THE STATE OF NEW HAMPSHIRE
SUPREME COURT

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Case No. 2018-0182

HOYLE, TANNER & ASSOCIATES, INC.
and
MCLEAN COMMUNICATIONS, LLC
and
AT COMM CORPORATION

v.

150 REALTY, LLC
and
HARBOUR LINKS ESTATES, LLC

ITNH, INC.
v.
HARBOUR LINKS ESTATES, LLC

Appeal from a Final Decision of the Hillsborough County Superior Court

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BRIEF OF APPELLEES HOYLE, TANNER & ASSOCIATES, INC., MCLEAN COMMUNICATIONS, LLC and AT COMM CORPORATION

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STATEMENT OF THE CASE AND FACTS

Hoyle Tanner & Associates, Inc. ("Hoyle Tanner"), McLean Communications LLC ("McLean"), and At Comm Corporation ("At Comm") (collectively, "Plaintiffs") have been leasing space at 150 Dow Street in Manchester, New Hampshire ("150 Dow") since 1998, 2001, and 1992, respectively. Def. Appx. at 3, 15, 177.[1] Pursuant to their respective leases, each of the Plaintiffs was granted a specified number of assigned parking spaces and certain rights to use a shared parking lot. Def. Appx. at 3, 15, 177. The Plaintiffs' leases (collectively, the "Leases"), as negotiated with the previous owner of 150 Dow, One Dow Court, Inc. ("ODC"), contemplated that base rent included the cost of parking as well as the cost of space in the building and, until 2017, the Plaintiffs and ODC performed in accordance with the Leases' parking provisions without issue. Def. Appx. at 4, 16, 178. In February 2017, 150 Realty, LLC and Harbour Links Estates, LLC (collectively, "150 Realty") purchased 150 Dow and two other nearby buildings, 100 Dow Street and 89 Dow Street (collectively the "Millyard Campus"), from ODC. Def. Appx. at 190. After efforts to convince Hoyle Tanner to voluntarily agree to a raise in their rent failed, 150 Realty announced "rules" that would, among other things, require the Plaintiffs to pay, in addition to their rent, a substantial amount of money for the parking spaces to which they were entitled, at no additional cost, pursuant to the Leases. Def. Appx. at 4-5, 16-17, 178-179. The underlying trial court proceedings were initiated by the Plaintiffs in connection with

[1] Citations to 150 Realty's Appendix are made herein as "Def. Appx. at __."

their objections to the rules as they pertained to parking. Def. App. at 1-12, 13-25, 175-187.

I. THE LEASES

A. Hoyle Tanner

Hoyle Tanner has been leasing space at 150 Dow since January 1, 1998 pursuant to a Lease Agreement entered into on October 14, 1997 and a number of amendments thereto (the "Hoyle Tanner Lease"). Def. Appx. at 3. From the inception of the Hoyle Tanner Lease until approximately 2017, the owner of the Property—and therefore Hoyle Tanner's landlord—was ODC. Def. Appx. at 3.

Hoyle Tanner's parking rights are governed by Section 27 of the Hoyle Tanner Lease, which provides that:

> a. Permanent parking for employees of LESSEE shall be limited to six (6) assigned parking spaces, located immediately adjacent to the 150 Dow Street building.
> b. Lessee shall be entitled to additional parking, as required, in the lot located between Gold's Gym and Sanel Auto Parts on Dow Street.
> c. LESSEE'S parking rights are subject to LESSOR'S reasonable rules and regulations.

Def. Appx. at 3. Hoyle Tanner's original lease granted it six (6) assigned parking spaces at the 150 Dow Street building. Def. Appx. at 3. Amendments to the Hoyle Tanner Lease over time increased that number from six (6) to fourteen (14). Def. Appx. at 4. In addition, Hoyle Tanner requires the use of a number of parking spaces in the lot located between

Gold's Gym (now Fit Lab) and Sanel Auto Parts on Dow Street. Def. Appx. at 4.

The Hoyle Tanner Lease, as negotiated between Hoyle Tanner and ODC, contemplated that base rent included the cost of parking as well as the cost of space in the building. Def. Appx. at 4. Consistent with that concept, the amendments to the Hoyle Tanner Lease in 2001 and 2012 provided Hoyle Tanner with additional parking spaces in connection with an increase in Hoyle Tanner's base rent. Def. Appx. at 4. Since the inception of the Hoyle Tanner Lease in 1998 to present, no additional fee beyond the base rent has ever been charged for the parking spaces Hoyle Tanner is permitted to use pursuant to the Hoyle Tanner Lease. Def. Appx. at 4. The Hoyle Tanner Lease currently runs until June 30, 2022, with the option to renew the lease for up to ten (10) additional years through June 30, 2032. Def. Appx. at 4.

B. McLean

McLean has been leasing space at 150 Dow since September 1, 2001 pursuant to a Lease Agreement entered into on July 19, 2001 and a number of amendments thereto (the "McLean Lease"). Def. Appx. at 15. From the inception of the McLean Lease until approximately early 2017, the owner of 150 Dow—and therefore McLean's landlord—was ODC. Def. Appx. at 15.

McLean's parking rights are governed by Section 27 of the McLean Lease, which provides that:

> a. Permanent parking for employees of Lessee shall be limited to six (6) assigned parking spaces, located immediately adjacent to the 150 Dow Street building, and up to twenty

four additional spaces located in the parking lot east of the buildings at 79-89 Dow Street and 801-815 Canal Street in Manchester

b. LESSEE'S parking rights are subject to LESSOR'S reasonable rules and regulations.
c. LESSEE'S employees shall have the right to use, in common with other tenants of LESSOR, the parking lot owned by LESSOR and located just east of LESSOR'S building at 79-89 Dow Street, provided they do not occupy spaces that are presently or becomes in the future, marked with a specific tenant's name. In addition, when requested to do so by LESSEE, LESSOR shall obtain parking permits from the City of Manchester, if available, and provide them to LESSEE at cost.

