

CAUSE NO. 18-03-03200

SADDLES BLAZIN, LLC

Plaintiff,

vs.

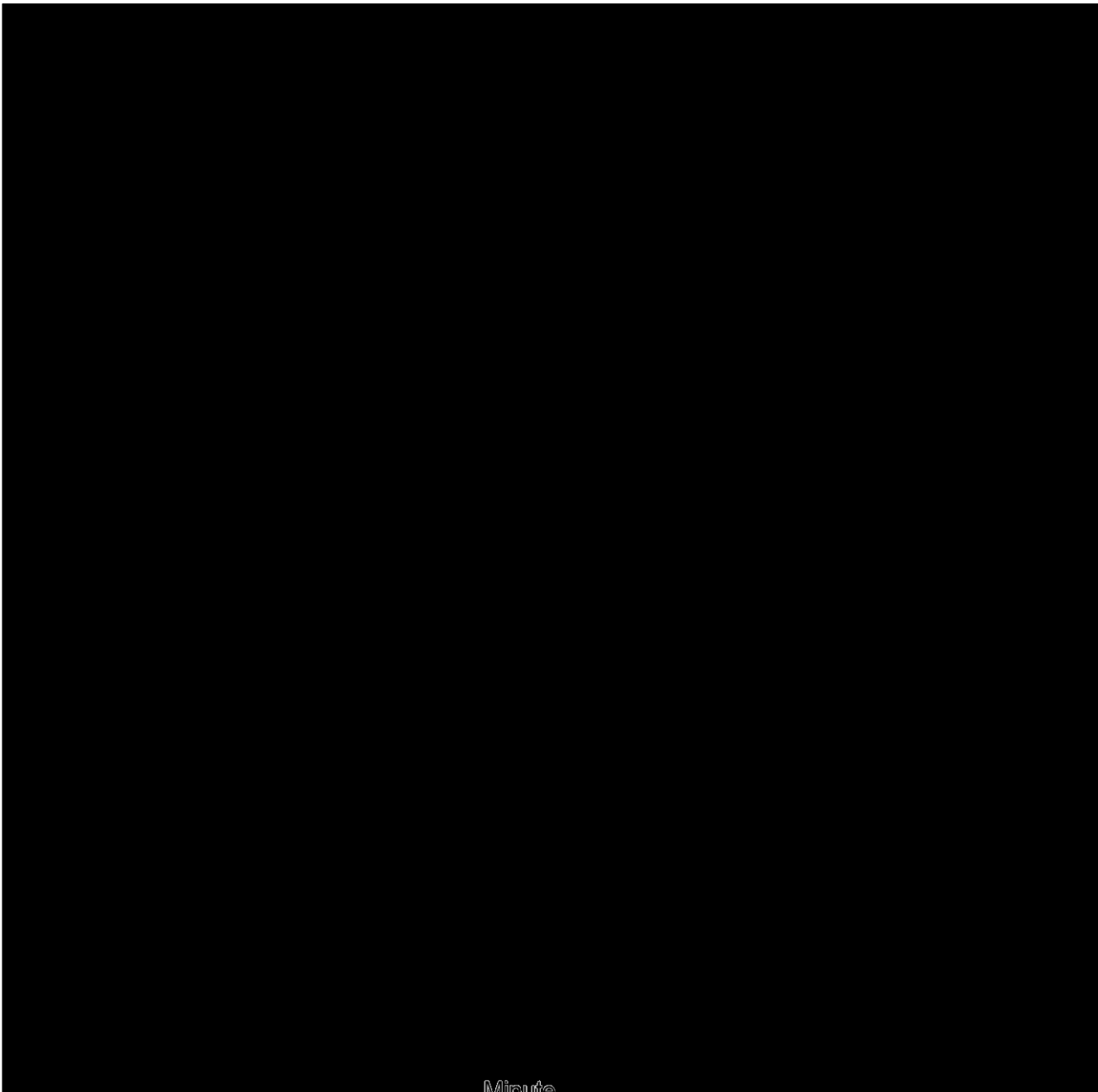
KRG PORTOFINO, LLC

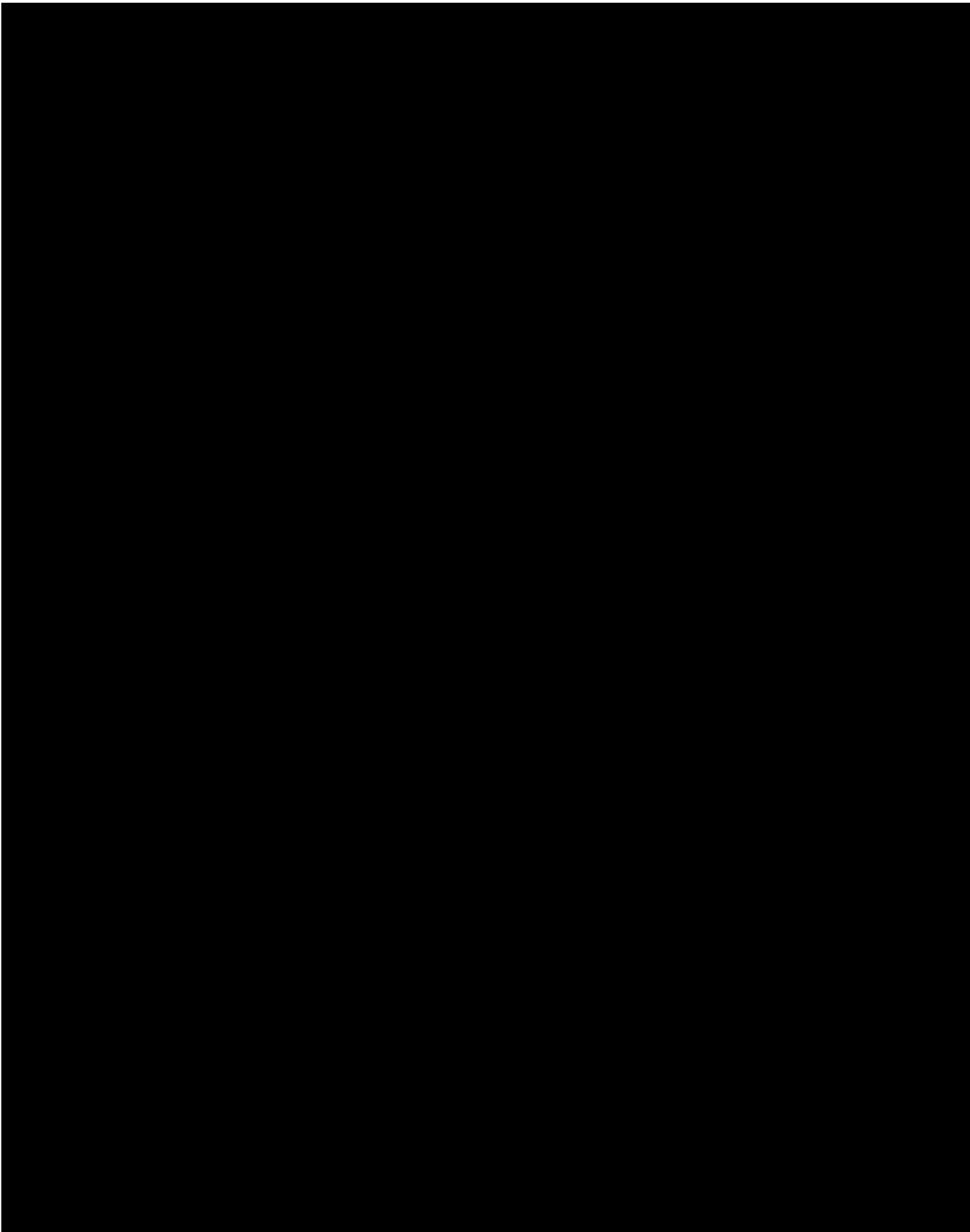
Defendant.

