

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-001451

01/20/2004

HONORABLE CATHY M. HOLT

CLERK OF THE COURT
E. Schneider
Deputy

FILED: 01/23/2004

JOHN H GIMBEL III

ROBERT N BRIER
EDWIN B STANLEY

v.

ROGER M NORDBY, et al.

PAUL S GERDING JR.

MINUTE ENTRY

This matter having been tried to the Court and having reviewed the pleadings, case law and file, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Roger M. Nordby ("Nordby") received a degree from the University of Minnesota in electrical engineering. He worked as an electrical engineer for 29 years (Tr. Vol. I, Aug. 19, pp. 58-59)¹ Nordby was managing partner and principal partner in the ownership of The Hermitage from approximately 1973 to 2001 (8/19, p. 63).

2. William W. Boyd ("Boyd") received a B.A. degree and an M.B.A. degree from Northwestern University in 1948 and 1949, respectively. Boyd owned The Hermitage and LaRhonda with Nordby and with Richard W. Holmquist.

¹ For convenience and brevity in citing the five volumes of the Trial Transcripts, Defendants will cite according to the date of the trial transcript and page number only, i.e.: (Tr. Vol. I, Aug. 19, p. 58-59) will be cited as "8/19, p.58-59). Also, Plaintiff's Exhibits will be cited as "PX," and Defendants' Exhibits will be cited as "DX."

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3. Richard W. Holmquist ("Holmquist") received a B.S.M.E. from the University of Minnesota in 1948. He has known Nordby 48 years, and has had a business relationship with Nordby for 32 years (8/22, p. 49).

4. Holmquist, Boyd and Nordby owned another apartment complex in Phoenix named LaRhonda and sold it, with no complaints from the buyer (8/22, pp. 50-51).

5. Holmquist, Boyd and Nordby bought the Hermitage in 1973. It then had 80 apartments. They added a 15-unit addition to The Hermitage's original 80 units (8/22, p. 55).

6. John Gimbel ("Gimbel" or "Plaintiff") received Bachelor's and Master's degrees in Business Administration from Pennsylvania State University. He spent 22 years with United Airlines with his last position as a vice president, and left the company in 1994. He was president and CEO of a medical device company for two years, then president and CEO of Spirit Airlines until the year 2000, when he retired. (8/20, pp. 17-18).] He has invested in residential real estate for 20 to 25 years. He acquired numerous single-family condos or homes and rented them (8/19, pp. 164-166). In total, he has owned 12 to 14 properties, and six to eight at one time (8/19, pp. 225-226). Gimbel owned eight to nine properties when he bought The Hermitage (8/19, p. 226). He is 56 years old and has been retired from corporate executive life for three years. He purchased The Hermitage apartments, closing on February 7th of 2001 (8/19, p. 160).

7. Robert Hawkins ("Robert"), and his wife, Lanell ("Lanell"), lived on The Hermitage property; and Robert was the manager and maintenance man for 14 to 15 years prior to 2001 (8/19, p. 63; 8/22, pp. 8-9). If a maintenance repair or replacement required outside help, and the repair was not a big dollar item, Lanell would have the repair done and send Nordby the invoices at the end of the month. Nordby would review them, sign checks for them, mail them to the vendors, and mail the invoices back to Lanell (8/19, p. 64).

8. Mike Rooney is the owner of an air conditioning business, Cascade Mechanical. He began working on the closed-loop chiller system at The Hermitage in approximately 1985, while then employed as a service supervisor of another company, Climate Control, and has made several service visits per year to The Hermitage since that time up to the present. (8/20, pp. 113-116).

9. The air conditioning at The Hermitage was provided by a "closed loop" system. A closed-loop means that water circulating through the system is enclosed or encapsulated (8/20, p. 116).

10. Any closed-loop system will lose some water (8/19, pp. 81-82; 8/21, p. 177). But, the amount of water lost in a closed-loop system increases over the life of a system, as well as problems associated therewith (8/20, pp. 104, 117). Water loss "comes with the territory" in a closed-loop system. Kuck currently has six to eight buildings that are losing water at a rate

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of 2,000 gallons per day (60,000 gallons a month), and that they have not been repiped (8/20, p. 110).

