Case No. 20170815-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

DAVID BRYCE JONES,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for abuse, neglect, or exploitation of a vulnerable adult, a second-degree felony, and unlawful dealing of property by a fiduciary, a second-degree felony, in the Third Judicial District, Salt Lake County, the Honorable James T. Blanch presiding

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FILED
UTAH APPELLATE COURTS

FEB 08 2019

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INTRODUCTION

In just over a year, Jones "loaned" himself his then 90-year-old, demented father's (David) entire retirement income (nearly $60,000 total) and ran up another $19,000 in charges on his father's credit card to pay for Jones's living expenses and his two failed restaurants, all while he refused to pay his father's assisted-living facility, medical care, prescriptions, or personal items such as a haircut or bed pads. When the assisted-living facility demanded payment, and threatened eviction, Jones brushed them off. He said that his father (who at this point could no longer identify a lion or a rhinoceros) would have wanted Jones to spend all the money on his failed restaurants. A

jury disagreed and convicted Jones of exploitation of a vulnerable adult and unlawful dealing of property by a fiduciary—both second-degree felonies.

Ineffective Assistance claims

"Expert" testimony. Two witnesses testified that David lacked capacity to read or understand complicated financial documents. According to Jones, these were "expert" opinions and his counsel should have objected. But these testimonies were based on the witnesses' personal observations of David and reasonable counsel could conclude that they were lay opinions or that any objection to their qualifications would have been unlikely to succeed (as both witnesses had advanced degrees and extensive experience in working with cognitively-impaired adults). In any event, the evidence of David's incapacity was overwhelming, so there would have been no reasonable probability of a different outcome if the testimony from these witnesses had been excluded.

404(b) evidence. In discovery, the prosecution did not give notice that it would offer 404(b) evidence. At trial, it introduced a lease agreement for one of Jones's restaurants and a document showing several loans made to Jones. Jones says that these documents are 404(b) evidence and his counsel should have objected on lack-of-notice grounds. But reasonable counsel could conclude that the documents were not proof of a "crime, wrong, or other act," or were intrinsic to Jones's charged crimes, and thus not subject to 404(b) and

its notice provisions. Reasonable counsel could also conclude that these documents helped Jones by lending support to his defense that his father had loaned him money in the past and wanted to see the restaurant succeed. In any event, neither document prejudiced Jones as both supported his defense and the evidence of his guilt was overwhelming.

Jury instruction. According to Jones, the unlawful dealing statute requires a knowing mental state for the substantial-risk-of-loss element and his counsel was ineffective for not requesting such an instruction. But reasonable counsel could conclude that the knowing mental state applied only to the violation-of-duty element, not the substantial-risk-of-loss element. At least, there was no controlling law to alert counsel otherwise. In any event, the evidence that Jones knew his actions involved a substantial risk of loss was overwhelming. So there is no reasonable probability that the outcome would have been different with Jones's requested instruction.

Merger. Jones says that his counsel was ineffective for not asking to merge his exploitation of a vulnerable adult count with his unlawful dealing of property by a fiduciary count because the two crimes are lesser-included offenses of each other. But exploitation requires an element not found in unlawful dealing: a vulnerable adult. And unlawful dealing requires an element not found in exploitation: a fiduciary.

Other claims

Jones makes two other claims. First, he says that the terms "unjust[]" and "improper[]" in the exploitation statute are unconstitutionally vague. But any person of ordinary intelligence would understand that taking all your 90-year-old, demented, father's income (roughly $6,500 a month, including $900/month from his father's long-term care insurance policy) to pay for your living expenses and failed restaurants, while refusing to pay your father's rent, care, prescriptions, or basic personal needs is unjust and improper and thus proscribed by the statue. So the statute, as applied to Jones, is not vague and he lacks standing to challenge the constitutionality of it as applied to the hypothetical conduct of others.

Second, Jones argues that there is insufficient evidence of intent. But this issue fails for procedural reasons: it is not preserved, and Jones fails to argue plain error or ineffective assistance of counsel. It also fails on its merits. At best, Jones shows a dispute in the evidence. But disputed evidence does not equal insufficient evidence; that is especially true when the evidence on the guilt side of the dispute is overwhelming, as it is here.

STATEMENT OF THE ISSUES

1. Was Jones's trial counsel ineffective for:

(a) not objecting to "expert" opinions;

(b) not objecting to alleged 404(b) evidence on lack-of-notice grounds;

(c) not objecting to the jury instruction for unlawful dealing;

(d) not moving to merge his unlawful dealing of property by a fiduciary conviction with exploitation of a vulnerable adult conviction?

Standard of Review. When a defendant argues ineffective assistance of counsel for the first time on appeal, there is no ruling for an appellate court to review. The issue therefore presents a question of law. *State v. Ott*, 2010 UT 1, ¶16, 247 P.3d 344.

2. Is the exploitation of a vulnerable adult statute unconstitutionally vague?

Standard of Review. Constitutional questions are questions of law, but statutes are presumed constitutional and an appellant must prove unconstitutionality beyond a reasonable doubt. *State v. Mohi*, 901 P.2d 991, 1009 (Utah 1995); *see also Stone v. Department of Registration*, 567 P.2d 1115 (Utah 1977) ("[I]t is not within the province of the courts to . . . declare a statute unconstitutional unless it is determined to be so beyond a reasonable doubt.").

3a. Is Jones insufficient evidence argument preserved? And if not, should the Court disregard it because Jones argues no exception to the preservation rule?

Standard of Review. None applies.

3b. Was there sufficient evidence to convict Jones of unlawful dealing of property by a fiduciary and exploitation of a vulnerable adult?

Standard of Review. A trial court's decision to submit a case to the jury is reviewed for correctness, with the ultimate ruling turning on a highly deferential view of the jury's role as fact-finder. *See State v. Hummel*, 2017 UT 19, ¶87, 393 P.3d 314; *State v. Gonzalez*, 2015 UT 10, ¶21, 345 P.3d 1168.

STATEMENT OF THE CASE

A. Summary of relevant facts.

David's declining health

Jones's father, David, volunteered during World War II where he flew B25 bombers. R597. His service launched his career. Fascinated by airplanes, he obtained degrees in civil and aeronautical engineering and later worked for the Air Force, Lockheed, and Boeing in locations that included Greece and Saudi Arabia. R598.

As David aged, his mental health declined. His younger brother, Ken, first noticed it around 2005. R599–600. At that time, David was 81 years old.

R805, 851. During a visit that year, David did not recognize Ken and was "noticeably disoriented." R600. In later phone calls, David didn't know who he was talking with and "wasn't entirely with it." *Id.*

Five years later, at age 86, David signed a power of attorney that gave his only child, Jones, broad authority, including control of David's finances and health-related decisions. R805–06, SE24. At this point, Jones admitted his father was already exhibiting signs of dementia. R808. The power of attorney gave Jones power, among other things, to contract for his father's medical care and pay reasonable compensation for it. R834, SE24. It also required Jones to act in his father's best interest, which Jones understood. R834, SE24.

Two years later, at age 88, Jones said his father was "incompetent," or at least arguably so, due to his "progressive dementia." R835–36, 838, 839–840, SE23.

Brewhaha

A year later, Jones pushed ahead with his plans to open a restaurant, Brewhaha. R804. According to Jones, he and his father were business partners and the restaurant was something both wanted. *Id.* Jones found a Sugarhouse property, and although the proposed lease was "incredibly unfair" with "harsh provisions," and even though the prior tenant warned him about the landlord and Jones called the landlord a "real snake" and a "horrible person"

Jones chose to sign it. R807, 836. The landlord insisted that David sign the lease too as a tenant and a personal guarantor. R836–37. So Jones, despite David's incompetence, had him sign. R836, 838–40, SE23.

While Jones said that his father was his "partner," his father had no ownership in the restaurant despite contributing most of the money. R735–36, 811, 838.

David is admitted to Highland Cove

Six months later, while alone at his St. George home, David became dehydrated and disoriented. R812. Some friends took him to the hospital. R812. After three nights, and twenty days of rehabilitation, it was determined that David could no longer live on his own. *Id.*

Jones arranged for his father to move to Highland Cove, an assisted living facility. R813. He filled out the admission paperwork where he noted that David suffered from "progressive dementia." R516, 536, SE1. He then signed an agreement to pay $3,000 a month for David's rent and care. SE2. This amount did not include other personal expenses such as medications, a haircut, toothpaste, and the like. R523, SE3.

Cody Tower, Highland Cove's manager, interacted with David daily. R534. Tower said that David's dementia was "obvious." R536. As an example, David stopped by Tower's office on his first day and "was having difficulty

finding words for what he was trying to say." R535. Tower followed David back to his room where David pointed at his pants pocket. *Id.* Eventually, Tower learned that David had lost his wallet, but David had been unable to express that in words. *Id.*

There were other signs too. David struggled to answer basic questions (R558–59), or to converse beyond an exchange of the most basic pleasantries, such as "hello" and "how are you" (R536, 538), and could no longer make his own food or bathe or dress himself. R557.

The Loan Document

Three weeks after admission to Highland Cove, Jones had his father sign a document authorizing Jones to loan himself money from his father's retirement income (Loan Document). SE16. The loan could be for business or personal use and there was "no limit" on the amount so long as David's physical and medical needs were met. *Id.* The Loan Document required Jones to keep records of each loan and to pay five-percent interest. *Id.*

Jones "loans" himself David's retirement income

David made good money in retirement. He had a civil service pension, social security, retirement from Boeing, and a long-term care policy designed to pay for David's stay at a facility like Highland Cove. R584, 660–61. These

sources totaled $6,500 a month, more than double what was needed to pay Highland Cove. R661–62.

Each month after securing the Loan Document, Jones "loaned" himself his father's retirement income (including his father's long-term care insurance) to pay for Brewhaha's renovation and operation. R820, 824–25, 853. Also, as Jones did not have income of his own, he "loaned" himself money to pay for his living expenses. R810. Jones kept no record of these loans. R846–48.

Jones fails to pay Highland Cove

These "loans" left no money to pay for his father's care. Jones missed payments to Highland Cove in December, January, February, and March as David's account balance ballooned to $14,967.97. R521, SE3. He also failed to pay for his father's prescriptions or basic hygiene items like a toothbrush, a haircut, or bed pads. R523, 543, 573, SE3.

Highland Cove sent monthly bills and statements to Jones. R518–19, 556, SE3. It also called, left voicemails, and spoke with him in person about the need to pay for his father's care. R522, 541–42. Jones explained that he had started a restaurant, Brewhaha, and was having cash flow problems. R546, 552, 820, 824. Each time, Jones promised that payment would be forthcoming.

R542. At no point did Highland Cove agree to let Jones miss payments. R548–49, 553.

Tired of the promises of payment, Highland Cove sent Jones an eviction notice. R543–44, SE4. It said that it had "reached out to [Jones] to make arrangements to get [his father's] account brought to a current status," had assisted him in making claims on his father's long-term care policy, and had been "lenient" with late fees. SE4. But it could do so no longer. *Id.* It demanded that Jones either bring his father's account current or vacate the apartment within 30 days. *Id.*

Jones ignored the notice. He didn't vacate or make payments; in fact, he missed two more (May and June). R544, SE3.[1]

This put Highland Cove in a difficult spot. It could not kick out a 90-year-old, demented man with no ability to care for himself. R544–45. In these situations, Highland Cove typically works with the State to try and get David financial assistance to either stay at Highland Cove or go to another facility. *Id.*

[1] A $3,000 payment was made in April, but Jones said that he never made that payment and believed it was an accounting error. R819–20.

Brewhaha fails, Jones starts another restaurant

About the same time as the eviction notice, Brewhaha's landlord filed suit against Jones, David, and Foothill Management, Jones's LLC. SE23. Jones was more than $10,000 behind in rent and had ignored the landlord's request to vacate the property. *Id.*

In this action, Jones filed a pro se motion to dismiss his father. SE23. He alleged that his father was under "24-hour a day supervision for progressive dementia, for which he has been suffering for several years," since at least 2012 (which was a year before he had his father sign the Loan Document), "and was not competent to sign either [the] lease or the personal guarantee." R839–40, SE23; *see* SE16 (showing Loan Document signed in November 2013). "Due to his condition," Jones continued, "[his father] has no knowledge or comprehension of the eviction . . . and has no competence to participate in this case." *Id.*

The lawsuit resulted in a six-figure judgment against Jones. R807.

Undeterred by Brewhaha's failure, the lawsuit, judgment, or Highland Cove's eviction notice, Jones opened another restaurant, Gusto. R765, 822–23, 851–53. Like Brewhaha, Jones used his father's retirement to fund Gusto. R824–25, 851, 853. Like Brewhaha, his father was not listed as an owner of Gusto. R735. And, again like Brewhaha, Gusto failed within months. R826.

Protective Services investigates

When Ken, David's younger brother, learned about the eviction notice, he was suspicious; he knew David's retirement was more than enough to pay Highland Cove. R605–07. So he reported his suspicions to Tower; and Tower (and later Ken) contacted Adult Protective Services (Protective Services). R546–47, 605–07.

When Protective Services first met David, it found that he couldn't remember his age, birthday, siblings' names, where he had worked, where he had banked, how much money he made, or how to call 911. R669. When Protective Services asked for a phone number, David brought them a fingernail kit. *Id.* When David took a phone call during the meeting, he looked confused, and when he hung up, he could not remember who he was talking to or what the conversation was about. R668–69, 675–77.

Jones admitted to Protective Services that he had used his father's retirement income but said he had his father's blessing to use "whatever money he wanted to." R672. When confronted with Highland Cove's unpaid bills, Jones said that Highland Cove let him "get away with it"—that is, they

had agreed to let him defer payments until Brewhaha was turning a profit—the same stories that Jones would later peddle at trial. R671–72, 688, 818–19.

Protective Services' investigation found that from October 2013 (when David was admitted to Highland Cove) to October 2014 (when the Office of Public Guardian took over as David's guardian, *see infra*) David made $76,000 from his retirement income. R661–62. During that time, Jones made just four payments to Highland Cove, totaling about $12,000. R662, SE3. Leaving more than $60,000 that Jones spent on the restaurant or himself. R677–78, 742, 830–33.

The Public Guardian takes over

The Office of Public Guardian (Public Guardian) took over as David's guardian in October 2014. R567. From there on, David's care at Highland Cove was paid each month and within a year it had paid in full the more than $27,000 David owed for unpaid care. R572, 588–89. With his account current, Ken, David's younger brother took over as guardian. R589, 607.

Jones runs up charges on David's credit card

As Protective Services investigated and the Public Guardian took over, Jones spent his father's money even faster. In mid-October, he opened a new credit card in his father's name. R663, 729–30, SE25–26. He then transferred around $5,000 from an old credit card (again in his father's name) to the new

card and closed the old one. *Id.* Then, in three weeks, he spent another $14,000 on the new credit card. *Id.* Some of these expenses were for the restaurant, but some were personal with charges to places like Snowbird, a dentist office, the DMV, cable television, and gas stations. SE26. Jones later called the Public Guardian and asked why it was not paying off this credit card. R571–72.

David fails the MoCA test

Shortly after the Public Guardian took over, David's geriatric nurse performed a MoCA test—the Montreal Cognitive Assessment—which is the favored screening tool for dementia. R692, 694, 702. When she walked into the room, David was standing, holding the phone, and listening to the dial tone. R698–99. In the test, David couldn't identify a lion or a rhinoceros, repeat sentences, repeat simple one- or two-syllable words like "face" or "church", answer simple math questions, recognize letters in the alphabet. R704–05. David scored zero out of a possible thirty points on the MoCA test. R707.

Jones tries to retake control of his father's income

When the Public Guardian took over, Jones lost access to his father's money. Just ten days after David failed the MoCA test, Jones drafted three documents (Financial Control Documents), took them to David, and had him sign them. R827–28, SE17–19. These documents directed David's retirement

income to be deposited into Jones's personal accounts, authorized Jones to manage David's retirement accounts and to make loans to himself, and changed the accounts' contact information from David's to Jones's. SE17–19. Each concluded by stating that David did not "recognize the authority of any person, institution, or Agency that attempts to change these directions." *Id.*

Jones admitted that the Financial Control Documents' purpose was to "try to keep the state and the state guardian from getting [his father's] money." R844–45.

At a Protective Services' hearing a month later, Jones testified that his father was "cogent" when he signed these documents and "definitely has the capacity on a day-to-day basis to make decisions about who controls his finance [sic] and where his money goes . . . and the conduct of his life." R672, 675–76. This directly contradicted the representations Jones made several months earlier when he argued that David should be dismissed from the lawsuit because of his progressive dementia. SE23.

Jones files for bankruptcy

Jones eventually filed for personal bankruptcy. R852. There Jones not only discharged the six-figure judgment, but he also discharged any of the "loans" he made to himself from David's retirement income. *Id.*

B. Summary of proceedings and disposition of the court.

The State charged Jones with exploitation of a vulnerable adult and unlawful dealing with property by a fiduciary, both second-degree felonies. R319.

Pretrial motions

Before trial, Jones moved to declare the exploitation statute, Utah Code Ann. § 76-5-111(4)(a)(iii) unconstitutional because the words "unjust" and "improper" were too vague. R174–84. The trial court deferred ruling on this motion until after the trial, where it denied the motion. R950–56.

Jones also asked the court to exclude any 404(b) evidence because the prosecution had not provided notice of such evidence despite his discovery requests. R362–81. Specifically, Jones asked the court to exclude "evidence that he used [his father's] credit cards." R366–67. Jones acknowledged that he had received the credit card evidence but protested that he "wasn't aware until recently that [the prosecution] planned on introducing it as part of the criminal event." R368–69. The prosecution responded that the credit card evidence was part of its case-in-chief, not 404(b) evidence. R369–71.

The court ruled that any evidence that "is relevant to what's charged in the information" would be admissible. R375. But if it was "evidence of other bad acts outside of the scope of what's charged in the information, then

[it would] hear an argument that it's not admissible because [the prosecution] didn't give the 404(b) notice." *Id.*

Motion for a Directed Verdict

At the close of the prosecution's case, Jones moved for a directed verdict for insufficient evidence. R753. When asked if he "want[ed] to make an argument" on that point, Jones declined, and the trial court denied it. *Id.*

Disposition and appeal

The jury convicted Jones of one count each of unlawful dealing of property by a fiduciary and exploitation of a vulnerable adult, both second-degree felonies. R252–53. The court sentenced Jones to 1-to-15 years in prison on each count and ordered them to run concurrently. R325. It then suspended the prison term, sentenced Jones to 180 days in jail for his exploitation charge and placed him on AP&P-supervised probation for 36 months. *Id.*

Jones now appeals. R328.

SUMMARY OF ARGUMENT

Point 1.A: Two witnesses testified that David lacked capacity to read or understand complicated financial documents. According to Jones, these were "expert" opinions and his counsel should have objected. But these testimonies were based on the witnesses' personal observations of David and reasonable counsel could conclude that they were lay opinions or that any

objection to their qualifications would have been unlikely to succeed (as both witnesses had advanced degrees and extensive experience in working with cognitively-impaired adults). In any event, the evidence of David's incapacity was overwhelming, so there is no reasonable probability of a different outcome even if these "expert" opinions had been excluded.

Point I.B: In discovery, the prosecution did not give notice of 404(b) that it intended to offer 404(b) evidence. At trial, it introduced a lease agreement for one of Jones's restaurants and a document showing several loans made to Jones. Jones says that these documents are 404(b) evidence and his counsel should have objected on lack-of-notice grounds. But reasonable counsel could conclude that the documents were not proof of a "crime, wrong, or other act," or were intrinsic to Jones's charged crimes, and thus not subject to 404(b) and its notice provisions. Reasonable counsel could also conclude that these documents supported his defense that his father had loaned him money before his progressive dementia and wanted to see the restaurant succeed. In any event, neither document prejudiced Jones as both helped his defense and the evidence of his guilt was overwhelming.

Point I.C: According to Jones, the unlawful dealing statute requires a knowing mental state for the substantial-risk-of-loss element and his counsel was ineffective for not requesting such an instruction. But reasonable counsel

could conclude that the knowing mental state applied only to the violation-of-duty element, not the substantial-risk-of-loss element. Jones cites no controlling authority available to counsel that would have alerted him otherwise. In any event, the evidence that Jones knew his actions involved a substantial risk of loss was overwhelming. So there is no reasonable probability that the outcome would have been different with Jones's requested instruction.

Point I.D: Jones says that his counsel was ineffective for not asking to merge his exploitation of a vulnerable adult count with his unlawful dealing of property by a fiduciary count because the two crimes are lesser-included offenses of each other. But exploitation requires an element not found in unlawful dealing: a vulnerable adult. And unlawful dealing requires an element not found in exploitation: a fiduciary.