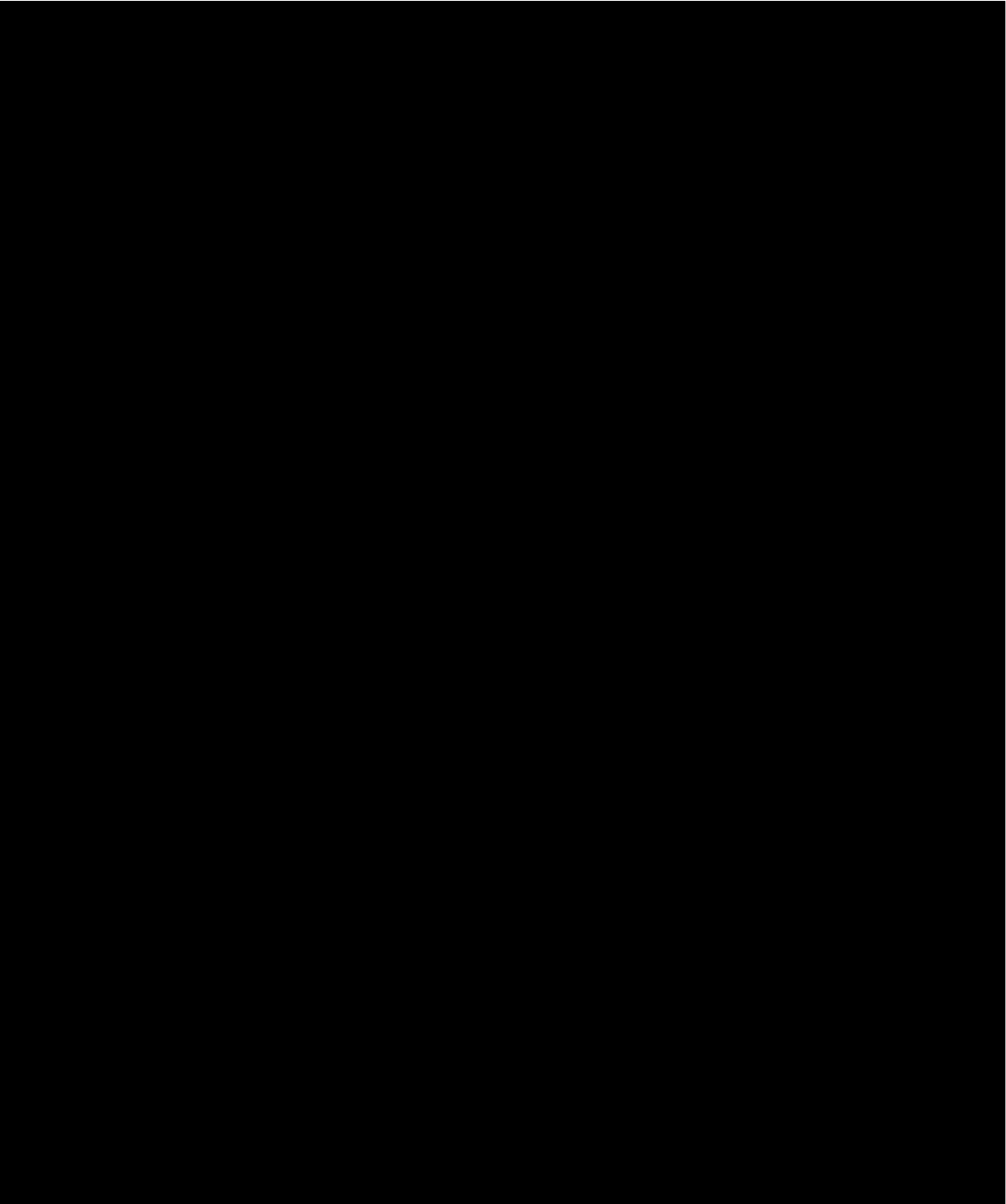
IN THE DISTRICT COURT

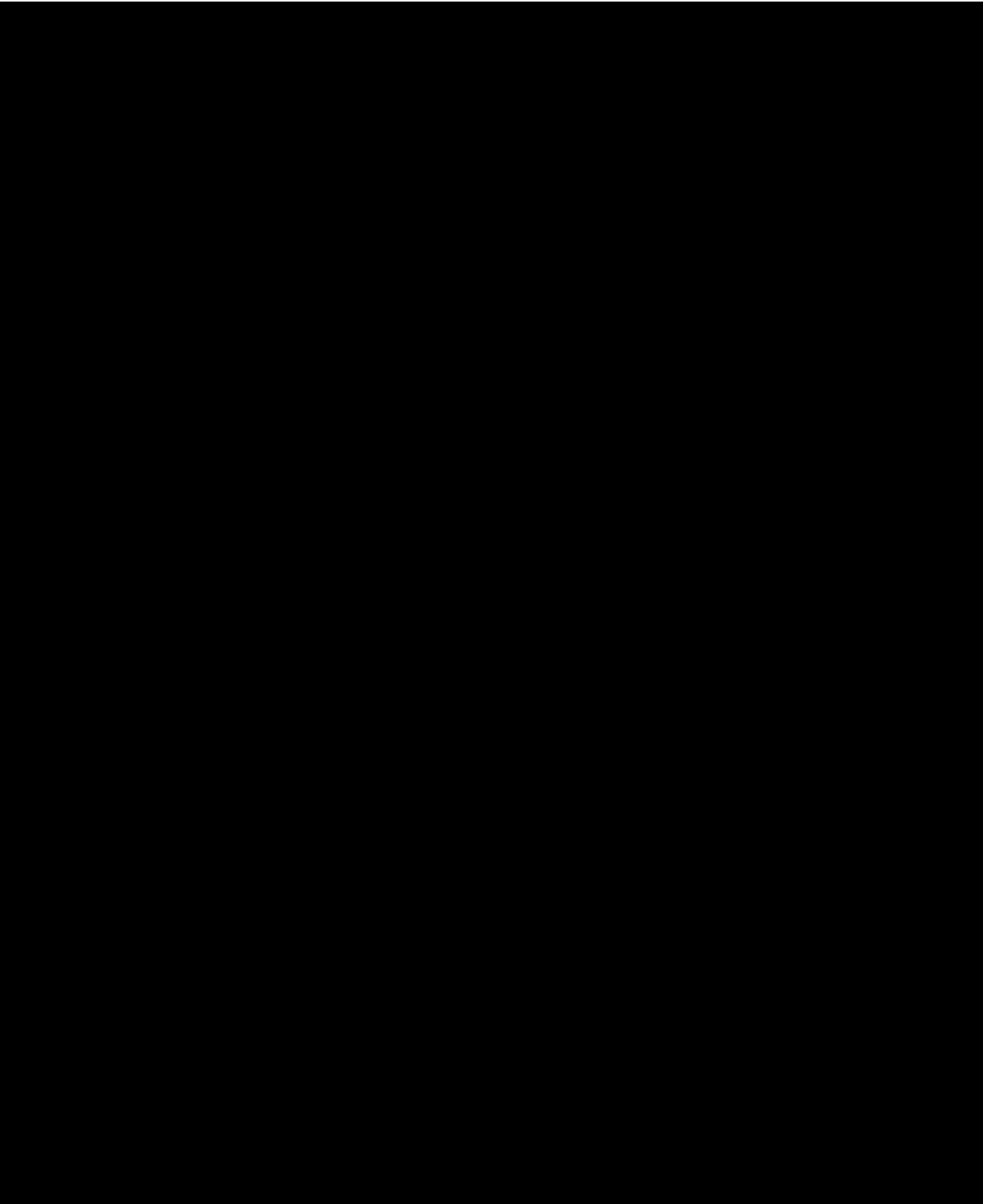
457TH JUDICIAL DISTRICT

MONTGOMERY COUNTY, TEXAS









CAUSE NO. 18-03-03200

SADDLES BLAZIN, LLC

Plaintiff,

vs.

KRG PORTOFINO, LLC

Defendant.

IN THE DISTRICT COURT

457TH JUDICIAL DISTRICT

MONTGOMERY COUNTY, TEXAS

**AMENDED AND ADDITIONAL FINDINGS OF
FACT AND CONCLUSIONS OF LAW**

BE IT REMEMBERED that this cause came before the Honorable Vince Santini (hereinafter “Judge”) for trial on the merits pursuant to the agreement of the parties and in accordance with Chapter 151, Texas Civil Practice and Remedies Code. Plaintiff, SADDLES BLAZIN, LLC (“Saddles”), appeared through its counsel of record and announced it was ready for trial. Defendant, KRG PORTOFINO, LLC (the “Landlord”), also appeared through its counsel of record and announced it was ready for trial. The Judge determined that he had jurisdiction over the parties and subject matter. The parties submitted all matters in controversy in this cause, legal and factual, to the Judge and after conducting a full trial and hearing the evidence and arguments of counsel, the Judge rendered a verdict, award, and judgment for Plaintiff, SADDLES BLAZIN, LLC.

As requested, the Court states and files the following findings of fact and conclusions of law.

Any finding of fact this is a conclusion of law is deemed a conclusion of law and any conclusion of law that is a finding of fact is deemed a finding of fact.

The Court incorporates by reference its ten page oral pronouncement of findings transcribed on the record beginning with “I want to congratulate both sides” and ending with “all other relief is denied.”