11. A closed loop can lose “thousands and thousands and thousands” of gallons a month for years, and the source will never be found (8/20, p. 135).

12. Like all closed-loop systems, The Hermitage closed loop had small leaks since the time Nordby installed the meter in 1980. Such small leaks cannot be found (8/19 pp. 81-82, 86-88). In the past at The Hermitage, water had surfaced if there was a major leak. Nordby’s experience was that there is no pooling unless there is a major leak. He never experienced a major leak that did not appear on the surface (8/19, pp. 80-83).

13. A condition occurred in approximately 1990 in a portion of the closed loop under the parking lot at The Hermitage. *Id.* Mr. Rooney’s company hired a leak detection company, found the leak, was authorized to dig the parking lot up, and replaced a section of piping that “was not soldered correctly.” *Id.* The size of that leak was 5 to 10 gallons a minute (or the equivalent rate of 7,200 – 14,400 gallons per day). *Id.* at p.119.

14. Underwood in fact noticed the parking lot pavement was cut and patched to make this underground repair, and asked Robert Hawkins about it, and was told about this leak (8/21, pp. 52-53).

15. In 1999, there was a pump deficiency in the mechanical room. The pump provided power to the domestic hot water system, such as sinks, showers, and dishwashers (8/22, pp. 51-52, 83-84). The pump provided hot water and was not connected to, or a part of, the closed-loop system of pipes for heating and cooling of the apartments. Some piping was redone, all above ground, by Ashford Plumbing, which replaced about 15 to 20 feet of three-inch pipe in the mechanical room (8/22, pp. 43-44; 8/19, p. 43).

16. Some time in 2000, Rooney told Lanell Hawkins that they could have a leak. He did not say there was a leak; nor did he say whether the leak was big or little. Lanell called a leak detector. The leak detector said that, if there was a leak, he would find it. The leak detector and the Hawkinses went through 40 apartments (8/21, pp. 161-165; 8/22, pp. 13-14). They did not find a leak (8/21, pp. 162-165; 8/22, pp. 13-14; 8/21, p. 16). The leak detector said that they had no leak (8/21, p. 165).

17. As was Lanell’s practice to inform Nordby of minor problems on her 3 by 5 cards, Lanell sent Nordby a 3 by 5 card telling him that Rooney “thinks we could have a leak.” She advised Nordby that leak detectors had come out and could not find the leak (8/19, pp. 69, 74). She wrote, “Good news, no leak was found” (8/21, p. 168). Nordby reasoned that since nobody could find a leak, it could not be repaired. As he put it, “you can’t fix something that cannot be found” (8/19, pp. 86-88).

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18. In May 2000, Nordby was getting too old to manage and administer The Hermitage (8/19, pp. 94-97). Nordby, age 81, was in bad health. He had undergone two heart bypass surgeries. Also, in that year, the Hawkinses told Nordby they were retiring at the end of 2000 (8/19, pp. 94, 95, 97-101). Nordby advised his partners (PX4), and they all voted to sell The Hermitage.

19. In the meantime, Gimbel, who had retired in 2000, decided he wanted to sell his highly profitable Hillsboro property and invest in something else (8/19, pp. 166-168). Gimbel was looking for an income stream of 8 to 9 percent. He started looking for an investment in Arizona in the fall of 2000, and looked at The Hermitage (8/19, pp. 167-169).

20. Gimbel was at The Hermitage two times before he signed the contract, and three to four times after he signed the contract, before closing (8/19, pp. 227-228).

21. Gimbel said that the age of the building was an important factor in his decision whether or not to buy The Hermitage (8/19, pp. 229-231). In making the purchase, Gimbel was aware that an older building will have more expenses than a newer building (8/19, p. 229; 8/20, p. 55).

