THIRD DISTRICT COURT-SUMMIT

2014 MAY 21 AM 10: 34

FILED BY [signature]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

GREATER PARK CITY COMPANY, a Utah corporation; and GREATER PROPERTIES, INC., a Delaware corporation,

Plaintiffs,

vs.

UNITED PARK CITY MINES CO., a Delaware corporation; TALISKER LAND HOLDINGS, LLC, a Delaware limited liability company; TALISKER LAND RESOLUTION, LLC, a Delaware limited liability company; VR CPC HOLDINGS, INC., a Delaware corporation; FLERA, LLC, a Delaware limited liability company; TALISKER CANYONS LEASECO, LLC, a Delaware limited liability company; TALISKER CANYONS FINANCE CO, LLC, a Delaware limited liability company; and JOHN DOE CORPORATIONS 1 through 10,

Defendants.

UNITED PARK CITY MINES CO., a Delaware corporation; and TALISKER LAND HOLDINGS, LLC, a Delaware limited liability company,

Counterclaim Plaintiffs,

vs.

GREATER PARK CITY COMPANY, a Utah corporation; and GREATER PROPERTIES, INC., a Delaware corporation,

Counterclaim Defendants.

MEMORANDUM DECISION AND ORDER

Case No. 120500157

May 21, 2014

Judge Ryan M. Harris

Before the Court are numerous motions, listed as follows:

(1) a Motion for Reconsideration, filed by Plaintiffs Greater Park City Company ("GPCC") and Greater Properties ("GPI") (collectively referred to herein as "the PCMR Parties");

(2) a Motion for Summary Judgment on Plaintiffs' Equitable and Nondisclosure Claims, filed by Defendants United Park City Mines Company ("UPCM") and Talisker Land Holdings ("TLH") (collectively referred to herein as "the Talisker Landlord Parties");

(3) a Motion for Summary Judgment on Plaintiffs' Claim for Violation of the Prohibition on Sale, filed by the Talisker Landlord Parties;

(4) a Motion for Summary Judgment on Plaintiffs' Claims for Violation of the Right of First Refusal, filed by the Talisker Landlord Parties and also by additional Defendants Talisker Land Resolution, LLC ("TLR") and Talisker Canyons LeaseCo, LLC ("TCLC") (the Talisker Landlord Parties, TLR, and TCLC are herein collectively referred to as "the Talisker Parties");

(5) a Motion for Summary Judgment on Count 8 of the Second Amended Complaint, filed by Defendants Flera, LLC ("Flera") and TCFC Finance Co, LLC (f/k/a Talisker Canyons Finance Co, LLC) (collectively referred to herein as "the Flera Parties");

(6) a Motion for Summary Judgment as to Plaintiffs' Claim for Violation of the Right of First Refusal in Their Eighth Cause of Action, filed by Defendant VR CPC Holdings, Inc. ("VRCPC");

(7) a Motion for Summary Judgment as to Plaintiffs' Claims Involving Flera, LLC and TCFC Finance Co, LLC, filed by the Talisker Parties; and

(8) a Motion for Summary Judgment on Plaintiffs' Seventh and Eighth Causes of Action, filed by the PCMR Parties.

To help the reader keep these numerous parties (and the Court's references to them) straight, a "cast of characters" is included in the margin.[1] After full briefing, these motions came before the Court for oral argument on April 3, 2014 and April 8, 2014. At the April 3 hearing, the PCMR Parties were represented by Alan L. Sullivan, Michael D. Zimmerman, Amber M. Mettler, James W. Quinn, and Bruce S. Meyer; the Talisker Parties were represented by John R. Lund, Kara L. Pettit, Howard M. Shapiro, Jonathan E. Paikin, and Christopher E. Babbitt; and the Flera Parties were represented by Mark F. James and Michael J. Gill. VRCPC was not present or

[1] The PCMR Parties: GPCC and GPI (both Plaintiffs)
The Talisker Parties: UPCM, TLH, TLR, and TCLC
The Talisker Landlord Parties: UPCM and TLH (a subset of the Talisker Parties)
The Flera Parties: Flera and TCFC Finance Co, LLC
The Talisker Parties, the Flera Parties, and VRCPC are sometimes collectively referred to as "Defendants."

represented at the April 3 hearing. At the April 8 hearing, the PCMR Parties were represented by Alan L. Sullivan, Michael D. Zimmerman, Amber M. Mettler, James W. Quinn, and Bruce S. Meyer; the Talisker Parties were represented by John R. Lund, Kara L. Pettit, Howard M. Shapiro, Jonathan E. Paikin, and Christopher E. Babbitt; the Flera Parties were represented by Mark F. James, Michael J. Gill, and Daniel K. Storino; and VRCPC was represented by Ryan T. Bergsieker. Based on the arguments presented at the April 3 and April 8 hearings, on the memoranda submitted by the parties, and on the Court's review of applicable law, the Court issues the following Memorandum Decision and Order.

INTRODUCTION

In order to render more accessible the analysis that follows, it is necessary to provide some procedural background. After the PCMR Parties filed this lawsuit in March 2012, the Talisker Landlord Parties (who at the time were the only named defendants) asked this Court to dismiss Plaintiffs' original Complaint and each of the six causes of action therein before even allowing the Parties to proceed to discovery, arguing that the allegations made, even if presumed to be true, failed to state valid claims against them. On November 20, 2012, this Court issued its decision on the Motion to Dismiss, granting that motion in part and denying it in part. Specifically, the Court dismissed all but two of the PCMR Parties' original claims, concluding that dismissal of the PCMR Parties' main claim—that they had substantially complied with the provisions in the operative leases regarding renewal—was required by the unambiguous language of the leases, as well as by three Utah Supreme Court cases, referred to as the Geisdorf line of cases, that the Court determined applied to the facts alleged. However, the Court allowed the PCMR Parties to proceed to discovery on (a) their claims that the Talisker Landlord Parties either waived their right to assert, or are equitably estopped from asserting, that the leases had expired; and (b) their claims that the Talisker Landlord Parties had failed to disclose to the PCMR Parties, at the earliest possible time after March 1, 2011, that the Talisker Landlord Parties believed that the leases had expired.

In addition, in September 2013 this Court allowed the PCMR Parties to add two new claims to their lawsuit, denominated their seventh and eighth causes of action. In those claims, the PCMR Parties assert that, variously, the Talisker Parties, the Flera Parties, and VRCPC violated either the leases' "prohibition on sale" provision (herein referred to as the "PoS Provision"), or the leases' "right of first refusal" provision (herein referred to as the "RoFR Provision"). Following the addition of these two new claims, the PCMR Parties had four claims that remained pending.

Now, after completion of discovery on these remaining four claims, the Parties have brought summary judgment motions to the Court, asking the Court to dispose of (in various ways) these remaining four causes of action before trial. In addition, the PCMR Parties have filed a Motion for Reconsideration asking the Court to reconsider its earlier decision that the Geisdorf line of cases applies here. In a nutshell, the PCMR Parties ask the Court to not only grant summary judgment in their favor on the PoS and RoFR claims, but also ask the Court to reinstate their main claim, dismissed in November 2012, regarding extension of the leases. For their part, the Defendants ask the Court to dismiss all four of the PCMR Parties' remaining claims.

After careful review of the voluminous memoranda and exhibits filed by the Parties, as well as examination of applicable case law, the Court declines the PCMR Parties' invitation to reconsider its earlier decision regarding the applicability of the Geisdorf line of cases and, in addition, is convinced, for the reasons that follow, that summary judgment in Defendants' favor is appropriate on all but one of the PCMR Parties' remaining causes of action (the claim for negligent nondisclosure). Accordingly, because there are no genuine issues of material fact remaining to be decided on any of the other causes of action, judgment on those claims in Defendants' favor is therefore appropriate as a matter of law for the reasons explained herein.

UNDISPUTED FACTS[2]

The Resorts

1. GPCC owns and operates Park City Mountain Resort ("PCMR"), one of only three ski/snowboard and summer resorts in Summit County. At the time this action was commenced, the Talisker Parties owned and operated Canyons, one of the other two resorts.

2. The PCMR Parties (and/or Park Properties, Inc. ("PPI"), a company with some affiliation with the PCMR Parties) own all of the land underlying PCMR's base and parking facilities. In addition, since 1971 GPCC has owned outright the water, snowmaking, and sewer infrastructure necessary for the operation of PCMR. See United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 883 (Utah 1993).

3. The PCMR Parties, however, do not own most of the land (herein referred to as "the Resort Lands") upon which PCMR's ski runs are located. Rather, they lease the Resort Lands from a landlord pursuant to two leases, which date back to the 1970s and will be discussed more fully below. The original leases were entered into between GPCC and UPCM, with UPCM acting as landlord and GPCC as tenant, which relationship continued from the 1970s through 2003.

4. In 2003, Talisker acquired UPCM and, in December 2004 UPCM assigned its rights under the relevant leases to TLH, and the PCMR Parties consented to this assignment. In addition, also in December 2004, UPCM conveyed the Resort Lands by Warranty Deed to TLH. See Warranty Deed (Babbitt Decl., Exh. 6).

5. From December 2004 through April 2011, then, the PCMR Parties continued to occupy the Resort Lands pursuant to the relevant leases, with TLH as their landlord. These years passed relatively uneventfully, at least in terms of the landlord-tenant relationship.

[2] The facts recited herein are taken from the Parties' briefs and the voluminous exhibits submitted. Only undisputed facts are included in this recitation. Where necessary or helpful, the Court has included a reference to relevant exhibits.

History of the Leases

6. The history of these particular leases begins in the 1960s, when UPCM—which owned vast acreage and water rights in and around Park City—began to develop a ski resort on some of its property. In these early days, the resort was called Treasure Mountain Resort, and the resort opened in December 1963.

7. In 1971, UPCM and some business partners formed GPCC, and UPCM sold to GPCC the ski resort operations, base facilities, other property and water rights. Around this same time, GPCC incurred debt as it underwent various expansion activities.

8. As part of these 1971 transactions, UPCM and GPCC entered into a lease captioned "Resort Area Lease," under which UPCM leased some 5600 acres to GPCC, a portion of which was the ski terrain for the resort. Under the terms of the Resort Area Lease, GPCC acquired the right to use part of the Resort Lands "for the construction, development and operation of ski lifts, ski runs and other winter and summer recreational and resort facilities and uses incident or related thereto, excluding, however, cabins and like structures." See Resort Area Lease, ¶¶ 1, 3.

9. The original Resort Area Lease also contained a provision limiting UPCM's right to sell the Resort Lands ("the PoS/RoFR Provision"). That provision, in its original form, stated as follows:

> In the event that [UPCM] should receive from a third party an offer to purchase any portion of the Leased Premises, other than portions upon which facilities or improvements constructed or utilized by [GPCC] are at the time of such offer situated (as to which portions [UPCM] shall not be free to sell) and in the event that [UPCM] should desire to accept said offer, it shall give written notice thereof to [GPCC], which notice shall set forth the portions of the Leased Premises which are the subject of said offer, the purchase price and all other material terms and conditions contained in said offer. [GPCC] shall have the right for a period of thirty days following the effective date of said notice to purchase the portion of the Leased Premises as to which said offer relates, as set forth in the notice from [UPCM], for a purchase price and upon terms and conditions equivalent to those contained in said offer.

See Resort Area Lease, ¶ 14.

10. The original Resort Area Lease also had a provision forbidding GPCC from selling or assigning its rights under the lease to any other party without prior written approval of UPCM. See id., ¶ 20. There was no reciprocal restriction on UPCM, other than the PoS/RoFR Provision set forth immediately above, and this remained the case even after the 1975 amendments.

11. The original term of the lease was 20 years, with one 20-year option renewable at the sole and unilateral discretion of GPCC. With regard to renewal of the option, the Resort Area Lease originally stated as follows:

> [UPCM] hereby gives and grants to [GPCC] the right and option to extend the term of this Lease for a period of twenty years following the expiration of the primary term hereof, such extension to be upon the same terms and conditions as are herein contained. In the event that [GPCC] shall elect to exercise said option to extend the term of this Lease, it shall give written notice of such election to [UPCM] at least sixty (60) days prior to the expiration of the primary term of this lease.

See Resort Area Lease, ¶ 18.

12. In addition, the original Resort Area Lease called for GPCC to pay its annual rent to UPCM in one lump sum "[w]ithin sixty days following the close of each calendar year during the term of the lease." Id. at ¶ 2. And the rents, at least by today's standards, were not onerous: At least during the initial term of the lease, GPCC was to pay the higher of (a) 1% of the first $100,000 of lift revenue plus 0.5% of all additional lift revenue, or (b) $0.50 per acre. Id.

13. By 1975, however, GPCC was experiencing financial difficulty, and owed a significant amount of debt to creditors. After negotiation, GPCC, UPCM, and GPCC's other partners and creditors agreed to a reorganization and restructuring designed to keep GPCC in business and allow it a better opportunity to pay off its outstanding debts.

14. In June 1975, all of these interested parties agreed to a Memorandum of Agreement whose ultimate purpose was to "relieve GPCC of real estate inventory" as well as "essentially all of its real estate mortgage debt" and "to infuse into GPCC adequate equity capital to place it on a solid financial footing" such that "its operations may be successfully and profitably conducted." See Memo. of Agreement (Zimmerman Decl., Exh. 47), at 1-2.

15. One of the primary terms of the restructuring was that UPCM lengthen the possible duration of the Resort Area Lease so that GPCC could have the option of a longer term of years within which it could utilize resort revenues to pay off the restructured debts. Accordingly, UPCM and GPCC agreed to amend the preexisting Resort Area Lease to clarify that the primary term would expire on April 30, 1991, and that three additional twenty-year extensions (rather than just one) would be available to GPCC at its option, meaning that GPCC would have within its sole control the option to extend the Resort Area Lease all the way through 2051 (instead of just until 2011 as was the case under the original lease). See Resort Area Lease, Amendment, ¶ 6.

16. The Parties also agreed that, if the lease was extended, the rent payable by GPCC would increase after 2011. See id., ¶ 2. During the "Primary Term" and the "First Extension" (from 1971 through 2011), the rent would be 1% of the first $100,000 of lift revenue plus 0.5% of all additional lift revenue. During the "Second Extension" (from 2011 to 2031), if exercised, the rent would increase to 2% of the first $100,000 of lift revenue plus 1% of all additional lift revenue. Id.

17. However, while UPCM agreed to additional option periods (and thereby a longer term of years within which the Resort Lands would potentially be under GPCC's control), the parties did not agree to change the method of exercising these options (to, for instance, one 80-year monolithic term or, alternatively, extensions which would take effect automatically unless GPCC opted out in writing). Indeed, after the amendment, GPCC was still under an obligation to affirmatively act in order to extend the lease:

> In the event that [GPCC] shall elect to exercise its option to extend this Lease under the provisions of the First, Second or Third Extension of the Primary Term, it shall give written notice of such election to [UPCM] at least sixty (60) days prior to the end of the Primary Term, or prior to the end of the First or Second Extension of Primary Term, as the case may be.

Id., ¶ 6(d).

18. As part of these amendments to the Resort Area Lease, the parties also agreed to a change in the language of the PoS/RoFR Provision. Specifically, the parties agreed to add the

phrase "on or after May 1, 1980" to the first sentence of that Provision. See id., ¶ 5. The parties explained the reason for this change in the Memorandum of Agreement, stating therein that UPCM "agrees for a period of five years after May 1, 1975 (but not thereafter) to relinquish the right conferred upon it under the provisions of Paragraph 14 of [the Resort Area Lease] whereby it has a right to sell and grants a right of first refusal to [GPCC] under said leases." See Memo. of Agreement (Zimmerman Decl., Exh. 47), at ¶ 3.

19. Also in 1975, GPCC and UPCM entered into a second lease, known as the Crescent Ridge Lease. The Resort Area Lease and the Crescent Ridge Lease are herein referred to as "the Leases," and together cover all of the Resort Lands at issue in this lawsuit. As with the Resort Area Lease, the initial (or "primary") term of the Crescent Ridge lease was to expire on April 30, 1991, but GPCC would have the option of extending the Crescent Ridge Lease for three additional 20-year terms. The operative language regarding exercise of GPCC's option to extend the Crescent Ridge Lease is substantively identical to the language, quoted above, from the Resort Area Lease amendment. See Crescent Ridge Lease, ¶ 17(d).

20. The Crescent Ridge Lease also had a PoS/RoFR Provision, which is substantively identical to the one in the amendment to the Resort Area Lease (i.e., that contains the "on or after May 1, 1980" phrase). See Crescent Ridge Lease, ¶ 13.

21. The Crescent Ridge Lease and the amended Resort Area Lease are also substantively identical with regard to rental provisions (payable within 60 days of the close of the preceding fiscal year, and on the same percentage terms as set forth in the amended Resort Area Lease).

22. However, neither the original nor the amended Resort Area Lease, nor the Crescent Ridge Lease, had any provision regarding a "holdover tenancy." That is, none of the Leases had any provision setting forth whether, and to what extent, the parties would continue to be bound, during any "holdover tenancy," by the specific provisions in the Leases.

23. As part of the 1975 restructuring, GPI and PPI were formed, largely by and for the benefit of GPCC's shareholders and creditors.[3] GPI was to be assigned GPCC's interest in the Leases, and would receive a relatively large (at any rate, larger than that received by UPCM under the Leases) percentage of lift ticket revenue in exchange for subleasing the Resort Lands back to GPCC. PPI was to be assigned GPCC's rights to certain real property, including the base facility, which it would lease back to GPCC.

24. Following the restructuring, GPCC did indeed (with UPCM's consent) assign its rights in the Leases to GPI, in apparent exchange for the creditors' agreement to the forgiveness and restructuring of certain of GPCC's debt. GPI then subleased the Resort Lands back to GPCC, pursuant to a Sublease Agreement. The Sublease Agreement has twenty-year renewable terms that expire in the same years as the underlying Leases (e.g., 1991, 2011), with the critical difference that the Sublease "shall automatically be extended" into the next term "unless [GPCC] notifies [GPI] in writing" at least 180 days prior to the end of each term. <u>See</u> Sublease, ¶ 2.02.

25. There is no record evidence whatsoever as to why the Leases require affirmative extension, yet the Sublease provides for automatic extension.

26. The Sublease also stated that "[i]n the event the term of this Sublease automatically is extended . . . , [GPCC] shall be obligated on behalf of [GPI] to extend the term of the Leases for a corresponding extended term in accordance with the provisions of the Leases." <u>Id</u>.

27. In or before 1991, GPCC took steps necessary to exercise its option to extend the Leases for an additional 20 years, until April 30, 2011. GPCC did this by sending three separate letters to UPCM, one in August 1985 notifying UPCM that GPCC was extending the Resort Area Lease; another in June 1990 notifying UPCM that GPCC was extending the Crescent Ridge

[3] While GPI and PPI were originally controlled entirely by two creditors of GPCC, this is apparently no longer the case. Although no record evidence exists on this point, the PCMR Parties' counsel represented at oral argument that the two creditors' interests in GPI and PPI were bought out in recent years by entities controlled by the Cumming family. <u>See</u> Transcript of April 3, 2014 Hearing, at 18-19. Assuming this representation to be true, GPCC, GPI, and PPI are all in the same family of companies (even if they are not technically "affiliates"), and the two creditors are out of the picture.

Lease; and another in December 1990 reminding UPCM that the first two extension letters had already been sent. See Paikin Decl., Exh. 5.

28. Over the several decades during which it has occupied the Resort Lands, GPCC has made improvements (e.g., ski lifts, lodges, restaurants, trails) on nearly all of the Resort Lands, spending some $98 million (over many decades) in the process. Only two relatively small portions of the Resort Lands have gone unimproved by GPCC through the years: (1) the backside of Pinecone Ridge; and (2) a parcel to the south of (and over the ridge from) the top of the Jupiter lift.

Interactions with Park City Municipal Corporation

29. In 1998, GPCC (along with its parent, Powdr Corp.) entered into a Development Agreement with Park City Municipal Corporation ("Park City"). This agreement permitted GPCC/PCMR to develop base facilities, and included the transfer of density of over 490 unit equivalents for the master planned area consolidated within specific parcels at PCMR's base area in return for, among other things, GPCC's commitment that, as long as it controlled the Resort Lands and operated PCMR, the resort's alpine terrain would be used solely for ski-resort-related activities and for no other purpose.

30. When the Development Agreement was approved in 1998, the majority of the Resort Lands were located outside Park City's corporate limits, and one of the principal purposes of the agreement was to ensure that the Resort Lands, while under control of GPCC, would be subject to use restrictions requiring that ongoing use would be that of a ski and summer recreational resort with density consolidated at the base.