The Oral pronouncement includes a finding of actual knowledge by Landlord, findings of fraud by nondisclosure by Landlord, findings of breach of contract against Landlord for, among other things, failing to deliver the premises and what delivery means, and the necessity for the City to obtain negative asbestos findings prior to issuing its certificates.

Findings of Fact

A. Asbestos contamination in the Portofino Shopping Center.

1. Landlord owns and operates the Portofino Shopping Center in Shenandoah, Texas.
2. Asbestos testing on June 10, 2016, confirmed the presence of asbestos in the mirror mastic for units within the Portofino Shopping Center. Subsequent testing revealed asbestos in numerous other units within the Portofino Shopping Center.
3. On June 11, 2016, Landlord’s employees and agents, including Veronica Soria and Adam Reedy (“Reedy”), received a copy of the asbestos report and had actual knowledge of the presence of asbestos in the Portofino Shopping Center.
4. On or before June 13, 2016, additional Landlord employees and agents, including Robert Brandon, had actual knowledge of the presence of asbestos in the

mirror mastic for units within the Portofino Shopping Center.

5. The presence of asbestos was discussed and negotiated during the letter of intent phases and contract negotiations, and it was important to Saddles and material.

6. The presence of asbestos within the Portofino Shopping Center as a whole, not just each individual unit, was discussed and negotiated during the letter of intent phase and contract negotiations, and it was important to Saddles and material. The parties discussed the whole shopping center and the lease referenced other sites in the shopping center. Any discovery of asbestos in the Portofino Shopping Center was material to the transaction.

7. Landlord's actual awareness and knowledge of asbestos in one pad site goes to another pad site because it is in the shopping center, which is the relevant inquiry.