22. Nordby gave Gimbel the costs and expenses of The Hermitage for three years. Gimbel was given complete access to the books and records (8/19, pp. 105, 106, 107-108, 141-143).

23. In January 2001, Gimbel and his professional inspector, Gary Johnson, toured The Hermitage for an entire day. The inspection lasted from 8:30 a.m. to 4:30 p.m., or 5:30 p.m. (8/19, pp. 209, 233-236).

24. Johnson prepared a written report (DX214). It states that "The purpose of the inspection is to perform a nondestructive, visual inspection of the chiller" (8/20, pp.43; 67). Johnson found the chiller to be in "good" condition. Johnson did not inspect whether the chiller cooled (8/21, p. 138, 8/19, pp. 206-207). During the inspection of the equipment room, Gary Johnson pointed out the age and the piping repairs (8/21, pp. 29-30).

25. Gimbel knew that Johnson was not going to look at items he says in his report that he was not going to. Gimbel knew that for Johnson to inspect those other items would have cost more (8/20, pp. 73-76).

26. Mike Osselaer ("Osselaer") and Keith Underwood ("Underwood") from Consolidated Asset Management ("CAM"), Gimbel's property manager to-be for The Hermitage, also inspected the property. Osselaer also told Gimbel that his inspection would be limited to visible conditions (8/20, p. 199). Osselaer testified that "It is not my normal practice to look for a problem that was not disclosed." (8/21, p. 43, 46).

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27. Osselaer also testified that he was not hired to look at the meter during the inspection (8/21, p. 42). He knew that the faster the water meter is running, the more water the system is losing (8/21, pp. 17-18, 24-25). He did not recall whether he or Johnson read the meter during the inspection (8/21, pp. 29-30). Reflecting his view of the purpose of an inspection, described in the preceding paragraphs, Osselaer said that, only when it has been disclosed that there is a problem with pipes, do “we start a more thorough investigation” (8/21, pp. 12-13).

28. Underwood had been a property manager at other buildings where there had been leaks. He knew that sometimes there are leaks. Underwood has performed 150 to 175 inspections. He noted that the amount of water being lost would be important to him in order to give Gimbel his opinion of the property. Underwood acknowledged that the purpose of an inspection is to determine if there is a problem (8/26, pp. 18, 19, 21). Underwood did not look to see if there was a meter, and did not ask if there was one. Underwood admitted that he could have looked to see if there was visible water coming from the underground; could have looked at past water bills; and could have looked for the Kuck readings. Underwood testified that he did not seek that information because he did not know that there was a problem (8/26, pp. 18-22).

29. Underwood observed a large repair of the asphalt in the parking lot running from the “A” building to the “B” building (8/21, pp. 52, 53, 54). Underwood observed the prior repair in the parking lot involved a 100-foot section of asphalt two-feet wide. He testified that it was of concern to him, so much so that he told Osselaer about it the same day he observed it, with the understanding that Osselaer would pass the information on to Gimbel. However, Underwood did not know if Osselaer pointed it out to either Gimbel or Gary Johnson.

30. Underwood said that, any time there is an underground repair, it is “nice” to know about it, and that an underground repair indicates a problem in the past. Underwood further observed that, if he thought there was a problem, it would have been “nice” to look to the meter or past water bills or other past readings (8/26, pp. 21, 24). Underwood conceded that that is an inspector’s job (8/26, p. 21).

31. Nobody asked Lanell Hawkins about whether there were leaks in the pipes (8/21, p. 183). Bob Hawkins did not recall any conversations with anyone regarding the chiller piping (8/22, pp. 32-33).

32. Gimbel bought a building that was over 30 years old (PX7; 8/19, pp. 92, 127). Yet, he “expected the property to have no defects,” and he did not want a building that would require any “hands-on by me” (8/19, p. 211).

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33. Gimbel's expectations were that, "once we had all the little things—the defects cured," then he would expect to see a "normal" cash flow evolve out of this investment; "and that's kind of my expectation" (8/19, p. 212).

