

2003-253-CD
GUMBERG ASSOCIATES-SANDY PLAZA VS PARTNERSHIP
INGERMAN GINSBURG

**IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA**

GUMBERG ASSOCIATES-SANDY PLAZA,
by J. J. GUMBERG CO., Agent,

CIVIL DIVISION

Plaintiff,

No. 03-253-CD

v.

COMPLAINT

INGERMAN GINSBURG PARTNERSHIP,

Issue No.

Defendant.

Filed on behalf of
Plaintiff:
GUMBERG ASSOCIATES-
SANDY PLAZA, by
J. J. GUMBERG CO., Agent

Counsel of Record for
This party:

H. Brian Peck, Esquire
PA I.D. #41004

6000 Waterdam Plaza Drive, Suite 160
McMurray, PA 15317
(724) 969-0626

FILED

FEB 24 2003

**William A. Shaw
Prothonotary**

**IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA**

GUMBERG ASSOCIATES-SANDY PLAZA,
by J. J. GUMBERG CO., Agent ,

CIVIL DIVISION

Plaintiff,

v.

No.

INGERMAN GINSBURG PARTNERSHIP,

Defendant.

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance, personally or by attorney, and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that, if you fail to do so, the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, THEN YOU SHOULD GO TO, OR TELEPHONE, THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

**DAVID S. MEHOLICK
COURT ADMINISTRATOR
CLEARFIELD COUNTY COURTHOUSE
CLEARFIELD, PA 16830
(814) 765-2641, EXT. 5982**

**IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA**

GUMBERG ASSOCIATES-SANDY PLAZA, CIVIL DIVISION
by J. J. GUMBERG CO., Agent ,

Plaintiff,

No.

INGERMAN GINSBURG PARTNERSHIP

Defendant

COMPLAINT

AND NOW, comes the Plaintiff, GUMBERG ASSOCIATES-SANDY PLAZA, by J. J. GUMBERG CO., Agent, by counsel, and files this Complaint and in support thereof states:

1. The Plaintiff, GUMBERG ASSOCIATES-SANDY PLAZA, is a Pennsylvania limited partnership, which regularly conducts business in Clearfield County, Pennsylvania, and the J. J. Gumberg Company ("Gumberg"), with offices located at Brinton Executive Center, 1051 Brinton Road, Pittsburgh, Pennsylvania 15221-4599, is its duly authorized agent.

2. The Defendant, INGERMAN GINSBURG PARTNERSHIP, is believed to be a partnership with offices located at 215 South Broad Street, Suite 200, Philadelphia, Pennsylvania 19107.

3. The Defendant is the owner of a parcel of land ("Tract A"), consisting of approximately 4.94 acres, located in Sandy Township, Clearfield County, Pennsylvania, and which is a part of the Sandy Plaza Shopping Center.

4. GUMBERG ASSOCIATES-SANDY PLAZA, is the owner of a portion of a parcel of land ("Tract B"), consisting of approximately 13.01 acres, located in Sandy Township, Clearfield County, Pennsylvania, also a part of the Sandy Plaza Shopping Center.

5. The Defendant, as the owner of Tract A, is subject to the provisions of a written agreement titled "Reciprocal Easements and Agreements" ("REA") dated October 10, 1980.

6. Subject to Article III, Paragraph 3.2, subparagraph (a) of the REA, Plaintiff is responsible for its pro rata share of the Common Area Maintenance ("CAM") costs. This provision states, in relevant part:

3.2 Tract Reimbursement of Pro Rata Share of Cost of
Parking Area Maintenance and Common Area Liability
Insurance.

(a) The Tract A Owner shall pay to the Tract B Owner a share, as described below, of the Maintenance Costs (herein called the "Tract A Reimbursement"). Such share shall be the product derived by multiplying the Maintenance Costs by a fraction the numerator of which shall be the Floor Area of all Stores on Tract A and the denominator of which shall be the Floor Area of all Stores on the Shopping Center Site. The Tract A Reimbursement shall be paid by the Tract A Owner to the Tract B Owner in equal monthly installments on the first day of each calendar month during each Operating year in such sums as shall be equal to one-twelfth (1/12th) of the estimated Tract A Reimbursement for each Operating Year as reasonably determined by the Tract B Owner. . . .

A true and correct copy of this provision is attached hereto as Exhibit "A" and incorporated herein by reference. A complete copy of the REA is available upon request.

7. Since 1981, Gumberg, as Agent of the owner of Tract B and pursuant to the REA, has maintained the common areas to Tracts A and B pursuant to the terms of the REA and a Lease of certain commercial space to K Mart Corporation ("K Mart") dated October 21, 1980 and subsequently amended.

A true and correct copy of the pertinent Lease provision is attached hereto as Exhibit "B" and incorporated herein by reference. A complete copy of the Lease is available upon request.

8. On or about January 22, 2002, K Mart, a commercial tenant on Tract A, filed for protection under Chapter 11 of the United States Bankruptcy Code.

9. As a result of the filing, all actions to collect rent and any related charges, including CAM costs, were stayed.

10. Since December 28, 2001, K Mart has defaulted in its CAM payments in the amount of \$18,210.18.

11. In light of the stay, demand was made to the Plaintiff to reimburse Gumberg the CAM costs in accordance with the REA.

12. Under the REA, the Plaintiff is obligated, as owner of Tract A, to reimburse Gumberg, as Agent for the Plaintiff, for the CAM costs attributable to Tract A which have historically been paid by K Mart.

13. The Plaintiff has failed or otherwise refused to comply with Gumberg's demand for payment.

14. The Defendant is in default of the REA for failing to reimburse Gumberg the CAM costs for Tract A.

15. Article X, Paragraph 10.1 of the REA permits Gumberg to charge interest on the unpaid balance at the rate of Ten (10%) percent per annum, and counsel fees incurred on collection. A true and correct copy of REA Article 10.1 is attached hereto as Exhibit "C" and incorporated herein by reference.

16. The balance due the Plaintiff from the Defendant is \$21,774.23, specified as follows:

CAM Adjustment (Due 12/28/01)	\$18,210.18
Interest (12/28/01 to 2/1/03)	2,116.02
Attorneys Fees and Costs (01/01/03 to 2/5/03)	1,448.03

WHEREFORE, GUMBERG ASSOCIATES-SANDY PLAZA, by J.J. GUMBERG CO., Agent prays for a judgment against INGERMAN GINSBURG PARTNERSHIP, a corporation, in the amount of \$21,774.23, plus additional interest accruing on the unpaid balance pursuant to the terms of the REA, plus additional attorneys fees and costs of this action plus interest at the legal rate from the date of judgment.

Date: February 20, 2003

GUMBERG ASSOCIATES-SANDY PLAZA, by
J.J. Gumberg Co., Agent,
By Counsel,



H. Brian Peck, Esquire
P. A. ID # 41004
6000 Waterdam Plaza Drive, Suite 160
McMurray, PA 15317
(724) 969-0626

(C)

(c) Except to the extent of obligations specifically required to be performed by the Tract B Owner, pursuant to Section 3.1 (a) above, each Party shall keep the Parking Area within its respective Tract in good condition and repair and shall make all necessary repairs, repaving and replacements thereto and shall perform all other functions thereon necessary for the proper maintenance, upkeep and operation thereof.

3.2 Tract Reimbursement of Pro Rata Share of Cost of Parking Area Maintenance and Common Area Liability Insurance.

(a) The Tract A Owner shall pay to the Tract B Owner a share, as described below, of the Maintenance Costs (herein called the "Tract A Reimbursement"). Such share shall be the product derived by multiplying the Maintenance Costs by a fraction the numerator of which shall be the Floor Area of all Stores on Tract A and the denominator of which shall be the Floor Area of all Stores on the Shopping Center Site. The Tract A Reimbursement shall be paid by the Tract A Owner to the Tract B Owner in equal monthly installments on the first day of each calendar month during each Operating Year in such sums as shall be equal to one-twelfth (1/12th) of the estimated Tract A Reimbursement for each Operating Year as reasonably determined by the Tract B Owner. At the end of each Operating Year, the actual Tract A Reimbursement for such Operating Year shall be determined by the Tract B Owner and a statement thereof, certified by the Tract B Owner, shall be submitted to the Tract A Owner within thirty (30) days after the end of such Operating Year. In the event the statement specified in the preceding sentence shall indicate that the Tract A Owner has paid to the Tract B Owner for the Operating Year covered by the Statement an amount in excess of the actual Tract A Reimbursement for such Operating Year, the Tract A Owner shall have the right to deduct from the next succeeding monthly installments of the Tract A Reimbursement for the next Operating Year, an amount equal to such overpayment; and in the event such statement shall indicate the Tract A Owner has paid to the Tract B Owner for the preceding Operating Year an amount less than the Actual Tract A Reimbursement, the Tract A Owner shall pay to the Tract B Owner within thirty (30) days of receipt of the aforesaid statement the amount of such deficiency.