8. Even though the Portofino Shopping Center contained toxic asbestos and Landlord knew or should have known the Portofino Shopping Center contained asbestos, Landlord's employees and agents, Kilroy and Reedy, made voluntary, material, and false representations about asbestos in the Portofino Shopping Center to Saddles. Landlord's false representations included (i) asbestos being discovered in the Portofino Shopping Center was only a possibility when, in truth, asbestos had already been discovered, (ii) the Portofino Shopping Center was asbestos-free when, in truth, the shopping center contained asbestos, and (iii) Landlord had only discovered asbestos in other shopping centers when, in truth, Landlord had already

discovered asbestos in the Portofino Shopping Center.

9. Even if true at the time the representation was made, the Landlord had actual knowledge and awareness of asbestos in the shopping center on June 13, 2016 and the Landlord had discovered new information that made an earlier representation misleading or untrue.

10. Saddles could not have discovered the falsity of the representations by Kilroy or Reedy by exercising ordinary care or through a reasonable investigation.

11. Landlord never corrected false representations made by Kilroy and Reedy.

12. Following months of discussions about asbestos, Landlord had actual awareness and knowledge of asbestos in the Portofino Shopping Center before execution of the lease.

13. The presence of asbestos in the Portofino Shopping Center was a material term that needed to be disclosed and was not.

14. Landlord remained deliberately silent.

15. Landlord's representations were material, false, and relied upon by Saddles.

16. Prior to executing the Lease, Landlord and Saddles discussed asbestos negotiating multiple drafts of letters of intent, including asbestos and hazardous materials. Twelve days prior to executing the lease Landlord had actual knowledge of asbestos on Landlord premises and failed to disclose its knowledge of asbestos to Saddles.

17. On June 29, 2016, Saddles and Landlord fully executed an agreement titled Lease (the "Lease") for the unit at issue (the "Premises"). Saddles never would have

leased the unit, executed the Lease, or agreed to Landlord performing work had Landlord disclosed the truth or corrected its prior representations.

18. Landlord did not disclose the truth or correct its prior representations in order to induce Saddles into the Lease and did induce Saddles into the Lease.

B. Asbestos is confirmed in the leased Premises.

19. On September 28, 2016, asbestos was discovered in the mirror mastic of the Premises. The mirror mastic discovered in the Premises is described by Landlord's employees as "exactly the same" as asbestos discovered throughout the Portofino Shopping Center.

20. On October 13, 2016, representatives for Saddles and Landlord met at the Premises to discuss the asbestos in the Premises.

21. Landlord agreed to remediate all asbestos in the Premises and to provide an "all clear" report before delivering the Premises ("Landlord's Work").

22. The remediation and report requirements of Landlord's Work were critical for business and legal reasons. Without the remediation and an all clear report, Saddles could not obtain a permit from the City of Shenandoah, could not finish out construction, and could not open for business.

C. Landlord did not complete Landlord's Work.

23. Landlord partially performed, but did not complete, Landlord's Work. Landlord's Work was incomplete because Landlord failed to complete the asbestos remediation and failed to provide an all clear report.

24. Paragraph 4.1(a) of the Lease states that:

(a) The “Delivery Date” shall be the date upon which Landlord shall deliver possession of the Premises to Tenant. On the Delivery Date, Tenant shall have full occupancy of the Premises, subject to all of the terms and conditions of this Lease. Landlord shall give Tenant notice of the Delivery Date on or about the Delivery Date (the “Delivery Notice”).

25. Paragraph 17 of the Construction Rules & Regulations Rider states, in relevant part, that:

In Premises where Landlord has performed work, the Premises will be turned over broom swept. In Premises turned over "As-Is" the Premises will be turned over in the existing condition, e.g., as the prior tenant may have left the Premises.

26. Landlord did not turn over the Premises in the existing condition as the prior tenant may have left the Premises.

27. Landlord performed work in the Premises.

28. The Landlord could not deliver possession or full occupancy of the Premises to Saddles without completing Landlord’s Work.

29. The Lease (and common sense) required the Landlord to complete all of the Landlord’s Work before delivery of the Premises to Saddles. This requirement is reasonable and logical because (1) Saddles could not apply for its permit until after the Landlord completed Landlord’s Work, (2) Saddles could not commence its finish out until Landlord completed Landlord’s Work, (3) Saddles could not obtain insurance until Landlord completed Landlord’s Work, (4) Saddles could not open for business unless Landlord completed Landlord’s Work, and (5) the Landlord could not deliver “possession” or “full occupancy” until Landlord completed Landlord’s Work.

30. On November 14 and 15, 2016, Landlord attempted asbestos remediation

within the Premises. However, Landlord failed to demonstrate that it completed remediation of the asbestos. Photographs of the bathroom and witness testimony are most consistent with the asbestos remediation being incomplete. Therefore, the Court finds that Landlord failed to complete the asbestos remediation and, thus, failed to complete Landlord's Work.

31. Landlord also failed to provide an all clear report to Saddles. The EFI Global Report produced by the Landlord, which is not an all clear report, is dated February 13, 2017. Landlord did not provide the report to Saddles and the report was not timely. Thus, Landlord failed to complete Landlord's Work because it failed to provide an all clear report to Saddles.

D. Unbeknownst to Saddles at the time, Landlord had uncovered additional instances of asbestos throughout the shopping center, yet Landlord actively withheld and concealed this information.

32. In addition to the discovery of asbestos at Amazing Lash and Casual Male, Landlord discovered asbestos at Old Navy, Tropical Smoothie, Pie Town, Carters, OshKosh and the Learning Academy.

33. In a letter dated October 3, 2016, Landlord's employee, Reedy, with Kilroy copied, conveyed to Saddles that asbestos had been found in "other centers" making no mention of the asbestos finds listed above, falsely implying asbestos had never been discovered in the Portofino Shopping Center, and Saddles did, falsely, believe the asbestos found at the Premises was an outlier, which Reedy knew was false and misleading.

34. Reedy testified that he had not encountered asbestos in other shopping

centers and did not know why he wrote his October 3, 2016 email the way he did. Reedy's representations were false, misleading, and deliberate.

E. Landlord intentionally "siloed" information regarding asbestos discoveries.

35. Although many Landlord employees knew about asbestos issues at the Portofino Shopping Center, no one person knew about all instances and each employee knew about different asbestos issues.

36. Landlord used intentional siloing of information relating to asbestos to conceal the truth and to deceive current and prospective tenants into believing the shopping center was not contaminated with asbestos.

37. Landlord continually referred to the asbestos issue as a minor financial issue, focusing solely on the cost of asbestos reporting and remediation services, and completely ignored the impact numerous asbestos findings throughout the Portofino Shopping Center would have if disclosed to current and prospective tenants as well as vendors and customers of the shopping center.