31. UPCM was not a party to the Development Agreement. Indeed, the signatories to the Development Agreement (GPCC, Powdr Corp., and Park City) agreed, as they must, "that nothing in this subsection [dealing with 'Development Exclusion'] is intended to adversely affect lessor's rights in the leases." See Development Agreement (Harrington Decl., Exh. 1), § 2.1.14.

32. The Development Agreement contains no specific provision mandating that skiers enter and exit the Resort Lands through the PCMR Parties' property at the base of the mountain.

33. In 1999, at UPCM's request, Park City annexed some 1,750 acres of land in the Empire Pass area into Park City. In the ensuing years, UPCM was interested in developing its landholdings in Empire Pass, but in order to do so UPCM needed to transfer development density from the Resort Lands to the Empire Pass area. In order for such a transfer to occur, the Resort Lands needed to be annexed into Park City.

34. In January 2006, UPCM (and others) applied for the annexation of over 3,000 acres of land into Park City, including some 2,800 acres of the Resort Lands, and proposed that the "residual density" related to those lands be transferred to the Empire Pass area to facilitate development there.

35. UPCM also proposed to Park City that, in return for the transfer of density, it would agree that the Resort Lands would be preserved as open space and used for ski resort purposes only, and governed by a deed restriction and a conservation easement to this effect.

36. UPCM understood that it would need the cooperation of GPCC/PCMR to bring about this annexation. In correspondence regarding the proposed annexation, PCMR representatives explained to Talisker's representatives that they had "determined that projecting [financial impact relating to the annexation] out over the next 45 years (the remaining lease term) is not subject to reasonable estimation." See Letter dated March 21, 2006 (Zimmerman Decl., Exh. 59), at 1.

37. Also as part of these discussions regarding annexation, GPCC/PCMR inquired of the Talisker Landlord Parties whether they would be willing to add another 25-year extension onto the end of the existing Leases, placing the Resort Lands under GPCC's control through 2076. In December 2006, however, the Talisker Landlord Parties responded that "an additional 25-year lease extension is not something that will be addressed in the midst of our [Empire Pass] approvals." See Letter dated December 21, 2006 (Paikin Decl., Exh. 10), at 1.

38. One issue that came up between the parties during this period was the question of whether the Resort Lands would be subject to an additional tax burden following their annexation into Park City. GPCC, which was obligated to pay taxes on the Resort Lands pursuant to the terms of the Leases, see Resort Area Lease, at 7-8 ¶ 8; Crescent Ridge Lease, at 9 ¶ 8, understandably did not want to be responsible for a higher tax burden due to UPCM/Talisker's desired annexation. Indeed, GPCC stated that it would only be willing to consent to the annexation and the related conservation easement if it could be assured that "it doesn't increase the cost of our joint operations for the next 45 years as Landlord and Tenant." See Letter dated July 21, 2006 (Zimmerman Decl., Exh. 65), at 3.

39. After some back-and-forth negotiation on the issue, Talisker agreed to reimburse GPCC for any additional tax burden, stating as follows in a January 2007 letter agreement:

> For the next forty-five years (*presuming the Lease renewal options are exercised and the Lease has not otherwise terminated*), Talisker will reimburse PCMR for its net out-of-pocket increases in both property taxes and local fees and taxes resulting from the annexation . . . .

See Letter dated January 11, 2007 (Zimmerman Decl., Exh. 69), at 1 (emphasis added). This letter agreement was countersigned by PCMR's John Cumming.

40. After a series of public hearings before the Park City Planning Commission and City Council, Park City approved the annexation and related density transfer. GPCC representatives, including Jenni Smith, attended these hearings. At deposition in this case, Smith testified that she "think[s]" the subject of the Leases came up in one or more of these public hearings:

> And I think [the Leases] came up in a meeting with the city where the city was actually the ones who represented that they had been told by [UPCM], Talisker, that our lease was good for another 50 years.

See Jenni Smith Depo. (Zimmerman Decl., Exh. 8), at 36-37.

41. In March 2007, the deed restriction was finalized. Both Talisker Landlord Parties signed and agreed to the terms of the deed restriction, and specifically agreed "to prevent residential development on the [Resort Lands]." See Deed Restriction (Harrington Decl., Exh. 2),

at 74 of 103. The deed restriction was clearly intended to apply both during as well as after the term of the Leases, as it contained a provision instructing the Talisker Landlord Parties what uses they could make of the Resort Lands during the term of the Leases as well as a separate provision instructing them what uses they could make of the Resort Lands "[u]pon and after the expiration or earlier termination of the [Leases]." Id. at 75 of 103.

42. The deed restriction, like the Development Agreement, contains no specific provision mandating that skiers enter and exit the Resort Lands through the PCMR Parties' property at the base of the mountain.

43. Sometime in or about 2007, around the time of the annexation and deed restriction, an appraisal of the Resort Lands was prepared on behalf of the Talisker Landlord Parties. The appraisal is unsigned, and there is no indication on the face of the appraisal even of the name of the appraiser whose work is reflected there. See Appraisal (Supp. Zimmerman Decl., Exh. 91). There is also no exact date thereon. Id. In the course of reaching his/her conclusions, the appraiser states that "[t]he subject lands are under a long-term lease (extending to 2051) to [PCMR]," id. at 6-15, that "[t]he entire mountain is under an 80-year lease to PCMR (expiring in 2051)," id. at 6-22, and that "the existing lease . . . extends for another 44 years," id. at 6-23.

44. Later, in 2010 and after working out many of the details of the conservation easements with Park City, UPCM stated in a letter to Park City that "[t]he required Conservation Easements are in place, and the PCMR Deed Restriction is to be converted to a Conservation Easement upon expiration of the PCMR lease, which is not expected to occur for decades." See Letter dated August 17, 2010 (Zimmerman Decl., Exh. 60), at 2.

Proceedings Before the Utah State Tax Commission

45. In or around 2001, UPCM became dissatisfied with the value of the Resort Lands as assessed by the governmental entities whose job it is to assess and levy property taxes, and UPCM appealed the assessed value all the way to the Utah State Tax Commission. The thrust of

UPCM's argument during the appeal was that the assessed value of the Resort Lands (some $6.7 million) was too high because that value did not appropriately take into account the long-term lease to GPCC. UPCM apparently believed, based on an appraisal report that it commissioned, that a more accurate value of the Resort Lands was approximately $1.8 million.

46. UPCM's appraiser based his conclusion in large part on the fact that the Resort Lands were subject to the Leases, which he characterized as a "long-term lease" that "encumbers the property" in that GPCC "has the right to use the property until 2051." See Second Decl. of Jenni Smith, Ex. 6 at 23 (appraisal report, also submitted as an exhibit to the Tax Commission); see also Tax Comm'n Hrg. Transcript, at 101-03 (UPCM's appraiser stating that the Leases are "a long term 50-year lease" that "cannot be broken" by UPCM).

47. As the matter wound its way through the administrative process, and eventually to a day-long evidentiary hearing before the Utah State Tax Commission on September 15, 2003, UPCM and its attorneys and witnesses repeatedly characterized the Leases as being a "50-year lease" that "ends in the year 2051." See PCMR Parties' Memo. in Supp. of Partial Summ. J., at 6-12, ¶¶ 23-39 (containing numerous citations to the Tax Commission record).

48. However, there were also a number of references and allusions, during the proceedings, to the fact that the Leases had an 80-year term that was not monolithic but, rather, was comprised of four 20-year periods with options for renewal. See Talisker Landlord Parties' Memo. in Opp. to Partial Summ. J., at 6-9 ¶¶ 11-21.

49. In December 2003, the Tax Commission issued its final decision, overruling the initial assessed value and determining that the actual value, for taxing purposes, of the Resort Lands was $1.94 million. See Tax Commission Decision, Dec. 15, 2003, at 14.

50. In its November 20, 2012 ruling, this Court already disposed of, and rejected, the PCMR Parties' arguments that the Talisker Landlord Parties made statements during these Tax Commission proceedings that would estop them from requiring the PCMR Parties to provide

written notice of their intent to extend the Leases. However, because the PCMR Parties have raised these arguments again in connection with the current briefing (although they have not specifically asked the Court to reconsider its earlier ruling regarding the Tax Commission proceedings), the Court includes here a lengthy excerpt from its November 20, 2012 ruling:

> The chief reason that the [PCMR] Parties' arguments regarding judicial estoppel are without merit is that the statements made by UPCM during the Tax Commission proceedings are not necessarily inconsistent with any statements made by the Talisker [Landlord] Parties here.
>
> The [PCMR] Parties point toward literally dozens of statements made by UPCM during the Tax Commission proceedings where UPCM characterized the Leases as items that are to exist in place until 2051. Citations to all of the references to the "50-year lease" can be found in the Park City Parties' briefing. See [PCMR] Parties' Memo. in Support of Partial Summary Judgment, at 6-12, ¶¶ 23-39 (citing to the Tax Commission record). A sampling of these statements follows:
>
> - UPCM's Appraisal Report, prepared by appraiser Brad Foulger, stated that "the lease has a 75-year term with 50 years remaining on the lease," id. at 6 ¶ 20, and that PCMR "has the right to use the property until 2051," id. at 6 ¶ 21.
> - UPCM's attorney, during opening statements at the day-long Tax Commission hearing, stated that the lease was a "50-year lease," id. at 7 ¶ 23, and that the lease runs "until 2051" or "for another fifty years," id. at 7 ¶¶ 24-25.
> - UPCM witness Steve Salmond testified that, in 1975, UPCM "extended the lease, so that it ended up being a full-term 80-year lease" that "ends in the year 2051." Id. at 8 ¶¶ 26-27.
> - UPCM witness David A. Thomas, a professor of real property law, testified that the Leases run for "another 50 years," "from 2001 to 2051." Id. at 9 ¶ 32.
> - UPCM appraiser Foulger testified that the Leases are a "long-term, 50-year lease" that "expires in 2051" and "cannot be broken" and that there is "no way" for UPCM to "get around the lease." Id. at 10 ¶¶ 33-34.
> - UPCM's attorney, during closing arguments, stated that the Leases "go on for another 50 years" and repeatedly referred to the Leases as a "50-year Lease Agreement." Id. at 10-11 ¶ 36.
> - UPCM, in its post-hearing briefing, again referred to the Leases as "50-year leases" and stated that "[e]veryone agrees that UPCM's property is subject to a fifty-year lease." Id. at 11-12 ¶¶ 39-40.
>
> While these statements (indicating that the Leases run through 2051) might appear at first blush to be inconsistent with the Talisker [Landlord] Parties' position in this case (that the Leases have expired), this is in fact not the case. There is no inconsistency. It simply did not matter, for purposes of the Tax Commission

proceedings, whether the Leases had one fixed 80-year term (from 1971 through 2051) or four 20-year renewable terms. In either event, as far as both the Talisker [Landlord] Parties and the Tax Commission were concerned, the effect was the same: the [PCMR] Parties had sole control over the term of the Leases and could, subject to their unilateral discretion, decide whether to extend the Leases through 2051. From UPCM's perspective, UPCM did not have within its control the usage of the Resort Lands—the [PCMR] Parties had the right to control that usage through 2051. UPCM's entire point in bringing the appeal was that it was (or would likely be) prevented from developing the Resort Lands or putting the property to any other use until 2051, due to the presence of the Leases as well as certain development restrictions placed on the property by the city of Park City. This point would have been equally valid, no matter whether the Leases had one 80-year term or four 20-year renewable terms with options that could be exercised at the unilateral option of the [PCMR] Parties. Thus, the distinction between one 80-year term and four 20-year terms was utterly immaterial to the Tax Commission. The Court has reviewed the entire Tax Commission record submitted by the parties, and the Court is unable to find a single reference therein indicating that this distinction was at all relevant.[FN] Indeed, if this distinction had been relevant, the parties to the Tax Commission proceeding who were adverse to UPCM—the state and county taxing authorities—could easily have brought the subject up and made hay of it. But they didn't, and that is telling. Notably, the appraisal expert offered by the taxing authorities, John Stewart, testified that his appraised value of $6.7 million was not at all dependent on the length of the Leases, and that it would have made no difference at all to his appraisal if the Leases had a term of ten years (instead of fifty) or even five. <u>See</u> Transcript, at 198-201.

> [FN] Even the best of the statements, from the perspective of the [PCMR] Parties, does not support the weight that the [PCMR] Parties attempt to lay upon it. In that statement, UPCM witness Steve Salmond testified that, in 1975, UPCM "extended the lease, so that it ended up being a full-term 80 year lease" that "ends in the year 2051." <u>See</u> Transcript, at 21. This statement, however, when read in context, is merely a description of the 1975 amendment to the Resort Area Lease under which the parties agreed to amend the lease to allow for two additional 20-year renewable options, meaning that the [PCMR] Parties would have options to renew the Leases all the way through 2051 instead of merely through 2011. Even this statement, fairly read and in context, cannot possibly be construed as some sort of waiver of UPCM's right to require written notice of the [PCMR] Parties' election to extend the Leases beyond 2011.

Moreover, it is not as if the true nature of the Leases was hidden or otherwise kept from the Tax Commission. The Tax Commission record, as noted above, contains many references to a "50-year lease." However, that same record is also replete with references to the fact that the Leases' term was not a monolithic 80 years but, rather, was comprised of four separate 20-year renewable terms. First and foremost, the Leases themselves were entered into evidence during the proceeding and were available for any of the tax commissioners to review. <u>See</u> Transcript, at 29, 170. Indeed, the Leases were referred to as Exhibits in the Tax Commission's final decision. <u>See</u> Tax Commission Decision, Dec. 15, 2003, at 3 n.4. As noted above, those Leases clearly indicate what the applicable lease term is and that the [PCMR] Parties have the unilateral right to extend those Leases until 2051 by exercising renewal options. See, e.g., Resort Area Lease, Amendment, ¶ 6; Crescent Ridge Lease, ¶ 17. One can only presume that the Tax Commissioners reviewed the Leases that were clearly made part of the record before them.

Second, the administrative law judge, Judge Jane Phan, who made the initial administrative determination as to the assessed value of the Resort Lands, clearly understood the distinction between one 80-year term and four 20-year terms, and clearly understood that the Leases in question here had four 20-year renewable terms rather than one 80-year monolithic term. In her July 2002 decision (the one that UPCM did not like due to her $6.76 million assessed value), Judge Phan specifically referenced the Leases as having "a 20 year term with additional 20 year options so that at the present time there are options in excess of 50 years remaining." See Tax Commission Order dated July 16, 2002. Significantly, Judge Phan's involvement in the case did not end with her July 2002 decision. To the contrary, Judge Phan actively participated in the appeal of the matter. Judge Phan was present for the day-long evidentiary hearing, see Transcript, at 5, and she was actually the one that signed the Tax Commission's ultimate decision in December 2003. Her knowledge with regard to the Leases was certainly available and accessible to the other Tax Commissioners.

Third, and contrary to the implications by the [PCMR] Parties in their briefing, the options and extensions were actually mentioned several times in the appellate proceedings before the Tax Commission itself. A sampling of those mentions and discussions follows:

- In UPCM's initial filing (captioned "Petition for Redetermination") with the Tax Commission following Judge Phan's July 2002 decision, UPCM informed the Tax Commission of the existence of the extension options, stating plainly that the Leases contained extension periods and that the percentage of rental income to which UPCM is entitled varies depending upon which extension is in place. See Petition for Redetermination, at 6 ¶ 8. As set forth in a later order from the Tax Commission, UPCM's Petition for Redetermination became the operative document in the appeal. See Order dated Feb. 3, 2003, at 1-2.
- UPCM witness Steve Salmond testified that the Leases contained option extensions, and that UPCM's right to payment under the Leases varied depending on which extension was in place. See Transcript, at 23-24.
- After the hearing, in post-hearing briefing, Summit County—who, as noted above, had every incentive to exploit any distinction that may exist between an 80-year lease and a lease with four 20-year extension options—mentioned the fact that the Leases had 20-year renewable terms rather than just one 80-year monolithic term, stating to the Tax Commission that "there were in excess of 50 years in renewal options remaining on the lease." See Summit County Post-Hearing Memorandum, at 2.
- And UPCM itself, in post-hearing briefing, also pointed out the existence of the extension options, stating again that UPCM's right to payment under the Leases varied depending upon which

> extension was in place. See UPCM's Post-Hearing Memorandum, at 11-12.
>
> In addition to all of these indications, culled purely from the cold record, that there was no material distinction for purposes of the Tax Commission proceeding between one 80-year lease term and four 20-year renewable terms, the Talisker [Landlord] Parties have also submitted the Declaration of Maxwell Miller ("Miller"), UPCM's attorney in the proceedings before the Tax Commission. In his declaration, Miller avers that neither the parties to the administrative proceedings nor the Tax Commission itself "ever indicated that, for purposes of determining the assessed value of the properties in question, a lease with a fixed term until 2051 was in any way materially different from a lease providing the lessee with options to extend until 2051." See Miller Decl., ¶ 6. Miller further avers that UPCM's references to a "50-year lease" during the administrative proceedings were "intended and simply encompassed the assumption, for purposes of valuing the land in the Tax Commission proceedings, that [the Park City Parties] would adhere to the terms, conditions and provisions of the leases including taking all required future actions to extend the leases in accordance with their terms." Id. at ¶ 8. Miller's declaration is unrebutted by the [PCMR] Parties, and no Rule 56(f) affidavit has been filed. Accordingly, the Court will consider, and credit, Miller's testimony for purposes of adjudicating the [PCMR] Parties' Summary Judgment Motion. However, the Court does not believe consideration of the Miller Declaration is proper for purposes of adjudicating the Talisker [Landlord] Parties' Motion to Dismiss, and therefore does not consider that declaration for purposes of the Motion to Dismiss.
>
> After careful review of the Tax Commission record (and, for purposes of the Summary Judgment Motion, the Miller Declaration), the Court is convinced that the statements made by UPCM during the administrative proceedings are not inconsistent with the position advanced by the Talisker [Landlord] Parties in this case. The distinction between a lease with one 80-year term and a lease with four 20-year renewable options was simply not in any way relevant or material to the matters before the Tax Commission. Moreover, the Tax Commission was fully aware of the terms of the Leases, and knew from both reviewing the Leases themselves as well as from discussion by UPCM and Summit County that the Leases contained four 20-year renewable options. There is simply no inconsistency.

See Nov. 2012 Mem. Dec. and Order, at 21-26.

2009-2011 Discussions Regarding Improvements

51. Between 2009 and 2011, representatives of the PCMR Parties and representatives of the Talisker Landlord Parties engaged in a series of discussions regarding potential improvements that could affect both PCMR and Canyons, including (but not limited to) a potential interconnect between the two resorts. During these discussions, the subject of the Leases never came up

directly. That is, neither side said anything to the other about the current lease term expiring in 2011, and both sides appeared to take for granted, without specific discussion, that PCMR would indeed extend the Leases beyond 2011. See Talisker Landlord Parties' Memo. in Supp. Of Mot. for Summ. J. on Plaintiffs' Equitable and Nondisclosure Claims, at 13 ¶ 16 (citing deposition testimony); see also PCMR Parties' Opp. to Mot. for Summ. J. on Plaintiffs' Equitable and Nondisclosure Claims, at 38-40 ¶¶ 99-103 (citing depositions and stating, in ¶ 100, that during these interconnect discussions "neither side said anything about the Leases expiring in 2011").

52. These discussions by definition were regarding improvements that would, in the main, not be put in place until after 2011. For instance, a draft agreement regarding the interconnect contemplated that the resorts would complete certain improvements in time for the 2012 ski season, and one iteration of the draft agreement contained a term of 999 years.

53. However, at no point during these discussions did the subject of the Leases ever come up directly. Certainly, there is no evidence that the Talisker [Landlord] Parties ever made any direct statement to the PCMR Parties, in the context of these discussions, that the PCMR Parties did not need to send written notice of their intent to extend the Leases beyond 2011.

54. Indeed, even speaking more generally, and not limited to the context of the interconnect discussions, the PCMR Parties have admitted that "no representative of [the Talisker Landlord Parties] made an express statement or representation to [the PCMR Parties] that the Leases would be extended past April 30, 2011 without written notice" as per the Leases. See Responses to Requests for Admission (Paikin Decl., Exh. 40), at 8. The PCMR Parties reiterated this admission at oral argument. See Transcript of April 3 Hearing, at 104 (PCMR Parties' counsel stating that "there's no evidence that Talisker said, 'Hey, you know that notice provision in the contract, don't bother complying with it'").