Point II: Jones says that the terms "unjust[]" and "improper[]" in the exploitation statute are unconstitutionally vague. But any person of ordinary intelligence would understand that taking all your 90-year-old, demented, father's income (roughly $6,500 a month, including $900/month from his father's long-term care insurance policy) to pay for your living expenses and failed restaurants, while refusing to pay your father's rent, care, prescriptions, or basic personal needs is unjust and improper and thus

proscribed by the statue. So the statute, as applied to Jones, is not vague and he lacks standing to challenge the constitutionality of it as applied to the hypothetical conduct of others.

Point III: Jones argues that there is insufficient evidence of intent. But this issue fails for procedural reasons: it is not preserved, and Jones fails to argue plain error or ineffective assistance of counsel. It also fails on its merits. At best, Jones shows a dispute in the evidence. But disputed evidence does not equal insufficient evidence; that is especially true when the evidence on the guilty side of the dispute is overwhelming, as it is here.

ARGUMENT

I.

Jones's counsel was not constitutionally ineffective.

Jones alleges that his counsel was ineffective because he: (1) did not object to unnoticed testimony that he says was expert testimony; (2) did not object to unnoticed evidence that he says was 404(b) evidence; (3) stipulated to a jury instruction that tracked the statutory language; and (4) did not ask to merge Jones's convictions, each of which included an element that the other did not.[2] Jones also alleges cumulative error.

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[2] Jones's first three ineffectiveness claims are found in section I of his brief; his fourth is found in section IV. For ease of reference, all four of his ineffectiveness claims are joined in a single section.

Claims of ineffective assistance place a "heavy burden" on appellants like Jones. *State v. J.A.L.*, 2011 UT 27, ¶25, 262 P.3d 1. To prevail, he must prove both (1) that his counsel's performance was deficient and (2) that he was prejudiced by it. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984).

Establishing deficient performance requires proof that no reasonable attorney would have done what counsel did. *Id.* at 687–88. To "eliminate the distorting effects of hindsight," reasonableness is evaluated from "counsel's perspective at the time." *Id.* at 689. It is also viewed under "prevailing professional norms," rather than "best practices" or "common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (cleaned up. And it is reviewed in light of the controlling law available to counsel. *State v. Dunn*, 850 P.2d 1201, 1228 (Utah 1993). Review of counsel's performance is highly deferential because unlike the reviewing court, counsel "observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." *Id.* So there are "countless ways to provide effective assistance in any given case" and even "the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

These principles distill to this: a defendant claiming deficient performance must prove that "no competent attorney" would have proceeded as his counsel did. *Premo v. Moore,* 562 U.S. 115, 124 (2011).

Establishing prejudice requires the defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding." *Harrington*, 562 U.S. at 104 (cleaned up). Rather, "[c]ounsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* (cleaned up). Proof of prejudice must be based on a "demonstrable reality and not a speculative matter." *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998) (cleaned up)).

Here, Jones fails to prove either required element for each of his four ineffective assistance claims. The failure to prove one is fatal.

A. Counsel was not ineffective for not objecting to Tower's or Mack's "expert" opinions.

Based on their personal observations, Cody Tower (Highland Cove's general manager) and Kimberly Mack (an investigator with Protective Services) opined that Jones's 93-year-old demented father, based on their personal observations, was incapable of understanding complicated financial

documents. According to Jones, these are expert opinions and his counsel should have objected to them because (1) the prosecution did not give expert-testimony notice as required by Utah Code Ann. § 77-17-13(1) (West 2018) and (2) the prosecution had neither (a) qualified them as experts nor (b) established the reliability of their opinions. Aplt.Brf.15–21.

This claim fails for several reasons. First, Tower's and Mack's opinions were no so clearly expert testimony that all competent counsel would have recognized it as such. Second, even if they would have, reasonable counsel could conclude that Tower and Mack were qualified and any objection would have been futile. And, as far as the notice objection, it would have resulted only in a continuance and reasonable counsel could conclude a continuance was unnecessary. Finally, even if all competent counsel would have objected, Jones cannot prove prejudice where Tower's and Mack's testimonies were cumulative of much stronger evidence of David's poor mental state.

1. Reasonable counsel could conclude that Tower and Mack gave lay opinions, not expert ones.

The test for determining if Tower's or Mack's opinions are lay or expert is "whether [their] testimony require[d] [them to] have scientific, technical, or other specialized knowledge." *State v. Rothlisberger*, 2006 UT 49, ¶¶11, 34, 147 P.3d 1176. Stated another way, if "an average bystander would be able to

provide [their] same testimony," then it is lay opinion testimony and the State was not required to provide notice or qualify them as experts. *Id.* ¶34.

But the question is not simply whether Tower's or Mack's opinions are lay or expert. Jones's claim is one for ineffective assistance. So the focus is not on the merits of the objection. Rather, the issue is whether Tower's and Mack's opinions were so clearly expert opinions that all competent defense attorneys would have recognized it as such. Here, the answer here is no. *See Strickland*, 466 U.S. at 690.[3]

a. Tower's testimony.

Tower saw David every day from the time he was admitted to Highland Cove. R533–34. Tower testified that David struggled to communicate with others (as an example, on David's first day at the facility he could not communicate that he had lost his wallet); could not understand most questions beyond basic pleasantries like "hello[]" or "how are you"; was

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[3] Jones tries to change the question. He says deficient performance is about strategy, not reasonableness. Aplt.Brf.18. According to him, if there was no reasonable strategy behind failing to object, then his counsel's performance is deficient. *Id.* This formulation of deficient performance has some support in Utah case law. *See State v. Jamieson*, 2017 UT App 236, ¶37 n.7, 414 P.3d 559. But the United States Supreme Court has rejected it: "*The relevant question is not whether counsel's choices were strategic, but whether they were reasonable*." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (emphasis added).

unable to take care of his day-to-day needs like food, clothing, and grooming without prompts or cues from others; and could not make his own decisions without "direction from other people." R533–34, 536, 538, 557, 559.

After David had been at Highland Cove for three weeks, Jones had David sign the Loan Document authorizing Jones to "borrow funds, on a periodic basis," with "no limit," from any or all of [David's] retirement accounts . . . for business or personal use as [Jones] deems necessary." SE16. None of this, of course, is opinion testimony at all, only observations of someone experienced in dealing with cognitively-impaired adults.

The State asked Tower, based on his interactions, if David could read and comprehend the Loan Document. R539.[4] Tower opined, "[A]s I know David and the complexity of what is written [in the Loan Document], I would say that it would be very difficult for him to understand what . . . he would be signing." *Id.*

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[4] The State's question was as follows: "Based upon your psychiatry degree, based upon your daily interaction with David O. Jones, do you have an opinion whether or not he could read this document and comprehend it?" R539. Tower's degree was in psychology, not psychiatry. R532. And though the question asked David to use his psychology training, it does not change the fact that his testimony was based on his personal observations, not his psychology training, and that reasonable counsel could conclude that any lay person who had interacted with David could have provided the same testimony.

This is lay opinion testimony. An average bystander, with no scientific, technical, or other specialized training, could opine that a 90-year-old man, with progressive dementia—who cannot answer questions beyond "how are you," who cannot take care of his day-to-day needs, or make decisions on his own—would have difficulty understanding a complex financial document. *Rothlisberger*, 2006 UT 49, ¶¶11, 34. At a minimum, Tower's testimony is not so clearly expert testimony that all competent defense attorneys would have recognized it as such.

b. Mack's testimony.

Mack's testimony is similar. Mack visited David roughly ten months after he signed the Loan Document. In this visit, David couldn't remember his age, birthday, how to call 911, what military branch he served in, where he banked, or his siblings' names. R669. When Mack asked David for Jones's phone number, he went to the counter, picked up a fingernail kit, and gave it to Mack. R669.

Based on these observations, Mack opined that: (1) David had "significant memory impairment," (2) ten months earlier David did not have capacity to sign the Loan Document, and (3) four months later David did not have capacity to sign the Financial Control Documents. R668, 678–79, 682–83, SE17–19.

An average bystander, with no scientific, technical, or other specialized training, could opine that a 90-year-old man, with progressive dementia—who does not remember his age, how to call 911, or his siblings' names, and brings a fingernail kit when asked for a phone number—has memory impairment and is incapable of understanding complex financial documents.[5] At a minimum, Mack's testimony is not so clearly expert that all competent defense attorneys would have recognized it as such.

2. Reasonable counsel could conclude that an objection would have been futile.

Tower had a bachelor's degree in psychology, a master's in counseling and psychology, and almost twenty years' experience in working with elderly persons. R532–33. So reasonable counsel could conclude that an

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[5] Jones argues that Mack's testimony about David's capacity to sign the Loan and Financial Control Documents could not qualify as lay testimony because it was not "rationally based on [Mack's] perception." Aplt.Brf.17–18. That is, because Mack did not see Jones at or near the time that he signed the documents she could not testify to his mental state on those occasions without offering expert testimony. *Id.* Jones may have a point on the Loan Document, which was signed 10 months before Mack first met David. But there was already plenty of evidence, including Jones's admission, that David lacked capacity to sign that document.

He has no such point on the Financial Control Documents. True, Mack saw David four months before he signed the Financial Control Documents. Yet, at that point, it was already clear that David lacked capacity to sign. As David was suffering from *progressive* dementia, his mental capacity would have only been worse—not better—four months down the line.

objection would have been futile (as Tower was qualified); or worse, it may have resulted in the prosecution chronicling Tower's experience in front of the jury, which would have increased the persuasiveness of his testimony.

The same is true of Mack. Mack had a bachelor's degree in gerontology and master's in social work. R666. She had worked for Adult Protective Services for seven years where she had conducted nearly a thousand evaluations of cognitively-impaired adults and was trained to do cognitive testing and capacity assessments. R666–67, 687. Again, reasonable counsel could conclude that an objection would have been futile (as Mack was qualified); or worse, it may have resulted in the prosecution chronicling Mack's experience in front of the jury, which would have increased the persuasiveness of her testimony.[6]

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[6] Jones suggests that his counsel may have been deficient for not investigating Mack's qualifications. Aplt.Brf.18–19 (stating counsel "was not in a position to weigh the relative risks of objecting against the need to object without at least investigating whether [Mack] was qualified . . . ."). But there is no record evidence that counsel had not investigated Mack's qualifications. Indeed, the record shows the opposite. Jones's counsel knew that Mack did not have degrees in psychology or psychiatry, knew that she did not do a cognitive test on David, and was prepared to highlight issues with her testimony such as the timing of when she visited David. R86–88.

3. Jones has not proved that all competent counsel would have tried to exclude the testimony on lack-of-notice grounds.

Even if counsel could have shown that Tower's and Mack's testimony was expert testimony, the trial court could have excluded it for lack of notice only if it found that the State deliberately withheld notice in "bad faith." Utah Code Ann. § 77-17-13(4). Jones has not alleged, let alone proven, that that was so.

On the record, then, counsel could have at most secured a continuance on lack-of-notice grounds; but again, only if he could show that Tower's and Mack's testimony was expert testimony. *Id.* But Jones has not shown that all competent counsel would have asked for a continuance or even concluded that one was desirable. Counsel knew Mack and Tower would testify, knew their qualifications, had prepared for both, and countered their testimony on cross-examination and with other witnesses. Not only that, but Jones offers nothing to suggest that there was a reasonable probability that a continuance would have changed the outcome of his trial.

4. There is no prejudice because the "expert" testimonies were merely cumulative of David's poor mental capacity.

Jones says that Tower's and Mack's "expert" opinions were prejudicial because they bolstered the prosecution's case that David lacked capacity. Aplt.Brf.20–21. But showing that evidence may have bolstered a fact does not

answer *Strickland*'s prejudice inquiry: whether there is a reasonable probability that without Tower's and Mack's opinions the result of would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *see State v. King*, 2010 UT App 396, ¶44, 248 P.3d 984 (noting that even if testimony results in improper bolstering there is no reversal "unless it was prejudicial"). Here, given the overwhelming evidence of David's incapacity, there is no such probability.

First, Jones admitted his father lacked capacity to sign the Loan and Financial Control Documents. According to Jones, his father started showing signs of dementia in 2010. R808. Three years later, but before Jones got David to sign either document, Jones admitted that his father was "incompetent"; and lacked capacity to sign things like a lease or a personal guarantee. R835–36, 838, 840, SE23. When he checked his father into Highland Cove, Jones again repeated that his father was "arguabl[y] . . . incompetent" at that time. R808. These admissions are enough to dispel any notions of prejudice. But there is more.

Multiple lay witnesses described David's incapacity long before he signed the Loan Document.

- Eight years before signing the Loan Document, David could not recognize his brother, was noticeably disoriented, and "wasn't entirely with it." R600.

- A couple of months before signing the Loan Document, David became disoriented and could no longer live on his own. R695, 812.

- Three weeks before signing the Loan Document, Jones admitted his father to Highland Cove, stating his father suffered from "progressive dementia." R516, 536, SE1.

- When the Loan Document was signed, David could not express himself in words, answer basic questions, or engage in meaningful conversations; he could not make his own food, bathe himself, or dress himself. R536–38, 557.

Over a year later, when David signed the Financial Control Document, his condition was worse:

- David could not remember the date or year. R696.

- When asked, "How are you today?" R697. David laughed and said, "I don't remember." *Id.* When asked, "What are you going to do for fun today?"; he couldn't answer. *Id*.

- David could give only two- to four-word answers to questions. R699.

- David couldn't remember his age, birthday, where he had worked or banked, his income, his siblings' names, or how to call 911. R669.

- Immediately after talking on the phone, David could not remember who he had talked to or what he talked about. R669, 675–77.

- He would hold the phone, listen to the dial tone, and appear confused. R698–99.

- When asked for a phone number, David brought a fingernail kit. R669.

- David couldn't draw a clock, tell time, identify a lion or a rhinoceros, repeat sentences or even simple one- or two-syllable words like "face" or "church," answer basic math questions, or recognize letters from the alphabet. R703–05.

The prosecution's actual expert, Perrine Anderson (David's geriatric nurse practitioner), started visiting David about four months after he signed the Loan Document and had visited him at least 25 times since. R697. During a visit that was one month before David signed the Financial Control Documents, Anderson gave David a MoCA test, which is the preferred screening tool for dementia. R702. David received the lowest possible score on the test, 0 out of 30 points. R707. On his best day, during all 25 visits, Anderson opined that David may have scored 2 or 3 points. R722. Anderson further opined that David would not have been able to read, much less understand, the Financial Control Documents and if you had come back into the room ten minutes after he had signed them, he would not remember it. R697–99, 701, 721–22.

* * * *

In sum, Jones may be right: Tower's and Mack's testimonies may have bolstered the prosecution's case to a small degree. That is, they may have added a piece to the already overwhelming evidence of David's incapacity. But that doesn't prove prejudice. It's not enough for Jones to say that their

testimonies added something to the evidence. Rather, Jones must show that subtracting their testimonies, there is a reasonable probability that the jury would have doubted David's incapacity. Jones doesn't—and can't—do that here.

B. Counsel was not ineffective for not objecting alleged 404(b) evidence.

Jones complains that his counsel should have objected to: (1) a one-page, handwritten document showing loans made to Jones from 1998–2000—more than ten years before David's dementia set in, and (2) the Brewhaha lease agreement, signed by Jones and David. Aplt.Brf.22–23. According to him, these were 404(b) evidence. *Id.* And because trial counsel did not receive notice of them as was requested and required for actual 404(b) evidence, his counsel should have objected. *Id.*

Jones has not proved that all competent counsel would have thought that this was 404(b) evidence, or would have objected either way. And he has not proved a reasonable probability that excluding the evidence would have made a more favorable result reasonably likely.

1. The loan evidence did not prejudice Jones and reasonable counsel could chose not to object.

The prosecution introduced a one-page, handwritten document showing that someone had loaned Jones $64,300 from 1998 to 2000. SE20. The

prosecution asked an investigator just two questions about this document (confirming that the document showed loans to Jones and that there was no indication that interest had been paid) during the two-day, thirteen-witness trial. R685. There was no discussion of who made the loans, what they were for, or whether they were paid. It was not discussed again in closing or elsewhere.

Where "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice," as it is here, the Court should do so without reaching the deficient performance question. *Strickland*, 466 U.S. at 697.

Jones makes no effort to show how this loan evidence prejudiced him. Instead, his prejudice argument focuses on the Brewhaha lease. Aplt.Brf.26–28. Nowhere does he prove what *Strickland* prejudice requires: a reasonable probability that without the loan evidence the outcome of his trial would have been different. 466 U.S. at 694.

And Jones couldn't prove prejudice even if he had tried. Yes, if we *assume* that the loans were never repaid—because it is unclear if they were—then the document could show that Jones had a habit of not paying his loans. But this case is not about unpaid loans. It is about Jones's abuse of his fiduciary power and his exploitation of father. And the evidence on these points was overwhelming. *See* subsection I.A.4, *supra* and section III, *infra*.

Moreover, the loan evidence may have helped Jones. If these were loans from his father, as Jones says (Aplt.Brf.24 n.10), then it was at least some circumstantial evidence supporting his story that his father wanted to invest in Brewhaha, which was Jones's defense. R509, 886–87, 889. It showed that almost ten years before any dementia or mental illness clouded his judgment, David loaned him nearly $65,000, which could have been seen as some support for his claim that David wanted to loan him the nearly $80,000 that he took for his restaurants.

Jones has not proved how, in light of all the overwhelming evidence, this record of unpaid loans from ten years earlier was enough to tip the scales against him.

Jones also cannot show deficient performance. He says that there was no "sound trial strategy" for not objecting. Aplt.Brf.25. But "sound trial strategy" is not the standard for deficient performance. *See Knowles v. Mirzayance*, 556 U.S. 111, 121 (2009); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). The question for deficient performance "is not whether counsel's choices were strategic, but whether they were reasonable." *Flores-Ortega*, 528 U.S. at 481. Jones must show that all competent counsel would have objected to the loan evidence. But as shown, the loan evidence could reasonably be considered supportive of the defense. A competent attorney may choose not

to object to evidence that could be seen as helpful. In any event, Jones has not shown that it was so clearly damaging to the defense that no competent counsel would have let it be admitted unchallenged.

2. Reasonable counsel could conclude that rule 404(b) did not apply to the Brewhaha lease. In any event, the Brewhaha lease did not prejudice Jones.

Jones says that his counsel was ineffective for not objecting to the Brewhaha lease that he and David signed. Aplt.Brf.25–26. According to him, the lease was 404(b) evidence. *Id.* And because he never received notice of it as he had requested, he says that his counsel should have objected on lack-of-notice grounds and there was no "reasonable trial strategy" for not doing so. *Id.*

Again, the question for deficient performance "is not whether counsel's choices were strategic, but whether they were reasonable." *Flores-Ortega*, 528 U.S. at 481.

Here, reasonable counsel could conclude that the lease agreement was not 404(b) evidence. The Brewhaha lease, by itself, was not evidence of a "crime, wrong, or other act" that was used "to prove [Jones's] character," or anyone's character. Utah R. Evid. 404(b)(1). It's only Jones's later, in-court representation that he knew his father was "not competent" at the time he signed the Brewhaha lease that makes having his father sign the lease a bad

act. SE23. But Jones's in-court representation of his father's incompetency was admissible irrespective of whether the lease's admissibility. And as such, the lease, as the physical document that his father signed was going to be admissible too.

Further, because getting his father to sign the Brewhaha lease when his father was incompetent to do so is integral, that is "intrinsic," to Jones's crimes, it is not evidence of another crime used to prove his general criminal character. *State v. Lucero*, 2014 UT 15, ¶14 n.7 (cleaned up) (noting that if challenged evidence is "inextricably intertwined with the crime that is charged," or "if both the crime charged and the prior act are considered part of a single criminal episode," then rule 404(b) and its notice provisions do not apply); *see United States v. Lambert*, 995 F.2d 1006, 1007 (10th Cir. 1993); *State v. Burke*, 2011 UT App 186, ¶¶65–66, 256 P.3d 1102. It's evidence of this crime. At least counsel could reasonably so conclude.

Reasonable counsel could also choose not to object because, like the loan evidence, the Brewhaha lease could be considered supportive of the defense theory. It showed that his father, before admission to Highland Cove, signed the lease both as a tenant and as personal guarantor. This offered some support for Jones's narrative that his father was his partner, wanted Brewhaha to succeed, and wanted to invest his money in it.

For this reason, and others, there was no prejudice. The lease, by itself, did nothing to help the prosecution. What helped the prosecution was Jones's admission in a later court filing that he knew his father was "not competent" when he signed the lease. SE23.[7] But even if the lease had never been introduced, Jones's admission would have been. It was his non-hearsay statement admitting that his father was "not competent" when he signed the lease that proved a central issue: David's vulnerability and his incompetency to give his son money. The lease itself was not damning.

