IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

LUCY T. SABLAN, for Herself and and as Guardian for NICK T. SABLAN, JR.	)	**Civil Action No. 99-264B**
Plaintiffs,	)	**ORDER AND DECISION FOLLOWING TRIAL**
vs.	)	
SONG AM CORPORATION and LEE KI HAE	)	
Defendants.	)	

INTRODUCTION

This case begins and ultimately turns upon the obligations created by a commercial lease agreement. Plaintiffs bring this case pursuant to the Holdover Tenancy Act, 4 CMC § 40201 *et seq.*, and seek specific performance under a lease agreement, termination of the lease agreement, and an award of possession of the leased premises. Plaintiffs further seek damages from Defendants for the failure to maintain the premises and for reasonable attorney's fees and costs.

This matter came before the court for bench trial on November 8, 1999, in Courtroom 217A of the Commonwealth Superior Court. David Wiseman, Esq. appeared for the Plaintiff, Lucy Sablan, and Eric Smith, Esq. appeared on behalf of the Defendants, Song Am Corporation and Lee Ki Hae. Following the hearing, the court requested proposed findings of fact and conclusions of law from the parties and took the matter under advisement. Upon review of the evidence adduced at

trial, consideration of the arguments **[p. 2]** and authority cited by counsel, and a careful review of all papers submitted in support of and in opposition to the motion, the court now renders its written decision.

I. FACTS

1. Lucy and Nick Sablan, husband and wife, along with their child, Nick T. Sablan, Jr., are the owners of five lots of real property in Garapan [hereinafter, the "Property"].[1] In 1997, Lucy and Nick Sablan began negotiations with Defendant Lee, Ki Hae, the president and majority shareholder of Defendant Song Am Corporation ("Song Am"), to lease the Property for a term of fifty-five years.

2. As a result of the negotiations, the Sablans executed a written contract to lease the property to Lee and Baik Dae Kyung on July 16, 1997 (the "Agreement to Lease," Trial Ex. A). The proposed lease was for a term of fifty-five years, and was to commence "one week after title search shows clear title." Ex. A, ¶ 1. The Agreement to Lease contemplated the execution of a formal lease agreement with a term of fifty-five years that was to take effect on the date that the lease was executed. *Id.* at § 3(a). Pursuant to the terms and conditions of the Agreement to Lease, Song Am deposited the sum of $10,000 to be used as advance rent if the parties executed a lease agreement. (Ex A; testimony of Lee, Ki Hae).

3. Lee then drafted a formal lease agreement to commence November 1, 1997 and expire October 31, 2052 unless sooner terminated. *See* Draft Lease Agreement, Trial Ex. B, § II [the"Draft"]. In material part, the Draft required the tenants to pay to the landlord an

[1] The Property is located behind Jade Garden Restaurant and consists of eighteen apartments in two buildings and three houses built in the 1980's. One of the houses served as the Sablan residence.

advance rental payment of $96,000 which was to be applied and considered as the full basic rent for the 55th year of the lease term. The Draft, however, was never executed.

4. Instead, Plaintiffs and Song Am, through Lee as its president, executed a lease for a term of fifty five years on December 26, 1997 (the "Lease," Trial Ex. "C"). Lee drafted the Lease and presented it to Lucy Sablan for signature. Article 4 of the Lease expressly provided that the lease would commence on February 1, 1998 and extend to and including January 31, 2053 (Ex. "C.") **[p. 3]** The parties also agreed that for the first year, the rent would be $7,000 per month; for the second year, $8,000 per month; and thereafter, up to the fifty-fourth year, the rent would increase by ten percent (10%) every ten years. *See* Ex. "C." While the Lease also required the tenant to make an advance payment of $60,000 upon the execution of the Lease[2] and another advance payment of $36,0000 within one year from the date of execution,[3] it did not contain any restriction as to how the advance payments were to be used. Ex "C" at arts. 5(3)(a) and (b).

5. In addition to the $10,000 deposit, Song Am paid as advance rent the sum of $25,000 at the time it executed the Lease. Although neither party established precisely when additional advance rent was tendered, they agree that Song Am made a second $25,000 payment as additional advance rent after Mr. Lee took possession of the Property.

6. On January 23, 1998, the parties executed an amendment to the Lease (the "Amendment") ("Ex. "D") that was also prepared by Lee. Rather than simply listing additions and deletions to the Lease, the Amendment restated all applicable terms in their entirety. Although most

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[2] The $60,000 payment was to include the $10,000 advanced as a deposit. Ex. "C" at art. 3(a).

[3] *Id*. at art. 3(b). The Lease actually provided that the $36,000 payment was due and payable within one year from the date of execution or from the date of the $60,000 payment.

of the terms remained the same, among the changes included in the Amendment were the addition of Nick T. Sablan, Jr. as lessor, the addition of Lot No. 012 D 26 to the Property, alterations to the amount and schedule of monthly payments,[4] and the addition of a covenant for the tenant to obtain insurance (Ex "D," art. 12). The Amendment also modified the term of the lease to begin effective February 1, 1998 and terminate on January 31, 2053. *Id*. at art. 4.

7. Both the Lease and the Amendment contained an integration clause stating that the document contained the entire agreement between the parties and that there were no other agreements of the parties modifying the lease (Exs. "C" and "D" at art. 20). The Amendment, moreover, provided that title to all permanent improvements was to be surrendered to the Lessor upon termination of **[p. 4]** the Lease. Ex. "D" at art. 19. Although the initial Agreement to Lease and the Draft both provided that advance rental payments would be applied and considered as the full basic rental for the 55th year of the lease term, neither the Lease nor the Amendment contained any such restriction. Lee testified at trial, however, that the $96,000 payment was to be applied to the final year of the lease.

8. Lucy Sablan testified that on or about January 2, 1998, she notified the tenants on the property that effective February 1, 1998, the apartments would thereafter be managed by Lee and directed the tenants to make rental payments to him commencing the same date (Ex. "Q"). On the same date, Lee notified the tenants by letter that effective February 1, 1998, he would be the new Landlord (Ex. "R"). In his letter, Lee stated that he would begin renovations and improvements in the buildings and the surrounding area.

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[4] *See* art. 5, ¶ 2.