55. Both John Cumming and Ian Cumming testified at deposition that they each understood that the PCMR Parties were required to take at least some affirmative step in order to

extend the Leases beyond 2011. See J. Cumming Depo. (Paikin Decl., Exh. 49), at 42-43; I. Cumming Depo. (Paikin Decl., Exh. 48), at 18-19, 25.

Powdr Corp. Financial Statements

56. GPCC's parent corporation, Powdr Corp., retains an independent accounting firm to prepare and audit periodic financial statements for the company, and thereafter disseminates those statements to its Board of Directors and its shareholders. Before they are finalized, they are reviewed by Powdr Corp.'s Chief Financial Officer.

57. In the statements for the year ending May 31, 2008, Powdr Corp. reported that "GPCC has the option to extend the Resort Area Lease for periods of 20 years with the current option period expiring January 1, 2011." See 2008 Financials (Paikin Decl., Exh. 13), at 19.

58. In the statements for the year ending May 31, 2009, Powdr Corp. again stated that "GPCC has the option to extend the Resort Area Lease for periods of 20 years with the current option period expiring January 1, 2011," but added an additional statement that "[m]anagement expects that [UPCM], GPI, and PPI will renew this lease upon its expiration." See 2009 Financials (Paikin Decl., Exh. 14), at 19.

59. Identical language was included in the financial statements for the year ending May 31, 2010. See 2010 Financials (Paikin Decl., Exh. 15), at 17 (stating that "GPCC has the option to extend the Resort Area Lease for periods of 20 years with the current option period expiring January 1, 2011," and that "[m]anagement expects that [UPCM], GPI, and PPI will renew this lease upon its expiration").

60. When asked about these financial statements at his deposition, PCMR's John Cumming testified that he shared management's expectation that the Leases would be renewed upon their expiration. See J. Cumming Depo., at 47.

The Events of 2011

61. As this Court has already ruled in its November 20, 2012 ruling, under the unambiguous terms of the Leases, in order to affirmatively extend the Leases according to their terms, the PCMR Parties were obligated to send written notice to the Talisker Landlord Parties on or before March 1, 2011.

62. March 1, 2011 came and went without any written notice being sent.

63. On April 29, 2011—the very day before the 20-year "First Extension" of the Leases was to expire and 60 days after written notice to extend was due—Powdr Corp.'s Vice President of Finance, Elizabeth Paul, was preparing loan documents in connection with Powdr Corp.'s bank financing arrangement and ran across some language in previous loan documents stating that the Leases expired on "January 1, 2011." Understandably concerned, Paul emailed Jenni Smith to ask about this language she had discovered. See Talisker Landlord Parties' Memo. in Supp. of Mot. for Summ. J. on Plaintiffs' Equitable and Nondisclosure Claims, at 21 ¶ 34 (citing emails); see also PCMR Parties' Resp. to Talisker's Statement of Undisputed Facts (attached as Appendix A to their Opp. to Mot. for Summ. J. on Plaintiffs' Equitable and Nondisclosure Claims), at ¶ 34.

64. Smith responded quickly, stating that "I'm not really sure where the dates came from," and telling Paul that she needed to check with legal counsel. Smith then contacted GPCC's attorneys in Los Angeles, who then set up meetings with various individuals in management of PCMR. Ultimately, both counsel as well as various members of PCMR's management team spent many hours on Friday, April 29 and Saturday, April 30 looking through documents for evidence that an extension letter had been sent. Counsel flew from Los Angeles to Utah on Sunday, May 1 to continue the search and to meet in person with PCMR management. Ultimately, the search proved unfruitful—they were never able to uncover any written notice of extension of the Leases beyond 2011 because none had been sent prior to May 2, 2011. See Talisker Landlord Parties' Memo. in Supp. of Mot. for Summ. J. on Plaintiffs' Equitable and Nondisclosure Claims, at 21-23

¶¶ 35-38 (citing emails); see also PCMR Parties' Resp. to Talisker's Statement of Undisputed Facts (attached as Appendix A to their Opp. to Mot. for Summ. J. on Plaintiffs' Equitable and Nondisclosure Claims), at ¶¶ 35-38.

65. Various members of PCMR's management team have different explanations for why no lease extension letter was ever sent. Former Powdr Corp. CFO Rick DesVaux testified that he was aware of the necessity of sending a lease extension letter and, indeed, had set a reminder on his Outlook calendar to send such a letter but, alas, he was terminated in 2008 before any such letter was sent. See DesVaux Depo. (Paikin Decl., Exh. 51), at 6-7, 13-14, 17-19, 26-28. Then-current CFO Jennifer Botter testified that she believed that the Leases extended automatically, and that no affirmative act was necessary to effectuate the extension. See Botter Depo. (Paikin Decl., Exh. 45), at 29, 69, 78-79. And Jenni Smith testified that she believed, for various reasons, that the Leases had already been extended beyond 2011 and that nothing more needed to affirmatively be done to effectuate the extension. See Smith Depo. (Zimmerman Decl., Exh. 8), at 36.

66. As noted above, John Cumming (as well as his father Ian Cumming) believed that some affirmative act needed to be taken in order to effectuate the extension, but John Cumming considered any such act a "technicality" and apparently failed to delegate that task to any particular individual. See J. Cumming Depo. (Paikin Decl., Exh. 49), at 42-43, 60, 65-66; see also PCMR Parties' Br. in Supp. Mot. Reconsider, at 31 ¶ 80 (stating that "GPCC did not have a tickler system to keep track of whether or when the Leases needed to be renewed"). Indeed, John Cumming stated that "I run this business. Ultimately I'm responsible . . . . And I have chosen not to try to pin the tail on the donkey . . . . So the miss has been pinned squarely on me." See J. Cumming Depo. at 65-66.

67. After finally determining that no renewal letter had been sent, PCMR's management team gathered for a meeting on the morning of Monday, May 2, 2011. At this meeting, the decision was made to send a confirmation letter. The letter was created that day, May 2. After

various edits were made by various people, the letter was finalized, signed, and sent that same day. See April 30/May 2 Letter (Paikin Decl., Exh. 22). Somehow, the letter ended up bearing the date of April 30, 2011 rather than the date of May 2, 2011, although no witness has, as of yet, been able to provide any explanation for the incorrect date.

68. The letter is captioned "Notice Confirming Extension of [the Leases]," and purports to be "written notice confirming that [the Leases] have been extended through April 30, 2031." Nowhere in the letter is there any assertion that written notice may not have been required because the Talisker Landlord Parties may have waived their right to require written notice.

69. The letter was sent to the attention of Kaylene Kotter, who had previously been GPCC's contact person at UPCM for communications regarding the Leases. However, unbeknownst to the PCMR Parties, Kotter had left the employ of the Talisker Landlord Parties in 2010. The letter was received by the Talisker Landlord Parties no later than May 4, 2011 (indeed, it was stamped "received" on May 4, see Letter (Zimmerman Decl., Exh. 79)), but because Kotter was no longer employed there, the letter apparently did not catch anyone's attention.

70. In July 2011, the PCMR Parties sent a rent check to the Talisker Landlord Parties for rent payable for the 2010-2011 ski season (the season just ended). Talisker received the check and cashed it, in keeping with the provisions in the Leases (as well as the Parties' longtime practice) allowing GPCC to pay rent *after* the relevant season had ended. This payment was a lease payment in arrears, paid after the conclusion of the season for which the rent is due.

71. Over the course of the summer of 2011, the PCMR Parties made certain capital improvements to the PCMR premises, including some improvements on the Resort Lands. The decisions about which improvements to make in any particular summer were made at least several months earlier, but the actual improvements were not made until the summer of 2011. See Talisker Landlord Parties' Memo. in Supp. of Mot. for Summ. J. on Plaintiffs' Equitable and Nondisclosure Claims, at 28 ¶ 51 (citing deposition testimony); see also PCMR Parties' Resp. to

Talisker's Statement of Undisputed Facts (attached as Appendix A to their Opp. to Mot. for Summ. J. on Plaintiffs' Equitable and Nondisclosure Claims), at ¶ 51.

72. Indeed, on July 19, 2011 PCMR issued a press release announcing that it would invest some $7 million in improvements into the resort during the summer of 2011, including adding and replacing lifts, and adding snowmaking and grooming equipment. See Press Release (Paikin Decl., Exh. 31). Some (but not all) of these improvements were to take place on the Resort Lands, see id. (describing some of the improvements as occurring "near the Resort Base Area," including the installation of a new "dedicated beginner learning area" and "replacement of the 3 Kings Lift"), and all of them were scheduled to be completed prior to the opening of the 2011-2012 ski season. The PCMR Parties proceeded with these plans as scheduled, and completed these improvements, spending some $7 million on all of the 2011 improvements combined.

73. Also over the course of the summer of 2011, Talisker and GPCC representatives continued periodic meetings to discuss the potential interconnect proposal regarding their respective resorts. At no point during any of these meetings during the summer of 2011 did anyone from either side bring up the Leases. That is, during these discussions no one from the PCMR side mentioned the April 30/May 2 letter and the associated renewal issue, and no one from the Talisker side mentioned the issue of the Leases having expired or needing to be renewed. See, e.g., May 5, 2011 Memo. (Paikin Decl., Exh. 26), at 2 (stating that Talisker's Bistricer had a conversation with PCMR's Cumming on May 2, 2011, during which conversation Cumming did not mention the letter being sent that day, see Cumming Depo., at 75); see also Email dated May 19, 2011 (Zimmerman Decl., Exh. 82) (Bistricer writing to Cumming, discussing an upcoming meeting to discuss issues common to both resorts, and stating that it "[s]hould be fun to create something together and we all look forward to working together with you guys").

74. Despite the Talisker Landlord Parties' actual receipt of the letter no later than May 4, 2011, it was not until the late fall of 2011 that any particular employee of the Talisker Landlord

Parties came to the realization that the PCMR Parties had failed to strictly comply with the Leases' renewal provisions. Apparently the Talisker Landlord Parties (like the PCMR Parties) did not have any employee specifically responsible for tracking whether a lease renewal notice was sent. See Bistricer Depo., at 61.

75. On November 3, 2011, certain Talisker employees discussed the Leases and emailed copies of them to each other, but even at this point the metaphorical light bulb above Talisker's head does not appear to have fully illuminated yet. In late December 2011, however, Talisker's Jack Bistricer had a conversation with PCMR's John Cumming, and certain words and phrases used by Cumming during that conversation piqued Bistricer's interest, and the next day he began to investigate issues related to the leases and, at that point, discovered that no written extension had been sent. See id. at 55-56.

76. On December 30, 2011, the Talisker Landlord Parties sent a letter to the PCMR Parties for the first time expressing their view that the Leases had not been extended beyond April 30, 2011. See December 30, 2011 Letter (Paikin Decl., Exh. 35).

77. On January 9, 2012, Powdr Corp. CFO Botter sent a letter to counsel for the Talisker Landlord Parties, indicating the PCMR Parties' view (at that time, at least) that the Leases had automatically extended, and referencing the automatic extension provision in the Sublease. See Letter dated January 9, 2012 (Paikin Decl., Exh. 37), at 1.

78. Over the course of the next few months, the PCMR Parties and the Talisker Landlord Parties engaged in certain discussions and letter exchanges in which they explored, to one degree or another, possible resolutions to the issues surrounding extension of the Leases. This back-and-forth was set out in some detail in the Court's Ruling and Order dated Nov. 22, 2013.

79. The Parties were ultimately unable to come to a mutually acceptable resolution, and the PCMR Parties filed this lawsuit in March 2012.

More Recent Events Regarding Occupancy of the Resort Lands

80. At all times since the letter was sent, the PCMR Parties have remained on the Resort Lands and have continued to operate PCMR. In April 2012, one month after the filing of this lawsuit, the Talisker Landlord Parties sent a letter to the PCMR Parties clarifying the Talisker Landlord Parties' position that they had allowed the PCMR Parties to remain on the land through April 30, 2012 as an "allowance period," and informing the PCMR Parties that the "allowance period" will terminate on April 30, 2012 and "any right you may have currently to occupy and possess the premises will end at that time." Furthermore, the Talisker Landlord Parties told the PCMR Parties that "[i]f you do not leave the premises, you will be a tenant at will beginning May 1, 2012," and communicated an expectation that, if the PCMR Parties chose to remain on the land, they pay a significantly higher rent amount and "comply with and honor all provisions of the expired Leases not inconsistent with the terms" set forth in the letter (including heightened rent). If these conditions were met, the Talisker Landlord Parties stated that they "will not seek to evict you from the premises before May 1, 2013." See April 12, 2012 Letter (Zimmerman Decl., Exh 14), at 1-2.

81. In the summer of 2012, the PCMR Parties actually cut a rent payment for the past 2011-2012 season, calculating the rent using the lower rate specified in the Leases (as opposed to the higher rate specified in the April 2012 letter), and tendered that payment to the Talisker Landlord Parties. However, the Talisker Parties refused to accept that rent payment, apparently in the belief that it was insufficient.

82. On March 29, 2013, the Talisker Landlord Parties sent a letter to the PCMR Parties, asking them again to pay higher rent, and stating that if the PCMR Parties did not agree to higher rent, "then you may not be able to remain on the Resort Lands beyond April 30, 2013. We have no present intention to move for immediate possession of the Resort Lands. If and when we decide to do so in the future—a right we reserve, for all purposes—we will provide you all notice that is appropriate and due under law." See March 29, 2013 Letter (Zimmerman Decl., Exh. 15), at 2.

83. The PCMR Parties remained on the Resort Lands thereafter and, in the summer of 2013, again tendered rent for the recently-ended season calculated according to the original Leases. The Talisker Landlord Parties again refused to accept that rent payment.

84. On August 28, 2013, the Talisker Parties served the PCMR Parties with a Five Day Notice to Quit, pursuant to Utah's unlawful detainer statute. In a cover letter accompanying the notice, the Talisker Landlord Parties stated that "[d]espite our belief that the leases expired over two years ago, we have allowed you to remain on the property." See August 28, 2013 Letter (Zimmerman Decl., Exh. 21), at 1.

85. Despite the service of this notice in August 2013, the Talisker Landlord Parties did not immediately take any further action aimed at obtaining occupancy of the Resort Lands. Indeed, it was not until March 14, 2014 that the Talisker Landlord Parties filed any motion related to efforts to obtain occupancy of the Resort Lands. That motion is still pending, awaiting, *inter alia*, the outcome of the motions discussed herein.

Facts Regarding Involvement of Flera

86. In or about 2009, the Talisker Parties were looking for additional capital, and entered into discussions with Flera, a special-purpose limited liability company formed by investors in 2009 specifically to facilitate a preferred equity investment in Talisker Canyons Finance Co.

87. At the time of Flera's investments, Talisker Canyons Finance Co. had many assets, including (a) the real estate development rights associated with Canyons ski resort; (b) Canyons ski resort operations; and (c) the Waldorf Astoria hotel.

88. Talisker Canyons Finance Co. was also the second-tier corporate parent (or corporate grandparent) of TLH, the owner of the Resort Lands. Given the relatively small rent payments then being made under the Leases, the Resort Lands were not a lucrative part of Talisker Canyons Finance Co.'s overall asset portfolio, accounting for only about 0.5% of its total revenues at the time of the initial Flera investment. Indeed, Flera asserts that the Talisker

Landlord Parties' interest in the Resort Lands was not a material factor in its decision to invest. See Affidavit of Jeffrey R. Thuringer, at ¶ 12.

89. Flera's objective was to obtain a preferred return within a short time window of three to five years, after which Flera planned to exit the investment.

90. Initially, Flera invested $145 million in Talisker (later infusing additional funds, for a total of $230 million). Flera's investment in Talisker (and related events described herein) is referred to herein as "the Flera Transaction." In exchange, Flera became one of only two members of Talisker Canyons Finance Co. (the other being TCFC Holding Co., denominated "the Talisker Member" of Talisker Canyons Finance Co.). As its capital contribution, TCFC Holding Co. was "deemed" to have contributed all of its property (and property owned by its subsidiaries) to the endeavor, including the Resort Lands (owned by its corporate grandchild).

91. However, despite this "deemed" capital contribution, the Resort Lands continued, and still continue, to actually be owned at all relevant times by the same entity they had been owned by since 2004: TLH.

92. As part of this large equity investment, Flera obtained significant rights regarding control of Talisker Canyons Finance Co., TLH's corporate grandparent. Although (from 2010 through June 2013) the "Talisker Member" retained day-to-day management responsibility over Talisker Canyons Finance Co., Flera from the outset had veto power over the Talisker Member's ability to "appoint, employ or contract with any of its Affiliates for the transaction of business in connection with . . . the Property," including the Resort Lands, and the Talisker Member could not "extend, amend, terminate or otherwise modify any existing agreement" concerning Talisker's property without Flera's prior consent. See TCFC Second Operating Agreement (Zimmerman Decl., Exh. 23), at § 4.1(b). Flera also gained veto power over certain "Major Decisions," including "the adoption of any material governance documents affecting the Property" and "the disposition by sale or lease of all or any material portion of the Property," including the Resort Lands. Id. at §

4.5(c), (o). One application of these control provisions was that Talisker needed to seek Flera's approval before consummating its 2013 transaction with Vail Resorts.

93. In June 2013, after an arbitrator concluded that Talisker had violated certain "Bad Boy Acts" provisions in the TCFC Operating Agreement, Flera's degree of control over Talisker Canyons Finance Co. grew still larger. At that time, Flera became the day-to-day manager of Talisker Canyons Finance Co., and caused the company to be renamed "TCFC." Also, after June 2013, the Talisker Member of TCFC no longer has a veto right as to the "disposition by sale or lease of" the property of TCFC or its subsidiaries, including the Resort Lands owned by TLH, meaning that Flera now has the right to sell the property of TCFC and its wholly-owned subsidiaries without the consent of the Talisker Member.

94. The Talisker Member, however, still retains its financial interest in TCFC, as well as a veto right with regard to certain other "Major Decisions." And the Resort Lands continue to be owned by TCFC's corporate grandchild, TLH.

Facts Regarding the Vail Transaction

95. In August 2012, Vail Resorts' CEO Robert Katz sent his first emails to Talisker's Jack Bistricer inquiring about the possible acquisition or lease of Canyons Resort, and also possible acquisition or lease of the Resort Lands. Over the course of the fall of 2012, Katz and Bistricer continued to explore the notion of Vail's involvement. Katz was interested in either a purchase or a long-term lease. Bistricer, however, made it clear to Katz that he was not interested in selling, but that he would potentially be interested in working out the terms of a long-term lease. <u>See</u> Bistricer Depo. (Paikin Decl., Exh. 28), at 35, 167-68, 193.

96. Katz also explained to Bistricer that Vail would require, as a component of any transaction, full rights to control the ongoing litigation with the PCMR Parties (that is, this lawsuit).

97. After months of negotiation, Talisker and Vail (through VRCPC) consummated their transaction in a series of agreements executed in May 2013. Herein, this transaction is referred to

as "the Vail Transaction." Under the terms of the agreements, VRCPC obtained an immediate long-term leasehold interest in the Canyons Resort property, with the possibility, in the event that the Talisker Parties prevail in this lawsuit, of adding the Resort Lands to that lease. The lease has a fifty-year term, along with six fifty-year renewal periods that will take effect automatically unless affirmative opt-out actions are taken, meaning that if all renewal periods are exercised the lease could last as long as 350 years.

98. As part of the Vail Transaction, a new Talisker entity was created, known as Talisker Land Resolution ("TLR"). This new entity was formed in order to afford Vail a mechanism through which to exercise control over this litigation and thereby protect its contingent interest in the Resort Lands. As set up as part of the May 2013 transaction, TLR became the new corporate parent of TLH, which entity continued (and continues) to own the Resort Lands. Following the May 2013 transaction, TLR owns 100% of the equity in, and is the sole member of, TLH.

99. TLR has two members, a Talisker Member and a Vail Member, although the Vail Member has no actual ownership interest in TLR. VRCPC is the Vail Member. Each member has the right to appoint one manager to TLR's Board of Managers. This setup gives VRCPC veto power over certain management decisions of TLR, including management decisions regarding the Resort Lands and regarding this litigation.

100. For the time being, Vail's lease expressly excludes the Resort Lands, and for now includes only the lands associated with Canyons Resort. However, under the terms of the May 2013 transaction, if the Talisker Parties prevail in this litigation and succeed in ousting the PCMR Parties from the Resort Lands, VRCPC will at that point become the new tenant on the Resort Lands. Conversely, if the PCMR Parties prevail herein, VRCPC will not immediately become the new tenant on the Resort Lands, but will have to wait to assume its tenancy until after the PCMR Parties' lease rights expire. However, even under this scenario, Talisker may elect to assign to VRCPC the right to receive any rents paid by the PCMR Parties until their lease rights expire.