C. Reasonable counsel could conclude that the substantial-risk-of-loss element required only a reckless mental state.

The trial court, consistent with the statute, instructed the jury that to convict Jones of unlawful dealing, it had to find:

> 1. That [Jones];
>
> 2. Acting intentionally, knowingly or recklessly with respect to each and every one of the following elements;
>
> 3. Dealt with property that had been entrusted to him as a fiduciary, in a manner in which the [Jones] knew (beyond just recklessness) was a violation of the [Jones]'s duty;

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[7] Most of Jones's prejudice argument focuses on his admission that he knew his father was incompetent. Again, that's separate from the lease, is not 404(b) evidence, and was always going to be admitted. So Jones cannot use it to argue prejudice.

> 4. Which involved a substantial risk of loss or detriment to the owner or to a person for whose benefit the property was entrusted; and
>
> 5. The total value of the property is equal to or exceeds $5,000.

On the unlawful dealing charge, the jury was instructed as follows:

R238. Jones says his counsel was ineffective for stipulating to this instruction because the unlawful dealing statute (Utah Code Ann. § 76-6-513 (West 2018)) requires at least a knowing mental state for the substantial-risk-of-loss element (the fourth element). Aplt.Brf.29–30.

Because this is an ineffective assistance of counsel claim, the question is not whether the unlawful dealing statute could be interpreted to require a knowing mental state for the substantial risk-of-loss element. That is a statutory argument that Jones did not make below and is thus unpreserved. Instead, the question for ineffective assistance of counsel is this: Did the unlawful dealing statute so clearly require a knowing mental state for the substantial-risk-of-loss element that all competent defense attorneys would have requested it? The answer is no.

Reasonable counsel could conclude that the knowing mental state did not apply to the substantial-risk-of-loss element. The unlawful dealing statute reads:

> A person is guilty of unlawfully dealing with the property by a fiduciary if the person deals with property that has been entrusted to him as a fiduciary . . . in a manner in which the person knows is a

> violation of the person's duty and which involves substantial risk of loss or detriment to the owner . . . .

Utah Code Ann. § 76-6-513. The knowing mental state clearly applies to the violation-of-duty element, and the jury was so instructed. R238. But the statutory language does not clearly extend the knowing mental state to the substantial-risk-of-loss element. With no guidance from any appellate court or the legislature, reasonable counsel could conclude that the default intentional, knowing, or reckless mental state applied to the substantial-risk-of-loss element. Utah Code Ann. § 76-2-102 (West 2018). And because that conclusion would be a reasonable one, counsel reasonably agreed to the jury being instructed in that language.

Jones has not demonstrated otherwise. He relies on extra-jurisdictional statutes and cases to support his argument that the substantial-risk-of-loss element also requires a "knowing" mental state. But counsel is not charged with knowing and arguing extra-jurisdictional authority. Instead, Jones must "demonstrate that [*Utah*] law at the time of his trial entitled him" to an instruction that the substantial-risk-of-loss element required a knowing mental state and that all reasonable counsel would have requested such an instruction." *State v. Dunn*, 850 P.2d 1201, 1228 (Utah 1993). He fails to do so.

In any event, Jones cannot prove prejudice. The evidence that he knew his actions involved of a substantial risk of loss or detriment to his father was overwhelming. *See* subsection III.B. *infra*.

And the jury found that Jones acted knowingly. In its special verdict form the jury found that Jones acted intentionally or knowingly with respect to all the elements of the exploitation of a vulnerable adult charge. R237, 253. So it necessarily found that Jones knowingly used at least $5,000 of his father's resources for Jones's own profit. And if Jones knowingly used his father's resources for his own profit, he knew that his actions involved a substantial risk of loss. So there is no reasonable probability that the jury would have found that Jones's actions were merely reckless as opposed to knowing.

D. Jones's convictions are not lesser-included offenses.

Jones's argument that his counsel should have moved to merge his two convictions rests on his assumption that the unlawful dealing count is necessarily included in the exploitation count (or vice versa).[8] It's not.

Utah's merger statute (Utah Code Ann. § 76-1-402 (West 2018)) "contains two merger tests." *State v. Wilder*, 2018 UT 17, ¶22, n.6, 420 P.3d

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[8] Jones never spells out which count he believes is the lesser and which is the greater. However, as detailed below, neither is a lesser-included of the other.

1064. The same criminal act test found in subsection (1) and the lesser-included offense test found in subsection (3). *Id*.

Jones "makes no argument and provides no reasoned analysis concerning the applicability of subsection (1)." *State v. Corona*, 2018 UT App 154, ¶45, --- P.3d ---. He "does not address the question of whether his [unlawful dealing and exploitation counts] constitute a single offense, but instead only 'compares the statutory elements of each offense' and attempts to determine whether a greater-lesser relationship exists." *Id.*; *see* Aplt.Brf.48–53. "Accordingly, under subsection (1), [Jones] has failed to demonstrate that his claim is meritorious and has therefore failed to show that his counsel was ineffective" for not moving to merge the two counts based on the same criminal act test. *Id.*[9]

So the only question Jones presents is whether his counsel was ineffective for not moving to merge one of his two crimes into the other as a lesser-included offense.

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[9] Jones cites subsection (1)'s same criminal act language. Aplt.Brf.48. But then lays out the test for lesser-included offenses and analyzes his claim thereunder. *Id.* at 49.

Even if he had made the same criminal act argument, his claim would fail. His two convictions required separate acts. For unlawful dealing, he had to be his father's fiduciary. Utah Code Ann. § 76-6-513; R238. For exploitation of a vulnerable adult, he had to take advantage of his father's vulnerable condition. Utah Code Ann. § 76-5-111; R237. Those acts are not the same.

An offense is an included offense, and merges with the greater, when "[i]t is established by proof of the same or less than all the facts *required* to establish commission of the offense charged." Utah Code Ann. § 76-1-402(3)(a) (emphasis added). "To be necessarily included in the greater offense, the lesser offense must be such that it is impossible to commit the greater without first having committed the lesser." *Schmuck v. United States*, 489 U.S. 705, 719 (1989) (cleaned up); *see State v. Chukes*, 2003 UT App 155, ¶10, 71 P.3d 624. Thus, if "the lesser offense requires an element not required for the greater offense," it is not a lesser included offense. *Schmuck*, 489 U.S. at 716; *see Chukes*, 2003 UT App 155, ¶10.

The question of whether a lesser-greater relationship exists "turns on the statutorily defined elements of the two crimes." *Finlayson*, 2000 UT 10, ¶16 *overruled in part by State v. Wilder*, 2018 UT 17, ¶33, --- P.3d ---. While courts may look "to the facts to determine what crime, or variation of the crime, was proved . . . once this determination is made, the court looks [only] to [its] statutory elements." *Id*. In other words, "the focus" of any lesser-included-offense analysis "is on the [crime's] statutory elements" not the facts used to prove those elements. *State v. Meacham*, 2000 UT App 247, ¶29, 9 P.3d 777.

Here, unlawful dealing requires that Jones be a fiduciary; there is no such requirement for exploitation of a vulnerable adult. *Compare* Utah Code Ann. § 76-6-513 (West 2018) *with* Utah Code Ann. § 76-5-111 (West 2018); *see also* R237–38 (providing the jury instructions in this case).[10] Similarly, exploitation of a vulnerable adult requires a vulnerable adult; there is no such requirement for unlawful dealing. *Compare* Utah Code Ann. § 76-5-111 *with* Utah Code Ann. § 76-6-513; *see also* R237–38. Because Jones could commit each crime without necessarily committing the other, they are not lesser-included offenses. *Schmuck*, 489 U.S. at 716; *Chukes*, 2003 UT App 155, ¶10. And as such, any merger motion would have been futile; Jones's counsel cannot be ineffective for not making a futile motion. *State v. Heywood*, 2015 UT App 191, ¶48, 357 P.3d 565 (citing *State v. Kelley*, 2000 UT 41, ¶26, 1 P.3d 546).

E. Jones has shown no error, let alone cumulative error

Jones finally asks this Court to reverse based on cumulative error, if nothing else. But because he has not shown any error, he necessarily cannot

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[10] True, some variations of exploitation of a vulnerable adult may include a fiduciary element. For example, one variation requires that the defendant be in a "position of trust," which includes a fiduciary. Utah Code Ann. § 76-5-111(4)(a)(i). Another variation requires that the defendant "use[] a vulnerable adult's power of attorney or guardianship" for the profit of someone other than a vulnerable adult. *Id.* § 76-5-11(4)(a)(iv). But neither of those variations were charged here, nor was the jury instructed on them.

show cumulative error. *See State v. Martinez-Castellanos*, 2018 UT 46, ¶¶39–40, 872 Utah Adv. Rep. 51.

II.

Jones lacks standing to challenge the exploitation of a vulnerable adult statute because it is not vague as applied to his conduct.

A person is guilty of second-degree exploitation of a vulnerable adult if, acting with intent or knowledge, he or she "unjustly or improperly uses or manages the resources of a vulnerable adult for the profit or advantage of someone other than the vulnerable adult." Utah Code Ann. § 76-5-111 (4)(a)(iii) (West 2018). According to Jones, the terms "unjust" and "improper" are unconstitutionally vague because they are subjective and "could lead to charges against virtually anyone who uses a vulnerable adult's resources for the use of anyone other than the vulnerable adult." Aplt.Brf.38–45.

The vagueness doctrine "is an outgrowth . . . of the Due Process Clause of the Fifth Amendment." *United States v. Williams*, 553 U.S. 285, 304 (2008). Some vagueness is inherent in language—"[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). So the Constitution "does not require impossible standards" and the elimination of any possible vagueness. *United States v. Petrillo*, 332 U.S. 1, 8 (1947). A statute is only unconstitutionally vague because it either "fails to provide people of ordinary intelligence a reasonable

opportunity to understand what conduct it prohibits," or "it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *see also City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) *State v. Green*, 2004 UT 76, ¶43, 99 P.3d 820.

It is well-established that a defendant "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Village of Hoffman Estates*, 455 U.S. at 495. So a court should "examine the [defendant's] conduct before analyzing other hypothetical applications of the law." *Id.* If the defendant's conduct is clearly prohibited, then he lacks standing to challenge the statute based on another's hypothetical conduct. *State v. Ansari*, 2004 UT App 326, ¶44, 100 P.3d 231; *State v. Jones*, 2018 UT App 110, ¶16, 427 P.3d 538.

Here, Jones lacks standing because his conduct is clearly prohibited. Jones, acting intentionally or knowingly (R237, 253), took his 90-year-old, demented father's retirement income (whom Jones admitted was "incompetent" at this point) —including $900/month from his father's long-term care policy—to pay for Jones's living expenses and his two failed restaurants, while refusing to pay for his father's rent, care, prescriptions, or personal needs such as a haircut or bed pads. Any person of ordinary intelligence, "would have had to have known that wherever the precise

boundary between [just] and [unjust use of his father's resources] might lie," his conduct clearly fell on the side of unjust and improper. *State v. Tulley*, 2018 UT 35, ¶69, 428 P.3d 1005.[11]

Jones ignores his conduct. He uses nearly all his vagueness argument (10 of 11 paragraphs) to explore the hypothetical conduct of others or decisions from other jurisdictions. Aplt.Brf.38–45. In his final, two-sentence paragraph, he concludes—with no analysis—that the exploitation statute is vague as applied to him because "he was not put on notice as to any lay activity what [sic] conduct constituted improper or unjust management of [his father's] resources." Aplt.Brf.44–45. But an as-applied challenge is not concerned with what *general* conduct is unjust or improper, it is about whether Jones's *specific* conduct was. Here, by any definition, Jones's conduct

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[11] Not only that, but Jones's conduct clearly violated other more specific provisions of the exploitation statute that Jones does not assail as vague (although he was not charged under these variations). For example, under subsection 4(a)(ii) Jones was guilty of second-degree felony exploitation if, acting intentionally or knowingly, he "[knew] or should know[n] that the vulnerable adult lack[ed] capacity to consent, and obtain[ed] or use[d] . . . the vulnerable adult's funds, assets, or property with intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of his property, for the benefit of someone other than the vulnerable adult." Utah Code Ann. § 76-5-111(4)(ii). Jones said his father was incompetent well before he started taking his money—so Jones knew or should have known his father lacked capacity to consent to his use of all his father's resources for Jones's own personal gain.

was unjust and improper. *Tulley*, 2018 UT 35, ¶69. And because it is, Jones has no standing to mount a facial challenge to the exploitation statute. *Ansari*, 2004 UT App 326, ¶44; *see Jones*, 2018 UT App 110, ¶17.

In any event, persons of ordinary intelligence are on notice of what is "unjust" or "improper" when they read the exploitation statute as a whole. When interpreting a statute, this Court's objective is "to give effect to the intent of the legislature in light of the purpose the act was meant to achieve." *Gutierrez v. Medley*, 972 P.2d 913, 915 (Utah 1998). In discerning that intent, the Court looks first to the statute's plain language—with a presumption that "the legislature chose its words carefully, using each term advisedly" and "according to its ordinary meaning." *State v. LeBeau*, 2014 UT 39, ¶26, 337 P.3d 254. "The plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute or with other statutes under the same or related chapters." *State v. MacGuire*, 2004 UT 4, ¶15, 84 P.3d 1171, 1175 (Utah 2004) (cleaned up).

Here, the terms "unjust" and "improper" do not appear in isolation. The exploitation statute lists five variations of the crime. The first prohibits employing deception or intimidation to obtain or use a vulnerable adult's resources for someone other than the vulnerable adult. Utah Code Ann. § 76-5-111(4)(i). The second makes it a crime to use a vulnerable adult's resources

for someone other than the vulnerable adult when the vulnerable adult lacks the capacity to consent. *Id.* § 76-5-111(4)(ii). The third—the subsection under which Jones was charged—makes it a crime to "unjustly" or "improperly" use a vulnerable adult's resources for the profit of someone other than the vulnerable adult. *Id.* § 76-5-111(4)(iii). The fourth makes it a crime for a power of attorney or guardian to "unjustly" or "improperly" use the vulnerable adult's resources for the profit of someone other than the vulnerable adult. *Id.* § 76-5-111(4)(iv). And the fifth makes it a crime to "involve a vulnerable adult who lacks the capacity to consent in the facilitation" of a crime. *Id.* § 76-5-111(4)(v).

Read as a whole, the legislature clearly sought to prohibit a particular type of conduct: use of a vulnerable adult's resources, *without proper consent or authorization*, for the profit of someone other than the vulnerable adult. *Id.* § 76-5-111(4). So the terms "unjust" and "improper," in context, relate to whether the vulnerable adult consented or authorized the use of his resources or if the defendant used deceit, intimidation, undue influence, persuasion, or other means to obtain it.

Jones clearly understood this. His argument below was that his actions were not unjust or improper because his father consented to them and did so when he was still capable of consent. That is, he knew that if his father did

not consent, or lacked capacity to do so, his actions were unjust or improper. And his consent defense shows that he clearly knew what he needed to address to avoid a conviction.

The plain meaning of the terms "unjust" and "improper" are also not difficult for ordinary people to understand or apply. "Unjust" simply means, "Contrary to justice, not fair or reasonable." *Unjust*, Black's Law Dictionary (10th ed. 2014). Exploitation itself is defined is defined in reference to "unjust" actions. *Exploitation*, Black's Law Dictionary (10th ed. 2014) (defining "exploitation" as "taking *unjust* advantage of another for one's own benefit or selfish ends" (emphasis added)). And "Improper" means, "Incorrect, unsuitable or irregular; Fraudulent or otherwise wrongful." *Improper*, Black's Law Dictionary (10th ed. 2014).

No ordinary person would think it unjust or improper (that is, unfair, unreasonable, fraudulent, or wrongful) for a child to ask a vulnerable parent for help paying college tuition or buying a home. Aplt.Brf.41. But an ordinary person would find it unjust or improper, (that is, unfair, unreasonable, fraudulent, or wrongful) for a child to ask, knowing the vulnerable parent lacked capacity to consent, or using intimidation or deceit to obtain their consent, or persuading, pushing, manipulating, or using other means to take

the money or obtain the "consent." This is not nearly as complicated as Jones tries to make it.

Moreover, the statute is not one of strict liability, as Jones suggests. Aplt.Brf.40 (arguing that the statute "could lead to charges against virtually anyone who uses a vulnerable adult's resources for the use of anyone other than the vulnerable adult."). It requires Jones, or any other defendant, to act intentionally or knowingly for felony exploitation. That is, Jones had to at least know that his father was a vulnerable adult. He had to at least know that his actions were unjust or improper. And he had to know that he was using his father's resources for his own profit. It wasn't enough that he acted negligently or recklessly.[12] As the United States' Supreme Court, and Utah's supreme court, note, "scienter requirements" like the ones here, "alleviate vagueness concerns." *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007); *see Due South, Inc. v. Dep't of Alcoholic Bev. Control*, 2008 UT 71, ¶46, 197 P.3d 82; *State v. Sailer*, 684 A.2d 1247, 1249 (Sup. Ct. Del. 1995).

None of Jones's out-of-state cases are persuasive or even helpful. While they use similar words (e.g., "illegal," "improper," and "unjust") each is part

[12] If he had acted with criminal negligence or recklessness, he would have been guilty of a class B or A (respectively) misdemeanor. Utah Code Ann. § 76-5-111(4)(b)(iii)–(iv).

of a larger statute with significant differences. Aplt.Brf.41–43. As an example, the Mississippi statute Jones references made "the illegal or **improper use** of a vulnerable person or his resources for another's profit or advantage, **with or without the consent of the vulnerable adult**" a crime. *Decker v. State*, 66 So.2d 654, 658 (Miss. 2011) (emphasis in original). So any use, even with consent, could be improper. *Id.* It was the "with or without the consent" language as much as the "improper use" that troubled the Mississippi supreme court. *Id.* Utah does not contain the "with or without consent language" or anything like it. Not only that, but Utah's statute contains multiple variations of the crime and is part of a much broader exploitation statute.

The same problems exist with Jones's Florida case, *Cuda v. State*. There, the statute made it a crime to "improper[ly] or illegal[ly] use or manage[] the funds, assets, property, power of attorney, or guardianship of [an] aged person or disabled adult for profit." 639 So.2d 22, 23 n.1. Again, unlike Utah's, there were no variations or descriptions of the type of prohibited acts. *Id.* And the court also failed to review Cuda's actions and whether the statute, as applied to Cuda, was vague. Something this Court has made clear must occur first. *See supra*.

And Jones's out-of-court cases are not unanimous. *State v. Sailer*, for example, found a statute similar to Utah's was not unconstitutionally vague. 684 A.2d 1247 (Del. 1994). There, the statute defined exploitation as the "illegal or improper use or abuse of an infirm person, his resources or his rights, by another person, whether for profit or other advantage." *Id.* at 1249 n.1. Delaware held that this statute was not vague because, like Utah's, the legislature's intent, the language of the statute, the mental-state requirement, and the plain meaning of the terms "illegal" and "improper" "adequately notified" defendants of what actions were unlawful. *Id.*

* * * *

In sum, Jones lacks standing to raise a vagueness claim. But the statute is not vague because it clearly prohibits Jones from taking all his 90-year-old, demented, incompetent father's retirement income (roughly $6,500 a month, including $900/month from his father's long-term care insurance policy)to pay for Jones's personal living expenses and his two failed restaurants, while refusing to pay for his father's rent, care, prescriptions, or basic personal needs.

III.

There is sufficient evidence of Jones's intent.

Jones says that the trial court erred when it denied his directed verdict motion. Aplt.Brf.45–47. According to him, there was insufficient evidence

that he knew he had "violated his fiduciary duty and that the breach involved a substantial risk of loss," as required by his unlawful dealing conviction. *Id.* at 46. And, he says, there was insufficient evidence that he "unjustly or improperly used or managed" his father's resources to his own advantage, as required by his exploitation conviction. *Id.*

This claim fails for a few reasons. First, it is unpreserved, and Jones fails to adequately argue that a preservation exception applies. So this Court should decline to review it. Second, even if preserved, there is more than enough evidence to support both convictions.

A. This issue is unpreserved.

An issue is preserved if it is "presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶51, 99 P.3d 801 (cleaned up). This requires the issue to be both timely and *specifically* raised, with supporting evidence or relevant legal authority. *Id.*; *see also* Utah R. Crim. P. 12(a) ("A motion shall state succinctly and with particularity the grounds upon which it is made and the relief sought.").