9. As set forth in his January 2, 1998 letter, Defendant Lee did in fact begin making improvements to the Property. With the permission of the lessors, Lee testified that he began construction of a 10,000 gallon water tank on the property in January of 1998 at a cost of approximately $15,000. Lee also spent $1,000 on a leaching field and constructed a retaining wall at a cost of $20,000 (Exs. 11, 13, and 15). Prior to February 1, 1998, Song Am also began making repairs to the Sablan family residence, and commenced trash removal. Lee also testified that he expended approximately $70,000 to replace the plumbing, install a new tin roof, and build a laundromat. In addition, Lee replaced some of the furniture in the apartments with items he imported from Korea, estimated at $5,000 in value.[5]

10. Lucy Sablan testified that at the time she turned over the premises, only two of the units were unfurnished. She turned over possession, along with certain furnishings and outstanding security deposits, to Lee on February 1, 1998. *See* Ex. "G." Mrs. Sablan further testified that at the time she transferred the Property, it was in good condition. She prepared and gave Lee an inventory **[p. 5]** of each apartment's contents along with a $6,027.00 credit against the first month's rent in security deposits (Ex. "G").

11. During the time that Defendants occupied the premises, they experienced a number of problems. First, Lee suffered a stroke in November of 1998 and left Saipan for medical treatment in Korea. During this time, Lee's daughter took over as manager of the apartments and reported continuing problems with sewage in Building No. 1. Although Ms. Lee repeatedly attempted to clear the drains and even relocated the seventeen or eighteen tenants

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[5] *See* Ex. 13 (evidencing the transport of some $3,243 in used furnishings, along with $1,750 in shipping costs). Although Lee claimed to have expended considerable sums in improvements, the sum total of receipts tendered at trial amounted to $26,000 (Exs. 10, 13, and 15). Lee testified, however, that his receipts did not include costs for labor which he estimated to come to one-third of the costs expended.

occupying the two bedroom unit to another apartment, William Agulto, a Housing Specialist for the Northern Marianas Housing Corporation (NMHC"), confirmed that continuing sewage problems required him to remove some of the NMHC-referred tenants from the premises.

12. Lee eventually purchased fire and liability insurance coverage as required under the lease. *See* Trial Exs. 7 and 8. Although Lucy Sablan testified that the insurance coverage had been canceled in February of 1999, Lee contended that the policies were current through May of 1999 because his daughter had made payments to the insurance company as late as April or May of that year. *See* Ex 9. Lucy Sablan nevertheless testified that to protect their interest in the leased premises, she advanced costs for insurance in the amount of $3,040.

13. Although Defendants made the advance payments of $60,000, they failed to pay the remaining advance payment of $36,000. Between February 1, 1998 and December of 1998, however, Song Am managed to make monthly rental payments, albeit sporadically. *See* Ex. "S" and "T." Although Lee knew that the advance payment of $96,000 was not to be used for monthly rental payments, in December of 1998, he asked Lucy Sablan to apply $60,000 of the advance payment to cover unpaid monthly rentals.

14. Plaintiffs rejected Lee's request, and when Song Am failed to make a full payment in December of 1998, on February 2, 1999 Lucy Sablan made demand to pay or quit the premises (Trial Ex. "E"). On March 11, 1999, Plaintiffs sent a Notice of Termination to Defendants, informing them that if they failed to bring payments current by April 3, 1999, the lease would be terminated. *See* Ex. "F." Although Defendants failed to tender payment to Plaintiffs, Lee testified that even after **[p. 6]** the lease was terminated, he continued to collect rent for the month of April 1999. Following service of the complaint in this action

on May 7, 1999, Song Am voluntarily vacated the premises and surrendered possession to Lucy Sablan.

15. When Plaintiffs recovered the premises, the condition had deteriorated dramatically. *See* Exs. "J" and "O." Photographs taken by Mrs. Sablan several days after Defendants vacated the premises not only corroborate Nick and Lucy Sablan's testimony that the grounds were in a state of disrepair, but that a number of the apartments were filthy. *See* Exs. "J" through "O." Apartment unit no. 1 had flooded with water and its carpeting was infested with worms. *See* Exs. "L," "M," and "N." Lucy Sablan testified that the septic tank had overflowed, causing waste and water to flood the apartments of the ground floor of the building where every single window had also been broken. Not only was there substantial damage to doors and cabinets, but all units evidenced water leakage, even those on the second floor. Both tin houses also displayed water damage and leakage, and toilets and other plumbing fixtures appear to have been destroyed. Lucy Sablan testified that of all the furnishings and appliances transferred with the premises, only a handful remained when she re-took the premises. According to Mrs. Sablan, none of the vacant apartments had furniture or appliances.

16. Lee denied leaving the premises in the state described by Lucy Sablan. He admitted, however, that after taking possession, he did transfer a number of broken or unusable appliances and furniture to storage, and to have left some $4500 in furnishings on the premises.[6] With regard to the sewage problem, Lee admitted that there was a sewage

[6] Lee testified that he transferred the unusable items to storage in Koblerville, and that when he left in May of 1999, he took all the property from storage, including three refrigerators, two beds, and five tables, all of which were valued by Mrs. Sablan at approximately $500.00.

malfunction causing waste material to overflow into several apartments in August of 1998, He claimed, however that he arranged for the drains to be repaired.[7] **[p. 7]**

17. Following recovery of possession, Lucy Sablan enlisted her brother-in-law to correct the same sewage problems Lee claims to have repaired. Mrs. Sablan testified that she arranged for the septic tank to be drained and contacted Sablan Enterprises to obtain estimates for other repairs to the exterior and interior of the building. Because the cost of repairs was prohibitive, Mrs. Sablan attempted to complete them herself. She testified that from May through October of 1999, she expended $8,896.12 on these efforts. *See* Ex. "P."

18. This matter was scheduled for trial on November 8, 1999. On May 27, 1999, this court granted Plaintiffs' request for a preliminary injunction, ordered Plaintiffs to remain in continued and exclusive possession of the premises, and recognized Plaintiffs' exclusive right to collect all rent from tenants remaining on the premises. Approximately one week before trial, Defendants filed a motion for leave to file an amended answer and compulsory counterclaim contending that the interest acquired under the Lease exceeded fifty five years and thus violated Article 12 of the Commonwealth Constitution. In their proposed amended answer and counterclaim, Defendants also asserted that they were not in arrears in the payment of rent, that that they were unlawfully evicted from the property, and that Plaintiffs were collecting rents from sub-lessees and not crediting or otherwise offsetting the amounts collected against amounts allegedly owed.. Defendants further claimed a refund from the $60,000 paid in advance rentals, sought reimbursement for improvements made to the

[7] Lee So Young, Lee's daughter, testified that she also made several repairs to the drains during Defendants' occupancy. Although she did not inspect all of the apartments before Defendants vacated, she did examine apartment no. 1. and disputes Mrs. Sablan's testimony as to its condition.

property, and contended that Plaintiffs were unjustly enriched by the funds deposited, furniture and fixtures purchased, and other improvements made to the property.