38. Landlord's actions regarding the findings of asbestos and failure to disclose were intentional, reckless and lacked any regard for the health and safety of others.

39. Landlord's improper remediation, both at the Premises and at the Old Navy location, further put tenants, customers, and vendors at risk for health, safety, and well-being.

F. Landlord wrongfully defaulted Saddles, wrongfully accelerated Saddles rent, and repudiated the Lease.

40. On November 17, 2016, Landlord, by and through its counsel, wrongly

defaulted Saddles, wrongfully accelerated Saddles' rent, wrongfully demanded Saddles take possession of an unremediated space, wrongfully demand Saddles take possession of a the Premises before Landlord completed Landlord's Work, and repudiated the Lease.

41. In response, on or about November 17, 2016, Saddles said they were not going accept delivery at that time because Landlord's Work had not been completed.

42. Saddles did not say they were no longer moving forward and did not say they were pulling out of the lease. Those statements are attributable to Kilroy, not Saddles, and are incorrect. The testimony of Kilroy and Reedy regarding their November conversations with Saddles' are not credible.

43. Landlord's November 17, 2016 letter was an unequivocal repudiation of Landlord's duty to complete Landlord's Work and to properly deliver the Premises.

44. On February 13, 2017, nearly three months after Landlord threatened delivery and defaulted Saddles, Rick Anderson of EFI Global completed his Report of Asbestos Abatement for the Premises. Landlord did not even possess a report, much less an all clear report, until February 13, 2017, months after it wrongfully defaulted Saddles and accelerated Saddles rent.

45. The February 13, 2017 EFI report failed to establish that remediation of the Premises was complete.

46. Landlord breached the Lease because it, among other things, failed to fulfill its obligations prior to delivery.

47. Saddles did not breach the Lease.

G. Landlord never delivered the Premises to Saddles.

48. Some of Landlord's representatives planned to deliver the Premises to Saddles on or around November 17, 2016. But, at that time, Landlord had not completed Landlord's Work and could not deliver the Premises to Saddles.

49. For delivery to occur, Landlord was required to send a delivery notice and required to provide the keys to Saddles. However, Landlord did not send a delivery notice to Saddles and did not provide the keys to Saddles.

50. Thus, Landlord never actually delivered the Premises to Saddles.

51. Because the Landlord could not and did not deliver the Premises, Saddles could not and did not have an obligation to pay rent, rent could not and did not commence and Saddles could not and did not take possession of the Premises.

52. Landlord's employee, Robert Brandon, admitted his team had egg on its face because they failed to complete Landlord's Work and failed to deliver the Premises to Saddles. Other explanations offered by the Landlord are not credible.

H. The Lease was not an "As-Is" lease.

53. The section of the Lease that references "As-Is" is Article IV - Construction, Section 4.2 - Possession, which section follows and necessitates a delivery to have first occurred.

54. The Lease contained a Construction Rules & Regulations Rider that provided, in paragraph 17, for two different situations: 1) delivery "As-Is" and 2) delivery after completion of Landlord's Work. Thus, Premises turned over in the existing condition are "As-Is" and Premises where the Landlord performed work are

not delivered “As-Is.”

55. Landlord did not turn the Premises over to Saddles in its existing condition.

56. Landlord performed work, including partially performing Landlord’s Work, at the Premises.

57. The “As-Is” clause in Section 4.2 is not applicable because the landlord performed work in the Premises.

58. The Landlord could not deliver the Premises to Saddles “As-Is” after it partially performed work in the Premises, especially because the Landlord performed work in the Premises before delivery.

I. Landlord wrongfully withheld Saddles' security deposit.

59. Saddles paid a security deposit in the amount of \$11,392.02.

60. By letter dated November 28, 2016, Saddles formally demanded return of its security deposit by email and federal express overnight and surrendered any right of possession. The Lease and Saddles’ demand letter provided notice to the Landlord of Saddles’ forwarding address.

61. Landlord did not attempt to account to Saddles for the security deposit and did not provide a written description and itemized list of damages and offsets until after this lawsuit was filed (March 8, 2018), which is more than 60 days from the date of the Saddles’ November 28, 2016 demand.

62. Landlord is presumed to have acted in bad faith because of its failure to return the security deposit or to provide a written description and itemized list of deductions. Additionally, Landlord failed to determine whether delivery actually

occurred, failed to determine whether rent commenced, failed to determine whether any rent was due or owing, improperly accelerated rent before delivery, claimed delivery occurred despite acknowledging it had egg on its face for failing to deliver the Premises, made false representations regarding asbestos in the Portofino Shopping Center, and failed to meet Landlord's burden of proving that the retention of any portion of the security deposit was reasonable.

63. Landlord retained Saddles' security deposit in bad faith.

J. Saddles suffered direct damages resulting from Landlord's breach of contract, fraud, and wrongful withholding of the security deposit.

64. Saddles paid non-refundable franchise fees in the amount of \$12,500.00 for the Premises.

65. Saddles paid architecture fees in the amount of \$22,936.96 for the Premises.

66. Saddles paid asbestos survey fees in the amount of \$1,000.00 for the Premises.

67. Saddles paid a security deposit in the amount of \$11,392.02 for the Premises.

68. The amount of reasonable and necessary attorney's fees expended or incurred by Saddles exceeds \$160,000.00.

69. Saddles requested that the Court award attorney's fees of \$160,000.00, which is less than the total amount of reasonable and necessary attorney's fees expended or incurred.

70. Saddles expended or incurred at least \$160,000.00 in reasonable and necessary attorney's fees, produced evidence to support an award in that amount, and established that amount was reasonable and necessary.