34. Gimbel is a sophisticated investor. He has made numerous real estate investments over the years. He is well educated and has held very responsible positions.

35. Gimbel financed his purchase of The Hermitage through the Defendants. He financed 80 percent of the purchase price (8/20, pp. 28-29; 8/26, p. 132).

36. In February 2001, Gimbel entered into a contract with CAM to manage the property (DX220). The contract provided for compensation to CAM of 3 percent of the gross income. The numerous problems, particularly with air handlers, which arose in the first six months or so of CAM's management, is attributable to CAM's lack of maintenance at The Hermitage.

37. On March 19, 2001, Bruce Greenberg inspected the property and found it in good over-all condition, with no significant deferred maintenance (PX20, p. GIM00177).

38. The Aaron Wright appraisal, which was undertaken in order to permit Gimbel to refinance the property, also found no problems with the chiller system or pipes. He stated that the general condition and the level of maintenance was "good" (8/20, pp. 31, 42).

39. In the spring of 2001, Gimbel transferred title in The Hermitage to The Hermitage of Scottsdale, L.L.C., a Nevada limited liability corporation (8/20, p. 30).

40. In May 2001, after the sale of The Hermitage, a leak occurred at The Hermitage. Rooney described it as a "significant" leak (8/20, pp. 117-118). He said that "significant" means to him that the system cannot maintain water pressure, and it has to have another valve or piping or bypass open. (8/20, p. 117). Rooney testified that a leak of that nature previously had occurred only one time at The Hermitage in about 1990, and that on that occasion the system was losing about five to ten gallons a minute (8/20, pp. 118, 119).

41. Rooney described the May 2001 leak as much worse than anything he had seen before at the Hermitage. The fast spinning of a meter indicates that it is a large leak. Rooney observed spinning close to this degree, such as in May 2001 at The Hermitage, only on one other occasion at The Hermitage, in about 1990. He said that in May 2001 the meter was spinning at a much faster rate than what he had ever seen at The Hermitage (8/20, pp. 134, 140-141).

42. There are a number of ways to find whether there is a leak. Ordinarily, the first line of defense is the water meter. The make-up line on the closed-loop system had a meter on it showing exactly the amount of water being lost by the system at any point in time.

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(8/21, pp. 17-18; DX 288) It has a dial with a rotating hand showing the amount of water use; the faster the hand turns, the more water is being used. *Id.*, pp. 22-25. Additionally, the dial can be used together with a watch to determine the exact rate of water loss at any given time. *Id.*, pp. 23-25. This procedure takes no more than a few minutes. *Id.*, p. 44.

43. The water meter also has a set of numbers, looking like an odometer on a car, stating the number of gallons used. *Id.*, pp. 21-22, DX 288. These numbers are shown in the periodic meter readings on the make-up system by Mr. Kuck. (PX13 and PX287).

44. This meter is located in the equipment room at The Hermitage (8/21, p.18). Plaintiff's manager, Mr. Osselear, specifically acknowledged that the dial is "in plain view" in the equipment room. *Id.*, p. 29. He also stated that during their inspection of The Hermitage, he and the inspector, Gary Johnson, went into the equipment room. *Id.*, p. 29. He further acknowledges that they could have looked at this dial if they had wished to, *id.*, pp. 29-30, and that if they had looked at the dial, they could have determined exactly the rate at which water was leaking out of the system at that time. *Id.*, p. 30. However, he does not recall doing so. *Id.*, pp. 29, 34.

45. The defect complained of, the loss of water from the closed-loop system, could not properly be classified as a "latent defect," because there was a dial in plain view available to the buyer's inspector and other representatives, showing exactly the amount and rate of such water loss at the time of the inspection.

46. There are companies which provide professional services to locate leaks. However, the leak detector retained by Lanell Hawkins in 2000 did not find any leak, although he said he would be able to do so if there were one (8/21, pp. 164-166). And, CAM employed three leak detectors in 2001 and one in 2002, and, like the leak detector in 2000, none of them were able to locate a leak (8/20, p. 203; 8/20, p. 48).