That didn't happen here. Jones claims that his generic directed verdict motion preserved the issue. Aplt.Brf.3 (citing R753). At the close of the State's case, counsel asked for a "directed verdict for insufficiency of the evidence."

R753. When asked if he "want[ed] to make an argument," counsel declined, and the court summarily denied the motion. *Id.* That was all.

"[A] generic motion for a directed verdict," like Jones's, can preserve a specific ground for appeal only when "'the specific ground for an objection is clear from its context.'" *State v. Isom*, 2015 UT App 160, ¶22, 354 P.3d 791 (quoting *State v. Gonzalez*, 2015 UT 10, ¶26, 345 P.3d 1168); *see State v. Doyle*, 2018 UT App 239, --- P.3d ---. For example, in *Gonzalez*, it was clear that Gonzalez's generic directed verdict motion was based on the State's alleged failure to disprove self defense because that was Gonzalez's "sole defense" to the murder charge. 2015 UT 10, ¶26. And in *Doyle* it was clear that Doyle's directed verdict motion that the state had the burden to prove self defense and that it had to "present more than it had" was enough to preserve an argument that the self-defense evidence was inconclusive and speculative. 2018 UT App 239, ¶16.

Unlike *Gonzalez* or *Doyle*, there is no one clear ground for Jones's motion. Jones had two, separate charges: exploitation of a vulnerable adult and unlawful dealing of property by a fiduciary.[13] Both have several elements

[13] Gonzalez had two charges too, murder and obstruction of justice. 2015 UT 10, ¶26. But Gonzalez's "obstruction-of-justice charge turned on his challenge to the murder charge." *Id.* So, unlike here, the obstruction charge depended on the murder charge. *Id.*

that Jones disputed. For example, on his exploitation charge, Jones disputed that he acted with intent *and* that he unjustly or improperly used his father's resources. On his unlawful-dealing charge, he disputed that he knowingly violated a duty to his father *and* that his actions involved a substantial risk of loss to his father. His perfunctory motion failed to identify which of these elements he alleges the State did not prove and fails to provide any supportive reasoning or authority. *State v. Worwood*, 2007 UT 47, ¶16, 164 P.3d 397; *State v. Bosquez*, 2012 UT App 89, ¶7, 275 P.3d 1032.[14]

The purpose of the preservation requirement is to put the "trial judge on notice of the asserted error and allow[ ] for [timely] correction." *438 Main Street*, 2004 UT 72, ¶51. Jones's motion did not call the judge's attention to the problem he raises here: a lack of evidence of intent. So the trial court never had a chance to address this issue. This Court should not address it either.

Jones says, in a footnote, that this Court may nevertheless review this claim for plain error or ineffective assistance of counsel. Aplt.Brf.46 n.18. But

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[14] And the seriousness of his exploitation charge varies based on his mental state. If it was done intentionally or knowingly, it is a second-degree felony. Utah Code Ann. § 76-5-110(4)(b) (West 2018). If done recklessly, it is a class A misdemeanor. *Id.* Jones advocated that an instruction on the lesser, class-A offense be given to the jury. Yet his directed verdict motion fails to state whether he believes the State failed to prove an intentional or knowing mental state, a reckless mental state, or any mental state.

while an unpreserved claim can be reviewed for plain error or ineffective assistance, it is not enough to merely utter those words in a footnote without providing any analysis or application of these doctrines to his specific facts. *See State v. Padilla*, 2018 UT App 108, ¶19, --- P.3d ---.

B. Jones's claim is meritless.

When reviewing a sufficiency of the evidence challenge, this Court does not "sit as a second fact finder." *Salt Lake City v. Miles*, 2014 UT 47, ¶10, 342 P.3d 212. Instead, its review "is limited to insuring that there is sufficient competent evidence regarding each element of the charge to enable a jury to find, beyond a reasonable doubt, that the defendant committed the crime." *Id.* In doing so, this Court must view the "evidence and all reasonable inferences that may be drawn therefrom . . . in the light most favorable to the jury verdict." *Id.* In the end, so long as there is "some evidence" to support each element, this Court's sufficiency inquiry ends. *Id.*

Jones says that there was insufficient evidence that he knew he had violated his fiduciary duty or that he knew was using his father's retirement income unjustly or improperly. Aplt.Brf.46–47. He also claims that there was no evidence that his actions created a substantial risk of loss. *Id.*

But there is overwhelming evidence to support both, and far more than his stingy recitation (see Aplt.Brf.46–47). Consider the following:

- By his own admission, Jones knew his father was "not competent" no later than 2012. R808, 837–38, SE23.

- A year later, Jones had his father sign a lease for Brewhaha that Jones knew contained provisions that were "harsh" and "incredibly unfair," and even though the prior tenant warned Jones about the landlord. R807, 836–37, SE23.

- Six months later, shortly after his father's three-night hospital stay, twenty-day rehabilitation, and after he was checked in to Highland Cove for "progressive dementia," Jones had his father sign the Loan Document, which allowed Jones to loan himself all his father's retirement income. R516, 536, SE1, 16.

- Over the next several months, Jones "loaned" himself all his father's $6,500/month retirement income, including $900/month that was from a long-term care policy specifically created to pay for his father's care, then used that money to pay for Brewhaha and Jones's own personal living expenses because Jones was unemployed. R661, 820, 824–25, 853.

- When Brewhaha failed, and after a six-figure judgment, Jones chose to open another restaurant, again with his father's retirement income, and again without paying for his father's care. R807, 735, 820–25, SE23

- Although he used his father's retirement income for his restaurants, and claimed his father was his partner, his father was not listed as an owner on the business registration documents. R735.

- In one year, Jones took more than $60,000 from his father's retirement income. R742, 830–32.

- In that same year, Jones made just four payments to Highland Cove totaling about $12,000, which left an unpaid balance of over $27,000. SE3.

- Jones failed to pay for his father's personal expenses, such as a haircut a bed pad, or his medications. R523, 543, 573, SE3.

- Highland Cove sent Jones monthly bills and statements requesting payment. R519, 556, SE3.

- Highland Cove spoke with Jones several times each month about his need to make payments. R522, 541–42.

- Highland Cove sent an eviction notice, but Jones still refused to make payments or remove his father from Highland Cove. R543–44, SE4.

- Tower, Highland Cove's manager, *did not* agree to let Jones miss or defer payments.[15]

- When Jones learned that the Public Guardian was taking over his father's income, and he would no longer have access to it, Jones continued to try to siphon his father's resources by opening a new credit card in his father's name and, in three weeks, transferring an almost $5,000 balance from an old card in his father's name, ran up $14,000 in new charges, some for the restaurant and some for his own personal pleasure (like Snowbird or cable television), and then asked the Public Guardian to pay for these expenses. R663, 729–30, SE25–26

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[15] Jones's brief says that the evidence showed that "Tower did not recall the arrangement with [Jones] to defer payments." Aplt.Brf.46. That is wrong. Especially where, as here, the evidence is to be viewed in the light most favorable to the jury's verdict. When asked if he let Jones defer payments, Tower said bluntly, "No. That would not have been my standard procedure." R548 (cleaned up). True, Tower did say it was possible that Jones *asked* for a deferment (Tower could not remember if he had) and that he did not recall the specifics of his conversations with Jones, but Tower reiterated that he "would not have agreed to postponement of months of nonpayment." R552–53 (emphasis added).

- Jones drafted documents to try and retake control of his father's income from the Public Guardian and had his father—who at this point could not identify a lion or rhinoceros or repeat one- or two-syllable words—sign them. SE17–19.

This evidence is overwhelming of Jones's knowledge. When it is viewed in the light most favorable to the jury's verdict, as it must be, it is much more than "some evidence" of Jones knowledge and ends this Court's sufficiency inquiry. *Miles*, 2014 UT 47, ¶10.

Jones also says that there was "no evidence that there was ever an actual substantial risk of loss" because his father was not evicted, and Highland Cove could not evict him. R47. Yet Jones ignores the more than $60,000 that he "loaned" himself from his father's retirement income, the more than $19,000 in charges that rang up on his father's credit card, and the fact that he then discharged any obligation he had to repay these amounts his personal bankruptcy.[16] So not only was there a "risk of loss," there was an *actual* loss. That's why the trial court ordered Jones to pay $75,000 in complete restitution. Complete restitution is the amount "necessary to compensate a

[16] This is consistent with Jones's unwillingness below to accept any responsibility for his actions. For sentencing, he said that he was "grateful that through all of this [his] father had suffered no harm and no loss." R978, R1003, 1011. The court responded, "Your father suffered a loss in terms of the money that you diverted away from him. . . . He is the victim. . . . You've done a significant amount of harm financially to your father." R979, 982.

victim for *all losses* caused by the defendant." Utah Code Ann. § 77-38a-302 (West 2018) (emphasis added).

CONCLUSION

For the foregoing reasons, the State asks this Court to affirm.

Respectfully submitted on February 8, 2019.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 13,903 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

Nathan D. Anderson
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CERTIFICATE OF SERVICE

I certify that on February 8, 2019, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

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/s/ Melanie Kendrick

Addenda

Addendum A

Utah Code Annotated § 76-1-402 (West 2018)

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.
(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:
(a) The offenses are within the jurisdiction of a single court; and
(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.
(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:
(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or
(c) It is specifically designated by a statute as a lesser included offense.
(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.
(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

Utah Code Annotated § 76-5-111 (West 2018)

(1) As used in this section:

(a) "Abandonment" means a knowing or intentional action or inaction, including desertion, by a person or entity acting as a caretaker for a vulnerable adult that leaves the vulnerable adult without the means or ability to obtain necessary food, clothing, shelter, or medical or other health care.

(b) "Abuse" means:

(i) attempting to cause harm, intentionally or knowingly causing harm, or intentionally or knowingly placing another in fear of imminent harm;

(ii) causing physical injury by knowing or intentional acts or omissions;

(iii) unreasonable or inappropriate use of physical restraint, medication, or isolation that causes or is likely to cause harm to a vulnerable adult that is in conflict with a physician's orders or used as an unauthorized substitute for treatment, unless that conduct furthers the health and safety of the adult; or

(iv) deprivation of life-sustaining treatment, except:

(A) as provided in Title 75, Chapter 2a, Advance Health Care Directive Act; or

(B) when informed consent, as defined in this section, has been obtained.

(c) "Business relationship" means a relationship between two or more individuals or entities where there exists an oral or written agreement for the exchange of goods or services.

(d)(i) "Caretaker" means any person, entity, corporation, or public institution that assumes the responsibility to provide a vulnerable adult with care, food, shelter, clothing, supervision, medical or other health care, or other necessities.

(ii) "Caretaker" includes a relative by blood or marriage, a household member, a person who is employed or who provides volunteer work, or a person who contracts or is under court order to provide care.

(e) "Deception" means:

(i) a misrepresentation or concealment:

(A) of a material fact relating to services rendered, disposition of property, or use of property intended to benefit a vulnerable adult;

(B) of the terms of a contract or agreement entered into with a vulnerable adult; or

(C) relating to the existing or preexisting condition of any property involved in a contract or agreement entered into with a vulnerable adult; or

(ii) the use or employment of any misrepresentation, false pretense, or false promise in order to induce, encourage, or solicit a vulnerable adult to enter into a contract or agreement.

(f) "Elder adult" means a person 65 years of age or older.
(g) "Endeavor" means to attempt or try.
(h) "Exploitation" means an offense described in Subsection (4) or Section 76-5b-202.
(i) "Harm" means pain, mental anguish, emotional distress, hurt, physical or psychological damage, physical injury, suffering, or distress inflicted knowingly or intentionally.
(j) "Informed consent" means:
(i) a written expression by the person or authorized by the person, stating that the person fully understands the potential risks and benefits of the withdrawal of food, water, medication, medical services, shelter, cooling, heating, or other services necessary to maintain minimum physical or mental health, and that the person desires that the services be withdrawn. A written expression is valid only if the person is of sound mind when the consent is given, and the consent is witnessed by at least two individuals who do not benefit from the withdrawal of services; or
(ii) consent to withdraw food, water, medication, medical services, shelter, cooling, heating, or other services necessary to maintain minimum physical or mental health, as permitted by court order.
(k) "Intimidation" means communication conveyed through verbal or nonverbal conduct which threatens deprivation of money, food, clothing, medicine, shelter, social interaction, supervision, health care, or companionship, or which threatens isolation or harm.
(l)(i) "Isolation" means knowingly or intentionally preventing a vulnerable adult from having contact with another person by:
(A) preventing the vulnerable adult from receiving visitors, mail, or telephone calls, contrary to the express wishes of the vulnerable adult, including communicating to a visitor that the vulnerable adult is not present or does not want to meet with or talk to the visitor, knowing that communication to be false;
(B) physically restraining the vulnerable adult in order to prevent the vulnerable adult from meeting with a visitor; or
(C) making false or misleading statements to the vulnerable adult in order to induce the vulnerable adult to refuse to receive communication from visitors or other family members.
(ii) The term "isolation" does not include an act intended to protect the physical or mental welfare of the vulnerable adult or an act performed pursuant to the

treatment plan or instructions of a physician or other professional advisor of the vulnerable adult.
(m) "Lacks capacity to consent" means an impairment by reason of mental illness, developmental disability, organic brain disorder, physical illness or disability, chronic use of drugs, chronic intoxication, short-term memory loss, or other cause to the extent that a vulnerable adult lacks sufficient understanding of the nature or consequences of decisions concerning the adult's person or property.
(n) "Neglect" means:
(i) failure of a caretaker to provide nutrition, clothing, shelter, supervision, personal care, or dental or other health care, or failure to provide protection from health and safety hazards or maltreatment;
(ii) failure of a caretaker to provide care to a vulnerable adult in a timely manner and with the degree of care that a reasonable person in a like position would exercise;
(iii) a pattern of conduct by a caretaker, without the vulnerable adult's informed consent, resulting in deprivation of food, water, medication, health care, shelter, cooling, heating, or other services necessary to maintain the vulnerable adult's well being;
(iv) intentional failure by a caretaker to carry out a prescribed treatment plan that results or could result in physical injury or physical harm; or
(v) abandonment by a caretaker.
(o) "Physical injury" includes damage to any bodily tissue caused by nontherapeutic conduct, to the extent that the tissue must undergo a healing process in order to be restored to a sound and healthy condition, or damage to any bodily tissue to the extent that the tissue cannot be restored to a sound and healthy condition. "Physical injury" includes skin bruising, a dislocation, physical pain, illness, impairment of physical function, a pressure sore, bleeding, malnutrition, dehydration, a burn, a bone fracture, a subdural hematoma, soft tissue swelling, injury to any internal organ, or any other physical condition that imperils the health or welfare of the vulnerable adult and is not a serious physical injury as defined in this section.
(p) "Position of trust and confidence" means the position of a person who:
(i) is a parent, spouse, adult child, or other relative by blood or marriage of a vulnerable adult;
(ii) is a joint tenant or tenant in common with a vulnerable adult;

(iii) has a legal or fiduciary relationship with a vulnerable adult, including a court-appointed or voluntary guardian, trustee, attorney, or conservator; or
(iv) is a caretaker of a vulnerable adult.
(q) "Serious physical injury" means any physical injury or set of physical injuries that:
(i) seriously impairs a vulnerable adult's health;
(ii) was caused by use of a dangerous weapon as defined in Section 76-1-601;
(iii) involves physical torture or causes serious emotional harm to a vulnerable adult; or
(iv) creates a reasonable risk of death.
(r) "Undue influence" occurs when a person uses the person's role, relationship, or power to exploit, or knowingly assist or cause another to exploit, the trust, dependency, or fear of a vulnerable adult, or uses the person's role, relationship, or power to gain control deceptively over the decision making of the vulnerable adult.
(s) "Vulnerable adult" means an elder adult, or an adult 18 years of age or older who has a mental or physical impairment which substantially affects that person's ability to:
(i) provide personal protection;
(ii) provide necessities such as food, shelter, clothing, or medical or other health care;
(iii) obtain services necessary for health, safety, or welfare;
(iv) carry out the activities of daily living;
(v) manage the adult's own resources; or
(vi) comprehend the nature and consequences of remaining in a situation of abuse, neglect, or exploitation.
(2) Under any circumstances likely to produce death or serious physical injury, any person, including a caretaker, who causes a vulnerable adult to suffer serious physical injury or, having the care or custody of a vulnerable adult, causes or permits that adult's person or health to be injured, or causes or permits a vulnerable adult to be placed in a situation where the adult's person or health is endangered, is guilty of the offense of aggravated abuse of a vulnerable adult as follows:
(a) if done intentionally or knowingly, the offense is a second degree felony;
(b) if done recklessly, the offense is third degree felony; and
(c) if done with criminal negligence, the offense is a class A misdemeanor.

(3) Under circumstances other than those likely to produce death or serious physical injury any person, including a caretaker, who causes a vulnerable adult to suffer harm, abuse, or neglect; or, having the care or custody of a vulnerable adult, causes or permits that adult's person or health to be injured, abused, or neglected, or causes or permits a vulnerable adult to be placed in a situation where the adult's person or health is endangered, is guilty of the offense of abuse of a vulnerable adult as follows:
(a) if done intentionally or knowingly, the offense is a class A misdemeanor;
(b) if done recklessly, the offense is a class B misdemeanor; and
(c) if done with criminal negligence, the offense is a class C misdemeanor.
(4)(a) A person commits the offense of exploitation of a vulnerable adult when the person:
(i) is in a position of trust and confidence, or has a business relationship, with the vulnerable adult or has undue influence over the vulnerable adult and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, the vulnerable adult's funds, credit, assets, or other property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the adult's property, for the benefit of someone other than the vulnerable adult;
(ii) knows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, or assists another in obtaining or using or endeavoring to obtain or use, the vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of his property for the benefit of someone other than the vulnerable adult;
(iii) unjustly or improperly uses or manages the resources of a vulnerable adult for the profit or advantage of someone other than the vulnerable adult;
(iv) unjustly or improperly uses a vulnerable adult's power of attorney or guardianship for the profit or advantage of someone other than the vulnerable adult; or
(v) involves a vulnerable adult who lacks the capacity to consent in the facilitation or furtherance of any criminal activity.
(b) A person is guilty of the offense of exploitation of a vulnerable adult as follows:
(i) if done intentionally or knowingly and the aggregate value of the resources used or the profit made is or exceeds $5,000, the offense is a second degree felony;

(ii) if done intentionally or knowingly and the aggregate value of the resources used or the profit made is less than $5,000 or cannot be determined, the offense is a third degree felony;
(iii) if done recklessly, the offense is a class A misdemeanor; or
(iv) if done with criminal negligence, the offense is a class B misdemeanor.
(5) It does not constitute a defense to a prosecution for any violation of this section that the accused did not know the age of the victim.
(6) An adult is not considered abused, neglected, or a vulnerable adult for the reason that the adult has chosen to rely solely upon religious, nonmedical forms of healing in lieu of medical care.

Utah Code Annotated § 76-5-513 (West 2018)

(1) As used in this section:

(a) "Fiduciary" is as defined in Section 22-1-1.

(b) "Financial institution" means "depository institution" and "trust company" as defined in Section 7-1-103.

(c) "Governmental entity" is as defined in Section 63G-7-102.

(d) "Person" does not include a financial institution whose fiduciary functions are supervised by the Department of Financial Institutions or a federal regulatory agency.

(e) "Property" is as defined in Section 76-6-401.

(f) "Public money" is as defined in Section 76-8-401.

(2) A person is guilty of unlawfully dealing with property by a fiduciary if the person deals with property that has been entrusted to him as a fiduciary, or property of a governmental entity, public money, or of a financial institution, in a manner which the person knows is a violation of the person's duty and which involves substantial risk of loss or detriment to the owner or to a person for whose benefit the property was entrusted. A violation of this Subsection (2) is punishable under Section 76-6-412.

(3)(a) A person acting as a fiduciary is guilty of a violation of this subsection if, without permission of the owner of the property or some other person with authority to give permission, the person pledges as collateral for a personal loan, or as collateral for the benefit of some party, other than the owner or the person for whose benefit the property was entrusted, the property that has been entrusted to the fiduciary.

(b) An offense under Subsection (3)(a) is punishable as:

(i) a felony of the second degree if the value of the property wrongfully pledged is or exceeds $5,000;

(ii) a felony of the third degree if the value of the property wrongfully pledged is or exceeds $1,500 but is less than $5,000;

(iii) a class A misdemeanor if the value of the property is or exceeds $500, but is less than $1,500 or the actor has been twice before convicted of theft, robbery, burglary with intent to commit theft, or unlawful dealing with property by a fiduciary; or

(iv) a class B misdemeanor if the value of the property is less than $500.

Utah R. Evid. 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

(c) Evidence of similar crimes in child molestation cases.