(i) The "Maintenance Costs" shall mean the total of all costs and expenses incurred or expended in connection with, and limited to, the performance by the Tract B Owner, or by any other party acting on behalf of the Tract B Owner, of the obligations specified in Section 3.1 (a) and Section 3.1 (b) above. Such costs and expenses shall be reasonably competitive with costs of similar services in the area. Such costs shall not in any event include patching and replacement of paving, real estate taxes, capital expenses, office overhead or license or permit fees.

Repairs
and
Main-
tenance

15. Tenant shall make and pay for all maintenance, replacement and repair necessary to keep its building in a good state of repair and tenable condition, except for the following maintenance, replacement or repair shall be the Landlord's sole responsibility:

including but not limited to, the doors, door checks and the HVAC units,

a. all maintenance, replacement and repair to the roof, outer walls and structural portions of Tenant's building which shall be necessary to maintain buildings in a safe, dry and tenable condition and in good order and repair; and Tenant's

(b) all repairs, maintenance or replacement of or to the demised premises, including but not limited to, underground utility installations and underground electrical conduit and wire, which are or become joined by settlement of the premises or a portion thereof, or caused by soil conditions; and

(c) all repairs and replacement necessary to maintain the common area and or including all driveways, sidewalks, street, service and parking areas free of all settling, clear of standing water, and in a safe, sightly and serviceable condition, free of chuck holes, fissures and cracks.

(d) the keeping of the common area and or including all driveways, sidewalks, street, service and parking areas properly drained and free from debris, ice and snow, and shall provide for lighting, cleaning and keeping same in good repair, safe and attractive in appearance, including but not limited to the striping of same as Tenant may deem necessary.

Provided that Landlord has complied with the provisions of this Article 15, Tenant agrees to pay to Landlord its pro rata share of the costs to sweep, stripe, illuminate (including the replacement of bulbs) and to keep the common area free from ice and snow; and to maintain and replace the exterior landscaping within the demised premises. Landlord agrees to provide the Tenant within thirty (30) days after the end of each lease year a written statement certified by Landlord setting forth the cost of reimbursable items incurred by the Landlord pursuant to this Article 15 and calculations for determining the pro rata share of Tenant then due. At Tenant's request, Landlord shall furnish Tenant with copies of bills, receipts and other proof evidencing said reimbursable costs. Tenant's pro rata share of such expenses shall be an amount which shall be equal to the product of the total expense incurred by Landlord in providing such service multiplied by a fraction, the numerator of which shall be the number of square feet of leased area in Tenant's building and the denominator of which shall be the total number of square feet of gross leaseable area in all buildings erected and constructed on or within the land described in Exhibits A and A-1.

See Page
8A for
Insert

Nothing herein contained shall obligate Tenant to pay any share of costs and expenses incurred by Landlord for patching and replacement of paving, real estate taxes (other than hereinabove set forth), capital expenses, office overhead, license and permit fees, or rubbish removal for other tenants.

In the event buildings or improvements constituting the demised premises or a portion thereof shall be rendered unusable due to Landlord's default or negligence with respect to required repairs, there shall be a just and equitable adjustment of all annual minimum rental and all other charges payable under this lease and prompt shall be made in all cases emergency repairs which shall be Landlord's responsibility, hereunder, and which shall be necessary to protect the buildings or contents and/or to keep the common areas in a neat, clean, safe and orderly condition may be made by Tenant without notice to Landlord and the cost of such repairs not to exceed Three Thousand Dollars--in any one instance may be deducted by Tenant from rentals and amounts owing hereunder

(\$3,000.00)

repairs
and
maintenance
cont'd

During the term of this lease, Tenant shall pay to Landlord, monthly in advance on the first day of each month, the sum of Seven Hundred Dollars (\$700.00) being the estimate of Tenant's prorata share of the maintenance costs to be incurred by Landlord pursuant to this Article. Said amount shall be adjusted and revised by Landlord as of the end of the initial lease year and each subsequent lease year during the term hereof on the basis of the actual maintenance costs incurred during the immediately preceding lease year plus reasonably anticipated increases in such costs. Upon Landlord's furnishing to Tenant a written statement setting forth such revised estimate of maintenance costs to be incurred by Landlord pursuant to this Article and Tenant's approval thereof, Tenant shall pay to Landlord such revised estimated share in monthly installments in advance on the first day of each month in each lease year until the next succeeding revision of such estimate. If Tenant's prorata share of the maintenance costs incurred exceeds Tenant's payments in that lease year, Tenant shall pay to Landlord the deficiency within sixty (60) days after receipt of the statement. If Tenant's payments exceed Tenant's prorata share of the costs incurred, Tenant shall be entitled to a credit for such excess against estimated payments next thereafter due to Landlord on account of Tenant's prorata share of the costs incurred by the Landlord pursuant to this Article.

9.2 Successors and Assigns.

This Agreement, and the terms, covenants and conditions hereof shall bind and inure to the benefit of the Parties hereto, and their respective heirs, executors, personal representatives, successors, grantees and assigns.

ARTICLE X. SELF-HELP AND OTHER REMEDIES.

10.1 Rights of Self-Help.

If any Party (hereinafter the "Defaulting Party") fails to perform any of the provisions, covenants or conditions of this Agreement on its part to be performed (including, without limitation, the making of any payment to the other Party which the Defaulting Party has agreed herein to make or the payment of any Tax) at the time and in the manner herein provided for the performance thereof, then the other Party (hereinafter the "Non-defaulting Party") may give to the Defaulting Party a notice (the "Default Notice") specifying the alleged default. Upon receipt of the Default Notice, the Defaulting Party shall remedy the default within five (5) business days in the case of the failure to pay money when due, or within twenty (20) business days otherwise (or in the case of the default which, by its nature, cannot be remedied within such twenty (20) day period, the Defaulting Party shall start promptly to remedy the default, and thereafter shall diligently prosecute such remedy to the completion). A Defaulting Party shall be in default ("Default") under this Agreement if, and only if, it shall fail to effect such remedial action within the time so limited. If a Defaulting Party is in Default under this Agreement, the Non-defaulting Party may proceed to make payment or take such action as shall be necessary to remedy the Default for the account of the Defaulting Party. Thereafter, on demand, the Defaulting Party shall reimburse the Non-defaulting Party for the expenses (including counsel fees) incurred by the Non-defaulting Party in paying such sum or taking such action, together with all penalty sums reasonably required to be paid by it, if any, arising from such Default, with Interest (as defined below) from the date of expenditure to the date of payment. "Interest" as used in this Declaration shall mean ten percent (10%) per annum, but if the Party obligated to pay the Interest is entitled to assert the defense of usury, then in no event to exceed the amount which may, from time to time, legally be charged as interest to such Person in accordance with the laws of the Commonwealth of Pennsylvania for the amount on which Interest is being calculated.

Exhibit "C"

Commonwealth of Pennsylvania)
) ss:
County of Allegheny)

AFFIDAVIT

BEFORE ME, a Notary Public in and for said Commonwealth and County, personally appeared Charles A. Donald, satisfactorily proven to me, who, upon being duly sworn according to law, deposes and says that he is the Senior Vice President of J.J. Gumberg Co., and as such is authorized to execute this Affidavit on behalf of J.J. Gumberg Co.; that J.J. Gumberg Co. is the duly authorized agent of Gumberg Associates-Sandy Plaza; that J.J. Gumberg Co., as Agent, is the Owner of Tract A in that certain Reciprocal Easements and Agreements dated October 10, 1980 at issue in this action; and that he has reviewed the Complaint to which this Affidavit is attached, as well as other documents pertaining thereto and that the averments contained in said Complaint are true and correct to the best of his knowledge and belief.

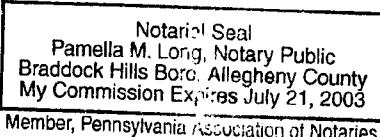
J.J. Gumberg Co., as Agent
for Gumberg Associates-Sandy Plaza

By: Charles A. Donald

Charles A. Donald

SWORN this 7th day of February, 2003

Pamella M. Long
Notary



FILED

3cc Atty Rock
[Signature]

M1046-81
FEB 24 2003

Atty pd. 85.00

William A. Shaw
Prothonotary

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA

GUMBERG ASSOCIATES-SANDY PLAZA,
by J. J. GUMBERG CO., Agent ,

CIVIL DIVISION

Plaintiff,

v.