Def. Appx. at 15. Pursuant to an amendment to the McLean Lease dated August 8, 2005, McLean was assigned an additional two (2) parking spaces. Sometime thereafter, ODC granted McLean an additional two (2) parking spaces and marked those spaces with signage designating them for McLean's use. Def. Appx. at 16. Therefore, McLean is currently entitled to ten (10) parking spaces at 150 Dow. Def. Appx. at 16. McLean is also entitled to up to twenty-four (24) additional parking spaces in the parking lots located at 801-815 Canal Street and/or 79-89 Dow Street. Def. Appx. at 16.

The McLean Lease, as negotiated between McLean and ODC, contemplated that base rent includes the cost of parking as well as the cost of space in the building. Def. Appx. at 16. Since the inception of the McLean Lease in 2001 to present, no additional fee beyond base rent has ever been charged for the parking spaces McLean is permitted to use

pursuant to the McLean Lease. Def. Appx. at 16. The McLean Lease currently runs until August 31, 2019, however, McLean has the option to extend the lease for a further three-year term, which would end on August 31, 2021, or alternatively, a one-year term which would end on August 31, 2020. Def. Appx. at 16.

C. At Comm

At Comm has been leasing space at 150 Dow since 1992 pursuant to certain Lease Agreements and various amendments thereto (the "At Comm Lease"). Def. Appx. at 177. From the inception of the At Comm Lease through approximately early 2017, the owner of 150 Dow—and therefore the At Comm's landlord—was ODC. Def. Appx. at 177. At Comm's parking rights are governed by Section 26 of the At Comm Lease, which provides that:

> a. Permanent parking for employees of LESSEE shall be limited to four (4) assigned parking spaces, located immediately adjacent to the 150 Dow Street building, and up to twenty four additional spaces located in the parking lot east of the buildings at 79-89 Dow Street and 801-815 Canal Street in Manchester.
> b. LESSEE'S parking rights are subject to LESSOR'S reasonable rules and regulations.
> c. LESSEE'S employees shall have the right to use, in common with other tenants of LESSOR, the parking lot owned by LESSOR and located just east of LESSOR'S building at 79-89 Dow Street, provided they do not occupy spaces that are currently present of become in the future, marked with a specific tenant's name. In addition, when requested to do so by LESSEE, LESSOR

> shall obtain parking permits from the City of Manchester, if available, and provide them to LESSEE at cost.

Def. Appx. at 177. The At Comm Lease, negotiated between At Comm and ODC, contemplated that base rest includes the cost of parking as well as the cost of space in the building. Def. Appx. at 178. Since the inception of At Comm's occupancy of space at 150 Dow, no additional fee beyond base rent has ever been charged for the parking spaces At Comm is permitted to use pursuant to the At Comm Lease. Def. Appx. at 178. The At Comm Lease currently runs until September 30, 2019. Def. Appx. at 178.

II. THE NEW RULES

In February 2017, 150 Realty purchased the Millyard Campus from ODC. Def. Appx. at 190. The Plaintiffs' leases with ODC were subsequently assigned to 150 Realty. Def. Appx. at 28. Shortly after 150 Realty purchased the Millyard Campus, 150 Realty reached out to Hoyle Tanner to request that Hoyle Tanner consider renegotiating its lease to, among other things, increase Hoyle Tanner's base rent from $5.89/square foot to $9.00/square foot. Def. Appx. at 4. Hoyle Tanner declined 150 Realty's request to renegotiate its lease. Def. Appx. at 4.

On August 18, 2017, 150 Realty sent letters to the Plaintiffs notifying them of new "150 Building Rules and Regulations" (the "New Rules"). Def. Appx. at 4, 16, 178. The New Rules provide, among other things, that beginning on October 1, 2017:

a. Tenant employees, including employees of the Plaintiffs, "parking cars on the Millyard Campus must display at all times a

valid front parking tag hanging from the vehicle's rear view mirror, as well as a valid read window parking sticker";

b. "Any vehicle that is parked in any parking spot on the Campus that does not display a valid front parking tag and rear window parking sticker . . . will be towed, at the owner's expense, regardless of whether the vehicle is parked in a specifically assigned spot for a specific tenant";

c. "For tenants whose leases designate a specific number of parking spaces that will be available for use but do not specify that those spaces shall be "free" of charge, a $55.00 monthly fee for each designated space will be charged";

d. "For tenants whose leases entitle them to use additional parking spaces but do not specify the exact quantity of additional parking spaces that may be utilized, a $135.00 monthly fee will be charged for each additional parking space required"; and

e. "All payments shall be required to be made prior to the first day of the month for parking tags and stickers to be valid for the given month."

Def. Appx. at 4-5, 16-17, 178-79. The New Rules as they relate to parking would require Hoyle Tanner to pay an additional $91,860.000 per year in connection with its lease of space at 150 Dow which, given that Hoyle Tanner's current base rent is approximately $191,000 per year, would contemplate a 48% increase in what Hoyle Tanner currently pays in connection with its lease of space at 150 Dow. Pl. Add. at 6.[2] Similarly, the

[2] Citations to the Plaintiffs' Addendum are made herein as "Pl. Add. at __."

New Rules as they relate to parking would require McLean to pay a substantial additional sum (potentially $20,000/year, $30,000/year, or more) in connection with its lease of space at 150 Dow, on top of its current annual rent of $75,000. Def. Appx. at 17. The New Rules as they relate to parking would also require At Comm to pay a substantial additional sum, on top of its current rent of $40,325 per year, in connection with its lease at 150 Dow. Def. Appx. at 179.

III. PROCEDURAL HISTORY

As a result of 150 Realty's New Rules, each of the Plaintiffs initiated a separate action in the New Hampshire Superior Court (the "Superior Court Actions"). Hoyle Tanner and McLean filed suit in Hillsborough County Superior Court on September 11, 2017 and September 21, 2017, respectively. Def. Appx. at 1, 13. At Comm filed suit in Rockingham County Superior Court on October 5, 2017. Def. Appx. at 175. The Plaintiffs all sought preliminary and permanent injunctive relief enjoining 150 Realty from enforcing the New Rules to the extent they require payment for parking, requesting a declaratory judgment that the New Rules are not enforceable to the extent they require payment for parking, and seeking damages for breach of contract and anticipatory breach of contract. Def. Appx. at 5-11, 17-22, 179-84. Additionally, At Comm and McLean alleged that the New Rules violated the implied covenant of good faith and fair dealing. Def. Appx. at 22-23, 184-85. The trial court characterized the underlying issue raised by the Plaintiffs' claims as whether "150 Realty can charge [the Plaintiffs] a fee for parking under 'the new rules.'" Def. Add. at 4. All the Superior Court Actions were consolidated before the

Hillsborough County Superior Court. Def. Add. at 4[3]; Def. Appx. at 526, 541.

