permit SONOMA

County of Sonoma
Permit & Resource Management Department

PLANNING COMMISSION /
BOARD OF ZONING ADJUSTMENTS APPEAL FORM **PJR-021**

To: Board of Supervisors
County of Sonoma, State of California

File No.: UPE07-0112

Appeal is hereby made by John Farrow, Farrow Ready Mix, Inc.

Mailing Address 3660 Copperhill Lane

City / State / Zip Santa Rosa, California 95403

Phone: (707) 591-0225 Email: john@farrowcommercial.com

The Sonoma County ○ Planning Commission / ◉ Board of Zoning Adjustments on

(date) March 28, 2024

◉ approved / ○ denied a request by Permit Sonoma Staff

for Revocation of use permit UPE07-0112

Located at 3660 Copperhill Lane, Santa Rosa, CA 95403

APN 059-250-004 Zoning: M2 Heavy Industrial Supervisorial District: 4

This appeal is made pursuant to Sonoma County Code Chapter Section 26-92-160 for the following specific reasons:

Please see attached.

Appellant Signature [signature] Date: 4/5/24

DO NOT WRITE BELOW THIS LINE - TO BE COMPLETED BY PERMIT SONOMA STAFF

This appeal was filed with Permit Sonoma on this date March 28, 2024, receipt of which is hereby acknowledged.

Permit Sonoma Staff Signature Hannah Spencer

Attachment to Permit Sonoma Appeal Form

1. Res Judicata and Collateral Estoppel Effect of Court's Finding in Prior Litigation as to the Vested Use Permit

The issues relating to Farrow Ready Mix's vested right in this use permit were litigated extensively in the Sonoma County Superior Court, case number SCV-269684, captioned *Farrow Commercial, Inc., a California Corporation v. CMS Properties LLC, a Montana limited liability company doing business in California as CMS Airport Properties, LLC, aka CMS Properties LLC.* Permit Sonoma had notice of this lawsuit by virtue of the document and witness subpoenas issued to it during the case by both sides, but chose not to participate or intervene as a party. In that lawsuit, the landlord, CMS Properties, filed a Cross-Complaint against Farrow for Breach for Breach of Contract, Nuisance, Trespass, Ejectment, and Injunctive Relief. The Court heard testimony for ten days in this case, and made specific findings of fact regarding the Court's interpretation of the subject lease agreement (dated November 17, 2018) and the Farrow tenants' efforts with respect to addressing the conditions of the use permit. The Court ruled against CMS on its Cross-Complaint on all causes of action and entered judgment against CMS and in favor of Farrow on all causes of action, including nuisance. Those findings have res judicata and/or collateral estoppel effect.

For example, in the October 17, 2023 Judgment Following Statement of Decision After Court Trial in Sonoma County Superior Court Case No. SCV-269684, the Court attached its Statement of Decision and ruled as follows:

Page 23:23 – Page 24:3 – "The evidence shows that Farrow is currently, and has been at all times during the tenancy, operating under a valid use permit as evidenced by a letter from the County of Sonoma dated December 27, 2018, that clarifies operation at the site is allowed pending satisfaction of the conditions of the existing use permit. **Farrow has exercised reasonable and diligent efforts to satisfy the conditions of the use permit under the circumstances and has expended substantial sums of money attempting to satisfy the final conditions of the use permit**. The express language of the Lease clearly does not include any temporal deadlines as CMS claims." [Emphasis added].

Page 25:10-19 – "**Testimony showed that from the beginning of its tenancy at the property, Farrow undertook efforts to satisfy the conditions of the use permit**. Farrow's expert, the former PRMD Code Enforcement Manager from 2002-2011 and PRMD Building and Safety Division Manager from 2011-2015, testified at trial that the use permit is a valid use permit for Farrow's operations of the property and that the use permit has vested. During Farrow's tenancy, in December 2019, CMS received a letter from the County stating that violations of the use permit existed at the property. CMS forwarded a copy of

this letter to Farrow, and **Farrow continued its efforts to communicate with the County and to satisfy the conditions of the use permit**. However, there were months during 2020 when the PRMD office was closed, and Farrow experienced delays beyond their control."

It is undisputed that the Court has made explicit findings of fact vis-à-vis Farrow's reasonable diligence in attempting to satisfy the conditions of the use permit since late 2018.

2. Inadequate Findings of Fact by Board of Zoning Adjustments

At the March 28, 2024 hearing, the Board of Zoning Adjustments did not make legally competent findings. Additionally, the adoption of the Resolution was arbitrary and capricious given the lack of specific findings as to why each unsatisfied condition is a nuisance.

3. Effect of CMS Litigation

The landlord filed two unlawful detainer actions, and a Cross-Complaint in the unlimited civil case, attempting to oust Farrow from the premises. The unlawful detainer cases were dropped. The Court found after trial in the unlimited civil case that all of CMS' claims lacked merit. For two years – between October 2021 and October 2023 – Farrow's efforts with the County were put on hold because of the lawsuit between Farrow and CMS. It is not reasonable to expect that the tenant in the case – Farrow – would spend the hundreds of hours, and hundreds of thousands of dollars it takes to satisfy the conditions, with the risk that at the end of the case, if it lost, it would be forced to vacate the premises, leaving everything that it had worked on and invested in behind. If the landlord hadn't tried to evict Farrow in 2021, Farrow would have continued its work with Adobe Associates and the County in 2021 and 2022 to get the conditions fully satisfied. The landlord, CMS, has frustrated and prevented Farrow's performance.

4. Continued Diligence

As Farrow showed at the March 28 hearing, its and its consultant Adobe Associates continue to work diligently to get the approvals finished. Building and sewer permits are with the County. Farrow is waiting on its other consultants (for example, its structural engineer is providing drawings which were anticipated to be returned in January 2024 but have not yet been). The "ball is in the court" of these other agencies and consultants, and the County, at the moment.

5. Illegal, Underground Amendment of the Conditions of Approval

As written, the conditions of approval did not contain any firm deadlines for compliance. Revoking a use permit for failing to meet a non-existent deadline is an illegal underground amendment to the conditions of approval.

6. Takings

Farrow spent a substantial sum of money in reliance on the permit, to its detriment; thus, the permit is now a vested right. Revoking the use permit in these circumstances, based on incompetent evidence and findings, is a compensable taking.

7. Any Other Basis Allowed By Law

The appellant expressly preserves its ability to assert any other basis for this appeal allowed by law.

Glenn M. Smith (SBN 97973)
Rachel M. Dollar (SBN 199977)
SMITH DOLLAR PC
Attorneys at Law
418 B Street, Fourth Floor
Santa Rosa, California 95401
Telephone: (707) 522-1100
Facsimile: (707) 522-1101
gsmith@smithdollar.com
rdollar@smithdollar.com

Michelle V. Zyromski (SBN 191606)
ZYROMSKI KONICEK LLP
613 Fourth Street, Suite 203
Santa Rosa, CA 95404
Telephone: (707) 542-1393
Facsimile: (707) 542-7697
michelle@zklegal.com

Attorneys for Plaintiff FARROW COMMERCIAL, INC. and for Cross-Defendants FARROW COMMERCIAL, INC. and FARROW READY MIX, INC.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA

FARROW COMMERCIAL, INC., a California corporation,

Plaintiff,

v.

CMS PROPERTIES LLC, a Montana limited liability company doing business in California as CMS AIRPORT PROPERTIES, LLC, aka CMS PROPERTIES, LLC; and DOES 1 through 30, inclusive,

Defendants.

CMS PROPERTIES LLC, a Montana limited liability company doing business in California as CMS AIRPORT PROPERTIES, LLC, aka CMS PROPERTIES, LLC; and DOES 1 through 30, inclusive,

Cross-Complainant,

v.

FARROW COMMERCIAL, INC., a California corporation; FARROW READY MIX, INC. and ROES 1 through 25, inclusive,

Cross-Defendants.