47. Osselaer also stated that there are two ways to determine whether there is a leak. One is to ask the owner, and the other is to actually look at the underground piping. He acknowledged that, if the inspector only asks the owner, he is relying on the fact that the owner knows that there is a leak, and knows the condition of the underground piping (8/20, pp. 162-163, 185-187).

48. Kuck took water meter readings on a periodic basis at The Hermitage from July 1999 to the present (PX13, PX287). When Kuck first read the meter for the closed-loop system at The Hermitage, he found the water loss was not "too bad" (8/20, p.104). He was able to keep his chemical treatment, which he placed into the closed loop on a regular basis, in the closed loop. But, by the time of the trial, he could not keep that chemical treatment in the loop. Kuck was unable to recall when it was that he found that he could not keep the treatment in the loop. He said he did not recall the date and time, and testified flatly, "I don't know the time" (8/20, pp. 104, 109-110).

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49. The Kuck readings show that from January 3, 2001 to March 8, 2001, the time the property was transferred, the Hermitage lost 12,350 gallons of water (PX 13, p. GIM00570), or 192 gallons a day, at a cost of \$0.002 per gallon (8/26, p. 169), or \$0.38 a day. Thirty-eight cents (\$0.38) per day is not material or basic to the transaction.

50. Underwood testified that the total lost water at The Hermitage from the time Gimbel commenced ownership to the date of the trial was 401,607 gallons. (This is roughly 420 gallons a day, or 12,615 gallons per month.) He testified that the total gallons lost per day today are 1,000 gallons per day (8/21, p.65-68).

51. Osselaer testified that the building was currently losing two to three gallons a minute. At face value, a water loss of two to three gallons a minute would mean that The Hermitage is currently losing 108,000 gallons a month (8/20, p. 216; 8/21, p. 17). There is nothing in the record that supports Osselaer's testimony. The most recent period of the Kuck readings, July 29, 2003 to August 14, 2003, just prior to the trial, shows an actual rate of water loss of about half this amount, at 1.25 gallons per minute, or approximately \$3.75 per day (PX 287, p.1).

52. By mid-to-late October 2001, Gimbel was convinced that there was a "lot more to the problems than normal maintenance" (8/19, p. 190). By mid-to-late October 2001, Gimbel decided that the pipe had to be replaced (8/19, p. 203; 8/20, pp. 16, 176, 190-192; 8/21, p. 10). Osselaer testified that, by October 2001, he decided that the piping needed to be replaced (8/20, pp. 190-192).

53. The cost of water lost since January 2001, is estimated by Gimbel at \$1,983.14 (PX19; 8/26, pp. 190-95). Osselaer made his decision that all the piping had to be replaced before he saw any of the underground piping at the time of the first repair in January 2002; before he saw the repair in April 2003; and before he saw the pipe that was brought into the courtroom (PX15; 8/20, pp. 196-198).

54. None of the speculations advanced by Plaintiff and his witnesses justify totally repiping the system.

55. The underground piping has not been replaced in the almost three years since the sale of the property. Nobody testifying on behalf of Gimbel was able to say that a decision as to when the piping would be replaced has been made (8/20, p. 205). In fact, Osselaer testified that he has never asked Gimbel when the system would be replaced.

56. The useful life of galvanized piping, on average, is 20 to 30 years (8/19, p. 35, 47).

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57. The underground piping has now exceeded the average useful life of galvanized underground piping. Therefore, if Gimbel were to obtain a new underground piping system at the expense of Defendants, this would be a total windfall to him.

58. Eighty units at The Hermitage had air handlers. Nordby replaced approximately six air handlers out of 80 during his ownership of The Hermitage (8/22, pp. 11-13). Gimbel replaced six to eight air handlers by July 2001 (8/19, pp. 187-188). He replaced 18 to 20 units in the year 2001 (8/20, pp. 17, 145). The number of air handlers replaced by Gimbel in 2002 and 2003 was substantially less than in 2001 (8/20, p. 17).