Separately, and apparently in response to the lawsuits initiated by Hoyle Tanner and McLean, 150 Realty filed separate demands for arbitration against each Plaintiff with the American Arbitration Association ("AAA"). Def. Appx. at 543. 150 Realty filed its demands for arbitration against Hoyle Tanner and At Comm on September 29, 2017, and against McLean on October 3, 2017 (the "Arbitration Actions"). Def. Appx. at 543.

After initiating the Arbitration Actions, 150 Realty filed motions to dismiss or stay the Superior Court Actions, in which it asserted that the Plaintiffs' claims were subject to mandatory arbitration pursuant to the Leases. Def. Appx. at 543. The Arbitration Actions, and the motions to dismiss or stay the Superior Court Actions, are centered on virtually identical sections of the Leases (the "Arbitration Provision") which provide in relevant part as follows:

> a. In the event of default on the part of LESSEE under the terms of this Lease, LESSOR shall be entitled to choose the forum LESSOR deems appropriate for purposes of enforcing its rights under this agreement and collecting any sums due LESSOR hereunder.
> Specifically, LESSOR shall be able to, at LESSOR's option, pursue collection and enforcement in the appropriate District or Superior Court, or LESSOR shall be entitled to pursue binding arbitration at LESSOR's sole determination.

[3] Citations to 150 Realty's Addendum, which consists of the two Orders on appeal, are made herein as "Def. Add. at __."

b. If LESSOR decides to submit any dispute between the parties pertaining to this Lease to binding arbitration, LESSOR shall still be entitled to prejudgment attachment remedies in District or Superior Court for purposes of securing any future judgment obtained through the arbitration process. Such arbitration proceedings shall take place in Manchester, New Hampshire. LESSOR shall, in the first instance, have the right to select an arbitrator from the American Arbitration Association, with said arbitration to be governed under the rules of the American Arbitration Association. Arbitration proceedings, including the selection of an arbitrator, shall be conducted pursuant to the rules, regulations, and procedures in effect as promulgated by the American Arbitration Association.

. . .

d. In the event that LESSEE initiates an action against LESSOR, whether by suit or by arbitration, LESSEE shall be required to bring such action in the appropriate forum in New Hampshire.

Def. Appx. at 222-23, 318, 369-70.

On December 11, 2017, the Hillsborough County Superior Court denied 150 Realty's motions to dismiss or stay the Hoyle Tanner and McLean actions, finding first that it had the authority to determine arbitrability, and thereafter that the Plaintiffs' claims are not subject to mandatory arbitration pursuant to the Arbitration Provision. Def. Add. at 5-8. The Rockingham County Superior Court likewise denied 150 Realty's motion to dismiss or stay the lawsuit initiated by At Comm, in part by adopting and incorporating the Hillsborough County Superior Court's order

denying 150 Realty's request for relief in the Hoyle Tanner and McLean actions. Def. Add. at 10-11.

This appeal follows the trial court's decision to grant summary judgment in favor of Hoyle Tanner and McLean with respect to their requests for declaratory judgment.[4] Pl. Add. at 33-39; Def. Appx. at 544. The Arbitration Actions are currently stayed. Def. Appx. at 544. The parties entered a stipulation in which Plaintiffs agreed to voluntary nonsuit, without prejudice, their remaining claims in order to allow 150 Realty to bring this appeal (the "Stipulation"). Def. Appx. at 542, 547.

SUMMARY OF THE ARGUMENT

The trial courts properly concluded that the issue of arbitrability was for the court, and not the arbitrator, to decide. Under New Hampshire law, the court decides the issue of arbitrability unless there is clear and unmistakable evidence that the parties agreed to delegate that issue to the arbitrator. Here, there is no such clear and unmistakable evidence. The principle that the incorporation of the AAA rules constitutes clear and unmistakable evidence of the parties' agreement that the arbitrator will decide the issue of arbitrability applies only where the arbitration clause at issue generally refers all controversies to arbitration. Because the Arbitration Provision at issue here does not refer all controversies to arbitration, that principle does not apply and the related case law cited by 150 Realty is inapposite. The trial courts' determination that it, and not the

[4] At Comm moved for summary judgment as well, however no order was ever issued on that motion. Pursuant to the Stipulation, however, the parties stipulated that the Court's arbitrability orders and summary judgment order apply to all parties in the consolidated matter (including At Comm) and that those orders are final trial court rulings. Def. Appx. at 544.

arbitrator, was the proper authority to undertake the determination of arbitrability should be upheld.

The trial courts also properly determined that, pursuant to the plain language of the Arbitration Provision, 150 Realty lacks the authority to compel arbitration of the Plaintiffs' claims. As an initial matter, subsection (d) of the Arbitration Provision plainly grants the Plaintiffs the authority to initiate an action against 150 Realty by suit or by arbitration, and nothing in the Arbitration Provision authorizes 150 Realty to override the Plaintiffs' decision in that regard. Even putting subsection (d) aside, 150 Realty's arguments relating to the interpretation of subsections (a) and (b) of the Arbitration Provision are baseless. When properly interpreted in accordance with the rules of contractual construction, subsections (a) and (b) support that 150 Realty could only compel arbitration if the Plaintiffs were in default under the terms of the Leases—and here, they are not. 150 Realty's proposed interpretation of subsections (a) and (b) must be rejected because it runs directly contrary to multiple rules of contractual construction.

The trial courts' orders should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

This case concerns simple contract interpretation, and thus is subject to *de novo* review by this Court. Lebanon Hangar Assocs., Ltd. v. City of Lebanon, 163 N.H. 679, 673 (2012).