CASE NO.: SCV-269684
(Unlimited Civil Case)

~~[PROPOSED]~~ **JUDGMENT FOLLOWING STATEMENT OF DECISION AFTER COURT TRIAL**

Dept.: 17
Judge: Honorable Bradford DeMeo
Complaint Filed: November 15, 2021
Trial Date: October 7, 2022
Resumed March 2, 2023

This action came on regularly for a court trial on October 7, 2022 in Department 17 of the Sonoma County Superior Court, the Honorable Bradford DeMeo presiding. Plaintiff Farrow Commercial, Inc., a California corporation and Cross-Defendants Farrow Commercial, Inc., a California corporation and Farrow Ready Mix, Inc., a California corporation ("Farrow") appeared by attorneys Michelle V. Zyromski and Glenn M. Smith. Defendant and Cross-Complainant CMS Properties LLC, a Montana limited liability company doing business in California as CMS Airport Properties LLC aka CMS Properties, LLC ("CMS") appeared by attorneys Daniel E. Post and Michael Shklovsky. Evidence via testimony of sworn witness John Farrow was presented to the Court for two days on October 12 and 13, 2022. The trial then was continued pursuant to California Rule of Court 3.1332(c)(3) & (4) and (d)(2), (3), (5) & (10).

The action resumed on March 2, 2023 in Department 17 of the Sonoma County Superior Court, the Honorable Bradford DeMeo presiding. Farrow appeared by attorneys Michelle V. Zyromski and Glenn M. Smith. CMS appeared by attorneys Christopher M. Mazzia and Michael Shklovsky. Evidence via testimony of sworn witnesses was presented to the Court for seven days on March 2, 3, 7, 8, 9, 10, and 14.

After hearing the evidence of the witnesses and arguments of counsel, the case was submitted to the Court for decision and judgment. On May 16, 2023, the Honorable Bradford DeMeo issued a Tentative Statement of Decision; the Tentative Statement of Decision was filed and served that same day. On May 31, 2023, CMS filed and served a document captioned, "CMS' Request for Specific Findings and Amendments Regarding the Court's May 16, 2023 Tentative Statement of Decision After Court Trial". On June 12, 2023, Farrow filed and served a document captioned, "Farrow Commercial, Inc. and Farrow Ready Mix, Inc.'s Responses to CMS' Request for Specific Findings and Amendments Regarding the Court's May 16, 2023 Tentative Statement of Decision After Court Trial; and Proposals Regarding Same." On June 15, 2023, the Honorable Bradford DeMeo issued a Statement of Decision After Court Trial; the Statement of Decision was filed on June 15, 2023 and served on June 16, 2023. In the "Decision" portion of the June 15, 2023 Statement of Decision After Court Trial, at pages 27:15-28:2, the Court ruled as follows:

Verdict shall be entered in favor of Plaintiff Farrow on plaintiff's first and second causes of

action for breach of contract and declaratory relief. Verdict shall be entered in favor of Defendant CMS on plaintiff's third and fourth causes of action. The Court further finds that any monetary damages caused by the breach of contract are nominal as much of the expenditures incurred by Farrow, according to the evidence presented, would most likely have been incurred without a breach in pursuit of satisfying terms and conditions of the use permit. Farrow will not be awarded monetary damages on its successful claims. However, the Court finds the exercise of the Option was valid.

Based on the foregoing, Verdict shall be entered against CMS and in favor of Farrow on all of CMS's causes of action alleged in their First Amended Cross-Complaint. CMS will not be awarded damages on its claims. Plaintiff shall prepare a Judgment for filing and entry according to the findings and decision contained in this Statement of Decision.

The Court reserves jurisdiction on attorney fees and costs.

A filed copy of the June 15, 2023 Statement of Decision After Court Trial is attached as Exhibit "A" and is incorporated by reference.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED THAT:

Judgment shall be entered in favor of Plaintiff Farrow Commercial, Inc., a California corporation and against Defendant CMS Properties LLC, a Montana limited liability company doing business in California as CMS Airport Properties LLC aka CMS Properties, LLC on Plaintiff's first and second causes of action for breach of contract and declaratory relief. No monetary damages are awarded. The exercise of the Option was valid. The Option is in full force and effect and the tenants are entitled to lawful possession of the leasehold interest at 3660 Copperhill Lane, Santa Rosa, California 95403 pursuant to the terms of the November 19, 2018 Commercial Lease Agreement and the Lease Agreement's three attached addenda, including the Option to Renew/Extend Lease, until at least November 18, 2025. The Option is self-executing and entitles the tenants to lawful possession of the leasehold interest until November 18, 2029, unless the tenants notify CMS 180 days prior to the first option period expiring of their intent not to exercise their option to renew.

Judgment shall be entered in favor of Defendant CMS Properties LLC, a Montana limited

liability company doing business in California as CMS Airport Properties LLC aka CMS Properties, LLC and against Plaintiff Farrow Commercial, Inc., a California corporation on Plaintiff's third and fourth causes of action for fraud (concealment) and unfair business practices.

Judgment shall be entered against Cross-Complainant CMS Properties LLC, a Montana limited liability company doing business in California as CMS Airport Properties LLC aka CMS Properties, LLC and in favor of Cross-Defendants Farrow Commercial, Inc., a California corporation and Farrow Ready Mix, Inc., a California corporation on all of CMS's causes of action alleged in its First Amended Cross-Complaint. CMS will not be awarded damages on its claims. CMS will take nothing by way of its First Amended Cross-Complaint.

The Court reserves jurisdiction on attorney fees and costs.

ZYROMSKI KONICEK ATTORNEYS AT LAW

DATED: 10/17/2023

By_____
HONORABLE BRADFORD DEMEO
Judge of the Superior Court

APPROVED AS TO FORM:

_____

Christopher M. Mazzia, Esq.

Michael Shklovsky, Esq.

EXHIBIT A

THE HONORABLE BRADFORD DEMEO
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SONOMA
3035 Cleveland Avenue
Santa Rosa, CA 95403
Telephone: (707) 521-6725

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA

FARROW COMMERCIAL, INC., a California corporation,

Plaintiff,

vs.

CMS PROPERTIES, LLC, a Montana limited liability company doing business in California as CMS AIRPORT PROPERTIES, LLC; and DOES 1 through 30, inclusive,

Defendants.

Case No. SCV-269684

STATEMENT OF DECISION AFTER COURT TRIAL

CMS PROPERTIES, LLC, a Montana limited liability company doing business in California as CMS AIRPORT PROPERTIES, LLC,

Cross-Complainant,

vs.

FARROW COMMERCIAL, INC., a California corporation; FARROW READY MIX, INC. and ROES 1 through 25, inclusive,

Cross-Defendants.

In this document the Court announces its Tentative Decision on the issues presented to the Court. The Tentative Decision will be the Statement of Decision unless within ten (10) days either party files and serves a document on the Court that specifies objections to the findings and

rulings contained herein, or makes proposals not covered in this document. Pending further order(s) or entry of Judgment, this Tentative Decision constitutes the temporary orders of the Court.

BACKGROUND

Farrow is a residential and commercial developer that was heavily involved in rebuilding many homes in Sonoma County following the Tubbs Fire of October 2017. In late 2018, to address difficulties in sourcing and supplying concrete to its fire rebuilds, John Farrow, President and CEO of Farrow Commercial, Inc. (hereinafter collectively referred to as "Farrow"), started negotiating with Carl Davis, owner of Carl's Ready Mix, to purchase the assets of Carl's Ready Mix, a concrete processing plant operating since 2007 at the Property.

The current owner of the property located at 3660 Copperhill Lane, Santa Rosa, California (hereinafter "Property") is the defendant CMS Properties, LLC. (hereinafter "CMS"). The Property was purchased by CMS in 2015.

Carl Davis (hereinafter "Carl") leased the Property in 2007 from the then owners. His goal was to operate a concrete business there. He applied for and obtained from the County of Sonoma (hereinafter "County") a Use Permit allowing him to operate his concrete business at the Property. He did business as "Carl's Ready Mix." Final Conditions of Approval were issued by the County in April of 2008. There is no dispute between the parties that Carl never complied with all of the County's Use Permit terms.

On May 11, 2011, the County issued to the prior Property owners a Notice of Violation of Use Conditions and a Notice and Order of Construction Without a Permit (noting construction of an unpermitted batch plant, commercial coach, and a tank exceeding 5,000 gallons without permits were all a public nuisance). In December 2011, the County recorded a Notice of Abatement Proceedings demanding the owners comply with the conditions of the existing use permit, including obtaining all required permits and inspections for the unpermitted batch plant or remove it. Pursuant to the County's Notices, penalties began accruing against the Property owners.