(1) In a criminal case in which the accused is charged with child molestation, evidence of the commission of other acts of child molestation may be admissible to prove a propensity to commit the crime charged provided that the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

(2) For purposes of this rule "child molestation" means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.

(3) Rule 404(c) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of evidence.

Addendum B

To Whom It May Concern,

I, David O Jones, do hereby authorize David Bryce Jones, my son and business partner, to borrow funds, on a periodic basis, from any or all of my retirement accounts, or from accounts receiving my retirement or insurance payments, for business or personal purposes, as he deems necessary.

Any loans made to David Bryce Jones, as authorized by either this document or by the Power-of Attorney he currently holds to handle my affairs, will accrue simple interest of 5% per year, from the time the funds are received by him. David Bryce Jones will maintain the necessary records to document any such loans, and to determine repayment requirements.

There will be no limit on the amount of the loans that can be made to David Bryce Jones, and no restriction on his use of my funds and assets, as long as he assures that I, David O Jones, have comfortable and safe living arrangements, and receive personal and medical care and any medications that I require.

Signed this 26 day of November, 2013,

by

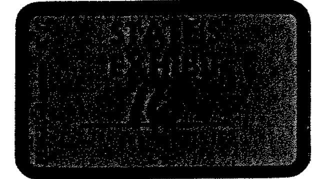
David O Jones

David O Jones

and

David Bryce Attorney in fact

David Bryce Jones, Attorney-in-Fact for David O Jones



Addendum C

To Whom it May Concern,

Re: Management of monthly retirement payments, bills and expenses for David O Jones

I, David O Jones, do hereby authorized and direct my son, David Bryce Jones, to manage the funds from my retirement accounts, to pay my monthly bills and expenses, from the bank account into which they are deposited.

After paying my monthly bills and expenses, from the funds that remain I also authorize and approve monthly loans of $2,000 to my son, David Bryce Jones. Each monthly loan will be for a term of 5 years (60 months), and will bear an interest rate of 5% annual simple interest.

The accumulated principle and interest of each of these loans will be paid into my personal checking account at the conclusion of the five year term.

I do not recognize the authority of any person, institution or Agency that attempts to change these directions for the management and disposition of my retirement funds.

Any questions may be directed to (801) 574-6991. If I am not available, you may speak to my son, Bryce Jones, who holds Durable Power of Attorney for me.

Thank you,

David O Jones

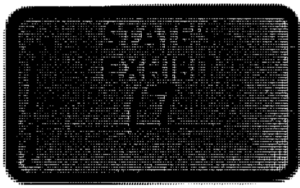
David O Jones

Signed before me this 9th day of January, 2015

Notary Public

My Commission expires: 03/30/17

NOTARY PUBLIC
JORDAN B McCLELLAN
665225
COMMISSION EXPIRES
MARCH 30, 2017
STATE OF UTAH



To: Social Security Administration

Western Program Service Center

P.O. Box 2000

Richmond, CA 94802-1791

Re: David O Jones payments & correspondence

I, David O Jones, do hereby direct this Office, effective February 1, 2015, to change the bank account into which my monthly claim checks are deposited, and to change my mailing address for notices, statements, and my 1099 for 2014.

My birthday is February 4, 1924

My social security # is 529-28-1874

Please deposit my monthly checks into the checking account at Wells Fargo Bank, on which I am a signer:

Bank Routing # 124002971

Checking Account # 6248763309

Please change my mailing address to 369 E 900 S #291 Salt Lake City, Utah 84111

I do not recognize the authority of any person, institution or Agency that attempts to change these directions, and I direct you to refuse to recognize any changes to my deposit account or my mailing address, that are not authorized under my notarized signature.

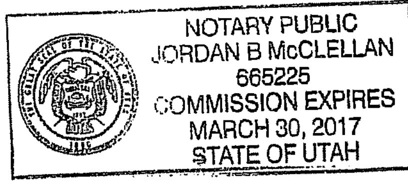
Any questions may be directed to (801) 574-6991. If I am not available, you may speak to my son, Bryce Jones, who holds Durable Power of Attorney for me.

Thank you,

David O. Jones

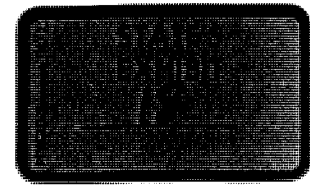
David O Jones

Signed before me this 9th day of January, 2015



Notary Public

My Commission expires: 03/30/17



Jones.000587

To: Office of Personnel Management

Attn: Retirement Operations

Re: David O Jones claim payments & correspondence

I, David O Jones, do hereby direct this Office, effective February 1, 2015, to change the bank account into which my monthly claim checks are deposited, and to change my mailing address for notices, statements, and my 1099 for 2014.

My birthday is February 4, 1924

My social security # is 529-28-1874

My OPM Claim number is CSA 2 245773 0

Please deposit my monthly checks into the checking account at Wells Fargo Bank, on which I am a signer:

Bank Routing # 124002971

Checking Account # 6248763309

Please change my mailing address to 369 E 900 S #291 Salt Lake City, Utah 84111

I do not recognize the authority of any person, institution or Agency that attempts to change these directions, and I direct you to refuse to recognize any changes to my deposit account or my mailing address, that are not authorized under my notarized signature.

Any questions may be directed to (801) 574-6991. If I am not available, you may speak to my son, Bryce Jones, who holds Durable Power of Attorney for me.

Thank you,

David O Jones

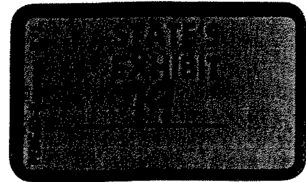
David O Jones

Signed before me this 9th day of January, 2015

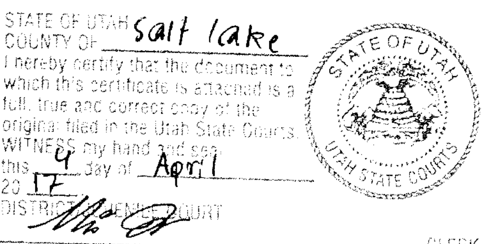
Notary Public

My Commission expires: 03/30/17

NOTARY PUBLIC
JORDAN B McCLELLAN
665225
COMMISSION EXPIRES
MARCH 30, 2017
STATE OF UTAH



Addendum D



JAMES H. DEANS, #846
TIMOTHY S. DEANS, #13193
Attorney for Plaintiff
440 South 700 East - #101
Salt Lake City, UT 84102
Telephone: 801-575-5005

THIRD DISTRICT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT
450 SOUTH STATE STREET, SALT LAKE CITY, UTAH

K S PARK IRA **Plaintiff(s),** vs. DAVID BRYCE JONES, DAVID O JONES, FOOTHILL MANAGEMENT LLC **Defendant(s),**	**COMPLAINT FOR EVICTION (UNLAWFUL DETAINER: DEFAULT IN RENT)** **Civil No.:** EV **Judge:** (Discovery Tier: Exempt)

Plaintiff(s) complains of defendant(s) and for cause of action alleges:

1. That the amount claimed in controversy is less than $20,000 exclusive of costs.

2. That plaintiff(s) is the owner of certain real property located at:

2108 East 1300 South Salt Lake City 84108, State of Utah; and that defendant(s) is/are a resident of Salt Lake County, State of Utah.

3. That by instrument dated 03/15/13, plaintiff(s) as lessor and defendant(s) as lessee agreed upon the rental of the premises at the above address on a lease basis commencing 3/15/13 - 5/15/18. Pursuant to the terms of the agreement defendant(s) agreed to pay plaintiff(s) a reasonable rental in the sum of $3,400.00 per month for the use thereof, payable in advance on the 1st day of each month, together with a late fee of as set forth in the Agreement if rent not paid within 5 day(s) after due date. A copy of the Agreement is attached hereto as Exhibit "A" and hereby made a part hereof.

4. That defendant(s) is/are presently in arrears in rent in the sum of $10,331.52 for the period commencing 05/01/14 and ending 06/30/14 and that plaintiff(s), by and through its agents, has made demand upon defendant(s) for payment but defendant(s) has/have neglected and refused to pay plaintiff(s).

5. That on or about the 7th day of June , 2014 defendant(s) was/were served a 3 -Day Notice to Pay Rent or Vacate. A copy of said Notice being attached hereto as Exhibit "B" and hereby made a part hereof, but that defendant(s) has/have failed to pay the rent demanded or vacate the premises and therefore is in unlawful detainer pursuant to Section 78B-6-811 U.C.A.

6. That pursuant to the terms of paragraph 23 of the Agreement defendant(s) agreed to be responsible for all costs including a reasonable attorney's fee should plaintiff(s) take legal action to enforce its rights under the Agreement.

7. That plaintiff(s) is/are entitled to a reasonable attorney's fee, together with its costs and expenses incurred herein.

8. Pursuant to Utah Code 78B-6-811, plaintiff asks for a judgment for any of the following.

A. Any rent due and unpaid by defendant(s) through the end of the parties' rental agreement;

B. Damages caused because defendant(s) remained in possession of plaintiff's property, in unlawful detainer, after the time expired in the eviction notice(s) referred to in this complaint;

C. Physical damages beyond normal wear and tear (waste) caused by defendants to the plaintiff's property during the time defendant(s) were in possession of plaintiff's property;

WHEREFORE, plaintiff(s) prays Judgment against defendant(s) as follows:

A. Ordering the defendant(s) to move out and allowing plaintiff(s) to retake possession of the premises and terminating all rights of the defendant(s) arising from the Agreement.

B. If necessary, ordering the Sheriff to forcibly evict the defendant(s) and any and all other persons claiming an interest in the premises through defendant(s) and turn over possession to plaintiff(s) (Order of Restitution).

C. For past due rent in the sum of $8,064.82 for the period commencing 05/01/14 and ending 06/10/14 together with treble rentals from and including the 11th day of June 2014, until possession of the rented premises is restored to plaintiff(s).

D. For an award to Plaintiff(s) of its costs and expenses incurred herein. Together with reasonable attorney's fees.

E. Any rent due and unpaid by defendant(s) through the end of the parties' rental agreement;

F. Damages caused because defendant(s) remained in possession of plaintiff's property, in unlawful detainer, after the time expired in the eviction notice(s) referred to in this complaint;

G. Physical damages beyond normal wear and tear (waste) caused by defendants to the plaintiff's property during the time defendant(s) were in possession of plaintiff's property.

H. For such other and further relief as the Court deems just and equitable in the premises.

DATED this 11th day of June, 2014.

/s/ Timothy S. Deans
TIMOTHY S. DEANS
Attorney for Plaintiff

EXHIBIT "A"

THIS IS A LEGALLY BINDING CONTRACT, IF NOT UNDERSTOOD, SEEK COMPETENT ADVICE.

LEASE

In consideration of the covenants and agreements of the respective parties herein contained, the parties hereto do hereby agree as follows:

1. **PARTIES.** This Lease, dated for reference purposes only, (Date): ____________, is made by and between (Landlord): Kang's Park IRA "Landlord" and (Tenant): Foothill management LLC herein called "Tenant."

2. **PREMISES.** Landlord does hereby demise and let unto Tenant and Tenant hereby leases from Landlord that certain space (herein called "Premises"), together with improvements now and hereafter erected therein (collectively the 'premises'), said Premises being agreed, for the purpose of this Lease as follows:
2108 E 1300 E Salt Lake city, Utah 84108 1317 S 2100 E (parking)
The premises herein referred to are leased in their 'as is where is and with all faults' condition. Said Lease is subject to the terms, covenants and conditions herein set forth and the Tenant covenants as a material part of the consideration of this Lease to keep and perform each and all of said terms, covenants and conditions by it to be kept and performed and that this Lease is made upon the conditions of said performance.

3. **TYPE OF BUSINESS.** Landlord hereby leases to tenant the Premises for the purpose of conducting a Foods Beverage entertainment business, and for no other purpose, except as consent may be granted by Landlord in writing.

4. USE. It is the sole responsibility of the Tenant to check with the necessary and proper governmental authorities regarding the use or the Premises for their stated business purpose; such authorities may include but are not limited to business licensing entities, zoning, housing, building, health, fire departments, etc. Landlord makes no representations or guaranty in this regard.

5. **LENGTH OF LEASE.** The terms of this lease shall be for 62 months commencing (Starting Date:) on 3/15/2013 ~~200~~ and ending on 5/15/2018.
An Option is X is not ____ granted. (If this space is not checked and initialed by both Tenant and Landlord, an Option is not granted). If Option is granted, it is conditional upon the complete compliance with the terms and conditions and covenants of this Lease. The Option Period, if granted, will be for a period of 60 months, extending this Lease until 5/15/2023.
Tenant must notify Landlord in writing of his intention to terminate the lease at least 120 days prior to termination of existing Lease and Tenant must notify Landlord of its intention to exercise the Option 120 days prior to end of lease term.

6. KEY: Tenant will have all locks re-keyed by professional Locksmith & provide Landlord with copy of key(s) within seven days of occupancy.

7. **RENT AND LATE CHARGES.** This is an absolute NET Lease. Tenant agrees to pay the Landlord as rental, without prior notice of demand, for the Premises the base rent monthly sum of $ 3,400 NNN + CAM, annual increases, and fees, and prorated property tax and insurance, etc. per the Lease, payable in equal monthly installments which monthly installment is due on or before the first day of each and every successive calendar

month thereafter during the term hereof, except that the first month(s) prorated rent shall be paid upon the execution hereof. Rent shall be increased by five percent (5%) each year over the previous year. This increase shall take effect upon each yearly anniversary of the original lease date. If this Lease has an Option agreement that is exercised in accordance with the conditions set forth herein, the base rent and annual increases will be established at market rates at the time of the option, but shall not be less than the established base rent due upon exercising of the Option. The annual increase per year until expiration of the option period will be five percent (5%). The CAM, common area maintenance, will include, but is/are not limited to, the tenant's share of the following costs: (a) Care, repair, maintenance & improvement of the premises, entire building(s), land and common areas, (b) Real Estate Taxes on the entire Building(s) and Land; property insurance, tenant's pro-rata share of property tax and insurance in an amount to be determined by Landlord. (c) Utilities: Prorated share of Tenant's utilities to be determined by Landlord, (d) Property management fee. If Tenant is the sole occupant of the premises, then their responsibility is 100% of the afore-referenced fees (a-d). Said rent shall be paid to Landlord, without deduction or offset in lawful money of the United States of America, which shall be legal tender at the time of payment at the Office of the Building or to such other person or at such other place as Landlord may from time to time designate in writing. Tenant hereby acknowledges the 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. Such costs include but are not limited to, processing and accounting charges, and late charges which may be imposed upon Landlord by terms of any mortgage or trust deed covering the Premises. Accordingly, if any installment of rent or of a sum due from Tenant shall not be received by Landlord or Landlord's designee within FIVE days of the due date thereof, then Tenant shall pay to Landlord as late fee equal to ten percent (10%) of such overdue amount. On the sixth day and each day thereafter until rent and other sums due are paid in full, there shall be a one percent additional late fee charged per day of the overdue amount(s). The parties hereby agree that such late charges represent a fair and reasonable estimate of the cost that Landlord will incur by reason of the late payment by Tenant. Acceptance of such late charges by the Landlord shall in no event constitute a waiver of Tenant's default with respect to such overdue amount, nor prevent Landlord from exercising any of the other rights and remedies granted hereunder. Landlord may, at its sole determination, direct Tenant to pay rent into an Escrow Account which may have a cost per month to Tenant not to exceed ($100) one-hundred dollars. If Tenant pays a rent payment with a check that is not honored by the bank, Tenant agrees to pay Landlord $100, per event, to cover all costs and expenses and also all subsequent rent checks must be made with certified checks or money orders made payable to Landlord, or as directed by Landlord.

8. GRAFFITI. If any person places graffiti or marks onto the exterior and/or interior of the premises Tenant is responsible to paint over the graffiti within twenty-four hours of the occurrence. Paint MUST be of the SAME color and quality as the original paint covering the walls of the Premise and the work shall be done in a professional manner. If this is not done within the twenty-four hour period of time, Landlord may at its sole discretion, cause the graffiti to be painted over and the Tenant will be responsible for the cost of such materials and labor, and reimburse Landlord immediately upon presentation of bill.

9. SECURITY DEPOSIT. Tenant has deposited with Landlord the sum of $ $3400 dollars as security for the faithful performance by Tenant of all of the terms, covenants, and conditions of this Lease to be kept and performed by Tenant during the term hereof. If Tenant defaults with respect to any provision of this Lease, including but not limited to the provisions relating to the payment of rent, Landlord may (but shall not be required to) use, apply or retain all or any part of this security deposit for the payment of any rent or any other sum in default, or for the payment of any amount which Landlord may spend or become

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obligated to spend by reason of Tenant's default, or to compensate Landlord for any other loss or damage which Landlord may suffer by reason of Tenants default. If any portion of said deposit is so used or applied Tenant shall within five (5) days, after written demand therefore, to deposit cash with Landlord in an amount sufficient to restore the security deposit to its original amount and Tenant's failure to do so shall be a material breach of this Lease. Landlord shall not be required to keep this security deposit separate from its general funds, and Tenant shall not be entitled to interests on such deposit. No trust relationship is created herein between Landlord and Tenant with respect to said security deposit. If Tenant shall fully and faithfully perform every provision of this Lease to be performed by it a part of the security deposit or any balance shall be returned to Tenant (or, at Landlord's option, to the last assignee of Tenant s interest hereunder) within 30 days of the expiration of the Lease term. In the event of termination of Landlord's interest in this lease Landlord shall transfer said deposit to Landlord's successor in interest. All security, cleaning, damage and performance deposits due Tenant will be refunded to the Tenant within 30 business days of the termination of this agreement in the amount of $ 2,700 except in the event that the tenant has not complied with the rule of the house or conditions of this contract, or that the tenant's duration of tenancy is less than 5 years, or should the Tenant fail to give the owner a hundred-twenty day written notice of Tenant's intention to terminate the lease prior to lease expiration date or should the tenant do damage to the premises or fail to clean all appliances and parts of the premises or pay all monies due or surrender all *keys* to doors, mailboxes, storage, etc. and supply correct and true forwarding address in writing, whereby the Landlord will retain said deposits. Tenant shall not use any part of the deposit for last month's payment. The nonrefundable security deposit is $ 500.

10. USE. Tenant further agrees that said premises shall not be used for any other purpose than as above specified, and Tenant will not assign this lease without written consent of Landlord first having been obtained. Tenant shall not do or permit anything to be done in or about the Premises nor bring or keep anything therein which will in any way increase the existing rate of or effect any fire or other insurance upon the Building or any of its contents, or cause cancellation of any insurance policy covering said Building or any part thereof or any of its contents. Tenant shall not do or permit anything to be done in or about the Premises which will in any way obstruct or interfere with the rights of other tenants or occupants of the Building or injure or annoy them or use or allow the Premises to be used for improper, immoral or unlawful or objectionable purpose, not shall Tenant cause, maintain or permit any nuisance in, on or about the Premises. Tenant shall not commit or suffer to be committed anv waste in or upon the Premises.

11. **HAZARDOUS SUBSTANCE:** No tenant, contractor, agent or other authorized user of any of the premises shall use, generate, manufacture, store, treat, dispose of or release any hazardous substance on, under, about or from any of the premises; and any such activity shall be conducted in compliance with all applicable federal, state and local laws, regulations, including all environmental laws.

12. COMPLIANCE WITH LAW. Tenant shall not use the Premises or permit anything to be done in or about the Premises which will in any way conflict with any law, statute, ordinance or governmental rule or regulation now in force or which may hereafter be enacted or promulgated. Tenant shall, at its sole cost and expense, promptly comply with all laws, statutes, ordinances, and governmental rules, regulations or requirements of any board of fire insurance underwriters or other similar bodies now or hereafter constituted, relating to, or affecting the condition, use or occupancy of the Premises, excluding structural changes not related to or affected by Tenant s improvements or acts. The judgment of any court of competent jurisdiction or the admission of Tenant in any action against Tenant, whether Landlord be a party thereto or not, that Tenant has violated any law, statute, ordinance of governmental rule, regulation or requirement, shall be conclusive of that fact as between the Landlord and Tenant.

13. LIENS. Tenant shall keep the Premises and the property in which the Premises are

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situated free from any liens arising out of any work performed, materials furnished or obligations incurred by Tenant. Landlord may require, at Landlord's sole option, that Tenant shall provide to Landlord in an amount equal to one and one-half (1-1/2) times any and all estimated cost of any improvements, additions, or alterations in the Premises, to insure Landlord against any liability for mechanics' and material man's liens and to insure completion of the work. Tenant fully indemnifies Landlord against any and all liens that may arise.