DISCUSSION

I. THE MOTION FOR RECONSIDERATION

The Court will first discuss the PCMR Parties' Motion for Reconsideration. As noted above, the PCMR Parties have asked the Court to reconsider its earlier decision to apply the Geisdorf[4] line of cases to the facts of this case, arguing that the facts of this case are sufficiently different from the facts presented in the Geisdorf cases as to make it inequitable to apply those cases here. For the reasons that follow, the Court is unpersuaded by the PCMR Parties' arguments, and therefore declines to alter its earlier decision that the Geisdorf cases apply squarely here.

As an initial matter, it is worth noting that motions to reconsider are not expressly authorized by the Utah Rules of Civil Procedure, and are disfavored in this state to the point of having been referred to by the Utah Supreme Court, in a true Western metaphor, as "the cheatgrass of the litigation landscape." See Shipman v. Evans, 2004 UT 44, ¶18 n.5, 100 P.3d 1151. Still, though these motions are disfavored on grounds of efficiency and judicial finality, courts do possess the authority to revisit non-final decisions at any time prior to final judgment. See IHC Health Servs. v. D&K Mgmt., Inc., 2008 UT 73, ¶27, 196 P.3d 588 (stating that, until final judgment is entered in a case, "reconsideration of an issue . . . is within the sound discretion of the district court"). There are a number of circumstances in which it may be appropriate for a trial court to revisit a prior non-final ruling, including circumstances where:

> (1) the matter is presented in a "different light" or under "different circumstances"; (2) there has been a change in the governing law; (3) a party offers new evidence; (4) "manifest injustice" will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.

---

[4] Herein, any reference to "the Geisdorf cases" means the following three cases: Geisdorf v. Doughty, 972 P.2d 67 (Utah 1998); Utah Coal and Lumber Restaurant, Inc. v. Outdoor Endeavors Unlimited, 2001 UT 100, 40 P.3d 581; and U.S. Realty 86 Associates v. Security Inv., Ltd., 2002 UT 14, 40 P.3d 586.

See Trembly v. Mrs. Fields' Cookies, 884 P.2d 1306, 1311 (Utah Ct. App. 1994). Although the PCMR Parties do not specify which of the Trembly scenarios they think are present here, the Court infers that the PCMR Parties are invoking (4) and (5): manifest injustice and court error.

A. The Geisdorf Cases Did Not Represent a Significant Change in the Law

The PCMR Parties' first argument, at least in their briefs (they made no mention of this argument during the April 3 hearing), is that the Geisdorf cases are each of relatively recent vintage, dating back only to 1998, and that these cases should not be applied here, where the Leases in question were entered into in 1975. The PCMR Parties argue that they are entitled to application, in this case, of the law as it was in 1975, which law the PCMR Parties assert is materially different from the law set forth in the Geisdorf cases. There are two infirmities with this particular argument.

First, this is not the way the Geisdorf cases themselves were decided. Each of those cases, including (by definition) Geisdorf itself, involved a lease that was entered into prior to the holding in Geisdorf having been announced. Yet, despite this, the holdings in those cases were not applied prospectively only—they were applied to the very leases at issue in those cases, all of which were entered into prior to Geisdorf. And this is hardly unusual: even in cases where a "judicial decision decisively changes the common law, the changed law generally applies retrospectively." See Van Dyke v. Chappell, 818 P.2d 1023, 1025 (Utah 1991). Thus, under generally-applicable principles of law, even if the Geisdorf cases can be said to constitute a material change in the common law, they should apply to this case, despite the fact that the Leases in question arose prior to the cases having been decided.

Second, and more fundamentally, the Geisdorf cases do not represent a significant change in the common law. In point of fact, Utah law has been remarkably consistent in this particular arena for over a century. As the Talisker Parties point out, Utah (and federal) appellate courts had been presented eleven separate times, prior to Geisdorf, with the question of whether strict compliance with lease renewal provisions was required under Utah law, and eleven times the answer was "yes." See Talisker Parties' Br. in Opp. Mot. Reconsider, at 4 & n.11 (citing to the cases set out here in the margin[5]).

Also, long prior to Geisdorf, the Utah Supreme Court had not only announced that strict compliance was necessary in lease extension cases, but had also held that there was only a small role for equity to play in such cases. On this point, the case of I.X.L. Furniture & Carpet Installment House v. Berets, 91 P. 279 (Utah 1907), is instructive. In that case, which bears significant similarities to this one, a furniture and carpet store leased its business premises from a landlord pursuant to a 2-year lease that began on December 1, 1904. The lease gave the tenant the unilateral right to extend the lease for an additional three years on the same terms and conditions; all the tenant had to do to exercise this extension option was to simply make a request to renew prior to the expiration of the initial 2-year lease term. Alas, however, the tenant forgot to make any such request prior to the expiration of the initial 2-year lease term, despite having made significant investments and improvements in the leased premises, and despite both sides being "fully aware" that the tenant "intended to continue said lease." Id. at 279. On December 3, 1906, either one or two days after expiration of the initial two-year lease term, the tenant finally remembered to make the renewal request. The Court first determined that the request was late, even if only by a day or two, and then rejected the tenant's argument that the "equities" of the situation required relief:

> [The tenant] attempted to avoid the consequences of a late request by setting up some alleged equities. There is, however, no equity in the facts pleaded, even if proved just as alleged, that would authorize any court to grant the relief prayed for. Courts have no right to disregard any provisions of a contract, or to save rights that are lost thereunder through the act of the party asking relief, unless it is made to appear that it would be unconscionable or clearly inequitable to do or not to do so.

[5] Kelsey v. Crowther, 27 P. 695 (Utah 1891), aff'd, 162 U.S. 404 (1896); Tilton v. Sterling & Coke Co., 77 P. 758 (Utah 1904); I.X.L. Furniture & Carpet Installment House v. Berets, 91 P. 279 (Utah 1907); Gibbs v. Morgan, 118 P.2d 128 (Utah 1941); Aiken v. Less Taylor Motor Co., 171 P.2d 676 (Utah 1946); Basler v. Warren, 159 F.2d 41 (10th Cir. 1947); Lincoln Land & Dev. Co. v. Thompson, 489 P.2d 426 (Utah 1971); Nance v. Schoonover, 521 P.2d 896 (Utah 1974); Equitable Realty, Inc. v. Nielson, 519 P.2d 243 (Utah 1974); J.R. Stone Co., Inc. v. Keate, 576 P.2d 1285 (Utah 1978); Nielson v. Droubay, 652 P.2d 1293 (Utah 1982); Upland Indus. Corp. v. Pac. Gamble Robinson Co., 684 P.2d 638 (Utah 1984).

> Nothing of that kind appears from the pleadings in this case. [The tenant] pleads nothing that would have prevented it from making the request at the proper time *except mere inadvertence*. . . . [The tenant] . . . cannot predicate any right to relief upon . . . the fact that at least two of the [landlord representatives] had knowledge, through conversations with [the tenant's] manager, that he intended to request a new lease available. A mere intention to make a request was not sufficient.

See I.X.L. Furniture, 91 P. at 283 (emphasis added).

Certainly, the Utah Supreme Court in the Geisdorf cases did not appear to believe that it was blazing a new trail. On the issue of whether strict or merely substantial compliance should be required in lease renewal cases, the Court stated that "[t]his court has previously held that 'when the optionee decides to exercise his option he must act unconditionally and precisely according to the terms of the option.'" See Geisdorf, 972 P.2d 67, 70 (Utah 1998) (citing Upland Indus. Corp., 684 P.2d at 640 (which had been quoting Williston on Contracts § 61D (3d ed. 1957)). The Geisdorf Court also cited favorably to I.X.L. Furniture. Id. at 73-74. And on the issue of equity's role in the process, the Court in Utah Coal stated that a broad role for equity would be "inconsistent with our prior case law," which the Court interpreted as "traditionally . . . limit[ing] the application of equity to cases of fraud, misrepresentation, duress, undue influence, mistake, and waiver." See Utah Coal, 2001 UT 100, ¶¶ 13, 16.

In the end, the Court is convinced that the Geisdorf cases did not represent a major departure or shift from previous legal pronouncements of the Utah Supreme Court. Rather, those cases simply provided additional clarity to a long line of Utah appellate case law indicating that strict compliance (rather than mere substantial compliance) is required to exercise a lease renewal option, and that there is but a limited role for the application of equity in that process, and that equity may not be invoked in cases where a deadline was missed through mere negligence. The principles announced in the Geisdorf cases do not, therefore, appear to be materially different from the legal principles extant in previous cases but, even to the extent that they are, those cases may fairly be applied to this case notwithstanding the fact that the Leases were created in the 1970s.

B. The Geisdorf Cases are Not Meaningfully Distinguishable from the Instant Case

The PCMR Parties' next argument—and the one they spent all of their time on during argument—is that the facts of this case are materially and significantly different from the facts of the typical lease case (such as Geisdorf, Utah Coal, and I.X.L. Furniture), and that these different facts render those typical lease cases inapposite and materially distinguishable. In essence, the PCMR Parties argue that the Geisdorf cases, and the rules set out therein, are meant to apply only to the typical landlord-tenant or storefront lease situation, where only two parties are involved and the property in question is easily let to a new tenant if the lease were to expire. The PCMR Parties assert that the situation presented here is materially different in two respects.

First, the PCMR Parties point out that the Leases in question were merely one small part of a complex, multi-party transaction engineered in 1975 to keep GPCC viable despite crippling debt, and argue that other parties besides GPCC and UPCM are (or were) dependent upon the Leases extending beyond 2011 in order to effectuate the purpose of that entire overall transaction. As part of that transaction, all parties involved (including creditors who had agreed to restructure debt obligations) agreed that the potential duration of the Leases needed to be extended beyond an additional 36 years (to an additional 76 years) in order to make sure there was sufficient time for the restructured debt to be repaid. The parties executed this desire by amending the Leases to give GPCC the right to exercise two additional 20-year renewal terms. As part of the same transaction, GPI and PPI were created as creditor-related entities that came to own the base facilities, and these entities were set up to receive a relatively large portion of the resort's revenue. The PCMR Parties point to all of this and assert that, under circumstances like this, it would be improper to apply the Geisdorf "strict compliance with no exception for negligence" rule.

The Court is not persuaded. Essentially, the PCMR Parties are arguing for the establishment of a "complex multi-party transaction" exception to the Geisdorf rule of strict compliance, and the Court sees multiple problems with this position. As an initial matter, there is not even a hint of such an exception in *any* of the rather abundant Utah case law on this subject. In cases dating back more than a century, and reaffirmed rather forcefully in the recent Geisdorf trilogy, the Utah Supreme Court has stated that a rule of strict compliance applies to all lease extension cases. If a broad and categorical exception for complex transactions is to be made to the Utah Supreme Court's rule, it should be that Court, and not this one, that creates it.[6] As things stand, this Court is bound by Geisdorf and the other lease extension cases, and must apply those cases as instructed.

More to the point, however, even if this Court were inclined to consider the creation of such an exception, this Court would be disinclined to do so on public policy grounds. Creation of an exception in complex transactions, while leaving no room for any such exception in cases involving smaller, less-sophisticated transactions, would seem to be exactly the wrong thing to do. Complex transactions, like the one consummated in 1975, usually are entered into by sophisticated parties who generally have sufficient resources to protect their interests by, for instance, hiring lawyers to scrutinize the transaction to ensure that it is in line with applicable law as well as with the parties' intentions. In this case, the 1975 transaction involved three major financial institutions and one major investor, as well as GPCC, UPCM, and Alpine Meadows of Tahoe, sophisticated companies in their own right. See Memo. of Agreement (Zimmerman Decl., Exh. 47), at 1, 25. These companies, and their attorneys, were perfectly capable of looking out for their own best interests and of making sure the documents were drafted correctly and in accordance with their collective intentions. These companies and their lawyers specifically elected to draft Leases that had four

---

[6] In this vein, the Court is struck by the similarity between the arguments made by the lessee in Utah Coal and the arguments made by the PCMR Parties here. In both instances, the same attorney was/is making the arguments, and in both instances the court was urged to adopt a standard derived from F.B. Fountain Co. v. Stein, 118 A. 47 (Conn. 1922), which standard envisioned a larger role for equity to play in the analysis. Compare Utah Coal, 2001 UT 100, ¶¶15-17 with PCMR Parties' Reply Br. in Supp. Mot. Reconsider, at 24-25 (both urging adoption of a three-factor test, with the factors being (1) the length of the delay in exercising the option, (2) the loss or prejudice to the lessor as a result of the delay, and (3) the hardship to the lessee). The Utah Supreme Court expressly refused to adopt that standard in Utah Coal, and the Court does not believe it prudent, especially in the face of that refusal, to adopt that standard here.

20-year extension terms, rather than one 80-year monolithic term, a decision that was made (according to the PCMR Parties' attorney at oral argument) to preserve flexibility *for GPCC*. See Transcript of April 3 Hearing, at 16-17. These companies and their lawyers, despite knowing that the duration of the Leases was a critical factor in making the deal work, specifically chose to make those 20-year extension terms exercisable by an affirmative act of renewal, rather than to make them automatically exercisable unless an affirmative opt-out action was taken. They chose these particular provisions, presumably, for good reason after consultation. Creation of an exception in cases involving large, complex, multi-party transactions would relieve sophisticated parties—precisely the ones who have at their disposal top-flight legal advice—from the consequences of their own negligence in failing to adhere to their own carefully-negotiated documents, while leaving apartment lessees and small storefront businesses without a similar avenue for relief. Viewed from a long-term perspective, creation of this sort of exception, in the name of equity, would be decidedly inequitable.[7]

Next, the PCMR Parties point to the involvement of Park City Municipal Corporation, and the way in which the entire mountain is set up, and argue that a less-strict approach should be taken here because the entire Park City community depends upon the PCMR base area being the gateway to recreation on the Resort Lands. The PCMR Parties point to the 1998 Development Agreement, the 2007 Annexation Agreement, and the deed restriction as evidence that all of the parties hereto, including the Talisker Landlord Parties, voluntarily submitted to a regulatory scheme that requires the Resort Lands to be operated in tandem with the PCMR base area. The arguments made by the PCMR Parties are energetically offered, but are ultimately unpersuasive.

As far as the Court can tell, there is no specific language anywhere in the Development Agreement, Annexation Agreement, or deed restriction that actually requires the Resort Lands to

---

[7] Moreover, such an exception would appear to be extremely difficult to manage, and would raise perplexing questions. What is a "large, complex, multi-party transaction"? Where would a court draw the line between a smaller transaction not worthy of exceptional relief, and a larger one that would be?

be operated in tandem with the PCMR base area. While the Court can certainly understand, from a community perspective, why such an outcome might be preferred, the Court cannot say that such an outcome is compelled by the language of any of the so-called "regulatory" documents to which the PCMR Parties refer. Even if this were the case, however, the Court simply does not see how any such requirement, set forth in municipal zoning-style documents, would compel the Court to relax the rules set forth in Geisdorf that would ordinarily govern lease extension disputes. Even if those documents did in fact require an "integrated" resort, and even if the Talisker Parties operated an "un-integrated" resort in putative violation of those documents, those documents might afford legal relief to an applicant at a zoning hearing or other proceeding. But the question of an applicant's entitlement to any such relief, under those separate documents, appears completely divorced from the question of whether to apply Geisdorf to the lease extension question.

In the end, the Court cannot escape the perception that the PCMR Parties are simply asking the Court to create a *sui generis* exception to the Geisdorf rule here given the "enormous public consequences" that may attach to this case. See Transcript of April 3 Hearing, at 44. It is a legal axiom that "hard cases make bad law," see Northern Securities Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting) (stating that "[g]reat cases, like hard cases, make bad law"), which is a clever way of saying that there may exist a temptation, in certain difficult cases, to make sympathetic exceptions to legal rules in one case that may prove unworkable or ill-advised in the long run over many cases. When these (or similar) arguments were raised by the PCMR Parties during briefing on the Motion to Dismiss, the Court disposed of them by stating that, while these facts "may require these parties to deal with one another differently, in negotiations or otherwise, than would [otherwise] occur," "the Court does not see any reason why [these facts] would require the Court to take a different *legal* analysis when examining the language of the Leases' renewal provisions." See Nov. 2012 Mem. Dec. and Order, at 13. Now, many months later and after reviewing additional briefing and materials, the Court remains convinced that its analysis was sound the first time around. The Geisdorf cases apply here with full force, and in this Court's view it would be inappropriate to create a "complex multi-party transaction" exception, or an "enormous public consequences" exception, to the rules laid down in Geisdorf. This Court must continue to "resist any temptation to ignore legal principles simply because this case might seem weightier than many others." Id. at 46. For all of these reasons, even after reconsideration, the Court respectfully declines to alter its earlier decision to apply the Geisdorf cases to this one. The PCMR Parties' Motion for Reconsideration is DENIED.

II. THE MOTIONS FOR SUMMARY JUDGMENT

The other seven motions at issue here are all Motions for Summary Judgment. Utah R. Civ. P. 56 provides that summary judgment should only be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). The party moving for summary judgment "must make an initial showing that he is entitled to judgment and that there is no genuine issue of material fact that would preclude summary judgment in his favor," and if he does so, "the burden then shifts to the nonmoving party to show that there is a genuine issue of material fact or a deficiency with the moving party's legal theory that would preclude summary judgment." See Jones & Trevor Mktg., Inc. v. Lowry, 2012 UT 39, ¶29, 284 P.3d 630.

A. The Talisker Landlord Parties' Motion for Summary Judgment on Plaintiffs' Equitable and Nondisclosure Claims

The Court will next address the Motion for Summary Judgment on Plaintiffs' Equitable and Nondisclosure Claims, filed by the Talisker Landlord Parties. By that motion, the Talisker Landlord Parties seek summary dismissal of the PCMR Parties' first and third causes of action—those two claims left alive following the Court's November 2012 ruling. Because the analysis regarding each cause of action differs, the Court will discuss each in turn.

1. Summary Judgment is Appropriate on the PCMR Parties' Equitable Claims.

The claims at issue here are set forth in Subparagraphs 42(e) through 42(g) of the PCMR Parties' operative Complaint.[8] There, the PCMR Parties claim that the Talisker Landlord Parties either waived their right to claim, or are equitably estopped from claiming, that the Leases have expired. As the Court summarized in its November 2012 ruling, the PCMR Parties claim that the Talisker Landlord Parties made certain communications, both to them directly as well as to others, indicating that the Leases would continue through 2051 and that, because of these communications, the PCMR Parties were relieved of their contractual obligation to provide written notice of their intention to renew the Leases beyond 2011. See Nov. 2012 Mem. Dec. and Order, at 31. At the Motion to Dismiss stage, the Court found the allegations, despite their non-specific nature, to be sufficient to survive a Rule 12 motion. However, the Court made the following observations regarding Geisdorf and its potential applicability to these issues later in the case, and set out a roadmap for the PCMR Parties to follow with regard to these claims:

> The Talisker [Landlord] Parties protest that the [PCMR] Parties' claims for waiver and equitable estoppel are barred by the Geisdorf line of cases. In Utah Coal and US Realty, the Utah Supreme Court made clear that, while principles of equity could potentially apply to excuse an optionee's failure to strictly comply with lease renewal provisions, equity's application is more limited in lease option renewal cases than in general run-of-the-mill cases. Indeed, in Geisdorf, the Utah Supreme Court stated that trial courts are "to be especially careful in their examination of the evidence in questions of waiver and option performances, especially where such waiver is merely implied," and that "courts should be cautious in finding implied waiver on the part of an optionor unless the totality of the circumstances demonstrates an unambiguous intent to waive the strict compliance required to exercise an option." See Geisdorf, 972 P.2d at 72. Later, the Utah Supreme Court clarified that it is not enough, in lease renewal cases, simply to show that the delay in the exercise of the option was slight, the loss to the lessor small, and that the lessee would suffer hardship. See Utah Coal, 2001 UT 100, ¶¶15-16. Rather, in lease option cases, the standards are stricter.

[8] In this Court's November 2012 ruling, these Subparagraphs are referred to as 32(e) through 32(g). With the filing of the Second Amended Complaint in September 2013, the PCMR Parties added ten paragraphs of additional allegations, making paragraph 32 of the First Amended Complaint read as paragraph 42 of the Second Amended Complaint.

