IN THE SUPREME COURT OF THE STATE OF NEVADA

BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC, a Nevada limited liability company, Appellant, v. HIGCO, INC., a Nevada corporation, Respondent.	Case No. 71085 District Court Case No. CV-14-710780-B

APPENDIX

TO

APPELLANT'S OPENING BRIEF

VOLUME I (Part 4 - APP 000163-246)

Charles H. McCrea (SBN #104)
HEJMANOWSKI & McCREA LLC
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chm@hmlawlv.com

Attorneys for Appellant

APPELLANT'S APPENDIX
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SECTION 33
SERVICE OF NOTICES

33.01. Any and all notices and demands by either party hereto to the other party, required or desired to be given hereunder, shall be in writing and shall be validly given only if personally delivered, deposited in the United States mail, certified or registered, postage prepaid, return receipt requested, or if made by Federal Express or similar delivery service which keeps records of deliveries and attempted deliveries, or if made by facsimile machine with electronic confirmation of receipt (receipt of which is acknowledged or if a copy thereof is promptly delivered by certified mail or a delivery service which keeps records of deliveries and attempted deliveries). Service shall be conclusively deemed made on the first business day delivery is attempted or upon receipt, whichever is sooner, and addressed to the addresses set forth in **Section (l)** of the Fundamental Lease Provisions above.

33.02. Any party hereto may change its address for the purpose of receiving notices or demands as herein provided by a written notice given in the manner aforesaid to the other party hereto, which notice of change of address shall not become effective, however, until the actual receipt thereof by the other party.

SECTION 34
BROKERS

34.01. Landlord and Tenant hereby acknowledge and agree that, in connection with the transactions contemplated by this Agreement, the brokers listed in **Section (m)** of the Fundamental Lease Provisions above shall receive a commission pursuant to a separate agreement, payable within thirty (30) days after Tenant opens for business to the public from the Leased Property.

34.02. Landlord represents and warrants to Tenant, and Tenant represents and warrants to Landlord, that no broker or finder, other than those brokers set forth in **Section (m)** of the Fundamental Lease Provisions above, if any, has been engaged by them in connection with any of the transactions contemplated by this Agreement. Landlord and Tenant will indemnify, save harmless and defend the other from any liability, cost or expense arising out of or connected with any claim for any commission or compensation made by any person or entity claiming to have been retained or contacted by them in connection with this transaction, other than those brokers set forth in Section 34.01.

SECTION 35
MISCELLANEOUS

35.01. The captions appearing at the commencement of the sections hereof are descriptive only and for convenience in reference to this Lease and in no way whatsoever define, limit or describe the scope or intent of this Lease, nor in any way affect this Lease.

35.02. Masculine or feminine pronouns shall be substituted for the neuter form and vice versa, and the plural shall be substituted for the singular form and vice versa, in any place or places herein which the context requires such substitution or substitutions.

35.03. The laws of the State of Nevada shall govern the validity, construction, performance and effect of this Lease. The parties hereto agree that the venue for any disagreement, dispute or litigation shall be the State of Nevada, County of Clark, and City of Las Vegas.

35.04. Whenever in this Lease any words of obligation or duty are used in connection with either party, such words shall have the same force and effect as though framed in the form of express covenants on the part of the party obligated.

35.05. In the event Tenant now or hereafter shall consist of more than one person, firm or corporation, then and in such event, all such persons, firms or corporations shall be jointly and severally liable as Tenant hereunder.

35.06. The submission of this Lease for examination and/or execution hereof by Tenant does not constitute a reservation of or option for the Leased Property and this Lease becomes effective as a Lease only upon execution and delivery thereof by Landlord and Tenant.

35.07. Should any claim or lien be filed against the Leased Property, or any action or proceeding is instituted affecting the title to the Leased Property, Tenant shall give Landlord written notice thereof as soon as Tenant obtains actual or constructive knowledge thereof.

35.08. This Lease shall not be construed either for or against Landlord or Tenant, but shall be interpreted in accordance with the general tenor of its language and as if drafted mutually.

35.09. Notwithstanding any other provision of this Lease, in the event the term of this Lease shall not have commenced within twenty-one (21) years from the date of execution hereof, this Lease shall become null and void, and Landlord and Tenant shall thereupon be released from any and all obligations with respect thereto.

35.10. Tenant shall pay all costs, expenses and reasonable attorneys' fees that may be incurred or paid by Landlord in processing, documenting or administering any request of Tenant for Landlord's consent required pursuant to this Lease, including, without limitation, requests to assign or sublet the Lease.

35.11. If Tenant hereunder is a corporation, the parties executing this Lease on behalf of Tenant represent and warrant to Landlord: that Tenant is a valid and existing corporation; all things necessary to qualify Tenant to do business in Nevada have been accomplished prior to the date of this Lease; that all franchise and other corporate taxes have been paid to the date of this Lease; that all forms, reports, fees, and taxes required to be filed or paid by said corporation in compliance with applicable laws will be filed and paid when due.

35.12. Landlord reserves the absolute right to effect such other tenancies in the Center as Landlord, in the exercise of its own business judgment, shall determine. Tenant does not rely on the fact, nor does Landlord represent, that any specific tenant or number of tenants shall, during the term of this Lease or any extension thereof, occupy any space in the Center. There are no other representations or warranties between the parties hereto, and all reliance with respect to representations is solely on such representations and agreements as are contained in this Lease.

35.13. The various rights, options, elections and remedies of Landlord contained in this Lease shall be cumulative and no one of them shall be construed as exclusive of any other, or of any right, priority or remedy allowed or provided for by law and not expressly waived in this Lease.

35.14. The obligations of Landlord under this Lease do not constitute personal obligations of the individual members, managers, partners, directors, officers, shareholders or similar positions of Landlord, and Tenant shall not seek recourse against the individual partners, directors, officers, members, managers or shareholders of Landlord or any of their personal assets for satisfaction of any liability in respect to this Lease.

35.15. The terms, provisions, covenants and conditions contained in this Lease shall apply to, bind and inure to the benefit of the heirs, executors, administrators, legal representatives, successors and assigns (where assignment is permitted) of Landlord and Tenant, respectively.

35.16. If any term, covenant or condition of this Lease, or any application thereof, should be held by a court of competent jurisdiction to be invalid, void or unenforceable, all terms, covenants and conditions of this Lease, and all applications thereof, not held invalid, void or unenforceable, shall continue in full force and effect and shall in no way be affected, impaired or invalidated thereby.

35.17. Time is of the essence of this Lease and all of the terms, covenants and conditions hereof.

35.18. This Lease contains the entire agreement between the parties and cannot be changed or terminated orally.

35.19. Tenant acknowledges that the site plan attached hereto as Exhibit A-2 is for the purposes of convenience only and that Landlord reserves the right at any time during initial construction or thereafter to expand, reduce, remove, demolish, change, renovate or construct any existing or new improvements at the Center.

35.20. The parties hereto understand that this is a legal document and each acknowledges that they have had the opportunity to seek independent legal counsel to review this Lease.

35.21 Upon Landlord's request, and within thirty (30) days thereof, Tenant agrees to modify this Lease to meet the reasonable requirements of a lender selected by Landlord who demands such modification as a condition precedent to granting a loan and placing a deed of trust or other mortgage encumbrance upon the Parcel or the Leased Property; provided such modification does not increase the monthly minimum rent, percentage rent or any other monetary obligation of Tenant under this Lease; provided further, that such lender agrees to execute an attornment and non-disturbance agreement in favor of Tenant concurrently with Tenant's execution of any documents required under this Section 35.21.

SECTION 36
QUEING AND CROWD CONTROL

36.01. Orderly Queuing and Crowd Control. Tenant agrees to (i) maintain all queuing, which occurs due to the Permitted Use of the Leased Property, in an orderly fashion whether such queuing occurs inside or outside the Leased Property or the Center; and (ii) keep all crowds, which may gather due to the Permitted Use of the Leased Property under control whether such crowds gather inside or outside the Leased Property or the Center.

36.02. Additional Measures. If Landlord determines, in its sole judgement, that Tenant has not complied with Paragraph a hereof, Tenant will, upon Landlord's direction and at Tenant's sole cost and expense (i) hire a security guard or guards; and/or (ii) install temporary and removable crowd control devices in areas designated by Landlord.

36.03. Other Directions by Landlord. Tenant agrees to follow Landlord's other directions regarding orderly queuing and crowd control.

36.04. Self-help. If Tenant fails to comply with Landlord's directions pursuant to Sections 36.02 and 36.03 hereof, Landlord shall have the right to do so on Tenant's behalf, and Tenant shall concurrently reimburse Landlord for the cost and expense of doing so.

(SIGNATURE PAGE FOLLOWS)

IN WITNESS WHEREOF, the parties hereto have executed this Lease the day and year first set forth above.

"TENANT"

HIGCO, INC.
a Nevada corporation

By: Sean T. Higgins
Name: Sean T. Higgins
Its: President

"LANDLORD"

BOCA PARK PARCELS, LLC
a Nevada limited liability company

By: _____
John M. McCall
Manager; Corporate Counsel

GUARANTY

GUARANTY OF LEASE dated _____ by and between Boca Park Parcels, LLC, a Nevada limited liability company, as Landlord, and Higco, Inc., a Nevada corporation, as Tenant.

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, the undersigned Guarantor hereby unconditionally and irrevocably guarantees the full and faithful performance by Tenant of all the terms, covenants and conditions of the above-referenced Lease. This Guaranty shall remain in full force and effect regardless of any amendment, modification, extension, compromise or release of any term, covenant or condition of the Lease or of any party, assignee or subtenant thereto, as the case may be.

The undersigned agrees to indemnify Landlord against any and all liability, loss, costs, charges, penalties, obligations, expenses, attorneys' fees, litigation, judgments, damages, claims and demands of any kind whatsoever in connection with, arising out of or by reason of the assertion by Tenant of any defense to its obligations under the Lease or the assertion by Guarantor of any defense to its obligations hereunder. Guarantor waives any right or claim or rights to cause a marshalling of Tenant's assets or to proceed against Guarantor or Tenant or any security for the Lease or this Guaranty in any particular order and Guarantor agrees that any payments or performance required to be made hereunder shall become due upon demand in accordance with the terms hereof immediately upon the happening of a default under the Lease, whether or not Guarantor has been given notice of such default, and Guarantor hereby expressly waives and relinquishes all rights and remedies accorded by applicable law to guarantors, including, but not limited to, notice of demand, notice of default, any failure to pursue Tenant or its property, any defense arising out of the absence, impairment or loss of any right of reimbursement or subrogation and any defense arising by reason of any defense of Tenant or by reason of the cessation of the liability of Tenant or any defense by reason of the assertion by Landlord against Tenant of any of the rights or remedies reserved to Landlord pursuant to the provisions of the Lease, or by reason of summary or other proceedings against Tenant.

No delay on Landlord's part in exercising any right, power or privilege under this Guaranty or any other document executed in connection herewith shall operate as a waiver of any such privilege, power or right.

Guarantor agrees that any judgment rendered against Tenant for monies or performance due Landlord shall in every and all respects bind and be conclusive against Guarantor to the same extent as if Guarantor had appeared in any such proceedings and judgment therein had been rendered against Guarantor. Guarantor agrees that Landlord may seek any and all damages and/or remedies from Guarantor directly without first having to seek damages and/or remedies from Tenant.

Guarantor subordinates to Tenant's obligations to Landlord all indebtedness of Tenant to Guarantor, whether now existing or hereafter contracted, whether direct or indirect, contingent or determined. With respect to any such indebtedness of Tenant to Guarantor, Guarantor further agrees to make no claim therefor until any and all obligations of Tenant to Landlord shall have been discharged in full and Guarantor further covenants and agrees not to assign all or any part of such indebtedness while this Guaranty remains in effect.

The terms, covenants and conditions contained in this Guaranty shall inure to the benefit of the successors and assigns of Landlord.

If any term, covenant or condition of this Guaranty, or any application thereof, should be held by a court of competent jurisdiction to be invalid, void or unenforceable, all terms, covenants and conditions of this Guaranty, and all applications thereof not held invalid, void or unenforceable shall continue in full force and effect and shall in no way be affected, impaired or invalidated thereby.

In this Guaranty, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

This Guaranty shall be construed in accordance with its intent and without regard to any presumption or other rule requiring construction against the party causing the same to be drafted.

The laws of the State of Nevada shall govern the validity, construction, performance and effect of this Guaranty. The venue for any disagreement, dispute or litigation shall be the State of Nevada, County of Clark and City of Las Vegas.

Should Guarantor consist of more than one person or entity, then, in such event, all such persons and entities shall be jointly and severally liable as Guarantor hereunder. In any action brought by Landlord to enforce any of its rights under or arising from this Guaranty, Landlord shall be entitled to receive its costs and legal expenses including reasonable attorneys' fees, whether such action is prosecuted to judgment or not. If Landlord shall engage the services of any attorney for the purpose of collecting any rental due from Tenant, having first given Tenant five (5) days' notice of its intention so to do, Tenant shall pay the reasonable fees of such attorney for his services regardless of the fact that no legal proceeding or action may have been filed or commenced.

Dated this 5th day of November, 2002.

"GUARANTORS"

Kevin Higgins

Sean Higgins

G. Michael Higgins

EXHIBIT A-1

LEGAL DESCRIPTION OF CENTER

See Attached

CONSULTING ENGINEERS • PLANNERS • SURVEYORS
PROVIDING QUALITY PROFESSIONAL
SERVICES SINCE 1960

PROFESSIONAL LAND SURVEYOR · STATE OF NEVADA
ALAN R. RIEKKI
No. 12489
2/03/00

W.O. 5334-1
OCTOBER 15, 1998
BY: TZ / ARR
P.R. BY: ARR

REVISED: 5/27/99
REVISED: 2/03/00

EXPLANATION:
THIS LEGAL DESCRIBES A PARCEL OF LAND GENERALLY LOCATED NORTHEASTERLY OF RAMPART BOULEVARD AND CHARLESTON BOULEVARD.

LEGAL DESCRIPTION
PHASE 1

BEING A PORTION OF LOT 1, BLOCK 1 OF THAT COMMERCIAL SUBDIVISION KNOWN AS "PECCOLE RANCH TOWN CENTER" ON FILE IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY, NEVADA, IN BOOK 86 OF PLATS, AT PAGE 23, LOCATED WITHIN THE SOUTH HALF (S 1/2) OF SECTION 32, TOWNSHIP 20 SOUTH, RANGE 60 EAST, M.D.M., CITY OF LAS VEGAS, CLARK COUNTY, NEVADA, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE WEST SIXTEENTH SECTION CORNER OF SAID SECTION 32, BEING ON THE CENTERLINE OF RAMPART BOULEVARD; THENCE NORTH 00°33'39" WEST, ALONG THE CENTERLINE OF SAID RAMPART BOULEVARD, 119.00 FEET; THENCE NORTH 89°26'21" EAST, DEPARTING SAID CENTERLINE, 56.00 FEET TO THE EASTERLY RIGHT-OF-WAY OF SAID RAMPART BOULEVARD, SAME BEING THE POINT OF BEGINNING;

THENCE ALONG SAID EASTERLY RIGHT-OF-WAY, THE FOLLOWING COURSES: NORTH 00°33'39" WEST, 124.06 FEET; THENCE NORTH 07°45'20" EAST, 60.83 FEET; THENCE NORTH 01°42'24" WEST, 81.44 FEET; THENCE NORTH 15°44'35" WEST, 41.23 FEET; THENCE NORTH 01°42'24" WEST, 118.57 FEET; THENCE NORTH 00°33'39" WEST, 457.05 FEET TO THE BEGINNING OF A CURVE CONCAVE SOUTHEASTERLY HAVING A RADIUS OF 1650.00 FEET; THENCE NORTHEASTERLY, 547.45 FEET ALONG SAID RIGHT-OF-WAY AND SAID CURVE THROUGH A CENTRAL ANGLE OF 19°00'36"; THENCE SOUTH 71°33'03" EAST, DEPARTING SAID EASTERLY RIGHT-OF-WAY, 15.00 FEET; THENCE 72°37'30" EAST, 200.04 FEET; THENCE SOUTH 04°29'51" EAST, 151.87 FEET; THENCE NORTH 89°26'21" EAST, 681.46 FEET; THENCE SOUTH 00°24'22" EAST, 131.38 FEET; THENCE NORTH 89°26'21" EAST, 782.86 FEET; THENCE SOUTH 00°19'57" EAST, 530.10 FEET; THENCE NORTH 89°40'03" EAST, 125.00 FEET TO THE WESTERLY RIGHT-OF-WAY OF MERIALDO LANE; THENCE SOUTH 00°19'57" EAST, ALONG SAID WESTERLY RIGHT-OF-WAY, 541.00 FEET TO

2727 SOUTH RAINBOW BOULEVARD LAS VEGAS, NEVADA 89146-5148
TEL. (702) 873-7550 FAX: 362-2597

THE BEGINNING OF A CURVE CONCAVE NORTHWESTERLY HAVING A RADIUS OF 54.00 FEET; THENCE SOUTHWESTERLY, 84.82 FEET ALONG SAID CURVE THROUGH A CENTRAL ANGLE OF 90°00'00" TO THE NORTHERLY RIGHT-OF-WAY OF CHARLESTON BOULEVARD; THENCE SOUTH 89°40'03" WEST, ALONG SAID NORTHERLY RIGHT-OF-WAY, 559.98 FEET; THENCE SOUTH 89°26'21" WEST, CONTINUING ALONG SAID NORTHERLY RIGHT-OF-WAY, 1215.42 FEET TO THE BEGINNING OF A CURVE CONCAVE NORTHEASTERLY HAVING A RADIUS OF 54.00 FEET; THENCE NORTHWESTERLY, 84.82 FEET ALONG SAID CURVE THROUGH A CENTRAL ANGLE OF 90°00'00" TO THE POINT OF BEGINNING, AS SHOWN ON THE "EXHIBIT TO ACCOMPANY LEGAL DESCRIPTION" ATTACHED HERETO AND MADE A PART HEREOF.