71. Saddles' attorneys' fees are usual and customary attorney's fees for Montgomery County, Texas.

72. The Landlord is not the prevailing party.

73. Saddles is the prevailing party.

Conclusions of Law

A) Breach of Contract

74. The Landlord and Saddles entered into a valid, enforceable contract.

75. Saddles, the tenant, is a proper party to bring suit for breach of contract.

76. Saddles performed, tendered performance of, or was excused from performing its contractual obligations.

77. The Landlord repudiated the contract.

78. Saddles did not repudiate the contract.

79. Saddles accepted Landlord's repudiation.

80. The Landlord breached the contract.

81. The Landlord did not perform its contractual obligations.

82. The Landlord's breach of the contract was material.

83. Saddles did not breach the contract.

84. The Landlord's breach of contract caused Saddles' injury and damages.

85. Under Texas law, "[r]epudiation of a contract is a breach of contract. *Mar-Len of Louisiana, Inc. v. Gorman-Rupp Co.*, 795 S.W.2d 880, 887 (Tex. App.—Beaumont 1990, writ denied). The "defendant breaches a contract by repudiating an obligation under the contract, without just excuse, after the defendant has partially performed

its contractual obligations.” *Van Polen v. Wisch*, 23 S.W.3d 510, 516 (Tex.App.—Houston [1st Dist.] 2000, pet. denied); see *Miller v. Vineyard*, 765 S.W.2d 865, 869 (Tex.App.—Austin 1989, writ denied); *Laredo Hides Co. v. H&H Meat Prods. Co.*, 513 S.W.2d 210, 220 (Tex.App.—Corpus Christi 1974, writ ref’d n.r.e.). Landlord breached the contract by repudiating its obligation to complete Landlord’s Work, accelerating rent before completing Landlord’s Work, accelerating rent before delivery of the Premises, demanding rent before delivery of the Premises and before the commencement of rent, and defaulting Saddles when it had no legal right to do so. Landlord’s actions and words constitute a clear and unequivocal repudiation of the parties’ agreement.

86. Additionally, “the repudiation of a contract before the time of performance has arrived amounts to a tender of breach of the entire contract and allows the injured party to immediately pursue an action for damages.” *Murray v. Crest Const., Inc.*, 900 S.W.2d 342, 344 (Tex. 1995). Here, Landlord repudiated the Lease before delivery of the Premises to Saddles and before Saddles time of performance had arrived. Landlord’s repudiation amounted to a tender of breach of the entire contract and allowed Saddles to immediately pursue an action for damages.

87. “Anticipatory repudiation of a contract may consist of either words or actions that indicate that a party is not going to perform the contract according to its terms in the future.” *Mar-Len of Louisiana, Inc. v. Gorman-Rupp Co.*, 795 S.W.2d 880, 887 (Tex. App.—Beaumont 1990, writ denied). Landlord, through its words and actions, unequivocally indicated that it was not going to perform the contract according to

its terms.

88. Saddles performance was excused because Landlord repudiated.

89. Saddles was represented by an attorney.

90. Saddles presented the claim to the Landlord.

91. Payment for the just amount owed to Saddles was not tendered before the expiration of the 30th day after the claim was presented.

92. Saddles is entitled to recover reasonable attorney fees from the Landlord. Tex. Civ. Prac. & Rem. Code Ann. § 38.001.

93. Landlord's breach of contract caused Saddles' injuries and damages including loss of monies paid for its franchise fee (\$12,500), asbestos survey (\$1,000), architect fees (\$21,936.96), security deposit (\$11,392.02) and attorney's fees (\$160,000.00).

94. Landlord is not entitled to attorney's fees.

B) Tex. Bus. & Com. Code Ann. § 27.01 - Statutory Fraud in a Real Estate Transaction by Nondisclosure.

95. There was a transaction involving real estate between the Landlord and Saddles.

96. During the transaction, the Landlord made a false representation of fact, made a false promise, and/or benefited by not disclosing that a third party's representation was false.

97. The false representation or promise was made for the purpose of inducing, and did induce, Saddles to enter into a contract.

98. The Landlord had actual awareness that a third party's representation or promise was false.

99. The Landlord did not disclose to Saddles that the representation or promise was false.

100. The Landlord benefited from the false representation or promise.

101. Saddles relied on the false representation or promise by entering into the contract.

102. The Landlord is liable to Saddles for reasonable and necessary attorney's fees, expert witness fees, costs for copies of depositions, and costs of court.

103. The reliance caused Saddles' injuries including loss of monies paid for its franchise fee (\$12,500), asbestos survey (\$1,000), architect fees (\$21,936.96), security deposit (\$11,392.02) and attorney's fees (\$160,000.00).

C) Fraudulent Inducement

104. The Landlord concealed from Saddles and failed to disclose to Saddles certain facts, including the discovery of asbestos in the Portofino Shopping Center.

105. The Landlord had a duty to disclose these facts to Saddles because Landlord and Saddles were parties to a real estate transaction, Landlord discovered new information that made an earlier representation misleading or untrue, Landlord created a false impression by making a partial disclosure, and Landlord voluntarily disclosed some information and therefore had a duty to disclose the whole truth.

106. The Landlord knew the representation was false and specifically knew asbestos had been discovered at Amazing Lash.

107. The facts were material.

108. The Landlord knew Saddles was ignorant of the facts.

109. The Landlord knew Saddles did not have an equal opportunity to discover the facts.

110. The Landlord remained deliberately silent when it had a duty to speak.

111. By failing to disclose the facts, Landlord intended to induce, and did induce, Saddles into taking some action or refraining from taking action.

112. Saddles relied on the Landlord's nondisclosure and misrepresentations.

113. Landlord had reason to expect that Saddles would enter into a binding agreement, the Lease, based on Landlord's false representations and Saddles did enter into the Lease based on Landlord's false representations.

114. Saddles was injured as a result of acting without the knowledge of the undisclosed facts including loss of monies paid for its franchise fee (\$12,500), asbestos survey (\$1,000), security deposit (\$11,392.02) and architect fees (\$21,936.96).

D) Common Law Fraud by Nondisclosure

115. The Landlord concealed from Saddles and failed to disclose to Saddles certain facts, including the discovery of asbestos in the Portofino Shopping Center.

116. The Landlord had a duty to disclose these facts to Saddles because Landlord and Saddles were parties to a real estate transaction, Landlord discovered new information that made an earlier representation misleading or untrue, Landlord created a false impression by making a partial disclosure, and Landlord voluntarily disclosed some information and therefore had a duty to disclose the whole truth.

117. The Landlord knew the representation was false and specifically knew

asbestos had been discovered at Amazing Lash.

118. The facts were material.

119. The Landlord knew Saddles was ignorant of the facts.

120. The Landlord knew Saddles did not have an equal opportunity to discover the facts.

121. The Landlord remained deliberately silent when it had a duty to speak.

122. By failing to disclose the facts, Landlord intended to induce, and did induce, Saddles into taking some action or refraining from taking action.

123. Saddles relied on the Landlord's nondisclosure.

124. Saddles was injured as a result of acting without the knowledge of the undisclosed facts including loss of monies paid for its franchise fee (\$12,500), asbestos survey (\$1,000), security deposit (\$11,392.02) and architect fees (\$21,936.96).