II. QUESTIONS PRESENTED

1. Whether Defendants should be permitted to amend their answer to assert omitted counterclaims against Plaintiffs.

2. Assuming, *arguendo*, that leave to amend is granted, whether the Lease, as amended, violates Article XII of the Commonwealth Constitution.

3. In the event that the Lease, as amended, does not contravene Article XII: **[p. 8]**

   A. Whether Plaintiffs are entitled to retain prepaid rent when the lease has been prematurely terminated on account of tenant default, and whether Plaintiffs may continue to pursue collection of unpaid advance rentals under a terminated lease.

   B. Whether Song Am is liable to Plaintiffs for $36,000 in advance rental payments, an additional $36,500 in rents due and owing up to April of 1999, an additional $3,040 for insurance coverage paid for by the Plaintiffs, additional damages to repair the premises, and attorney's fees.

   C. Whether an estimate obtained by Plaintiffs from Sablan Construction Company should be admitted as evidence of damages under the business records exception to the hearsay rule.

   D. Assuming that Song Am is liable under the lease for all or part of the damages claimed by Plaintiffs, whether Lee Ki Hae should also be held responsible for damages as the alter ego of Song Am Corporation.

4. Whether Defendants are entitled to the return of any advanced rental payments, to a credit for improvements made to the property, to damages on their counterclaim for wrongful eviction, to restitution for personal property allegedly withheld, and to lost earnings.

5. Whether either party is entitled to an award of attorney's fees and costs of litigation.

III. ANALYSIS

A. Leave to Amend to Add Omitted Counterclaims

1. Defendants maintain that during the course of trial preparation, they discovered that the Lease and the Amendment violated Article XII of the Commonwealth Constitution. Defendants thus seek to add a counterclaim challenging the validity of the lease as well as several additional counterclaims stemming from the allegedly wrongful eviction. Defendants maintain that they neglected to raise the counterclaims earlier because only during the course of trial preparation, when they enlisted the aid of a translator, did they discover that changes made to the underlying documents caused the term of the lease to exceed fifty five years. Defendants also contend that it was only during trial preparation that they discovered that the total investment made in the property, combined with the advanced rentals paid under the Lease Agreement, far exceeded rentals allegedly due. *See* Motion **[p. 9]** for Leave to File [Proposed] Amended Answer and Compulsory Counterclaim and Declaration of Eric S. Smith.

2. A counterclaim arising out of the same transaction or occurrence that comprises the subject matter of the opposing party's claim is compulsory and must be asserted in the pending case. Com. R. Civ. P. 13(a). The failure to raise a compulsory counterclaim will result in its being barred in any subsequent proceeding. C. Wright, A. Miller, M. Kane, 6 FEDERAL PRACTICE AND PROCEDURE [hereinafter, WRIGHT AND MILLER] §§ 1409, 1417 (1990). When a

counterclaim has been omitted through oversight, inadvertence, or excusable neglect, or when a proposed amendment would serve the interests of justice, Com. R. Civ. P. 13(f) permits a party to amend his pleadings to assert it. Only when the delay is inexcusable, where the pleader has displayed a lack of good faith, when the omitted counterclaim can be raised separately in an independent action, or when the proposed counterclaim is totally lacking in merit should leave to amend be denied. *In re Circuit Breaker Litigation*, 175 F.R.D. 547 (C.D.Cal. 1997).

3. Defendants recognize that since the proposed counterclaims seek legal relief arising from the same transaction forming the basis of Plaintiffs' complaint, they are compulsory within the meaning of Com. R. Civ. P. 13(a). Defendants thus acknowledge that they may very well be precluded from having their claims adjudicated unless leave to amend is granted.[8] The court recognizes that leave to amend should be "freely given when justice so requires" and that this policy should be applied with "extraordinary liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.1990). At the same time, this court also notes that leave to amend is by no means automatic. *See Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

4. In this case, Plaintiffs have regained possession of the property and thus are able to collect monthly rental income from the tenants on the premises. In addition, they have the use of funds, furniture, **[p. 10]** and improvements paid for or made by Defendants. Thus, the court finds that there would be little, if any, prejudice to Plaintiffs by the addition of the counterclaims, particularly since there has been no delay in the trial of this case and the court has permitted the parties to introduce evidence relating to the counterclaims. Where, as here, the omitted counterclaims are also compulsory, where one of the counterclaims raises issues

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[8] *See* 6 WRIGHT AND MILLER § 1430 at 223; *Mafnas v. Laureta*, Civil Action No. 88-0696 (N.M.I. Super.Ct. July 10, 1996) (Order Partially Granting Motions to Strike Affirmative Defenses and to Dismiss Counterclaims and third-Party Claims), Slip Op. at 10 (denying leave to amend to add compulsory counterclaim in Article XII action would not only be inefficient but grossly unjust).

of constitutional import, and where the counterclaims appear to the court to have been brought in good faith, the motion to amend should be granted. Accordingly, the court grants Defendants' motion for leave to add counterclaims for violation of Article XII, for breach of lease by eviction, for restitution for improvements and personal property withheld, and for lost earnings.

B. Article XII

5. Next, the court considers whether the Lease, as amended, violates Article XII of the Commonwealth Constitution which, in material part, restricts the acquisition of permanent and long term interests in real property within the Commonwealth to persons of Northern Marianas descent. N.M.I Const. Art. XII, § 1. Since only persons of Northern Marianas descent may legally acquire "permanent and long- term interests in real property within the Commonwealth" by "sale, lease, gift, inheritance or other means," any transaction violating the constitutional restriction is void *ab initio* — void from the beginning, as if it never occurred. *See generally Aldan-Pierce v. Mafnas*, 2 N.M.I. 122 (1991), *rev'd on other grounds*, 31 F.3d 756 (9th Cir. 1994), *cert. denied*, 513 U.S. 1116, 115 S. Ct. 913, 130 L. Ed. 2d 794 (1995).

6. In what can only be categorized as a highly unusual turn of events, Defendants invoked Article XII to set aside the lease and thereby escape its obligations, even though Lee admitted to drafting the document and attempting to perform under its terms. At trial, Lee claimed that the term of the lease exceeded fifty-five years and that he was not of Northern Marianas descent. *See* Trial Ex. "U." Song Am, albeit a domestic corporation, contended that it was equally disqualified from acquiring and holding a long-term interest in property in the Commonwealth, since one hundred **[p. 11]** percent of its directors and voting shareholders are likewise not of Northern Marianas descent.[9] In light of these admissions and Article XII's prohibition, the court must therefore determine whether Song Am's acquisition of a

[9] *See* Trial Ex. "U." Although Article XII recognizes that a corporation may be considered to be a person of Northern Marianas descent, to do so, one-hundred percent of its directors and voting shareholders must be persons of Northern Marianas descent. N.M.I Const. Art. XII, § 5.

leasehold interest exceeded a term of fifty five years. *See Ferreira v. Borja*, 1 F.3d 960, 962 (9th Cir. 1993) *citing Ferreira v. Borja,* 2 N.M.I. 514, 540 (1992) (King, J. dissenting), *vacating and remanding* 2 N.M.I. 514 (1992), *opinion on remand,* 4 N.M.I. 211 (1995), *rev'g* 3 CR 472 (N.M.I. Super. Ct. 1988).