No. 03-253-CD

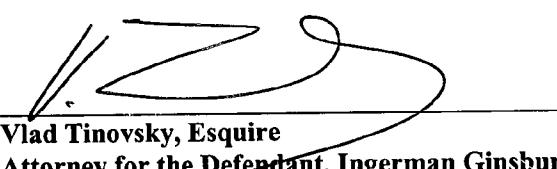
INGERMAN GINSBURG PARTNERSHIP,

Defendant.

DEFENDANT'S ACCEPTANCE OF SERVICE OF COMPLAINT

I, **Vlad Tinovsky, Esquire** in my capacity as counsel to the above-named Defendant, Ingerman Ginsburg Partnership, do hereby acknowledge that I have received and accepted a copy of the Complaint filed by Gumberg Associates-Sandy Plaza, By J. J. Gumberg Co., Agent in the above-referenced case on the date entered on the line beside my signature below.

Dated: March 6, 2003



Vlad Tinovsky, Esquire
Attorney for the Defendant, Ingerman Ginsburg Partnership

FILED

MAR 13 2003

William A. Shaw
Prothonotary

FILED

NO CC

11:50 AM
MAR 13 2003

STC

William A. Shaw
Prothonotary

**IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA**

GUMBERG ASSOCIATES-SANDY PLAZA,
By J.J. GUMBERG CO., Agent,

CIVIL DIVISION

Plaintiff,

No. 03-253-CD

ANSWER AND NEW MATTER

v.

INGERMAN GINSBURG PARTNERSHIP,
Defendant.

Filed on behalf of
Defendant:
INGERMAN GINSBURG
PARTNERSHIP

Counsel of Record for Defendant:

Jason K. Willis, Esquire
PA I.D. No. 86752

Eckert Seamans Cherin
& Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219-2788
412-566-6000
412-566-6099 (fax)

FILED

APR 17 2003
M/1:25 (ws)
William A. Shaw
Prothonotary
No Cens. Copy
EJM

**IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA**

GUMBERG ASSOCIATES-SANDY PLAZA,
By J.J. GUMBERG CO., Agent,

CIVIL DIVISION

v.

INGERMAN GINSBERG PARTNERSHIP,
Defendant.

ANSWER AND NEW MATTER

AND NOW, comes the Defendant, INGERMAN GINSBURG PARTNERSHIP ("Ingerman"), by and through its counsel, and files this Answer and New Matter ("Answer") in response to the Complaint ("Complaint") filed by GUMBERG ASSOCIATES-SANDY PLAZA, by J.J. GUMBERG CO., Agent ("Plaintiff"), and in support thereof, avers as follows:

ANSWER

1. Denied. Ingerman, upon reasonable investigation, is without sufficient knowledge or information to form a belief as to the truth of the allegations within paragraph 1 of the Complaint, and on that basis denies each and every allegation contained therein.

2. Denied as stated. It is admitted that Ingerman is a general partnership with offices at 215 South Broad Street, Philadelphia, Pennsylvania 19107.

3. Admitted.

4. Denied. Ingerman, upon reasonable investigation, is without sufficient knowledge or information to form a belief as to the truth of the allegations within paragraph 4 of the Complaint, and on that basis denies each and every allegation contained therein.

5. Admitted in part; denied in part. It is admitted that Ingerman is the owner of Tract A. The allegation in paragraph 5 of the Complaint that "Defendant . . . is subject to the provisions of a written agreement titled "Reciprocal Easements and Agreements" (REA") dated October 10, 1980", states a state a legal conclusion to which no responsive pleading is required. By way of further answer, the REA is a document which is the best evidence of its terms.

6. Denied. The allegations in paragraph 6 of the Complaint state a legal conclusion to which no responsive pleading is required. By way of further answer, Ingerman, upon reasonable investigation, is without sufficient knowledge or information to form a belief as to the truth of the allegations within paragraph 6 of the Complaint, and on that basis denies each and every allegation contained therein. In addition, the REA is a document which is the best evidence of its terms.

7. Admitted in part; denied in part. It is admitted that Plaintiff has maintained the common areas with respect to Tract A as agent for Ingerman. By way of further answer, Ingerman, upon reasonable investigation, is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations within paragraph 7 of the Complaint, and on that basis denies each and every remaining allegation contained therein.

8. Admitted.

9. Denied. The allegations in paragraph 9 of the Complaint state a legal conclusion to which no responsive pleading is required. By way of further answer, Ingerman, upon reasonable investigation, is without sufficient knowledge or information to form a belief as to the

truth of the allegations within paragraph 9 of the Complaint, and on that basis denies each and every allegation contained therein.

10. Denied. The allegations in paragraph 10 of the Complaint state a legal conclusion to which no responsive pleading is required. By way of further answer, Ingeman, upon reasonable investigation, is without sufficient knowledge or information to form a belief as to the truth of the allegations within paragraph 10 of the Complaint, and on that basis denies each and every allegation contained therein.

11. Admitted in part; denied in part. It is admitted that Plaintiff requested Ingeman to pay an amount of \$18,210.18 which Plaintiff claimed related to CAM costs. By way of further answer, the remaining allegations in paragraph 11 of the Complaint state a legal conclusion to which no responsive pleading is required. In addition, Ingeman, upon reasonable investigation, is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations within paragraph 11 of the Complaint, and on that basis denies each and every remaining allegation contained therein. Further, the REA is a document which is the best evidence of its terms.

12. Denied. The allegations in paragraph 12 of the Complaint state a legal conclusion to which no responsive pleading is required. By way of further answer, Ingeman, upon reasonable investigation, is without sufficient knowledge or information to form a belief as to the truth of the allegations within paragraph 12 of the Complaint, and on that basis denies each and every allegation contained therein. In addition, the REA is a document which is the best evidence of its terms.

13. Denied. Ingeman, upon reasonable investigation, is without sufficient knowledge or information to form a belief as to the truth of the allegations within paragraph 13 of the Complaint, and on that basis denies each and every allegation contained therein.

14. Denied. The allegations in paragraph 14 of the Complaint state a legal conclusion to which no responsive pleading is required. By way of further answer, Ingeman, upon reasonable investigation, is without sufficient knowledge or information to form a belief as to the truth of the allegations within paragraph 14 of the Complaint, and on that basis denies each and every allegation contained therein.

15. Denied. The allegations in paragraph 15 of the Complaint state a legal conclusion to which no responsive pleading is required. By way of further answer, Ingeman, upon reasonable investigation, is without sufficient knowledge or information to form a belief as to the truth of the allegations within paragraph 15 of the Complaint, and on that basis denies each and every allegation contained therein. In addition, the REA is a document which is the best evidence of its terms.

16. Denied. Ingeman, upon reasonable investigation, is without sufficient knowledge or information to form a belief as to the truth of the allegations within paragraph 16 of the Complaint, and on that basis denies each and every allegation contained therein.

WHEREFORE, defendant Ingeman Ginsberg Partnership demands that this Court dismiss Plaintiff's Complaint with prejudice and award Ingeman costs and attorney's fees and such other relief as this Court deems appropriate.

AFFIRMATIVE DEFENSES

17. The Complaint and each claim contained therein fails to state a claim upon which relief can be granted.

18 Plaintiff, by its own conduct, has waived its right to assert and/or is estopped from asserting any claim against Ingeman.

19. Plaintiff's alleged damages were caused by its own actions.

20. Plaintiff's claims are barred, in whole or in part, because Plaintiff failed to mitigate any damages it allegedly has incurred.

21. Plaintiff's claims are barred, in whole or in part, by the doctrines of unclean hands.

22. Ingeman is entitled to have any recovery had by Plaintiff offset, set-off or recouped by the amounts owed by Plaintiff to Ingeman.

23. Plaintiff's claims are barred, in whole or in part, because Plaintiff has not been damaged by the alleged conduct of Ingeman.

24. Any and all claims alleged by Plaintiff in its Complaint against Ingeman are barred by fundamental principles of fairness and equitable considerations, including laches.

25. Plaintiff failed to adhere to and fully perform its obligations owed to Ingeman and as such, its requested relief is precluded.

26. Ingeman hereby gives notice that it intends to rely upon and utilize such other affirmative defenses as may become available or apparent during the course of discovery and, thus, reserve the right to amend this Answer to assert any such defenses.

COUNTERCLAIMS

Counterclaim I **(Breach of Contract)**

27. Since approximately 1981, Plaintiff has performed certain services with respect to Tract A as agent and/or on behalf of Ingberman, which included, *inter alia*, performance of common area maintenance ("CAM").