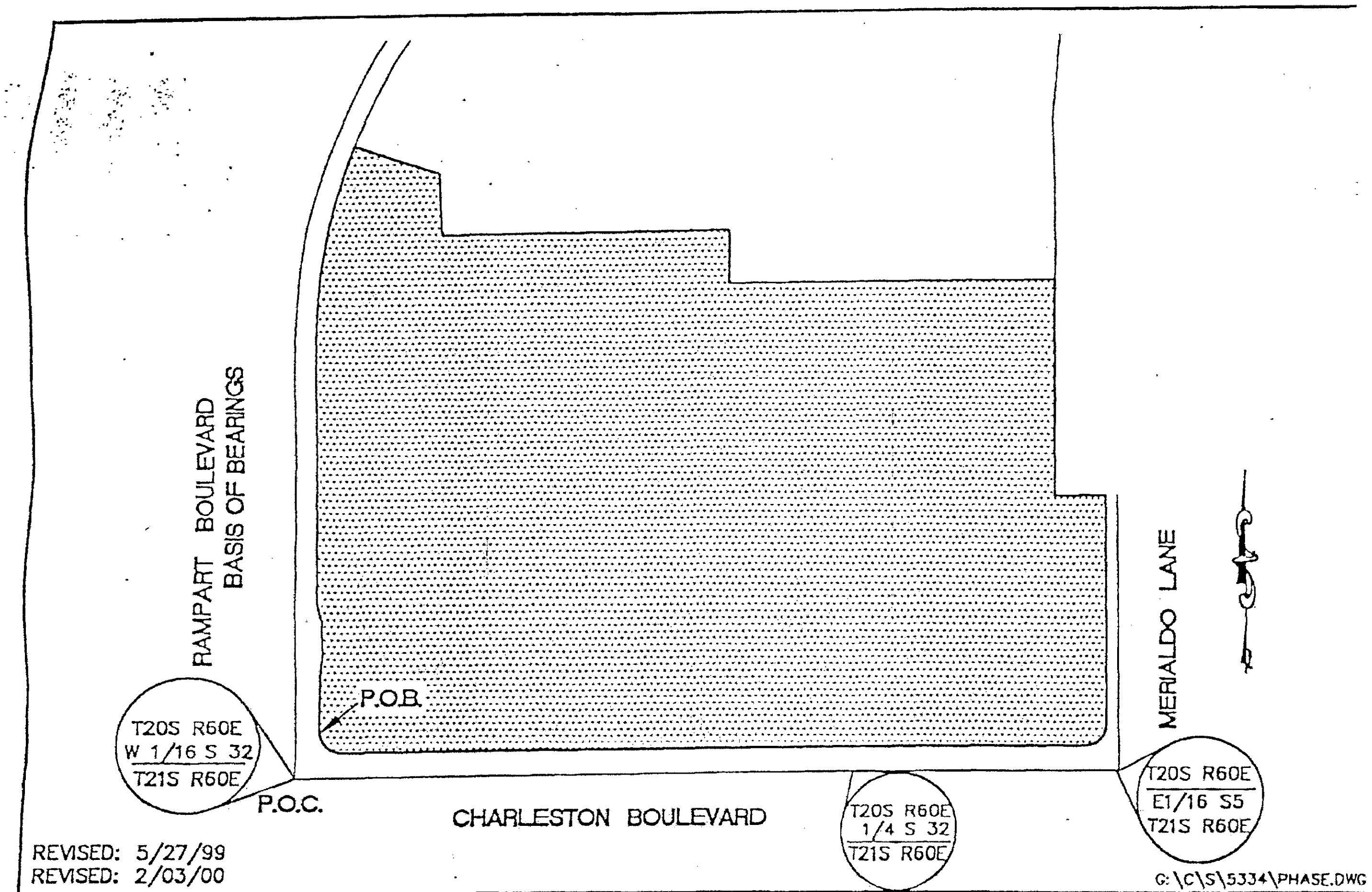
CONTAINING 51.11 ACRES, MORE OR LESS, AS DETERMINED BY COMPUTER METHODS.

BASIS OF BEARINGS:

NORTH 00°33'39" WEST, BEING THE BEARING ON THE CENTERLINE OF RAMPART BOULEVARD, AS SHOWN ON THAT CERTAIN PARCEL MAP ON FILE IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY, NEVADA, IN FILE 82 OF PARCEL MAPS, AT PAGE 11.

NOTE: THIS LEGAL DESCRIPTION IS PROVIDED AS A CONVENIENCE AND IS NOT INTENDED FOR THE PURPOSE OF SUBDIVIDING LAND NOT IN CONFORMANCE WITH NEVADA REVISED STATUTES.

END OF DESCRIPTION.



REVISED: 5/27/99
REVISED: 2/03/00

G:\C\S\5334\PHASE.DWG

vtn nevada

EXHIBIT TO ACCOMPANY
LEGAL DESCRIPTION
PHASE 1

W.O.#: 5334-1
DATE: 10/15/98
BY: TZ / ARR
SCALE: 1"=300'
SHEET 1 OF 1

Project: 5334srvy
Lot Map Check

Thu Feb 03 10:58:52 2000

Lot name: PHASE1NEW

North: 16123.28 East: 17690.35
Line Course: N 00-33-39 W Length: 124.06
North: 16247.33 East: 17689.14
Line Course: N 07-45-20 E Length: 60.83
North: 16307.60 East: 17697.34
Line Course: N 01-42-24 W Length: 81.44
North: 16389.01 East: 17694.92
Line Course: N 15-44-35 W Length: 41.23
North: 16428.69 East: 17683.73
Line Course: N 01-42-24 W Length: 118.57
North: 16547.21 East: 17680.20
Line Course: N 00-33-39 W Length: 457.05
North: 17004.24 East: 17675.73
Curve Length: 547.45 Radius: 1650.00
Delta: 19-00-36 Tangent: 276.26
Chord: 544.94 Course: N 08-56-39 E
Course In: N 89-26-21 E Course Out: N 71-33-03 W
RP North: 17020.39 East: 19325.65
End North: 17542.55 East: 17760.45
Line Course: S 71-33-03 E Length: 15.00
North: 17537.81 East: 17774.68
Line Course: S 72-37-30 E Length: 200.04
North: 17478.07 East: 17965.59
Line Course: S 04-29-51 E Length: 151.87
North: 17326.67 East: 17977.50
Line Course: N 89-26-21 E Length: 681.46
North: 17333.34 East: 18658.93
Line Course: S 00-24-22 E Length: 131.38
North: 17201.96 East: 18659.86
Line Course: N 89-26-21 E Length: 782.86
North: 17209.62 East: 19442.68
Line Course: S 00-19-57 E Length: 530.10
North: 16679.53 East: 19445.76
Line Course: N 89-40-03 E Length: 125.00
North: 16680.26 East: 19570.76
Line Course: S 00-19-57 E Length: 541.00
North: 16139.27 East: 19573.90
Curve Length: 84.82 Radius: 54.00
Delta: 90-00-00 Tangent: 54.00
Chord: 76.37 Course: S 44-40-03 W
Course In: S 89-40-03 W Course Out: S 00-19-57 E
RP North: 16138.95 East: 19519.90
End North: 16084.95 East: 19520.21
Line Course: S 89-40-03 W Length: 559.98
North: 16081.70 East: 18960.24
Line Course: S 89-26-21 W Length: 1215.42
North: 16069.81 East: 17744.88
Curve Length: 84.82 Radius: 54.00

Project: 5334srvy Thu Feb 03 10:58:52 2000

Lot Map Check

Delta: 90-00-00 Tangent: 54.00
Chord: 76.37 Course: N 45-33-39 W
Course In: N 00-33-39 W Course Out: S 89-26-21 W
RP North: 16123.80 East: 17744.35
End North: 16123.28 East: 17690.35

Perimeter: 6534.39 Area: 2,226,298.754 sq.ft. 51.109 acres

Mapcheck Closure - (Uses listed courses, radii, and deltas)
Error Closure: 0.00 Course: S 50-22-28 E
Error North: -0.001 East: 0.001
Precision 1: 3,557,022.19

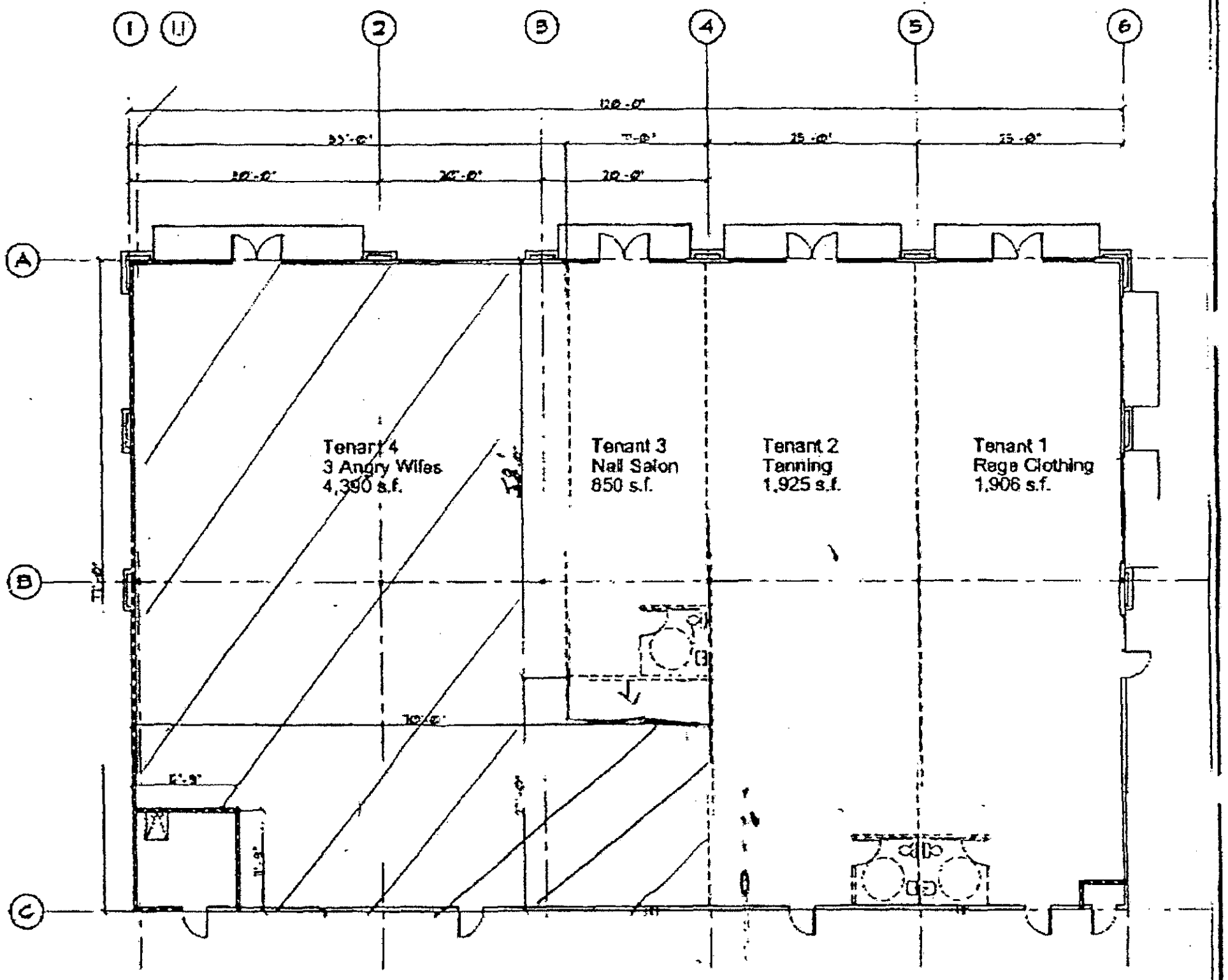
EXHIBIT A-2

SITE PLAN

See Attached

Building Information

Building Area		9,240 gsf
Building Size		120' x 77'
Tenant 1	57'+/- x 77'	4,390 sf
Tenant 2	17' x 50'	850 sf
Tenant 3	25' x 77'	1,925 sf
Tenant 4	25' x 77'	1,906 sf
Total Retail		9,071 sf
Common		169 sf
		9,240 sf



Pad J @ Boca Park I

Triple Five Nevada Dev. Corp.
Las Vegas, Nevada 702-242-6937

North

Scale: 1" = 20'
0 10 20

Perlman ARCHITECTS
PERLMAN ARCHITECTS, INC.
2230 CORPORATE CIRCLE, SUITE 200
HENDERSON, NEVADA 89074
702.990.9900 702.932.3222 fax

Date: July 29, 2002
Project Number: 143031

EXHIBIT B

COMMENCEMENT DATE

Sean T. Higgins
Higco, Inc.
10273 Garden Glen Lane
Las Vegas, Nevada 89135

Re: Three Angry Wives – Boca Park Marketplace
Commencement Date Memorandum

Dear Mr. Higgins:

The commencement date of that Lease dated as of _____ ___, 200___, by and between Boca Park Parcels, LLC, a Nevada limited liability company, as Landlord, and Higco, Inc., a Nevada corporation, as Tenant, was the ____ of _____, 200___.

"LANDLORD"

BOCA PARK PARCELS, LLC
a Nevada limited liability company

By: _____
John M. McCall
Manager, Corporate Counsel

EXHIBIT C

DESCRIPTION OF WORK

When Landlord's architect has completed drawings of the basic shell of the building (or if such drawings have already been completed, then promptly after the execution of this Lease), Landlord shall deliver a floor plan of the Leased Property to Tenant showing the columns and other structural work in the Leased Property.

Within fifteen (15) days after receipt of said floor plan, Tenant shall submit to Landlord four (4) sets of fully dimensioned scale drawings of the interior space of the Leased Property, prepared by Tenant's registered architect at Tenant's expense. Said drawings shall indicate the specific requirement of Tenant's space showing clearly interior partitions, trade fixture plans, location and layout of the bar, restrooms, telephones and post locations ("Interior Plans"). Tenant shall also deliver to Landlord specifications for all such trade fixtures. Landlord, at landlord's sole cost and expense, shall, using the Interior Plans complete all architectural, mechanical, electrical and plumbing drawings. Landlord shall allow Tenant to review said plans and the parties shall both sign off on the final drawings. These shall be the "Approved Plans". The Approved Plans shall be completed by Landlord in conformity with this Exhibit C and all applicable permits, authorizations, building regulations, zoning laws and all other governmental rules, regulations, ordinances, statutes and laws. In addition, Landlord, at landlord's sole cost and expense, shall apply for and obtain all necessary permits from all government agencies required to complete Landlord's Work. Such plans shall also indicate the work to be done by Landlord at Landlord's expense, as provided in Section I hereof ("Landlord's Work"), the work to be done by Landlord at Tenant's expense and the work to be done by Tenant at Tenant's expense (any work that is not Landlord's Work as provided in Section I hereof, shall be referred to as "Tenant's Work"). Any engineering services required for Tenant's Work or any re-engineering services required of Landlord's Work because of Tenant's Work shall be at the expense of Tenant.

Unless provided otherwise in this Exhibit C, Tenant shall complete or arrange for the completion of Tenant's Work, at Tenant's expense, in accordance with the Approved Plans. Tenant agrees and acknowledges that any and all contractors, subcontractors and materialmen utilized, directly or indirectly, by Tenant or any agent of Tenant shall at all times comply with all applicable laws, ordinances and regulations, including, without limitation, compliance with State Industrial Insurance System and State Contractors Board requirements. Tenant shall obtain Landlord's prior written approval of the contractor and any subcontractor or subtrade who is to perform the construction work, or any portion thereof. Tenant and/or its contractor shall diligently and aggressively pursue, obtain and pay for all required inspections, licenses, authorizations, building permits, fees and occupancy certificates required for Tenant's Work or for Tenant to open for business after all work has been completed. Tenant may not enter upon the Leased Property until plans and specifications have been adopted as hereinafter provided and Landlord notifies Tenant that the Leased Property is ready for Tenant to perform its work. Tenant shall not conduct its work in such a manner as to interfere with Landlord performing Landlord's Work hereunder. Tenant may request that Landlord complete all or any part of Tenant's Work at Tenant's expense, subject to Landlord's acceptance of the job and the terms and conditions thereof and that Tenant's request specifically state in writing the scope of Tenant's Work to be undertaken by Landlord at Tenant's expense.