7. Uncontradicted evidence reflects that the initial lease was executed on December 26, 1997 and not on December 26, 1998, as set forth in the document. The Amendment, moreover, bears an execution date of January 23, 1998. Since both the Lease and the Amendment bear an effective date of February 1, 1998 and an expiration date of January 31, 2053, were the court to look to the date of execution of the lease agreement as the date triggering commencement of the leasehold interest, then the court would agree with Defendants that the term of the leasehold interest impermissibly exceeds fifty-five years.

8. However, leases are conveyances whose covenants are interpreted under contract law. *Lane v. Wahl,*101 Wash.App. 878, 6 P.3d 621(Wash. App. 2000). Thus, any analysis of when a lease commences begins with the text itself which is presumptively controlling. *SDC/Pullman Partners v. Tolo Inc.*, 60 Cal.App.4th 37, 70 Cal.Rptr.2d 62, 64 (1977). Unless the parties agree otherwise, a lease begins immediately after midnight on the date specified in the beginning of the lease and ends immediately before midnight on the date specified for the termination of the lease. Restatement (Second) Property § 1.4, Comment d (1977). Here, the parties did not designate the date of execution as commencement date, but expressly provided that the lease would become effective on February 1, 1998. Ex. "C" and "D" at arts 4. Consistent with these provisions, Lucy Sablan testified that although she permitted Defendants access to the Property following execution **[p. 12]** of the Lease and the payment of advance funds, she did not turn over possession until February 1, 1998.

9. Contrary to their position at trial where they asserted some pre-occupancy possessory interest in order to commence making repairs and improvements, Defendants admit in their pleadings that, consistent with the Amendment, they actually took possession on February 1, 1998. *See* Proposed Amended Answer and Counterclaim, Second Claim for Relief at ¶ 7 (filed Nov.

1, 1999). Consistent with their pleadings, moreover, Defendants began collecting rental income from tenants on that date. Because the lease clearly and unambiguously provides for a period of fifty five years, effective February 1, 1998, and because Defendants were not entitled to the benefits of possession before that date, the court need not stretch to find some ambiguity concerning the date of commencement. The court therefore finds that the Amendment does not violate Article XII of the Commonwealth's Constitution and is fully enforceable pursuant to its terms.

C. Plaintiffs' Claims

10. Since the lease is not void *ab initio,* the court now turns to Plaintiffs' claims. A landlord has a right to terminate a lease upon breach of a material covenant. *See generally Sablan Enterprises, Inc. v. New Century, Inc.,* Appeal No. 95-020 (Dec. 9, 1977); RESTATEMENT (SECOND) PROPERTY, § 12.1(3) (1977). The Amendment, moreover, expressly authorizes Plaintiffs to terminate the lease if Song Am fails to pay rent when required. *See* Ex. "D" at art. 7. Lee admits that he never tendered the balance of advance rentals of $36,000, and that Song Am did not pay rent since December of 1998. The court therefore concludes that because Plaintiffs had no obligation to apply any or all of the advanced rent to unpaid rent, Song Am was in default on its rental payments and, as a result, Plaintiffs were entitled to terminate the leasehold interest.

1. Offsets against Prepaid Rent

11. In contrast to the initial Agreement to Lease and the Draft, neither the Lease nor the Amendment expressly provided that advance rental payments would be applied and considered as the full basic rental for the 55th year of the lease term. Based on Lee's testimony as well as that of Nick and **[p. 13]** Lucy Sablan, however, the court finds that notwithstanding the deletion of language concerning the application of the $96,000 advance payment, the parties understood and agreed that the $96,000 payment called for by article 5.3(a) of the Amendment was not a security deposit but was to be used instead as payment for the final year of the leasehold term. Of the $96,000 due as advance rentals, moreover,

$60,000 was to have been paid upon the execution of the Amendment, and the remainder of $36,000 was due and payable "within one (1) year ... from the date of the execution of the Lease or from the date of the payment of the initial sum of $60,000...." Amendment, Ex. "D" at art. 3(a) and (b). Contending that neither the Lease nor the Amendment spell out precisely when the $36,000 balance was due,[10] and maintaining that the $36,000 payment obligation did not survive the termination of the lease, Defendants argue that they should not be held in breach of contract for failure to make the $36,000 payment, and that any prepaid rent that was not applied to past due rental arrearages should be returned to them.

12. Plaintiffs take an entirely opposite position on the issue of prepaid rent. They contend that since the parties agreed to payment of $96,000 for the 55th year of the lease, they should be able to retain the $60,000 in prepaid rent, collect an additional $36,000 as either advanced rentals or a form of liquidated damages, and collect additional damages for Defendants' failure to maintain the premises since Defendants breached the Amendment by, among other things, failing to pay rent when required, failing to maintain insurance, failing to make repairs, and failing to make the $36,000 payment. In addition, they contend that prepaid rent differs from a security deposit in that if a lease is forfeited before the period for which prepaid rent is to be applied, the tenant loses all prepaid rent. **[p. 14]**

13. Unlike a security deposit, an advance payment of rent is generally not refundable to the tenant; it is considered to be the property of the landlord when paid. 5 D. Thomas, THOMPSON ON REAL PROPERTY ["THOMPSON"] § 40.05(b)(1) (1994); RESTATEMENT (SECOND) PROPERTY, § 12.1(3), Reporter's Notes, Note 11 at 428 (1977). Accordingly, in the absence of a lease provision or statute to the contrary, the majority of jurisdictions hold that a tenant may not recover an advance payment of rent when a lease has been prematurely

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[10] Pointing to article 3(b), Defendants maintain that the $36,000 payment could have been due on any one of three dates: one year after December 26, 1997, the date that the Lease was executed; (b) one year after January 23, 1998, the date that the Amendment was executed; or (c) one year from the date that the $60,000 payment was made. Although any one of these interpretations is certainly possible, the court finds these distinctions to be insignificant, in that the parties agree that the $60,000 was paid shortly after Lee took possession in February of 1998, and that Song Am never made the $36,000 payment, despite repeated demands therefor.

