Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995), *citing with approval, Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365 (8th Cir.1983). In *Camfield*, the Eighth Circuit offered the

following rationale in the context of summary judgment:

If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own earlier testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

*Camfield*, 719 F.2d at 1365; accord, *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566, 572 (2d Cir.1991) ("party may not . . . create a material issue of fact by submitting an affidavit disputing his own prior sworn testimony"); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 543-44 (9th Cir.1975) (inconsistent statements of party did not create genuine issue of fact). Here, there was no mention in Trial Exhibit 125 that Ms. Brickner was "confused" or did not understand the question(s). (See TE 125).

The sham Errata affidavit should have been disregarded upon One Land's motion for same, and the Trial Court's refusal to do so was clearly erroneous. Respondent Margaret Brickner's errata sheet manipulating her deposition testimony after the fact does not change her deposition answers; neither she nor the Trust were involved in any way in the contract cancellation as required by Article IX, paragraph 9.1 of the Purchase Agreement.

B. The Defects in Respondents' Cancellation Cannot be Cured by "Ratification", and are Without Legal or Factual Merit.

Respondents next assert that "even if it could be established that Margaret Brickner did not authorize the cancellation, the cancellation is still effective under the ratification doctrine." (Respondents' Brief at P. 24). One Land again submits Ms. Brickner's under oath deposition testimony, which was reversed wholesale upon further reflection with her attorney

weeks after the deposition, must control. One Land also submits that given Ms. Brickner's and her legal counsel's conduct, that the changed deposition answers and testimony must be summarily stricken from the record. Arguing "ratification" or retroactive participation in events that occurred over three years prior, is improper. Respondents seek to retroactively obtain Ms. Brickner's and the Trust's participation and authorization in the cancellation under paragraph 9.1 that did not exist at the time.

To begin, the Seller's right of termination of the Agreement was contained in the Agreement at Article IX, Paragraph 9.1. (TE 24, J. App.- 60). There is no provision in the Agreement that permits Respondents, or any one or two of them, to be "absent" for two to three years before complying with the paragraph 9.1 termination mandates. *Id.* To be validly drafted, served and operative (notwithstanding the other defects noted above), the Notice of Cancellation needed to be formally joined by all three Respondents at the time it was prepared and allegedly served. At the time when the Notice of Cancellation was alleged to have been served, it was **facially void** for failure to observe these requirements. (*See, generally*, April 26-27, 2005 TT (M. Brickner) at pp. 173-204; TE 125).

It is undisputed that Ms. Brickner and the Trust also did not give the required thirty (30) day notice, either individually or on behalf of the Trust, at the required time or otherwise. According to Ms. Brickner, no one acted on her behalf or the Trust with respect to the purported paragraph 9.1 termination of the Agreement. *Id.* As a result, "ratification" cannot now alter the unambiguous terms of the parties' written Agreement, or apply to

modify its terms making a void act suddenly valid. When the Notice of Cancellation was drafted and allegedly served without the participation of Ms. Brickner individually and on behalf of the Trust, the Agreement Termination terms were not observed, and the Notice was void back in 2002. A party cannot ratify an act that is void under the underlying contract. *See Mark Twain Kansas City Bank v. Kroh Bros. Development Co.*, 863 P.2d 355, 362 (Kan. S.Ct.1992)(A trustee cannot ratify an act that is performed in violation of the underlying agreement). Ratification cannot apply as a matter of law on these grounds alone.

Further, in the Minnesota Supreme Court decision of *Anderson v. First National Bank of Pine City*, cited by Respondents, the court ruled: “[r]atification occurs when one, having full knowledge of all the material facts . . .”. *Anderson v. First National Bank of Pine City*, 303 Minn. 408, 410, 228 N.W.2d 257, 259 (Minn. 1975)(emphasis added). Here, Ms. Brickner provided no testimony in support of any new-found understanding of the 2002 Notice of Cancellation, and the material facts and events related thereto. When Ms. Brickner addressed the issue in her September 2, 2004 deposition and/or at trial, Ms. Brickner still did not know: (1) to whom cancellation documents were going to be sent; (2) what was even contained in the cancellation documents; or (3) any of the information that was provided which may have gone into the cancellation documents. (April 26-27, 2005 TT (M. Brickner) at pp. 174 -204). Ms. Brickner did not participate at all in the drafting of those documents. *Id.* Ms. Brickner did not ever see any drafts of the notice of cancellation or the cancellation documents before the lawsuit, and had no firsthand knowledge of who actually may have