28. The actions of Ingberman and Plaintiff since 1981 with respect to the Tract A property management services formed a contract between Ingberman and Plaintiff ("Management Agreement"), pursuant to which Plaintiff owed Ingberman certain duties and obligations.

29. On or about January 2003, Plaintiff, abruptly and without due notice to Ingberman, failed to perform, *inter alia*, snow removal services with respect to Tract A as required under the Management Agreement.

30. Plaintiff's failure to perform, *inter alia*, snow removal services under the Management Agreement constitutes a material breach thereof, and as a result of such material breach Ingberman suffered damage and irreparable harm.

WHEREFORE, defendant Ingberman-Ginsburg Partnership respectfully requests that this court award it:

- a) judgment against Plaintiff in amount no less than \$10,000.00 attributable to loss incurred by Ingberman as a result of Plaintiff's breach of contract;
- b) costs and expenses of this lawsuit, including reasonable attorneys' fees; and
- c) such other relief as this Court deems just and proper.

Counterclaim II
(Breach of Fiduciary Duty - Loyalty)

31. The averments in paragraph 1 through 30 above are incorporated herein by reference.
32. At all material times hereto, Plaintiff, as agent for Ingberman under the Management Agreement, owed Ingberman a fiduciary duty.
33. At all material times hereto, Plaintiff, as agent for Ingberman, was required under the Management Agreement to provide snow removal services with respect to Tract A.
34. At all material times hereto, Plaintiff knew that Ingberman was required to provide snow removal services to Tract A pursuant to the lease between Ingberman and the tenant of Tract A, Kmart Corporation ("Kmart").
35. On or about January 2003, Plaintiff failed perform its snow removal duties with respect to Tract A as was required under the Management Agreement.
36. On or about January 2003, Ingberman engaged a snow removal contractor to perform snow removal services for Tract A due to Plaintiff's failure to perform such services in accordance with the Management Agreement.
37. At all material times hereto, Plaintiff was aware of the business relationship between Ingberman and the snow removal contractor and the lease between Ingberman and Kmart.
38. In breach of its fiduciary duty to Ingberman, Plaintiff made certain statements to the snow removal contractor, and took certain other intentional actions, which were intended to frustrate and prevent the snow removal contractor from performing its snow removal services with respect to Tract A.

39. Plaintiff intended for its statements and actions to result in interference with the business relationship between Ingberman and the snow removal contractor and also with the lease between Ingberman and Kmart.

40. Plaintiff knew that there was a reasonable probability that its statements and actions would result in interference with, and the loss to Ingberman of the benefits from, the snow removal contract and lease with Kmart.

41. As a result of Plaintiff's breach of fiduciary duty, Ingberman suffered damage and irreparable harm.

WHEREFORE, defendant Ingberman Ginsburg Partnership respectfully requests that this court award it:

- a) judgment against Plaintiff in amount no less than \$10,000.00 attributable to loss incurred by Ingberman as a result of Plaintiff's breach of fiduciary duty;
- b) costs and expenses of this lawsuit, including reasonable attorneys' fees; and
- c) such other relief as this Court deems just and proper.

Counterclaim III
(Tortious Interference with Contractual Relationship)

42. The averments in paragraph 1 through 41 above are incorporated herein by reference.

43. At all material times hereto, Plaintiff, as agent for Ingberman under the Management Agreement, owed Ingberman a fiduciary duty.

44. At all material times hereto, Plaintiff, as agent for Ingberman, was required under the Management Agreement to provide snow removal services with respect to Tract A.

45. At all material times hereto, Plaintiff knew that Ingberman was required to provide snow removal services to Tract A pursuant to the lease between Ingberman and the tenant of Tract A, Kmart.

46. On or about January 2003, Plaintiff failed perform its snow removal duties with respect to Tract A as was required under the Management Agreement.

47. On or about January 2003, Ingberman engaged a snow removal contractor to perform snow removal services for Tract A due to Plaintiff's failure to perform such services in accordance with the Management Agreement.

48. At all material times hereto, Plaintiff was aware of the business relationship between Ingberman and the snow removal contractor and the lease between Ingberman and Kmart.

49. In breach of its fiduciary duty to Ingberman, Plaintiff made certain statements to the snow removal contractor, and took certain other intentional actions, which were intended to frustrate and prevent the snow removal contractor from performing its snow removal services with respect to Tract A.

50. Plaintiff intended for its statements and actions to result in interference with the business relationship between Ingberman and the snow removal contractor and also with the lease between Ingberman and Kmart.

51. Plaintiff knew that there was a reasonable probability that its statements and actions would result in interference with, and the loss to Ingberman of the benefits from, the snow removal contract and lease with Kmart.

52. As a result of Plaintiff's statements and actions, Ingberman suffered damage and irreparable harm.

WHEREFORE, defendant Ingeman Ginsburg Partnership respectfully requests that this court award it:

- a) judgment against Plaintiff in amount no less than \$10,000.00 attributable to loss incurred as a result of Plaintiff's tortious interference with the contract between Ingeman and the snow removal contractor and the lease between Ingeman and Kmart corporation.
- b) costs and expenses of this lawsuit, including reasonable attorneys' fees; and
- c) such other relief as this Court deems just and proper.

Counterclaim IV
(Breach of Fiduciary Duty - Care)

53. The averments in paragraph 1 through 52 above are incorporated herein by reference.

54. At all material times hereto, Plaintiff, as agent for Ingeman under the Management Agreement, owed Ingeman a fiduciary duty.

55. At all material time hereto, Plaintiff performed CAM with respect to Tracts A, and was aware of the annual costs of such maintenance.

56. At all material times hereto, Plaintiff knew that the lease between Ingeman and Kmart required Kmart to make monthly escrow payments in the amount of \$1,000.00 for CAM charges. The Clearfield County Industrial Development Authority ("Clearfield") acted as escrow agent for the sums paid by Kmart for, *inter alia*, the CAM charges.

57. At all material times hereto, Plaintiff, as agent for Ingeman, was paid by Clearfield the funds escrowed by Kmart for the CAM charges.

58. At all material times hereto, and unbeknownst to Ingeman, Plaintiff submitted bills directly to Kmart for additional amounts owned for annual CAM charges. Such additional

sums exceeded the amounts escrowed by Kmart by approximately \$18,000.00 to \$22,000.00 annually.

59. At all material times hereto, with full knowledge that Kmart was not escrowing sufficient funds to payment the annual CAM charges, Plaintiff failed to notify Ingberman of any additional CAM charges in excess of the escrowed sums and failed to provide Ingberman with copies of any bills related to such additional CAM charges.

60. In fiscal 2002, Plaintiff, with full knowledge that Kmart was making insufficient escrow payments for CAM charges, was aware that Kmart was in financial distress and was on the verge of filing for bankruptcy.

61. Plaintiff, with full knowledge that Kmart was making insufficient escrow payments for CAM charges and that Kmart was in financial distress and on the verge of bankruptcy, failed to inform Ingberman that additional sums were owned for CAM charges and that the escrowed funds were grossly inadequate to pay such additional CAM charges.

62. Plaintiff, with full knowledge that Kmart was making insufficient escrow payments to pay for additional CAM charges, that Kmart was on the verge of bankruptcy, and that Kmart defaulted on its obligation to pay the 2002 additional CAM charges in the amount of approximately \$18,000.00, failed to take the appropriate or necessary actions to collect such amounts from Kmart or to give Ingberman sufficient notice of Kmart's default so that Ingberman could take the appropriate or necessary actions to collect such sums.

63. At all material times hereto, Plaintiff failed to notify Ingberman that it would be billed for additional CAM charges not paid for by Kmart.

64. Plaintiff also had a fiduciary duty to notify Ingberman and Clearfield of the insufficiency of Kmart's escrow amounts and to cause the escrow amounts to be increased to the

level adequate to pay for the actual CAM charges incurred, however, Plaintiff failed to discharge such duty.

65. As a result of the foregoing conduct, Plaintiff breached its fiduciary duty to Ingeman, and as a result of such breach Ingeman suffered damage and irreparable harm.

WHEREFORE, defendant Ingeman Ginsburg Partnership respectfully requests that this court award it:

- a) judgment against Plaintiff in amount no less than \$30,000.00 attributable to loss incurred by Ingeman as a result of Plaintiff's breach of fiduciary duty;
- b) costs and expenses of this lawsuit, including reasonable attorneys' fees; and
- c) such other relief as this Court deems just and proper.