II. THE TRIAL COURTS HAD THE AUTHORITY TO DECIDE THE ISSUE OF ARBITRABILITY

150 Realty's argument that the trial courts lacked the authority to determine the issue of arbitrability is without merit. In its December 11, 2017 Order, the Hillsborough County Superior Court correctly summarized New Hampshire law on this issue as follows:

> "The jurisdiction of arbitrators over the parties and the subject matter depends entirely upon the voluntary agreement of the parties." Aetna Life & Cas. Co. v. Martin, 134 N.H. 90, 93 (1991). "It follows that a contractual provision creating a right to arbitration remains subject to traditional principles of contract law, and its interpretation and construction is therefore a question of law for the court." Id. "Consequently, the court, and not the arbitrator, has jurisdiction to determine whether the dispute is arbitrable." Id.; see First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) ("This Court, however, has added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.").

Def. Add. at 6. Here, because there is no clear and unmistakable evidence that the parties to the Leases agreed to arbitrate arbitrability, the trial court was the proper authority to determine that issue.

Private Jet Services Group, Inc. v. Marquette University, cited by 150 Realty, provides additional support for this conclusion. See No. 14-cv-436-PB, 2015 WL 2228041 (D. N.H. May 12, 2015). In Private Jet, the

Federal District Court for the District of New Hampshire recognized that "[o]rdinarily, gateway arbitrability questions are issues for judicial determination" and that "unless the parties clearly and unmistakably provide otherwise, the threshold question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." Id. at *4 (internal quotations, brackets, and citations omitted). Private Jet goes on to recognize the exception to that general rule, specifically: "parties to an arbitration agreement may, if they so choose, agree to delegate gateway arbitrability questions to an arbitrator rather than to a court." Id. The Private Jet court found that the parties in that case had clearly and unmistakably agreed to delegate gateway arbitrability questions to the arbitrator because the agreement at issue in that case contained not only an arbitration clause, but also a "delegation clause" which provided, in no unclear terms, that "[a]ny dispute regarding the applicability of [the arbitration clause] to a particular claim or controversy shall be arbitrated as provided in this Article[.]" Id. at *3.

Here, importantly, the Arbitration Provision contains no delegation clause—this, by itself, supports the conclusion that the parties did not clearly and unmistakably agree to delegate the issue of arbitrability to the arbitrator, such that the trial court did not err in deciding that issue. In support of their argument to the contrary, 150 Realty relies on the following single sentence from the Arbitration Provision: "Arbitration proceedings, including the selection of an arbitrator, shall be conducted pursuant to the rules, regulations, and procedures in effect as promulgated by the American Arbitration Association." Def. Appx. at 222, 318, 369. 150 Realty proceeds to cite to a number of non-binding authorities which, 150 Realty claims,

support that "[w]here a contract requires arbitration to be conducted under AAA rules, courts have held that there is clear and unmistakable evidence that the parties intended that an arbitrator, not a court, determine arbitrability." Def. Br. at 8-10. This is due, 150 Realty argues, to the fact that Rule R-7 of the AAA rules grants the arbitrator the power to rule on his or her own jurisdiction. Def. Br. at 9. 150 Realty's conclusion is inaccurate, and results from its failure to acknowledge legally recognized limits on the principle it cites.

Specifically, 150 Realty ignores that incorporation of the AAA rules constitutes an implicit agreement to delegate the issue of arbitrability to the arbitrator only where the arbitration clause generally provides for arbitration of all disputes. This concept is addressed in James & Jackson, LLC v. Willie Gary, LLC, 906 A.2d 76 (Del. 2006). In James & Jackson, the Delaware Supreme Court adopted the view that reference to the AAA rules evidences a clear and unmistakable intent to submit arbitrability issues to the arbitrator, but clarified that rule:

> does not, however, mandate that arbitrators decide arbitrability in *all* cases where an arbitration clause incorporates AAA rules. Rather, it applies in those cases where the arbitration clause generally provides for arbitration of all disputes and also incorporates a set of arbitration rules that empower arbitrators to decide arbitrability.
> In this case, the arbitration clause begins by requiring arbitration of any controversy arising out of or relating to the LLC Agreement in accordance with the AAA rules. But it continues by expressly authorizing the nonbreaching Members to obtain injunctive

> relief and specific performance in the courts. Thus, despite the broad language at the outset, not all disputes must be referred to arbitration. Since this arbitration clause does not generally refer all controversies to arbitration, the federal majority rule does not apply, and something other than the incorporation of the AAA rules would be needed to establish that the parties intended to submit arbitrability questions to an arbitrator. There being no such clear and unmistakable evidence of intent, the trial court properly undertook the determination of substantive arbitrability.

Id. at 80-81 (internal citations omitted; emphasis supplied).

Unsurprisingly, each and every case cited by 150 Realty in support of its contention that incorporation of the AAA rules constitutes evidence that the parties intended to submit the issue of arbitrability to the arbitrator involves an arbitration clause which generally dictates that all disputes shall be submitted to arbitration. See Oracle Am. Inc. v. Myriad Group A.G., 724 F.3d 1069, 1071 (9th Cir. 2013) (involving an arbitration provision which provided that "[a]ny dispute arising out of or relating to this License shall be finally settled by arbitration"); Sakyi v. Estee Lauder Cos., 308 F. Supp. 3d 366, 371 (D.C. Cir. 2018) (involving an arbitration provision which provided that "[a]ny dispute . . . no matter how characterized, pleaded or styled, shall be resolved by binding arbitration"); Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 9 (1st Cir. 2009) (involving an arbitration provision which provided that "all controversies, disputes, or claims . . .arising out of or related to the relationship of the parties, this Agreement, any related agreement between the parties, and/or any specification, standard, or