received copies of that cancellation notice. *Id.*

Respondents' 11<sup>th</sup>-hour "ratification" also fails as a matter of law on a number of other grounds. In this regard, the unpublished Minnesota Appellate decision of *Miller v. State Farm Insurance* bears a striking resemblance to our case. *See Miller v. State Farm Insurance*, No. A03-1022, 2004 WL 948377 (Minn. App. May 4, 2004)(attached to Affidavit of Kevin E. Giebel pursuant to Minn. Stat. §480A.08(3)). The Plaintiff in *Miller* attempted ratification six (6) days before facing a Summary Judgment hearing. *Id.* at \*1. The Court determined that the Plaintiff's "claim of ratification appears to be a belated attempt to avoid the legal consequences of his (errors and omissions)." *Id.* at \*2. The *Miller* court further observed, as is true in the instant case: "there (has) been a material change in circumstances that would make it 'obviously unfair' to allow ratification." *Id.* As a result, the Minnesota Appellate Court noted in its decision: "[i]f ratification occurs at a time 'when the situation has so materially changed that it would be inequitable to subject the other party to liability . . . the other party has an election to avoid liability.'" *Id.* at 3, citing Restatement (Second) of Agency §89(1958). The Court in *Miller* proceeded to grant summary judgment in favor of the party opposing ratification. *Id.*

In the present case, Ms. Brickner sought to ratify, many years since the Notice of Cancellation was prepared and allegedly served. Like the *Miller* Plaintiff, Ms. Brickner seeks to reverse her personal non-involvement, and the absence of the Trust, all as required by the termination mandates of the parties' Agreement. Since the alleged termination in

2002-03, Appellants (both parties) have undergone extensive pre-trial discovery, motion practice and spent weeks in a trial in addition to other lengthy legal processes. Respondents entered into a nearly identical Purchase Agreement with Town Center Development to re-sell the subject real estate. (See TE 48, J. App. - 121). Like *Miller*, the situation in this action has materially changed over the course of the last several years, leading up to Ms. Brickner's and the Trust's recent allegations of "ratification", such that it would clearly be inequitable to apply ratification at this late date to a defective termination.

With respect to the other case cited by Respondents in support of Ms. Brickner's ratification strategy<sup>6</sup>, the two-page, 1906 Arkansas decision of *Hill v. Peoples*, 95 S.W. 990 (Ark. 1906) concerns the ratified sale of real estate to a party who occupied lands for many years, improved the real estate and made rental payments to the party(ies) deemed to have ratified the sale. *Id.*, 95 S.W. at p. 990. The case is opposite to this action as the equities favored the possessors, who successfully sought to enforce the ratification. *Id.*, 95 S.W. at 991. Significantly, the *Hill* Court observed the well-settled rule that "trustees under a will empowering them to sell and convey lands could not legally delegate to an agent authority to fix prices on the lands and make sales thereof . . ." *Id.* Therefore, not only has the circumstances changed since 2002 rendering ratification by Ms. Brickner of events in 2003

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Respondents also cite Minn. Stat. §524.3-701 (2002) which deals with personal representatives in probate and not trustees, and is misplaced in this action. Of note however, is personal representatives being bound by similar non-delegable duties as those of trustees. *Id.*

many years later in 2005-2007 inappropriate, but Ms. Brickner could not have legally delegated the Trust duties to any of the other Respondents.

C. Respondents' Statutory Cancellation is Void Under *Codden*.

Like the mandates of Article IX, paragraph 9.1, "default" is the threshold requirement before a vendor is entitled to invoke statutory cancellation. *Coddon v. Youngkrantz*, 562 N.W.2d 39, 42 (Minn. App. 1997)(involving a 60-day statutory default period). Even then, only a material breach or a substantial failure in performance gives the seller a right to terminate. *Id.* In *Coddon*, the court strongly criticized the effects of cancellation of a contract which included loss of buyer's down-payments, loss of subsequent payments and which relieved the seller from his agreement to convey the property, calling such a result "inequitable" and "absurd", even though the buyer was in technical default for missing some payments. *Id.*, 562 N.W.2d at 43.

The *Coddon* court further observed that the parties to such a transaction are bound by a covenant of good faith and fair dealing inherent in the contract. *Id.* The Court also noted that: "(the seller) cannot benefit from a default he helped create" and that "vendors of (contracts in real estate) must exercise their rights in good faith; where they act in such a manner to prevent vendee's performance, they cannot claim a default until they have afforded the vendee a reasonable opportunity to perform." *Id.* (citations omitted).