Counterclaim V
(Breach of Contract)

66. The averments in paragraph 1 through 65 above are incorporated herein by reference.

67. At all material times hereto, Plaintiff, as agent for Ingeman under the Management Agreement, owed Ingeman a duty.

68. At all material time hereto, Plaintiff performed CAM with respect to Tracts A, and was aware of the annual costs of such maintenance.

69. At all material times hereto, Plaintiff knew that the lease between Ingeman and Kmart required Kmart to make monthly escrow payments in the amount of \$1,000.00 for CAM charges. Clearfield acted as escrow agent for the sums paid by Kmart for, *inter alia*, the CAM charges.

70. At all material times hereto, Plaintiff, as agent for Ingberman, was paid by Clearfield the funds escrowed by Kmart for the CAM charges.

71. At all material times hereto, and unbeknownst to Ingberman, Plaintiff submitted bills directly to Kmart for additional amounts owned for annual CAM charges. Such additional sums exceeded the amounts escrowed by Kmart by approximately \$18,000.00 to \$22,000.00 annually.

72. At all material times hereto, with full knowledge that Kmart was not escrowing sufficient funds to payment the annual CAM charges, Plaintiff failed to notify Ingberman of any additional CAM charges in excess of the escrowed sums and failed to provide Ingberman with copies of any bills related to such additional CAM charges.

73. In fiscal 2002, Plaintiff, with full knowledge that Kmart was making insufficient escrow payments for CAM charges, was aware that Kmart was in financial distress and was on the verge of filing for bankruptcy.

74. Plaintiff, with full knowledge that Kmart was making insufficient escrow payments for CAM charges and that Kmart was in financial distress and on the verge of bankruptcy, failed to inform Ingberman that additional sums were owned for CAM charges and that the escrowed funds were grossly inadequate to pay such additional CAM charges.

75. Plaintiff, with full knowledge that Kmart was making insufficient escrow payments to pay for additional CAM charges, that Kmart was on the verge of bankruptcy, and that Kmart defaulted on its obligation to pay the 2002 additional CAM charges in the amount of approximately \$18,000.00, failed to take the appropriate or necessary actions to collect such amounts from Kmart or to give Ingberman sufficient notice of Kmart's default so that Ingberman could take the appropriate or necessary actions to collect such sums.

76. At all material times hereto, Plaintiff failed to notify Ingeman that it would be billed for additional CAM charges not paid for by Kmart.

77. Plaintiff also had a duty, affirmative and/or implied, to notify Ingeman and Clearfield of the insufficiency of Kmart's escrow amounts and to cause the escrow amounts to be increased to the level adequate to pay for the actual CAM charges incurred.

78. As a result of the foregoing conduct, Plaintiff breached its contractual duty under the Management Agreement to Ingeman, and as a result of such breach Ingeman suffered damage and irreparable harm.

WHEREFORE, defendant Ingeman Ginsburg Partnership respectfully requests that this court award it:

- a) judgment against Plaintiff in amount no less than \$30,000.00 attributable to loss incurred by Ingeman as a result of Plaintiff's breach of fiduciary duty;
- b) costs and expenses of this lawsuit, including reasonable attorneys' fees; and
- c) such other relief as this Court deems just and proper.

Counterclaim VI
(Negligence)

79. The averments in paragraph 1 through 78 above are incorporated herein by reference.

80. At all material times hereto, Plaintiff, as agent for Ingeman under the Management Agreement, owed Ingeman a duty.

81. At all material time hereto, Plaintiff performed CAM with respect to Tracts A, and was aware of the annual costs of such maintenance.

82. At all material times hereto, Plaintiff know that the lease between Ingeman and Kmart required Kmart to make monthly escrow payments in the amount of \$1,000.00 for CAM charges.

83. At all material times hereto, Plaintiff, as agent for Ingeman, collected the funds escrowed by Kmart in payment for CAM charges.

84. At all material times hereto, and unbeknownst to Ingeman, Plaintiff submitted bills directly to Kmart for additional amounts owned for annual CAM charges. Such additional sums exceeded the amounts escrowed by Kmart by approximately \$18,000.00 to \$22,000.00 annually.

85. At all material times hereto, with full knowledge that Kmart was not escrowing sufficient funds to payment the annual CAM charges, Plaintiff failed to notify Ingeman of any additional CAM charges in excess of the escrowed sums and failed to provide Ingeman with copies of any bills related to such additional CAM charges.

86. In fiscal 2002, Plaintiff, with full knowledge that Kmart was making insufficient escrow payments for CAM charges, was aware that Kmart was in financial distress and was on the verge of filing for bankruptcy.

87. Plaintiff, with full knowledge that Kmart was making insufficient escrow payments for CAM charges and that Kmart was on the verge of bankruptcy, failed to take actions to increase the amount escrowed by Kmart for CAM charges and further failed to inform Ingeman and Clearfield that additional sums were owned for CAM charges and that the escrowed funds were grossly inadequate to pay such additional CAM charges.

88. Plaintiff, with full knowledge that Kmart was making insufficient escrow payments to pay for additional CAM charges, that Kmart was on the verge of bankruptcy, and

that Kmart defaulted on its obligation to pay the 2002 additional CAM charges in the amount of approximately \$18,000.00, failed to take the appropriate or necessary actions to collect such amounts from Kmart or to give Ingberman and Clearfield sufficient notice of Kmart's default so that Ingberman could take the appropriate or necessary actions to collect such sums.

89. At all material times hereto, Plaintiff failed to notify Ingberman that it would be billed for additional CAM charges not paid for by Kmart.

90. As a result of the foregoing conducted, Plaintiff breached its duty to Ingberman, and as a result of such breach Ingberman suffered damage and irreparable harm.

91. Plaintiff's breach was the direct and proximate cause of the damage and irreparable harm suffered by Ingberman.

WHEREFORE, defendant Ingberman Ginsburg Partnership respectfully requests that this court award it:

- a) judgment against Plaintiff in amount no less than \$30,000.00 attributable to loss incurred by Ingberman as a result of Plaintiff's negligence;
- b) costs and expenses of this lawsuit, including reasonable attorneys' fees; and
- c) such other relief as this Court deems just and proper.

Respectfully submitted,

Dated: April 16, 2003



Jason K. Willis, Esq.

Eckert Seamans Cherin & Mellott, LLC
44th Floor, 600 Grant Street
Pittsburgh, Pennsylvania 15219

Attorneys for Defendant
Ingberman Ginsburg Partnership

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of Defendant Ingeman Ginsburg
Partnership's Answer and New Matter was served by First Class Mail this ^{16th} day of April, 2003
on:

H. Brian Peck, Esquire
6000 Waterdam Plaza Drive, Suite 160
McMurray, PA 15317



Jason K. Willis

VERIFICATION

I, Philip Rosen, am Controller of Ingerman Ginsburg Partnership, and I am authorized to make this verification on its behalf. I hereby verify that the averments made in the foregoing ANSWER AND NEW MATTER are true and correct to the best of my knowledge information and belief. I understand that this verification is made subject to the penalties provided in 18 P.S. § 4904, relating to unsworn falsification to authorities.

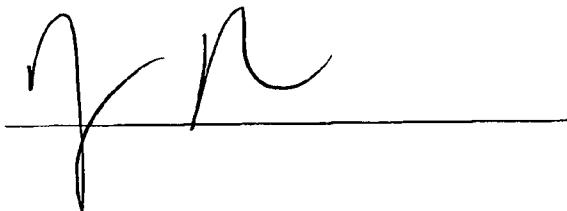


03-253-03

VERIFICATION

I, Philip Rosen, am Controller of Ingerman

Ginsburg Partnership, and I am authorized to make this verification on its behalf. I hereby verify that the averments made in the foregoing ANSWER AND NEW MATTER are true and correct to the best of my knowledge information and belief. I understand that this verification is made subject to the penalties provided in 18 P.S. § 4904, relating to unsworn falsification to authorities.



FILED

APR 23 2003

William A. Shaw
Prothonotary

FILED

APR 23 2003
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NO CC
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WAK

William A. Shaw
Prothonotary

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA

GUMBERG ASSOCIATES-SANDY PLAZA,
by J. J. GUMBERG CO., Agent,

CIVIL DIVISION

Plaintiff,

No. 03-253-CD

v.
INGERMAN GINSBURG PARTNERSHIP,
Defendant.