In 2015, Defendant CMS (through its principals Mark Ciddio and Stacey Ciddio)

purchased the Property and continued the lease with Carl's Ready Mix. According to testimony at trial, CMS was aware that Carl's Ready Mix was operating the concrete processing business under a use permit issued by Sonoma County in April 2008 that came as a document called "Final Conditions of Approval," listing 56 pre-operational and operational conditions for operation of the business. Mr. Davis made attempts, but never satisfied, all 56 conditions of the use permit during the more than a decade that he operated Carl's Ready Mix at the Property. CMS never insisted that Mr. Davis satisfy all 56 conditions of the use permit to continue his tenancy at the property.

In late 2018, Farrow purchased Carl's Ready Mix assets and negotiated a new lease with CMS. The CMS attorneys drafted a standard form Commercial Lease Agreement ("Lease") with the proposed terms. The Lease was thereafter circulated/reviewed by all parties, discussed, and agreed upon, signed by Farrow on December 7, 2018, and signed by CMS on February 27, 2019. The Lease has three attached addenda, each of which is expressly incorporated into the Lease by reference.

Plaintiff claims that the Option to Renew/Extend Lease ("Option") allows Plaintiff to occupy the Property for two additional four-year time periods, and by its terms, was self-executing – meaning that the tenant was not required to take any action to formally exercise it.

The Option states, "6. Other Tenant shall notify Landlord at least one hundred eighty days (180) of its intent NOT to exercise the Tenant's option to renew." Farrow claims it exercised the Option to extend the Lease by remaining in possession of the Property and, despite no obligation, by timely giving written notice to CMS on or about November 9, 2021.

During Farrow's tenancy on the Property, the world fell into a pandemic in proportions not experienced since 1918. Governments continued to run, but it is self-evident that they moved at a much slower pace due to staffing issues as a result of shelter in place emergency orders and return to work safety measures. Local zoning and permit approvals, among other governmental actions, were continuing but universally delayed to some extent during the pandemic.

///

CLAIMS OF THE PARTIES

Farrow claims it is entitled to occupy the Property for an extended term according to the Option to Renew/Extend Lease. Farrow further argues that the option was self-executing, and that Farrow was in substantial compliance with the Lease terms and conditions, including the use permit terms and conditions, when the option self-executed in late Spring of 2021. The legal theories upon which Plaintiff's claims rest are alleged as breach of contract, declaratory relief, fraud and concealment, and unfair business practices.

In its cross-complaint CMS claims it is entitled to possession of the Property, ejectment, and damages for trespass. The legal theories upon which the claims rest are breach of contract, ejectment, trespass, nuisance, and injunctive relief.

CMS argues that the Option is and was never valid because no one on behalf of CMS signed it. To this claim the court disagrees and finds that a signature on the option page addendum was not required to make the option valid as it was incorporated by reference in express language on page 1, section 1.3 of the lease document. See Defendant's Exhibit 26 in evidence. CMS further argues that the Option was not effectively exercised by Farrow. To this claim the court disagrees and finds that the option was self-executing unless the tenant notified landlord 180 days prior to the term expiring, which the tenant did not send such notice. Finally, CMS argues the Option to extend the lease term cannot be exercised because Farrow breached the lease by not satisfying all 56 conditions of the use permit and/or by other environmental violations pertaining to the Property. The Court will address this issue in further detail hereinafter as in the view of the Court this is the key issue in this case.

LAW AND ANALYSIS

A. Credibility of Witnesses

The credibility of witnesses is one of the important and crucial parts of this trial. The Court listened to all testimony presented. Pursuant to California Evidence Code section 780, the Court will make findings based on the credibility of witnesses and how much weight to be given to their testimony and opinions.

Notwithstanding conflicting versions of certain details, the parties themselves appeared to

be genuine in their recount of the facts as they believe occurred. Much of the conflict in this case appears to be perception and perspective.

Haven Holm, called to testify for the defense, was not a credible witness. With very little reliable independent memory of events, other than his clear disdain for plaintiff for being fired in December of 2018, Mr. Holm had very little reliable information unless he was prompted with a leading question. This occurred several times during his testimony under oath. As his testimony progressed this Court allowed several leading questions and it became clear that unless a leading question was asked, or he was prompted with visual cues and documents, he had very weak independent recall of events, dates, names, and other details important to the case. His testimony was general, conclusory, and was inconsistent with documentary evidence, dated emails, and testimony of other witnesses.

Casey McDonald, of Adobe and Associates, was credible and informative of the efforts made by the parties to achieve progress to meet the terms and conditions of the use permit. Both parties at one time or another had hired Adobe to conduct analysis and land planning regarding the Property. Ms. McDonald also provided evidence of timelines and communications with Sonoma County personnel regarding the use permit and other matters involving the property. Her testimony was helpful in resolving conflicting assertions by the parties as to when efforts were made to comply with County requirements including confusion caused by defendants as they submitted an application for permits to install water and sewer on the Property as Plaintiff was attempting to do the same.

Brian Keefer, a Permit Sonoma planner in 2018, was also credible and helpful in describing the requirements for Farrow to operate under the use permit. He testified that code enforcement in Sonoma County is passive – it is a complaint bases system of enforcement. Therefore, the conditions of the use permit are not monitored by the County enforcement agency unless prompted by a complaint. He testified that the County continued to review planning applications, but indicated things were somewhat slow during the pandemic.

Troy Saldana, a Farrow employee, was also credible. He performed a very thorough gathering of documents, with little to no information directly from CMS, and was a percipient

witness to a walk-through of the Property in early December of 2018 involving John Farrow, Mark Ciddio, and others. Saldana was the only witness to that event called to testify at trial. He prepared a punch list of things needing attention, among other information, from that site visit.

Plaintiff's expert, **Benjamin Neuman**, presented with impressive background and experience as an inspector, plan reviewer and code enforcement officer for the County of Sonoma Permit and Resource Management Department (now Permit Sonoma), and at one point in his career was the head of that agency. His years of experience, education, and breadth of knowledge is impressive and helpful to this Court. He testified that there is no time deadline in which use permit conditions must be satisfied unless expressly stated in the use permit, which there was no such deadline for any of the conditions. His testimony corroborated the testimony of Brian Keefer regarding enforcement. He testified that numerical limits such as trips per day of heavy trucks is a fluid condition and may be considered as an average over a period of time. He testified that the use permit in question is valid today even though some of the conditions are still not met. This is critical to Plaintiff's case. There was no counter expert testimony offered by the defendants.

B. The Option Is Valid Without Separate Signature

1. <u>The Lease Includes the Commercial Lease Agreement (Form 552-3) and Its Three Addenda, Including the Option Addendum (Form 565) as Expressly Incorporated by Reference.</u>

There is no dispute here that a valid written contract exists. The Lease was negotiated between the parties, and the formal memorandum of its terms was thereafter circulated/reviewed by all parties, and signed by Farrow on December 7, 2018, and by CMS on February 27, 2019. The Lease has three attached addenda, each of which is expressly incorporated into the Lease by paragraph 1.3 that provides: "The following checked addenda are part of this agreement:" followed by check marks in front of "Addendum Lease/Rental [See RPI Fonn 550-1]," "Option to Renew/Extend Lease [See RPI Form 565]," and "Addendum 3: Aerial Photo with leased area designated." Thus, the operative terms of the Lease include those set forth in the standard form Commercial Lease Agreement (Form 552-3) as well as those included in the attached addenda:

Form 550-1, Fonn 565, and the aerial photograph. CMS admits the Lease is valid but claims the Option (Form 565) is not valid simply because CMS did not execute this Form separately from the standard Form Commercial Lease Agreement (Fonn 552-3). This assertion is unsupported by the law and by the facts.

California law establishes the validity of the entire Lease (the standard form 552-3 with all three of its attached addenda) regardless of the lack of Defendant's execution of the Option. Addenda incorporated into a contract need not be separately executed. "A contract may validly include the provisions of a document not physically a part of the basic contract .... 'It is, of course, the law that the parties may incorporate by reference into their contract the terms of some other document. [Citations.] But each case must turn on its facts. [Citation.] For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party, and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties.'" (*Williams Constr. Co. v. Standard-Pacific Cmp.* (1967) 254 Cal.App.2d 442, 454.) "The contract need not recite that it 'incorporates' another document, so long as it 'guide[s] the reader to the incorporated document.' [Citations.] (*Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 54, 67 Cal.Rptr.2d 850.)" [*Troykv. Farmers Group, Inc.* (2009) 171Cal.App.4th1305, 1331; *Dipito LLC v. Manheim Investments, Inc.* (S.D. Cal., Dec. 14, 2021, No. 3:21-CV-01205-HJLB) 2021WL5908994, at *11; 14A Cal. Jur. 3d Contracts§ 238.]