Lastly, the Minnesota Court of Appeals in *Coddon* noted:

We also recognized (in *O'Meara v. Olson*, 414 N.W.2d 563, 564 (Minn. App. 1987)) that strict application of statutory cancellation could be unjust. If the theory of the

(vendor) were followed, a full hearing on the merits in open court subject to appellate review would be preempted by summary, non-judicial cancellation enforced by the vendor. This would thwart the purpose of the statute – protection of vendees – and lead to an absurd result. (*Id.* at 567). We have rejected the argument that equity is powerless to interfere with the vested cancellation rights of a contract vendor: However drastic the statutory procedure, it cannot be that the legislature intended equity to be entirely powerless and deprived of all its former beneficent Jurisdiction in such matters. \* \* \* It is because we are confident that the legislature did not intend such complete tying of hands of equity that we are using its power here.

*Id.*, 562 N.W.2d at 44, *citing with approval, D. J. Enterprises of Garrison, Inc. v. Blue Viking, Inc.*, 352 N.W.2d 120, 121-22 (Minn. App. 1984), *review denied* (Minn. Oct. 11, 1984), quoting *Follingstad v. Syverson*, 160 Minn. 307, 311-12, 200 N.W. 90, 92 (1924). The Court determined that: “expiration of the statutory redemption period does not divest a district court of jurisdiction to consider a vendee’s equitable claims.” *Coddon, Supra.*, 562 N.W.2d at 39.

D. One Land’s Claims were not Barred by any 60-day Contractual Limitation of Action.

"If [a contractual limitations period] is not reasonable or, . . . it is unconscionable, then it is not permitted regardless of the parties' freedom to contract." *Peggy Rose Revocable Trust v. Eppich*, 640 N.W.2d 601, 610 (Minn. S. Ct. 2002); *citing General Electric Credit Corp. v. Home Indemnity Co.*, 168 Ga. App. 344, 309 S.E.2d 152, 156 (1983). In addition to the contractual prohibition against waiver of claims, (Article XII, paragraph 12.3), any requirement that One Land commence an action to enforce its contractual rights within sixty (60) days is facially void and clearly unenforceably short. A clause limiting a party’s right to seek equitable remedies in a contract for the sale of real estate, if not initiated within 6

months, has been held in one instance to even be unconscionable. *Flynn v. Sawyer*, 272 N.W.2d 904, 908 (Minn. S. Ct. 1978). One Land submits that a 60 day period within which to commence an action for specific performance is equally unconscionable. A further proof, this limitation language was not made mutual between the parties to the Agreement.

Moreover, the sixty (60) day “limitation” period was specifically made subject to “Section 3.2” of the Agreement (Article III, paragraph 3.2) which pertains to Seller’s title obligations and Buyer’s (One Land’s) right to object to title. One Land addresses in detail in its Brief Respondents’ breaches of Article III, paragraph 3.2, and submits that to date, Respondents have yet to comply with this provision. In addition, Respondents’ breach of the Agreement remains ongoing, as admitted at trial by their legal counsel Jeffrey Johnson. (April 27, 2005 TT (J. Johnson) at P. 394).

## **II. ONE LAND DID NOT ABANDON ITS RIGHTS UNDER THE PURCHASE AGREEMENT.**

Respondents cite only one case, *Application of Berman*, in which a court allegedly found abandonment under circumstances involving less than 11 months of arguable inactivity<sup>7</sup>, according to Respondents, for “nine (9) months.” (Respondents’ Brief at P. 29).<sup>8</sup>

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In the present case, contact was had between the parties from at least January 9, 2003 (*see* Respondents’ Brief at P. 30) to the date of Appellant Duckwall’s Notice of Adverse Claim dated December 3, 2004, a period of approximately 11 months. (*See* TE 50).