In the event that, based on the final plans and specifications, Tenant desires that Landlord not undertake a specific element of Landlord's Work, Landlord will provide Tenant a credit to Tenant for that portion of Landlord's Work not performed by Landlord. Such credit shall not exceed the actual cost to Landlord had Landlord provided that omitted portion of Landlord's Work. Any credits provided in this Exhibit C shall be paid to Tenant upon the Commencement date of the Lease.

Landlord has agreed to modify the exterior store front design of the Leased Property, removing all windows and allowing for a larger exterior door. Any further modifications by Tenant must be previously approved by Landlord in writing.

Any additional charges, expenses (including architectural and engineering fees) or costs arising by

reason of any subsequent change, modification or alteration in said Approved Plans and specifications made at the request of Tenant shall be at the sole cost and expense of Tenant, and Landlord shall have the right to demand immediate payment for such change, modification or alteration prior to Landlord's performance of any work in the Leased Property to the extent that such request affects the work Landlord is to perform hereunder. No such changes, modifications or alterations in said Approved Plans and specifications can be made without the written consent of Landlord after the written request thereof by Tenant. No part of the cost of any trade fixture or personal property for Tenant shall be payable by Landlord.

The fact that Tenant may enter into possession of the Leased Property prior to the actual completion of the building for the purpose of installing trade fixtures and equipment shall not be deemed an acceptance by Tenant of completion by the Landlord until actual completion shall have taken place; provided, however, in such event, Tenant shall hold Landlord harmless and indemnify Landlord for any loss or damage to Tenant's fixtures, equipment and merchandise and for injury to any person.

Where the Approved Plans and specifications are in conflict with this Exhibit C, the provisions of this Exhibit C shall prevail.

I. WORK DONE BY LANDLORD AT LANDLORD'S EXPENSE

Landlord shall deliver to Tenant the Leased Property as agreed upon in this Exhibit C ("Landlord's Work") which shall include:

A. STRUCTURE

1. Frame, etc.: The building shall be of steel frame, reinforced concrete, masonry, wood, or bearing wall or any combination construction designed in accordance with governing building codes.

2. Exterior Walls: The exterior walls shall be of masonry or such other material or materials as selected by Landlord's architect or agent.

3. Clear Heights: Clear height between floor slab and Tenant's ceiling shall be no less than nine feet (9') and, no lower than the top of any window frame, and shall otherwise be governed by structural design.

4. Floor Construction: Floors shall be of concrete slab on grade, smooth finish, including restrooms

5. Roof: The roof shall be composition gravel, tile or as otherwise specified by Landlord's architect or agent.

6. Ceilings: Finished ceiling in restrooms, suspended t-bar acoustical ceiling over balance of ceiling area, including ceiling as required by code in the kitchen.

7. Insulation: Landlord shall furnish all insulation for walls and ceilings.

8. Demising Walls: Landlord shall provide the wood frame, metal frame or masonry fire wall, as required by code, separating the leased suites within the same building. Landlord shall also provide standard drywall unpainted and ready for tenant's décor, and insulation, as

required by code, for such demising walls. Landlord shall also install an interior partition of up to eighty (80) linear feet, not including restroom walls, separating the storage and kitchen area from the sales area.

9. Exits: Exits shall be in accordance with governing codes, however, the exact location shall be determined after reviewing Tenant's Interior Plans.

10. Dimensions: Frontage Dimension: Interior stores shall be measured from center line to center line of party walls; exterior stores shall be measured form center line of party walls to outside face of exterior walls. Depth shall be measured from outside face of exterior walls and window mullions.

11. Door Frames: Exterior door frames will be hollow metal construction or as otherwise specified by Landlord's architect or agent.

12. Doors: Exterior service doors will be hollow metal, which shall generally be located at the rear of the Leased Property.

13. Parapets, etc.: Landlord reserves the right to require a 12' neutral strip between stores, centered on the line defining Leased Property.

B. STORE FRONTS

1. Design: As agreed upon by the Landlord and Tenant.

C. UTILITIES

1. Water and Sewer: Landlord will furnish to designated points in the Leased Property, as determined by the Approved Plans, water and sewer service as required for two restrooms with three (3) stalls each and to all designated points for Tenant's bar per Approved Plans. All installation beyond these facilities shall not be part of the Landlord's responsibility. Landlord may install, at Tenant's expense, a check, sub or flow meter, as applicable, to monitor Tenant's water usage at the Leased Property.

2. Grease Trap: Landlord shall install, at Tenant's expense one (1) pre-cast type exterior grease interceptor(s) sized per requirements of applicable codes and in accordance with the size of Tenant's restaurant at location designated by Landlord's. Tenant, however, shall maintain said grease Interceptors and Landlord shall have no liability for said grease interceptor.

3. Gas: Landlord shall install and furnish such utility to designated points in the Leased Property per the Approved Plans. Cost of the gas meter shall be Tenant's responsibility based upon Tenant's credit with the gas company.

4. Electricity: Landlord will furnish panels, as well as, sufficient conduit and wiring to the Leased Property to a maximum 600 amp. meter socket. Any and all fixtures, panel, breakers or equipment and the distribution of electrical service throughout the Leased Property, in accordance with the mutually Approved Plans and specifications, shall be Landlord's responsibility at Landlord's expense. Landlord shall also provide forty five (45) light fixtures capped at a maximum of $120.00 per light, up to fifty (50) wall or ceiling outlets and four (4) telephone boxes.

5. Telephone, Data and Cable: Landlord shall furnish a conduit and wiring for telephone, data and cable to designated points in the Leased Property per the Approved Plans. All conduit systems and wiring from the telephone, data and cable throughout the Leased Property shall

be undertaken by Landlord at Landlord's expense.

6. Exterior Signage: Landlord shall provide all j-boxes and other equipment necessary for the installation of Tenant's signage on three (3) sides of the building facia, at Landlord's sole cost and expense, per Tenant's mutually approved Signage Plan. Landlord shall provide signage criteria from Perlman Architects who handles the approvals.

7. HVAC: Landlord will furnish Tenant with air conditioning unit(s) at the rate of one (1) ton for every 200 square feet of floor space. The HVAC unit(s) will be placed on the roof, with a plenum duct into the Leased Property. All wiring and distribution of the HVAC, in accordance with the Approved Plans and specifications, shall be undertaken by Landlord, at Landlord's expense.

D. FIRE SPRINKLERS

Landlord will furnish fire sprinklers as required for the building shell only.

E. RESTROOMS

Landlord shall furnish two (2) restrooms, located per Tenant's Interior Plan, The men's' room shall contain: one (1) water closet, partitioned with a door, two (2) urinals, two (2) hot/cold water sinks, exhaust fan, light switch and fixture, and one mirror. The women's room shall contain: three (3) water closets, partitioned with doors; two cold/hot water sinks, exhaust fan, light switch and fixture and one mirror. Such restrooms shall meet the requirements of the Americans with Disabilities Act. Landlord shall be responsible for the water and sewer connection fees associated with said restroom.

F. ROUGH PLUMBING

Landlord shall provide one (1) mop sink, eight (8) flood drains per Approved Plans.

G. Permits: All required building permits and fees to build the building shall be Landlord's responsibility, however, the Certificate of Occupancy and permits and fees for Tenant's Work shall be paid by Tenant.

H. TENANT IMPROVEMENT ALLOWANCE:

Landlord shall, in addition to all work contemplated by this Section I of Exhibit C, also provide Tenant with an allowance of ten dollars ($10.00) per square foot of the Leased Property, which may be used for additional tenant improvements on the Leased Property. Landlord shall pay this allowance to tenant thirty days following Tenant's opening of the business to the public upon. invoiceupon the Commencement Date of the Lease.

II. WORK DONE AT TENANT'S EXPENSE

All work provided for in the plans and specifications, as mutually agreed upon by Landlord and Tenant that is not specifically set forth as "Landlord's Work" in Section I of this Exhibit C ("Tenant's Work"). All Tenant's Work shall be in full compliance with any and all applicable federal, state or local laws, ordinances, regulations and rules. Tenant's Work shall include, without limitation, the cost of any architectural, permitting or engineering services or expenses required for any work beyond Landlord's Work and the following:

A. Electrical Fixtures and Equipment: All meters, electric fixtures (lighting fixtures), equipment, except as provided in Section I (C) above, "Work Done by Landlord."

B. Gas Connections: The cost of all gas meters.

C. Water Connections: The cost of all water, check, sub or flow meters or valves, whichever is applicable, and any plumbing distribution throughout the Leased Property.

D. Walls: All interior partitions and curtain walls within the Leased Property, except as set forth in Section I.

E. Furniture and Fixtures: All store fixtures, cases, wood paneling, cornices, etc.

F. Show Window Background, Floors, etc.: All show window finish floors, show window backgrounds, show window lighting fixtures and show window doors.

G. Floor Coverings or Finishes: All floor coverings or finishes, including any additional preparation of floor slab for vinyl, tile or any special or other floor treatment.

H. HVAC: Intentionally omitted.

I. Alarm Systems, etc.: All alarm systems or other protective devices including any special wiring required for such devices.

J. Special Plumbing: All extra plumbing, either roughing in or fixtures required for Tenant's special needs not included in the Approved Plans.

K. Special Ventilation: Any required ventilation and related equipment including show window ventilation.

L. Intentionally Omitted.

M. Special Equipment: All special equipment such as conveyors, elevators, escalators, dumb waiters, etc., including installation and connection.

N. Electric Floor Outlets and Point of Sale Stations. Intentionally omitted.

O. Sewer: All sewer hookups, usage and service charges shall be paid by Tenant.

P. Store Front: Any alterations to the standard storefront, except as provided for in Section I, must be approved by Landlord or Landlord's architect, and Tenant shall bear all additional costs.

Q. Permits: Intentionally omitted.

R. Roof: Tenant and/or Tenant's contractor shall not penetrate the roof of the Leased Property without the prior written approval of Landlord. Any penetration of the roof must be sealed by the original roofing contractor, at Tenant's expense.

S. Fire Sprinkler: All fire sprinkler work, beyond the fire sprinkler work for the building shell performed by Landlord pursuant to Section I(D) above, required by government code and requirements due to Tenant's interior or exterior design.

T. Wiring: Any other wiring and connections required by Tenant, except as provided by Landlord pursuant to Section I above.

U. Restrooms: Intentionally omitted.

V. Drywall: Other than as specifically provided in Section I, including all painting and staining.

W. Insulation: Intentionally omitted.

X. Other: Any other work required by Tenant not covered herein.

EXHIBIT D

RULES AND REGULATIONS

Tenant agrees as follows:

1. All loading and unloading of goods shall be done only at such times, in the areas, and through the entrances designated for such purposes by Landlord.

2. The delivery or shipping of merchandise, supplies and fixtures to and from the Leased Property shall be subject to such rules and regulations as, in the judgment of Landlord, are necessary for the proper operation of the Leased Property or the Center.

3. No radio or television or other similar device shall be installed within the Leased Property such that it can be heard or seen outside the Leased Property without first obtaining in each instance Landlord's consent in writing. No aerial shall be erected on the roof or exterior walls of the Leased Property or in the Center, without in each instance, the written consent of Landlord and the installation of such aerial shall be by the roofing contractor that installed the roof. Any aerial so installed without such written consent shall be subject to removal without notice at any time at Tenant's expense of removal, repair to the roof and restoration of the roof warranty.

4. Tenant shall not, without the written consent of Landlord first had and obtained, use in or about the Leased Property any advertising or promotional media such as search lights, loud speakers, phonographs, or other similar visual or audio media which can be seen or heard outside the Leased Property.

5. Tenant shall keep the Leased Property at a temperature sufficiently high to prevent freezing of water in pipes and fixtures.

6. The exterior areas immediately adjoining the Leased Property shall be kept clean and free from dirt and rubbish by Tenant to the satisfaction of Landlord, and Tenant shall not place or permit any obstructions or merchandise in such areas.

7. Tenant and Tenant's employees shall park their cars only in those parking areas designated for that purpose by Landlord. Tenant shall furnish Landlord with automobile license numbers assigned to Tenant's car or cars, and cars of Tenant's employees, within five (5) days after taking possession of the Leased Property and shall thereafter notify Landlord of any changes within five (5) days after such changes occur. In the event that Tenant or its employees fail to park their cars in designated parking areas as aforesaid, then Landlord at its option, in addition to any other remedies, including, but not limited to, towing, may charge Tenant Twenty-Five Dollars ($25.00) per day per car parked in any area other than those designated.

8. The plumbing facilities shall not be used for any other purpose than that for which they are constructed, and no foreign substance of any kind shall be thrown therein, and the expense of any breakage, stoppage, or damage resulting from a violation of this provision shall be borne by Tenant who shall, or whose employees, agents, servants, customers or invitees shall, have caused it.

9. Tenant shall keep the Leased Property free from pests and vermin.

10. Tenant shall not burn any trash or garbage of any kind in or about the Leased Property or the Center.

11. Tenant shall not make noises, cause disturbances, or create odors that may be offensive to Landlord or to other tenants of the Center or their employees, agents, servants, customers or invitees.

12. No portion of the Leased Property or the Center shall be used for sale or display of any obscene, pornographic, so called "adult" or other offensive merchandise or activities.

13. Tenant shall not install or otherwise place on the Leased Property, without Landlord's written consent therefor first had and obtained, any sign or other object or thing visible to public view outside of the Leased Property, except that Tenant shall, at its expense, erect a sign on the exterior of the Leased Property of such size, shape, materials and design as may be prescribed by Landlord. Tenant shall not change or modify such sign without the written consent of Landlord. Tenant shall be required to properly maintain its sign, including prompt repairs of any nature. Tenant shall keep such sign lit during such hours as Landlord may designate. Upon expiration of the Lease, Tenant shall be responsible for promptly removing all signs placed in and around the Leased Property by Tenant. Tenant shall repair all damage caused to the building or Leased Property by such removal, including proper "capping off" of electrical wiring.

14. Tenant and Tenant's employees and agents shall not solicit business in the parking areas or other common areas, nor shall Tenant distribute any handbills or other advertising matter in automobiles parked in the parking area or in other common areas.

15. Tenant shall refrain from keeping, displaying or selling any merchandise or any object outside of the interior of the Leased Property or in any portion of any sidewalks, walkways or other part of the Center outside of the Leased Property.

16. Landlord may impose fines and penalties upon Tenant for failure to comply with the Rules and Regulations.

IAFD
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DISTRICT COURT

CLARK COUNTY, NEVADA

HIGCO, INC., a Nevada corporation, Plaintiff, vs. BOCA PARK PARCELS, LLC, a revoked Nevada limited liability company; BOCA PARK MARKETPLACE LV, LLC, a Nevada limited liability company; BOCA PARK MARKETPLACE LV SYNDICATIONS GROUP MM, INC., a Nevada corporation; BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC, a Nevada limited liability company; and DOES I-X, and ROE ENTITIES I-X, inclusive, Defendants.	CASE NO DEPT **INITIAL APPEARANCE FEE DISCLOSURE (NRS CHAPTER 19)** **BUSINESS COURT**

Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for parties appearing in the above-entitled action as indicated below:

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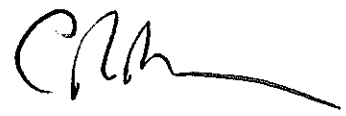
Name of Plaintiff:	
HIGCO, INC.	$1,530.00
TOTAL REMITTED	$1,530.00

Dated this 5th day of December 2014.

GORDON SILVER



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Attorneys for Defendants BOCA PARK PARCELS, LLC, BOCA PARK MARKETPLACE LV, LLC, BOCA PARK MARKETPLACE LV SYNDICATIONS GROUP MM, INC. and BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

HIGCO, INC., a Nevada corporation, Plaintiff, vs. BOCA PARK PARCELS, LLC, , a revoked Nevada corporation, et al., Defendants.	Case No. A-14-710780-B Dept. No. XI **MOTION TO DISMISS WITH PREJUDICE**

Defendants BOCA PARK PARCELS, LLC, BOCA PARK MARKETPLACE LV, LLC, BOCA PARK MARKETPLACE LV SYNDICATIONS GROUP MM, INC. and BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC, (collectively "Defendants"), through their attorneys HEJMANOWSKI & McCREA LLC, respectfully move his Court to dismiss with prejudice the Complaint filed herein for failure to state a claim upon which relief can be granted. This motion is made and based upon NEV. R. CIV. P. 12(b)(5), application of the doctrines of *res judicata* and claim-splitting, the pleadings and documents on file in this case, the pleadings and

documents on file in Case No. A660548, the memorandum of points and authorities which follows and any argument the Court may allow at a hearing of this matter.