terminated on account of tenant default. *E.g.*, *Oregon v. Demarest*, 503 P.2d 682 (Or. 1972); *Lochner v. Martin*, 147 A.2d 749 (Md. 1959); *Stiles v. Lambert*, 94 So.2d 784 39 Ala.App. 15 (Ala.1956).[11] The rule justifying the landlord's retention of the advance rental deposit upon lease termination due to tenant default has sometimes rested on the distinction between advance rent and security deposits.[12] Other courts considering the question have ruled in favor of the landlord on the ground that rent is non-apportionable.[13] One court reached the same result by reasoning that, although the landlord is not entitled to the deposit until the beginning of the rental period for which the deposit has been made, a tenant default that results in lease termination also accelerates the time when the advance rent becomes the **[p. 15]** landlord's property.[14] Yet another court permitted the landlord to retain prepaid rent as some sort of liquidated damages for the tenant's breach of the lease.[15]

14. Regardless of the reasoning used, it is a fundamental principle of law that courts do not make contracts for parties but only enforce their rights under contracts made by them. In this case, neither the Lease nor the Amendment provide that advance rentals should be returned to the

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[11] *See also Casino Amusement Co. v. Ocean Beach Amusement Co.*, 133 Sp. 559 (Fla. 1931) ("One who agrees to pay in advance cannot well complain if, as a result of the agreement he makes, he is in a position different from that in which he would be had he not so agreed"); *Zaconick v. McKee*, 310 F.2d 1 (5th Cir.1962); *Sline Properties, Inc. v. Colvin*, 190 F.2d 401 (4th Cir. 1951); Annotation, *Right of Lessor to Retain Advance Rental Payments Made Under Lease Terms Upon Lessee's Default in Rent*, 21 A.L.R.2d 656 (1953).

[12] *E.g.*, *Ace Realty Co. v. Friedman*, 236 P.2d 174 (Cal.App. 1951)(where there is an absolute payment of rent in advance for some portion of a term, or where there is a payment of a certain sum as a bonus or consideration for execution of lease, lessor may retain the payment upon termination, but if the payment qualifies as a deposit as security for performance of terms of the lease, the lessor may not retain it at the end of the lease); *Housholder v. Black*, 62 So.2d 50 (Fla. 1952) (where there is no evidence that advance rental payment would be used to secure lease payment obligations, deposit by landlord belongs to tenant upon lease termination by tenant default and tenant has no claim to refund).

[13] *See* 5 THOMPSON at § 40.05(b)(1).

[14] *Schoen v. New Britain Trust Co.*, 150 A. 696 (Conn. 1930). *See also, Tatelbaum v. Chertkof*, 212 Md. 475, 129 A.2d 680 (1957) (lessor may retain advance rental payment when a lessee defaults in paying rent for a previous period because the right and title to the payment passes upon the execution of the lease or the payment required, and prevention of its application to the part of the term for which it was paid arises from the lessee's own misconduct); *Lundsten v. Largent*, 298 P.2d 488 (Wash. 1957) (the general rule is that the right and title to advance rentals passes to the lessor on the payment thereof, and the lessee can derive further benefit therefrom only by occupying the premises during the period for which the rent is paid);

[15] *See Loew v. Antonick*, 82 Ariz. 204, 310 P.2d 825, 828-829 (1956).

tenant at the time of termination of the lease. Nor can any obligation to return prepaid rent be gathered from CNMI statutes, the terms of the lease itself, or from the lease when considered in the light of the attendant circumstances.[16] In short, there is no evidence that the parties intended the $96,000 payment to secure performance of the stipulations contained in the lease. There is, however, unrefuted testimony that Defendants understood the $96,000 would serve as rent for the final year of the lease and not as a security deposit, and that, consistent with the treatment of the $60,000 prepayment as advance rent, Plaintiffs refused to apply any of these funds to satisfy rental arrearages. The court therefore concludes that the $96,000 payment was an advance payment on rent for the last year of the lease, which the lessee's default prevented from being applied in accordance with the terms of the lease. Accordingly, upon termination of the lease, the payment became the property of the Plaintiffs and Defendants cannot recover whatever advance rental payments were actually made. **[p. 16]**

15. For the same reason, Defendants are liable for the remaining advance rental payments, even though the lease has terminated. As a general rule, liability for future rent is extinguished when a tenant offers to surrender a lease and the landlord agreed to the surrender. *See* RESTATEMENT (SECOND) PROPERTY § 12.1(3), comment (g).[17] Rights which accrue prior to the surrender of the lease, however, are not extinguished. *See, e.g., Frisco Jones, Inc. v. Peay*, 558 P.2d 1327, 1330 (Ut. 1977). Under the terms of the Amendment, Plaintiffs' right to payment of the remaining advance rental payment matured well before Defendants vacated

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[16] When a contract is plain, unambiguous, and complete, parol evidence is not admissible to contradict or add to the written contract. *See Seol v. Saipan Honeymoon Corp.*, Appeal No. 96-011 (N.M.I. Sup. Ct. April 12, 1999), Slip Op. at 2-3. A court may, however, consider parol evidence of the attendant and surrounding circumstances at the time the lease was made in order to place the court in the same situation and give it the same advantages which were possessed by the actors themselves in construing the document. *Sablan v. Cabrera*, 4 N.M.I. 133, 139-40 (1994). In other words, the court does not admit parol evidence to show that a party meant something other than what he or she said, but to show what he or she meant by what was said. *Id.*, 4 N.M.I. 140, n. 40.

[17] Termination of the lease agreement or eviction of the tenant by the landlord relieves the tenant from all liability for future rent, except where the parties have expressly contracted to the contrary. *See* RESTATEMENT (SECOND) PROPERTY §12.1(3)(a). A surrender, however, will not extinguish the tenant's liability for previously accrued rent or for damages based on a previous breach of lease covenants. *Id.*

the premises. Since Song Am's surrender of the premises did not extinguish its liability for previously accrued rent, it will not cancel Plaintiffs' claim for damages based on a previous breach of the lease covenants.[18]

16. Song Am acknowledges that the amount of unpaid rent to which Plaintiffs were entitled between December of 1998 and May of 1999 is $38,366.67. *See* Defendants' Proposed Findings of Fact and Conclusions of Law at12 (filed Dec. 6, 1999). Although Song Am would have the advance rent applied to satisfy this obligation, Plaintiffs refused to do so, and the Amendment contains no such requirement. Accordingly, the court rules that Plaintiffs may retain the $60,000 advance payment in its entirety without set-off against past due rentals. Plaintiffs' termination of the lease, moreover, does not bar them from collecting any additional future prepaid rentals.