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Respondents cite *Ahlstrand v. McPherson*, 285 Minn. 398, 173 N.W.2d 330 (1969) for abandonment after thirty-three (33) months and *Boulevard Plaza Corp. v. Campbell*, 254 Minn. 123, 135, 94 N.W.2d 273, 283 (1959) for abandonment after 18 months. *Boulevard* is discussed in One Land’s Brief; *Ahlstrand* involved other factors leading to the sustaining

This is not what the Court in *Berman* rested its decision upon, namely a nine-month period of time as alleged by Respondents. The Court in *Berman* made the following findings in support of abandonment:

- (1) No payment or tender of payment had been made on the contract since January 1974;
- (2) Defendants did not tender payment in their answer or at any time in the proceeding making payment under the contract over 2 years in arrears and continuing;
- (3) Plaintiff found the premises abandoned and in a poor state of repair in July 1974. He made repairs and subsequently secured a tenant. Plaintiff paid the real estate taxes in 1974, and his tenants have been in possession since September 1974; and
- (4) Defendants were aware of the default under the contract as early as May 6, 1974, when one of their representatives (an employee of the corporation defendants had hired to manage their interest in the property) visited the property and contacted Plaintiff. Attorneys for that corporation also contacted Plaintiff in May and July of 1974, but no offers of payment were made nor were further negotiations concerning the property conducted. The property was vacant from June to September 1974, when applicant's tenants began occupancy. Defendants contend that another representative of the corporation visited the premises in June 1974, discovered that no one was in possession, and retained an individual to make repairs, but those repairs were never accomplished.

*Application of Berman*, 310 Minn. 446, 453, 247 N.W.2d 405, 409 (Minn. S. Ct. 1976). The Berman Court concluded that: "Defendants' failure to actively assert their interest in the subject property, coupled with the long period of arrearage (over two years), adequately justifies a conclusion of abandonment." *Id.* No such arrearages for over two years of  

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of abandonment, in addition to 33 months of payment and tax arrears. *See Ahlstrand, Supra.*

inactivity exist in the present case. As such, the now fully disclosed facts of *Berman*, and the 33 month *Ahlstrand* case, are misplaced by Respondents in the present case.

Moreover, it is the intent of the parties that is probative: “[a] finding of abandonment depends upon the intentions of the parties and is not predicated on any single factor, but on all of the facts and circumstances concerning the owner's relationship with the subject property and the seller.” *Id.*, at 452, 247 N.W.2d at 408. Lastly, it is hornbook law that the law abhors a forfeiture, and that effort should be given to the enforcement contracts.

**III. EXPERT CLARK GOSET’S DAMAGE CALCULATIONS WERE SUFFICIENTLY DEFINITE TO AWARD APPELLANTS DAMAGES CONSISTENT WITH MR. GOSET’S OPINIONS.**

Appellants’ Evidence of Damages.

In addition to One Land’s Brief which adequately addresses Respondents’ challenges to Mr. Goset’s opinions, One Land wishes to first point out that Respondents misunderstand One Land’s discussion regarding the difficulty of proving damages to an epirical certainty given the fact that Respondents’ breaches of the Agreement prevented One Land and John Andrew Duckwall from realizing their plans for the subject business and real estate. Further, of course, neither Mr. Duckwall nor One Land paid the balance of the Agreement purchase price; they were never given a chance to do so. They also were prevented from operating the Sandee’s business and constructing a senior facility on the premises. If this had happened, Mr. Goset’s job would have been considerably easier.

However, Mr. Goset was asked to provide damage opinions based upon the current

state of affairs. In this regard, Mr. Goset testified extensively about his background and qualifications, providing a Professional Vitae (May 16, 2005 TT (C. Goset) at pp. 9-14; Group TE 161), and was qualified by the Court as an expert (without any objections from Respondents). Mr. Goset described the extensive investigation he performed in arriving at his opinions, and the data utilized to arrive at his opinions. (May 16, 2005 TT (C. Goset) at pp. 14-37; Group TE 161, 173). Mr. Goset's opinions were properly rendered "to a reasonable degree of professional certainty in (his) field as a state licensed appraiser", and that the numbers provided were "accurate and true". (May 16, 2005 TT (C. Goset) at P. 39; *see* Group TE 161). Mr. Goset based his opinions on the undisputed business values attributed to the Sandee's restaurant by Respondents themselves and/or Respondents' business documents. (*See* TE 161). Appellants' proof was more than adequate in this matters. Unfortunately, the Trial Court did not make a meaningful review of Mr. Goset's opinions believing that, as Respondents kindly point out, "the Trial Court noted that a decision in favor of Respondents rendered any discussion of Appellants' expert testimony moot." (Respondents' Brief at P. 42, citing R. App. 45). Respondents apparently agree with Appellants that the Trial Court's consideration of Appellants' damage evidence and expert opinions to be incomplete due to the Trial Court's erroneous belief that Appellants' evidence of damages was somehow irrelevant. At the very least, this is reversible error.