Here, Lease paragraph 1.3 is clear and unequivocal in its reference to Form 565. Defendant knew of the Option as it was initially provided by its own counsel, was reviewed by Defendant, and was discussed at negotiation sessions. The Option was attached to each of the three drafts of the Lease during negotiations. Defendant expressly consented to inclusion of the Option and all its terms, and never withdrew such consent at the time of signing or during the tenancy until, at or near the time they attempted eviction, when they claimed that the Option is not valid. The Option was available to all parties as it was physically attached to the Lease as the second addendum.

An option is a unilateral irrevocable offer; on the exercise of an option, there is a bilateral contract between the parties that obligates both the optionor and the optionee to perform according to the terms of the option. Here, CMS, by their execution of the Lease made the Option irrevocable. Upon exercise of the Option by Farrow, both parties became obligated to perform per the terms of the Option as agreed.

2. The Lease is an Integrated Contract with no Ambiguity as to Its Terms Including the Option.

The Lease is expressly integrated as set forth in paragraph 23.5 which states, "This lease agreement reflects the entire agreement between the parties". This clause indicates the parties' intent that the Lease reflects the final, complete, and exclusive statement of their agreement. The parol/extrinsic evidence rule prohibits the introduction of extrinsic evidence to vary or contradict the express terms of an integrated written instrument. The terms of a writing that the parties intend as a final expression of their agreement cannot be contradicted by evidence of a prior agreement or a contemporaneous oral agreement. A court is to rely strictly on the plain language of a contract and should not revise a contract in the guise of construing it. When the language of an instrument is clear and explicit and does not lead to an absurd result, the language of the contract is controlling. Also, when several writings are taken as one transaction, they must be so construed as to give effect, as far as practicable, to every part of each. "A contract and a document incorporated by reference into the contract are read together as a single document. ..." [*Id.* citing *Poublon v. C.H Robinson Company* (9th Cir. 2017) 846 F.3d 1251.] Civil Code § 1642, providing that multiple contracts are to be taken together, also applies to instruments or writings that are not, on their own, contracts. [Cal. Civ. Code§ 1642. *City of Brentwood v. Department of Finance* (2020) 54 Cal. App. 5th 418, 434; 14A Cal. Jur. 3d Contracts§ 236.]

"The decision whether to admit parol [or extrinsic] evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged,

the extrinsic evidence is then admitted to aid in the second step-interpreting the contract." [*ASP Properties Group LP v. Fard Inc.* (2005) 133 Cal.App.4th 1257, 1267.] The threshold determination of whether there is "ambiguity" is a question of law. [(CCP § 1856(d).] Here, the plain meaning of the integrated Lease, when construed to give effect to all portions of the contract (including the Option Addendum), is unambiguous as it demonstrates that the parties mutually agreed that Plaintiff had the option to extend the lease per the terms expressly set forth in the Option. Mark and Stacey Ciddio both admitted that they "agreed" to the Option and understood that Farrow would sign the Option at a later time. "The purpose of the law of contracts is to protect the reasonable expectations of the parties" and "the mutual intention of the parties at the time the contract is formed governs interpretation." [*ASP Properties, supra* at 1268-1269.] Here, the language of the Lease is not reasonably susceptible to Defendant's allegation that the parties did not so mutually agree; extrinsic evidence is not necessary on this point. Perhaps more importantly, merger clauses (such as Paragraph 23.5 here) have been held conclusive on the issue of integration, so that parol evidence to show that the parties did not intend the writing to constitute the sole agreement will be excluded." [2 Witkin, Cal. Evid. 5th (2002) Documentary Evidence § 71(2).]

3. Extrinsic Evidence, if Considered, Supports Mutual Intent to be Bound by the Option.

Even if a document is a complete integration of the parties' agreement, extrinsic evidence may be held admissible to prove an interpretation for which it is reasonably susceptible. If the terms of a contract are ambiguous, reference may be made to extrinsic evidence and surrounding circumstances to resolve the ambiguity. Such interpretation based on consideration of the extrinsic evidence is an issue of fact. [CACI 318 Interpretation- Construction by Conduct.]

Whether a document is incorporated into the contract is a question of fact and depends on the parties' intent as it existed at the time of contracting. [*Versaci v. Superior Court* (2005) 127 Cal. App. 4th 805; *Shaw v. Regents of University of California* (1997) 58 Cal. App. 4th 44.] If, in taking the several writings together, an ambiguity arises, extrinsic evidence may be resorted to for the purpose of explaining their meaning.

Here, the extrinsic evidence and surrounding circumstances demonstrate both Farrow and CMS intended to be bound by all the terms of the Lease, including all three of its explicitly incorporated addenda, thus including the Option at issue. In November 2018, the CMS attorneys Borba Frizzell Kerns, P.C. drafted the standard form Commercial Lease Agreement and circulated it to the parties for review. The initial version, as well as all subsequent versions, included the second addendum, the Option (Form 565). This Option was included because Farrow (through principal John Farrow) previously told CMS (through principal Mark Ciddio) that Farrow intended to occupy the property on a long-term basis to allow establishment and eventual expansion of the business. Ciddio stated he could give Farrow a three-year term plus two four-year extensions. CMS' attorneys then filled out Form 565 with specific lease extension terms offering the option to extend the lease, initially by four years at a 2% rent increase, and then for another four years at a 4% rent increase; the Option was presented to Farrow along with the other contract documents. The parties orally agreed upon all the terms and conditions set forth in the Lease and each form was dated November 19, 2018, with the mutual intention that formal execution by the parties would follow.

Shortly after these oral discussions, plus a December 3, 2018, meeting at the property (the site visit referred to hereinabove), in reliance on the parties' mutual agreement on the lease terms, Farrow moved onto the property, began tenant improvements, and began operations. CMS did not object to Farrow moving forward. Farrow signed the Lease on December 7, 2018; he signed the fifth page of the standard form contract (Form 552-3) and signed Addendum Lease/Rental Agreement (Form 550-1). He did not sign the Option to Renew/Extend Lease (Form 565) only because he understood it to be an option to be exercised and executed closer to the end of the initial three-year rental term.

CMS (through its principal Stacey Ciddio) signed the Lease on February 27, 2019. CMS signed the fifth page of the standard form contract (Form 552-3) and signed Addendum Lease/Rental Agreement (Form 550-1) and the aerial photo but neglected to sign the Option to Renew/Extend Lease (Form 565). Stacey Ciddio testified that CMS agreed to the Option terms and did not intend to withdraw the Option at the time of signing. She testified she did not

communicate to Farrow any withdrawal of the Option and that she was aware that Farrow had not signed it only because he intended to sign it later if and when he chose to exercise the option. Mark Ciddio also testified that "we agreed [to two four-year options], but never signed the page." Based on this evidence CMS cannot argue revocation of their Option offer. [See CACI 308 Contract Formation - Revocation of Offer: CMS did not withdraw the offer; Farrow accepted the offer of an option before CMS attempted to withdraw it; no withdrawal was communicated to Farrow.] Stacey Ciddio, on behalf of CMS, signed the Commercial Lease Agreement with the attached Option and with the express language of Paragraph 1.3 incorporating the Option, and a signed copy was provided to Farrow. The first time CMS indicated any objection to the Option was at or near the time of their attempted eviction of Farrow after attorneys had become involved. The Option cannot be viewed in isolation or a vacuum; it must be taken together with the other documents in the transaction, including the express incorporation by paragraph 1.3, and considering the actions of the parties. CMS' act of signing the Lease was the functional equivalent of signing the Option both because the Option was expressly incorporated in the Lease and because CMS' signature demonstrated their confirmation of the terms fully negotiated and orally agreed upon on November 19, 2018. This evidence is persuasive of a mutual understanding notwithstanding the missing signature on the Option.