operating procedure . . .shall be submitted promptly for arbitration"); Petrofac, Inc. v. DynMcDermott Petro. Operations Co., 687 F.3d 671, 673 (5th Cir. 2012) (involving an arbitration provision which provided that the parties "agree to enter into binding arbitration for any Request for Equitable Adjustment or claim submitted against the referenced subcontract, in lieu of litigation"); Wal-Mart Stores, Inc. v. Helferich Patent Licensing, LLC, 51 F. Supp. 3d 713, 716 (N.D. Ill. 2014) (involving an arbitration provision which provided that "[a]ll disputes, controversies, or differences that may arise between the parties out of, or in relation to, or in connection with this Agreement, or for the breach thereof, shall be finally settled in Chicago, Illinois by arbitration"); Mounts v. Midland Funding, LLC, 257 F. Supp. 3d 930 (E.D. Tenn. 2017) (involving an arbitration provision which provided that "[a]ll claims relating to your account, a prior related account, or our relationship are subject to arbitration, including claims regarding the application, enforceability, or interpretation of this Agreement and this arbitration provision"); McLaughlin v. McCann, 942 A.2d 616, 619 (Del. Ch. 2008) (involving an arbitration provision which provided that "[i]f a dispute arises under this agreement, the matter shall be submitted to arbitration"); Glasswall, LLC v. Monadnock Constr., Inc., 187 So. 3d 248, 250 (Fl. Ct. App. 2016) (involving an arbitration provision which provided that "any claim subject to, but not resolved by, mediation shall be subject to arbitration"); Brake Masters Sys. V. Gabbay, 78 P.3d 1081, 1087 (Ariz. Ct. App. 2003) (involving an arbitration provision which provided that "any dispute about that agreement . . . would be submitted for binding arbitration"); Fallo v. High-Tech Inst., 559 F.3d 874, 876 (8th Cir. 2009) (involving an arbitration provision which provided that "[a]ny controversy

or claim arising out of or relating to this Agreement, or breach thereof, no matter how pleaded or styled, shall be settled by binding arbitration"); Galilea, LLC v. AGCS Marine Ins. Co., 879 F.3d 1052, 1054 (9th Cir. 2017) (involving an arbitration provision which provided that "[a]ny dispute arising out of or relating to the relationship between Pantaenius America Ltd and/or our participating underwiters and the insured shall be settled by arbitration"); Terminix Int'l Co. LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1329 n.1 (11th Cir. 2005) (involving an arbitration provision which covered "any controversy or claim between [the parties] arising out of or relating to [the] agreement" or "all matters in dispute between them, including but not limited to any controversy or claim between them arising out of or relating to [the] Agreement, to any wood destroying insect report with respect to the identified property, or to the identified property in any way, whether by virtue of contract, tort or otherwise"); Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2d Cir. 2004) (involving an arbitration provision which provided that "[i]n the event of any controversy arising with respect to this Agreement . . . such controversy shall be determined by arbitration"); Hopkinton Drug, Inc. v. CaremarkPCS, LLC, 77 F. Supp. 3d 237, 241 (D. Mass. 2015) (involving an arbitration provision which provided that "Any and all disputes in connection with or arising out of the Provider Agreement by the parties will be exclusively settled by arbitration").

By contrast, the Arbitration Provision at issue in this case comes nowhere near mandating arbitration of all disputes. Instead, it provides that the lessor may choose to pursue binding arbitration in a small category of disputes—namely, disputes arising out of default on the part of the lessee—

and that the lessee may choose to initiate an action against the lessor by suit or by arbitration. Def. Appx. at 222-23, 318, 369-70. It goes on to provide that another category of claims are not subject to mandatory arbitration; specifically, it provides that the lessor is "entitled to prejudgment attachment remedies in District or Superior Court for purposes of securing any future judgment obtained through the arbitration process." Def. Appx. at 222, 318, 369. In short, rather than providing that all disputes shall be submitted to arbitration and that the AAA rules shall apply, the Arbitration Provision provides that some disputes may be submitted to arbitration and that, in the event that happens, the AAA rules shall apply. Because the Arbitration Provision does not generally refer all controversies to arbitration, the cases cited by 150 Realty are inapposite, and "something other than the incorporation of the AAA rules would be needed to establish that the parties intended to submit arbitrability questions to an arbitrator." James & Jackson, 906 A.2d at 81. Because there is no evidence that the parties intended to submit arbitrability questions to the arbitrator, the trial court properly undertook that determination.

III. THE TRIAL COURTS PROPERLY CONCLUDED THAT THE PLAINTIFFS' CLAIMS ARE NOT SUBJECT TO MANDATORY ARBITRATION

150 Realty does not have the right to compel arbitration of the Plaintiffs' claims. As the trial court correctly noted, "'[t]he proper interpretation of a lease is ultimately a question of law for [the court] to determine.'" Def. Add. at 6 (citing S. Willow Properties, LLC v. Burlington Coat Factory of New Hampshire, LLC, 159 N.H. 494, 501 (2009)). "'As

with any contract, [the Court] interpret[s] a lease by giving its terms their reasonable meaning.'" Id. Pursuant to RSA 542:2, a court may—on application of one of the parties—stay the trial of an action pending arbitration, however only "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under" an agreement in writing for arbitration. An arbitration provision "is to be interpreted so as to make it speak the intention of the parties at the time it was made bearing in mind its purpose and policy[,]" and "[w]hile there is a presumption of arbitrability if the contract contains an arbitration clause, [the court] may conclude that a particular grievance is not arbitrable if it is determined with positive assurance that the contract is not susceptible of an interpretation that covers the dispute." State v. Phillip Morris USA, Inc., 155 N.H. 598, 604 (2007) (internal citations and quotations omitted). Put differently, "the principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties." Appeal of Town of Bedford, 142 N.H. 637, 639 (1998) (internal citations omitted). As set forth below, the Arbitration Provision at issue in this case is not susceptible of an interpretation that covers this dispute.

As an initial matter, pursuant to subsection (d) of the Arbitration Provision, the Plaintiffs were entitled to bring their claims against 150 Realty "by suit or by arbitration," and the Leases do not authorize 150 Realty to override the Plaintiffs' decisions in that regard. The inquiry into whether 150 Realty may compel arbitration of the Plaintiffs' claims should end here. Even if subsection (d) did not end this inquiry, however, 150

Realty's arguments based upon subsections (a) and (b) of the Arbitration Provision are meritless. When properly interpreted in compliance with the rules of contractual construction, subsection (a) of the Arbitration Provision provides that the lessor—150 Realty—is entitled to pursue binding arbitration at its sole determination only "[i]n the event of default on the part of LESSEE under the terms of the Lease," and subsection (b) provides that if the lessor decides to do that, certain subsidiary agreements apply. Def. Appx. at 222-23, 318, 369-70. Pursuant to this lawful interpretation, 150 Realty may not compel arbitration of the Plaintiffs' claims because the Plaintiffs are not in default under the terms of the Leases. 150 Realty's proposed interpretation of the Arbitration Provision, pursuant to which subsection (b) entitles it to submit any dispute pertaining to the Leases to binding arbitration, must be rejected because, among other things, it would render subsection (a) meaningless.