Dated: January 26, 2015

HEJMANOWSKI & McCREA LLC

By:/s/Charles H. McCrea
Charles H. McCrea (SBN #104)
520 South Fourth Street, Suite 320
Las Vegas, NV 89101

Attorneys for Defendants BOCA PARK PARCELS, LLC, BOCA PARK MARKETPLACE LV, LLC, BOCA PARK MARKETPLACE LV SYNDICATIONS GROUP MM, INC. and BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC

NOTICE OF MOTION

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD

PLEASE TAKE NOTICE THAT the undersigned will bring the above motion for hearing before this Court at 8:30AM .m., on the 26 day of Feb., 2015.

Dated: January 26, 2015

HEJMANOWSKI & McCREA LLC

By:/s/Charles H. McCrea
Charles H. McCrea (SBN #104)
520 South Fourth Street, Suite 320
Las Vegas, NV 89101

Attorneys for Defendants BOCA PARK PARCELS, LLC, BOCA PARK MARKETPLACE LV, LLC, BOCA PARK MARKETPLACE LV SYNDICATIONS GROUP MM, INC. and BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND STATEMENT OF FACTS

This is not the first action between these identical parties involving the identical subject matter. The instant action asserts two claims for relief against Defendants – breach of contract and breach of the implied covenant of good faith and fair dealing – arising out of Defendants'

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alleged breach of a lease provision purporting to grant plaintiff Higco, Inc. ("Higco") the exclusive right to conduct gaming operations in the commercial center known as "Boca Park Phase I." These claims are based on the assertion that Defendants' execution of a lease with Wahoo's Fish Taco in early 2012 (the "Wahoo's Lease") granting Wahoo's Fish Taco the right to offer gaming on its premises violated the lease between Defendants and Higco which Higco claims grants it that right exclusively. Complaint, ¶¶17-20.

Nearly three years ago, on April 23, 2012, Higco filed a Complaint against Defendants in Department XIII of this Court (the "First Action) [1] seeking declaratory relief arising out of the very same conduct that is the basis of the claims asserted in this action, i.e., Defendants' alleged breach of the same lease provision by entering into the Wahoo's Lease granting Wahoo's Fish Taco the right to conduct gaming operations in the Boca Park Phase I commercial center. Final judgment in the First Action was entered in favor of Higco on November 7, 2012. No further action was taken by Higco and the time to appeal or amend the judgment entered in the First Action expired long ago.

Higco's prosecution of this action is a patent violation of the doctrine of *res judicata* and also the doctrine prohibiting a party from splitting claims.

II. LEGAL ANALYSIS

A. Standard of Review

Pursuant to NEV. R. CIV. P. 12(b)(5), a motion to dismiss is properly granted where the allegations in the complaint, "taken at face value . . . and construed favorably in the [plaintiff's] behalf, fail to state a cognizable claim for relief." ***Morris v. Bank of Am. Nev.***, 110 Nev. 1274, 1276, 886 P.2d 454, 456 (1994) (upholding trial court's dismissal of claims for fraud and conspiracy) (citation omitted). When analyzing a motion to dismiss under Rule 12(b)(5), the material factual allegations in the complaint are accepted as true. ***Buzz Stew LLC v. City of***

[1] Complaint, ¶13 (***Higco, Inc. v. Boca Park Parcels, LLC, et al.***, Case No. A660548).

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North Las Vegas*,** 181 P.3d 670, 672 (2008) ("[A] complaint should be dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief"). In addition to the allegations in the complaint, the court also may consider a document upon which the plaintiff relies in the complaint, even if the document was not attached to the complaint. *See* ***Committee for Reasonable Regulation of Lake Tahoe, 365 F. Supp. 2d at 1153. The court also may consider matters of public record. ***Breliant v. Preferred Equities Corp.***, 109 Nev. 842, 847, 858 P.2d 1258 (1993) ("[T]he court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted.").

B. Higco's Claims Are Barred by the Doctrine of *Res Judicata*

The parties to the First Action and this action are identical. And the facts underlying the claim brought by Higco in the First Action are the very same facts that underlie the claims asserted by Higco in this action.

On November 7, 2012, Defendants were served with the Notice of Entry of Order Granting Plaintiff's Motion for Summary Judgment in the First Action.[2] Higco's Judgment became final at that time and subject to the doctrine of *res judicata*.

The doctrine of *res judicata* precludes parties from relitigating a cause of action which has been finally determined by another court of competent jurisdiction. ***Horvath v. Gladstone***, 97 Nev. 594, 596, 637 P.2d 531, 533 (1981). It is particularly applicable when the prior proceeding was between the same parties regarding the same subject matter. *See* ***Landex, Inc. v. State ex rel. List***, 94 Nev. 469, 582 P.2d 786 (1978); **Yor*k v. York***, 99 Nev. 491, 664 P.2d 967 (1983). Not only is the prior judgment conclusive with respect to matters actually litigated, but also as to all matters which might have been litigated and decided in the prior action. ***York***, 99 Nev. at

[2] The Order Granting Plaintiff's Motion for Summary Judgment filed November 7, 2012 is attached as Exhibit 1 to Higco's Complaint in this action.

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493, 664 P.2d at 968.

> ***A judgment on the merits by a proper court will operate to bar every matter offered and received to sustain or defeat the claim and every other matter which might with propriety have been litigated and determined in that action in subsequent litigation between the parties or their privies involving identical causes of action.***

Bisssell v. College Dev. Co., 89 Nev. 558, 561, 517 P.2d 185, 187 (1973) (emphasis added).

Without question, Higco could have asserted its claims for breach of contract and breach of the implied covenant of good faith and fair dealing in the First Action. Higco's failure to do so compels the dismissal of these claims on principles of *res judicata*.

C. Higco's Claims Are Barred by the Doctrine Prohibiting the Splitting of Claims

Higco's strategy of first obtaining a declaratory judgment and then, more than two years later, bringing a new action on the same facts against the same parties also implicates the doctrine prohibiting the splitting of claims. The "claim-splitting" doctrine[3] generally prohibits a plaintiff from asserting rights or remedies against a defendant when previous litigation resulted in a final, valid judgment and the newly asserted claims are based on "any part of the transaction, or series of connected transactions, out of which the action[s] arose." Restatement (second) of Judgments § 24, *Dimensions of "Claim" for Purpores of Merger or Bar--General Rule Concerning "Splitting"*; ***Rycoline Products Inc. v. C and W Unlimited***, 109 F.3d 883, 885 ("The Doctrine thus requires a party to bring in one action 'all affirmative claims that [it] might have against another party . . . '"). In Nevada, "a single cause of action may not be split and separate actions maintained." ***Smith v. Hutchins***, 93 Nev. 431, 432 (1977). "[A] single cause of action" exists where the facts alleged "show one primary right of the plaintiff, and one wrong done by the defendant which includes that right." ***Reno Club, Inc. v. Harrah***, 70 Nev. 125, 130 (1953).

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[3] This doctrine is also known as the "entire controversy doctrine," "primary right theory," "single action rule," "single injury rule" and "indivisibility of a cause of action rule." *See*

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Under such circumstances, "the plaintiff has stated but a single cause of action, no matter how many forms and kinds of relief he may claim . . . ." *Id.*

Higco is precluded from prosecuting a new action for damages (i.e., the instant action) where a prior action (i.e., the First Action) involving the same alleged wrong was prosecuted to final judgment. For example, in ***Reno Club***, the plaintiff/appellant brought an action against its landlord and a tenant who refused to deliver the property to the plaintiff. The plaintiff's action sought specific performance of a lease option that entitled it to occupy the premises in dispute. *Id.* at 127. Plaintiff succeeded on its complaint and obtained a judgment entitling it to possession. *Id.* The tenant-in-possession, however did not immediately surrender the premises. As a consequence, plaintiff filed a new suit seeking damages for both the initial period of unlawful possession, and the period from the judgment's entry until the time the plaintiff actually obtained possession. In the second suit, the district court awarded damages for the latter period, and denied damages allegedly incurred during the former period. Plaintiff appealed.

On appeal, the Nevada Supreme Court concluded that based on the "rule against splitting causes of action," the district court correctly denied damages that accrued based on the initial unlawful detainer period, i.e., those damages based on the first lawsuit that only sought specific performance as a remedy. *Id.* The court described claim-splitting as precluding a plaintiff from splitting or dividing single causes of action into "separate suits maintained for the various parts thereof." *Id.* at 129. The court then reviewed the record and found that "the question of damages now before us was not litigated in the earlier suit between the parties and did not constitute an issue in that suit." *Id.* The court then determined that the two district court actions were based on a "single cause of action" "regardless of the fact that performance, delivery of possession or damages may be included among the *remedies* available." *Id.* at 131. As a consequence, "a suit

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Richmond v. P.P. Green, 78 Cal. Rptr. 356, 359-60 (2000 Cal. App.).

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to recover possession or title is held to bar a subsequent action for damages . . . where such damages were not sought in the former suit." *Id.* The court concluded that the plaintiff's "difficulty . . . is not through failure to state a cause of action in the former suit, but through failure in that suit to seek its full remedy." *Id.*

Applying the same principles and analysis enunciated by the Nevada Supreme Court in ***Reno Club***, this Court is obligated to dismiss with prejudice Higco's Complaint filed in this action.

III. CONCLUSION

For the foregoing reasons, this action should be dismissed with prejudice.

Dated: January 26, 2015

Respectfully submitted,

HEJMANOWSKI & McCREA LLC

By:/s/Charles H. McCrea
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Las Vegas, NV 89101

Attorneys for Defendants BOCA PARK PARCELS, LLC, BOCA PARK MARKETPLACE LV, LLC, BOCA PARK MARKETPLACE LV SYNDICATIONS GROUP MM, INC. and BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of HEJMANOWSKI & McCREA LLC and that on this 26th day of January, 2015, I caused document to which this is attached entitled **MOTION TO DISMISS WITH PREJUDICE** to be served as follows:

[ ] by depositing same for mailing in the United States Mail, in a sealed envelope addressed to:

[ ] by email as indicated below:

[ ] by facsimile as indicated below:

[ ] by hand delivery to:

and/or

[X] by the Court's electronic filing and service system through Wiznet.

/s/Charles H. McCrea
An Employee of
HEJMANOWSKI & McCREA LLC

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

HIGCO, INC., a Nevada corporation,

Plaintiff,

vs.

BOCA PARK PARCELS, LLC, a revoked Nevada limited liability company; BOCA PARK MARKETPLACE LV, LLC, a Nevada limited liability company; BOCA PARK MARKETPLACE LV SYNDICATIONS GROUP MM, INC., a Nevada corporation; BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC, a Nevada limited liability company; and DOES I-X, and ROE ENTITIES I-X, inclusive,

Defendants.

CASE NO. A-14-710780-B
DEPT. XI

OPPOSITION TO MOTION TO DISMISS

Date of Hearing: February 26, 2015
Time of Hearing: 8:30 a.m.

COMES NOW Plaintiff HIGCO, Inc. (hereafter "Plaintiff"), by and through its counsel, the law firm Gordon Silver, and hereby opposes the Motion to Dismiss filed by Defendants BOCA PARK PARCELS, LLC, BOCA PARK MARKETPLACE LV, LLC, BOCA PARK MARKETPLACE LV SYNDICATIONS GROUP MM, INC. and BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC, (collectively "Defendants"), on grounds that filing the Declaratory Relief Action seeking clarification of contract rights, then later filing a claim for damages resulting from breach of those rights does not subject the second case to dismissal based on either issue or claim preclusion, or on "claim splitting."

This Opposition is made and based upon the following Memorandum of Points and Authorities, any attachments thereto, and the papers and pleadings already on file herein.

Dated this 12th day of February 2015.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The Defendants' attempt to dismiss this case for breach of contract and damages on grounds of *res judicata* and "claim spitting" is meritless and misguided. The Motion to Dismiss ignores that the 2012 action sought only a declaration of the parties' rights under the Lease, and it misapplies the law to argue that the Defendants have no liability for breaching the Lease with impunity simply because Plaintiff did not bring a breach of contract claim along with a declaratory relief claim, in 2012.

In 2002, Plaintiff and Defendants entered into a lease whereby Plaintiff leased a parcel of land in Summerlin, Nevada for the operation of Plaintiff's tavern, to include gaming. In negotiating the Lease, the parties contemplated that Plaintiff would have an exclusive right to offer gaming in Defendants' development. That exclusive was ultimately incorporated into the Lease. The Fundamental Lease Provisions constitute the terms specific to the Lease. Section (o), found on Page 3, states:

> **Exclusive Use Section 7.17**
>
> Landlord shall grant Tenant an exclusive for Boca Park I for a tavern and gaming, except for any tenants currently located in the Center, which allow gaming (i.e. Vons, Longs) (the "Exclusive Use").

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In 2012, when the Plaintiff learned that a new tenant in Boca Park I had applied for a gaming license, it protested and directed the Defendants to the Exclusive Use provision of the Lease. In response, Defendants asserted the position that Plaintiff's Lease did not contain an exclusive use provision for gaming, or alternatively that the exclusive right provision was unenforceable. To resolve this dispute over the language, Plaintiff filed a declaratory relief action and requested that the Court construe the parties' rights under the Lease. The Complaint did not allege a breach of contract claim or bad faith claim. In its decision, the Court concluded that Plaintiff had the exclusive right to offer gaming in the Boca Park I. Undeterred, Defendants refused to abide by the lease terms and allowed the new tenant to offer gaming in Boca Park I. The effect of this neighboring competition (some 600 feet away) on the Plaintiff's revenues became evident over time, and when the Defendants failed to respond to written demands Plaintiff was forced to bring the present action for breach of the lease or for breach of the implied covenant of good faith and fair dealing.

Because the 2012 Declaratory Relief Action sought only a ruling on the rights of the parties, and only focused on the validity and construction of the Lease, Defendants arguments regarding *res judicata* and precluding "claim splitting" are simply wrong, and the Motion to Dismiss must be denied.

II.

LEGAL ARGUMENT

A. Defendants misrepresent the scope of the First Action.

Defendants inappropriately conflate Case No. A-12-660548-B (the "Declaratory Relief Action") with the present action for breach of contract in an attempt to avoid liability for their unrepentant actions. To this end, Defendants falsely contend that the Declaratory Relief Action sought "declaratory relief arising out of . . . Defendants' alleged breach of the same lease provision by entering into the Wahoo's Lease granting Wahoo's Fish Taco the right to conduct gaming operations in Boca Park Phase I commercial center." (Motion to Dismiss, at p. 3:8-13).

In reality, on April 23, 2012, Plaintiff initiated the Declaratory Relief Action, asserting a single claim for Declaratory Relief. Therein, Plaintiff requested that the Court interpret the rights

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of the parties under a November 5, 2002, lease for a property in Boca Park Phase I (the "Lease"), and specifically whether the exclusive use for "Boca Park Phase I for a tavern and gaming, except for any tenants currently located in the center, which allow gaming (i.e., Vons, Longs)" (hereinafter, the "Exclusive Use Provision") precluded Defendant from leasing to another business – here operating under a "supper club" license – offering gaming. (Declaratory Relief Action Complaint at ¶¶7, 9, 18-21). The Plaintiff did not allege a claim of breach or for damages.

Prior to the filing of the Declaratory Relief Action, Defendants had argued that the Lease did not contain an applicable Exclusive Use Provision. (Declaratory Relief Action Complaint at ¶ 16). Throughout the Declaratory Relief Action, Defendants, by and through their current counsel, continued to argue that the Lease was ambiguous, that the Lease did not include an Exclusive Use Provision for gaming, and that the "after-executed" Exclusive Use Provision was unenforceable. (See Opposition to Plaintiff's Motion for Summary Judgment, on file in the First Action).

The Court did not agree with the Defendants. In granting summary judgment, Judge Denton explained that the issue in the Declaratory Relief Action was whether the Lease included the Exclusive Use Provision. (See November 7, 2012 Order Granting Plaintiff's Motion for Summary Judgment, on file in the Declaratory Relief Action, at pp. 4-5).[1] The Court then ordered that "the controlling lease is unambiguous, and that Higco has a right to an exclusive use both for tavern and for gaming in Boca Park I, except for any tenants offering gaming in Boca Park I as of November 5,2002, including Von's and Longs; and that the exclusive use applies to all businesses operating in Boca Park I, such that Defendants shall not allow any business in Boca Park I, other than Higco, to offer gaming, unless the business allowed gaming in Boca Park I, as of November 5, 2002." (Id. at p. 6:1-7).