Further extrinsic evidence of CMS' intent to include the Option in the Lease may be found in the subsequent conduct of their attorneys Borba Frizzell Kerns, P.C. who represented CMS throughout the lease negotiations; such conduct is imputed to CMS under the laws of agency. On December 28, 2018, CMS' attorney Kristen Frizzell Kerns e-mailed John Farrow regarding certain items:

> *John,*
> *I understand there are still some outstanding items.*
> *With the lease, the Option page is not signed. Is that because you do not want the Option, or were you expecting to sign it only if you exercise the Option?*
> *Could you initial the map attachment and send it back?*
> *CMS has not received the Deposit, documentation from the court, and certificate of insurance. Time is of the essence on these items since Farrow has been operating on the site.*

In response to that e-mail, Farrow communicated to Ms. Kerns not "we do not want the Option," but rather, that Farrow planned to sign the Option around the time of the expiration of the initial lease term:

> *Hello Kristen,*
> *My name is Lydia and I am John Farrow's assistant. Please see attached the use permit from the County of Sonoma for 3 660 Copperhill Lane.*
> *John expected to execute the extension at the time the original lease expires.*

Thereafter, Kerns apparently received Farrow's initials on the aerial photo that is dated January 14, 2019, as she had requested, and made no further mention of the Option. Kern's acquiescence to Farrow's signature near expiration of the initial term is evidence that the term was intended to be binding and such conduct is imputed to CMS as Kern was clearly acting in her agency capacity.

On the agency issues, *Columbia Pictures Corp. v. De Toth* (1948) 87 Cal.App.2d 620 is instructive. Plaintiff (motion picture producing company) and defendant (director) entered into an oral agreement of employment at a specific salary and options according to plaintiff's standard form of contract for directors, under which each intended to be bound with agreement to sign the standard form contract at a future time. Defendant claimed he did not know the detailed and elaborate provisions of the standard form contract; nevertheless, he was held to the acts and expressions of his attorney as his agent. The court recognized defendant was represented in the making of the contract by attorney Allenberg; after attending a meeting with Columbia, defendant left the details to Allenberg. The court cited Civil Code sections 2330 and 2332, which provide: "'An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal.' ... [and] ... 'as against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.'" [*Columbia Pictures, supra.* at 630.] Further, "a principal is chargeable with and is bound by the knowledge of, or notice to, his agent received

while the agent is acting within the scope of his authority, and which is with reference to a matter over which his authority extends." [*Id.*]

Thus, the court imputed Allenberg's acts and words to the principal contracting party (defendant director) and held the oral contract evidenced by the terms set forth in the written contract, was valid. Likewise, here Kerns' indication that the Option remained viable to be executed and exercised at a later date is imputed to CMS.

C. The Option Addendum was Timely and Validly Exercised

The Option Addendum states, "6. Other Tenant shall notify Landlord at least one hundred eighty days (180) of its intent NOT to exercise the Tenant's option to renew." Thus, the language creates an automatic renewal that requires Farrow to do nothing to exercise the option; the terms require Farrow to notify defendant only if Farrow's intent was NOT to exercise the Option. The standard form Option to Renew/Extend Lease (Form 565) has a provision for written notice: "4. A written notice of Exercise of Option to Renew/Extend Lease needs to be delivered prior to expiration of the option exercised and no sooner than _ months before expiration of the option exercised," which paragraph was stricken by CMS prior to execution. Nevertheless, Farrow did take the affirmative step, on November 9, 2021, prior to expiration of the original lease term, of executing the Option and notifying CMS of its intention to exercise the option and extend the lease term. Farrow then attempted to pay full rent for November 2021, but Defendant returned the rent and this litigation ensued. Payments in the amount of the agreed rent were later timely resumed under the terms of the Preliminary Injunction ordering payments to continue pending the action.

Here, *ADV Cmp. v. Wilanan* (1986) 178 Cal.App.3d 61 is instructive. In that case, tenant ADV Corp. leased premises in Santa Ana from Wilanan to operate a used car business. The written lease agreement provided for a term of five years and included an option to renew for an additional five years. (*Id.* at 63.) Similar to the instant case, the ADV lease did not require the tenant to take any affirmative act to notify the landlord of its intent to exercise the option: "The [trial] court's minute order provides: 'There was no prescribed manner by which [ADV] was required to exercise its option to extend the lease.'" (*Id.* fn. 3).

Wikman initiated eviction proceedings and ADV filed a complaint seeking "a judicial determination that it exercised its option to renew the lease and was entitled to possession for an additional term of five years." (*Id.* at 64). The trial court found in favor of tenant ADV Corp. for three reasons: (1) the prior relationship between the parties, (2) ADV's conduct in expanding the tenant improvements (purchase of a new office trailer and storage shed, resurfacing the parking lot three times during its tenancy, and spending tens of thousands of dollars annually on advertising), and (3) the specific language in the lease. The court of appeal affirmed the judgment in favor of the tenant based on the language of the lease that did not require the tenant to notify the landlord of its intent to exercise the option, combined with the tenant's remaining in possession and tendering rent:

> [If] the lease ... [provides] merely for an extension, [the tenant's] remaining in possession (no specific form of notice having been required) [is] sufficient notification of [the tenant's] decision. [*ADV, supra,* 178 Cal.App. 3d at 66 (citations omitted; brackets and parentheses in original).]

The *ADV* court further explained:

> In other words, "if the lessor gives the lessee the right to an extension of the term, and does not specifically require him to give notice of his election to avail himself of such right, his mere continuance in possession after the original term is to be regarded as showing his election to that effect." [*Id.* (citation omitted).]

Here, Paragraph 6 of the Option does not require Farrow to do anything to exercise its option. In fact, the opposite is true - the language specifically states that the tenant is only to notify the landlord if the tenant does NOT intend to exercise the option. Moreover, consistent with his representation to CMS in December 2018, Mr. Farrow signed the Option on November 9, 2021, prior to expiration of the initial lease term. Also, like ADV, Farrow invested significant sums into the Property in reliance on the extended lease term. Thus, in compliance with all terms of the Lease, Farrow validly exercised the Option resulting in an extension of the Lease for the first option term of four years.

D. The Breaches Alleged Do Not Invalidate the Option to Extend the Lease

Defendant argues breaches based on (1) failure to satisfy each and every one of the 56

conditions of the use permit within a certain time period, and (2) alleged violations at the leased property pertaining to the Environmental Protection Agency, the North Coast Quality Control Board, or other governmental agencies. The Court finds the alleged breaches are not material breaches that would preclude exercise of the Option to extend the lease. Moreover, any such breaches were waived by CMS.

1. Farrow Was Not Required to Satisfy All 56 Conditions of the Use Permit Within a Specific Time Period.

The Addendum does not state that Farrow had to satisfy all of the conditions of the use permit within a specified time period.

The case *ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4111 1257 is instructive. The underlying case was an unlawful detainer action filed by landlord ASP Properties Group, L.P. against its tenant Fard, Inc., who executed a 10-year lease of commercial property in La Mesa, California, with ASP's predecessor-in-interest to use for auto sales, repair, and auto related business. ASP sent Fard a letter in June 2003 demanding that Fard complete eleven specific items of "modifications, maintenance or repairs" within 60 days. (*ASP, supra,* 133 Cal.App.4th at 1264). ASP then served Fard with a three-day notice to perform covenants or quit on or about November 10, demanding that Fard completed the modifications, maintenance, or repairs within three days or quit its possession of the premises. (*Id.*) On November 26, ASP filed an unlawful detainer action, alleging Fard did not cure the three-day notice. (*Id.*) At the unlawful detainer trial, among other findings, the trial court interpreted the lease and its amendment as not requiring the tenant to install new roofs to replace the existing roofs. The landlord appealed, contending (1) the trial court erred in interpreting the lease and amendment not to require tenant to install new roofs and (2) the tenant breached the lease by not replacing the roofs of the premises. (*Id.* at 1268). The court of appeal affirmed the trial court's judgment in favor of the tenant. (*Id.* at 1265, 1274, 1276).

The term of the lease in *ASP Properties* was from April 1, 1997, to March 31, 2007. The lease contained a standard "Repairs and Maintenance" provision, which required the tenant to "maintain at his sole expense and without contribution from Landlord, the [P]remises in good

and safe condition, including, but not limited to[,] plate glass, electrical writing, plumbing and heating installation." (*ASP, supra,* 133 Cal.App.4th at 1262). On July 15, 2000, the parties executed an Amendment, which contained a $500 monthly reduction in rent for the remainder of the lease term, and added the following language to Paragraph 3 of the lease (regarding use of the premises): Tenant agrees to comply with any and all requirements, laws, ordinances, or other mandates of the City of La Mesa and at Tenant's expense to cure any condition, use or perform any necessary modification, maintenance or repairs as may from time to time be required by the City of La Mesa, or Landlord, within sixty (60) days of receipt of written notice that such a defect, violation or other conditions exists which is unacceptable to the City of La Mesa or Landlord. Tenant's failure to make any improvement, correct any condition, or otherwise comply with any written notice shall constitute a breach of this Lase if Tenant permits such conditions, violation or use to continue on or after the sixty-first (61st) day after receipt of such notice. (*Id.* at 1262-1263).