REPLY TO NEW MATTER AND
ANSWER AND AFFIRMATIVE
DEFENSES TO DEFENDANT'S
COUNTERCLAIMS

Filed on behalf of
Plaintiff:

GUMBERG ASSOCIATES-
SANDY PLAZA, by
J. J. GUMBERG CO., Agent

Counsel of Record for
This party:

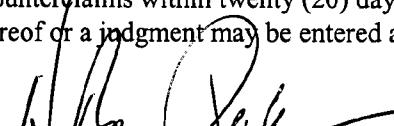
H. Brian Peck, Esquire
PA I.D. #41004

6000 Waterdam Plaza Drive, Suite 160
McMurray, PA 15317
(724) 969-0626

NOTICE TO PLEAD:

TO THE PLAINTIFF:

You are hereby notified to file a written response
to the enclosed Affirmative Defenses to Defendant's
Counterclaims within twenty (20) days from service
hereof or a judgment may be entered against you.


H. Brian Peck, Esquire
Counsel for J.J. Gumberg Co.

FILED

MAY 12 2003

William A. Shaw
Prothonotary

**IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA**

GUMBERG ASSOCIATES-SANDY PLAZA,
by J. J. GUMBERG CO., Agent,

CIVIL DIVISION

Plaintiff,

V.

No. 03-253-CD

INGERMAN GINSBURG PARTNERSHIP.

Defendant.

**REPLY TO NEW MATTER AND ANSWER AND
AFFIRMATIVE DEFENSES TO DEFENDANT'S COUNTERCLAIMS**

AND NOW, comes the Plaintiff, GUMBERG ASSOCIATES-SANDY PLAZA, by J. J. GUMBERG CO., Agent, by counsel, and files the following Reply to New Matter and Answer and Affirmative Defenses to Defendant's Counterclaims, and in support thereof avers as follows:

REPLY TO NEW MATTER

1. The averments of Paragraph 17 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied and strict proof thereof is demanded at the time of trial.

2. The averments of Paragraph 18 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied and strict proof thereof is demanded at the time of trial.

3. The averments of Paragraph 19 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied and strict proof thereof is demanded at the time of trial.

4. The averments of Paragraph 20 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied and strict proof thereof is demanded at the time of trial.

5. The averments of Paragraph 21 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied and strict proof thereof is demanded at the time of trial.

6. The averments of Paragraph 22 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied and strict proof thereof is demanded at the time of trial.

7. The averments of Paragraph 23 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied and strict proof thereof is demanded at the time of trial.

8. The averments of Paragraph 24 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied and strict proof thereof is demanded at the time of trial.

9. The averments of Paragraph 25 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied and strict proof thereof is demanded at the time of trial.

10. The averments of Paragraph 26 constitute a statement to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied and strict proof thereof is demanded at the time of trial.

ANSWER TO COUNTERCLAIMS

11. The averments of Paragraph 27 are denied as stated. Since 1981, Plaintiff arranged for maintenance of the common areas to Tracts A and B pursuant to the terms of the Reciprocal Easement

Agreement ("REA") and a Lease of certain commercial space to K Mart Corporation ("K Mart") dated October 21, 1980 and subsequently amended. Plaintiff specifically denies that it acted as the agent of Defendant in performing common area maintenance ("CAM"). The remaining allegations in Paragraph 27 are denied. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

12. The averments of Paragraph 28 are denied. Plaintiff specifically denies that it has or by its actions formed a Management Agreement with Defendant. Furthermore, Defendant gave (and Plaintiff received) no consideration for said alleged services (e.g. management fee). Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

13. The averments of Paragraph 29 are denied as stated. On or about January 1, 2003, Plaintiff did stop arranging for snow removal services with respect to Tract A. Plaintiff denies, however, that it abruptly and without due notice to Defendant ceased arranging for such. Notice was given orally to both Defendant and the manager of K Mart that Plaintiff would cease snow removal services with respect to Tract A. Plaintiff specifically denies that it has or had a Management Agreement with Defendant. Plaintiff's response set forth in Paragraph 12 above is incorporated herein by reference. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

14. The averments of Paragraph 30 are denied. By way of further answer, Plaintiff's responses as to the existence of an alleged "Management Agreement" and arrangement of snow removal services set forth in Paragraphs 11 through 13 above are incorporated herein by reference. Moreover, to the extent that the averments of Paragraph 30 constitute conclusions of law, no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied and strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

15. Plaintiff's averments set forth in Paragraph 1 through 16 of the Complaint and 17 through 30 herein are incorporated by reference as though fully set forth at length in response to the averments of Paragraph 31.

16. The averments of Paragraph 32 are denied. Plaintiff specifically denies the existence of the alleged "Management Agreement" and further that at any time pertinent hereto, it acted as the agent of Defendant and/or owed Defendant a fiduciary duty. Plaintiff's allegations of fact set forth in Paragraphs 11 through 13 above are incorporated herein by reference. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

17. The averments of Paragraph 33 are denied as stated. By way of further response, Plaintiff's allegations of fact set forth in Paragraphs 11 through 13 above are incorporated herein by reference. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

18. Plaintiff, upon reasonable investigation, is without sufficient knowledge or information to form a conclusion as to the truth of the allegations within Paragraph 34, and on that basis, denies each and every allegation contained therein. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

19. The averments of Paragraph 35 are denied as stated. By way of further response, Plaintiff's allegations of fact set forth in Paragraphs 11 through 13 above are incorporated herein by reference. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

20. Plaintiff, upon reasonable investigation, is without sufficient knowledge or information to form a conclusion as to the truth of the remaining allegations within Paragraph 36, and on that basis, denies each and every allegation contained therein. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

21. The averments of Paragraph 37 are denied. Plaintiff, upon reasonable investigation, is without sufficient knowledge or information to form a conclusion as to the truth of the allegation in Paragraph 37 concerning Defendant's purported business relationship with the snow removal contractor and the Lease between Defendant and K Mart, and on that basis, denies each and every allegation contained therein. By way of further response, Plaintiff's allegations of fact set forth in Paragraphs 11 through 13

above are incorporated herein by reference. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

22. The averments of Paragraph 38 are denied as stated. As Plaintiff notified Defendant that it would do, Plaintiff directed the snow removal contractor who performed snow removal services for Plaintiff to cease removal of snow from Tract A. Plaintiff specifically denies it had any fiduciary duty to Defendant or that it took any action(s) intended to frustrate or prevent the snow removal contractor from performing snow removal services with respect to Tract A. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

23. The averments of Paragraph 39 are denied. Plaintiff's response set forth in Paragraph 22 above is incorporated herein by reference. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

24. The averments of Paragraph 40 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied for the reasons and upon the facts set forth above. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

25. The averments of Paragraph 41 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied for the reasons and upon the facts set forth above. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

26. Plaintiff's averments set forth in Paragraph 1 through 16 of the Complaint and 17 through 41 herein are incorporated by reference as though fully set forth at length in response to the averments of Paragraph 42.

27. The averments of Paragraph 43 are denied. Plaintiff specifically denies the existence of the alleged "Management Agreement" and further that at any time pertinent hereto, it acted as the agent of Defendant and/or owed Defendant a fiduciary duty. Plaintiff's allegations of fact set forth in

Paragraphs 11 through 13 above are incorporated herein by reference. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

28. The averments of Paragraph 44 are denied as stated. By way of further response, Plaintiff's allegations of fact set forth in Paragraphs 11 through 13 above are incorporated herein by reference. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

29. Plaintiff, upon reasonable investigation, is without sufficient knowledge or information to form a conclusion as to the truth of the allegations within Paragraph 45, and on that basis, denies each and every allegation contained therein. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

30. The averments of Paragraph 46 are denied as stated. By way of further response, Plaintiff's allegations of fact set forth in Paragraphs 11 through 13 above are incorporated herein by reference. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

31. Plaintiff, upon reasonable investigation, is without sufficient knowledge or information to form a conclusion as to the truth of the remaining allegations within Paragraph 47, and on that basis, denies each and every allegation contained therein. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

32. The averments of Paragraph 48 are denied. Plaintiff, upon reasonable investigation, is without sufficient knowledge or information to form a conclusion as to the truth of the allegation in Paragraph 48 concerning Defendant's purported business relationship with the snow removal contractor and the Lease between Defendant and K Mart, and on that basis, denies each and every allegation contained therein. By way of further response, Plaintiff's allegations of fact set forth in Paragraphs 11 through 13 above are incorporated herein by reference. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

33. The averments of Paragraph 49 are denied as stated. As Plaintiff notified Defendant that it would do, Plaintiff directed the snow removal contractor who performed snow removal services for Plaintiff

to cease removal of snow from Tract A. Plaintiff specifically denies it had any fiduciary duty to Defendant or that it took any action(s) intended to frustrate or prevent the snow removal contractor from performing snow removal services with respect to Tract A. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

34. The averments of Paragraph 50 are denied. Plaintiff's response set forth in Paragraph 22 above is incorporated herein by reference. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

35. The averments of Paragraph 51 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied for the reasons and upon the facts set forth above. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

36. The averments of Paragraph 52 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied for the reasons and upon the facts set forth above. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

37. Plaintiff's averments set forth in Paragraph 1 through 16 of the Complaint and 17 through 52 herein are incorporated by reference as though fully set forth at length in response to the averments of Paragraph 53.