> Where a lessee's failure to exercise an option to renew a lease in a timely manner is due to fraud, misrepresentation, duress, undue influence, mistake or the lessor's waiver of its right to receive notice, it would be oppressive and unjust to require strict compliance with the lease, and thus equity should be invoked. Conversely, equity should not be applied in situations where the lessee's negligence, inadvertence, or neglect caused the failure to exercise a lease renewal option.

See Utah Coal, 2001 UT 100, ¶14. In the end, the Court restricted the application of equity in lease renewal cases only to cases in which the lessee's failure to strictly comply "is caused by instances of fraud, misrepresentation, duress, undue influence, mistake, or the lessor's waiver of its right to receive notice." Id. at ¶18.[FN] The Court also went on to make clear that the term "mistake" does not include negligence, and that if the failure to renew was caused by the optionee's negligence, that is *not* a situation where principles of equity will intervene to aid the optionee. Id. at ¶¶19-20; see also US Realty, 2002 UT 14, ¶17. The Geisdorf cases, taken together, also indicate that the act of payment of rent after the lease expiration date will not, standing alone, be sufficient to invoke equity, even if that rent is accepted for a period of time by the lessor. See, e.g., Geisdorf, 972 P.2d at 68-69 (indicating that the lessee paid, and the lessor accepted, rent for several months, but that was not enough to invoke equity); US Realty, 2002 UT 14, ¶8 (same). Finally, the Geisdorf cases indicate that the lessor's "assumed knowledge of [the lessee's] intent to exercise the option does not work a waiver of the requirement," and that "a mere intention to make a request for a [renewed] lease was not sufficient, and a lessor's knowledge of that intent is not a sufficient basis for relief." See Geisdorf, 972 P.2d at 73-74.

[FN] Although the phrase "equitable estoppel" does not appear in Utah Coal's list of equitable remedies available in lease renewal cases, that doctrine is similar enough to "misrepresentation" and "waiver" for the Court to be satisfied that equitable estoppel is one of those situations that, if proven, could afford relief to an optionee.

Clearly, after discovery, in order to ultimately prevail on this equity claim, the PCMR Parties will need to show more than that they made a negligent mistake, and more than simply that they paid and the Talisker [Landlord] Parties accepted rent for some period of time after April 30, 2011. Certainly they will need to be more specific about the communications and "discussions" that they believe evidence a waiver on the part of the Talisker [Landlord] Parties. And they will need to show more than simply that the Talisker [Landlord] Parties knew that the PCMR Parties had an intent to exercise the option to renew. However, at this stage of the litigation, even taking into account the stricter standards for the application of equity that apply in lease renewal cases, the PCMR Parties have made allegations sufficient to survive the Motion to Dismiss.

See Nov. 2012 Mem. Dec. and Order, at 32-33.

Following the Court's November 2012 ruling, the parties proceeded to the discovery stage of the litigation. Many documents were requested and produced, and many depositions were taken. The discovery period ended in January 2014, and following the expiration of the discovery period, the Talisker Landlord Parties filed the current motion, seeking summary dismissal of these equitable claims. In the motion, the Talisker Landlord Parties maintain that the PCMR Parties have now had a full and complete opportunity to discover the facts, go through old files, talk to witnesses, and ask questions, and they assert that, even after all of this discovery, the PCMR Parties still cannot point to any concrete communications indicating that the Talisker Landlord Parties waived their right to require written notice of a lease extension, or that they otherwise should be equitably estopped from enforcing any such requirement.

And at the outset, the Talisker Landlord Parties' argument appears to have some force. Indeed, in their responses to Requests for Admission, the PCMR Parties admitted that "no representative of [the Talisker Landlord Parties] made an express statement or representation to [the PCMR Parties] that the Leases would be extended past April 30, 2011, without written notice as set forth" in the Leases. See Responses to Reqs. for Admission (Paikin Decl., Exh. 40), at 8; see also Transcript of April 3 Hearing, at 104 (PCMR counsel stating that "there's no evidence that Talisker said, 'Hey, you know that notice provision in the contract, don't bother complying with it'"). This admission is crucial, because it makes clear that there are no ***express*** statements, and that the PCMR Parties' arguments are based on communications that must be ***implied*** from conduct. With this in mind, the Court will proceed to examine the PCMR Parties' claims for waiver and equitable estoppel, and to analyze in that context the factual support that the PCMR Parties have been able to unearth to support their position.

a. *The Talisker Landlord Parties did not unambiguously waive their contractual right to require written notice of lease extension, or their right to claim that the Leases had expired.*

Under Utah law, "waiver" is "the intentional relinquishment of a known right." Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n, 857 P.2d 935, 939-40 (Utah 1993). A party seeking to show that another party made a waiver must show three elements: "(1) an existing right, benefit, or advantage; (2) knowledge of its existence; and (3) an intention to relinquish that right." Id. at 940. A waiver must be "distinctly made," although it may be either "express or implied." See IHC Health Servs., Inc. v. D&K Mgmt., Inc., 2003 UT 5, ¶7, 73 P.3d 320; see also Soter's, 857 P.2d at 941 (stating that the waiver must be "clearly intended"). Whether the elements of waiver exist in a particular case is to be determined from "the totality of the circumstances." Soter's, 857 P.2d at 942.

In cases involving lease extensions, the Geisdorf Court provided additional guidance to trial courts as to how they should approach waiver issues. Specifically, the Geisdorf Court instructed trial courts to exercise caution in cases where a lessee claims that the lessor *impliedly* waived its right to require written notice of lease extension:

> Since the performance of options requires a stricter standard than performance of bilateral contracts, it logically follows that a stricter standard is necessary for the waiver of option requirements than that which is required for waiver of bilateral contract provisions. In Soter's, this court held "that there is only one legal standard required to establish waiver under Utah law." Our position has not changed; we need not and do not go so far as to establish a separate and more rigorous "clear and convincing" standard with which to deal with option issues. Instead, we urge trial courts to be especially careful in their examination of the evidence in questions of waiver and option performances, *especially where such waiver is merely implied.* Further, courts should be cautious in finding implied waiver on the part of an optionor unless the totality of the circumstances demonstrates an unambiguous intent to waive the strict compliance required to exercise an option.

See Geisdorf, 972 P.2d at 72 (emphasis added) (citations omitted).

i. Even under the totality of the circumstances, there is insufficient evidence of any unambiguous waiver.

With this background, the Court's next task is to examine all of the statements, conduct, and communications the PCMR Parties have found that they think amounts to an implied waiver of the Talisker Landlord Parties' right to require written notice of lease extension. As near as the Court can tell, from information included in the PCMR Parties' briefing (specifically, the summaries included at pages 2-4 and 51 of the PCMR Parties' Opposition to the Talisker Landlord Parties' Motion for Summary Judgment on Plaintiff's Equitable and Nondisclosure Claims) as well as in two specific handouts passed up to the bench by the PCMR Parties' counsel at the April 3 hearing, what follows is a comprehensive list of the evidence the PCMR Parties have in their corner:

(a) Statements made by the Talisker Landlord Parties during the Tax Commission proceedings in or around 2003 (which statements are set forth in detail in the Court's November 2012 ruling, and excerpted above);

(b) Statements made during the municipal annexation process, including the following:

- the March 21, 2006 letter from J. Cumming to Bistricer, wherein Cumming states that "[w]e have determined that projecting differences out *over the next 45 years (the remaining lease term)* is not subject to reasonable estimation," and that "[i]f there were to be a conservation agreement that is acceptable to us we would also want to approve the local manager and a system for selecting his successors *over the remaining 45 years of the Lease*" (emphasis added);
- the July 21, 2006 letter from J. Cumming to Bistricer, wherein Cumming states that "[w]e're happy to assist you . . . but we need to make certain that it doesn't increase the cost of our joint operations *for the next 45 years as Landlord and Tenant*" (emphasis added);
- Bistricer's deposition testimony that he reviewed these letters from J. Cumming and didn't correct any of the statements therein about the term of the Leases, see Bistricer Depo., at 53;
- the December 19, 2006 letter from J. Cumming to Bistricer, wherein Cumming discusses his request for a "25 year lease extension [from 2051 to 2076]" and tells Bistricer that "you were the one who asked me to make a proposal regarding a Lease extension, which I did";
- the January 11, 2007 letter agreement, wherein Bistricer commits that, *"[f]or the next forty-five years (presuming the Lease renewal options are exercised and the Lease has not otherwise terminated)*, Talisker will reimburse PCMR for its net out-of-pocket increases in both property taxes and local fees and taxes resulting from the annexation" (emphasis added);
- vague and nonspecific "represent[ations]" made by unspecified Talisker representatives to Park City Municipal Corporation officials during the annexation process, to the effect that "the lease was for another 50 years," as described by Jenni Smith in her deposition, see J. Smith Depo., at 36-37, 80;

(c) Statements made by the Talisker Landlord Parties during long-term planning discussions between the parties, including discussions regarding interconnect:

- an October 2010 draft of a potential Connection Letter Agreement, drafted by Talisker, and stating that "The Canyons and PCMR will each be responsible for designing and constructing the chairlifts and ski trails leading to the Connection on our respective properties. We will each aim to complete the chair lifts and ski trails for the opening of the 2012 ski season. . . . The term of this letter agreement will commence as of the date hereof and *will expire on the passing of 999 years*" (Zimmerman Decl., Exh. 75, at 1, 9) (emphasis added);

- John Cumming deposition testimony, where Cumming stated that "I don't recall having specifically said 'Jack, we have – we intend to extend,' and/or 'We have extended.' But the context of our conversations clearly implied not just extension of these leases, but a very long-term relationship between the companies, which is something that I embrace, and embraced, and I thought was best for the community and for his company and mine," and that he and Bistricer had "discussion[s] about how old we were both going to be forty years down the road, and how this community was going to likely evolve, and the role that we would play," and stated that his impression was that everyone anticipated there would be a long-term relationship, see J. Cumming Depo., at 52-54;

- additional John Cumming deposition testimony where Cumming stated that when he and Bistricer "discussed the terms of an interconnect between the two resorts and the way that we would share pricing, he sent me proposals which were nine-hundred-year proposals. And we discussed those . . . proposals personally in groups and individually. And so the context was always quite clear. . . . [I]t was quite clear to me, and I believe to him, that the intent was we were going to renew and that we were going to be partners in the community for a very long time to come. There was no question in anybody's mind about that," id. at 55-56;

- the May 19, 2011 email (Zimmerman Decl., Exh. 82) in which Bistricer writes to John Cumming and mentions an upcoming meeting to discuss issues common to both resorts, and states that it "[s]hould be fun to create something together and we all look forward to working together with you guys," and Bistricer's related deposition testimony stating that he made no mention, either in this email or in the contemporaneous "forward-looking" discussions, of the Leases having already expired, see Bistricer Depo., at 120-22;

(d) the Talisker-commissioned unsigned appraisal (Supp. Zimmerman Decl., Exh. 91), performed sometime around the time of the annexation and deed restriction, wherein the appraiser states that "[t]he subject lands are under a long-term lease (extending to 2051) to [PCMR]," id. at 6-15, that "[t]he entire mountain is under an 80-year lease to PCMR (expiring in 2051)," id. at 6-22, and that "the existing lease . . . extends for another 44 years," id. at 6-23;

(e) the fact that the Talisker Landlord Parties accepted the rent check PCMR tendered in the summer of 2011, which was rent "in arrears" for the recently-concluded 2010-2011 ski season; and

(f) the fact that the Talisker Landlord Parties said nothing about the Leases having expired until the end of December 2011, some eight months after they expired and some ten months after written notice of extension was due.

After carefully considering the cited evidence in context and under the applicable legal standards, the Court is convinced that no reasonable jury could find, even considering all of this evidence together and in the "totality of the circumstances," see Geisdorf, 972 P.2d at 72, 73 & n.6, that this evidence "demonstrates an unambiguous intent" on the part of the Talisker Landlord Parties "to waive the strict compliance required to exercise an option," id. at 72.

Certainly, when analyzed separately, these pieces of evidence are each individually insufficient. For starters, with regard to the 2011 rent payment, applicable case law already instructs that payment of rent after the lease expiration date will not, standing alone, be sufficient to invoke equity, even if that rent is accepted for a period of time by the lessor. See, e.g., id. at 68-69 (indicating that the lessee paid, and the lessor accepted, rent for several months, but that was not enough to invoke equity); US Realty, 2002 UT 14, ¶8 (same). And in those cases, the proffered rent was actually for the period *after* the lease expired, which is notably different from the situation here, where the 2011 payment represented rent for the 2010-2011 ski season, which took place *before* the First Extension of the Leases expired. In this case, the Talisker Landlord Parties have not actually accepted any rent for any period of time *after* April 30, 2011; in fact, they have pointedly refused to accept the rent payments that GPCC has tendered for the 2011-12 and 2012-13 ski seasons. Thus, the PCMR Parties' 2011 rent payment is not helpful to them here.

Likewise, the fact that all parties, including the Talisker Landlord Parties, assumed that the PCMR Parties would renew the Leases (or had the intent to renew the Leases) is essentially irrelevant. See Geisdorf, 972 P.2d at 73-74 (stating that the lessor's "assumed knowledge of [the lessee's] intent to exercise the option does not work a waiver of the requirement," and that "a mere intention to make a request for a [renewed] lease was not sufficient, and a lessor's knowledge of that intent is not a sufficient basis for relief"); I.X.L. Furniture, 91 P. at 283 (stating that "the fact that at least two of the [landlord's representatives] had knowledge, through conversations with [the tenant's] manager, that [the tenant] intended to request a new lease available" was unhelpful to the tenant, because "[a] mere intention to make a request was not sufficient"). Despite this clear case law, the PCMR Parties persist in not only making the argument that their intent to renew should somehow relieve them from actually renewing, but in placing this argument front-and-center, at the top of their list of arguments. See PCMR Parties' Opp'n to Defs.' Mot. for Summ. J. on Equitable and Nondisclosure Claims, at 51. This argument is simply not a strong one, and is squarely foreclosed by applicable case law.

To be sure, all individuals and entities involved in this case assumed that the PCMR Parties would make the rational decision to extend the term of the Leases. After all, the annual rent payments were well below market, and under the Leases the decision to extend was entirely within the control of the PCMR Parties. In this context, the actions of the Talisker Landlord Parties in entering into discussions regarding future planning cannot reasonably be construed as a waiver of a specific contractual right. Rather, these actions are nothing more than a rational acknowledgment that PCMR controlled the situation through 2051, and that prudent long-term planning needed to account for the strong likelihood that the PCMR Parties would extend the Leases. Indeed, in Geisdorf the landlord had discussions with the tenant about long-term planning issues, some of which only would have mattered if the lease in question were extended, and there the Court rejected any argument that such discussions work a waiver of the right to require written notice. See Geisdorf, 972 P.2d at 73-74 (stating that "neither the discussion about the future payment schedule nor the consultation about painting the building provides distinct inferences to support an intent to waive written notice; myriad possible conclusions can be drawn from either instance"); see also Utah Coal, 2001 UT 100, ¶¶3, 19-20 (stating that the tenant had made significant and expensive improvements to the premises, to the point where the tenant would not recover that investment without extending the lease to its fullest, and that the landlord "knew of [the tenant's] financial need to take all three extensions," and later holding that equity would not excuse the tenant's failure to timely request the lease extension).

Next, as this Court has already explained in detail, the representations made by the Talisker Landlord Parties to the Tax Commission were simply made to demonstrate, in that context, that control of the Resort Lands was solely in the hands of the PCMR Parties through 2051. For purposes of the Tax Commission proceedings, whether the Leases had one 80-year monolithic term, or whether they had four 20-year renewable terms, was utterly irrelevant. Read in context, statements to the effect that the Leases were "long-term leases" that "run through 2051" cannot fairly be read to indicate a waiver of the Talisker Landlord Parties' contractual right to require each extension period to be invoked through written notice.

The same is true with regard to similar statements made in connection with the municipal annexation process in the mid-2000s. The fact that the Talisker Landlord Parties did not correct the PCMR Parties when they stated, in letters to the Talisker Landlord Parties, that the "remaining lease term" was "45 years" cannot fairly be read to work a specific waiver of the contractual right to require written renewal notice. This is especially true when the final letter agreement worked out between the parties with respect to tax burdens after annexation specifically stated that "for the next forty-five years (*presuming the Lease renewal options are exercised and the Lease has not otherwise terminated*), Talisker will reimburse PCMR for its net out-of-pocket increases in both property taxes and local fees and taxes resulting from the annexation" (emphasis added). Thus, the Talisker Landlord Parties took care to specify, in 2007, that they still considered the PCMR Parties to have the obligation to actually renew the Leases. Their 2010 statement that the Leases are "not expected to [expire] for decades" is completely consistent with this belief.

As for Jenni Smith's deposition testimony that the Talisker Landlord Parties made certain unspecified statements to Park City municipal officials to the effect that the lease was "for another 50 years," those statements are not only vague, nonspecific, and without proper foundation, but they constitute inadmissible hearsay. The best Smith can say, in this regard, is that she "think[s]" that the Leases "came up in a meeting with the city where the city was actually the ones who represented that they had been told by [UPCM], Talisker, that our lease was good for another 50 years." See J. Smith Depo., at 36-37. She nowhere provides any information about the identity of the Talisker official who said those things, or the identity of the municipal official who recounted this conversation. In any event, Smith is barred by the hearsay rule from testifying (at least when the testimony is offered, as here, for the truth of the matter asserted) as to what a municipal officer told her. See Utah R. Evid. 801(c); 802. And finally, even if such statements were somehow admissible, they still would not amount to evidence sufficient to work a waiver, because (as with the statements made before the Tax Commission) the alleged statements simply demonstrate the Talisker Landlord Parties' belief that the PCMR Parties would in fact exercise their right to continue to occupy the Resort Lands through 2051.[9]

Furthermore, the statements made in connection with the "interconnect" discussions in later years are no different than the statements made to the Tax Commission or during municipal annexation proceedings. These statements and discussions merely pointed toward a shared understanding and assumption that the PCMR Parties fully intended to exercise their renewal options, and that prudence required the two sides to engage in certain long-term planning discussions in light of this very likely eventuality. As noted above, Geisdorf precludes such long-term planning discussions, even when premised on a working assumption that the Leases will be renewed, from working a waiver of the landlord's contractual right to require written notice. See Geisdorf, 972 P.2d at 73-74.

Finally, the fact that the Talisker Landlord Parties apparently did not immediately realize that the Leases had not been properly renewed, and did not inform the PCMR Parties of their belief in that regard until December 2011, has no relevance to this claim (although it does have relevance to the nondisclosure claim, discussed below). As an initial matter, in order to invoke

[9] The same is true with regard to the appraisal commissioned by Talisker in or around 2007. There is no foundation for this document, given that it nowhere even bears the name of its author. But even if the document were admissible, it stands for nothing more than the proposition that the PCMR Parties had within their control the right to occupy the Resort Lands through 2051.

equity in lease extension cases, there must be a causal link between the landlord's actions (that constitute waiver and/or estoppel) and the tenant's failure to renew. See Utah Coal, 2001 UT 100, ¶19. This topic is discussed more fully below, but for present purposes it is important to note that, as a simple matter of chronology and logic, there can be no causal link between a failure to renew and any events that occurred *after* the renewal was due. If the renewal deadline has already passed, there is no longer any existing right to renew, and a moribund right to renew cannot be resurrected by later actions taken by the landlord after the expired deadline. See, e.g., Dyer v. Ryder Student Transp. Servs., Inc., 765 A.2d 858, 860-61 (R.I. 2001) (stating that a renewal right "could not be revived through the acceptance of a rental payment" after the expiration of the renewal right).[10]

Moreover, with regard to whether the Talisker Landlord Parties' late recognition of the fact that the Leases had expired is a factor that can give rise to equitable relief, the US Realty case is instructive. In that case, the tenant sent a letter attempting to invoke its right to extend its leases, but that letter was 45 days late. The landlord received the letter, but "placed [it] in a file without reading [it]." US Realty, 2002 UT 14, ¶7. After the letter was sent and received, the "parties continued to carry on business as normal" for the next three months. Id. at ¶8. Finally, the landlord came to the belated realization that the leases had not been properly extended, and at that point informed the tenant of its belief and "declared the leases terminated." Id. at ¶9. When the tenant later argued that this fact required the invocation of equity, the Court rejected that argument, stating that the landlord's "failure to insist on strict compliance until two weeks prior to the leases' expiration" does not "compel[] a distinct inference of an intent to waive timely written notice." Id. at ¶16.