Despite Defendants' misrepresentation that the Declaratory Relief Action alleged their

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[1] The Court found that during the negotiation of the Lease the parties contemplated the Exclusive Use Provision; however, when the parties executed the Lease the Exclusive Use Provision was omitted. (See November 7, 2012 Order Granting Plaintiff's Motion for Summary Judgment, on file in the Declaratory Relief Action, at p. 3:3-22). Thereafter, Defendants delivered an initialed Exclusive Use Provision to Plaintiff. (Id. at p. 3:23-4:10). The Court found that that initialed Exclusive Use Provision was sufficient to correct the mistake in the Lease and was enforceable.

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breach of the Lease, one can see that the Declaratory Relief Action focused only on the construction and validity of the Lease provisions.

B. Declaratory Relief provides relief from uncertainty concerning rights and does not foreclose a later action for breach of the lease.

A party to a written contract may request that a court determine any question of construction or validity of that contract and obtain a declaration of the parties' rights arising thereunder. NRS 30.040. Declaratory relief is remedial and its express "purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and [is] to be liberally construed and administered." NRS 30.140; Las Vegas Plywood & Lumber, Inc. v. D & D Enterprises, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982)(remedial statutes are liberally construed). Declaratory relief should be applied consistent with the public policy reasons expressly provided for in NRS 30.140. Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. Cnty. of Washoe, 124 Nev. 193, 200-01, 179 P.3d 556, 560-61 (2008)

In the Declaratory Relief Action, Plaintiff sought a declaration of the parties' rights under the Lease. Consistent with the public policy goals of declaratory relief, the Court provided certainty as to the terms of the Lease and declared that the Exclusive Use Provision was enforceable and applied to any gaming, not just taverns, in Boca Park I.[2]

The Declaratory Relief Action does not preclude the present action for a breach of the Lease and damages. Declaratory relief is available "whether or not further relief is or could be claimed" and before or after a contract is breached. NRS 30.030; NRS 30.050. Importantly, requests for declaratory relief are not causes of action, but remedies. Velazquez v. Mortgage Elec. Registration Sys., Inc., No. 2:11-CV-576 JCM CWH, 2012 WL 5288141, at *2 (D. Nev. Oct. 23, 2012) (citing Stock West, Inc. v. Confederated Tribes of Coville Reservations, 873 F.2d. 1221, 1225 (9th Cir.1989) (holding that declaratory judgment does not create substantive cause of action)).[3] In contrast to a "cause of action," "a declaratory judgment in essence does not carry

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[2] Also consistent with the public policy goals of the Uniform Declaratory Judgments Act, Plaintiff used the court's Declaration of its rights under the Lease to further settlement negotiations, which ultimately Defendants rebuked.

[3] The Declaratory Judgments Act is to be interpreted consistent with federal laws and

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with it the element of coercion as to either party." Aronoff v. Katleman, 75 Nev. 424, 432, 345 P.2d 221, 225 (1959) (internal citations omitted). Instead, it only determines "legal rights without undertaking to compel either party to pay money or to take some other action to satisfy such rights as are determined to exist by the declaratory judgment." Id. Consistent therewith, declaratory relief, in contrast to a cause of action, does not require that a party has suffered damages. Nevada Mgmt. Co. v. Jack, 75 Nev. 232, 235, 338 P.2d 71, 73 (1959)(setting forth the requirements for declaratory relief); see also Kolender v. Lawson, 461 U.S. 352, 355 (1983)(requiring only a likelihood of injury for declaratory relief). Maffeo v. Nevada, No. 2:09-CV-02274, 2010 WL 4136985, at *6 (D. Nev. Oct. 19, 2010) *aff'd sub nom.* Maffeo v. Nevada, ex rel. Bd. of Regents of Nevada Sys. of Higher Educ., 461 F. App'x 629 (9th Cir. 2011).

The Declaratory Relief Action did not adjudicate a cause of action of breach, and did not rule on whether Defendants breached the Lease. To the contrary, the Declaratory Relief Action only declared what constituted the Lease terms and the parties' rights thereunder. In contrast, the current action makes a claim for damages resulting from a breach of the Lease.[4] The Complaint in this case alleges that after gaming commenced at Wahoo Taco, the Plaintiff began to suffer damages in the form of lost gaming revenue. Therefore, the current action does not pertain to the same facts as the Declaratory Relief Action (namely interpretation of the Exclusive Use Provision and the determination that it applies to all "gaming," rather than being limited to "taverns" with gaming). As such the Declaratory Relief Action does not preclude the later claim for damages resulting from a breach of the Lease and for bad faith.

1. This action is not barred by issue preclusion or claim preclusion.

Res judicata, a term which was disavowed by the Nevada Supreme Court in Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1054, 194 P.3d 709, 712-13 (2008), precludes parties from re-litigating a cause of action previously determined by a court. (Motion to Dismiss, at p. 4:19-21). The Court in Five Star broke the concept of *res judicata* into two modern components:

(continued)

regulations. NRS 30.160.

[4] Tellingly, Plaintiff brought the Declaratory Relief Action ***before*** any actual breach of the Lease could have occurred (Wahoo Tacos had not yet offered gaming) and prior to any ascertainable damages.

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claim preclusion and issue preclusion. Assuming that Defendants seek dismissal on either of those grounds of claim or issue preclusion, neither helps them here. Issue preclusion requires that "the issue decided in the prior litigation must be identical to the issue presented in the current action . . . [and] the issue was actually and necessarily litigated. Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1054-55, 194 P.3d 709, 713 (2008).[5] Likewise, claim preclusion requires that "the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case."[6] Id.

In this action, the Plaintiff alleges that Defendants breached that Lease by allowing another tenant to conduct gaming in Boca Park I and that this breach caused damages to the Plaintiff. There can be no doubt that the claim in the Declaratory Relief Action is not identical to the current claims and did not adjudicate these same facts. The Declaratory Relief Action sought only a declaration of the parties' rights under the Lease, whereas the current action seeks damages for a breach of the Lease. Undoubtedly, the determination of the Plaintiff's rights under the Exclusive Use Provision relieved any doubt as to issue of the Defendants' duty and cannot be re-litigated. However, because the issue of Defendants' performance under the Lease was never litigated, issue preclusion does not support dismissal of the current claims for breach.

Nor does claim preclusion apply. "Claim preclusion applies to prevent a second suit based on all grounds of recovery that were or could have been brought in the first suit." Id. at 1058, 194 P.3d at 715; Bank of Lake Tahoe v. Bank of Am., 57 F. App'x 310, 311 (9th Cir. 2003) (Claim preclusion "embraces all grounds of recovery that were asserted in a suit, as well as those that could have been asserted.") (citing Univ. of Nevada v. Tarkanian, 110 Nev. 581, 879 P.2d 1180, 1192 (1994). The fact that a cause of action might have been joined in a single suit, however, does not bring the case within the bar of claim preclusion. Reno Club, Inc. v. Harrah, 70 Nev. 125, 132-33, 260 P.2d 304, 307-08 (1953).

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[5] Issue preclusion also requires that the initial ruling must have been on the merits and have become final and the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation." Those elements are met here.

[6] The other two elements of claim preclusion, which are met here, are: (1) the parties or their privies are the same, (2) the final judgment is valid.

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The Declaratory Relief Action filed by Higco did not provide any recovery at all. It focused solely on the enforceability and construction of the Lease term and not the parties' performance thereunder. The actions focused on different grounds of relief. Claim preclusion, therefore, is inapplicable here. Five Star illustrates the difference between this case and a case where the claims of the first action preclude the claims of the second.

In Five Star, the plaintiff brought an action seeking specific performance of a land-purchase contract, i.e. the transfer of land. 124 Nev.at 1050, 194 P.3d at 710. That case was dismissed and not appealed. In a second action, the plaintiff tried to revive the claim by bringing a breach of contract claim seeking damages for the defendant's failure to transfer the same land that was the subject of the specific performance claim. Id. The court concluded that claim preclusion applied because the second suit was based "on the same facts and alleged wrongful conduct"—the failure to transfer the property—as the first action. Id. Here, the Declaratory Relief Action was not based on Defendants wrongful conduct, as is the instant action, but merely sought a determination of the parties rights based on a disputed interpretation of the Exclusive Use Provision. As there is no common for relief, claim preclusion does not apply.

Furthermore, at the time Plaintiff filed the Declaratory Relief Action it could not have brought a good faith claim for breach of contract. Wahoo Taco was either awaiting or had just received gaming approval as a "supper club." Plaintiff had not yet confirmed its interpretation that the Exclusive Use Provision precluded all other gaming (except Von's) in Boca Park I, nor was it aware of having suffered any damages. Plaintiff's claim for breach of contract did not ripen until Plaintiff suffered damages. It is also undisputed that the Exclusive Use Provision is an ongoing obligation and that Defendants' wrongful conduct, i.e. allowing Wahoo Taco to engage in gaming, is ongoing and causes additional damages each day. Thus, dismissal on ground of claim preclusion is wholly inappropriate.

2. Plaintiff did not split its claims because the Declaratory Relief Action is not based on a wrongful act, as the present matter—Defendants breach of contract.

"Policy demands that all forms of injury or damage sustained by the plaintiff as a consequence of the defendant's wrongful act be recovered in one action rather than in multiple

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actions." Smith v. Hutchins, 93 Nev. 431, 432, 566 P.2d 1136, 1137 (1977). For the single action rule (claim splitting doctrine) to apply, "**claims brought in both suits must be based on the same allegedly wrongful acts of the defendants**." Albert Winemiller, Inc. v. Keilly, 281 P.3d 1232 (Nev. 2009)(emphasis added); see also Brewer v. State, 281 P.3d 1157 (Nev. 2009); Laughon v. Silver State Shopping Ctr., 109 Nev. 820, 822-23, 858 P.2d 44, 46 (1993)(finding the single action rule prevents suing the "same defendant in separate actions for different elements of damage"); Hutchins, 93 Nev. at 432–33, 566 P.2d at 1137 ("A plaintiff cannot file suit for one part of the defendant's wrong and a second action for a second part of the defendant's wrong that arises from the same incident."); see also McGuire v. Lear, 602 F. Supp. 1385, 1387 (D. Nev. 1985)(There is only one cause of action when there is "only one right of the plaintiff and one wrong by the defendants involving that right.")

Filing a declaratory relief action to seek contract interpretation, then later filing a damage claim once a damage claim for breach of contract has arisen is not claim splitting. As discussed above, the Declaratory Relief Action was not based on alleged wrongful conduct by Defendants. Instead, it sought a declaration of the parties' rights under the Lease. By comparison, the present case alleges that Defendants breached the Lease and that the breach caused damages in the form of loss of gaming revenues over time, and continuing today. Because a breach of the Lease is not the conduct addressed in the Declaratory Relief Action, the one action one, or "claim splitting doctrine" is not implicated.

3. Public policy dictating that declaratory relief be liberally construed and subject to further relief when proper or necessary requires that the action not be dismissed.

In its most simple form, Defendants' argument is that because Plaintiff's asked the court construe its rights under the Lease, and in particular with respect to the Exclusive Use Provision, Plaintiff can never enforce the Lease that provision in an action for breach. This position is ludicrous, and advocates for Defendants' continuing breach with impunity. However, as expressed by statute, the purpose of declaratory relief "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and [is] to be liberally construed and administered." NRS 30.140. The statute and public policy afford a party

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the opportunity to seek clarity from the Court as to the rights of both parties, without having to sue for breach. Defendants' argument that a party must bring a breach of contract claim concurrent with a request for declaratory relief, or otherwise lose the claim, does not promote the resolution of uncertainty in contractual obligations, but instead encourages litigation for breaches of ambiguous or disputed terms. This plainly contradicts the public policy behind declaratory relief. Thus, the Motion to Dismiss flies in the face of the declaratory relief statutes and must be dismissed.

III.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests the Court deny Defendants' Motion to Dismiss in its entirety.

Dated this 12th day of February 2015.

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CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 27 day of February 2015 she caused a copy of the foregoing Opposition to Motion to Dismiss, to be transmitted by electronic service in accordance with Administrative Order 14.2, to all interested parties, through the Court's **Odyssey E-File & Serve** system addressed to:

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DISTRICT COURT

CLARK COUNTY, NEVADA

HIGCO, INC., a Nevada corporation, Plaintiff, vs. BOCA PARK PARCELS, LLC, , a revoked Nevada corporation, et al., Defendants.	Case No. A-14-710780-B Dept. No. XI **REPLY IN SUPPORT OF MOTION TO DISMISS WITH PREJUDICE** **Date of Hearing: 2/26/2015** **Time of Hearing: 8:30 AM**

On April 23, 2012, Plaintiff filed an action for declaratory relief claiming that the exclusive use provision in its lease with Defendants (the "Lease") was being violated by Defendants' grant of a lease to Wahoo's Fish Taco ("Wahoo's") permitting Wahoo's to conduct gaming on its premises (the "Declaratory Relief Action"). The Declaratory Relief Action concluded in Plaintiff's favor on November 8, 2012 with Plaintiff's filing and service of the Notice of Entry of Order Granting Plaintiff's Motion for Summary Judgment. The summary judgment adjudicated the rights and liabilities of all the parties and disposed of all the claims

asserted. Accordingly, it was immediately appealable to the Nevada Supreme Court. NRAP 3A. No appeal was taken and the judgment became final on December 11, 2012.

It is indisputable that this action, commenced two years later, is based on the same Lease and the same allegations that were at issue in the Declaratory Relief Action. That being so, the law is clear that this action cannot be maintained. It is prohibited under principles that preclude a party from litigating claims that could have been asserted in an earlier action involving the same parties and subject matter. Plaintiff's argument that the doctrines of *res judicata* (or claim preclusion) and "claim splitting" have no application here are without merit.

Claim Preclusion

> The parties are in agreement as to the elements of claim preclusion. They are:
>
> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; and (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation.

Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1054-55, 194 P.3d 709, 713 (2008) citing *University of Nevada v. Tarkanian*, 110 Nev. 581, 879 P.2d 1180 (1994)). Plaintiff readily concedes that the second and third elements are met here[1] but attempts to argue that the first element is not, asserting that the Declaratory Relief Action "focused solely on the enforceability and construction of the Lease term and not the parties' performance thereunder." Opposition, 8:1-3. This argument is nonsensical. The ***issue*** decided in the Declaratory Relief Action is identical to the ***issue*** to be decided in this action: Whether Defendants violated the exclusive use provision in its Lease with Plaintiff by granting Wahoo's the right to conduct gaming. Because Judge Denton entered a final judgment resolving that issue, the doctrine of claim preclusion clearly applies and this action must be dismissed.

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[1] Opposition, p. 7, footnotes 5 and 6.

Plaintiff seeks to avoid this result by accusing Defendants of falsely representing to the Court that the Declaratory Relief Action arose out of "Defendants' alleged breach" of the exclusive use provision in the Lease by granting Wahoo's the right to conduct gaming on its premises. Opposition, 3:21-26. Plaintiff then argues, "Despite Defendants' misrepresentation that the Declaratory Relief Action alleged their breach of the Lease, one can see that the Declaratory Relief Action focused only on the construction and validity of the Lease provisions." Opposition, 4:24-5:2.