38. The averments of Paragraph 54 are denied. Plaintiff specifically denies the existence of the alleged "Management Agreement" and further that at any time pertinent hereto, it acted as the agent of Defendant and/or owed Defendant a fiduciary duty. Plaintiff's allegations of fact set forth in Paragraphs 11 through 13 above are incorporated herein by reference. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

39. The averments of Paragraph 55 are denied as stated. Since 1981 Plaintiff has arranged for maintenance of the common areas for Tract A and received partial reimbursement of maintenance costs from K Mart. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

40. Plaintiff, upon reasonable investigation, is without sufficient knowledge or information to form a conclusion as to the truth of the remaining allegations within Paragraph 56, and on that basis, denies each and every allegation contained therein. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

41. The averments of Paragraph 57 are denied. At no time pertinent hereto was Plaintiff the agent of Defendant. Furthermore, payments for CAM charges were received directly from K Mart. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

42. The averments of Paragraph 58 are denied. In addition to regular monthly CAM charges, K Mart was required to pay annual CAM adjustments. It is denied that Defendant was without knowledge of the same. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

43. The averments of Paragraph 59 are denied. Plaintiff's knowledge of K Mart's escrow practice was, at all times pertinent hereto, limited to the extent that K Mart timely paid its monthly CAM charges as well as annual CAM adjustments. Furthermore, Plaintiff had no obligation to provide Defendant with copies of bills related to additional CAM charges. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

44. The averments of Paragraph 60 are denied. Plaintiff's allegations of fact set forth in Paragraph 43 above are incorporated herein by reference. Furthermore, all times pertinent hereto, Defendant knew or should have known of the financial condition of K Mart. With regard to the rest of Defendant's allegations, after reasonable investigation, Plaintiff is without information sufficient to form a conclusion as to their truth, and on that basis the same are denied. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

45. The averments of Paragraph 61 are denied. Plaintiff's response set forth in Paragraph 44 above is incorporated herein by reference. Plaintiff, upon reasonable investigation, is without sufficient knowledge or information to form a belief as to the truth of the allegations within Paragraph 61, and on that basis, denies each and every allegation contained therein. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

46. The averments of Paragraph 62 are denied. Plaintiff's responses set forth in Paragraph 43 though 45 above are incorporated herein by reference. It is denied that Plaintiff failed to take appropriate or necessary actions to collect the debt. Furthermore, the automatic stay in K Mart's reorganization proceeding precluded collection activities by Plaintiff or Defendant. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

47. The averments in Paragraph 63 are denied. There is and was no requirement to notify Defendant that it would be billed for additional CAM charges not paid for by K Mart. At all times pertinent hereto, Defendant knew or should have known its obligations under the REA. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

48. The averments in Paragraph 64 are denied. No fiduciary duty was owed to Defendant or Clearfield. At all times pertinent hereto, Defendant knew or should have known its duties and obligations under the REA. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

49. The averments of Paragraph 65 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied for the reasons and upon the facts set forth above. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

50. Plaintiff's averments set forth in Paragraph 1 through 16 of the Complaint and 17 through 65 herein are incorporated by reference as though fully set forth at length in response to the averments of Paragraph 66.

51. The averments of Paragraph 67 are denied. Plaintiff specifically denies the existence of the alleged "Management Agreement" and further that at any time pertinent hereto, it acted as the agent of Defendant and/or owed Defendant a fiduciary duty. Plaintiff's allegations of fact set forth in Paragraphs 11 through 13 above are incorporated herein by reference. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

52. The averments of Paragraph 68 are denied as stated. Since 1981 Plaintiff has arranged for maintenance of the common areas for Tract A and received partial reimbursement of maintenance costs from K Mart. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

53. Plaintiff, upon reasonable investigation, is without sufficient knowledge or information to form a conclusion as to the truth of the remaining allegations within Paragraph 69, and on that basis, denies each and every allegation contained therein. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

54. The averments of Paragraph 70 are denied. At no time pertinent hereto was Plaintiff the agent of Defendant. Furthermore, payments for CAM charges were received directly from K Mart. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

55. The averments of Paragraph 71 are denied. In addition to regular monthly CAM charges, K Mart was required to pay annual CAM adjustments. It is denied that Defendant was without knowledge of the same. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

56. The averments of Paragraph 72 are denied. Plaintiff's knowledge of K Mart's escrow practice was, at all times pertinent hereto, limited to the extent that K Mart timely paid its monthly CAM charges as well as annual CAM adjustments. Furthermore, Plaintiff had no obligation to provide Defendant with copies of bills related to additional CAM charges. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

57. The averments of Paragraph 73 are denied. Plaintiff's allegations of fact set forth in Paragraph 43 above are incorporated herein by reference. Furthermore, all times pertinent hereto, Defendant knew or should have known of the financial condition of K Mart. With regard to the rest of Defendant's allegations, after reasonable investigation, Plaintiff is without information sufficient to form a conclusion as to their truth, and on that basis the same are denied. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

58. The averments of Paragraph 74 are denied. Plaintiff's response set forth in Paragraph 44 above is incorporated herein by reference. Plaintiff, upon reasonable investigation, is without sufficient knowledge or information to form a belief as to the truth of the allegations within Paragraph 74, and on that basis, denies each and every allegation contained therein. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

59. The averments of Paragraph 75 are denied. Plaintiff's responses set forth in Paragraph 43 though 45 above are incorporated herein by reference. It is denied that Plaintiff failed to take appropriate or necessary actions to collect the debt. Furthermore, the automatic stay in K Mart's reorganization proceeding precluded collection activities by Plaintiff or Defendant. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

60. The averments in Paragraph 76 are denied. There is and was no requirement to notify Defendant that it would be billed for additional CAM charges not paid for by K Mart. At all times pertinent hereto, Defendant knew or should have known its obligations under the REA. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

61. The averments in Paragraph 77 are denied. No fiduciary duty was owed to Defendant or Clearfield. At all times pertinent hereto, Defendant knew or should have known its duties and obligations under the REA. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

62. The averments of Paragraph 78 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied and strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

63. Plaintiff's averments set forth in Paragraph 1 through 16 of the Complaint and 17 through 78 herein are incorporated by reference as though fully set forth at length in response to the averments of Paragraph 79.

64. The averments of Paragraph 80 are denied. Plaintiff specifically denies the existence of the alleged "Management Agreement" and further that at any time pertinent hereto, it acted as the agent of Defendant and/or owed Defendant a fiduciary duty. Plaintiff's allegations of fact set forth in Paragraphs 11 through 13 above are incorporated herein by reference. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

65. The averments of Paragraph 81 are denied as stated. Since 1981 Plaintiff has arranged for maintenance of the common areas for Tract A and received partial reimbursement of maintenance costs from K Mart. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

66. Plaintiff, upon reasonable investigation, is without sufficient knowledge or information to form a conclusion as to the truth of the remaining allegations within Paragraph 82, and on that basis, denies each and every allegation contained therein. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

67. The averments of Paragraph 83 are denied. At no time pertinent hereto was Plaintiff the agent of Defendant. Furthermore, payments for CAM charges were received directly from K Mart. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

68. The averments of Paragraph 84 are denied. In addition to regular monthly CAM charges, K Mart was required to pay annual CAM adjustments. It is denied that Defendant was without knowledge of the same. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

69. The averments of Paragraph 85 are denied. Plaintiff's knowledge of K Mart's escrow practice was, at all times pertinent hereto, limited to the extent that K Mart timely paid its monthly CAM charges as well as annual CAM adjustments. Furthermore, Plaintiff had no obligation to provide Defendant with copies of bills related to additional CAM charges. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

70. The averments of Paragraph 86 are denied. Plaintiff's allegations of fact set forth in Paragraph 43 above are incorporated herein by reference. Furthermore, all times pertinent hereto, Defendant knew or should have known of the financial condition of K Mart. With regard to the rest of Defendant's allegations, after reasonable investigation, Plaintiff is without information sufficient to form a conclusion as to their truth, and on that basis the same are denied. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

71. The averments of Paragraph 87 are denied. Plaintiff's response set forth in Paragraph 44 above is incorporated herein by reference. Plaintiff, upon reasonable investigation, is without sufficient knowledge or information to form a belief as to the truth of the allegations within Paragraph 87, and on that basis, denies each and every allegation contained therein. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

72. The averments of Paragraph 88 are denied. Plaintiff's responses set forth in Paragraph 43 though 45 above are incorporated herein by reference. It is denied that Plaintiff failed to take appropriate or necessary actions to collect the debt. Furthermore, the automatic stay in K Mart's reorganization proceeding precluded collection activities by Plaintiff or Defendant. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

73. The averments in Paragraph 89 are denied. There is and was no requirement to notify Defendant that it would be billed for additional CAM charges not paid for by K Mart. At all times pertinent hereto, Defendant knew or should have known its obligations under the REA. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

74. The averments of Paragraph 90 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied for the reasons and upon the facts set forth above. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

75. The averments of Paragraph 91 constitute conclusions of law to which no responsive pleading is required. To the extent a responsive pleading is required, the averments are denied for the reasons and upon the facts set forth above. Strict proof of Defendant's allegations to the contrary is demanded at the time of trial.