E) Bad Faith Retention of a Security Deposit.

125. Saddles, as the tenant, and Landlord, as the landlord, executed and entered into a valid and enforceable commercial lease, the Lease.

126. Section 93.001 of the Texas Property Code applies to the Lease between the Landlord and Saddles. Tex. Prop. Code §93.001.

127. The Landlord breached Paragraph 14.1 of the Lease and failed to comply with Texas Property Code §93.005(a) by failing to return Saddles' security deposit not later than the 60th day after the date Saddles surrendered any right of possession and provided notice to the Landlord of Saddles forwarding address.

128. The Landlord failed to overcome the statutory presumption that the Landlord acted in bad faith. Tex. Prop. Code §93.011(d).

129. The Landlord has failed to carry the Landlord's burden of proving that the retention of any portion of the security deposit was reasonable. Tex. Prop. Code §93.011(c).

130. The Landlord is liable to Saddles for an amount equal to the sum of \$100 plus three times \$11,392.02, being the portion of the security deposit wrongfully withheld, in the total amount of \$34,276.06. Tex. Prop. Code §93.011(a).

131. The Landlord has forfeited its right to withhold any portion of the security deposit or to bring suit against Saddles for damages to the premises. Tex. Prop. Code §93.011(b).

132. Saddles is not liable to the Landlord for rent, holdover rent or any leasehold expenses.

133. The Landlord is liable to Saddles for its reasonable attorney's fees. Tex. Prop. Code §93.011(a).

F) Declaratory Judgment Action.

134. Pursuant to Tex. Civ. Prac. & Rem. Code, Chapter 37, Saddles did not breach the Lease and is not legally obligated to pay any monies whatsoever to Landlord.

G) Promissory Estoppel

135. Landlord is estopped to deny its obligation to fully remediate the premises, to provide an all clear report, and to fully discharge its obligations to remediate the premises because Landlord made representations and agreements that were relied

upon by Saddles to Saddles substantial detriment.

H) Quasi Estoppel

136. Landlord is prevented from obtaining a benefit by asserting rights to the disadvantage of Saddles that are inconsistent with Landlord's previous position. As such, Landlord is estopped to deny the existence or enforceability of a contract and/or agreement requiring it to fully remediate the asbestos and to provide an all clear report, and estopped to deny it assumed any obligation Saddles had to remediate the asbestos

I) Affirmative Defenses.

137. Saddles prevailed on its affirmative defenses, as follows:

1) **Quasi Estoppel.** Landlord is prevented from obtaining a benefit by asserting rights to the disadvantage of Saddles that are inconsistent with Landlord's previous position. As such, Landlord is estopped to deny the existence or enforceability of a contract and/or agreement requiring it to fully remediate the asbestos and to provide an all clear report, and estopped to deny it assumed any obligation Saddles had to remediate the asbestos.

2) **Promissory Estoppel.** Landlord is estopped to deny its obligation to fully remediate the premises, to provide an all clear report, and to fully discharge any of Saddles' obligations to remediate the premises because Landlord has made representations and agreements that were relied upon by Saddles to Saddles' substantial detriment.

3) **Modification.** To the extent the Lease did not require Landlord to

fully remediate the asbestos or to provide an all clear report, the parties modified the agreement in that the Landlord agreed to fully remediate the asbestos in and potentially in the premises and to provide an all clear report before any delivery.

4) **Ambiguity.** To the extent section 4.2 of the Lease, or any other portion of Lease, is constructed as an “as-is” clause, it is ambiguous and unenforceable because the “as-is” clause conflicts with the Construction Rider and the agreement of the parties.

5) **Waiver.** Landlord waived the “as-is” clause by, among other things, agreeing to fully remediate the asbestos in or potentially in the premises, agreeing to provide an all clear report, by not providing Saddles access to the premises, and as a result of the construction rider.

6) **Conditions Precedent and/or Subsequent.** Landlord failed to perform conditions precedent and/or subsequent and, thereby, breached the lease.

7) **Justification or Excuse.** Saddles acted pursuant to a legal excuse and/or was justified to act in the manner of which Landlord now complains, including, but not limited to, in objecting to and not accepting delivery of the premises because of the presence and stigma of asbestos.

8) **Mutual Mistake.** Landlord’s claims are barred, in whole or in part, by mutual mistake and/or Landlord’s knowledge of the mistake by the Saddles.

9) **Force Majeure.** Saddles was prevented from acting in the manner in which Landlord alleges it should have by force majeure. The discovery of asbestos and the stigma of an asbestos stained premises prevented Landlord from delivering

the premises and prevented Saddles from accepting delivery of the premises (Sec. 14.12). Additionally, Landlord's alleged damages, if any, were caused, in whole or in part, by the Covid-19 pandemic.

10) **Implied Warranty of Suitability.** Landlord breached the implied warranty of suitability, which was not waived and/or was ratified by or arose as a result of Landlord's conduct, because the premises contained asbestos. These defects existed in the leased premises at the inception of the lease. Such defects were vital to the use of the premises for Saddles' intended commercial purpose in that Saddles intended to operate a pizza restaurant and the presence of asbestos, currently or in the past, was unacceptable.

11) **Offset and Credit.** Saddles is entitled to offset and credit in relation to its counterclaims and monies paid to Landlord before termination of the Agreement, including payment of a security deposit.

12) **Mitigation of Damages.** Landlord's claims are barred, in whole or in part, because Landlord failed to use reasonable diligence to mitigate its damages, if any, resulting from Saddles' alleged wrongdoing, if any. Landlord's failures to mitigate include, but are not limited to, deferring rent for the replacement tenant and failing to mitigate damages caused by the Covid-19 pandemic.

13) **Future Damages.** Landlord's claims for damages are, factually and as a matter of law, too speculative to be recovered.

14) **Fraud.** As set forth supra, Landlord's claims are barred due to its acts of common law fraud, statutory fraud, fraudulent inducement, and fraud by

nondisclosure.