The trial courts properly found that 150 Realty cannot compel arbitration of the Plaintiffs' claims.

A. Subsection (d) of the Arbitration Provision Authorized the Plaintiffs to Initiate an Action Against 150 Realty in Court.

While 150 Realty focuses its argument on the interpretation of subparagraphs (a) and (b) of the Arbitration Provision, it conspicuously avoids any reference to subparagraph (d). Subparagraph (d) provides that "[i]n the event that LESSEE initiates an action against LESSOR, whether by suit or by arbitration, LESSEE shall be required to bring such action in the appropriate forum in New Hampshire." Def. Appx. at 90, 130, 172 (emphasis supplied). Pursuant to subparagraph (d), therefore, the Plaintiffs had the right to initiate an action against 150 Realty "by suit or by

arbitration[.]" Here, they elected to do so "by suit." Nothing in the Arbitration Provision authorizes 150 Realty to override Plaintiffs' selection of forum.[5] Relying on subsection (d), the Rockingham County Superior Court correctly noted that "[t]he black letter text of the parties' contract makes it clear—beyond any doubt—that the plaintiff lessee contracted for the right to bring this case in Superior Court." Def. Add. at 10. For this reason alone, the trial courts' conclusion that 150 Realty cannot compel arbitration of the Plaintiffs' claims was correct and should be affirmed.

B. Pursuant to the Proper Interpretation of Subsections (a) and (b) of the Arbitration Provision, 150 Realty Cannot Compel Arbitration of the Plaintiffs' Claims.

Even assuming, for the sake of argument, that subparagraph (d) did not end this inquiry, a proper interpretation of subsections (a) and (b) of the Arbitration Provision leads to the conclusion that the Plaintiffs' claims are not subject to mandatory arbitration. Subparagraph (a) provides that:

> [i]n the event of default on the part of LESSEE under the terms of this Lease, LESSOR shall be entitled to choose the forum LESSOR deems appropriate for purposes of enforcing its rights under this agreement and collecting any sums due LESSOR hereunder.
> Specifically, LESSOR shall be able to, at LESSOR's option, pursue collection and enforcement in the appropriate District or Superior Court, or LESSOR shall be entitled to pursue binding arbitration at LESSOR's sole determination.

[5] In this case, 150 Realty attempted to override the Plaintiffs' selection of forum by issuing arbitration demands after the first two Plaintiffs (Hoyle Tanner and McLean) initiated actions against it on September 11, 2017 and September 21, 2017 respectively. Def. Br. At 4 n.2, 5 n.3.

Def. Appx. at 89, 130, 171 (emphasis supplied). Subparagraph (b) builds upon subparagraph (a), setting forth certain subsidiary agreements which apply "[i]f LESSOR decides to submit any dispute between the parties pertaining to this Lease to binding arbitration[.]" Def. Appx. at 89, 130, 171.

Applying the Arbitration Provision to the facts at issue in this case, the trial court properly concluded that 150 Realty is not entitled to demand arbitration of the Plaintiffs' claims because the Plaintiffs are not in default under the terms of the Leases. See Def. Add. at 6 (holding that "a plain reading of the dispute resolution provisions demonstrates 150 Realty's right to compel arbitration is limited to situations where the lessee defaults under the terms of the lease"). This interpretation of the Arbitration Provision is consistent with well-established principles of New Hampshire contract law, pursuant to which a contract is reviewed by looking at the agreement as a whole. BankEast v. Michalenoick, 138 N.H. 367, 369 (1994) (citing Manchester Bank v. Industrial Dev. Auth., 119 N.H. 14, 16 (1979)).

150 Realty argues that it has the right to compel arbitration of the Plaintiffs' claims because it has alleged in the Arbitration Demands that the Plaintiffs are in violation of the New Rules, which it claims are part of the Leases. As an initial matter, the issue here is whether 150 Realty has a right to compel arbitration of the Plaintiffs' claims. The separate allegations made by 150 Realty in the Arbitration Actions are irrelevant. Even assuming that were not the case, and even assuming that the New Rules were validly promulgated pursuant to 150 Realty's authority under the Leases, it does not follow that the New Rules constitute the "terms of [the] Lease[s.]" Indeed, such a conclusion would defy logic—the terms of the

Leases include only the terms included in the Leases themselves and any amendments thereto; the New Rules constitute an entirely separate and distinct external document. As noted above, under New Hampshire law, a court interpreting an arbitration provision must do so in a manner that "speak[s] the intention of the parties at the time it was made[.]" Phillip Morris USA, Inc., 155 N.H. at 604 (internal citations and quotations omitted). A determination that 150 Realty has the authority to submit the Plaintiffs' challenge to the New Rules to binding arbitration would improperly broaden the Arbitration Provision beyond what the parties to the original lease intended—had the parties to the original Lease intended to grant the lessor the right to demand arbitration for disputes concerning documents external to the leases, they would not have specifically restricted the Arbitration Provision to disputes concerning the lessees' default under the terms of the Leases.

In an effort to get around the plain language of the Arbitration Provision, 150 Realty looks to a case, Private Jet, to support its argument that the New Rules constitute the terms of the Lease. 150 Realty's argument fails because the facts at issue in Private Jet are readily distinguishable from the facts at issue in this case. Private Jet involved two agreements: (1) an "Air Services Agreement" entered into between the parties on August 21, 2013; and (2) an "Escrow Agreement" entered into between the parties the next day "to facilitate the escrow payments required by the Air Services Agreement." 2015 WL 2228041, at *2. The Air Services Agreement did not contain an arbitration provision, however the Escrow Agreement did. Id. at *3. The court rejected the plaintiff's argument that a dispute concerning the Air Services Agreement was not

subject to the arbitration provision contained within the Escrow Agreement, reasoning that the following facts suggested sufficient commonality between the two agreements that a claim for breach of the Air Services Agreement was arbitrable because it related to the Escrow Agreement: (1) "[t]he Escrow Agreement . . . establishes the escrow account that [the defendant] was to use to make the payments required by the Air Services Agreement"; (2) "[t]he Escrow Agreement . . . expressly refers to the Air Services Agreement as an 'attached' document"; (3) "the parties made the two agreements within one day of each other"; and (4) "the Air Services Agreement [did] not contain an integration clause specifying that the parties intended it to function as a complete agreement separate from the Escrow Agreement." Id. at *8.