14. ASSIGNMENT AND SUBLETTING. Tenant shall NOT either voluntarily or by operation of law, assign, transfer, mortgage, pledge, hypothecate or encumber this Lease or any interest therein, and shall not sublet the said Premises or any part thereof, or any right or privilege appurtenant thereto, or suffer any other person (the employees, agents, servants and invites of Tenant excepted) to occupy or use the said Premises, or any portion thereof, without the written consent of Landlord first had and obtained. Consent to one assignment, subletting, occupation or use by any person shall not be deemed to be a consent to any subsequent assignment, subletting, occupation or use by another person. Any such assignment or subletting without said consent shall be void, and shall, at the option of the Landlord, constitute a default under this lease. Landlord must sign any sublease agreement with subtenant to be effective. Any attempted assignment, licensee, transfer or sublease without Landlord's prior written consent shall be void. If Landlord consents to an assignment or subletting, the original Tenant will not be released from all of the obligations, liability of the original lease and the new tenant will deposit $ 1700 as additional security deposit and provide and sign a personal guarantee of the Lease by the principles of the acquiring party prior to the commencement of the Lease. Unless Landlord specifically agrees, in writing, no assignment or sublease shall act as a release of liability of the prior assigning-Tenant.

15. HOLD HARMLESS. Tenant shall indemnify Landlord and hold Landlord harmless from any claim, loss, misdeed, accident or damage suffered from any cause whatsoever occurring upon the premises. Tenant shall indemnify and hold harmless Landlord against any and all claims arising from Tenant's use of the Premises for the conduct of its business or from any activity, work or other thing done, permitted or suffered by the Tenant in or about the Building, and shall further indemnify and hold harmless Landlord against and from any and all claims arising from any breach or default in the performance of the obligation on Tenant's part to be performed under the terms of this Lease, or arising from any acts or negligence of the Tenant, and from all and against all cost, attorney's fees, expenses and liabilities incurred in or about any such claim or any action or proceeding brought thereon, and, in any case, action or proceeding brought against Landlord by reason of any such claim. Tenant upon notice from Landlord shall defend the same at Tenant's sole expense by counsel reasonably satisfactory to Landlord. Tenant as a material part of the consideration to Landlord hereby assumes all risks of damage to property or injury to persons in, upon or about the Premises, from any cause and Tenant hereby waives all claims in respect thereof against Landlord.

Landlord or its agents shall not be liable for any damage to property entrusted to employees of the Building, nor for loss or damage to persons or property resulting from fire, snow, explosion- falling plaster, steam, gas, electricity, water or rain which may leak from any part of the Building or from the pipes, appliances or plumbing works therein or from the roof, street, or subsurface or from any other place resulting from dampness or any other cause whatsoever. Landlord or its agents shall not be liable for interference with the light or other incorporeal hereditaments, loss of business by Tenant, nor shall Landlord be liable for any latent defect in the Premises or in the Building. Tenant shall give prompt notice to Landlord in case of fire or accidents in the Premises or in the Building or of defects therein or in the fixtures or equipment.

Landlord shall not be liable for damage suffered or sustained by Tenant by reason of any breakage or leakage of any plumbing, drain, gas, water pipes, steam or running water or because of any defective condition of any wash stand, tank, water closet or waste water in or about said premises or building or for any damage suffered or sustained from rain, snow, hail, earthquake, fire, wind or wind storms or from any act or negligence of the occupants of any adjoining building. Should any judgment be rendered against Landlord regarding injury or liability claims, Tenant shall contribute the full judgment amount to Landlord to offset the judgment amount.

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The indemnification and the hold Landlord harmless made by Tenant shall survive termination of this agreement and the discharge of Tenant's other obligations hereunder.

16. WAIVER. Tenant hereby waives all rights of recovery against the Landlord for any loss or damage caused by natural disasters. Failure on the part of Landlord to complain of the action of any action or non-action on the part of Tenant, no matter how long the same may continue, shall never be deemed to be a waiver by Landlord of any of its rights hereunder or allowed by law. Further, it is covenanted and agreed that no waiver at any time of any of the provisions hereof by Landlord shall be construed as a waiver of any of the other provisions hereof and that a waiver at any time of any of the provisions hereof shall not be construed as a waiver at any subsequent time of the same provisions. The consent or approval by Landlord to or of any action by Tenant requiring Landlord's consent or approval shall not be deemed to waive or render unnecessary Landlord's consent or approval to or of any subsequent similar acts by Tenant.

17. INSURANCE. Tenant shall maintain and pay for insurance covering their business. Tenant shall pay their share (pro-rata share to be determined by Landlord) of insurance costs for insurance covering the entire property, such insurance to be purchased in amounts, and types, determined by the Landlord. If the Tenant is the sole occupant of the premises, they are responsible for 100% of the insurance costs. The Landlord collects the prorated property Insurance cost at any time (determined by Landlord) during the term of the lease.

18. LIABILITY INSURANCE. Tenant shall, at Tenant's expense, obtain and keep in force during the term of this Lease a policy of comprehensive public liability insurance in the minimum amount of Two Million Dollars insuring Landlord and Tenant against any liability arising out of the ownership, use, occupancy or maintenance of the Premises and all areas appurtenant thereto. The limit of said insurance shall not, however, limit the liability of the Tenant hereunder. Tenant may carry said insurance under a blanket policy, providing, however, said insurance by Tenant shall have a Landlord's protective liability endorsement attached thereto. If Tenant shall fail to procure and maintain said insurance, Landlord may, but shall not be required to, procure and maintain same, but at the expense of Tenant. Insurance required hereunder, shall be in companies rated A+AAA or better in *Best's Insurance Guide*. Tenant shall deliver to Landlord copies of policies of liability insurance required herein or certificates evidencing the existence and amounts of such insurance with loss payable clauses satisfactory to Landlord. No policy shall be cancelable or subject to reduction of coverage except after thirty (30) days prior written notice to Landlord. Landlord may from time to time request copies of the policies and Tenant shall comply within seven days of the request.

19. RULES AND REGULATIONS. Tenant shall faithfully observe and comply with the rules and regulations that landlord shall from time to time promulgate. Landlord reserves the right from time to time to make all reasonable modifications to said rules. The additions and modifications to those rules shall be binding upon Tenant upon delivery of a copy of them to Tenant. Landlord shall not be responsible to Tenant for the nonperformance of any said rules by any other tenant(s) or occupant(s).

20. HOLDING OVER. If Tenant remains in possession of the Premises or any part thereof after the expiration of the term hereof, with or without the express written consent of Landlord, such occupancy shall be a tenancy from month to month at a rental in the amount of 150% of the last monthly rental, plus all other charges payable hereunder, and upon all the terms hereof applicable.

21. ENTRY BY LANDLORD. Landlord reserves and shall at any and all times have the right to enter the Premises, inspect the same. Landlord may, at any time, enter the Premises in order to supply any services to be provided by Landlord to Tenant hereunder, to submit said Premises to prospective purchasers or tenants, to post notices of non-responsibility, and to alter, improve or repair the Premises and any portion of the Building of

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which the Premises are a part and the Landlord may for that purpose erect scaffolding and other necessary structures where reasonably required by the character of the work to be performed. Tenant hereby waives any claim for damages or for any injury or inconvenience to or interference with Tenant's business, any loss of occupancy or quiet enjoyment of the Premises, and any other loss occasioned thereby. For each of the aforesaid purposes, Landlord shall at all times have and retain a key with which to unlock all of the doors in upon and about the Premises, excluding Tenant's vaults, safes and files, and Landlord shall have the right to use any and all means which Landlord may deem proper to open said doors in an emergency, in order to obtain entry to the Premises without liability to Tenant except for any failure to exercise due care for Tenant's property. Any entry to the Premises obtained by Landlord by any of said means, or otherwise shall not under any circumstances be construed or deemed to be a forcible entry or unlawful entry into, or a detainer of, the Premises, or an eviction of Tenant from the Premises or any portion thereof. Tenant shall provide to Landlord a complete set of all keys in current use on the Premises and the security code(s) for any entrance door.

22. RECONSTRUCTION. In the event the Premises or the Building of which the Premises are a part are damaged by fire or other perils covered by extended coverage insurance, contingent upon Insurance Company providing payment of loss to Landlord, Landlord agrees to forthwith repair the same; and this Lease shall remain in full force and effect, except that Tenant shall be entitled to a proportionate reduction of the rent while such repairs are being made, such proportionate reduction to be based upon the extent to which the making of such repairs shall materially interfere with the business carried on by the Tenant in the Premises. If the damage is due to the fault or neglect of Tenant or its employees there shall be no abatement of rent. In the event the Premises or the Building of which the Premises are a part are damaged as a result of any cause other than the perils covered by fire and extended coverage insurance then Landlord Shall forthwith repair the same, provided the extent of the destruction be less than Two Thousand Dollars. In the event the destruction of the Premises or the Building is to an extent greater than Two Thousand Dollars then Landlord shall have the option: (I) to repair or restore such damage or (2) give notice to Tenant at any time within sixty (60) days after such damage terminating this Lease as of the date specified in such notice, which date shall be no less than thirty (30) days and no more than sixty (60) days after the giving of such notice. In the event of giving such notice, this Lease shall expire and all Interest of the Tenant in the Premises shall terminate on the date so specified in such notice and the rent, reduced by a proportionate amount, based upon the extent, if any, to which such damage materially interfered with the business carried on by the Tenant in the Premises, shall be paid up to date of such termination. Notwithstanding anything to the contrary contained in this Article, Landlord shall not have an obligation whatsoever to repair, reconstruct or restore the Premises when the damage resulting from any casualty covered under this Article occurs during the last twenty-four (24) months of the term of this Lease or any extension thereof. Landlord shall not be required to repair any injury or damage by fire or other cause, or to make any repairs or replacements of any panels, decoration, office fixtures, railings, floor covering. Partitions, or any other property installed in the Premises by Tenant. The Tenant shall not he entitled to any compensation or damages from Landlord for loss of the use of the whole or any part of the Premises, Tenant's personal property or any inconvenience or annoyance occasioned by such damage, repair, reconstruction, or restoration.

23. DEFAULT. The occurrence of any one or more of the following events shall constitute a default and breach of this Lease by Tenant.

(a) The vacating or abandonment of the Premises by Tenant.

(b) The failure by Tenant to make any payment of rent or any other payment required to be made by Tenant hereunder, within five (5) days of the due date thereof. Default time is determined according to the date payment is received by Landlord. (c) The failure by Tenant to observe or perform any of the covenants, conditions or provisions of this Lease to be

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observed or performed by the Tenant, other than described in Article (b) above, where such failure shall continue for a period of thirty (30) days (d) The making by Tenant of any general assignment or general arrangement for the benefit of creditors; or the filing by or against Tenant of a petition to have Tenant adjudged a bankrupt, or a petition or reorganization or arrangement under any law relating to bankruptcy (unless, in the case of a petition filed against Tenant, the same is dismissed within sixty (60) days): or the appointment of a trustee or a receiver to take possession of substantially all of Tenant's assets located at the Premises or of Tenants interest in this Lease, where possession is not restored to Tenant within thirty (30) days; or the attachment, execution or other judicial seizure of substantially all of Tenant's assets located at the Premises or of Tenants interest in this Lease, where possession is not restored to Tenant within thirty (30) days; or the attachment, execution or other judicial seizure of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this Lease, where such seizure is not discharged in thirty (30) days. (e) Any failure by Tenant to pay rent or other fees when due, or perform any term hereof, shall, at the option of the Landlord, terminate all rights of Tenant hereunder. All property on the premises is hereby subject to a lien in favor of Landlord for all sums due hereunder, to the maximum extent allowed by law. (f) Tenant agrees to pay Landlord $100 per day when Tenant is in default until the default is cured in addition to the rent, late fees, expenses, charges and other obligation owed to Landlord, described as above in Section 23 and Section 7. (g) Attorneys Fees: In any action arising out of this Contract, the Landlord shall be entitled to costs, expenses, fees, charges and reasonable attorney's fees.

24. **CONDEMNATION**. In the event that during the term of this Lease the Premises or the use or possession thereof, is taken in condemnation proceedings or by any right of eminent domain or for any public or quasi-public use, or purchased by any governmental agency vested with authority to condemn in lieu of such taking, this Lease and the term hereby granted shall terminate and expire on the date when possession shall be taken by the condemner, or purchaser in lieu thereof, and the rent herein reserved shall be apportioned and paid in full to that date. Neither Landlord nor Tenant shall be liable to the other for rent, damage or otherwise for or by reason of any matter or thing occurring thereafter; provided however, that if a part only of the Premises or Building shall be so taken or condemned, and the part of the Premises not so taken or condemned shall in the judgment of both the Landlord and Tenant be reasonably adequate, suitable and acceptable for use by Tenant for the purposes of Tenant's business, then this Lease shall continue in full force and effect except that the rent herein reserve shall be diminished in the proportion that the floor area of the part of the Building so taken or condemned shall bear to the total floor area of the Building immediately prior to such taking. All compensation awarded for such taking of the fee and leasehold interest shall belong solely to and be the property of Landlord provided, however, that Tenant shall be entitled to claim against the condemning authority for loss of business and leasehold, provided such claim does not detract from or diminish the award made to Landlord by the condemning authority and for the cost of removal of fixtures.

25. **PARKING.** Tenant shall have the right to use in common with other tenants or occupants of the Building the parking facilities of the Building subject to the rules and regulations for such parking facilities which may be established or altered by Landlord from time to time during the term hereof This includes but is not limited to the number of parking spaces available and their location. Landlord may at any time assign parking spaces. Landlord, in its sole discretion, may determine whether, or not parking is available on the premises for Tenant's use and how much, if any.

26. **ESTOPPEL STATEMENT.** Tenant shall at any time and from time to time upon not less than (10) days written notice from Landlord execute, acknowledge and deliver to Landlord a statement in writing, (a) certifying that this Lease is unmodified and in full force and effect (or, if modified, stating the nature of such modification and certifying that this Lease as so

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modified, is in full force and effect (any modifications must have been in writing)), and the date to which the rental and other charges are paid in advance, if any; and (b) acknowledge that there are not, to Tenant's knowledge, any uncured defaults on the part of the Landlord hereunder, or specifying such defaults if any are claimed; and (c) the Commencement Date and the Termination Date of this Lease. Any such statement may be relied upon by any prospective purchaser or encumbrancer of all or any portion of the real property of which the Premises are a part.

27. AUTHORITY OF PARTIES. (a) Corporal Authority. If Tenant is a corporation, each individual executing this Lease on behalf of said corporation represents and warrants that he is duly authorized to execute and deliver this Least on behalf of said corporation, in accordance with a duly adopted resolution of the board of directors of said corporation or in accordance with the by-laws of said corporation, and that this Lease is binding upon said corporation in accordance with its terms. All person(s) signing this lease on behalf of a corporation hereby personally guarantees full performance of the lease. (b) Limited Partnerships. If the Landlord herein is a limited partnership, it is understood and agreed that any claims by Tenant on Landlord shall be entirely limited to the assets of the limited partnership, L.LC, and furthermore Tenant expressly waives any and all rights to proceed against the individual partners or officers, directors or shareholders of any partner, corporate partner, etc. except to the extent of their interest in said limited partnership.

28. ALTERATIONS AND ADDITIONS. Tenant shall make improvements to the Premises as set forth in attached Exhibit "_______" herein referenced and made a part hereof. Tenant shall not make or suffer to be made any alterations, additions or improvements to or of the Premises or any part thereof without the written consent of Landlord first had and obtained and any alterations, additions or improvements to or of said Premises including but not limited to wall covering, paneling and built in cabinet work, and all of movable furniture and trade fixtures, shall on the expiration of the term become a part of the realty and belong to the Landlord and shall be surrendered with the Premises. In the event the Landlord consents to the making of any alterations, additions or improvements to the Premises by Tenant, the same shall be made by Tenant at Tenant's sole cost and expense, and any contractor or person selected by Tenant to make the same must first be approved of in writing by Landlord and must be duly licensed and bonded. When Tenant makes any alteration, addition or improvement to the Premises the plans must be previously approved by Landlord in writing and Tenant shall, throughout the Term of the Lease and at no expense whatsoever to Landlord, promptly comply or cause compliance with all applicable laws and ordinances and the orders, rules, and regulations, and requirements of the Federal, State, County and municipal governments and appropriate departments. (For example: permits, inspections, building codes, etc.). Upon the expiration or sooner termination of the term hereof, Tenant shall, upon written demand by Landlord at Tenant's sole cost and expense, forthwith and with all due diligence remove any alterations, additions, or improvements made by tenant, designated by Landlord to be removed, and Tenant shall, forthwith and with all diligence at its sole cost and expense, repair any damage to the Premises caused by such removal and restore the premises to its same prior condition if so designated by Landlord.

29. REMEDIES IN DEFAULT In the event of any such material default or breach by Tenant, Landlord may at any time thereafter, with or without notice or demand and without limiting Landlord in the exercise of a right or remedy which Landlord may have by reason of such default or breach. (A) Terminate Tenant's right to possession of the Premises by any lawful means, in which case this Lease shall terminate and Tenant shall immediately surrender possession of the Premises to Landlord. In such event Landlord shall be entitled to recover from Tenant all damages incurred by Landlord by reason of Tenant's default including, but not limited to, the cost of recovering possession of the Premises; expenses of re-letting, including necessary renovation and alteration of the premises, reasonable attorneys fees, any real estate

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commission actually paid, the worth at the time of award by the court having jurisdiction thereof of the amount by which the unpaid rent for the balance of the term after the time of such award exceeds the amount of such rental loss for the same period that Tenant proves could be reasonably avoided; that portion of the leasing commission paid by Landlord and applicable to the unexpired term of this Lease. Unpaid installments of rent or other sums shall bear interest from the date due at the rate of eighteen per cent (18%) per annum and there shall be a one percent additional late fee charged per day of the overdue amount until unpaid rent and other sums due is paid in full. In the event Tenant shall have abandoned the Premises, Landlord shall have the option of (a) taking possession of the premises and recovering from Tenant the amount specified in this paragraph, or (b) proceeding under the provisions of the following Article (B). (B) Maintain Tenant's right to possession, in which case this Lease shall continue to be effective whether or not Tenant shall have abandoned the Premises. In such event Landlord shall be entitled to enforce all of Landlord's rights and remedies under this Lease, including the right to recover the rent as it becomes due hereunder. (C) Pursue any other remedy now or hereafter available to Landlord under the laws or judicial decision of the State in which the Premises are located. (D) ATTORNEYS FEES: in any action arising out of this Contract, the tenant agrees to pay Landlord all all costs, expenses, fees, charges and reasonable attorney's fees. incurred as part of any court, bankruptcy, arbitration proceeding or appeal.

(E) Landlord may, in addition to any other remedy provided by law or permitted herein, at its option elect not to terminate this lease and re-let the Premises on behalf of Tenant, applying any moneys collected first to the payment of expenses of resuming or obtaining possession of the Premises and second to the payment of cost of placing the Premises in rentable condition, including leasing commission, and third to the payment of rent and any other charges due to Landlord hereunder. Tenant shall remain liable for any deficiency in rent as such charges accrue, which shall be paid to Landlord upon demand therefore.

Furniture, fixtures, business property, personal property of Tenant cannot be removed from the premises until the rent and other charges are fully paid.

30. NOTICES. All notices, concerns, issues and demands which may be required or permitted to be given by Tenant to Landlord shall be in writing. All notices and demands by the Tenant to the Landlord shall be sent via U.S. Mail, postage prepaid, addressed to the Landlord at the address set forth below, or to such other person or place as the Landlord may from time to time designate.

Tenant: Foothill Management LLC, 369E 900S #291. SLC UT 84111

Landlord: K.S. Park, PO BOX 2308, Salt Lake City, UT 84110

31. INVALIDITY OF PARTICULAR PROVISIONS. If any provision of this Lease or its application to any person or circumstance shall to any extent be invalid or unenforceable, the remainder of this Lease, or the application of such provision to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected, and each provision of this Lease shall be valid and be enforced to the fullest extent permitted by law.

32. SUBORDINATION, ATTORNMENT.

Upon request of the Landlord, Tenant will in writing subordinate its rights hereunder to the lien of any first or subsequent mortgage, or First or subsequent deed of trust, insurance company or other lending institutions, now or hereafter in force against the land and building of which the Premises are a part, and upon any buildings hereafter placed upon the land of which the Premises are a part and to all advances made or hereafter to be made upon the security thereof. In the event any proceedings are brought for foreclosure, or in the event of the exercise of the power of sale under any mortgage or deed of trust made by the Landlord covering the Premises, the Tenant shall attorn to the

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purchaser upon any such foreclosure or sale and recognize such purchase as the Landlord under this Lease. Provisions of this Article to the contrary- notwithstanding, and so long as Tenant is not in default hereunder, this Lease shall remain in full force and effect for the full term hereof and any option/extensions, if there are any.