2. Insurance

17. Lee's testimony concerning his insurance obligation is inconsistent, at best. At trial, he testified that he stopped paying rent in December of 1998, and that the insurance policy had been cancelled the following February of March. At his deposition, moreover, Lee admitted that he did not replace the policy after December, because he knew at that time that he was going to quit the business. **[p. 17]** Although Ms. Lee indicated that she had made payments on the insurance policy in April and May of 1999, she did not tender to the court a company receipt, cancelled check, or other credible evidence of payment.[19] The court therefore finds Ms. Lee's claim to have made payment after the effective date of termination of the lease agreement unpersuasive.

18. At the same time, Lucy Sablan failed to provide any evidence corroborating her claim for insurance coverage. Although she claimed to have advanced some $3,040 for a policy, Mrs.

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[18] *See also* RESTATEMENT (SECOND) PROPERTY §13.1, comment l (when a tenant has failed to perform a promise under the lease, landlord is entitled to recover loss sustained by the premature termination of the lease, plus the loss resulting from the tenant's failure to perform his promise).

[19] Exhibit 9, an invoice from International Insurance Agency made out to Lee Ki Hae, reflects an outstanding balance on December 30, 1998 of $1,465.00. Ms. Lee contends that the handwritten notations on the invoice reflect payments made in April and May of 1999, and show that the outstanding balance was paid in full.

Sablan likewise failed to tender either the policy or evidence of payment into evidence. Plaintiffs' claim for damages in the amount of $3,040 to obtain insurance coverage is therefore denied.

3. Damages

19. Plaintiffs seek double the amount of rent from April 3, 1999 through May 7, 1999 under the Holdover Tenancy Act. Plaintiffs also seek to recover rentals and security deposits collected and/or withheld during the period within which Defendants continued to occupy the premises after the lease terminated, as well as additional damages for Defendants' failure to repair and maintain the premises.

20. In material part, the Amendment provides that at the option of the lessor, the lease "shall terminate and be forfeited," if the lessee fails to cure the default or breach within thirty days after receipt of notice of default. Ex. "D" at art. 7. Song Am never denied receiving the February 2, 1999 notice to pay or quit (Ex. "E"). It admitted, moreover, receiving notice that the lease would terminate on April 3, 1999 unless Plaintiffs' demands for payment were met (Ex. "F."). Notwithstanding its failure to cure the default and the subsequent termination of the lease on April 3, Song Am continued to occupy the premises, continued to collect rents and security deposits from tenants, and did not surrender the premises until May 7, 1999.

21. A tenant remaining on the premises after his lease has been validly terminated for the nonpayment of rent becomes a holdover tenant. *See* 4 CMC § 40205; RESTATEMENT (SECOND) PROPERTY **[p. 18]** § 12.1. When a tenant holds over and continues "in possession of the premises or any part thereof after termination of the rental agreement without the permission of the landlord, the landlord may recover possession of the premises, or any part thereof, for the period during which the tenant refuses to surrender possession." 4 CMC § 40205. Under the Holdover Tenancy Act, therefore, Plaintiffs are entitled to collect double the amount of rent from April 3, 1999 to May 7, 1999, which, under the Amendment,

amounts to $18,012.90.[20] Plaintiffs are further entitled to the return of all rentals and security deposits collected by Lee or Song Am during this period which, according to the evidence adduced at trial, amounts to some $4,000.[21]

22. As to Plaintiffs' claim for damages to the Property caused by Defendants' removal of furnishings, the only evidence concerning the valuation of these items was provided by Mrs. Sablan, who testified to a collective value of approximately $500 for the items removed by Lee to storage.[22] Evidence of the value of the remaining items allegedly damaged or destroyed was never established. Since Lee admitted to removing certain items from the premises and not returning them, the court finds that an award of $500 for the items so removed and not returned to be appropriate.

23. Turning next to Plaintiffs' remaining claim for damages to the premises, the court notes that the lease contains no obligation for Song Am to maintain or repair the premises. At common law, however, a tenant is charged with the responsibility of keeping the premises wind and water tight **[p. 19]** and returning the property at the end of the term in the same state of repair as it was when the tenant became entitled to possession, reasonable wear and tear excepted. RESTATEMENT (SECOND) PROPERTY §§ 12.1; 13.1, Reporter's Note 4.[23] From the condition of the premises at the time that Plaintiffs regained possession, it is clear to the

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[20] Under the Amendment, monthly rentals increased to $8,000 commencing February of 1999. *See* Ex. D. For the twenty-seven days in April that Song Am held over the premises, therefore, Song Am is liable to Plaintiffs for double rent at $533.33 per day or $14,400. For the additional seven days that Song Am occupied the premises in May, Song Am is liable to Plaintiffs for double rent in the amount of $516.13 per day, or $3,612.90.

[21] Lee testified that in April of 1999, he collected some $3,000 in rent from the tenants on the premises. One of these tenants, Lamberto Flores, testified that he also paid Lee a security deposit of $500 and advance rent of $500, both of which were not returned to him after Lee vacated the premises. Although the court also received testimony from Noel Tatuna, who stated that he too paid a security deposit to Lee that was not returned, no evidence of the amount actually paid was presented.

[22] Mrs. Sablan did not provide the court with any information regarding the type, size, model, or age of any of the electrical appliances that Lee was alleged to have removed from the premises, nor did she provide any evidence concerning the age or condition of the missing furniture.

[23] *See also Ada v. J.J. Enterprises, Inc.*, Civil Action No. 93-0644 (N.M.I. Super. Ct. Aug. 11, 1993) (Order to submit Suppl. Mem. of Law) (recognizing "waste" as the failure of a lessee to exercise ordinary care in the use of the leased premises that causes material and permanent injury over and above ordinary wear and tear).

court that these obligations were breached. Plaintiffs have failed to establish to a reasonable degree of certainty, however, the amount of damages to which they are entitled for the breach of this obligation.

24. To prove damages, Plaintiffs elicited testimony from Mrs. Sablan to establish that she paid $8,896.12 to replace on air conditioner, mend plumbing and appliances, make repairs to the units, and collect trash (Ex. "P"). Through Mrs. Sablan, Plaintiffs also attempted to introduce an estimate for more than $80,000 in future repairs under the business records exception to the hearsay rule. Defendants objected, arguing that third-party repair estimates could not qualify as business records as they had not been prepared by the Plaintiffs. Defendants also pointed to the absence of any evidence substantiating that the estimate had been prepared by persons with first-hand knowledge of the damage or that the preparer provided estimates as part of a regular business activity. Defendants argued that in the absence of evidence demonstrating that it was the regular practice of Lucy Sablan to obtain information from construction companies, that the records had been integrated into Plaintiffs' office records, and that Plaintiffs relied upon these records in their day-to-day operations, the repair estimate was inadmissible hearsay.