The Amendment also replaced Paragraph 4 of the Lease as follows: Repairs and Maintenance. Tenant shall maintain at his sole expense and without contribution from Landlord, the Premises in good and safe condition, including, but not limited to, the roof, plate glass, electrical wiring, plumbing and heating installation. (a) Tenant shall comply with any and all zoning regulations, laws, ordinances and other requests of the City of Law Mesa concerning the use, repair and maintenance of [Premises] as set forth in the correspondence received from the City of La Mesa and any future correspondence which concern[s] the use and/or maintenance and repair of the [P]remises. In addition to correcting the existing violation as of the date of [the Amendment], Tenant agrees to submit a plan ("Plan") as requested by the City of La Mesa for the remodel of the building to include, but not [be limited to,] the installation of handicap access and other changes as may be required by the City of La Mesa. Such Plan shall be submitted to Landlord for Landlord's consent prior to Tenancy submitting the Plan for approval by the City of La Mesa. After the Plan is approved by the City of La Mesa, Tenant agrees that it shall implement the Plan at Tenant's sole cost and expense, except [that] Landlord agrees that upon approval of the Plan by the City of La Mesa, he shall ... pay Tenant the sum of $1000.00 as

Landlord's contribution [toward] the actual cost of construction required under the approved Plan ... Any additional cost or expense in order to implement the Plan, complete the construction or otherwise comply with the Plan or to cure any existing or future violations as noted by the City of La Mesa or Landlord shall be at the sole cost and expense of the Tenant. (*Id.* at 1263).

In ruling in favor of the tenant, the trial court made several findings, including: From the [A]mendment the court gathers that there were some issues with the City of La Mesa, some code violations that were likely cited and that the [L]andlord was concerned that [T]enant should take care of those issues and that an Amendment was crafted and signed. (*Id.* at 1264).

The court does not find that the language in Paragraph 4 of the Amendment requiring the [T]enant to maintain in a good and safe condition, the roof, among other things, had the same meaning as the [T]enant must replace a roof that had already exceeded its life expectancy at the time [Tenant] took [possession]. (*Id.* at 1264-1265).

> ... The Court does not find that 'maintain' means to replace or to install initially. Thus, the Court finds [Tenant] had no obligation to install a new roof or to install heating and air conditioning ... The Court does not find that the [L]ease and [the Amendment] required [Tenant] to improve or modify anything and everything the Landlord requested. The bargained-for exchange between the parties was that [Tenant] brought the property into compliance with the City of La Mesa's codes and expended $30,000 - $40,000 maintaining the leasehold .... *The language of the Amendment is less than clear and must be construed against the drafter - [Landlord]. The Court will not read into the [A]mendment any more than it states. It does not say that [Tenant] must replace the roof.* When the [A]mendment was drafted, the testimony of the witnesses was that replacing the roof was not discussed. ((*Id.* at 1265) (bold in original; italics added for emphasis).)

The court of appeal began its analysis of the trial court's interpretation of the lease and amendment by summarizing the basic tenants of contract interpretation. These include the principle that, "Interpretation of a contract 'must be fair and reasonable, not leading to absurd conclusions.' [Citations]. 'The court must avoid an interpretation which will make a contract extraordinary, harsh, unjust, or inequitable. [Citation].'" (*Id.* at 1269). Moreover, Section 1643 provides: "A contract must receive such interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intent of the parties." In the event other rules of interpretation do not resolve an apparent ambiguity or

uncertainty, "the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." (§ 1654.) (*Id.*) (Emphasis added.)

The court proceeded to focus on the primary purpose of the Amendment as it pertained to the parties' expectations vis-a-vis correcting various code violations. (*Id.* at 1271). The court found that the tenant's duty of maintenance could *only* be reasonably construed to require the tenant to *maintain* – not replace – the roofs in their conditions as of the time the lease was signed in 1997 and the amendment in 2000 ("i.e., in their then-dilapidated conditions"). (*Id.*) Had the parties intended Tenant to assume the obligation to replace the roofs, one would reasonably expect the Lease and/or Amendment to expressly so state rather than merely stating Tenant was required to maintain the roofs (and other parts of the Premises). (*Id.* at 1272.) (Emphasis added).

The court expounded: Case law supports a conclusion that, absent an express provision (or undisputed extrinsic evidence) showing a tenant has an obligation to replace a roof, a tenant's obligation to maintain or repair the premises (including a roof) does not include an obligation to replace an old, dilapidated roof with a new roof at tenant's expense. In *Iverson v. Spang Industries, Inc.* (1975) 45 Cal.App.3d 303 [119 Cal. Rptr. 399], a lease required the tenant to leave the premises in good order, condition, and repair except for reasonable use and wear. (*Id.* at p. 310.) *Iverson* stated:

> Such covenants are generally reasonably interpreted to avoid placing any unwarranted burden of improvement on the [tenant]. [Citation.] ... ' ... The tenant is certainly not obligated to restore the premises to his landlord in a better condition than they were at the inception of the tenancy. [Citations.]

In *Haupt v. La Brea Heating etc. Co.* (1955) 133 Cal.App.2d Supp. 784 [284 P.3d 985], a lease required the tenant to "'make whatever repairs are necessary to the floor' and 'to repair the floor to a usable state.'" (*Id.* at p. Supp. 788). *Haupt* concluded neither the lease nor statutory provisions (i.e., §§ 1928, 1929) obligated the tenant to restore the premises to a better condition than existed at the inception of the lease. (*Haupt, supra,* at pp. Supp. 788-789.) *Haupt* stated: "If, at the time of the letting, the roof was old and worn, *certainly [the tenant was] not required to repair the same and should not be held liable for the cost of a new roof* nor for damages

occasioned by rainwater finding its way into the premises. [Citation:]" (*Haupt, supra,* 133 Cal.App.2d at p. Supp. 789, italics added.) (*Id.* at 1272.)

The *ASP* court also surveyed cases from other jurisdictions, and quoted applicable language supporting its rationale:

> "... We cannot believe that the parties ever intended at the time of the execution of the lease here that the [tenant] would be burdened with an immediate $60,000.00 obligation for a roof and related structure by himself, let alone the other items, to substantially restore the [landlord's] building ..." ... [Landlord's] position is obviously unfair because it would give [landlord] a better, fully reconstructed building than he leased, the life of which improvements would extend far beyond the [tenant's] remaining term of less than eight years. It would become far superior to its condition at the date of the lease. By the express terms of the agreement, [the tenant's] obligation was only to keep it in its lease date condition. It had taken over 30 years for the building to reach its dilapidated state .... (*Id.*, citing *Scott v. Prasma,* (Wyo. 1976) 555 P.2d 571, 576-579).

The *ASP* court held that the landlord's attempted insinuation of language into the lease must fail:

> We conclude that although there is evidence supporting a finding both Landlord and Tenant knew, when the Lease and Amendment were executed in 1997 and 2000, the roofs needed to be replaced, that knowledge does not support a reasonable inference they intended, absent express language in the Lease or Amendment, Tenant be required to replace the already dilapidated roofs. (*Id.* at 1274).

Because the tenant was not required to replace the roofs, it was not in breach of the lease for not doing so:

> Accordingly, we conclude, as a matter of law, Tenant was not required to replace the roofs of the Premises pursuant to either the Lese or the Amendment. Therefore, we reject Landlord's assertion Tenant breached the Lease and Amendment by not replacing the roofs. (*Id.* at 1274).

In the instant case, CMS is attempting to do what the *ASP* landlord did – insert language into the lease that the lease did not contain; namely here, a requirement that Farrow satisfy all 56 conditions of the use permit within a particular time period. The lease, drafted as it was by the landlord, does not say that. The *ASP* trial court properly stated that it would "not read into the Amendment any more than it states." (*ASP, supra,* 133 Cal.App.4111 at 1265.) The court of

appeal referred to the absence of "express language in the lease" vis-a-vis the tenant's obligations. CMS had ample opportunity to draft the lease language to expressly state that the conditions of the use permit had to be satisfied within a certain period of time. For example, the lease addendum could have stated, "Tenant has 36 months to apply for, obtain, and/or satisfy all pre-operational conditions of the use permit." It did not; rather, the lease merely states, "Tenant will obtain the appropriate Use Permit for its use from the County of Sonoma within 12 months." The lease is utterly silent as to any time period required for the *satisfaction of the conditions* of that use permit.