33. BROKERS. Both parties warrant and represent that they have had no dealings with any real estate broker or agents in connection with the negotiation of this Lease and/or the leasing of the premises excepting only __________ None ______ and they know of no other real estate broker or agent who is/are entitled to a commission in this Lease. In the event of any brokerage or claim against one party predicated upon prior dealing with the other party named herein, the other party agrees to defend the same and indemnify the other party against any such claim and to pay the other party all damages and attorney fees suffered thereby.

34. CONDITION & SERVICING OF PREMISES. Tenant accepts Premises in 'as is where is and with all faults' condition. By taking possession of the Premises, Tenant shall be deemed to have accepted the Premises as being in good, sanitary order, condition and repair. Tenant shall, at Tenant's sole cost and expense, keep the Premises and every part thereof in good condition and repair. Tenant, at its cost and expense, shall keep the Premises in a neat, clean, sanitary condition and shall keep in good repair the entire premises including without limitation, walls, ceilings, painting, wall coverings, paneling, carpeting, floor coverings, doors, windows, door and window moldings, electrical system, plumbing system, and heating facilities (including the replacement of light bulbs and fluorescent tubes). Tenant will also maintain, regularly service all HVAC, make-up air and Fire protection systems which service the Premises (including spring and fall servicing as recommended by the manufacturer and replacement of filters as necessary). Tenant will hire a licensed contractor each year to cover/remove cover(s) and service all evaporative cooler(s) serving the Premises. Neither Tenant or any employee of Tenant shall get upon the roof and shall not cause anyone other than a licensed contractor to get upon the roof for such purpose. Tenant shall upon the expiration or sooner termination of this Lease hereof surrender the Premises to the Landlord in good condition. Landlord shall have no obligation whatsoever to alter, remodel, improve, repair, decorate, or paint the Premises or any part thereof and the parties hereto affirm that Landlord has made no representations to Tenant respecting the condition of the Premises or the Building.

35. CONFIDENTIALITY CLAUSE. As important consideration to induce Landlord to enter into this Lease with Tenant, Tenant covenants and warrants that it will keep all information contained in this Lease, and any information pertaining to the Landlord made known to Tenant in the strictest confidence.

36. REPAIRS and MAINTENANCE. Tenant at its sole cost and expense shall repair and maintain their portions of the Building (their space as detailed in the description of the leased premises), including the plumbing, air conditioning. heating and electrical systems, sprinkler systems, glass windows (Tenant will replace any broken glass with glass of equal or better quality in an immediate fashion) installed or furnished by Landlord, also such maintenance and repairs that are caused in part or in whole by the act, neglect, fault or omissions of any duty by the Tenant, its agents, servants, employees or invitees in which case Tenant shall pay to Landlord the reasonable cost of such maintenance and repairs. Landlord shall not be liable for any failure to make any such repairs or to perform any maintenance, there shall be no abatement of rent and Landlord shall have no liability in or to any portion of the Building or the Premises or in or to fixtures, appurtenances and equipment therein. Tenant waives the right to make repairs at Landlord's expense under any law, statute, or ordinance now or hereafter in effect. Tenant shall be responsible for all of the repairs to the interior and exterior of the building (or their portion of the exterior of the building) and pay for it. Tenant at its sole cost and expense shall be responsible to maintain and repair plumbing, leaks, ceilings, walls, roof, electrical, heating, drain, air conditioning, fixtures, and other appliances, parking surface areas and walkways and any other necessary repairs/maintenance, including the timely removal of snow on all surfaces of

the premise, and also maintain the yard, grass and trees in a professional manner. Tenant will be responsible for snow removal. However, Landlord may charge Tenant a pro-rata share of all costs of maintenance and repair on the entire property, or on their individual leased space. The percentage of said pro rations shall be determined by Landlord at its sole discretion. This percent may change from year to year. If Landlord causes work to be performed on the entire Building or Tenant's individual space then Tenant shall pay to Landlord the cost of their pro-rata share of the maintenance or repair work of the entire property or the entire individual leased space. Tenant covenants and agrees to maintain and keep the premise and grounds in First Class Condition. If Landlord elects to do some maintenance or repair work, it will in no way relieve the Tenant of their own obligations under this Lease. Tenant further covenants to immediately have all repairs and/or maintenance work performed in a professional manner by a licensed contractor and in a prompt manner complying with all governmental regulations regarding permits, inspections, etc. Tenant agrees, at his sole cost and expense, to repair and seal all of the cracks in the asphalt on the parking lot and repair all damage to the parking surface.

37. SERVICES AND UTILITIES. Tenant agrees that he accepts Premises in their present condition of 'as is where is and with all faults' Tenant agrees that he will keep said premises in a clean and sanitary condition and will, at his sole cost and expense, comply with rules, ordinances and regulations of any public authority with respect to the use or condition of said premises. Further he agrees that he will pay all water rates, plumbing bills, heating, gas, garbage and electric charges, and for the services of any other utilities. He agrees to keep in first class condition and repair all water pipes, sewage pipes, sprinkler system and connections and any other conduits, fixtures or appliances used or installed in connection with any utility service. Tenant further agrees to contract, and pay, for the removal of snow from the sidewalks, building roof and parking area and pay for first class yard maintenance. If Landlord pays for any utility and/or service charge then the proration of the utility and/or service charge will be determined at the Landlord's sole discretion and any such allocated prorated amount will be the sole obligation of the Tenant to pay Landlord immediately upon presentment of the bill. If Tenant is a single occupant they are responsible for 100% of all utilities and service charges and fees.

38. TAXES. Tenant shall pay, or cause to be paid, before delinquency, any and all taxes levied or assessed and which become payable during the term hereof upon all Tenant's leasehold property located in the Premises. In the event any or all of the Tenant's leasehold improvements, equipment, furniture, signs, fixtures and personal property shall be assessed and taxed, Tenant shall pay to Landlord its share of such taxes within ten (10) days after delivery to Tenant by Landlord of a statement in writing setting forth the amount of such taxes applicable to Tenant's property. Tenant agrees to pay real property taxes in a timely manner (within fifteen days of presentment of the bill by Landlord). Landlord may elect to prorate the property tax share at Landlord's sole discretion and collect that portion of the real property taxes due either each monthly or at any other time(determined by Landlord) during the term of the lease. If the tenant is a sole occupant of the whole building, the tenant is responsible for 100% of the property taxes.

39. RULES AND REGULATIONS. Rules and Regulations, as listed in Addendum 'A' are incorporated herein. Landlord may, without prior notice, from time to time change the Rules and Regulations.

40. GENERAL PROVISIONS. General Provisions as listed in Addendum 'B' are incorporated herein.

41. ADDENDUMS. Addendums to this agreement are incorporated herein.

42. EXHIBITS. Exhibits to this agreement are incorporated herein.

43. DISHONORED CHECKS. Tenant agrees to pay $100 Dollars each time any check is dishonored at the bank and also to pay any fees or penalties imposed by the bank on the Landlord for each occurrence.

44. All negotiations, considerations, representations and undertakings between Landlord and Tenant are incorporated herein and may be modified or altered only by agreement in writing

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between Landlord and Tenant; and no act or omission of any employee or agent of Landlord shall alter, change or modify any of the provisions hereof.

Addendum 'A'

Rules and Regulations:

1. No sign, placard, picture, advertisement, name or notice shall be inscribed, displayed or placed or affixed on or to any part of the building, inside or outside, without the written consent of Landlord first had and obtained and Landlord shall *have* the right to remove any such sign, placard, picture, advertisement, name or notice without notice to and at the expense of Tenant. All approved signs or lettering on doors or the building shall be painted, affixed or inscribed at the expense of Tenant by a person approved of by Landlord. Tenant shall not place anything or allow anything to be placed near the glass of any window, door, petition or wall which may appear unsightly from outside the Premises. Tenant shall not without prior written notice of Landlord screen or obscure any windows, other than by the use of approved window coverings.
2. The sidewalks, walks, passages, exist, and entrances, elevators, and stairways shall not be obstructed by any of the tenants or used by them for any purpose other than for ingress and egress from their respective Premises.
3. Parking is not permitted in the front of the building in the front yard area. Every instance of illegal parking shall have a $50.00 per hour fine. No overnight parking is permitted on premises without written permission first had and obtained from Landlord.
4. Tenant shall not alter any lock or install any new or additional locks or any bolts on any door or windows of the Premises without prior written authorization of Landlord.
5. The toilet rooms, urinals, washbasins shall not be used for any purpose other than that for which they were constructed and no foreign substance whatsoever shall be thrown therein and the expense of any breakage, stoppage, or drainage resulting from the violation of this rule shall be borne by the Tenant who, or whose employees or invitees shall have caused it.
6. Tenant shall not overload the premises or deface the premises or *any* part thereof.
7. No furniture, freight, or equipment shall be brought into the Building without the prior written notice of the Landlord. The customary and reasonable, movement of retail stock in and out of the building is excepted. All moving in or out of the same shall be done in a time and manner as designated by Landlord, other than the customary, reasonable business practice of receiving and shipping retail stock. Safes or other heavy objects shall not be permitted without specific prior written notice. Landlord shall not be responsible for loss of or damage to any such safe or property from *any* cause and all damage done to the Building by moving or maintain any such safe or other property shall be repaired at the expense of Tenant.
8. Tenant shall not use, keep, or permit to be used or kept any foul or noxious gas or substance in the Premises, or permit or suffer the Premises to be occupied or used in a manner offensive to the Landlord or other occupants of the Building by reason of noise, odors, and/or vibrations, or interfere in any way with other Tenants or those having business therein, nor shall any animals or birds be brought in or kept in or about the Premises of the Building.
9. No cooking shall be done or permitted by any Tenant on the Premises nor shall the Premises be used for the storage of merchandise, for washing clothes, for lodging, or for any improper, objectionable, or immoral purpose. If the Tenant is licensed properly by the governing municipal authority/authorities, then cooking is permitted if it is listed as an acceptable "USE" within this Lease. If applicable, within the studio apartments the Tenant may have a small microwave oven. Any other cooking device is prohibited.
10. Tenant shall not use or keep in the Premises or the Building any kerosene, gasoline, or inflammable or combustible fluid or material, or use any method of heating or air conditioning other than that supplied by Landlord.

Landlord's initials: Tenant's Initials: Tenant's Initials:

11. Landlord reserves the right to exclude or expel from the Building any person who, in the judgment of Landlord, is intoxicated or under the influence of liquor or drugs. or who shall in any manner do any act in violation of any of the rules and regulations of the Building.
12. Landlord may assign parking to the Tenant. Vehicles parked in non-assigned spaces can be towed at Tenants expense.
13. No vending machines or machines of any description shall be installed, maintained or operated upon the Premises without the written prior consent of the Landlord.
14. Landlord shall have the right exercisable without notice and without liability to Tenant, to change the name of the Building of which the Premises are a part.
15. Tenant shall not disturb, solicit, or canvas any occupants of the Building and shall cooperate to prevent same.
16. Without the written consent of Landlord Tenant shall not use the name of the Building in connection with any promotion or advertising the business of Tenant except as Tenant's address.
17. Landlord shall have the right to control and open the public portions of the Building, and any public facility, and heating and air conditioning as well as facilities furnished for the common use of the tenants, in such manner as it deems best for the benefit of the tenants generally.
18. Tenant shall keep all entrance doors into the Premises locked when the Premises are not in use, and all doors opening to public corridors shall be kept closed except for normal ingress and egress of Premises.
19. Landlord will direct electricians as to where and when telephone or telegraph wires are to be introduced. No boring or cutting of wires will be allowed without the consent of the Landlord. The location of telephone boxes and call boxes shall be approved by Landlord. Should any tenant install telephone wires, telephones, or machines without prior written approval the Landlord may at any time direct the Tenant to remove the same at Tenant's sole cost and expense.
20. The Landlord reserves the right to establish the hours of business. Business hours must be within the legal limits, if any, established by the governing authority.

Addendum 'B'

General Provisions

1. Clauses, plats, riders, addendum's, exhibits, if any, signed by the Landlord and the Tenant and endorsed on or affixed to this Lease are a part hereof.
2. Waiver. The waiver by Landlord of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition on any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of rent hereunder by Landlord shall not be deemed to be a waiver of any preceding breach by Tenant of any term, covenant or condition of this Lease, other than the failure of the Tenant to pay the particular rental so accepted. regardless of Landlord's knowledge of such preceding breach at the time of the acceptance of such rent.
3. Separability. Any provision of this Lease which shall prove to be invalid, void or illegal shall in no way affect, impair or invalidate any other provision hereof and such other provision shall remain in full force and effect
4. Joint Obligation. If there be more than one Tenant the obligations hereunder imposed upon Tenant shall be joint and several. The undersigned individual(s) and entities, jointly and severally, fully guarantee this Lease. The undersigned individuals fully guarantee this Lease personally.
5. Marginal Headings. The marginal headings and Article titles to the Articles of this Lease are not a part of this Lease and shall have no effect upon the construction or interpretation of

Landlord's Initials: Tenant's Initials: Tenant's Initials:

any part hereof.
6. Time. Time is of the essence of this Lease and each and all of its provisions in which performance is a factor.
7. Successors and Assigns. The covenants and conditions herein contained, subject to the provisions as to assignment, apply to and bind the heirs, successors, executors, administrators and assigns of the parties hereto.
8. Recordation. Tenant shall not record this Lease or a short form memorandum hereof without the prior written consent of the Landlord first had and obtained.
9. Quiet Possession. Upon Tenant paying the rent reserved hereunder and observing and performing all of the covenants, conditions and provisions on Tenant's part to be observed and performed hereunder, Tenant shall have quiet possession of the Premises for the entire term hereof, subject to all the provisions of this Lease.
10. Signs and Auctions. Tenant shall not place any sign upon the Premises or Building or conduct any auction thereon without Landlord's prior written consent.
11. Force Majeure. This Lease and the obligations of the Tenant hereunder shall not be affected or impaired because the Landlord is unable to fulfill any of its obligations hereunder or is delayed in doing so, if such inability or delay is caused by reason of strike, labor troubles, acts of God, or any other cause beyond the reasonable control of the Landlord.
12. Attorney's Fees. If any legal action or proceeding or efforts are brought or made, by either party, to enforce any part of this Agreement, including arbitration or an action for declaratory relief, the Landlord shall recover its reasonable time and expenses spent in preparation and presentation or litigation thereof, and shall recover a reasonable sum for attorney's fees, costs and expenses with regard to the same, all of which shall be paid whether or not such action is prosecuted to judgment. Said sums shall be paid whether or not suit or arbitration is instituted. If the Landlord chooses to use a collection agency to recover money owed from the Tenant the Tenant agrees to reimburse Landlord for all of the collection agency fees in addition to any other sums permissible by law. This provision survives the termination of the Lease.
13. Sale of Premises by Landlord. In the event of any sale of the Building, Landlord shall be and is hereby entirely freed and relieved of all liability under any and all of its covenants and obligations contained in or derived from this Lease arising out of any act, occurrence or omission occurring after the consummation of such sale; and the purchaser, at such sale of any subsequent sale of the Premises shall be deemed, without any further agreement between the parties or their successors in interest or between the parties and any such purchaser, to have assumed and agreed to carry out any and all of the covenants and obligations of the Landlord under this Lease.
14. In the event of default of the Lease Agreement, tenant agrees to pay all collection costs, fees, expenses and charges, but not limited to, reasonable attorney's fees, court costs, cost of preparing documents for court. Tenant agrees to pay collection agency fees up to 50% unpaid balance whether incurred by filing a law suit or otherwise.
15. The undersigned individuals and entities, jointly and severally fully guarantee the lease.
16. Choice of Law. This Lease shall be governed by the laws of the State in which the Premises are located.
17. Name. Tenant shall not use the name of the Building or of the development in which the Building is situated for any purpose other than as an address of the business to be conducted by the Tenant in the Premises.
18. Cumulative Remedies. No remedy or election hereunder shall be deemed exclusive but shall, wherever possible, be cumulative with all other remedies at law or in equity.
The undersigned individuals and entities, jointly and severally fully guarantee the lease.

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Addendum 'C'

PERSONAL GUARANTY

FOR VALUE RECEIVED and as an inducement to Kaug S. Patel RA to enter into, execute and deliver concurrently herewith, a Lease dated the ______ day of ______ month 200___ and commencing no later than 3/15/2013 in which Kaug S. Patel RA appears as the "Landlord" and DAVID Bryce Jones / DAVID O Jones appears as the "Tenant", in which undersigned individuals and entities hold substantial financial interests, the undersigned (collectively "Guarantors"), jointly and severally hereby guarantee, absolutely and unconditionally, (Landlord) Kaug S Patel IRA its successors and assigns the full performance and observance of all the terms, provisions, covenants, conditions and agreements contained in the said Lease to be performed and observed by said Tenant, its successors and assigns.

The Guarantors further agree that their liability under this Guaranty shall be joint and several, primary and that in any right of action which shall accrue to Landlord, under said Lease, Landlord, at its option, may proceed against the Guarantors, jointly and severally, and may proceed against the Guarantors without having commenced any action or having obtained a judgment against said Tenant.

It is agreed that the failure of Landlord to insist in any one or more instances upon a strict Performance or observance of any of the terms, provisions, covenants, conditions, and agreements of said Lease or to exercise any right therein contained shall not be construed or deemed to be a waiver or relinquishment for the future of such terms, provisions, covenant, conditions or agreements, but the same shall continue and remain in full force and effect. Receipt by Landlord of amounts due it under the terms of said Lease the Agreement with knowledge of the breach of any provision of said Lease shall not be deemed a waiver by Landlord of such breach. The Guarantors agree that, with or without notice or demand to either said Tenant or the Guarantors, said Guarantors will reimburse Landlord for all reasonable expenses, costs, charges, and fees including reasonable attorney fees, incurred by Landlord in connection with the exercise of enforcement of its rights hereunder. The guarantors waive all defenses available to surety or guarantor except full performance of the terms, provisions, covenants, conditions and agreements contained in said Lease. Each of the undersigned do hereby represent and warrant, with respect to his, her or its respective financial statement if attached hereto and made a part hereof as an Exhibit or referred to by name and date in an Exhibit attached hereto and made a part hereof, that the data and information set forth in such financial statement (i) is current as of the date thereof; (ii) is true, accurate, complete, as of the date hereof, (iii) fairly represents the financial condition of the individual or entity to whom or which it relates, and (iv) there has been no substantial adverse change in his, her or its financial condition as set forth in such financial statement since the date hereof. All the terms and provisions hereof shall inure to the benefit of the successors and assigns of Landlord and shall be binding upon the Guarantors and their respective heirs, executors, administrators and assigns.

IN WITNESS WHEREOF, the undersigned have hereunto set their hands all on the ____ day of 200___ .

Tenant(s): [signature] [signature]
DAVID BRYCE JONES DAVID O JONES

Landlord's Initials KP Tenant's Initials: DBJ Tenant's Initials

IN WITNESS WHEREOF, the parties hereto have executed this Lease including the Rules and Regulations, Personal Guaranty, and the General Provisions detailed above at the place and on the dates specified immediately adjacent to their respective signatures.

LANDLORD: ______________________ Salt Lake City, Utah

TENANT: ______________________
Signed and Guaranteed Personally

TENANT: ______________________
Signed and Guaranteed Personally

TENANT: ______________________
Signed and Guaranteed Personally

TENANT: ______________________
Signed and Guaranteed Personally

Landlord's Initials: Tenant's Initials Tenant's Initials

Addendum "F"

Tenant has inspected the premises three different occasions during past three months and tenant agrees to take the property in as is condition with an absolute triple net lease.

The base rent is discounted to $3,400 per month from $7,000 per month and the month of March 2013 and April 2013 will be free of base rents in exchange for repairs, maintenances, alterations, additions, and improvements of the property (such as the plumbing, leaks, ceilings, walls, roof, drains, air conditioning, heating systems, electrical systems, glass windows, ceiling sprinkle systems, parking surfaces and etc.) by the tenant at tenant's sole cost and expense.

Landlord will permit the tenant to build a deck outside the building on the North side of the property along the 1300 South Street according to the city's building code and their approval.

The initial lease period is 62 months with an option to renew the lease conditional upon complete timely compliance with the terms and conditions of the lease agreement.

The base rent schedule is:
First year—February will be $3,400 plus CAM charges and pay a security deposit of $3,400.
March will be free of base rent but pay CAM fees.
April will be free of base rent but pay CAM fees and pay the second security deposit of $3,400.
May will be $3,400 plus CAM fees.
And then follows the terms of the lease agreement.