[10] Of course, actions taken by a landlord after expiration of a renewal right can have other important legal implications, such as, for instance, supplying terms governing a holdover tenancy, giving rise to a fraudulent or negligent non-disclosure claim (as discussed herein more fully below), or even (in exceptional cases) giving rise to offer and acceptance with regard to the terms of a new lease arrangement. However, one thing that post-expiration actions—at least actions short of the landlord's actual agreement to reinstate the renewal—*cannot* do is revive a renewal right that has already expired.

Thus, considered separately, none of the individual statements amounts to an unambiguous waiver on the part of the Talisker Landlord Parties. But even considering these pieces of evidence together, rather than in isolation, as instructed by the Utah Supreme Court, this Court simply cannot reach the conclusion that, even so viewed, any reasonable factfinder could possibly find the totality of these circumstances sufficient to "demonstrate[] an unambiguous intent to waive the strict compliance required to exercise an option." See Geisdorf, 972 P.2d at 72; see also id. at 73 (stating that "[n]one of the events show distinct intent, nor can we accept the supposition that these events, individually manifesting indistinct intent, can suddenly and reasonably evince unambiguous intent when taken as a whole"). The PCMR Parties argue vigorously that, at the summary judgment stage, it would be inappropriate to grant the Talisker Landlord Parties' motion on this point because it is at least possible for a reasonable factfinder to draw all of the inferences in favor of the PCMR Parties and find for them. The Court disagrees.

It is indeed rare to have not one, but four, Utah Supreme Court cases (the Geisdorf trilogy, plus I.X.L. Furniture) more or less directly on point here, dating back more than a century with recent reaffirmation. These cases are not only instructive on the merits, but are also instructive procedurally, and in that regard these cases are not favorable to the PCMR Parties. In Geisdorf, Utah Coal, and I.X.L. Furniture, the court ultimately decided each case by determining that the facts set forth there were such that no reasonable factfinder could possibly find for the tenant. In I.X.L. Furniture, the district court "sustained the demurrer" of the landlord to the tenant's complaint for specific performance, see I.X.L. Furniture, 91 P. at 280, and the Utah Supreme Court affirmed, ultimately determining that on the facts alleged equity was inappropriate, id. at 283 (stating that "[t]here is . . . no equity in the facts pleaded, even if proved just as alleged, that would authorize any court to grant the relief prayed for"). In Geisdorf, the district court allowed the case to proceed to trial, where the jury found for the tenant on a substantial performance theory, and the Utah Supreme Court reversed, ultimately determining (with respect to the equity issue) that

> [a]fter careful consideration of these events, both individually and as a totality, we are led to conclude that they do not support the jury's finding of [the landlord's] intent to waive the written notice requirement of the Renewal Clause. None of the events show distinct intent, nor can we accept the supposition that these events, individually manifesting indistinct intent, can suddenly and reasonably evince unambiguous intent when taken as a whole.

See Geisdorf, 972 P.2d at 73. In this way, the Utah Supreme Court took the issue from the factfinder and made an implicit determination that the factfinder had acted unreasonably when it actually made the opposite finding. Finally, in Utah Coal, the district court on cross-motions for summary judgment entered summary judgment *for the tenant*, and the landlord appealed. The Utah Supreme Court reversed, determining that there was "no evidence to support a conclusion" that there had been the sort of mistake made for which equity should intervene. Utah Coal, 2001 UT 100, ¶20. The Court remanded the case for further proceedings, where the district court (this Court) declared the lease terminated on motion, and that decision was not further appealed. See Utah Coal, Third Dist. Ct., Summit County, Case No. 980600256 (March 18, 2002 Minute Entry declaring the lease terminated).

The Court is certainly mindful of Geisdorf's footnote 6, in which the Utah Supreme Court cautioned that "[t]here may be instances in which a number of ambiguous events, statements, or examples of conduct may show, in the totality of the circumstances, a distinct intent" to waive. However, in the end, after careful examination of the specific undisputed facts of this case—both individually and as a totality—and applicable binding precedent, the Court finds the conclusion inescapable that the Talisker Landlord Parties simply did not, at any point, manifest a distinct and unambiguous intent to waive their contractual right to require strict compliance, including written notice, with the renewal provisions of the Leases, and did not waive their right to claim that the Leases have expired. They certainly assumed, and perhaps even knew, that the PCMR Parties had every intention of exercising their rights to renew the Leases through 2051, and they took certain actions (e.g., long-term planning discussions) consistent with that belief. But in order to create even a factual question with regard to waiver, there needs to be something more concrete, something more unambiguous, pointing toward a specific waiver.[11] And despite full opportunity to conduct comprehensive discovery, the PCMR Parties cannot point to anything sufficiently specific or unambiguous to surmount the summary judgment hurdle on the issue of the existence of waiver.

ii. *Even if there were a waiver, there is insufficient evidence of a causal link between any waiver and the PCMR Parties' failure to renew.*

Moreover, even if there were evidence that the Talisker Landlord Parties had unambiguously waived their right to require written notice, the PCMR Parties would still have to demonstrate a causal link between any such waiver and their own failure to timely extend the Leases. See Utah Coal, 2001 UT 100, ¶19. Under the undisputed facts of this case, there is simply insufficient evidence of any such causal link.

The key members of PCMR's management team gave various reasons for the PCMR Parties' failure to provide timely written notice of their intent to extend the Leases. As noted above, Jennifer Botter testified that she believed that the Leases extended automatically, and that no affirmative act was necessary to effectuate the extension, and Jenni Smith testified that she believed, for various reasons, that the Leases had already been extended beyond 2011 and that nothing more needed to affirmatively be done to effectuate the extension. In the April 30/May 2 Letter itself, as well as in their January 9, 2012 letter to Talisker, the PCMR Parties steadfastly maintained Botter's position that the Leases extended automatically. In Powdr Corp.'s financial statements, however, the company proclaimed that "GPCC has the option to extend" the Leases beyond 2011 and that "management expects" that this option will be exercised. John Cumming described the PCMR Parties' failure to timely extend as a "miss," and even in their operative

[11] One example of a fact pattern that was held to constitute grounds for equitable relief is set forth in Nielson v. Droubay, 652 P.2d 1293 (Utah 1982). In that case, the tenant was planning to exercise its option on the last possible day to do so but, as fate would have it, on that day a fierce snowstorm arrived making travel, and thereby delivery of written notice, difficult (fax machines and email not yet having been invented). The tenant's attorney telephoned the landlord's agent and asked permission to exercise the option one day late given the weather, and the landlord's agent agreed that notice one day late would be acceptable. In that case, the court afforded relief to the tenant. Id. at 1297. Under those facts, the landlord can fairly be said to have waived its right to require strict compliance on the exact date in question. No similar facts exist here.

complaint on file with this Court, the PCMR Parties alleged that their failure to timely extend was an "honest mistake." See Second Amended Compl., at ¶ 42(f).

Even taking all of this at face value, what is missing is any contention that the PCMR Parties failed to send a written lease extension letter *because* they were led down the garden path by the Talisker Landlord Parties' action in making them believe that no such letter was necessary. If the Talisker Landlord Parties had made a waiver of their right to require written notice, and the PCMR Parties had actually relied on that waiver, then there would have been no reason for the circling of the wagons that occurred over the weekend of April 29-May 2, 2011. If this were the case, then when Elizabeth Paul discovered the language in the loan documents on April 29, and asked her superiors about it, the answer would have been something along the lines of "don't worry about it, we don't have to do anything, Talisker made it plain that we didn't need to send a letter." But discovery has now revealed, as a matter of undisputed fact, that this was emphatically *not* the answer Paul received. A party in actual reliance upon an assurance that no letter is necessary does not spend three days frantically searching for evidence of the existence of that letter.

The PCMR Parties rightfully point out that the question of "reasonable reliance" is usually one for the jury. See Conder v. A.L. Williams & Assocs., 739 P.2d 634, 638 (Utah Ct. App. 1987) (stating that "[r]easonable reliance must be considered with reference to the facts of each case, and is usually a question for the jury to determine"). But the issue here is not the reasonableness of the PCMR Parties' reliance, but whether there is evidence of any reliance at all. The best that the PCMR Parties can muster is a citation to Botter's deposition testimony, where she testified that the April 30/May 2 Letter "served a purpose to confirm an extension that I understood was automatic and that had already been gained verbally." See Botter Depo., at 52. However, Botter readily concedes that she had absolutely no personal interaction with anyone at Talisker, whether about the Leases or about anything else. Id. at 33 (Botter testifying that "I have never communicated directly with anyone at [UPCM] or Talisker"). Accordingly, Botter could not have been relying on anything communicated to her by Talisker.

The PCMR Parties also cite to the deposition testimony of John Cumming, who testified that "[b]efore the litigation, we thought everything had been renewed" based on "many discussions among the parties about how the resorts and the community could work together over very long periods of time to make for better experiences for guests in Summit County." See J. Cumming Depo., at 24-25. However, as already noted above, Cumming was not laboring under the illusion that no notice was required; indeed, he not only signed the January 2007 letter agreement that recognized that the PCMR Parties would still be required to renew the Leases, but he admitted that he knew, prior to 2011, that the PCMR Parties would be required to take "some action" to extend the Leases, even if he considered that action a "technicality." See id. at 42-43, 60; see also id. at 59 (stating that it would be "fair to say" that he "did not ever make a conscious decision . . . not to give written notice of the extension").

Simply put, there is no evidence pointing to any actual reliance whatsoever—reasonable or not—by the PCMR Parties upon any representation made to them by the Talisker Landlord Parties that they did not have to send written notice. The reasons for the PCMR Parties' failure to provide written notice are, on the undisputed facts, completely unrelated to any actions taken by the Talisker Landlord Parties. Although the PCMR Parties have continually resisted any characterization of their actions as "negligence," it appears clear, after review of the undisputed facts, that the PCMR Parties' failure to provide written notice was precisely the sort of negligent oversight that the Courts in both Utah Coal and I.X.L. Furniture found unworthy of equitable intervention. See Utah Coal, 2001 UT 100, ¶20 (finding no distinction between an "honest and justifiable mistake" and a "negligent act or omission," and stating that, in order to invoke the equitable doctrine of "mistake," much more than a negligent omission need be shown); I.X.L. Furniture, 91 P. at 283 (stating that there is "no equity in the facts pleaded" because the tenant "pleads nothing that would have prevented it from making the request at the proper time except mere inadvertence"). The absence of any causal link between any actions of Talisker and the PCMR Parties' failure to provide written notice provides an alternative ground for summary judgment with regard to the question of waiver.

b. *The Talisker Landlord Parties are not equitably estopped from requiring written notice of lease extension or from claiming that the Leases expired.*

Equitable estoppel is "a doctrine which precludes parties from asserting their rights where their actions or conduct render it inequitable to allow them to assert those rights." See Hunter v. Hunter, 669 P.2d 430, 432 (Utah 1983). The purpose of the doctrine "is to rescue from loss a party who has, without fault, been *deluded* into a course of action by the wrong or neglect of another." See Salt Lake City Corp. v. Big Ditch Irr. Co., 2011 UT 33, ¶40, 258 P.3d 539 (emphasis added). Generally, "application of equitable estoppel is reserved for instances of wrongdoing by the estopped party," and is a "disfavored remedy" that "should be applied rarely." Id. In order to prevail on a claim of equitable estoppel, a party must establish three elements: (1) there must be "a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted"; (2) there must be "reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act, or failure to act"; and (3) there must be "injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act or failure to act." Id. at ¶41.

The record evidence supporting the PCMR Parties' estoppel claim is identical to the evidence supporting their waiver claim. And, for the reasons set forth above and as explained more fully here, the PCMR Parties' estoppel claim founders on the first and second elements: inconsistent statements, and actual reliance. Because the analysis with regard to actual reliance is identical to the analysis set forth immediately above, in the waiver section, no further ink need be spilled on that point. The analysis immediately above demonstrates as a matter of law that, at least with regard to their failure to timely renew, the PCMR Parties were not "deluded into a course of action" by statements or actions undertaken by the Talisker Landlord Parties. See Big Ditch, 2011 UT 33, ¶40. With regard to inconsistency, however, some additional analysis is warranted.

In its November 2012 ruling, this Court explained in some detail how the statements made by the Talisker Landlord Parties before the Tax Commission—that the Leases were long-term leases that would be in effect for another 50 years—were not inconsistent with those same parties' later assertions that the Leases have now expired. In the Court's view, that same analysis continues to apply to the Tax Commission statements and, moreover, also applies to the other similar statements made in the course of the municipal annexation process and the interconnect discussions. These statements and discussions merely pointed toward a shared understanding and assumption that the PCMR Parties fully intended to exercise their renewal options, and that prudence required the two sides to engage in certain long-term planning discussions in light of this near-certain eventuality. Although the Court in Geisdorf was not analyzing "inconsistency" in the context of equitable estoppel, that Court did make clear that long-term planning discussions, even when premised on a working assumption that the Leases will be renewed, cannot constitute grounds for equitable relief. See Geisdorf, 972 P.2d at 73-74. In short, it was (and is) simply not inconsistent for the Talisker Landlord Parties, on the one hand, to engage in long-term planning discussions with municipal authorities and with the PCMR Parties themselves (even if the discussion topics assume that the Leases will be extended) while, on the other hand, nonetheless still maintaining their right to require written notice of lease extension as per the terms of the Leases. In order to demonstrate "inconsistency" for estoppel purposes, there would need to be something more specific on the part of the Talisker Landlord Parties indicating their willingness to forego their right to require strict compliance under the Leases. And nothing like that exists here.

In sum, then, equitable relief—especially equitable relief *implied* from circumstances—is to be awarded sparingly in cases involving lease extension options. The Utah Supreme Court has instructed trial courts to be "especially careful" in such cases, and to be "cautious in finding implied waiver on the part of an optionor unless the totality of the circumstances demonstrates an unambiguous intent to waive the strict compliance required to exercise an option." Geisdorf, 972 P.2d at 72; see also Utah Coal, 2001 UT 100, ¶20 (holding that a "negligent act or omission" is not worthy of equitable relief); I.X.L. Furniture, 91 P. at 283 (same). Discovery in this case has failed to unearth the kind of circumstances, even considered in their totality, that would be worthy of equitable relief. Because the undisputed facts, viewed through the lens of applicable and binding Utah precedent, would not permit a reasonable factfinder to afford equitable relief here, the Court concludes as a matter of law that the Leases expired, by their terms, on April 30, 2011, and that summary judgment in the Talisker Landlord Parties' favor is appropriate on the PCMR Parties' remaining equitable claims. Accordingly, those portions of the PCMR Parties' first cause of action, for declaratory relief, that survived the November 2012 ruling are now DISMISSED. The Talisker Landlord Parties' Motion for Summary Judgment on those claims is GRANTED.

2. *Summary Judgment is Appropriate on the PCMR Parties' Claim for Fraudulent Nondisclosure, but Questions of Fact Preclude Entry of Summary Judgment on the PCMR Parties' Claim for Negligent Nondisclosure.*

The other claim left alive following the November 20, 2012 ruling is the PCMR Parties' third claim, for damages related to the Talisker Landlord Parties' failure to disclose, at the earliest possible time after March 1, 2011, that they believed that the Leases had expired. The Talisker Landlord Parties have now, after discovery, moved for summary judgment on this claim also.

This particular claim has two variants: fraudulent nondisclosure and negligent nondisclosure. To prevail on a claim for either fraudulent or negligent nondisclosure, a plaintiff must show that "the defendant had a legal duty to communicate information." See Anderson v. Kriser, 2011 UT 66, ¶22, 266 P.3d 819; see also Smith v. Frandsen, 2004 UT 55, ¶11, 94 P.3d 919. Furthermore, "[t]he determination of whether a legal duty exists falls to the court . . . [as] a purely legal question." See Yazd v. Woodside Homes Corp., 2006 UT 47, ¶14, 143 P.3d 283. Courts have clarified that silence, in order to be actionable, must relate to a material matter known to the party and which it is his legal duty to communicate to the other contracting party, "whether the duty arises from a relation of trust, from confidence, *inequality of condition and knowledge*, or other attendant circumstances." See First Sec. Bank of Utah v. Banberry Dev. Corp., 786 P.2d 1326, 1328 (Utah 1990) (emphasis added). Indeed, Utah courts have determined that whether a duty to speak exists is determinable by reference to "all the circumstances of the case and by comparing the facts not disclosed with the object and end in view by the contracting parties." See Smith, 2004 UT 55, ¶14. "Knowledge that the other party to a contemplated transaction is acting under a mistaken belief as to certain facts is a factor in determining that a duty of disclosure is owing." See Elder v. Clawson, 384 P.2d 802, 805 (Utah 1963).

The only difference between fraudulent nondisclosure and negligent nondisclosure is the state of mind requirement. To prove fraudulent nondisclosure, the plaintiff must show that the defendant actually knew of the information that he failed to disclose, while to prove negligent nondisclosure, the plaintiff need only show that the defendant should have known of the information that he failed to disclose. See Anderson, 2011 UT 66, ¶¶22, 25,. In all other respects, the elements are identical.

In its November 2012 ruling, this Court already determined that the Talisker Landlord Parties' knowledge—if proven—that the PCMR Parties were about to make millions of dollars of in improvements to the Resort Lands while acting under a mistaken belief about the renewal of the Leases would establish a duty to inform the Park City Parties, at the earliest possible time, that the Talisker Landlord Parties believed that the Leases had expired. See Nov. 2012 Mem. Dec. and Order, at 36 (citing Elder, 384 P.2d at 805). Now that discovery has been completed and the undisputed facts are known, it is possible to focus in more deeply on the merits of the claims.

First, the Court is convinced that summary judgment is appropriate on the PCMR Parties' claim for fraudulent nondisclosure. As discussed above, discovery has revealed that the Talisker Landlord Parties had no system in place for tracking whether GPCC gave appropriate written notice of their intent to renew the Leases, and had not assigned the task of tracking any of this to any particular employee. Thus, the Talisker Landlord Parties failed to immediately recognize that GPCC had neglected to send written notice prior to the March 1 deadline specified in the Leases. Even the April 30/May 2 letter—which was approximately two months late regardless of whether it was sent on April 30 or May 2—failed to catch the attention of anyone at Talisker, because that letter was sent to the attention of Kaylene Kotter, who in 2011 no longer worked for Talisker. It was not until at least November 2011, and perhaps not until the end of December 2011 (after Bistricer and John Cumming had a conversation), that any particular employee of any of the Talisker Landlord Parties realized that there might be an issue with timely renewal of the Leases.

In the Court's view, the most relevant piece of knowledge at issue in this third cause of action—the knowledge that the Talisker Landlord Parties would have been obligated to disclose to the PCMR Parties—was not necessarily the knowledge that no timely letter had been sent but, rather, the knowledge that the Talisker Landlord Parties were taking the position that the Leases had expired. It is certainly at least conceivable (although perhaps not likely given the economic circumstances unique to this case) for a landlord to forgive a tenant's late notice, for instance, because the landlord and tenant have a good working relationship that both parties are interested in continuing. The undisputed facts of this case reveal that the Talisker Landlord Parties did not actually formulate a position with regard to whether the Leases had been properly extended until November or December 2011, and they provided notice of their position very soon after forming it. By this time, the ski season had already begun and whatever improvements were to be made at PCMR in 2011 had already been made. Thus, this is not a case where the landlord privately and consciously took the position, on (or soon after) March 2, that the Leases had expired for late notice, and then deliberately failed to inform the tenant of this position until December 30 in order to trick the tenant into making improvements to the leasehold that the landlord could later claim as its own. At least, there is no evidence of any such thing.

Accordingly, the PCMR Parties simply have no proof that the Talisker Landlord Parties had *actual knowledge* of relevant information, that they would have been under a duty to disclose, significantly earlier than they actually did disclose it. For this reason, one of the elements of the PCMR Parties' claim for fraudulent nondisclsosure fails for lack of proof, and summary judgment in favor of the Talisker Landlord Parties is appropriate on that part of the claim.

The situation is different, however, with regard to the PCMR Parties' claim for negligent nondisclosure. To prevail on that claim, the PCMR Parties do not have to demonstrate that the Talisker Landlord Parties had *actual knowledge* of the information they would have been under a duty to disclose. Rather, as noted, the PCMR Parties must simply demonstrate that the Talisker Landlord Parties *should have known* of the information. And, based on the facts adduced during discovery, there are genuine issues of material fact with regard to whether the Talisker Landlord Parties should have known sooner that the PCMR Parties did not timely renew, and whether the Talisker Landlord Parties should have been in a position much sooner to formulate a position in that regard and to communicate that position to the PCMR Parties before they went out and made summer improvements to PCMR. Under the facts here, it would at least be possible for a reasonable factfinder to conclude, from the available evidence, that the Talisker Landlord Parties acted unreasonably by failing to institute a system to track renewal of the Leases, by failing to assign such tasks to any particular employee, by failing to do anything more with the April 30/May 2 letter other than stamp it as "received," and generally by failing to communicate to the PCMR Parties sooner (and before the PCMR Parties spent money on improvements that summer) that the Talisker Landlord Parties believed the Leases had expired.