J) Attorney's Fees

138. Saddles is entitled to judgment against the Landlord for Saddles' reasonable attorney's fees through trial in the amount of \$160,000.00. Under, Texas law, "the duty to segregate between recoverable and nonrecoverable attorney's fees does not apply when the services for which the fees are incurred "advance both a recoverable and unrecoverable claim," such that the "fees are so intertwined that they need not be segregated." *Transcor Astra Group S.A. v. Petrobras Am. Inc.*, No. 20-0932, 2022 WL 1275238, at *14 (Tex. Apr. 29, 2022). Saddles had no duty to segregate between recoverable and nonrecoverable attorney's fees because the services for which the fees were incurred advanced both recoverable and unrecoverable claims. Saddles claims and defenses arose out of the same transaction and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts. Saddles attorney's fees do not relate solely to a claim for which such fees are unrecoverable.

139. In the event that Landlord files post-judgment motions in District Court and they are denied, Saddles is entitled to an additional judgment of \$10,000.00 for attorney's fees. In the event of an unsuccessful appeal (direct or indirect) to the Court of Appeals by Landlord, Saddles is entitled to an additional judgment of \$25,000.00 for attorney's fees. In the event of an unsuccessful petition for discretionary review or indirect appeal to the Supreme Court of Texas by Landlord, Saddles is entitled to an additional judgment of \$15,000.00 for attorney's fees. In

the event the petition for discretionary review or indirect appeal to the Supreme Court of Texas by Landlord is granted and ultimately unsuccessful, Saddles is entitled to an additional judgment of \$25,000.00 for attorney's fees. In the event that Landlord files a motion for rehearing with the Supreme Court of Texas and is denied, Saddles is entitled to an additional judgment of \$5,000.00 for attorney's fees.

K) Prejudgment Interest

140. The Texas Supreme Court has long recognized that prejudgment interest is “compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment.” *See Johnson & Higgins of Tex. Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (Tex. 1998). The award of prejudgment interest during periods of delay is generally left to the discretion of the trial court. *Aquila Sw. Pipeline, Inc. v. Harmony Expl., Inc.*, 48 S.W.3d 225, 242 (Tex. App.—San Antonio 2001, pet. denied). Prejudgment interest begins to accrue on the earlier of (1) 180 days after the date the defendant receives written notice of a claim or (2) on the day the suit is filed. *Id.* It is not necessary that a claim demand a certain amount or detail the elements of damage. *Bobo v. Varughese*, 507 S.W.3d 817, 823 (Tex. App.—Texarkana 2016, no pet.).

141. Saddles is entitled to prejudgment interest.

L) One satisfaction rule

142. “Under the one satisfaction rule, a plaintiff is entitled to only one recovery for

any damages suffered.” *Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 106–07 (Tex. 2018), opinion corrected on reh'g (Sept. 28, 2018); *see also Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 7 (Tex. 1991) (“The one satisfaction rule applies to prevent a plaintiff from obtaining more than one recovery for the same injury.”).

143. Saddles prevailed on its causes of action for breach of contract, statutory fraud by non-disclosure, common law fraud by non-disclosure, fraudulent inducement, and bad faith retention of its security deposit.

144. The Court applied the one-satisfaction rule to afford the greatest recovery to Saddles by electing breach of contract instead of statutory fraud by nondisclosure, common law fraud by non-disclosure, or fraudulent inducement.

145. For Landlord’s breach of contract the Court found the damages to be the sum amount of \$35,436.96 representing the franchise fee (\$12,500.00), asbestos survey (\$1,000.00), and architect fees (\$21,936.96).

146. The Court awarded damages for bad faith retention of the security deposit because it is a separate and distinct injury and does not result in a double-recovery. A “party is entitled to sue and to seek damages on alternative theories, and a judgment awarding damages on each alternative theory may be upheld if the theories depend on separate and distinct injuries and if separate and distinct damage findings are made as to each theory.” *See Waite Hill Servs., Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 184 (Tex.1998); *see also Peterson Grp., Inc.*, 417 S.W.3d at 64 (upholding separate recoveries for fraud and breach of contract claims because claims “sought recovery of different damages” and because the jury

awarded “separate and distinct damages for separate and distinct injuries for fraud and breach of contract”).

147. For Landlord’s bad faith retention of the security deposit, the Court found the damages to be the sum amount of \$34,276.06 representing the sum of \$100 plus three times the \$11,392.02 security deposit. Tex. Prop. Code §93.011(a).

148. Landlord’s bad faith retention of the security deposit is separate and distinct conduct and resulted in separate and distinct injuries and damages.

149. Landlord’s bad faith retention of the security deposit occurred at a different point in time, after the breach of contract, after Landlord’s repudiation, and after Landlord’s fraudulent conduct.

150. The Court awarded \$160,000.00 in reasonable and necessary attorney’s fees. Attorney’s fees are recoverable for Saddles’ causes of action for breach of contract and bad faith retention of the security deposit. The Court applied the one satisfaction rule to its award of attorney’s fees by only awarding attorney’s fees once.

151. The award of attorney’s fees does not result in a double recovery.

152. Saddles is entitled to recover its costs of court.

M) Postjudgment Interest

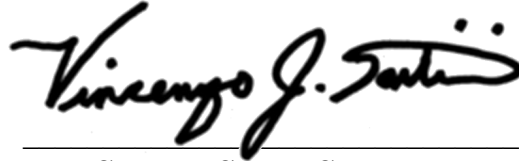
153. Post-judgment interest compensates judgment creditors for their lost use of the money due to them as damages. *Phillips v. Bramlett*, 407 S.W.3d 229, 238 (Tex. 2013).

154. Saddles is entitled to post judgment interest.

155. The Court incorporates by reference its May 5, 2022 Final Judgment.

7/8/2022 11:33:05 AM

SIGNED on _____

A handwritten signature in black ink, reading "Vincenzo J. Satriano". The signature is written in a cursive style with a large, sweeping initial "V".

JUDGE PRESIDING

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Envelope ID: 66156960
Status as of 7/8/2022 3:39 PM CST

Associated Case Party: Saddles Blazin, LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Jeffrey J.Tom		jeff@mcfirm.com	7/8/2022 3:38:28 PM	SENT
Curtis L. Cukjati	5207540	curt@mcfirm.com	7/8/2022 3:38:28 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Curtis L.Cukjati		attorney@mcfirm.com	7/8/2022 3:38:28 PM	SENT
Jeffrey Tom		attorney@mcfirm.com	7/8/2022 3:38:28 PM	SENT

Associated Case Party: KRG Portofino LLC

Name	BarNumber	Email	TimestampSubmitted	Status
James HStilwell		James@woodlandstxlawfirm.com	7/8/2022 3:38:28 PM	SENT
James H.Stilwell		james@meslawfirm.com	7/8/2022 3:38:28 PM	SENT