25. Com. R. Evid. 803(6) allows business records to be admitted into evidence when witnesses testify that the records have been integrated into a company's records and relied upon in its day-to-day operations. *See Matter of Ollag Constr. Equip. Corp.*, 665 F.2d 43, 46 (2d Cir.1981). In particular, Com. R. Evid. 803(6) provides an exception to the hearsay rule for records of regularly **[p. 20]** conducted activity.[24] Even if the document is originally created

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[24] Com. R. Evid. 803(6) states:

> A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness [is not excluded by the hearsay rule, even though the declarant is available as a witness]. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

by another entity, its creator need not testify when the document has been incorporated into the business records of the testifying entity. *See MRT Const., Inc. v. Hardrives*, 158 F.3d 478, 483 (9th Cir. 1988).

26. The Commonwealth's Supreme Court has not previously addressed the question of the foundation testimony necessary to admit documents produced by third parties not before the court under Rule 803(6) where those documents have been incorporated into another business entity's records. Other courts addressing this situation, however, have generally held that a document prepared by a third party may properly be admitted as part of the business entity's records if the business integrated the document into its records and relied upon it. Thus, the Court of Appeals for the Ninth Circuit has held that documents prepared by third parties and integrated into the records of an automobile dealership were properly admitted based on testimony that the documents were kept in the regular course of business and were relied upon by the dealership. *See United States v. Childs*, 5 F.3d 1328, 1334 (9th Cir.1993). The Ninth Circuit found the fact that the auto dealership relied upon the accuracy of the documents in its day-to-day business activities particularly relevant. In so doing, the court distinguished its earlier ruling in *NLRB v. First Termite Control Co.,*[25] in which it reversed a district court's decision to admit a freight bill prepared by a third party, by explaining "[i]n reaching that decision we emphasized the fact that [the company **[p. 21]** integrating the document into its records] did not rely on the portion of the record at issue and 'had no interest in the accuracy of that portion of the [record].' " *Childs*, 5 F.3d at 1334 n. 3.

27. *Childs* holds that Rule 803(6) does not require that the document actually be prepared by the business entity proffering the document. Instead, *Childs* and related cases addressing this issue stress two factors, indicating reliability, that would allow an incorporated document to be admitted based upon the foundation testimony of a witness with first-hand knowledge of the record keeping procedures of the incorporating business, even though the business did not actually prepare the document. The first factor is that the incorporating business rely

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[25] 646 F.2d 424 (9th Cir.1981).

upon the accuracy of the document incorporated and the second is the presence of other circumstances indicating the trustworthiness of the document. *See, e.g., Munoz v. Strahm Farms, Inc.*, 69 F.3d 501, 503 (Fed. Cir.1995) ("Reliability is the basis for admitting evidence under the business records exception.").

28. In this case, the reliance and additional assurances of credibility are absent. First, there is no indication that the repair estimates at issue were clearly relied upon by Plaintiffs or were obtained for any purpose other than eluding this court's pretrial disclosure requirements and proving damages at trial. *Compare MRT*, 158 F.3d at 483 (bills prepared by third party and incorporated into a company's records admissible under Rule 803(6) to establish fees paid because company relied upon bills as statements of fees owed) *with First Termite Control*, 646 F.2d at 428 (explaining that certain records prepared by third party not admissible under Rule 803(6) to prove origin of lumber because nothing in the trial record indicated that there was a reason for offering party to be interested in the accuracy of the records as far as they referred to the origin of the lumber). In addition, Plaintiffs have failed to provide any evidence or indicia of trustworthiness of the repair estimates, nor have they provided any other evidence of the procedures used in the original preparation of the repair estimate. As the cases described above indicate, such testimony is not necessary where an organization incorporated the records of another entity into its own, **[p. 22]** relied upon those records in its day-to-day operations, and where there are other strong indicia of reliability. Because no such indicia exist here, the hearsay objection is sustained.

29. In assessing damages, moreover, the court is not only faced with the problem of attempting to ascertain their cost, but also whether it was Song Am or the tenants remaining on the Property who were responsible for the entire ruin and decay. In this regard, the only competent evidence of property damage was offered by Mrs. Sablan for minor repairs and cleanup that, the court finds, should appropriately be borne by Song Am. On the basis of Mrs. Sablan's testimony, the court therefore awards Plaintiffs $8,896.12.

4. Piercing the Corporate Veil

30. A corporation generally possesses a legal existence separate and apart from its officers and shareholders so that the operation of a corporate business does not render officers and shareholders personally liable for corporate acts. *See, e.g., Dela Cruz v. Hotel Nikko Saipan, Inc.*, Appeal No. 95-031 (N.M.I. Sup.Ct. September 6, 1997), Slip Op. at 6. When the shareholders treat the corporation not as a separate entity but rather as an instrument to conduct their own personal business, however, the court may pierce the corporate veil to impose personal liability on the shareholders for the corporation's debts. *Id.*, *citing United Enterprises, Inc. v. King*, Appeal No. 94-046 (N.M.I. Sup. Ct. Nov. 30, 1995).

31. Courts are inclined to pierce the corporate veil when there is evidence of an abuse of the corporate form, either through ongoing fraudulent activities of a principal or a pronounced commingling of the identities of the corporation and its principal or principals. *Id.* In the Commonwealth, courts examine a variety of factors to determine when liability should attach to the individual shareholders of a corporation: undercapitalization, failure to observe corporate formalities, nonpayment of dividends, siphoning of corporate funds by the dominant shareholder, malfunctioning of other officers or directors, absence of corporate records, use of the corporation as a facade for operations of dominant stockholders, and use of the corporation to promote injustice or fraud. **[p. 23]** *United Enterprises, Inc.*, 4 N.M.I at 307.[26] Courts are reluctant to disregard the corporate entity, however, simply "to add another string to Plaintiff's bow." *Tropic Builders, Ltd. v. Naval Ammunition Depot Lualualei Quarters, Inc.*, 48 Haw. 306, 326, 402 P.2d 440, 452 (1965); *see also Associated Vendors, Inc. v. Oakland Meat Co., Inc.*, 210 Cal.App.2d 825, 26 Cal.Rptr. 806, 813 (1962). Only when the court has determined that a corporation and shareholder are identical will it

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[26] Other relevant factors considered by courts may include: (1) Whether the individual shareholder is in a position of control or authority over the entity; (2) Whether the individual controls the entity's actions without need to consult others; (3) Whether the individual uses the entity to shield himself from personal liability; (4) Whether the individual uses the business entity for his or her own financial benefit; (5) Whether the individual mingles his own affairs in the affairs of the business entity; and (6) Whether the individual uses the business entity to assume his own debts, or the debts of another, or whether the individual uses his own funds to pay the business entity's debts. *United Enterprises, Inc.*, 4 N.M.I. at 307, *citing Towe Antique Ford Found. v. I.R.S.*, 999 F.2d 1387, 1391-93 (9th Cir. 1993).

then proceed to determine whether it will "pierce the corporate veil" for purposes of liability. *Id.*

32. To do so, the court applies a two-part test. First, the court looks at "[w]hether the interests of the dominant stockholders are so intertwined with those of the corporation that separate entities no longer exist, and[, second] [w]hether injustice or fraud would result if the fiction of separate entities was upheld." *United Enterprises, Inc.*, 4 N.M.I. at 307, *citing Economic Development Loan Fund v. Pangelinan*, 2 CR 451, 458 (D.N.M.I. App. Div. 1986).