For these reasons, the Talisker Landlord Parties' motion for summary judgment with regard to the remaining portions of the PCMR Parties' third cause of action is GRANTED IN PART and DENIED IN PART. The PCMR Parties' claim for fraudulent nondisclosure is DISMISSED, but the claim for negligent nondisclosure survives summary judgment and may proceed to trial.

B. The Summary Judgment Motions Regarding the PCMR Parties' Seventh and Eighth Causes of Action for Breach of PoS and RoFR Provisions

Finally, the Court turns to the summary judgment motions, all argued on April 8, regarding the two causes of action that the Court allowed the PCMR Parties to add, by way of the filing of an amended complaint, in September 2013. In these two claims, denominated the Seventh and Eighth Causes of Action, the PCMR Parties assert that the Talisker Landlord Parties breached the PoS and RoFR Provisions in the Leases by entering into the Flera Transaction and the Vail Transaction, and they seek declaratory relief against the Talisker Parties, the Flera Parties, and VRCPC. Both sides have filed competing summary judgment motions regarding these two claims. After review of the memoranda submitted and applicable case law, for the reasons set out below, the Court agrees with the Talisker Parties, the Flera Parties, and VRCPC, and believes that summary judgment on these two claims in favor of those parties is appropriate.

Both the PoS Provision and the RoFR Provision appear in the same paragraph in the Leases, and that paragraph stated as follows in the original 1971 Resort Area Lease:

> In the event that [UPCM] should receive from a third party an offer to purchase any portion of the Leased Premises, other than portions upon which facilities or improvements constructed or utilized by [GPCC] are at the time of such offer situated (as to which portions [UPCM] shall not be free to sell) and in the event that [UPCM] should desire to accept said offer, it shall give written notice thereof to [GPCC], which notice shall set forth the portions of the Leased Premises which are the subject of said offer, the purchase price and all other material terms and conditions contained in said offer. [GPCC] shall have the right for a period of thirty days following the effective date of said notice to purchase the portion of the Leased Premises as to which said offer relates, as set forth in the notice from [UPCM], for a purchase price and upon terms and conditions equivalent to those contained in said offer.

See Resort Area Lease, ¶ 14. In 1975, as part of the overall restructuring to allow GPCC to obtain relief from crippling debt obligations, UPCM agreed, for a period of five years, to "relinquish" its right to sell the Resort Lands, see Memorandum of Agreement (Zimmerman Decl., Exh. 47), at ¶ 3, and this proviso required an amendment to the language of the PoS/RoFR Provision. Following the 1975 amendments to the Leases, the first clause of the PoS/RoFR Provision stated as follows (with the one material change highlighted):

> In the event that [UPCM] should, *on or after May 1, 1980*, receive from a third party an offer to purchase any portion of the Leased Premises, . . .

See Resort Area Lease, Amendment, ¶ 5. The provision was otherwise substantively unchanged.

Immediately noteworthy, for present purposes, is the distinction made by the operative language between (a) those portions of the Resort Lands that have not been improved by GPCC and (b) those portions of the Resort Lands upon which GPCC has "constructed or utilized" "facilities or improvements." With regard to improved portions of the Resort Lands, the operative language is strikingly simple: the landlord "shall not be free to sell" those parcels, at any time or under any circumstances, as long as that provision is in effect. The Parties, in their briefing, refer to this provision as the "prohibition on sale," and the Court, as noted, herein refers to this provision as the "PoS Provision."

With regard to portions of the Resort Lands that remain unimproved, however, the situation is somewhat more complicated. If the Talisker Landlord Parties receive "an offer to purchase" any such parcels, and "desire[] to accept said offer," then they must give written notice of the offer and its particulars to GPCC. At that point, GPCC will have thirty days to decide whether it is interested in matching the "offer to purchase" and, if it is, it shall have the right "to purchase" those parcels "for a purchase price and upon terms and conditions equivalent to those contained in the offer."

There is no dispute between the parties here as to which portions of the Resort Lands are "improved" and which remain "unimproved." All parties are in agreement that GPCC has, over the years, made improvements (e.g., ski lifts, lodges, restaurants, trails, signs, tree glading) to all but two isolated parcels of the Resort Lands. These two unimproved parcels are shown on the maps marked as Exhibits 8 and 9 to the Babbitt Declaration; on those maps, the two parcels are marked with an "X" in pen. One of the parcels is the back (or west) side of Pinecone Ridge, and the other is located to the south of the top of the Jupiter lift. All of the rest of the Resort Lands—including all of the ski runs, bowls, and trails that skiers and snowboarders routinely use during the ski season—are considered "improved" by both sides in this case. Thus, the RoFR Provision itself applies only to the two isolated and little-used unimproved parcels, and does not even apply to the bulk of the Resort Lands. Those lands are governed not by the RoFR Provision but by the comparatively simple PoS Provision.

Both the PoS Provision and the RoFR Provision are restraints on a landowner's right to alienate its property, see Kaiser v. Bowlen, 455 F.3d 1197, 1206 (10th Cir. 2006) (stating that "[r]ight of first refusal provisions are restrictions on alienation"), and as such are governed by certain rules of contractual interpretation. It is hornbook law that there exists a "general policy against restraints on alienation." See Restatement (Second) of Property, Landlord & Tenant § 15.2, cmt. e (1977). Of course, contracting parties may agree to such restraints, and they are not *per se* unenforceable, but such contractual provisions "will be narrowly construed to keep the restraint as limited as is consistent with the language describing the restraint." Id.; see also Kaiser, 455 F.3d at 1207-08 (10th Cir. 2006) (stating that restraints on alienation, including RoFR provisions, "are interpreted narrowly").

1. *The PoS and RoFR Provisions of the Leases Did Not Apply During the PCMR Parties' Holdover Tenancy.*

Analytically, the first question to tackle, in considering the effect of the PoS/RoFR Provisions in this case, is the extent to which these provisions even apply to the transactions at issue here. As discussed above, the Leases did actually expire on April 30, 2011, but the Talisker Landlord Parties took no action to remove the PCMR Parties from the Resort Lands until at least August 28, 2013, when they delivered a notice to quit. All parties agree that, before April 30, 2011, the PoS/RoFR Provisions were in effect, and that *after* August 28, 2013, they were *not* in effect. See Transcript of April 8 Hearing, at 106 (PCMR Parties' counsel stating, in response to a question from the Court, that "I do agree that once [the Talisker Landlord Parties] served the notice to quit that that effectively extinguished" the PoS/RoFR Provisions). The issue upon which the parties differ here is whether those provisions were in effect between May 1, 2011 and August 27, 2013—a time period during which the Vail Transaction was consummated.

At all times since April 30, 2011, the PCMR Parties have remained on the Resort Lands conducting business as usual. In April 2012, the Talisker Landlord Parties informed the PCMR Parties that they had allowed the PCMR Parties to remain on the land through April 30, 2012 as an "allowance period," stated that any such "allowance period" will terminate April 30, 2012 and that "any right you have currently to occupy and possess the premises will end at that time," and warned the PCMR Parties that, if they did not vacate the premises by April 30, 2012, they "will be a tenant at will beginning May 1, 2012." In that same letter, the Talisker Landlord Parties communicated an expectation that, if the PCMR Parties did not vacate the premises, they would be expected to pay a significantly higher rent amount and would be expected to "comply with and honor *all provisions* of the expired Leases not inconsistent with the terms" set forth in the letter, including heightened rent (emphasis added).

Following April 30, 2012, the PCMR Parties did not vacate the premises, and they did not pay heightened rent (although they did keep tendering rent checks to the Talisker Landlord Parties pursuant to the original Leases, which checks the Talisker Landlord Parties refused to accept). Despite this, the Talisker Landlord Parties did not take any action during the 2012-2013 ski season to evict the PCMR Parties. At the conclusion of that season, in April 2013, the Talisker Landlord Parties sent another letter to the PCMR Parties, asking them again to pay higher rent, and stating that if the PCMR Parties did not agree to higher rent, "then you may not be able to remain on the Resort Lands beyond April 30, 2013. We have no present intention to move for immediate possession of the Resort Lands. If and when we decide to do so in the future—a right we reserve, for all purposes—we will provide you all notice that is appropriate and due under law."

The PCMR Parties' response to this April 2013 letter was the same as their response to the previous letter: they remained on the Resort Lands without paying the higher rent demanded by the Talisker Landlord Parties. A few months later, on August 28, 2013, the Talisker Landlord Parties served the PCMR Parties with a Five Day Notice to Quit, stating in a cover letter accompanying the notice that, up until that time, "we have allowed you to remain on the property." Even after service of this notice in August 2013, the Talisker Landlord Parties did not immediately (until March 2014) take any further action to remove the PCMR Parties from the Resort Lands, and allowed the PCMR Parties to remain on the property through the 2013-2014 ski season.

The period between May 1, 2011 and August 28, 2013 can accurately be described as a "holdover tenancy": a period of time after the Leases had expired but during which the tenant remained on the property prior to eviction proceedings being initiated by the landlord. See, e.g., 49 Am.Jur.2d Landlord and Tenant § 843 (stating that "[a] tenant becomes a 'holdover tenant' by failing to properly exercise an option to extend the lease and occupying the premises past the term of the lease"). It is clear that "a holdover tenancy will not renew a lease," see Keith Jorgensen's, Inc. v. Ogden City Mall Co., 2001 UT App 128, ¶15, 26 P.3d 872, but it is less clear exactly what the contractual terms of a holdover tenancy are and, specifically, whether and to what extent the provisions of the original lease documents apply to the parties during a holdover tenancy.

At root, this question is one of contractual interpretation. On this point, as with other terms and conditions of the leasehold, the parties to the lease can agree in advance as to what will occur during a holdover tenancy. Indeed, some lease agreements have specific provisions to this effect. See, e.g., Kutkowski v. Princeville Prince Golf Course, LLC, 289 P.3d 980, 983 (Haw. Ct. App. 2012) (describing the lease at issue there as having a separate provision entitled "Effect of Licensee's holding over"), rev'd on other grounds, 300 P.3d 1009 (Haw. 2013). Where the parties to the lease have agreed on specific rules that will govern a holdover tenancy, those rules will be enforced by courts. Id. at 994 (stating that courts will "carefully scrutinize[] the terms of [] leases before them to determine whether the parties intended that an option to purchase or right of first refusal expire with the term of the lease").

In this case, the parties to the Leases unfortunately did not include in the Leases a specific "holdover provision," or any other kind of clause setting forth agreed-upon procedures to be applied during a holdover tenancy. In the absence of a specific holdover provision, the PCMR Parties point hopefully to the added language in the 1975 version of the PoS/RoFR Provision, which states that the provision is effective "on or after May 1, 1980." They argue that this language indicates that the PoS/RoFR Provision was intended to be effective at any time after May 1, 1980, regardless of whether the Leases were expired or not. But in the Court's view, the PCMR Parties place too much weight upon this phrase, especially given both the clear indication of the parties' intent with regard to that specific phrase as well as the absence of any specific holdover provision in the Leases. As the parties set forth in their Memorandum of Agreement, the point of adding the "on or after May 1, 1980" phrase to the Leases was to memorialize UPCM's five-year temporary relinquishment of its right to sell the Resort Lands subject to the RoFR Provision. It would be stretching that particular phrase too far—and would be inconsistent with the narrow interpretation principles applicable to restraints on alienation—to construe that language as an indication that the parties intended the PoS/RoFR Provision to apply during a holdover tenancy.[12]

The PCMR Parties also point to the language of the Talisker Landlord Parties' April 2012 letter, in which they informed the PCMR Parties that they would be expected to "comply with and honor *all provisions* of the expired Leases" (emphasis added). While this language does provide some evidence that the parties' each understood that the *tenant* (the PCMR Parties) would be expected to comply with all of the provisions of the Leases during the holdover tenancy, such an

[12] While the "on or after May 1, 1980" language may perhaps appear ambiguous when viewed in isolation, any ambiguity inherent in that phrase is erased by reference to the contemporaneously-executed Memorandum of Agreement, which clearly sets forth the parties' intentions, in 1975, in including that phrase in the PoS/RoFR Provision. When the PoS/RoFR Provision is read in conjunction with the Memorandum of Agreement, there is no ambiguity about why that "on or after May 1, 1980" phrase was included in the amended Leases: that provision was intended to memorialize the five-year hiatus in UPCM's right to sell, and was clearly not intended to have anything to do with a holdover tenancy. Significantly, neither party offers any *other* evidence—parol or otherwise—regarding the parties' intended meaning of that phrase. Accordingly, the conclusion is inescapable that this phrase was simply not meant to provide instruction as to whether the PoS/RoFR Provision applies during holdover tenancies.

understanding does not provide significant guidance here. As an initial matter, this understanding is entirely in keeping with Utah law on the subject. Under Utah law, "holding over after the expiration of a fixed term in a lease gives rise to the presumption, which in the absence of contrary evidence will be controlling, that *the holdover tenant* continues to be bound by the covenants which were binding upon him during the fixed term." See Cottonwood Mall Co. v. Sine, 767 P.2d 499, 503 (Utah 1988) (emphasis added). However, the understanding gleaned from the April 2012 letter sheds no light on whether, and to what extent, the *landlord* is similarly bound, which is the relevant question here given that the PoS/RoFR Provisions are restrictions on the landlord (and not the tenant).

Because neither the terms of the contract, nor the parties' course of dealing, shed any light on the parties' intentions with regard to whether the PoS/RoFR Provision remains effective during a holdover tenancy, the Court must examine applicable case law in an effort to determine whether there exists a consensus "default rule" that applies to these situations in the absence of clear contractual guidance. In the briefing, both sides vigorously argue that such a default rule exists and both argue, citing the same case (Kutkowski), that the default rule cuts in their favor. On this point, the Court is persuaded that the Talisker Parties have the better of the argument.

In Kutkowski, the court conducted a lengthy survey and analysis of case law from across the country on the narrow question of whether a RoFR provision remained in effect during a holdover tenancy. After completing this analysis, the court concluded that the prevailing rule was that "the law will not imply a continued obligation to sell the leased property, absent an expression of the lessor's agreement to continue such obligation during a holdover tenancy." Kutkowski, 289 P.3d at 994. However, the court did candidly state that, in the cases it had surveyed, "the courts have reached this conclusion based on their interpretation of the particular lease terms presented." Id. at 992. And in the case before it, the Kutkowski court determined that language in the specific "holdover provision" in the applicable lease provided sufficient indication of the parties' intent that the RoFR provision should apply during the holdover tenancy. Id. at 994-95.

Like the Court in Kutkowski, this Court is convinced, after surveying applicable law, that there does indeed exist a default rule—applicable only in the absence of contractual language or intent to the contrary—that tenant purchase options, tenant rights of first refusal, and restraints on the landlord's ability to alienate the leasehold do not apply during a holdover tenancy. This default rule is a venerable doctrine that has existed for decades in American jurisprudence. See Wright v. Barclay, 36 N.W.2d 645, 647-48 (Neb. 1949) (holding that an option to purchase is "not one of the terms of the original tenancy which will be incorporated into the tenancy created by a tenant holding over after the expiration of the original lease"); see also Spaulding v. Yovino-Young, 180 P.2d 691, 694 (Cal. 1947) (stating that "[w]hile a lessor may be content for a fixed time to be restricted to a fixed price for the sale of his property, it is another matter altogether to conclude that an option to purchase is to continue for an indefinite period under authority of a 'hold-over' tenancy unless clear words are used to express that purpose"). The rationale for this default rule is found in the notion, set forth above, that options, RoFRs, and prohibitions on sale are restraints on alienation and "should be strictly construed and not extended beyond the express provisions thereof. If the parties desire to extend an option in a lease beyond the term thereof they can easily use language expressly so providing but the law should not do so for them." See Wright, 36 N.W.2d at 647. In keeping with this principle, these courts have determined that, in the absence of contractual intent to the contrary, the landlord remains bound during a holdover tenancy only by those terms "which regulate the relations between landlord and tenant," and not by other ancillary provisions not directly related to the tenancy, such as options to purchase and rights of first refusal. Id. at 648. Courts have also identified other policy reasons for the rule, stating that the contrary rule would create undesirable incentives for landlords:

> As a matter of commercial reality, the extension of a right of first refusal beyond the termination of the contract that conveyed that right makes little sense, given the

> ease with which the exercise of such a right could be frustrated. A landlord, having granted a right of first refusal in a terminated lease but wanting to sell her property to a third party, could simply kick out a holdover tenant at the earliest opportunity and sell the property one day later. The holdover tenant in such case would clearly have no rights after both the lease and the holdover tenancy had terminated, and the landlord would be free to sell the property as she wished. For this reason, extension of a right of first refusal into a holdover tenancy actually creates an incentive for landlords to evict holdover tenants as soon as possible.

See Bateman v. 317 Rehoboth Avenue, LLC, 878 A.2d 1176, 1184 (Del. Ch. 2005).

Whether because of its sound bases or on other grounds, this default rule has gained support throughout the country, and is now not only recognized by courts as the "majority rule," see Grisham v. Lowery, 621 S.W.2d 745, 749 (Tenn. Ct. App. 1981), but is flatly proclaimed to be the law in leading legal encyclopedias, see, e.g., 49 Am.Jur.2d Landlord and Tenant § 329 (stating that "[a]n option to purchase or a right of first refusal cannot be exercised by a lessee holding over after the expiration of a lease"); 52 C.J.S. Landlord and Tenant § 143 (stating that "[o]rdinarily, the tenant has no such privilege of purchase after termination of the lease and during a holdover tenancy"); D.E. Ytreberg, Annot., Holding Over Under Lease, or Renewal or Extension Thereof, as Extending Time for Exercise of Option to Purchase Contained Therein, 15 A.L.R. 3d 470, § 2 (stating that "[c]ases which deal with the situation of the tenant holding over without a lease appear to agree that a purchase option contained in a lease which, by its terms, is exercisable during the lease term, cannot be exercised by a lessee holding over after the expiration of the lease"). Some of the other cases that have followed this majority rule are set out in the margin.[13]

The PCMR Parties argue that this default rule, even if it exists, cannot be applied here because the Leases are at least ambiguous as to whether or not the contracting parties intended for the PoS/RoFR to apply during a holdover tenancy, and if the Leases are ambiguous on this point, then summary judgment is inappropriate. In support of this argument, the PCMR Parties cite Richardson v. Hart, 2009 UT App 387, 223 P.3d 484. In that case, the question was whether the

[13] Wanous v. Balaco, 107 N.E.2d 791 (Ill. 1952); Nevala v. McKay, 583 P.2d 1065 (Mont. 1978); Carroll v. Daigle, 463 A.2d 885 (N.H. 1983); Power Test Petroleum Dist. v. Baker-Tripi Realty Corp., 481 N.Y.S.2d 619 (Sup. Ct. 1984); Blaschke v. Wiede, 649 S.W.2d 749 (Tex. Ct. App. 1983).

parties to a one-year residential lease intended for a tenant purchase option to extend into a holdover tenancy. Both sides pointed to particular contractual language that they believed supported their respective positions, and the court ultimately determined that the contract was ambiguous and that "additional proceedings are required for the trial court to determine the intent of the parties." Id. at ¶22.

The difference between Richardson and this case is that there is no potentially ambiguous contractual language at issue here with regard to whether the drafters of the Leases intended for the PoS/RoFR Provision to extend to holdover tenancies. The only relevant language ("on or after May 1, 1980") cannot be considered ambiguous when read in conjunction with the contemporaneous Memorandum of Agreement, and the Leases are otherwise silent on the question. While contractual silence can itself be a form of ambiguity, see Nielsen v. Gold's Gym, 2003 UT 37, ¶14, 78 P.3d 600, in this case neither party has proffered *any* parol evidence with regard to what the drafters of the Leases might have intended back in 1975. When asked about this at oral argument, counsel for the PCMR Parties stated that "we haven't explored" whether there existed any meaningful evidence from the negotiators of the Leases on this point. See Transcript of April 8 Hearing, at 87-88. Apparently no depositions were taken of any of the individuals who negotiated the Leases in 1971 or 1975. Certainly no affidavits along those lines were submitted by any of the parties as part of the truly voluminous filings made in connection with these motions.