In truth, it is Plaintiff who has misrepresented the record. In the complaint filed in the Declaratory Relief Action, Plaintiff plainly alleges "***Defendants Violate Plaintiff's Bargained-For Exclusive Use Provision.***" Complaint, 4:13, (Exhibit A; emphasis in original). Moreover, in its motion for summary judgment filed May 15, 2012, Plaintiff states at the very outset:

> ***Defendants have breached the Parties' Lease***, by allowing a new tenant to offer gaming in Boca Park Phase I. Whether ***this breach*** was due to a lack of care or, or a calculated economic ***breach***, the Defendants allowing a new tenant to offer gaming within Boca Park Phase I, is a ***clear violation*** of the exclusive for gaming granted Plaintiff under its Lease. [] ***Plaintiff asks the Court to enter summary judgment*** affirming the clear language of the Lease granting Plaintiff an exclusive for gaming in Boca Park Phase I, ***finding Defendants' actions to be in breach of the Lease.***

Motion for Summary Judgment, 3:4-11 (Exhibit B; emphasis added).[2]

Plaintiff concedes that the doctrine of claim preclusion applies not only to claims actually

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[2] In the Declaration of Sean T. Higgins filed in support of Plaintiff's motion for summary judgment he states: "I became aware sometime in early March 2012, however, that ***Defendants had violated Plaintiff's bargained-for Exclusive Use Provision***. ***Defendants violated the Exclusive*** by entering into a lease agreement with Wahoo's Fish Taco that allowed gaming on the Wahoo's Fish Taco leased premises. [ ] Gaming approval was subsequently granted, on April 29, 2012, and the Wahoo's Fish Taco began gaming operations shortly thereafter. [Declaration, 2:7-14.] I instructed Plaintiff's counsel to make a written demand that Defendants not allow gaming on the Wahoo's Fish Taco premises ***in violation of the Exclusive Use Provision*** of the Lease. [Declaration, 2:21-23.] Defendant acknowledges the language and was aware of the Exclusive Use Provision when it allowed gaming to proceed at the Wahoo's Fish Tacos within Boca Park Phase I. ***This action clearly violates the bargained for agreement to an exclusive for gaming***, and is damaging to The Three Angry Wives, which derives a substantial portion of its revenue from gaming. [Declaration, 3:4-8.]" (emphasis added).

brought in a prior action but also to claims that ***could have*** been brought (Opposition, 7:17-24) and then argues it could not have asserted its claim for breach of contract in the Declaratory Relief Action because it "did not ripen until Plaintiff suffered damages". Opposition, 8:20-21. This is both untrue and an incorrect statement of the law. Plaintiff's claim "ripened" at the moment it had knowledge of facts supporting a good faith allegation that Defendants were violating the exclusive use provision of the Lease, which indisputably occurred prior to the commencement of the Declaratory Relief Action. Although Wahoo's may not have been actually conducting gaming on its premises on April 23, 2012 when the Declaratory Relief Action was filed, Plaintiff admits that "[g]aming approval was subsequently granted, on April 29, 2012, and the Wahoo's Fish Taco began gaming operations shortly thereafter."[3]

In addition, it was not necessary that Plaintiff actually suffer damages before its breach of contract claim could "ripen." It is well settled that damages are not a necessary element of a claim for breach of contract:

> Liability in a contract case … does not depend on proof of injury. Proof of liability is complete when the breach of contract is shown. *Stromberger v. 3M Co., supra,* 990 F.2d 974, 976. At that point the plaintiff is entitled to nominal damages, even if he cannot show any injury from the breach. *Id.* at 976; *Chronister Oil Co. v. Unocal Refining & Marketing,* 34 F.3d 462, 466 (7th Cir.1994); 3 E. Allan Farnsworth, *Farnsworth on Contracts* § 12.8, p. 185 (1990).

Hydrite Chemical Company v. Calumet Lubricants Company, 47 F.3d 889, 891 (7th Cir. 1995).

Claim Splitting

While breach of contract and declaratory relief may be different "claims for relief," they are the same "cause of action" as defined in the claim splitting-context. A "cause of action" encompasses all affirmative claims that might have been brought against another party if those claims arise from the same factual underpinnings. If a new claim is based on the same factual

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[3] Declaration of Sean T. Higgins in Support of Motion for Summary Judgment, 2:13-14.

predicate, "the plaintiff has stated but a single cause of action, no matter how many forms and kinds of relief he may claim." *Reno Club, Inc. v. Harrah*, 70 Nev. 125, 131, 260 P.2d 304, 307 (1953). The factual allegations stated in Plaintiff's declaratory relief complaint are identical to those stated in its breach of contract complaint. Thus, if Plaintiff had included a breach of contract claim in its complaint filed in the Declaratory Relief Action, it could have moved for summary judgment as to liability--as is commonly done in deficiency cases--and then pursued discovery to prove its damages. Plaintiff also could have amended its complaint in the Declaratory Relief Action at any time – even after the entry of summary judgment – to assert the claims asserted here, but it did not. Plaintiff had a simple procedural way to avoid claim-splitting. As a consequence, Plaintiff's "difficulty [ ] is not through failure to state a cause of action in the former suit, but through failure in that suit to seek its full remedy." *Id.*

Public Policy

Plaintiff's argument that Defendants' motion should be denied on public policy grounds because the declaratory judgment statute "is to be liberally construed and administered" misses the mark entirely and completely ignores the strong public policy favoring the resolution of disputes in one action instead of multiple actions which unnecessarily increase costs and uncertainty for litigants and burden an already overtaxed judicial system.

The claim preclusion and claim-splitting doctrines are clearly intended to prevent parties from seeking to impose liability in one action and then seeking damages in a completely new and separate action. Here, Plaintiff's actions were part of a deliberate strategy to stagger (or split) its claim. Consequently, the Court should reject any attempt by Plaintiff to circumvent the philosophy favoring finality of judgments and the expeditious termination of ligation which underpins both doctrines addressed by this motion. Indeed, both doctrines would be rendered totally impotent if one is permitted to first file and prosecute an action to final judgment solely

seeking a declaratory judgment that a contract has been breached and, then years later, prosecute a second action seeking damages for that breach.

Conclusion

For all of the foregoing reasons, Defendants' Motion to Dismiss with Prejudice should be granted.

Dated: February 19, 2015

Respectfully submitted,

HEJMANOWSKI & McCREA LLC

By:/s/Charles H. McCrea
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Attorneys for Defendants BOCA PARK PARCELS, LLC, BOCA PARK MARKETPLACE LV, LLC, BOCA PARK MARKETPLACE LV SYNDICATIONS GROUP MM, INC. and BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of HEJMANOWSKI & McCREA LLC and that on this 19th day of February, 2015, I caused document to which this is attached entitled **REPLY IN SUPPORT OF MOTION TO DISMISS WITH PREJUDICE** to be served by the Court's electronic filing system through E-Service pursuant to NRCP 5((b)(2)(D) and EDCR 8.05 on:

Eric R. Olsen (SBN #3127)
eolsen@gordonsilver.com

Dylan T. Ciciliano (SBN #12348)
dciciliano@gordonsilver.com

/s/Charles H. McCrea
An Employee of
HEJMANOWSKI & McCREA LLC

EXHIBIT A

EXHIBIT A

COMP
GORDON SILVER
ERIC R. OLSEN
Nevada Bar No. 3127
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FRANCHESCA V. VAN BUREN
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Tel: (702) 796-5555
Fax: (702) 369-2666
Attorneys for Plaintiff, Higco, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

HIGCO, INC, a Nevada corporation,

Plaintiff,

vs.

BOCA PARK PARCELS, LLC, a revoked Nevada limited liability company; BOCA PARK MARKETPLACE LV, LLC, a Nevada limited liability company; BOCA PARK MARKETPLACE LV SYNDICATIONS GROUP MM, INC., a Nevada corporation; BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC, a Nevada limited liability company; and DOES I-X, and ROE ENTITIES I-X, inclusive,

Defendants.

CASE NO. A-12-660548-B
DEPT. XIII

COMPLAINT

ARBITRATION EXEMPT:
Declaratory Relief Requested

Business Court Requested

COMES NOW Plaintiff, HIGCO, Inc. ("Plaintiff"), a Nevada corporation, by and through its counsel, the law firm of Gordon Silver, and hereby alleges against Defendants, BOCA PARK PARCELS, LLC, a revoked Nevada limited liability company; BOCA PARK MARKETPLACE LV, LLC, a Nevada limited liability company; BOCA PARK MARKETPLACE LV SYNDICATIONS GROUP MM, INC., a Nevada corporation; BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC, a Nevada limited liability company; as follows:

. . .

. . .

I.

THE PARTIES, JURISDICTION AND VENUE

1. At all times herein mentioned, Plaintiff was and is a Nevada corporation with its principal place of business in the City of Las Vegas, Clark County, State of Nevada.

2. Plaintiff is informed and believes and thereupon alleges that at times herein mentioned, Defendant Boca Park Parcels, LLC ("Boca Park Parcels") was Nevada limited liability company organized and existing under the laws of the State of Nevada, but that Boca Park Parcels has been revoked.

3. Plaintiff is informed and believes and thereupon alleges that at all times herein mentioned, Defendant Boca Park Marketplace LV, LLC ("Boca Park Successor-in-Interest") was and is now a Nevada limited liability company organized and existing under the laws of the State of Nevada.

4. Plaintiff is informed and believes and thereupon alleges that at all times herein mentioned, Defendant Boca Park Marketplace LV Syndications Group MM, Inc. ("Boca Park Parent Corp.") was and is now a Nevada corporation organized and existing under the laws of the State of Nevada.

5. Plaintiff is informed and believes and thereupon alleges that at all times herein mentioned, Defendant Boca Park Marketplace Syndications Group, LLC ("Boca Park Manager") was and is now a Nevada limited liability company organized and existing under the laws of the State of Nevada.

6. The true names and capacities, whether individual, corporate, associate or otherwise of Defendants DOES I-X, inclusive, are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes and thereon alleges that each of the Defendants designated herein as a fictitiously named Defendant may have rights or duties arising from or related to the contract at issue in this case, or is in some manner responsible for the events and happenings herein referred to, or is an affiliate, subsidiary, parent entity, or successor in interest to one of the herein named defendants. When Plaintiff ascertains the true names and capacities of DOES I-X, inclusive, it will ask leave of this Court to amend its

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Complaint by setting forth the same.

7. The true names and capacities, whether individual, corporate, associate or otherwise of Defendants ROE ENTITIES I-X, inclusive, are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes and thereon alleges that each of the Defendants designated herein as a fictitiously named Defendant may have rights or duties arising from or related to the contract at issue in this case, or is in some manner responsible for the events and happenings herein referred to, or is an affiliate, subsidiary, parent entity, or successor in interest to one of the herein named defendants. When Plaintiff ascertains the true names and capacities of ROE ENTITIES I-X, inclusive, it will ask leave of this Court to amend its Complaint by setting forth the same.

8. This Court has original jurisdiction pursuant to NRS 30.030.

9. Venue is proper in this district pursuant to NRS 13.010.

II.

GENERAL ALLEGATIONS

Plaintiff is Granted an Exclusive Use for Gaming in Boca Park Phase I

7. On or about November 5, 2002, Plaintiff and Defendant Boca Park Parcels entered into a lease for a property in Boca Park Phase I ("Lease"). (*See* Lease, attached hereto as Exhibit 1.)

8. Pursuant to the Lease, Defendant Boca Park Parcels was to provide Plaintiff with a suite "consisting of approximately 4,390 square feet" in Building J of the Boca Park Marketplace, as further described by Exhibit A-2 of the Lease. (*See* Ex. 1, at p.1, sec. b; Exhibit A-2.)

9. Defendant Boca Park Parcels also granted Plaintiff an exclusive use for "Boca Park Phase I for a tavern **and** gaming, except for any tenants currently located in the center, which allow gaming (i.e., Vons, Longs)" (hereinafter, the "Exclusive Use Provision"). (*See id.* at p.3, sec. o (emphasis added).)

. . .

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The Three Angry Wives is a Restaurant and Tavern That Offers Gaming

10. As valuable consideration, Plaintiff was to pay Defendant Boca Park Parcels rent based on a per square foot amount, adjusted periodically during the term of the lease. (*See* Ex. 1 at p.1, sec. e.)

11. In addition, Plaintiff agreed that the permitted use would be "for use as a Three Angry Wives restaurant and tavern with gaming and on-premises sale of liquor, beer and wine and a complete menu." (*See id.* at p.2, sec i.)

12. Plaintiff and Defendants operated under this agreement successfully from November 5, 2002 until present.

13. Plaintiff is informed and believes, and thereupon alleges, that on June 23, 2005, Defendant Boca Park Parcels transferred the property upon which the Three Angry Wives is situated to its successor-in-interest, Defendant Boca Park Successor-in-Interest.

Defendants Violate Plaintiff's Bargained-For Exclusive Use Provision

14. Plaintiff is informed and believes that one or more of Defendants Boca Park Successor-in-Interest, Boca Park Manager and/or Boca Park Parent Corp. recently entered into a lease agreement with Wahoo's Fish Taco that allows gaming on the Wahoo's Fish Taco leased premises. This location is within Boca Park Phase I, and is within less than 660 feet of Three Angry Wives.

15. An application has been made for a gaming license at the Wahoo's Fish Taco leased premises, is currently in the final stages of licensing approval, and is expected to be granted on April 19, 2012.

16. Prior to that date, a demand was made by Plaintiff that Defendants not allow gaming on the Wahoo's Fish Taco leased premises in violation of the Exclusive Lease Provision of the Lease, but Defendants have made it clear by their actions, and have stated through their representatives, that they do not believe that Plaintiff has an Exclusive Use provision in its Lease, and that the Defendants are free to allow other tenants in Boca Park Phase I to offer gaming, notwithstanding the express language of the Lease.

. . .

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17. Plaintiff and Defendants have differing interpretations of the Lease, and a judicial determination is necessary with respect to the Exclusive Use provision contained in the Lease.

III.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
(Declaratory Relief)

18. Plaintiff repeats and realleges the allegations in the preceding paragraphs of this Complaint as though fully set forth herein.

19. A dispute has arisen and an actual controversy now exists between Plaintiff on the one hand, and Defendants on the other hand, in that Plaintiff contends that the Lease contains a restrictive covenant granting Plaintiff the exclusive right in Boca Park Phase I to offer gaming to its patrons. The only exception to this covenant is the express exception for gaming at the Von's supermarket. Plaintiff also has the exclusive right to own and operate a tavern in Boca Park Phase I. The terms "tavern" and "gaming" are to be read separately, such that Plaintiff has an exclusive related to each category. This restrictive covenant is contained in the Lease, Fundamental Lease Provisions, (o).

20. Defendants deny that Plaintiff has been granted an Exclusive Use provision in Boca Park Phase I with respect to gaming, despite the express language of the Lease.

21. Plaintiff desires a judicial determination of the interpretation of the Lease with respect to whether and to what extent the Lease contains an Exclusive Use provision in Plaintiff's favor, granting Plaintiff an exclusive right operate a tavern and an exclusive right to conduct gaming. Judicial determination is necessary and appropriate at this time so that Plaintiff and Defendants may ascertain the rights and duties between them to the extent they relate to the Lease and occurrences alleged herein.

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. For declaratory relief declaring that the Lease contains a restrictive covenant in Plaintiff's favor granting Plaintiff the exclusive right to operate a tavern and right to offer gaming, with the exception of the Von's, (interpreted as two separate

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exclusives) within Boca Park Phase I; and

2. For such other and further relief as the Court may deem just and proper.

Dated this 20th day of April, 2012.

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Attorneys for Plaintiff, Higco, Inc.

EXHIBIT B

EXHIBIT B

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CLERK OF THE COURT

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LIONEL SAWYER & COLLINS
MAY 17 2012
CHARLES H. McCREA

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DISTRICT COURT

CLARK COUNTY, NEVADA

HIGCO, INC., a Nevada corporation,

Plaintiff,

vs.

BOCA PARK PARCELS, LLC, a revoked Nevada limited liability company; BOCA PARK MARKETPLACE LV, LLC, a Nevada limited liability company; BOCA PARK MARKETPLACE LV SYNDICATIONS GROUP MM, INC., a Nevada corporation; BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC, a Nevada limited liability company; and DOES I-X, and ROE ENTITIES I-X, inclusive,

Defendants.

CASE NO. A660548
DEPT. XIII

MOTION FOR SUMMARY JUDGMENT

Date:
Time:

Plaintiff HIGCO, Inc. ("Plaintiff"), a Nevada corporation, by and through its counsel, the law firm of Gordon Silver, hereby moves the Court for summary judgment against Defendants, BOCA PARK PARCELS, LLC, a revoked Nevada limited liability company, BOCA PARK MARKETPLACE LV, LLC, an entity of unknown status; BOCA PARK MARKETPLACE LV SYNDICATIONS GROUP MM, INC., a Nevada corporation; and BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC, a Nevada limited liability company (collectively "Defendants"); on grounds that no material facts are in dispute and Plaintiff is entitled to judgment as to the clear or unambiguous language of the Lease, which provides Plaintiff an exclusive right to conduct gaming in Boca Park Phase I.

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This Motion is made and based on the following Memorandum of Points and Authorities and supporting Exhibits, including the Declaration of Sean T. Higgins (the "Higgins Declaration" attached hereto as **Exhibit 1**; the papers and pleadings already on file herein, judicial notice of which are hereby requested; and any oral argument the Court may permit at the hearing of this matter.

Dated this 15th day of May, 2012.

GORDON SILVER

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Attorneys for Plaintiff

NOTICE OF MOTION

YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the above and foregoing Motion on for hearing before this Court on the 18 day of June, 2012 at the hour of 9:00 o'clock a.m. of said day, or as soon thereafter as counsel can be heard in Department XIII.

Dated this 15th day of May, 2012.

GORDON SILVER

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Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Defendants have breached the Parties' Lease, by allowing a new tenant to offer gaming in Boca Park Phase I. Whether this breach was due to a lack of care, or a calculated economic breach, the Defendants allowing a new tenant to offer gaming within Boca Park Phase I, is a clear violation of the exclusive for gaming granted Plaintiff under its Lease. Faced with this fact, Defendants have taken a position contrary to the express and unambiguous contractual language and necessitated the filing of this action, and this motion. Plaintiff asks the Court to enter summary judgment affirming the clear language of the Lease granting Plaintiff an exclusive for gaming in Boca Park Phase I, and finding Defendants' actions to be in breach of the Lease.

II.