59. One of the maintenance items that was done by the Hawkinses and, to a far lesser extent by Gimbel, involved back-flushing. Back-flushing is defined as: "Shut the water off, take a plug out, put a hose on it, drain it into the stool, and then open your valves one at a time" (8/22, p. 11). Underwood testified that 35 air handlers needed to be "back-flushed" during the summer of 2001 (after the post-sale leak of May 2001, and before the new filter installation in December 2002). (8/21, pp. 57-58), and that one to two a week needed "back-flushing." The Hawkinses asked Rooney to back-flush perhaps two to three air handlers a year. The other back-flushings were done by Bob Hawkins (8/20, pp. 144-146).

60. In the fall of 2001, Gimbel retained an attorney, Peter Schelstraete ("Schelstraete").

61. On December 8, 2001, Nordby wrote Kuck (DX245) and asked Kuck to provide him with copies of the meter readings at The Hermitage. Instead, Kuck called Underwood, and asked him how to respond to Nordby. Underwood told Kuck to send Nordby nothing without Underwood's approval. Kuck then sent a memorandum to Underwood on January 8, 2002 (DX252), in which he said that he would not send Nordby anything without the prior approval of Underwood (8/20, pp. 98-99).

62. Osselaer refused to honor Nordby's request that Ashford Plumbing be allowed on site at The Hermitage for purposes of obtaining an independent bid to repipe. That request was made in the summer of 2003 and was ignored (8/26, pp. 116-117).

63. In December 2002, about two years after the purchase, Gimbel installed a large new filter on the system, at a cost of \$4,907.10 (PX19, 8/19 pp. 201-202; 8/26, p. 83). It made a "dramatic improvement" in the quality of the re-circulated water in the closed-loop system (8/19, p. 202).

64. Mike Rooney, of, Cascade worked for Nordby and he worked for CAM, Gimbel's property manager. He made it abundantly clear during the trial that he wanted to be "accurate" to both sides (8/20, pp. 114-115, 117, 131).

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65. Gimbel initially sought to charge defendants \$24,000 for an overhaul of the chiller (8/21, p. 152). Yet, Kuck testified that the chiller was in very good shape for its age, and that he would charge \$5,000 to overhaul the chiller, were it needed (8/20, pp. 102-103). This item was withdrawn by plaintiff at trial (8/21, 105-06).

66. Gimbel also sought to charge the defendants for a chiller compressor at a cost of \$14,000 (8/21, p. 152). Yet, Kuck testified that the chiller compressor is in good working condition, even though Gimbel wanted to replace it (8/20, p. 103).

67. The Court finds credible Bob Hawkins' testimony that he could turn the chiller back on during a changeover at any time after 12 to 24 hours (8/22, p. 42).

68. Gimbel obtained a proposal for repiping on March 13, 2002 (DX272, GIM00548, DX238, GIM00337, and DX254 and PX19, SR003), as follows: Sunstate Mechanical: 3/13/02, \$168,541.05 (8/22, p. 98).

69. After the Court had ruled on the relevance and admissibility of a number of claimed items of damages, and after Gimbel had withdrawn his claim of \$24,000 for an overhaul of the cooling tower and \$14,000 for rebuilding the compressor, the \$401,000 in damages claimed in the original PX19 was reduced to \$235,939.11.

70. Plaintiff, through PX19, and Underwood contend that Gimbel expended \$17,137.55 for air conditioning and heating repairs during the relevant time frame (PX19, 8/26, SR 49-154). Many of those invoices (8/20, p. 103) are on their face not related to the closed loop.

71. Even a superficial analysis of the invoices indicates that many of them have nothing to do with problems attributable to the defendants. For example, a number of them referenced replacement of "a bad thermostat." Another referenced a need for a replacement because "low on Freon" (8/22, pp. 104-111).