All of which leaves the Court puzzled about what there would be to have a trial about on this issue. In Richardson, the court remanded the case for additional proceedings "to determine the intent of the parties," but in this case neither side has even so much as proffered *any* parol evidence that they might introduce in an effort to shed light on the intent of the parties here. On summary judgment, the movant has the burden of demonstrating that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. See Orvis v.

Johnson, 2008 UT 2, ¶10, 177 P.3d 600. On the relevant issue—whether the PoS/RoFR Provision applies here and has been violated—the PCMR Parties would bear the burden of proof at trial. Under these circumstances, once the Talisker Landlord Parties bear their initial burden of demonstrating the absence of any genuine factual issue, the burden shifts to the PCMR Parties—the nonmoving party, but the party with the burden of proof at trial—to show the existence of a genuine issue of material fact. See Jones & Trevor Mktg., 2012 UT 39, ¶29; Waddoups v. Amalgamated Sugar Co., 2002 UT 69, ¶¶31, 33-34, 54 P.3d 1054.

Here, in the Court's view the Talisker Landlord Parties have successfully demonstrated that there are no genuine issues of material fact with regard to whether the drafters of the Leases intended for the PoS/RoFR Provision to apply during holdover tenancies. They have pointed out that the Leases are silent on the issue, and that a default rule exists, applicable in the absence of contractual language to the contrary, that limits the applicability of RoFRs during holdover tenancies. Accordingly, the burden shifts to the PCMR Parties to show the existence of a genuine issue of fact regarding the parties' contractual intent, and they have failed to do so. The PCMR Parties have produced no affidavits from drafters of the Leases averring that it was their view that the PoS/RoFR Provision was intended to apply during holdover tenancies. The PCMR Parties can point to no actual contractual language (other than the unambiguous "on or after May 1, 1980" language) that might support their view. And when asked at oral argument whether they could point to any specific relevant parol evidence, they responded by stating that "[w]e haven't explored that." The Court suspects that this is because there is no such evidence (likely because the individuals involved in the 1970s-era negotiations are no longer available), but in any case—whether there is no such evidence or whether the parties have failed to unearth evidence that does exist—there is nothing to have a trial about. Summary judgment exists so that courts and litigants do not have to spend time trying cases, like this one, in which the facts are known and all that remains is application of the law to those facts.

In a case like this, where the applicable contracts are utterly silent on the question, where neither party has a tenable argument that any specific piece of parol evidence can provide a resolution to the question of contractual intent, and where there exists a default rule in the law applicable to precisely such situations, summary judgment is appropriate. While clear contractual intent can vary the default rule, we have no evidence of any such contractual intent in this case. Accordingly, the Court will construe the PoS/RoFR Provision narrowly in this case, in keeping with the default rule. In the absence of any contractual intent to the contrary, the PoS/RoFR Provision does not apply during holdover tenancies, and thus was not in effect at any time after April 30, 2011. The Talisker Landlord Parties are entitled to summary judgment on this point.

2. *The Flera Transaction Is Not a "Sale" That Triggers the PoS Provision or a "Purchase" That Triggers the RoFR Provision.*

The Flera Transaction, however, occurred in 2010, before the Leases (and their PoS/RoFR Provision) expired. Accordingly, it is necessary to determine whether the Flera Transaction constitutes a "sale" for purposes of the PoS Provision or a "purchase" for purposes of the RoFR Provision.[14] As noted above, in that transaction Flera made a preferred equity investment, totaling some $230 million, in Talisker Canyons Finance Co., TLH's corporate grandparent, and in exchange became one of only two members of Talisker Canyons Finance Co., thereby acquiring significant management rights regarding that entity and its subsidiaries. At the time, Talisker Canyons Finance Co. owned the real estate development rights at Canyons, the Canyons ski resort operations, as well as the Waldorf-Astoria hotel. Revenue generated by the Resort Lands—then and now owned by TLH—represented only about 0.5% of the total revenues generated by

[14] Neither party makes any argument that the term "sale," as used in the PoS Provision, and the term "purchase," as used in the RoFR Provision, should be interpreted differently. And this makes sense after reviewing the applicable contractual language, in which the drafters of the Leases appear to have used those terms interchangeably within the same contractual paragraph. There is therefore no indication, from either the contractual language or from any party's argument here, that the terms "sale" and "purchase" should be interpreted differently. Accordingly, the Court herein will interpret them identically.

Talisker Canyons Finance Co. At no time, however, did the Resort Lands change hands. They were owned by TLH before Flera's investment, and are still owned by TLH.

The longstanding general rule, in jurisdictions across the nation, is that a sale of even all of the shares of stock in the landlord corporation itself (let alone the landlord corporation's corporate parent or grandparent) is not a "sale" or "purchase" of the landlord corporation's assets, and therefore does not trigger a right of first refusal that that only applies by its text to a sale of the actual property that is the subject of the lease. One court explained this principle thusly:

> There appears to be a dearth of cases dealing with the issue [of whether a sale of stock triggered a RoFR, and] [p]erhaps this is true because, as one authority suggests, the answer is usually obvious. We think it obvious in the matter now before us. Corporations are legal entities "conceived by the mind of man and legitimated by statute." They may be owned by one person or by millions of persons. The sale of corporate stock is an everyday occurrence, and indeed, an industry has been created for the purpose of buying, selling, and trading in stocks and other securities. If, perchance, a large corporation with a multitude of stockholders entered into a lease with a tenant, and the lease contained a "right of first refusal" to buy the leased premises if it were offered for sale, no one would seriously contend that a transfer of some of the corporate stock from a seller thereof to a buyer would operate so as to trigger the "right of first refusal" on the theory that the sale of the stock is the equivalent to a sale of the demised premises. Yet, the only difference between that hypothetical and the case *sub judice* is the quantity of stock being sold. The fact that as a result of the stock sale the control of the corporate landlord will be altered did not change the ownership of the [leased] property. That all the issued corporate stock of Landlord or part of the issued stock of Landlord was sold does not constitute a transfer of the property of the corporation so as to awaken the dormant clause of the lease pertaining to the "right of first refusal."

K.C.S., Ltd. v. East Main St. Land Dev. Corp., 388 A.2d 181, 183 (Md. Ct. Spec. App. 1978) (citations omitted). The Tenth Circuit, upon analyzing the issue more recently, adopted this same general rule, and stated that "[t]he distinction between a corporation and its assets, and the narrow interpretation of ROFR clauses, have led most courts considering the question to hold that the transfer of corporate stock does not trigger a ROFR that only applies by its text to the assets of a corporation." See Kaiser, 455 F.3d at 1208; see also Cruising World, Inc. v. Westermeyer, 351 So. 2d 371 (Fla. Ct. App. 1977); LaRose Market, Inc. v. Sylvan Center, Inc., 530 N.W.2d 505 (Mich. Ct.

App. 1995); Torrey Delivery, Inc. v. Chautaqua Truck Sales and Service, Inc., 366 N.Y.S.2d 506 (Sup. Ct. 1975); Tenneco, Inc. v. Enterprise Prods. Co., 925 S.W.2d 640 (Tex. 1996). Even the cases relied upon by the PCMR Parties recognize, and adhere to, this general rule. See H-B-S Partnership v. Aircoa Hospitality Servs., Inc., 114 P.3d 306, 314 (N.M. Ct. App. 2005) (stating that "[w]e, of course, recognize the general rule that a sale of a subsidiary by a parent corporation is not a sale of the subsidiary's assets, unless the assets are actually transferred"). As noted by the court in Kaiser, this general rule is, of course, in keeping with the principle of construing restraints on alienation narrowly. See, e.g., Kaiser, 455 F.3d at 1208; see also Tenneco, 925 S.W.2d at 646.

The Utah Supreme Court follows this general rule. In Prince v. Elm Inv. Co., Inc., 649 P.2d 820 (Utah 1982), the Court stated that the "sale of all the stock of a corporate lessor" was "not [] a sale for purposes of a right of first refusal," and that "[a] sale of stock should not, therefore, be equated with the sale of a corporate asset." See id. at 822-23 (citing, *inter alia*, East Main St., Westermeyer, and Torrey Delivery). After canvassing case law from around the country, the Utah Supreme Court set forth a four part rule to be used when determining whether a "sale" has occurred that would trigger a right of first refusal:

> All of the cases . . . can be harmonized under a single rule: for purposes of a right of first refusal, a "sale" occurs upon the *transfer* (a) for value (b) *of a significant interest in the subject property* (c) to a stranger to the lease (d) who thereby gains substantial control over the leased property.

Id. at 823 (emphasis added). Thus, in order to constitute a sale, a significant interest in the property itself—rather than merely an interest in the property's corporate owner—must be transferred for value.

In light of this general rule, the Flera Parties argue that their preferred capital investment cannot possibly constitute a "sale" or "purchase" for purposes of either the PoS Provision or the RoFR Provision. Because the Resort Lands themselves were never transferred, and always remained owned by TLH, they argue that neither provision could have been triggered. In response, the PCMR Parties make two arguments.

First, the PCMR Parties argue for an extremely broad reading of Prince, focusing on one sentence of the Prince opinion: "[t]he more reasonable approach is to allow the holder to exercise its right of first refusal to the extent of any significant transfer of ownership or control to an unrelated third party." Id. at 823. The PCMR Parties argue that, by including this sentence in the opinion, the Prince court intended to authorize a free-wheeling inquiry into the transaction in question in order to analyze whether "any significant transfer of ownership or control" over the property has been transferred. They argue that Flera, as part of the Flera Transaction, acquired significant control over the Resort Lands, and therefore the PoS/RoFR Provision was triggered. The Flera Parties (along with the Talisker Parties) assert that the PCMR Parties have taken this sentence from Prince out of context, and argue that the Prince Court did not intend to authorize such a sweeping inquiry into stock transactions. The Court agrees with the Flera Parties.

The PCMR Parties are indeed taking that sentence out of context. When the sentence in question is read in context with the two sentences that precede it, it becomes clear that the Court was simply stating that a landlord did not need to convey its *entire* interest in the property in order to trigger a right of first refusal, and that it would be possible to trigger such a provision by the conveyance of part, but not all of the landlord's interest in the property.[15] But there still needs to be a conveyance of at least part of the landlord's interest in the property itself (rather than an interest in the corporate landlord) in order to be a "sale" of the property.

Moreover, reading that sentence in the manner urged by the PCMR Parties would require the Court to read out of existence essentially the entire rest of the Prince opinion. That decision is clearly one *endorsing* (and not rejecting) the general rule, outlined above, that a sale of some or all

[15] The entire paragraph in question reads as follows:

> The holder of a right of first refusal has negotiated for a right to purchase ahead of any other buyer if the promisor-owner decides to sell. We see no reason to limit the application of that right to sale of the promisor-owner's *entire interest*. The more reasonable approach is to allow the holder to exercise its right of first refusal to the extent of any significant transfer of ownership or control to an unrelated third party.

Prince, 649 P.2d at 823 (emphasis added).

of the stock in the landlord is not the same thing as a sale of the property owned by the corporate landlord. The interpretation suggested by the PCMR Parties would turn Prince on its head.

Next, the PCMR Parties point to footnote 3 of Prince, which states as follows: "Although a transfer of corporate stock to a stranger to the lease may not be a 'sale,' and a transfer from a corporation to its stockholders (or vice versa) may not be a 'sale,' there would probably be a sale if these two steps occurred in sequence according to a pre-arranged plan." Id. at 823 n.3. The PCMR Parties assert that, by including this footnote, the Utah Supreme Court was authorizing trial courts to take at least a limited look behind the particular stock transaction at issue and make inquiry into whether there was an intent to circumvent the general rule described above. On some level, the Court agrees with the PCMR Parties. Certainly, the Prince footnote does imply an obligation on the part of trial courts to, at least to some degree, make sure that the landlord has not engaged in a multi-step transaction specifically formulated to evade the general rule. But even here, there still has to be a conveyance of at least a partial interest in the property itself—even if that conveyance occurs in two or more steps—in order to be a "sale." In the Court's view, footnote 3 of Prince does not vary Prince's requirement that a "significant interest in the subject property" actually be "transfer[red]" in order for the transaction to constitute a "sale."

Certainly, the parties could have contracted for broader language in their PoS/RoFR Provision, as has been done in other cases. See, e.g., H-B-S Partnership, 114 P.3d at 309 (describing a restriction placed on the landlord's ability to make any "direct or indirect transfer" of "an equity interest in a Partner which is a corporation, partnership or other entity if the transfer of the equity interest results in a change in control"). Indeed, in Tenneco, the court noted that the parties "could have included a change-of-control provision in the agreements that would trigger the preferential right to purchase," but because they did not, the court refused to read such a provision into the document, stating that "courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained." Tenneco, 925 S.W.2d at

646.[16] Back in 1975, these parties did not include in the Leases any sort of change-of-control trigger to the PoS/RoFR Provision. The plain language of the PoS/RoFR Provision indicates that only a "sale" or "purchase" of the Resort Lands will trigger the provision. As noted, the Court is under an obligation to construe the PoS/RoFR Provision narrowly, and as such determines that "sale" or "purchase" means an actual transfer of an interest in the Resort Lands themselves, rather than an interest in TLH (or one of TLH's corporate parents).

For all of these reasons, the Flera Transaction is simply not a "sale" or "purchase" within the meaning of the PoS/RoFR Provision.[17] Flera made an equity investment in the landlord's corporate grandparent, and did not thereby acquire any actual interest, let alone a significant interest, in the Resort Lands themselves. Accordingly, the Flera Parties and the Talisker Parties are entitled to summary judgment in their favor on this issue.

3. *Talisker Did Not Ever Receive an Offer to Purchase the Resort Lands, Which Offer It Desired to Accept, That Was Different From the Final Vail Transaction.*

Finally, with respect to the two unimproved parcels, there is no evidence that the Talisker Landlord Parties ever "desired to accept" any proposed transaction that was different than the

[16] At oral argument, the PCMR Parties conceded that their reading of Prince would essentially require courts to read into *every* PoS/RoFR provision at least a functional change-of-control provision. See Transcript of April 8 Hearing, at 73. This reading is, of course, far too broad.

[17] In light of the Court's ruling, set forth above, that the PoS/RoFR Provision was not in effect at the time that the Vail Transaction was completed in May 2013, it is not necessary for the Court to determine whether the Vail Transaction constituted a "sale" or "purchase" within the meaning of the PoS/RoFR Provision. However, the Court notes that, even after the Vail Transaction, the Resort Lands remain owned by TLH, and that at no point has there been a transfer of any significant interest in the Resort Lands themselves away from TLH. Under the Court's analysis of Prince, discussed above, VRCPC's assumption of even a high degree of control over TLR, the corporate parent of TLH, would not have turned the Vail Transaction into a "sale" or "purchase" that triggered the PoS/RoFR Provision. Moreover, the Leases do not contain any prohibition on the Talisker Landlord Parties' *leasing* (as opposed to selling) the Resort Lands, and defining the words "purchase" and "sale" broadly enough to imply a prohibition on leasing would be contrary to the principles requiring narrow interpretation of restraints on alienation. Certainly, the PCMR Parties assert that the lease between Talisker and Vail, which has a 50-year initial lease term with the potential for six more 50-year extensions, is in effect a "sale" simply due to the transaction's potential temporal length. But the PCMR Parties have pointed toward no specific authority in support of the argument that temporal length alone can transform a lease into a "sale," and they concede that their own 20-year lease with three potential additional 20-year extensions was in fact a lease. In short, although the Court does not finally reach the merits of the issue of whether the Vail Transaction was a "sale" or "purchase" within the meaning of the PoS/RoFR Provision, the Court does not find the PCMR Parties' arguments on that point particularly persuasive.

transactions that they actually did accept. This point was conceded at oral argument by the PCMR Parties. See Transcript of April 8 Hearing, at 93, 100, 124. Because the Flera Transaction was not a "sale" or a "purchase" within the meaning of the PoS/RoFR Provision, and because no other transaction was offered to the Talisker Landlord Parties, during the time that the RoFR Provision remained in effect, which transaction they "desired to accept," there is no basis for the triggering of the RoFR Provision with regard to the two unimproved parcels.

CONCLUSION

This case is now in its third year, and a lot has happened between December 2011—when the Talisker Landlord Parties first took the position that the Leases had expired—and the present time, including negotiation between the parties, discovery of many relevant facts, and even consummation of a transaction involving a new potential replacement tenant. The Court, at least as much as most members of the Summit County community, had certainly hoped that the parties to this litigation would have been able to find a way, at some point during the many months this case has been pending, to resolve the situation amicably for the good of everyone, including the community, and keep both resorts operating in something close to the usual manner. Unfortunately, such a resolution has not yet been reached, and in the absence of any such resolution, the litigation must go forward as expeditiously as possible. The Court appreciates the considerable efforts rendered to date in this case by the parties and their attorneys, and notes that, at least as near as the Court can tell, this case despite its contentiousness has been litigated in a professional, civil, and highly competent manner on all sides.

For all the foregoing reasons, on the merits of the issues presented, the Talisker Parties, the Flera Parties, and VRCPC generally have the better of the arguments. All of the PCMR Parties' claims, with the exception of the claim for negligent nondisclosure, fail on the merits. Specifically, the Court makes the following rulings and decisions on the motions presented:

1. The PCMR Parties' Motion for Reconsideration is DENIED.
2. The Talisker Landlord Parties' Motion for Summary Judgment on Plaintiffs' Equitable and Nondisclosure Claims is GRANTED IN PART, as follows:
   - the PCMR Parties' first cause of action, for declaratory relief as stated in Subparagraphs 42(e) through 42(g) and claiming that the Talisker Parties either waived their right to claim, or are equitably estopped from claiming, that the Leases have expired, is DISMISSED, with prejudice and on the merits;
   - the PCMR Parties' third cause of action, for fraudulent nondisclosure related to the Talisker Parties' alleged failure to disclose to the Park City Parties, at the earliest possible time after March 1, 2011, that the Talisker Parties believed that the Leases had expired, is DISMISSED, with prejudice and on the merits;

   and DENIED IN PART, as to the PCMR Parties' third cause of action for negligent nondisclosure related to the Talisker Parties' alleged failure to disclose to the Park City Parties, at the earliest possible time after March 1, 2011, that the Talisker Parties believed that the Leases had expired, which cause of action survives summary judgment and may proceed to trial.
3. The Talisker Landlord Parties' Motion for Summary Judgment on Plaintiffs' Claim for Violation of the Prohibition on Sale is GRANTED.
4. The Talisker Parties' Motion for Summary Judgment on Plaintiffs' Claims for Violation of the Right of First Refusal is GRANTED.
5. The Flera Parties' Motion for Summary Judgment on Count 8 of the Second Amended Complaint is GRANTED.
6. VRCPC's Motion for Summary Judgment as to Plaintiffs' Claim for Violation of the Right of First Refusal in Their Eighth Cause of Action is GRANTED.
7. The Talisker Parties' Motion for Summary Judgment as to Plaintiffs' Claims Involving Flera, LLC and TCFC Finance Co., LLC is GRANTED.
8. The PCMR Parties' Motion for Summary Judgment on Plaintiffs' Seventh and Eighth Causes of Action (clarified at oral argument to be a motion for *partial* summary judgment not including any motion regarding remedies, see Transcript of April 8 Hearing, at 110, 123) is DENIED.
9. The PCMR Parties' seventh and eighth causes of action are DISMISSED against all parties, with prejudice and on the merits.

This Memorandum Decision and Order is the order of the court, and no further writing is necessary to effectuate this decision.

DATED this 21st day of May, 2014.

RYAN M. HARRIS
District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
SUMMIT COUNTY

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 120500157 by the method and on the date specified.

EMAIL: CHRISTOPHER E BABBITT
EMAIL: RYAN T BERGSIEKER
EMAIL: ROBERT C BLUME
EMAIL: TROY L BOOHER
EMAIL: JONATHAN A DIBBLE
EMAIL: MICHAEL J GILL
EMAIL: MARK F JAMES
EMAIL: JOHN R LUND
EMAIL: AMBER M METTLER
EMAIL: BRUCE S MEYER
EMAIL: JONATHAN E PAIKIN
EMAIL: KARA L PETTIT
EMAIL: JAMES W QUINN
EMAIL: PHILLIP J RUSSELL
EMAIL: HOWARD M SHAPIRO
EMAIL: DANIEL K STORINO
EMAIL: CHRISTOPHER L STOUT
EMAIL: ALAN L SULLIVAN
EMAIL: MICHAEL D ZIMMERMAN

Date: 05/21/2014 /s/ BRIDGETTE BLONQUIST

Deputy Court Clerk