STATEMENT OF UNDISPUTED MATERIAL FACTS

On or about November 5, 2002, Plaintiff and Defendant Boca Park Parcels, LLC entered into a lease for a property in Boca Park Phase I ("Lease"). (*See* Lease, attached hereto as **Exhibit 2**.) Plaintiff and Defendant expressly contemplated that the purpose of the Lease was for Higco to operate The Three Angry Wives at that new location. The Three Angry Wives is a restaurant and tavern that offers gaming.

Pursuant to the Lease, Defendant Boca Park Parcels, LLC was to provide Plaintiff with a suite "consisting of approximately 4,390 square feet" in Building J of the Boca Park Marketplace, as further described by Exhibit A-2 of the Lease. (*See* Ex. 2, at p. 1, § b; Exhibit A-2.) Defendant Boca Park Parcels, LLC also granted Plaintiff exclusive use for "Boca Park Phase I for a tavern **and** gaming, except for any tenants currently located in the center, which allow gaming (i.e., Vons, Longs)" (thereafter, the "Exclusive Use Provision"). (*See id.* At p. 3, § o (emphasis added).) As valuable consideration, Plaintiff was to pay Defendant Boca Park Parcels, LLC rent based on a per square foot amount, adjusted periodically during the term of the Lease. (*See* Ex. 1 at p. 1, § e.) In addition, Plaintiff agreed that the permitted use would be "for use as a Three Angry Wives restaurant and tavern with gaming and on-premises sale of liquor,

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beer and wine and a complete menu." (*See id.* At p. 2, § i.) The parties operated under this agreement successfully from November 5, 2002 until present.[1]

In March 2012, Plaintiff became aware that Defendants had violated Plaintiff's bargained-for Exclusive Use Provision. One or more of Defendants had entered into a lease agreement with Wahoo's Fish Taco that allows gaming on the Wahoo's Fish Taco leased premises. This location is within Boca Park Phase I, and is within less than 660 feet of The Three Angry Wives. An application was made for a gaming license at the Wahoo's Fish taco leased premises, which was in the final stages of licensing approval when this action was commenced. Gaming approval was granted on April 29, 2012, and the Wahoo's Fish Taco began gaming operations shortly thereafter. Prior to that date, beginning March 21, 2012, demand was made by Plaintiff that Defendants not allow gaming on the Wahoo's Fish Taco lease premises in violation of the Exclusive Use Provision of the Lease, but Defendants made it clear by their actions, and have stated expressly through their representatives, that they do not believe Plaintiff has an Exclusive Use Provision in its Lease, notwithstanding the express language of the Lease. The Defendants stated that they feel free to allow other tenants in Boca Park Phase I to offer gaming, despite the unambiguous language of the Lease, including paragraph (o).

Defendants acknowledge that Wahoo's Tacos is within Boca Park Parcel I. They do not dispute that Wahoo's Tacos serves food, sells alcohol, and provides gaming, in the form of video poker, on its premises. Yet, they contend that this does not violate the exclusive contractually grant to Plaintiff for gaming. Plaintiff and Defendants have differing interpretations of the Lease; Plaintiff's based the clear reading and Defendants' based on a tortured one. A judicial determination is, therefore, necessary with respect to the Exclusive Use Provision contained in the Lease, and that determination can be made as a matter of law.

. . .

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[1] Plaintiff is informed and believes, and thereupon alleges, that on June 23, 2005, Defendant Boca Park Parcels, LLC transferred the property upon which The Three Angry Wives is situated to its successor-in-interest, Defendant Boca Park Marketplace LV, LLC. Boca Pak Marketplace LV LLC is not shown to exist in the Nevada Secretary of State's records. Boca Park Marketplace Syndications Group, LLC does exist and is active. Its Manager is Boca Park Marketplace LV Syndications Group MM, Inc.

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III.

LEGAL ARGUMENT

A. Legal Standard for Summary Judgment.

The party moving for summary judgment "bears the initial burden of production to show the absence of a genuine issue of material fact." *See*, *Celotex*, 477 U.S. at 323; *see also*, *Cuzze v. University and Community College System of Nevada*, 172 P.3d 131, 134 (Nev. 2007); *Clauson v. Lloyd*, 103 Nev. 432, 743 P.2d 631 (1987) (explaining *Celotex's* application in Nevada); *Wood v. Safeway, Inc.*, 121 Nev. 724, 731032, 121 P.3d 1026, 1031 (2005) (adopting the summary judgment standard set forth I *Celotex* and other Supreme Court decisions).

If such a showing is made then the party opposing summary judgment assumes a burden of production to show the existence of a genuine issue of material fact. *See*, *Celotex*, 477 U.S. at 331 (Brennan, J., dissenting) (rejecting the majority's application of the summary judgment rule to the facts at hand, but not its explanation of the rule); *Wood*, 121 Nev. At 732, 121 P.3d at 1031; *Main v. Stewart*, 109 Nev. 721, 726-27, 857 P.2d 755, 758-59 (1993). If the factual context makes the respondent's claim implausible, that party must come forward with more persuasive evidence than would otherwise by necessary to show that there is a genuine issue for trial. *Celotex*, 477 U.S. at 323-24; *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

Summary judgment is necessary and appropriate to "avoid a needless trial when an appropriate showing is made in advance that there is no genuine issue of fact to be tried, and the movant is entitled to judgment as a matter of law." *Coray v. Hom*, 80 Nev. 39, 41, 389 P.2d 76,77 (1964).

Any trial in this action would be "needless." The question here is one of interpretation of contract language. There are no disputed facts, and applying the undisputed facts to the applicable law, Plaintiff is entitled to summary judgment in its favor.

B. Legal Analysis.

A dispute has arisen and an actual controversy now exists between Plaintiff on the one hand, and Defendants on the other hand. Plaintiff points to the Lease, which contains a simple

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restrictive covenant granting Plaintiff the exclusive right within Boca Park Phase I to offer gaming to its patrons; the only exception to this covenant being the express allowance for gaming at the Von's supermarket.[2] Plaintiff also points to its exclusive right to own and operate a tavern in Boca Park Phase I.[3] This restrictive covenant is contained in the Lease, Fundamental Lease Provision, (o). That provision states:

> (o) **Exclusive Use**
> Landlord shall grant Tenant an exclusive for Boca Park Phase I for a tavern and gaming, except for any tenants currently located in the center, which allow gaming (i.e., Vons, Longs) (the "Exclusive Use").

The terms "tavern" and "gaming" are to be read separately, as a matter of contract construction, such that Plaintiff has an exclusive right related to each category. (See Exh. 1, p. 3.) Moreover, this reading is the only one that makes sense, in light of the phrase that follows, concerning an exception for Von's grocery store and Long's drug store, which clearly were not taverns, but were offering gaming at the time the Lease was signed.

Defendants, in response to Plaintiff's demands, have denied that Plaintiff has been granted an Exclusive Use Provision in Boca Park Phase I with respect to gaming, despite the express and unambiguous language of the Lease. The response to demands that Defendants not allow gaming at the Wahoo's Tacos before it had opened was to flatly reject Plaintiff's demand rather than avoid a breach and potential damages. Now, the Wahoo's Taco gaming is in operation. Because gaming is in operation there, Plaintiff has been forced to file this action to obtain judicial confirmation of the straight forward provisions of the Lease, including the Exclusive Use Provision granting Plaintiff an exclusive right to operate a tavern and an exclusive right to conduct gaming in Boca Park Phase I. A judicial determination is necessary and summary judgment appropriate, at this time, to confirm the rights and duties between Plaintiff and Defendants arising from the Lease.

No facts are in dispute and the language is clear; The Three Angry Wives has an exclusive for tavern **and** for gaming in this center, with express exception of Von's for gaming.

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[2] Long's Drug no longer does business at Boca Park.

[3] In fact, Plaintiff's only permitted use is as a "restaurant and tavern with gaming and on-site sale of liquor." *See id.* At p. 2, § i.)

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economic breach of the Lease, agreed to allow a new tenant to conduct gaming in the center, a stone's throw from Plaintiff's property. The facts are not in dispute, the language is clear, summary judgment is warranted.

IV.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests entry of summary judgment in its favor and against Defendants on the claim for declaratory relief, determining as a matter of law that the clear and unambiguous language of the lease grants Plaintiff an exclusive right (with the sole exception of Von's) to operate a tavern and to conduct gaming in Boca Park Phase I.

Dated this 15th day of May, 2012.

GORDON SILVER

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Attorneys for Plaintiff

EXHIBIT 1

DECLARATION OF SEAN T. HIGGINS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The undersigned, Sean T. Higgins, hereby states as follows:

1. I am over the age of 18 and am mentally competent. I have personal knowledge of the facts stated herein, except where stated upon information and belief, and as to facts stated upon information and belief, I am informed of those facts and believe them to be true. If called upon to testify as to the matters herein, I could and would do so. I make this declaration in support of the Plaintiff's Motion for Summary Judgment.

2. I am a shareholder and President of Higco Inc., the Plaintiff. I am also an attorney licensed to practice law in the State of Nevada.

3. Higco, the Plaintiff, owns and operates The Three Angry Wives, a restaurant and tavern that offers gaming. On or about November 5, 2002, Plaintiff and Defendant Boca Park Parcels entered into a lease of property in Boca Park Phase I ("Lease"). (*See* Lease, attached hereto as **Exhibit 2**.) I personally negotiated the Lease with the agent of the owner/landlord, Boca Park Parcels LLC. Boca Park Parcels provided an initial draft to which I requested certain changes, including the language of an exclusive for tavern and gaming. Both parties to the agreement knew that the purpose of the Lease was for Higco to operate The Three Angry Wives at a new location in Boca Park. Moreover, that purpose was expressly stated in the Lease.

4. Pursuant to the Lease, Defendant Boca Park Parcels was to provide Plaintiff with a suite "consisting of approximately 4,390 square feet" in Building J of the Boca Park marketplace, as further described by Exhibit A-2 of the Lese. (*See* Ex. 2, at p. 1, § b; Exhibit A-2.) As valuable consideration, Plaintiff was to pay Defendant Boca Park Parcels rent based on a per square foot amount, adjusted periodically during the term of the lease. (*See* Ex. 1 at p. 1, § e.)

5. Plaintiff agreed that the permitted use would be "for use as a Three Angry Wives restaurant and tavern with gaming and on-premises sale of liquor, beer and wine and a complete menu." (*See id.* At p. 2, § i.) Defendant Boca Park Parcels also granted Plaintiff an exclusive use for "Boca Park Phase I for a tavern and gaming, except for any tenants currently located in the center, which allow gaming (i.e., Vons, Longs)" (thereafter, the "Exclusive Use Provision") (*See*

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id. At p. 3, § o.) At the time, both Von's and Long's Drug conducted gaming at Boca Park. Even though Von's and Long's were clearly not competitors with the tavern aspect of the business, both were competitors with the gaming aspect and, therefore, the existence of this competition had to be addressed by the Exclusive Use Provision.

6. The Lease was signed with the Exclusive Use Provision, and parties have operated under this agreement successfully from November 5, 2002 until present.

7. I became aware sometime in early March 2012, however, that Defendants had violated Plaintiff's bargained-for Exclusive Use Provision. Defendants violated the Exclusive by entering into a lease agreement with Wahoo's Fish Taco that allowed gaming on the Wahoo's Fish Taco leased premises. This location is within Boca Park Phase I, and is within about 650 feet of The Three Angry Wives. At the time I learned of the breach, an application had already been made for a gaming license at the Wahoo's Fish Taco leased premises and was in the final stages of licensing approval. Gaming approval was subsequently granted, on April 29, 2012, and the Wahoo's Fish Taco began gaming operations shortly thereafter.

8. Prior to commencement of gaming at Wahoo's Fish Taco, made a demand on the landlord verbally, through its agent Triple 5 Group, for an explanation of violation and to demand that the planned gaming operations be stopped. I first spoke with Stacy Debevec and later with John Massing. Initially, the response was to provide a different version of the page of the Lease containing the Exclusive Use Provision, which bore obviously forged initials of both the former Triple 5 employee who had negotiated the Lease and of me. The page contained language different from that of the final executed Lease. After receiving that document, I instructed Plaintiff's counsel to make a written demand that Defendants not allow gaming on the Wahoo's Fish Taco premises in violation of the Exclusive Use Provision of the Lease. Formal written demand was sent, on or about March 22, 2012, by Higco's counsel, Gordon Silver. In responding to that demand, Defendants abandoned the forged page, and acknowledged the agreed language of the true Exclusive Use Provision. Nonetheless, Defendants took the position that Plaintiff does not have an Exclusive Use Provision for gaming in its Lease, notwithstanding the express language of the agreement. Astonishingly, the Defendants stated that they are free to

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allow other tenants in Boca Park Phase I to offer gaming, despite the unambiguous language of the Lease, and specifically paragraph (o).

9. An Exclusive Use Provision in the Lease for gaming was specifically bargained for and is unquestionably a material and critical term of the Lease. Defendant acknowledges the language and was aware of the Exclusive Use Provision when it allowed gaming to proceed at the Wahoo's Fish Tacos within Boca Park Phase I. This action clearly violates the bargained for agreement to an exclusive for gaming, and is damaging to The Three Angry Wives, which derives a substantial portion of its revenue from gaming. A court order and judgment determining the rights of the Plaintiff to this exclusive is of critical importance to our business.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this 15th day of May, 2012.

SEAN T. HIGGINS

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ODM
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

HIGCO, INC., a Nevada corporation, Plaintiff, vs. BOCA PARK PARCELS, LLC, a revoked Nevada limited liability company; BOCA PARK MARKETPLACE LV, LLC, a Nevada limited liability company; BOCA PARK MARKETPLACE LV SYNDICATIONS GROUP MM, INC., a Nevada corporation; BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC, a Nevada limited liability company; and DOES I-X, and ROE ENTITIES I-X, inclusive, Defendants.	CASE NO. A-14-710780-B DEPT. XI **ORDER DENYING DEFENDANTS MOTION TO DISMISS** **Date of Hearing: February 26, 2015** **Time of Hearing: 8:30 a.m.**

Defendants BOCA PARK PARCELS, LLC, BOCA PARK MARKETPLACE LV, LLC, BOCA PARK MARKETPLACE LV SYNDICATIONS GROUP MM, INC. and BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC, (collectively "Defendants"), having filed a Motion to Dismiss ("Motion"), Plaintiff, HIGCO, INC. ("Plaintiff") having filed an Opposition to the Motion to Dismiss ("Opposition"), and the Defendants having filed a Reply in Support of the Motion ("Reply"), and the matter having come on for hearing in Department XI of the Eighth Judicial District Court on the 26th day of February, 2015. The Court having considered the

papers and pleadings on file herein, including the Motion, Opposition and Reply, and having heard the argument of counsel, and the Court being fully advised in the premises and good cause appearing therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss is DENIED.

Dated this 4th day of March, 2015.

DISTRICT COURT JUDGE

GORDON SILVER

By: _____
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DISTRICT COURT

CLARK COUNTY, NEVADA

HIGCO, INC., a Nevada corporation, Plaintiff, vs. BOCA PARK PARCELS, LLC, et al., Defendants.	Case No. A-14-710780-B Dept. No. XI **FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

This matter having come on for non-jury trial before the Court beginning on July 26, 2016 and concluding on July 28, 2016. Plaintiff HIGCO, Inc. doing business as *Three Angry Wives* ("TAW") was present through its President Sean Higgins and represented by Eric R. Olsen, Esq. and Dylan T. Ciciliano, Esq. of the law firm of Garman Turner Gordon LLP; and Defendants Boca Park Parcels, LLC, Boca Park Marketplace LV, LLC; Boca Park Marketplace LV Syndications Group MM, Inc.; and Boca Park Marketplace Syndications Group, LLC (collectively "Defendants") were represented by Charles McCrea, Esq. of the law firm of Hejmanowski & McCrea LLC. The Court having read and considered the pleadings filed by the parties; having reviewed the evidence admitted during the trial; and having heard and carefully considered the testimony of the witnesses called to testify by deposition; the Court having considered the oral and written arguments of counsel, and with the intent of deciding all remaining claims before the Court pursuant to NRCP 52(a) and 58,[1] the Court makes the

[1] On February 16, 2016, the Court granted Plaintiff's Motion for Partial Summary Judgment on the issue of Defendants liability for breach of TAW's lease, which was unopposed

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following findings of fact and conclusions of law:[2]

FINDINGS OF FACT

1. On or about November 5, 2002, TAW and Defendant Boca Park Parcels, LLC entered into a lease for a property in Boca Park Phase I ("Lease").

2. TAW, as tenant, and Boca Park, as landlord, are parties to a lease (the "Lease") on premises in the Boca Park Marketplace Shopping Center (the "Shopping Center") located on the northeast corner of West Charleston Boulevard and South Rampart Boulevard, Las Vegas, Nevada, referred to in the Lease as "Boca Park Phase I." The Lease is dated November 5, 2002. The "Commencement Date" as defined in the Lease was September 20, 2003 and, if all Lease extensions are exercised by TAW, the Lease will terminate on September 30, 2033.