72. Underwood acknowledged that he could not separate out from an invoice amounts attributable to work made necessary by situations which Gimbel attributed to the Defendants, as distinguished from those not attributable to the Defendants. He said, for example, with respect to SR56, that it would be hard to determine the difference in costs attributable one way or the other (8/22, pp. 107-110).

73. Plaintiff, through PX19, p. SR001, and Underwood, claim a need to replace 56 air handlers, for a total of \$57,404 (8/22, pp. 118-121). Underwood testified that it is necessary to replace all 56 of the air handlers, which have not been previously replaced, now (8/22, pp. 118-120). Underwood testified that he knew all 56 needed to be replaced now, because "they are the same age" as the 24 that they had allegedly replaced in the three years that they were operating the property. Underwood said that this was true, because all 80 of the air handlers

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were installed at the same time (8/22, p. 121-124). However, this does not take into account that Nordby had replaced at least 27 units, an average of one per year, during his tenure (8/22, p. 122).

74. Underwood also sought recovery from defendants for installation of T-valves on the air handlers, which makes flushing the air handlers easier and, consequently, costs less time and money (8/21, pp. 63-65). It is, therefore, a betterment. Gimbel acknowledged that T-valves make air handlers easier to back flush (8/19, p. 201), and that a T-valve is an upgrade. Therefore, the cost of the T-valve upgrades should not be passed on to Nordby (8/22, p. 118). And, Plaintiff's evidence fails to establish the cost of these T-valves. So, any invoice including T-valves, and other related work, must be disregarded.

75. Turn-over costs totaling \$2,625 (PX19, p. SR002), as follows: the "average of the basic costs for turning in an apartment ...multiplied by the percentage of move-outs that I thought I would have." (8/22, pp. 116-117). The turn-over costs appeared to be duplicative with the lost tenant costs (8/22, pp. 116-117). The \$2,625 in turn-over costs is speculation (8/21, p. 101).

76. PX19, p. SR002, provides for an estimated loss of \$3,525 because of tenants moving out as a result of the contemplated work (8/22, pp. 112-115). But, Underwood testified that only one tenant has moved out, stating that the reason for his move was chiller problems (8/21, pp. 73-76, 8/22, p. 112; 8/26, p. 55). There were no tenant move-outs attributable to chiller problems in 2002 and 2003 (8/26, pp. 51-52, 73-74). Accordingly, the claimed damages of \$3,525 is speculation.

77. Gimbel presented the testimony of Craig Johnson to "gross up" his estimated cost of repair damage figure by 26 percent. According to Johnson, this is comprised of a 20 percent "contingency" factor and 6 percent "motivational" factor (8/21, pp. 136-137, 151). He applies these supposed factors to adjust down the hypothetical price of the property (8/21, pp. 152-154).

78. For each \$10,000 increment that the starting damage figure was wrong, as it has been directly established to be improper, the adjustment to price is wrong by a factor of 120 to 126 percent, or by \$12,000 to \$12,600. (8/21, p. 155). There is no valid basis for including, and indeed enlarging, through this indirect route, components of damages that have been directly established to be improper, such as these excluded from plaintiff's' damage exhibit no. 19. Therefore because the total damage figures on exhibit 19 was reduced at trial by \$165,158.42 (from \$401,097.53 to 235,939.11), Mr. Johnson's "contingency" analysis is off (overstated) by \$198,190.10 to \$208,099.61.

79. The "contingency" factor proposed by Johnson is in the nature of a "fudge" factor, and seeks improperly to protect Gimbel from inaccuracies in his own cost estimates ("my feeling that the costs were of a preliminary nature, and...could end up being

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conceivably higher.”) (8/21, p. 136). Johnson had no formal training in the use of contingency factors (8/21, p. 139), and he does not consider himself to be an expert on the subject of contingency factors (8/21, p. 141).

80. Jerry Tenge (“Tenge”) is a Senior Vice President with the national real estate firm Grubb & Ellis, with extensive experience in construction of apartment buildings in the metropolitan Phoenix area (8/26, pp. 177-82). He made an expert analysis of the hypothetical cost of The Hermitage as new construction in the years 2000-2001, to be used in comparison to the cost of acquiring such an asset as a 30-year old property, as actually occurred.