The reasoning from Private Jet does not apply in this case because none of the four facts upon which the court relied to conclude that there was commonality between the Air Services Agreement and the Escrow Agreement are present here. First, unlike the Escrow Agreement, which established the escrow account into which the plaintiff in Private Jet was to make payment, the leases can—and did, for many years—exist independently of the New Rules. Second, the New Rules do not expressly refer to the leases as an "attached" document, and it would make little sense if they did, given that the leases were created many years prior to the New Rules. Third, unlike the Escrow Agreement and the Air Services Agreement, which were made within two days of one another, the New Rules were created many years after the leases. Finally, each of the leases does contain an integration clause which provides that "[t]his Lease . . . sets forth the entire agreement between the parties[.]" Def. Appx. at 90, 131,

172. In addition, unlike in Private Jet, where both parties to the dispute were signatories to the Escrow Agreement and the Air Services Agreement, here, the New Rules are not an agreement between the Plaintiffs and 150 Realty which is ancillary to the Lease, but rather a completely separate set of rules that 150 Realty created unilaterally. Private Jet cannot be found to support the conclusion that the New Rules have sufficient "commonality" with the Leases to constitute the terms of the Leases.

During the proceedings below, 150 Realty also argued that the New Rules become an enforceable part of the Leases based on a single lease provision which provides that Plaintiffs' rights are "subject to lessor's reasonable rules and regulations." Pl. Add. at 25-26. The trial court was unpersuaded, noting that 150 Realty had "cited no legal authority supporting their argument that [the] reference to 'reasonable rules and regulations' would authorize them to unilaterally impose a parking fee." Pl. Add. at 38. 150 Realty's argument, as set forth in its Brief, suffers from this same deficiency. The trial court correctly found that the New Rules were not the part of the terms of the Leases, but rather would "constitute a substantive amendment to the respective leases, as it would add a material term to the leases without first affording plaintiffs the opportunity to bargain with defendants with regard to said term."[6] Pl. Add. at 38. Because

[6] On page 12 of its Brief, 150 Realty states: "[I]t is 150 Realty's position that the reasonable parking rules *are* an enforceable part of the Leases. In holding otherwise, the trial court directly and impermissibly considered the merits of 150 Realty's underlying claims." Def. Br. at 12. This argument misses the mark. First, the claims at issue in this case were asserted by the Plaintiffs, not by 150 Realty. Second, immediately after arguing that the trial court could not properly analyze whether the New Rules were a part of the Leases, 150 Realty goes on to argue that very issue at length. 150 Realty cannot have it both ways. In order to prevail on its motions to dismiss or stay, 150 Realty had to prove that the New Rules are part of the "terms" of the Leases. It cannot argue that the trial court was barred from determining that the New Rules were not terms of

the facts do not support that the Plaintiffs are in default under the terms of their leases, the trial courts properly found that 150 Realty is not entitled to compel arbitration of the Plaintiffs' claims.

C. 150 Realty's Interpretation of Subsections (a) and (b) of the Arbitration Provision is Inconsistent with the Rules of Contract Construction.

150 Realty's proposed interpretation of the Arbitration Provision, pursuant to which it is entitled to submit any dispute pertaining to the Leases to binding arbitration, must be rejected because it would render subsection (a) meaningless. 150 Realty argues that subparagraphs (a) and (b) are to be read in isolation, such that there are "two distinct sets of circumstances [which] trigger the lessor's right to invoke arbitration." Def. Br. at 14. Specifically, 150 Realty argues that it is entitled to invoke arbitration under the following two circumstances: (1) if the lessee defaults under the lease, the lessor is entitled to invoke arbitration pursuant to subparagraph (a); and (2) pursuant to subparagraph (b), the lessor can submit "any dispute between the parties pertaining to this Lease to binding arbitration." Def. Br. at 14-15. The obvious flaw in 150 Realty's reasoning is that, if subparagraph (b) is interpreted to grant the lessor the right to submit any dispute pertaining to the lease to binding arbitration, subparagraph (a) becomes meaningless because it is subsumed by subparagraph (b). Because 150 Realty's proposed interpretation of the Arbitration Provision would render subparagraph (a) superfluous and

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the Leases due to the fact that that conclusion would tend to support the merits of the Plaintiffs' ultimate argument that the New Rules are unenforceable, while at the same time encouraging the trial court to find that the New rules "*are* an enforceable part of the Leases"—a finding that would obviously support the merits of 150 Realty's ultimate argument that the New Rules are enforceable.

meaningless, it runs contrary to New Hampshire's "longstanding principle that 'all parts of an agreement are to be given a meaning wherever reasonably possible.'" Robbins v. Salem Radiology, 145 N.H. 415, 419 (2000) (quoting Rivier College v. St. Paul Fire Ins. Co., 104 N.H. 398, 402 (1963)). In addition, it runs contrary to the rule of contractual construction directing that a contract is reviewed by looking at the agreement as a whole. BankEast, 138 N.H. at 369. For these reasons, 150 Realty's proposed interpretation of the Arbitration Provision must be rejected. The trial courts properly determined that 150 Realty lacks the authority to compel arbitration of the Plaintiffs' claims.

IV. CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that this Court affirm (1) the trial courts' determination that the issue of arbitrability was for the court, and not the arbitrator, to decide; and (2) the trial courts' denial of 150 Realty's motions to dismiss or stay pending arbitration.

ORAL ARGUMENT REQUESTED

The Plaintiffs request oral argument. Attorney Bryanna Devonshire will argue on the Plaintiffs' behalf.

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

The Plaintiffs hereby certify that this Brief is in compliance with the 9,500 word limit set forth in Supreme Court Rule 16(11).