3. The Lease granted TAW "an exclusive for Boca Park Phase I for a tavern and gaming," (the "Exclusive Use") except for any tenants currently located in the center, which allow gaming (i.e., Vons, Longs).

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by Defendants. Therefore, the trial focused solely on TAW's damages, if any, resulting from Defendants' breach of the lease and from Wahoo's operation of slot machines on its premises.

[2] On December 5, 2014, TAW filed the instant action seeking money damages for the same breach of the Lease forming the basis for the declaratory judgment entered in the First Action. The Complaint in this action asserts two causes of action: Breach of contract and breach of the implied covenant of good faith and fair dealing. In the instant action, TAW is asserting rights and seeking a remedy against Boca Park based on the transaction out of which the First Action arose. TAW could have asserted its claims for breach of contract and breach of the implied covenant of good faith and fair dealing in the First Action but did not. On January 26, 2015, Boca Park moved to dismiss this case with prejudice on the grounds that TAW is prohibited from asserting the claims alleged in this action under the doctrines of "claim preclusion" and "claim-splitting." The Court denied the motion on February 26, 2015. On March 6, 2015, Boca Park filed a Petition for Writ of Prohibition or, in the Alternative, for Writ of Mandamus ("Writ Petition") with the Nevada Supreme Court seeking review of the Court's order denying Boca Park's motion to dismiss. On May 21, 2015, the Writ Petition was denied on procedural grounds. The Nevada Supreme Court "was not persuaded that [Defendants had] met their burden to demonstrate that our extraordinary intervention is warranted."

4. TAW's representative Sean Higgins provided the unrebutted testimony that the Exclusive Use was a valuable term under the Lease and was negotiated by and between TAW and Defendants.

5. The Court finds that while the Exclusive Use was a valuable term, it was not assigned a specific value under the Lease, nor is there a liquidated damages provision if the Exclusive Use was breached by Defendants.

6. Since the Commencement Date of the Lease, TAW has operated a tavern on the leased premises offering food, alcoholic beverages and gaming to its patrons 24 hours a day 7 days a week. The gaming on the premises consists of 15 slot machines.

7. The Lease commenced on September 20, 2003 and has an initial period of 10 years, followed by four (4) options of five (5) years each.

8. TAW has exercised the first of four options and its representatives testified that it intends on exercising the remaining three (3) options.

9. The Court previously found that TAW has performed under the lease and Defendants have failed to show that TAW would be unable to exercise the options under the lease. The Lease will expire on or about September 20, 2033.

10. On April 29, 2011, Boca Park entered into a lease (the "Wahoo's Lease") with *Wahoo's Fish Taco's* ("Wahoo's") for premises located in Boca Park Phase I.

11. The Wahoo's Lease allows Wahoo's to "operate slot machines from the Leased Property."

12. The Wahoo's Lease provides that Defendants receive, as rent, 6% of Wahoo's Gross Sales.[3]

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[3] This percentage of gross sales does not apply to any gaming revenues.

13. The Court previously determined that Defendants breached the Lease by allowing gaming at Wahoo's.

14. Wahoo's lease is for a period of five (5) years, with two (2), five (5) year options that can be exercised at Wahoo's discretion.[4]

15. Wahoo's lease commenced on November 8, 2011, and therefore if the options are exercised Wahoo's lease will continue until November 8, 2026.

16. On April 19, 2012, the Nevada Gaming Control Board approved Wahoo's application for a restricted gaming license.[5]

17. Wahoo's began offering gaming on May 1, 2012.

18. On April 23, 2012, TAW filed a Complaint against Boca Park in Department XIII of this Court (the "First Action")[6] seeking a judicial declaration that Boca Park breached the Lease by allowing Wahoo's to operate slot machines on its premises. A final declaratory judgment was entered in the First Action in favor of TAW on November 7, 2012. No further action was taken by TAW or Boca Park and the time to appeal or amend the judgment entered in the First Action expired.

19. TAW offered Jeremy A. Aguero ("Aguero") as an expert on the subject of TAW's damages. Aguero has extensive experience analyzing Las Vegas' gaming markets and has an expertise in gaming markets. Aguero is also an analytics professor at UNLV.

20. Aguero is qualified to provide expert testimony regarding the Las Vegas gaming market, gaming player's behavior and propensity to game, and the damages suffered by TAW as

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[4] Wahoo's had no gaming for the first six months of its leasehold.

[5] Higgins testified he learned of Defendants' breach when he saw Wahoo's on the agenda for gaming approval.

[6] *Higco, Inc. v. Boca Park Parcels, LLC*, Case No. A660548.

a result of the breach of the Exclusive Use. Aguero's testimony was limited to his field of expertise and assisted the Court in determining TAW's damages.

21. Aguero testified to the importance of exclusivity or lack of competitors.

22. Wahoo's offers gaming in Boca Park Phase I, but it is situated approximately 600 feet from TAW. It is clear that Wahoo's is competing against TAW for the same gaming customers, which decreases the value of the location for TAW and eliminates the value of the Exclusive Use.

23. There are a number of other competing businesses in the general vicinity of TAW and Wahoo's that offer food, alcoholic beverages and gaming.[7] Defendants argue that other gaming locations opened in surrounding areas during the relevant time period that may have led to TAW's damages. While this overlooks that the Lease prohibited Wahoo's from offering gaming in Boca Park Phase I, it also neglects that the other gaming locations were not "new" gaming locations but rather rebranding of existing gaming locations. Thus, the gaming locations do not represent "additional" competition to TAW.

24. The Wahoo's Lease and the TAW Lease overlap for a period of 174 months (May 1, 2012 to November 8, 2026) (14.5 years) allowing both TAW and Wahoo's to operate slot machines on their premises during that period.

25. The fundamental purpose of the Exclusive Use provision of the Lease is to prevent anyone other than the pre-existing Vons (grocery store) and Longs (drug store) from

[7] Those businesses existed prior to TAW's opening and include Calico Jack's (15 slot machines – located approximately one mile to the east), Dotty's #3 (15 slot machines – located approximately one mile to the south), Chicago Brewing Company (15 slot machines – located approximately one mile to the south), The Martini (15 slot machines – located approximately one-half mile to the south), Four Sevens Sports Bar & Restaurant (15 slot machines – located approximately two miles to the south), Distill (15 slot machines – located approximately two and one-half miles to the west), Dotty's #84 (15 slot machines – located approximately two blocks to the east), The Lion's Tail (15 slot machines – located approximately one mile to the north) and The Pint (15 slot machines – located approximately one and one-half miles to the west).

offering gaming in Boca Park Phase I. No other tenant should derive any revenue from gaming in Boca Park Phase I. It is undisputed that between July 2012 and June 2015, Wahoo's generated $10,452,017 in coin-in and more than $399,923 in revenue. This amounts to an average of $133,308 in gaming revenue per year for Wahoo.

26. Damages have occurred to TAW as a result of the loss of their exclusive ability to provide gaming activities. There is a difference of opinion among the witnesses as to the appropriate method for evaluation and calculation of the damages.

27. But for Defendants' breach of the lease, Wahoo's would not earn any gaming revenue in Boca Park Phase I. TAW argues that a measure of their damages could be all of Wahoo's gaming revenue, as TAW was entitled to capture all gaming revenue in Boca Park Phase I. Defendants contend that TAW should only be able to recover existing revenue that was lost to Wahoo. TAW is entitled to recover as damages revenue that TAW likely would have earned but-for Defendants' breach.

28. Wahoo's gaming revenue is increasing, not decreasing. Aguero testified that Wahoo's increasing gaming revenue demonstrate that Wahoo's is becoming established as a gaming location and that customers are becoming familiar with its services. Aguero further testified that it is expected that a new business's revenue will stabilize within a few years of opening. His opinion is that Wahoo's gaming revenues and activity in the twelve-months preceding July 2015 are more representative of Wahoo's long-term gaming revenue then preceding years or an average of the years because Wahoo's business had essentially stabilized. The Court disagrees, and believes his alternate time period between July 2012 and June 2015 is more representative of Wahoo's likely future gaming performance than the "stabilized" year.

29. Both Wahoo's and TAW have loyalty card programs supported by the common slot route operator, where gaming players have the ability to "log-in" to video poker machines to

gain rewards based on their level of play. When a player is logged-in, the machine tracks the amount of "coin-in" and "win" for that person. This type of play is "Rated Play." When a player does not log-in to the machine ("Unrated Play"), the amount of "coin-in" and "win" cannot be attributed to any one player. Between July 2012 and March 2015, Rated Play represented 56% of all of Plaintiff's gaming activity and 42% of Wahoo's gaming activity.

30. Aguero analyzed Wahoo's Rated Play against persons who are Rated Players at TAW. He determined that for the entire period of July 2012 to June 2015, 28.7% of Wahoo's Rated Play can be attributed to customers who are rated players with TAW. From July 2014 to June 2015, 37.1% of Wahoo's Rated Play can be attributed to customers who are rated players at TAW (referred to along with the 28.7% as "Shared Play"). Aguero testified that Shared Play is conservative because it only tracked Rated Player's Rated play. Aguero testified that to a reasonable degree of certainty TAW would have captured the Shared Play but-for Defendants' breach of the lease. His opinion was based on the fact that the Shared Play is attributable to TAW's known gaming players, which make up 56% of all of TAW's gaming activity. It is therefore reasonably certain that these players would continue to frequent TAW. Any player at Wahoo's would already be at Boca Park Phase I. Since the player was already in Boca Park Phase I, it is likely that they would go to the only (but-for the breach) location offering gaming in Boca Park Phase I. His conclusion was based on his research and experience with the importance of location and impact of competition on gaming establishments.

31. Aguero testified that Non-Rated and Rated players differ only in their propensity to gamble and the amount gambled during each visit, but that in numerous market studies he conducted for gaming properties, Non-Rated and Rated players otherwise have similar preferences and behaviors. It was therefore his expert opinion that during the period of July 2012 to June 2015, 28.7% of Wahoo's overall gaming revenue can be attributed to TAW's customers

and that from July 2014 to June 2015, 37.1% of Wahoo's overall gaming revenue can be attributed to TAW's customers. He further concluded that the figure was conservative in light of the fact that some new gaming players to Boca Park Phase I would never visit TAW because they would have been diverted to Wahoo.

32. Defendants' expert Michael Rosten ("Rosten") opined that gaming revenue derived for common loyalty card users cannot be used to determine those Wahoo's gaming players that would have otherwise patronized TAW. The Court disagrees. The evidence introduced by TAW demonstrates that the Shared Play comes from gaming players that were already customers of TAW and that were already within close proximity of TAW, 600 feet. Aguero testified that his research and gaming studies show that TAW's customers would have played at TAW but for the existence of Wahoo's and Defendants submit no evidence of the contrary. Aguero's testimony establishes that non-Rated Players exhibit the same behavior as Rated Players and therefore substantial evidence exists that TAW's Non-Rated players would have contributed a similar amount of gaming revenue to Wahoo, as TAW's Rated Players.

33. Defendants suggest that some of TAW's customers may have preferred Wahoo's or its cuisine. This position is fundamentally flawed and a customer's preference for Wahoo's or its cuisine is irrelevant. Had Defendants not breached the exclusivity provision of the lease, customers would not have had the option to visit Wahoo's, making the preference irrelevant.

34. Defendants also argue that TAW impermissibly includes those players who contributed less than 15% of their coin-in to TAW or Wahoo. This position is flawed. As testified to by Aguero, the method employed by TAW captures all of Plaintiff's Rated customers who contributed to Wahoo's Rated gaming revenue. It is irrelevant whether that contribution was evenly split between TAW and Wahoo's or disparately contributed. What is relevant is that the

person is a known customer to TAW. Defendants method is flawed in that it excludes significant players who would have almost certainly played at TAW but for the existence of Wahoo.[8]

35. Defendants also contend that many of TAW's Rated Players, who were also Wahoo's Rated Players, did not decrease the number of visits they made to TAW after Wahoo's opened. Once again, Defendants argument is misplaced. The relevant question is whether those players gamed at Wahoo's and they undeniably did. Defendants analysis considers number of visits and not volume of play, or where those players would have contributed the coin-in to TAW, as opposed to Wahoo's.

36. TAW's claimed damages are based on an opinion rendered by its expert, Jeremy Aguero. The essence of Aguero's opinion is that after Wahoo's began operating slot machines, some customers of TAW played those slot machines resulting in lost revenue to TAW.[9]

37. While evidence was presented indicating that there was overlap of customers of TAW and Wahoo's that played slot machines at both locations, there was no evidence to suggest a correlation between play by those customers at Wahoo's and a loss of gaming revenue to TAW.

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[8] Defendants classify 33 people as "Wahoo's customers" and removed them from the analysis. Those 33 customers contributed $41,205 in coin-in to TAW during the same period, with certain players contributing thousands in coin-in to TAW. Not only would none of the revenue been earned by Wahoo's but for the breach, but the evidence shows that those players were willing and likely to contribute the coin-in to TAW. Defendants exclude 65 Wahoo's Rated Players that they contend are "Minor Customer of Wahoo's." Those 65 customers contributed $97,820 in coin-in to Wahoo. Certain of those customers made as many as 51 visits to Wahoo. To exclude this group of individuals from the analysis ignores that many are not "minor" customers of Wahoo, that they would not have had the opportunity to be customer "but-for" the breach of contract, and that given their level of play at TAW, it is a near certainty that the players would have contributed the coin-in to TAW.

[9] Higgins testified that given the bargained for exclusivity he believed the appropriate method of calculation of TAW's damages would be all of the gaming revenue earned by Wahoo.

38. TAW's calculation of alleged damages in this action is based on a finding by its expert that 28.7% to 37.1% of Wahoo's gaming customers were also gaming customers of TAW and would have wagered exactly the same amount of money in TAW's slot machines that they wagered in Wahoo's slot machines if Wahoo's did not offer gaming.

39. TAW's expert's opinion of damages is supported by actual facts and is based on assumptions that are reliable.

40. The Court finds that substantial evidence supports Aguero's conclusion that 28.7% of Wahoo's overall gaming revenue can be attributed to Plaintiff's customers or customers that otherwise would have gamed at Plaintiff but for the existence of Wahoo. The Court further finds that Wahoo's appropriate gaming level is the period between July 2012 to June 2015, as opposed to an average across the "stabilized" year. Therefore, Plaintiff's yearly damages are $38,314 per year.

41. Plaintiff's yearly damages are $38,314 per year through the end of the last option period of Wahoo's.[10] That total is $499,997.70 after taking into consideration the deduction of 10% for the slot route operator's fees.

42. The Court made inquiry of Defendant's expert as to the disagreement between the experts and his stated methodology for calculating the discount rate to be applied to the award.

43. The Court finds Aguerro's opinion[11] related to the set off of the discount rate against the growth rate is more appropriate in determining the present value of TAW's damages.

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[10] The Court does not award damages beyond the term of the Wahoo's lease (14.5 years) as Defendant's entering into a new lease violating the exclusivity provision would be a new and separately actionable breach.

[11] Aguero testified that based on the industry, as established by expert testimony, a more appropriate discount figure would be the Nevada Safe Interest Rate, which reflects the time-value of money and that the evidence shows that Plaintiff's growth rate will at least likely equal the discount rate. Thus, he opines the discount rate should equal 0%.

44. If any findings of fact are properly conclusions of law, they shall be treated as if appropriately identified and designated.

CONCLUSIONS OF LAW

1. While damages need not be ascertained with "mathematical exactitude," there still must be a basis for determining reasonably accurate damages

2. The appropriate measure of damages for breach of a covenant against competition in a commercial lease is the difference in the value between the leasehold with the covenant unbroken and broken.

3. The evidence presented in this action is sufficient to enable the Court to ascertain with a reasonable degree of certainty the damages that have been sustained as a result of Boca Park's breach of the Lease.

4. Plaintiff's total damages are $499,997.70.

5. If any Conclusion of Law is properly a Finding of Fact, they shall be treated as if appropriately identified and designated.

JUDGMENT

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED that judgment shall be and the same is entered herein in favor of Plaintiff HIGCO, INC. and against Defendant BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC in the amount of FOUR HUNDRED NINETY NINE THOUSAND NINE HUNDRED NINETY SEVEN AND 70/100 DOLLARS ($499,997.70) plus pre- and post-judgment interest.

DATED and DONE this 2nd day of August, 2016.

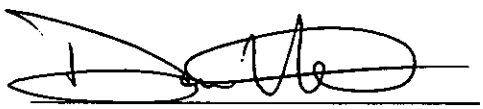
Elizabeth Gonzalez, District Court Judge

Certificate of Service

I hereby certify that on or about the date filed, this document was served on the parties identified on Wiznet's e-service list, a copy of this Order was placed in the attorney's folder on the 1st Floor of the RJC or mailed to the proper party as follows:

Eric R. Olsen, Esq. (Garman Turner Gordon)

Charles H. McCrea, Esq. (Hejmanowski & McCrea)



Dan Kutinac