WHEREFORE, Plaintiff demands that this Court either dismiss Defendant's counterclaims with prejudice, or alternatively enter judgment in favor of Plaintiff and against Defendant, plus additional attorneys fees and costs of this action plus interest at the legal rate from the date of judgment, and other relief as this Court deems appropriate.

PLAINTIFF'S AFFIRMATIVE DEFENSES TO DEFENDANT'S COUNTERCLAIMS

76. Counterclaim I and each claim contained therein fails to state a proper cause of action upon which relief can be granted.

77. Counterclaim II and each claim contained therein fails to state a proper cause of action upon which relief can be granted.

78. Counterclaim III and each claim contained therein fails to state a proper cause of action upon which relief can be granted.

79. Counterclaim IV and each claim contained therein fails to state a proper cause of action upon which relief can be granted.

80. Counterclaim V and each claim contained therein fails to state a proper cause of action upon which relief can be granted.

81. Counterclaim VI and each claim contained therein fails to state a proper cause of action upon which relief can be granted.

82. With regard to each of its alleged counterclaims, Defendant, by its own conduct, has waived its right to assert and/or is estopped from asserting any claim against Plaintiff.

83. Each of Defendant's alleged damages were caused by its own acts and/or omissions.

84. Each of Defendant's counterclaims is barred, in whole and in part, because Defendant failed to mitigate any damages it allegedly has incurred.

85. Each of Defendant's counterclaims is barred, in whole and in part, by the doctrine of unclean hands.

86. Any and all claims alleged by Defendant in its Counterclaims against Plaintiff are barred by fundamental principals of fairness and equitable considerations, including laches.

87. Defendant failed to adhere to and fully perform its obligations under the REA and its lease with K Mart and as such, its requested relief against Plaintiff is precluded.

88. If it is determined that Defendant is entitled to recover from Plaintiff based on the existence of a Management Agreement between Plaintiff and Defendant (which is denied), then Plaintiff is entitled to a management fee from Defendant for each year that said agreement is found to be in effect, and/or to a set-off for the value of said fee against any obligations owed to the Defendant.

89. If it is determined that Defendant is entitled to recover from Plaintiff based on the existence of a Management Agreement between Plaintiff and Defendant (which is denied), then Plaintiff is entitled to recover the amount of insurance for Tract A it paid and did not bill Defendant as required by the REA.

90. If it is determined that Defendant is entitled to recover from Plaintiff based on the existence of a Management Agreement between Plaintiff and Defendant (which is denied), then Plaintiff is entitled to have any recovery had by Defendant offset, set-off or recouped by the amounts owed by

Defendant to Plaintiff, including the difference in the amount paid by Plaintiff for CAM charges and the amount K Mart paid.

91. Plaintiff hereby gives notice that it intends to rely upon and utilize such other affirmative defenses as may become available or apparent during the course of discovery and, thus, reserve the right to amend this Reply to New Matter to assert such defenses.

Date: May 9, 2003

GUMBERG ASSOCIATES-SANDY PLAZA, by
J.J. Gumberg Co., Agent,
By Counsel,

H. Brian Peck, Esquire
P. A. I.C. # 41004
6000 Waterdam Plaza Drive, Suite 160
McMurray, PA 15317
(724) 969-0626

May-09-03 10:36A

P. 19

Commonwealth of Pennsylvania)
County of Allegheny) ss:
)

AFFIDAVIT

BEFORE ME, a Notary Public in and for said Commonwealth and County, personally appeared Charles A. Sizach, satisfactorily proven to me, who, upon being duly sworn according to law, deposes and says that he is the Senior Vice President of J.J. Gumberg Co., and as such is authorized to execute this Affidavit on behalf of J.J. Gumberg Co.; that J.J. Gumberg Co. is the duly authorized agent of Gumberg Associates-Sandy Plaza; that J.J. Gumberg Co., as Agent, is the Owner of Tract A in that certain Reciprocal Easements and Agreements dated October 10, 1980 at issue in this action; and that he has reviewed the Complaint to which this Affidavit is attached, as well as other documents pertaining thereto and that the averments contained in said Complaint are true and correct to the best of his knowledge and belief.

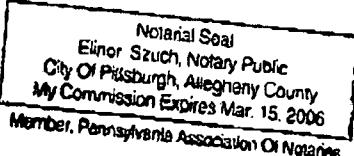
J.J. Gumberg Co., as Agent
for Gumberg Associates-Sandy Plaza

By: Charles A. Sizach

Senior Vice President

SWORN this 9th day of May, 2003

Elinor Szuch
Notary



Certificate of Service

The undersigned hereby certifies that he served a true and correct copy of the foregoing **REPLY TO NEW MATTER AND ANSWER AND AFFIRMATIVE DEFENSES TO DEFENDANT'S COUNTERCLAIMS** on opposing counsel at the address set forth below by fax and United States First Class Mail on May 9, 2003.

Jason K. Willis, Esquire
Eckert Seamans Cherin & Mellott, LLC
U. S. Steel Tower, 44th Floor
Pittsburgh, PA 15219



H. Brian Peck
H. Brian Peck, Esquire

FILED

MO
cc
MAY 12 2003
FBI
EKG

William A. Shaw
Prothonotary

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA

GUMBERG ASSOCIATES-SANDY PLAZA,
By J.J. GUMBERG CO., Agent,

CIVIL DIVISION

Plaintiff,

No. 03-253-CD **FILED**

v.

INGERMAN GINSBERG PARTNERSHIP,

MAY 10 2004

Defendant.

William A. Shaw /
Prothonotary

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to a Settlement Agreement and Release entered into by and between Plaintiff Gumberg Associates-Sandy Plaza, by J.J. Gumberg Co., Agent ("Plaintiff") and Defendant Ingerman Ginsberg Partnership ("Defendant"), the parties hereby STIPULATE and AGREE, by and between through their undersigned counsel, that (i) the Complaint in the above-captioned lawsuit, and all claims of Plaintiff asserted therein, against Defendant are hereby DISMISSED WITH PREJUDICE, and (ii) all counterclaims of Defendant asserted against Plaintiff in Defendant's Answer and New Matter in the above-captioned lawsuit are hereby DISMISSED WITH PREJUDICE.



Jason K. Willis, Esquire
Eckert Seamans Cherin & Mellott, LLC
USX Tower
600 Grant Street, 44th Floor
Telephone: 412-566-6000
Facsimile: 412-566-6099

Counsel for Defendant
Ingerman-Ginsburg Partnership



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6000 Waterdam Plaza Drive
Suite 160
McMurray, PA 15317
Telephone: 724-969-0626
Facsimile: 724-969-0624

Counsel for Plaintiff
Gumberg Associates-Sandy Plaza, by
J.J. Gumberg Co., Agent

FILED

MAY 10 2004



William A. Shaw
Prothonotary

**IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA**

CIVIL DIVISION

**Gumberg Associates-Sandy Plaza
J. J. Gumberg, Co.**

Vs. **No. 2003-00253-CD**
Ingerman Ginsburg Partnership

CERTIFICATE OF DISCONTINUATION

Commonwealth of PA
County of Clearfield

I, William A. Shaw, Prothonotary of the Court of Common Pleas in and for the County and Commonwealth aforesaid do hereby certify that the above case was on May 10, 2004, marked:

Discontinued, settled and ended with prejudice.

Record costs in the sum of \$85.00 have been paid in full by Attorney.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal of this Court at Clearfield, Clearfield County, Pennsylvania this 10th day of May A.D. 2004.

William A. Shaw, Prothonotary