2. The Alleged Breaches Were Non-Material and Do Not Affect Farrow's Ability to Remain in Possession of the Leased Premises

Commercial leases with options to renew/extend sometimes make it an express condition that the tenant keep all or certain covenants on his part; in such cases, nonperformance or breach of the covenants will defeat the tenant's right to renew the lease. [*Behrman v. Barto* (1880) 54 Cal.131, 132.] The Option at issue here has no such language.

Moreover, some cases have held a tenant was not entitled to exercise an option to renew/extend when it was in default on rent payments even absent an express written clause requiring such payment as a condition. This is because payment of rent is an implied condition. [*Nork v. Pacific Coast Medical Enterprises, Inc.* (1977) 73 Cal.App.3d 410, 416.] Farrow was current on rental payments when the option automatically executed and later when Farrow signed the option to extend on November 9, 2021. The evidence at trial shows Farrow timely tendered rent thereafter, initially returned by Defendant, but eventually accepted under the terms of the Preliminary Injunction. The alleged breaches argued by CMS here (permit use issues and environmental "violations") are not the kinds of breaches implied by law and are not the kinds of breaches that will nullify an option to renew/extend.

When the notice of exercise has been given in a timely manner, the tenant in default can exercise the option effectively if it has a substantial investment in the property and the defaults by the tenant are minor, or the landlord has waived the defaults, or the landlord's conduct renders

strict compliance with the lease or the renewal provisions futile. In some cases, a court may exercise its equitable jurisdiction and permit a lessee to renew a lease even though he or she is in violation of material terms of the lease. In this case the evidence shows Farrow has a substantial investment in the Property and was allowed to continue to operate on the premises under the use permit by the County of Sonoma by letter if Mr. Keefer long after any notice of abatement was issued (2011) or served.

Kaliterna v. Wright (1949) 94 Cal.App.2d 926, 935-936, disapproved on a different ground by *State Farm Mut. Auto. Ins. Co. v. Superior Court, In and For City and County of San Francisco* (1956) 47 Cal.2d 428, is applicable to this case. The court held where a lease renewal option was not made expressly conditional upon the full performance of the terms of the lease, the lessee was entitled to renew the lease despite certain alleged breaches of the lease which had, in the court's view, been waived by the landlord. The court rejected the landlord's argument that, to be entitled to renewal, a tenant must prove full compliance with all terms of the lease. The court pointed out that under any reasonable standard the tenant had fully complied in that she had paid her rent and made improvements to the property, such that forfeiture of the tenant's right to renew would be inequitable. [*Id.* at 935-936.]

The facts in *Kaliterna* are particularly on point here. Defendant/Lessor contended multiple breaches, *but only after the dispute arose* and defendant denied plaintiff's right to renew. "This was apparently the first intimation to plaintiff that the lessors thought the lease had been breached in any way." [*Id.* at 931.] During the litigation, defendants alleged failure to pay rent during an earlier term of the lease, failure to continually occupy the premises, failure to pay taxes on improvements, failure to keep the premises covered by fire insurance, unauthorized residential use of the premises, and structural changes without lessor approval. The court found:

> In the present case there was no breach by plaintiff which would justify a court in holding that plaintiff had lost the right to renew. Under any reasonable standard, plaintiff here had fully Performed, entitling her to renew by exercising the option. The evidence here shows

> that the lessor agreed to accept, and did accept, the reduced rental over the largest portion of the leased term; also, that the only proved breaches of the lease were waived. Moreover, the lease contained a grant of an option to renew, which was not made conditional upon the full Performance of the terms of the lease. [*Id.* At 936.]

Thus, as in the case at bar, the right to refuse to renew or extend the lease was waived by defendant who had acquiesced in the tenants' breaches of the terms and conditions of the lease.

Also instructive is *Title Ins. & Guaranty Co. v. Hart* (9th Cir. 194 7) 160 F .2d 961, cited by and relied upon by the *Kaltterna* court, which involved a mining operation conducted by tenant on the premises. In *Hart, supra,* the lease was actually conditioned on faithful compliance with the covenants of the lease; but nevertheless, the court held the lessee *not* precluded from exercising the option since "[i]t is not reasonable in human experience to expect that there could have been full, exact, strict, complete and perfect compliance with all of the covenants." [*Id.* at 970.] The breaches alleged in attempt to justify defendant's refusal to renew the lease were: failure to pay royalties, violations of California law (21 violations of Mine Safety and Mechanical Power Transmission orders of the California Industrial Accident Commission) and failure to keep complete records. [*Id.* at 968-970.] Particularly applicable here is the court's discussion of the legal violations of safety orders. The court noted:

> The record shows that the Commission allows a reasonable time for correction of any infraction of its numerous regulations, and it further shows that all matters testified to as violations were settled, and the case closed as far as the Accident Commission was concerned. All of these alleged violations appear to be relatively minor infractions and while it was necessary for the Commission to call the attention of lessees to certain violations more than once, it nevertheless is undisputed that appellee was not proceeded against, the mine was not closed and lessors were not injured by any of the violations of these safety orders. [*Id.* at 969.]

The court reached a similar conclusion in *Kern Sunset Oil Co. v. Good Roads Oil, Co* (1931) 214 Cal. 435 where the lease provided for the drilling and placing upon production of two wells each year until sixteen wells had been drilled and brought into production, during a period of over thirteen years the lessees had only completed thirteen wells. The court held that landlord's acceptance of rent for almost five years with knowledge of all the facts, without any complaints, constituted a waiver of the breach. [*Id.* at 440.]

Here, as in *Kalterna v. Wright, supra, Title Ins. & Guaranty Co. v. Hart, supra,* and *Kern v. Good Roads,* the evidence shows that the breaches claimed are not material terms that would nullify the option to extend the lease. As to the alleged 56 conditions of the use permit, the evidence supports due diligence throughout as well as waiver and acquiescence by CMS. As to the alleged governmental "violations," the issues have been dealt with and cured and have had no adverse effect on CMS. (See argument below in D.2.)

As in *Hart, supra,* and in the case at bar, exact, strict, and perfect compliance with the use permit issues is not practicable and was apparently not a concern of CMS during the tenancy of Carl's Ready Mix or for most of the tenancy of Farrow leading up to this dispute; this supports waiver and acquiescence by CMS. Also, as in *Kalterna, supra,* complaints of breach were only raised after the parties became adversarial. This timing suggests waiver and acquiescence by CMS of the breaches now alleged. As in *Kalterna, supra,* the Option here was not made expressly conditional upon the full performance of the terms of the lease, and we have the ambiguous and seemingly unlimited word "legalize" that defendants rely on in their argument. Thus, equity precludes removal of Farrow from the premises as Farrow has invested substantial sums in the Property in reliance on their option to renew for a total of eight years.

E. Defendant Has Not Proven Breaches

1. Failure to Fully Address all 56 Conditions Noted in the Use Permit Was Not a Breach of the Lease.

CMS claims Farrow is in breach of the Lease because it failed to satisfy all 56 conditions of the use permit within one year of the lease inception date, (November 19, 2018) or alternatively, within three years of its inception when the initial lease term expired (November 18, 2021). The evidence shows that Farrow is currently, and has been at all times during the tenancy, operating under a valid use permit as evidenced by a letter from the County of Sonoma dated December 27, 2018, that clarifies operation at the site is allowed pending satisfaction of the conditions of the existing use permit. Farrow has exercised reasonable and diligent efforts to satisfy the conditions of the use permit under the

circumstances and has expended substantial sums of money attempting to satisfy the final conditions of the use permit. The express language of the Lease clearly does not include any temporal deadlines as CMS claims.

Another addendum to the Lease at issue here is the "Addendum" Form 550-1 which includes the following terms drafted by CMS: "Agreement: 2. The following terms and conditions are made part of the above referenced lease or rental agreement: ... Other: Tenant will obtain the appropriate Use Permit for its use from the County of Sonoma within 12 months. Within thirty days, Tenant will provide a letter or otherwritten evidence that the County of Sonoma Permit and Resource Department (PRMD) will allow Tenant to legalize the existing use, and that the County will not prohibit the issuance of other pemits (for example, to other tenants or to Landlord) while Tenant is in the process of legalizing Tenant's use." Tenant agrees that other permits may be issued for other uses on the property, independent of Tenant's use, and will cooperate with landlord if necessary to obtain such permits.