81. It would have cost \$80 to \$85 per square foot to reconstruct this property in 2000-2001, using common frame and stucco material, for a total project cost of \$5,857,600 to \$6,223,700 (8/26, p. 189). It would cost an additional \$15 to \$20 per square foot, or approximately \$1 million to \$1,450,000 more, to use cement block construction, the actual material used at the Hermitage East (8/26, p. 189). This would give a total new construction cost of \$7,000,000 to \$7,700,000 (8/26, p. 190). These figures may be compared to the actual purchase price of The Hermitage of \$4,885,000 as a thirty year old complex, which Gimbel’s expert, Johnson, confirmed was almost exactly market value at the time of sale (concluding that \$4,900,000 was an appropriate starting market value) (8/21, p.132).

82. Implicit in the price paid by Gimbel was a large discount reflecting the fact that the property he bought was not in new condition, but rather was substantially depreciated to reflect its 30-years-plus age. Given this large implicit discount for buying an older building, it was unrealistic and unreasonable for Gimbel to expect to receive a property in essentially “like new” condition (8/21, p. 138).

83. The closed-loop system had seepage that was characteristic of its age, being similar to other properties of comparable age that Kuck and Rooney had worked on (8/20, pp. 110, 148; 8/26, p. 104).

CONCLUSIONS OF LAW

1. In light of the relatively small value of the chiller system (including any necessary repairs) and the relatively small cost of replacement water in comparison to the overall value of the property, Gimbel has failed to establish that the chiller system and any associated leakage of water was material and basic to the purchase of The Hermitage East Apartments.

2. In light of Section 8.2 of the Purchase Agreement, providing Gimbel with an opportunity to physically inspect the property, and Gimbel’s failure to disapprove the

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physical condition of the property pursuant to Section 8.2, Gimbel's claim against Defendants for breach of contract is precluded.

3. In light of Section 14 of the Purchase Agreement, providing that the property was sold "as is," Gimbel's claim against Defendants for breach of contract is precluded.

4. Gimbel has failed to establish that Defendants breached their contractual duties to Gimbel, and therefore the claim is denied.

5. Defendants have not deprived Gimbel of the essential benefit of the bargain in the Purchase Agreement.

6. Because Gimbel has failed to establish the chiller system and the cost of replacement water are material, and basic to the transaction, Gimbel may not prevail on any tort claim.

7. All tort claims in this matter are barred because of the contributory and/or comparative negligence of Gimbel due to Gimbel's failure to conduct tests of or otherwise examine the underground piping during the inspection period provided under Section 8.2 of the parties' Purchase Agreement, which would have disclosed the extent of any underground leakage.

8. Plaintiff has failed to establish a valid claim for breach of the covenant of good faith and fair dealing, and therefore this claim is denied.

9. Gimbel has failed to establish that Defendants failed to maintain an appropriate standard of care with regard to the sale of The Hermitage East Apartments, and therefore the claim is precluded.

10. Plaintiff has failed to establish a valid claim for negligent misrepresentation, and therefore the claim is denied.

11. Gimbel has failed to establish that Defendants actively concealed from Plaintiff the leakage of water from the chiller system of The Hermitage East Apartments, and therefore the claim is precluded.

12. Gimbel has failed to establish that Defendants knew of the leak, and that it was a material problem and basic to the transaction, and should have been disclosed to Gimbel.

13. Gimbel has failed to establish intent to defraud by Defendants.

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14. Plaintiff is not entitled to any punitive damages in this case, as Plaintiff has not established that Defendants had the evil state of mind required for punitive damages under Arizona law.

15. As the prevailing party in an action for breach of contract, Defendants are entitled to recover their reasonable attorneys' fees and expenses, in an amount to be determined upon application to the Court, pursuant to Section 25(d) of the Addendum to the Purchase Agreement, and pursuant to A.R.S. Section 12-341.01.