**IV. THE TRIAL COURT'S APPOINTMENT OF A SPECIAL MASTER WAS CONTRARY TO MINNESOTA RULE OF CIVIL PROCEDURE 53.01.**

Minnesota Rule of Civil Procedure 53.01 provides:

Rule 53.01. Appointment.

- (a) Authority for Appointment. Unless a statute provides otherwise, a court may appoint a master only to:
  - (1) perform duties consented to by the parties;
  - (2) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by
    - (A) some exceptional condition, or
    - (B) the need to perform an accounting or resolve a difficult computation of damages; or
  - (3) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge.
- (b) Disqualification. A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge, unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.
- (c) Expense. In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

Minn. R. Civ. P. 53.01 (2006).

In the present case, One Land did not consent to the Special Master, in appointment or scope of duties as required by Rule 53.01(a)(1). In addition, there existed no exceptional

conditions alleged or present for the appointment as required by Rule 53.01(a)(2)(A). The computations under consideration by the Trial Court were neither difficult, nor unusually time consuming – they consisted of costs and disbursements, and determination of the amount of attorney fees. The parties twice argued their respective positions on these issues before the Trial Court before the Court unilaterally appointed a special master. As such, the Trial Court’s appointment of a Special Master, and any Special Master Order(s) resulting therefrom, are not in compliance with the Rule, and void.

**V. ONE LAND WAS ENTITLED TO AMEND ITS COUNTERCLAIM TO ASSERT A CLAIM FOR PUNITIVE DAMAGES.**

Lastly, Respondents erroneously claim that One Land is not entitled to amend its pleadings to include a prayer for punitive damages since it allegedly did not prove facts sufficient to support the amendment: “[h]ere, Appellants did not, and cannot, prove any of their substantive claims, as such they cannot meet there (sic) burden to show that punitive damages would be warranted.” (Respondents’ Brief at P. 41). Respondents then argue the trial testimony adduced at trial did not, in their legal counsel’s opinion, support a “claim” for punitive damages as further support for the denial.

One Land moved to *amend* to include a prayer for punitive damages (there is no such “change of theories” as Respondent alleges, only an added damage prayer). Contrary to Respondents’ assertions, One Land need only articulate a prima facie case of punitive damages to have prevailed upon its motion. The term “prima facie”, as used in Minn. Stat. §549.191, does not refer to a quantum of evidence, but to a procedure for screening out

unmeritorious claims for punitive damages. *Thompson v. Hughart*, 664 N.W.2d 372, 377 (Minn. App. 2003); *see Swanland v. Shimano Indus. Corp., Ltd.*, 459 N.W.2d 151, 154 (Minn. App. 1990) (“[A] prima facie case simply means one that prevails in the absence of evidence invalidating it.”); *see also Northwest Airlines, Inc. v. American Airlines, Inc.*, 870 F. Supp. 1499, 1502-03 (D. Minn.1994) (the court should consider evidence proffered by Plaintiffs without regard for cross-examination or other challenge); *see also Berczyk v. Emerson Tool Co.*, 291 F. Supp.2d 1004 (D. Minn.2003) (under Minnesota law, plaintiff need only demonstrate an entitlement to allege punitive damages, not an entitlement to the damages themselves) (emphasis added). One Land was, and is, clearly entitled to amend to include a prayer for punitive damages.

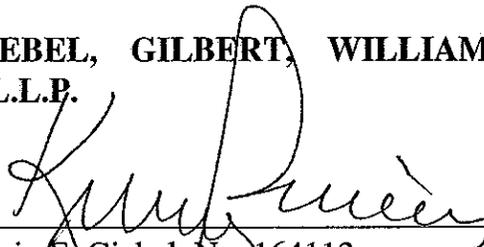
### CONCLUSION

For all of the foregoing reasons, Appellant One Land Development Company respectfully seeks reversal of the Trial Court’s Findings of Fact, Conclusions of Law and Order for Judgment in this matter. In the alternative, Appellant One Land Development Company respectfully seeks a new trial, all upon the files, records and proceedings herein, including Appellant John Duckwall’s Reply Brief in this matter.

Dated this 16<sup>th</sup> day of March, 2007.

Respectfully submitted,

**GIEBEL, GILBERT, WILLIAMS & KOHL,  
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