Tenant agrees to pay ~~80%~~ 70% DB of the total CAM fees of the entire property.

Tenant agrees to open utility accounts (electricity, gas, water) of the property under tenant's name during the terms of the lease.

It is the sole responsibility of the tenant at its sole cost and expense to comply and pass the required inspections for tenant's business as deemed required by such government authorities as licensing, Zoning, building, health, fire department, etc.

In the event of any default of the lease agreement, tenant agrees to pay landlord all the discount of the rents and free base rents given to the tenant in addition to other default terms of the lease agreement.

X [signature]
DAVID BRYCE JONE

X [signature]
K. S. PARK

X [signature]
David O. Jones

Addendum G

Changes made per Bryce Jones' request.

2. Premises : 2108 E 1300 S, Salt Lake City, Utah 84106.
5. Length of lease: 62 months. The option period, if granted, will be for a period of 60 months.
7. The annual increase per year until expiration of the option period will be ~~3% or CPI whichever is greater plus 5% of annual gross sale~~. 5%
8. Tenant is responsible to paint over the graffiti within 72 hours of the occurrence.
9. Building means Entire structure (2112 E 1300 S and 2108 E 1300 S) of the property.
13. Remove –" Landlord may require, at Landlord's sole option, that Tenant shall provide to Landlord in an amount equal to one and half times any and all estimated cost of any improvements, additions, or alterations in the premises, to insure Landlord against any liability for mechanics' and material man's liens and to insure completion of the work."
Added –"Tenant will purchase and pay for the insurance for personal injury of the person who does work on the premises, Insurance for personal liability , insurance for damages to the building during demolition and remodeling, insurance for mechanic and material liens, lien waver signed by workers and contractors who works on the premises. Tenant agrees to provide a copy of above insurances before commencing the work on the property.
15. middle of the second line-----"or damages suffered from any cause whatsoever except Landlord's intentional action occurring upon the premises".
Last sentence in page 4 –—"injury or liability claims due to tenant's fault (such as alcoholic intoxication related issues or unknown problems related to the nature of the business and others)". Tenant provides Landlord a copy of Insurance covering these issues within ~~10~~ 30 days after signing the lease agreement. Add Landlord as additionally insured in the insurance policy.
17. Add----"Tenant agrees to pay prorated property insurance in monthly basis"
19. Add----"The addition and modification to the rules will be changed by mutual agreement".
20. ----" at a rental in the amount of 120% of the last monthly rental,"
Add—Tenant allows Landlord to advertise the property for rent, place a rental sign on the property, and show the property to potential tenants during holding over period.
21. Add.—" Landlord makes a 24 hour advance notice to the tenant before entering the leased premises except emergencies such as fire, flood, break ins, vandalism of the property and other unknown emergencies.
23. Remove—–"Default time is determined according to the date payment is received by Landlord".
25. Remove—"Landlord, in its sole discretion, may determine whether, or not parking is available on the premises for Tenant's use and how much, if any".
Add——"Tenant will have ~~90%~~ 75% of the parking stalls of the property.
36. Add----"Tenant shall pay ~~85%~~ of all CAM fees during the terms of the lease".
38. Add---"Tenant agrees to pay his prorated property taxes in monthly basis".
Page 12 – (2) Add—"Tenant may obstruct walks, passages, exits and entrances, and stairways that Tenant deems necessary for the legal or practical needs of Tenant's business.
(3) Add –"allow customers to park their cars overnight if the city permits it".
"any abandoned, inoperable vehicles are not allowed to park overnight

TENANT: DBJ D.O.J.

Jones.001478

on the property"

(7) Add—"furniture, equipment and personal possessions in or out of the premises do not need any written notice to Landlord."

(9) Add –"Cooking, washing of linens and clothing, storing merchandise are allowed".

Page 13—(12) Remove—"Vehicle parked in non-assigned spaces can be towed at Tenants expense".

(13) Add—"allow to have vending machines and games in the premises".

(20) Remove –"The Landlord reserves the right to establish the hours of business".

Addendum "F"

The base rent schedule is: $1,030.57

First year---March 15, 2013 to April 15, 2013 will be $3,400 plus CAM fees.

April 16, 2013 to May 15, 2013 will be free of base rent but pay CAM fees.

May 16, 2013 to June 15, 2013 will be free of base rent but pay CAM fees.

June 16, 2013 to June 30, 2013 will be $1,700 plus CAM fees.

July 1, 2013 to July 31, 2013 will be $3,400 plus CAM fees.

And then follows the terms of the lease agreement.

Anyone or any entity that has interest in the business of Tenant (partners, members of LLC, or investors) must sign the lease agreement with Landlord.

X [signature]
DAVID BRYCE JONES

X [signature]
K.S. PARK

X David O. Jones
DAVID O JONES

Three day Notice
to perform lease Covenants or Surrender lease Premises.

TO : Foothill Management LLC and David Bryce Jones / David O. Jones
2108 East 1300 South, Salt Lake City, Utah 84108.

Within Three days after service of this Notice upon you, you are required to comply with your lease agreement by

1. Complying with the terms of the lease in every manner.
2. Pay overdue rent of $5,065.76 for May 2014 and $5,065.76 for June 2014.
3. Pay one percent additional late fee per day of the overdue amount.
4. Pay check bouncing fees of $200.00. (February 2014 and May 2014)
5. Pay the fee for the lien placed by Casper Plumbing since December 17, 2013.
6. Pay the default fee at the rate of $100.00 per day until it is cured.

The Total Amount due is $10,331.52 plus additional amount owing per above and terms of the lease

Should you fail to comply with these provisions of your lease agreement, you are hereby required TO VACATE THE PREMISES above identified and deliver possession of such premises to your Landlord or his duly authorized agent within 3 days after service of notice. If you fail to comply with your lease agreement or vacate said premises within such period of 3 days, you will be unlawfully detaining possession of said premises, and in accordance with the provisions of Section 78-36-10 Utah Code Annotated, you will be liable for TREBLE DAMAGES for such unlawful detainer, and action will be commenced against you to evict you from said premises and to take judgment against you for three times the damages assessed by the court for unlawful detainer, together with the cost and attorney's fees of legal action taken. You are also liable for the remaining monthly payments for the balance of the terms of the lease

THIS NOTICE is given and served in accordance with the provisions of Section 78-36-3 and Section 78-36-6 Utah Code Annotated.

Dated this 6/7/2014 Kay Park

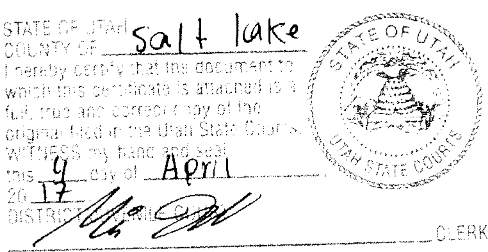
Municipal ordinances provide: It shall be unlawful for any person, upon vacating or removing from buildings, store rooms, or any other building, to fail to remove all garbage, rubbish and ashes from such building and premises and also the ground appertaining thereto, or to fail to place same in a thoroughly sanitary condition 24 hours after said premises shall be vacated.

RETURN OF SERVICE

I certify that service of this notice was completed in accordance with the provisions of Section 78-36-6 and Section 78-36-6 Utah Code Annotated, 1953 ______
Salt Lake City, Utah 84106 by K Stike on date 6/7/2014
_____ Sending a copy through a certified mail addressed to the tenant or
_____ Affixing a copy in conspicuous place on the real premises: ______ or
X Personal delivery to 2108 E 1300 S, SLC UT 84108

K Stike
Signature of Server

FILED
THIRD DISTRICT COURT
14 JUN 16 PM 8:36
WEST JORDAN DEPT.



David Bryce Jones
Defendant
2108 E 1300 S
Salt Lake City, Ut 84108
(801) 574-6991

THIRD DISTRICT COURT, STATE OF UTAH

WEST JORDAN DEPARTMENT

K S PARK IRA	)	
	)	**ANSWER AND**
Plaintiff(s)	)	**COUNTERCLAIM**
vs .	)	
DAVID BRYCE JONES, DAVID O JONES	)	**Civil No.: 1404 08031**
FOOTHILL MANAGEMENT LLC	)	**Judge: Barlow**
Defendants and	)	
Counterclaimants	)	
vs .	)	
K S PARK IRA	)	
K. S. PARK	)	
Counterclaim Defendants	)	(Counterclaim Tier II)

Defendants respond through defendant David Bryce Jones, as follows:

ANSWER

1. Admit.

2. Admit.
3. Admit.
4. Admit subject to Counterclaims.
5. Deny. Service was improper and invalid.
6. Admit subject to Counterclaims.
7. Admit but add that Defendants are entitled to a reasonable attorney's fee, reciprocally.
8.
   A. Deny.
   B. Deny.
   C. Deny.

Judgments requested:

A. Deny.
B. Deny.
C. Deny.
D. Deny. Request award to Defendants of their costs and expenses incurred herein, together with reasonable attorney's fees, based on Counterclaims.
E. Deny.
F. Deny.
G. Deny.
H. Admit.

<u>COUNTERCLAIM</u>

The Counterclaimants, acting through David Bryce Jones, *pro se*, allege as follows:

1. That the amount counterclaimed is $50,000-$60,000 exclusive of costs.
2. That counterclaimants are the lessors of certain real property located at: <u>2108 East 1300 South Salt Lake City 84108</u> , State of Utah, and that K. S. Park IRA and K.S. Park, counterclaim defendants, are residents of Salt Lake County, State of Utah.
3. This Court has jurisdiction and venue over this matter.
4. That the counterclaim defendants, in leasing the aforementioned premises, acted deceptively, recklessly, with gross negligence and/or negligence in representing the premises to the counterclaim plaintiffs as follows.
   A. Counterclaim defendants' failure to disclose structural defects in the building, including:
      1) Both sets of the "gallery" windows on the south side of the building, which had been improperly installed and had fallen away from the building structure, and were threatening to crash to the ground in the parking lot, which endangered people, vehicles and other property. This cost us $1000 to assess, reinforce and repair, in equipment, materials and labor.
      2) The west entry steps, hidden underneath carpeting, which had become seriously eroded and broken, endangering anyone who used them. This cost us over $1000 to clean up, repair, stabilize and re-carpet, in materials and labor.

   B. Dangerous and overgrown foliage, ie; large pine trees were growing sideways over the main parking lot entrance, blocking half of the

driveway and creating a traffic hazard. The Salt Lake Police Department determined that these trees also constituted a public nuisance and danger, as they created "hiding spaces" for potential criminals, and required us to remove them. This cost us $1500 in equipment, removal, labor and disposal.

C. Violations of building codes and safety codes which we had to remove, mitigate and repair before a building permit to remodel the premises would even be issued to us:

   1) The entire south side addition, and the mid-building therapy room additions and the interior 'balcony' were all built in violation of the building code, as the building was classified as a II-A structure, which prohibited wood-frame structures, as all of these were. We were required to remove the "interior structure and balcony" as it was not ADA accessible or compliant. This cost us $10,800 in equipment, material, labor and disposal

   2) The "gallery" addition was built in violation of the Fire and Safety codes in that it was too long to have only a single exit at the far end, with no fire sprinklers. We had to install special fire detectors and alarms, and cut through the "gallery" wall at the midway point and install an additional exit door. This cost us an additional $1,200 in equipment, materials and labor.

   3) The building was not ADA accessible from the parking lot, which required us to build two (2) wheelchair ramps-one in concrete and one framed in conjunction with a large turning platform, as well as the installation of stainless steel hand rails. These additions, required for both the building permit and to pass the business license inspection, cost us $2,500 in materials and labor.

4) The upstairs bathrooms, which were non-original additions, were built in violation of Fire Code, by using 'plastic' ABS waste plumbing in the building plenum, where cast iron or other metal material was required.

C. The systematic destruction of integral components of the premises, ie: 425 linear feet of base moldings was removed from rooms and hallways in the building, resulting in damage to the walls and floors, and requiring $1000 in replacement materials, $400 in repairs and $500 in labor costs.

5. In Summary, the negligence, deception, and bad faith misrepresentations by the counterclaim defendants has cost us $19,900 in equipment, materials and labor costs.

6. In addition to these expenses, dealing with all of these undisclosed and unforeseen problems delayed us for three months in finishing the remodel and being able to open for business. This required us to pay the counterclaim defendants $13,000 in lease and common area payments, without any income from business operations, which entailed a loss to us of at least $30,000-$40,000.

7. Without the deception of the counterclaim defendants, we would not now be experiencing the cash flow crisis in which we currently find ourselves, and the counterclaim defendants would have no reason be taking up the Court's time with this matter, which is of the counterclaim defendants' own device and own making.

DATED this 16th day of June, 2014.

David Bryce Jones
For Defendants and
Counterclaimans

CERTIFICATE OF SERVICE

I caused to be mailed by first-class postage, pre-paid, the following:

ANSWERS AND COUNTERCLAIM

To the following:

K S Park IRA

P. O. Box 2308

Salt Lake City, Ut 84110

K. S. Park

P. O. Box 2308

Salt Lake City, Ut 84110

David Bryce Jones

June 16, 2014

David Bryce Jones
Defendant
2108 E 1300 S
Salt Lake City, Ut 84108
(801) 574-6991

STATE OF UTAH
COUNTY OF Salt lake
I hereby certify that the document to which this certificate is attached is a full, true and correct copy of the original filed in the Utah State Courts.
WITNESS my hand and seal this 4 day of April 20 17
DISTRICT/JUVENILE COURT
CLERK
STATE OF UTAH · UTAH STATE COURTS
2014 JUN 20 AM 11:41
WEST JORDAN DEPT.

THIRD DISTRICT COURT, STATE OF UTAH

WEST JORDAN DEPARTMENT

K S PARK IRA	)	
	)	**MOTION AND**
Plaintiff(s)	)	**MEMORANDUM**
vs .	)	**To Continue**
DAVID BRYCE JONES, DAVID O JONES	)	**Request for Hearing Pending**
FOOTHILL MANAGEMENT LLC	)	**Answer to Counterclaim**
Defendants and	)	
Counterclaimants	)	
vs .	)	**Civil No.: 1404 08031**
K S PARK IRA	)	**Judge: Barlow**
K. S. PARK	)	
Counterclaim Defendants	)	

Complaint from Plaintiff(s) has been received, and an Answer and Counterclaim has been filed by Defendants/Counterclaimants.

Dated this 20 day of June 2014.

David Bryce Jones

CERTIFICATE OF SERVICE

I caused to be mailed by first-class postage, pre-paid, on the 20 day of June, 2014, the following:

Motion and Memorandum to Continue Request for hearing pending answer to counterclaim.

To the following:

K S Park IRA

P. O. Box 2308

Salt Lake City, Ut 84110

K. S. Park

P. O. Box 2308

Salt Lake City, Ut 84110

David Bryce Jones

STATE OF UTAH
COUNTY OF Salt
I hereby certify that the document to which this certificate is attached is a full, true and correct copy of the original filed in the Utah State Courts.
WITNESS my hand and seal
this 4 day of April
20 17
DISTRICT COURT
STATE OF UTAH · UTAH STATE COURTS
22 PM 4:35
CLERK

David Bryce Jones

Defendant
369 E. 900 S. #291
Salt Lake City, Ut 84111
(801) 574-6991

THIRD DISTRICT COURT, STATE OF UTAH

WEST JORDAN DEPARTMENT

K S PARK IRA	)	
	)	**MOTION AND**
Plaintiff(s)	)	**MEMORANDUM**
vs .	)	**To Remove**
DAVID BRYCE JONES, DAVID O JONES	)	**Defendant, David O Jones,**
FOOTHILL MANAGEMENT LLC	)	**From Civil Case # 1404 08031**
Defendants and	)	
Counterclaimants	)	
vs .	)	**Civil No.: 1404 08031**
K S PARK IRA	)	**Judge: Barlow**
K. S. PARK	)	
Counterclaim Defendants	)	

ONE. Defendant David O Jones is not and has never been a member of Foothill Management, LLC.

TWO. As David O Jones had no ownership in or other connection to Foothill Management, LLC, it was absolutely improper for Mr. K. S. Park to request that David O Jones sign the lease for the property at 2108 E. 1300 South Salt Lake City, Utah 84108, between Foothill Management, LLC and the K. S. Park Rollover IRA.

THREE. As David O Jones had no ownership in or other connection to Foothill Management, LLC, it was absolutely improper for Mr. K. S. Park to request that David O Jones sign a personal guarantee for the lease for the property at 2108 E. 1300 South Salt Lake City, Utah 84108, between Foothill Management, LLC and the K. S. Park Rollover IRA.

FOUR. David O Jones is currently under 24-hour a day supervision and medical care for progressive dementia, for which he has been suffering for several years, and was not competent to sign either this lease or the personal guarantee.

FIVE. Due to his condition of progressive dementia, David O Jones has no knowledge or comprehension of the eviction order issued by this court on July 1, 2014, and has no competence to participate in this case.

SIX. David O Jones should be removed as a Defendant in this case due to the aforementioned facts.

Dated this 22 day of August, 2014.

David Bryce Jones

CERTIFICATE OF SERVICE

I caused to be mailed by first-class postage, pre-paid, on the 22 day of August, 2014, the following:

Motion and Memorandum to remove Defendant, David O Jones, From Civil Case # 1404 08031.

To the following:

James H Deans

440 South 700 East, #101

Salt Lake City, Utah 84102

David Bryce Jones

Addendum E

INSTRUCTION NO. 31

DAVID BRYCE JONES is charged in Count 2 with committing the offense of Unlawful Dealing of Property by a Fiduciary on or about October 31, 2013, through February 1, 2015, in Salt Lake County, Utah. You cannot convict him of this offense unless, based on the evidence you find beyond a reasonable doubt each of the following elements:

1. That the defendant, David Bryce Jones,

2. Acting intentionally, knowingly, or recklessly with respect to each and every one of the following elements;

3. Dealt with property that had been entrusted to him as a fiduciary, in a manner which the defendant knew (beyond just recklessness) was a violation of the defendant's duty; ~~and~~

4. Which involved substantial risk of loss or detriment to the owner or to a person for whose benefit the property was entrusted; and

5. That the total value of the property is equal to or exceeds $5,000.

After careful consideration of all of the evidence in this case, if you are convinced that each and every one of the foregoing elements has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant NOT GUILTY.

Addendum F

1 discussion yesterday that it's your choice to make whether you
2 testify or not; is that right?
3 **THE DEFENDANT:** Yes.
4 **THE COURT:** And so if you testify, as I indicated
5 yesterday, you'll be subject to cross-examination by the other
6 side; otherwise, they can't ask you any questions. But if you
7 do not testify, the jury will be informed that they are not to
8 hold your silence against you.
9 Do you understand all those things?
10 **THE DEFENDANT:** Yes, sir.
11 **THE COURT:** Okay. Very well. So, we'll let you make
12 the final decision when it comes time for you to decide whether
13 to take the stand. I'm not going to have another break to
14 address that. I think we've addressed it --
15 **MR. WILSON:** We may have a lunch break, Your Honor.
16 **THE COURT:** Okay. All right.
17 **MR. WILSON:** I suggest.
18 **THE COURT:** All right. Well, it kind of depends on
19 how long you go.
20 **MR. MORTON. WILSON:** I have four witnesses.
21 **THE COURT:** Okay. Yeah, that's -- so it's -- so,
22 yeah, we may find ourselves in that situation.
23 So anything else we need to talk about before we
24 start with the defense case?
25 **MR. MORTON:** No, Your Honor.

1 **THE COURT:** Okay. So, I'll just go and let --
2 **MR. WILSON:** I'd move for directed verdict --
3 **THE COURT:** Okay.
4 **MR. WILSON:** -- for the insufficiency of the
5 evidence, Your Honor.
6 **THE COURT:** Okay. Did you want to make argument
7 regarding that?
8 **MR. WILSON:** No.
9 **THE COURT:** Okay. So the State doesn't need to
10 respond. I've listened carefully to the evidence, I think the
11 State's made a prima facie case with respect to both of the
12 charges. And so the motion for directed verdict is denied, but
13 has been appropriately preserved for the record.
14 So I'll go and mention to Talbot that the jury can
15 come back in and we'll get started with the defense case.
16 **MR. WILSON:** My apologies to the court earlier
17 [inaudible] identifying [inaudible].
18 **THE COURT:** Okay. Well, that's fine. It's important
19 for all of us to kind of remember the setting, but thank you
20 very much, Mr. Wilson.
21 **MR. WILSON:** Are we going to get a short recess, Your
22 Honor?
23 **THE COURT:** Well, we're lining them up, they're going
24 to come back in any second. So my understanding was that we
25 were ready to go.