In 2008, Carl's Ready Mix obtained a conditional use permit from the County of Sonoma to operate a concrete batch plant at the property. On or about April 22, 2008, the County issued a lengthy document entitled "Final Conditions of Approval" for UPE07-0112. On or about June 29, 2010, the County issued a similar document entitled "Final Conditions of Approval" for UPE07-0112. The "Final Conditions of Approval" advised Carl's Ready Mix of the non-operational and the operational conditions that it had to meet.

When Farrow purchased the assets of Carl's Ready Mix and commenced its tenancy at the property, despite Carl's Ready Mix's efforts, it had not met all of the Final Conditions of Approval. From the time CMS purchased the property in 2015 until Carl Davis moved out in late 2018, CMS never told Carl Davis that he had to satisfy all 56 conditions of the use permit or he would be evicted; never served Carl Davis with any warning notices regarding the final conditions of approval; never served him with any three-day notices to perform or quit regarding the final conditions of approval; and never served him with any three-day notices to perform or quit. After John Farrow executed the

lease with CMS on December 7, 2018, Mr. Farrow obtained the requisite letter from Sonoma County PRMD called for by the lease. On December 27, 2018, Brian Keefer, a Project Planner at the County of Sonoma Permit and Resource Management Department, sent a letter to Mr. Farrow which stated: *Hello Mr. Farrow, You may continue to operate the concrete mixing plant at 3660 Copperhill Lane pursuant to the Conditions of Approval of UPE07-0112. If you have any questions, please feel free to contact me at 707-565-1908, or via email at brian.keefer@sonoma-county.org.* Farrow provided a copy of this letter to CMS pursuant to the language in the Addendum. Stacey Ciddio signed the lease in Februaly 2019 without questions or comment regarding Mr. Keefer's letter.

Testimony showed that from the beginning of its tenancy at the property, Farrow undertook efforts to satisfy the conditions of the use permit. Farrow's expert, the former PRMD Code Enforcement Manager from 2002-2011 and PRMD Building and Safety Division Manager from 2011-2015, testified at trial that the use permit is a valid use permit for Farrow's operations at the property and that the use permit has vested. During Farrow's tenancy, in December 2019, CMS received a letter from the County stating that violations of the use permit existed at the property. CMS forwarded a copy of this letter to Farrow, and Farrow continued its efforts to communicate with the County and to satisfy the conditions of the use permit. However, there were months during 2020 when the PRMD office was closed, and Farrow experienced delays beyond their control. At one point in August 2020, CMS hired an attorney to issue a three-day notice to perform covenants or quit. On August 6, 2020, CMS caused to be served on Farrow a "3-Day Notice toPerfo1m Covenant or Quit" which stated that "Per the ADDENDUM of your lease at #2 'Tenant will obtain the appropriate Use Permit from the County of Sonoma'"; "You have failed to obtain that Use Permit", and "Within three (3) working days from the service of this notice you must obtain that necessary use permit from the County of Sonoma, or you must quit and deliver up possession of the premises." In response, Farrow's attorneys sent a copy of the Brian Keefer December 2018 letter to CMS, who took no further action at that time to try to evict Farrow.

CMS' First Amended Cross-Complaint alleges in the First Cause of Action for Breach of Contract at Paragraph 20: "FARROW breached the lease during its occupation by not obtaining a Use Permit for operation of its business within twelve (12) months of its lease. While FARROW obtained consent from the County to operate under the CUP provided to Carl's, it never applied for a Use Permit in its own name. In addition, FARROW is in breach of the lease and operating in violation of governmental ordinance in not obtaining its own use permit as agreed, and in failing to meet all the conditions of the CUP provided to Carl's. It is still in breach of even the conditions imposed by that use permit."

These claims ignore the fact that the Lease does not set any time limit for satisfaction of the conditions of the use permit and that CMS never claimed with Carl Davis, or with Farrow (until after relations became adversarial), that failure to resolve all 56 conditions constitutes a breach of the Lease.

2. Alleged Environmental Violations Are Not a Breach of the Lease

CMS further alleges "violations" at the leased property pertaining to the Environmental Protection Agency, the North Coast Water Quality Control Board, the Bay Area Air Quality Management District, or other governmental agencies.

The evidence shows that the issues were cured to the extent Farrow was responsible.

Testimony and evidence showed Farrow worked with the NCWQCB for over a year to obtain a WDID ("Waste Discharge Identification) number, including hiring a consultant, George Goobanoff, to submit all necessary information to NCWQCB in order to be assigned a WDID. In the process, the NCWQCB issued several letters to Farrow, including one dated February18, 2021, which stated that NCWQCB was fining Farrow due to the delay in obtaining the WDID number. Farrow paid a penalty of $7,049.85 on February 12, 2021, and the matter was resolved. Farrow has obtained its WDID (1491029104), has uploaded its Storm Water Pollution Prevention Plan ("SWPPP") and site map as requested by the NCWQCB to its database, and resolved the issues noted in an April 2021 site visit. There are no issues with Farrow's business operations at the Property currently pending involving the

NCQWCB.

Farrow is currently working under a valid Annual Permit obtained from the Bay Area Air Quality Management District. There was a lapse at one point during the pandemic, but Farrow was not fined, and no adverse action was taken against Farrow. The permit was renewed.

With respect to the Environmental Protection Agency ("EPA"), an inspection of the property occurred on November 17, 2020, and testimony regarding this incident demonstrates that it has been resolved. There are no issues with Farrow's business operations at the Property currently pending involving the EPA.

E. Claims for Fraud/Concealment and Unfair Business Practices

There is no substantial testimony that CMS purposefully withheld information with the intent to conceal it from Farrow. Therefore, the Court finds in favor of Defendants on Farrow's third cause of action for Fraud/Concealment, and its fourth cause of action for unfair business practices pursuant to California Business and Professions Code section 17200 et seq.

DECISION

Based on the foregoing, Verdict shall be entered in favor of Plaintiff Farrow on plaintiff's first and second causes of action for breach of contract and declaratory relief. Verdict shall be entered in favor of Defendant CMS on plaintiff's third and fourth causes of action. The Court further finds that any monetary damages caused by the breach of contract are nominal as much of the expenditures incurred by Farrow, according to the evidence presented, would most likely have been incurred without a breach in pursuit of satisfying terms and conditions of the use permit. Farrow will not be awarded monetary damages on it's successful claims. However, the Court finds the exercise of the Option was valid.

Based on the foregoing, Verdict shall be entered against CMS and in favor of Farrow on all of CMS's causes of action alleged in their First Amended Cross-Complaint. CMS will not be awarded damages on its claims. Plaintiff shall prepare a Judgment for filing and entry according to the findings and decision contained in this Statement of Decision.

///

The Court reserves jurisdiction on attorney fees and costs.

IT IS SO ORDERED.

Dated: June 15, 2023

BRADFORD DEMEO
Superior Court Judge

SCV-269684

PROOF OF SERVICE BY MAIL

I certify that I am an employee of the Superior Court of California, County of Sonoma, and that my business address is 600 Administration Dr., Room 107-J, Santa Rosa, California, 95403; that I am not a party to this case; that I am over the age of 18; that I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service; and that on the date shown below I placed a true copy of *STATEMENT OF DECISION AFTER COURT TRIAL* in an envelope, sealed and addressed as shown below, for collection and mailing at Santa Rosa, California, first class, postage fully prepaid, following ordinary business practices.

Date: June 16, 2023

Robert Oliver
Clerk of the Court

By: Sarah Helstrom
Sarah Helstrom, Deputy Clerk

-ADDRESSEES-

RACHEL MARY DOLLAR
SMITH DOLLAR PC
418 B ST 4TH FLR
SANTA ROSA CA 95401

MICHELLE V ZYROMSKI
ZYROMSKI KONICEK LLP
613 FOURTH STREET SUITE 203
SANTA ROSA CA 95404

DANIEL EVANS POST
MICHAEL SHKLOVSKY
CHRISTOPHER MITCHELL MAZZIA
ANDERSON ZEIGLER APC
50 OLD COURTHOUSE SQ 5TH FL
SANTA ROSA CA 95404