33. Applying these factors to the facts of this case, Plaintiffs emphasize that it was Lee who negotiated with Plaintiffs and that Lee alone executed the lease agreement. Plaintiffs point out, moreover, that Song Am shareholders and directors were family members, and that the shareholders also failed to pay for their stock. Plaintiffs argue further that corporate funds were made available to the family whenever needed, and that there was some evidence of co-mingling of personal and corporate funds. In addition, a review of the evidence reveals that the insurance policies for the premises were obtained by Lee in his name (Ex. 7-9), and that Lee, instead of Song Am, appeared to have entered into contracts to improve the Property (Ex.12). Although Plaintiffs interpret these factors as evidence of domination and control warranting the court to disregard the corporate entity, nothing here leads the court to conclude that Song Am is the alter ego of Lee. **[p. 24]**

34. The evidence instead reflects that although Lee principally negotiated and transacted Song Am's business, he did so in his capacity as president and treasurer of Song Am. Lee testified, moreover, that decisions, such as the decision to enter in to the lease with the Sablans, were made after consultation with family officers, directors, and shareholders. Contrary to the allegations of the Plaintiffs, the evidence shows that Song Am has maintained bank accounts separate from the personal accounts of the family, and that even after Lee became ill with a stroke in November of 1998, Song Am was able to conduct business and pay its bills without him. More importantly, there is no evidence that Song Am was ever used to shield Lee or any other family member from liability, or that Lee's control over the

corporation was exercised in a manner to induce Plaintiffs to enter into the transaction with the corporation. In short, the court finds no evidence that Song Am is the alter ego of Defendant Lee.

35. In reaching this conclusion the court is aware that Song Am may not have sufficient funds to pay a judgment. Were Plaintiffs initially concerned about Song Am's financial viability or its ability to make payments under the lease, however, they could have required a security deposit and/or insisted upon Lee's personal guarantee, prior to entering into the lease. The mere inability of a corporation to pay its debts as they become due cannot by itself justify setting aside the corporate entity, absent proof that the corporation was intentionally undercapitalized or that it deliberately divested itself of assets. Since Plaintiffs have failed to present evidence establishing that Song Am engaged in such conduct or was otherwise used to perpetuate a fraud, justify a wrong, or defeat justice, the court declines their request to hold Lee personally responsible for the damages incurred by the company.

D. The Counterclaims

36. In addition to their claim that the lease, as amended, violated Article XII, Defendants assert that based on the payment of $60,000 in advance rent and the payments tendered between February of 1998 and December of 1998, they were not in arrears in the rent. Predicated on the premise that prepaid rent should have been applied to outstanding and overdue rentals, Defendants assert **[p. 25]** that they were wrongfully evicted on or about May 7, 1999, when they received the complaint in this action. Defendants thus maintain that by wrongfully evicting them from the Property, Plaintiffs deprived them of business earnings and denied them the right to the use and enjoyment of all improvements made to the premises, which improvements, they claim, increased the Property value by more than $100,000. Defendants further maintain that they are entitled to restitution in the form of the cash value of the equipment, building supplies, appliances, fixtures, and other personal property left on the premises.

37. The court has concluded that Defendants are not entitled to recover advanced rent. Accordingly, the court finds Defendants' Second Claim, that they were wrongfully evicted because they were not in arrears when they were served with the complaint, to be without merit. With regard to Defendants' Third Claim for restitution, the court notes that the parties expressly deleted language from the Lease permitting Defendants to remove fixtures from the premises at the point when they surrendered possession to the lessor. By the Amendment, they instead provided that title to all structures, buildings, and any permanent improvements made to the premises would be surrendered to Plaintiffs upon termination of the lease, and the lease does not require Plaintiffs to compensate Defendants or otherwise make any adjustment to the parties' respective obligations for the value of the improvements Defendants elected to make. Ex. "D" at art. 19. Since the parties agreed that Plaintiffs would receive the benefit of the improvements without any credit to Defendants, the court finds no basis for rewriting the agreement between the parties to permit Defendants to recoup their losses now.

38. As to Defendants' Fourth Claim for reasonable value of the appliances, furniture, and other personalty left on the premises, Plaintiffs did not dispute that Defendants purchased at least $5,000 in furnishing and appliances that remained on the premises following Defendants' surrender, and that these items were never returned to Defendants. *See* Findings of Fact, *supra* at 4, ¶ 9 & Note 5. To permit Plaintiffs to retain these items without compensating or crediting Defendants for their costs would be unjust. Therefore, the court will, as part of the judgment entered pursuant to this **[p. 26]** decision, direct that any award to Plaintiffs be offset by the $5,000 in furnishings and other personalty left on the Property. Since the court finds that Plaintiffs were entitled to terminate the lease and re-take possession, Defendants' Fifth Claim for lost earnings is hereby denied.

F. Attorney's Fees

39. Article 20 of the Amendment provides that in the event of any suit by the Lessor or the Lessee "for the recovery or rent due, or because of any breach of any terms, covenant,

condition or provision" of the lease, the "prevailing party" is entitled to recover costs of suit and reasonable attorney's fees to be fixed by the court. Ex. "D," art. 20. Because Plaintiffs prevailed on all but two of their eight causes of action (including their claim of alter ego), they qualify as the prevailing party on their claims for relief and are entitled to collect reasonable attorney's fees and costs. *See Camacho v. L & T International Corp.*, 4 N.M.I. 323, 330 (N.M.I. 1996).

40. Because Defendants prevailed on only one of their five counterclaims, the court finds that Plaintiffs qualify as the prevailing party on the counterclaims as well. Within ten (10) days from the entry of judgment in this case, Plaintiffs are therefore directed to submit a bill of costs and statement of attorney's fees for fees and costs to be fixed by the court. Defendants shall have seven (7) days following service of the bill of costs and motion for fees to respond to Plaintiffs' submissions, following which the matter may either be set for hearing or decided by the court.

SO ORDERED this 13 day of February, 2001.

BY THE COURT:

/s/
TIMOTHY H. BELLAS, Associate Judge