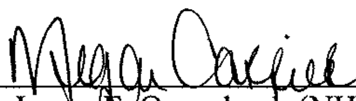
Respectfully submitted,

HOYLE, TANNER & ASSOCIATES, INC.,
MCLEAN COMMUNICATIONS, LLC,
AND
AT COMM CORPORATION

By its attorneys,

SHEEHAN, PHINNEY, BASS & GREEN, PA

November 15, 2018

By: 

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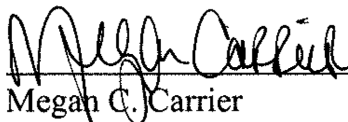
CERTIFICATE OF SERVICE

I certify that on this day, I caused a copy of the foregoing to be sent, by email and first class mail, postage prepaid, to all counsel of record.



Megan C. Carrier

ADDENDUM TO BRIEF OF APPELLEES HOYLE, TANNER & ASSOCIATES, INC., MCLEAN COMMUNICATIONS, LLC and AT COMM CORPORATION

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THE STATE OF NEW HAMPSHIRE

HILLSBOUROUGH COUNTY
NORTHERN DISTRICT

SUPERIOR COURT

Docket No. 216-2017-CV-00665

HOYLE, TANNER & ASSOCIATES, INC.
150 Dow Street
Manchester, NH 03101

v.

150 REALTY, LLC
126 Daniel Street, Suite 200
Portsmouth, NH 03801

and

HARBOUR LINKS ESTATES, LLC
60 Wentworth Road
Rye, NH 03870

PLAINTIFF'S HEARING MEMORANDUM IN SUPPORT OF REQUEST FOR PRELIMINARY INJUNCTION

Plaintiff in the above-captioned matter, Hoyle, Tanner & Associates, Inc., by and through its attorneys, Sheehan Phinney Bass & Green, PA, submits this Hearing Memorandum in support of its request for preliminary injunctive relief, stating as follows:

I. Factual Background

Plaintiff leases space at 150 Dow Street in Manchester, New Hampshire (the "Property"). Verified Complaint for Injunctive Relief, Declaratory Judgment, and Damages ("Compl.") at ¶ 6. Plaintiff has been leasing space at the Property since January 1, 1998 pursuant to a Lease Agreement entered into on October 14, 1997 and a number of amendments thereto (collectively, the "Lease"). Id. at ¶7; see also **Exhibit 1** hereto, Lease. From the inception of the Lease

through approximately early 2017, the owner of the Property—and therefore Plaintiff's landlord—was One Dow Court, Inc. ("ODC"). Compl. at ¶ 8.

Plaintiff's parking rights are governed by Section 27 of the Hoyle Tanner Lease, which provides that:

> a. Permanent parking for employees of LESSEE shall be limited to six (6) assigned parking spaces, located immediately adjacent to the 150 Dow Street building.
> b. LESSEE shall be entitled to additional parking, as required, in the lot located between Gold's Gym and Sanel Auto Parts on Dow Street.
> c. LESSEE'S parking rights are subject to LESSOR'S reasonable rules and regulations.

Id. at ¶ 9; **Exh. 1** at § 27. While the original Lease granted Plaintiff six (6) assigned parking spaces, amendments to the Lease over time increased that number to fourteen (14) assigned parking spaces. Compl. at ¶¶ 10-12; **Exh. 1** at amendments dated July 18, 2001 and May 30, 2012. In addition, Plaintiff requires the use of fifty-one (51) parking spaces in the lot located between Gold's Gym (now Fit Lab) and Sanel Auto Parts on Dow Street (the "Additional Lot"). Compl. at ¶ 13. The Lease, as negotiated between Plaintiff and ODC, contemplated that base rent included the cost of parking as well as the cost of space in the building. Id. at ¶ 14. Consistent with that concept, the amendments to the Lease in 2001 and 2012 provided Plaintiff with additional parking spaces in connection with an increase in Plaintiff's base rent. Id. at ¶ 15. Since the inception of the Lease in 1998 to present (nearly twenty years), no additional fee—beyond base rent—has ever been charged for the parking spaces Plaintiff is permitted to use pursuant to the Lease. Id. at ¶ 16.

On information and belief, in early 2017, Defendants purchased the Property from ODC and, together, became Plaintiff's new landlord. Id. at ¶ 17. The Lease currently runs until June 30, 2022, however Plaintiff has the option to renew the lease for up to ten (10) additional years

through June 30, 2032. Id. at ¶ 18; **Exh. 1** at amendment dated May 30, 2012. Shortly after Defendants purchased the Property, Defendants reached out to Plaintiff to request that Plaintiff consider renegotiating the Lease. Compl. at ¶ 19. Specifically, on February 16, 2017, William Binnie contacted representatives of Plaintiff on behalf of Defendants and "formally ask[ed] . . . to amend the lease" to, among other things, (a) increase Plaintiff's base rent from $5.89/square foot to $9.00/square foot; and (b) require Plaintiff to "pay a reasonable rate for the additional 65[1] parking spaces that Hoyle Tanner & Associates uses beyond their 14 per the lease." **Exhibit 2** hereto, February 16 Email. Plaintiff declined Defendants' request to renegotiate the lease. Id. at ¶ 20.

Via letter dated August 18, 2017, Defendants notified Plaintiff that they are introducing new "150 Building Rules and Regulations" (the "New Rules"). Compl. at ¶ 21; see also **Exhibit 3** hereto, August 18 Letter and New Rules. The New Rules provide, among other things, that beginning on October 1, 2017:

a. Tenant employees, including employees of Plaintiff, "parking cars on the Campus must display at all times a valid front parking tag hanging from the vehicle's rear view mirror, as well as a valid rear window parking sticker";

b. "Any vehicle that is parked in any parking spot on the Campus that does not display a valid front parking tag and rear window parking sticker . . . will be towed, at the owner's expense, regardless of whether the vehicle is parked in a specifically assigned spot for a specific tenant";

c. "For tenants whose leases designate a specific number of parking spaces that will be available for use but do not specify that those spaces shall be "free" of charge, a $55.00 monthly fee for each designated space will be charged";

[1] As noted above, Plaintiff currently only requires the use of 51 parking spaces in the Additional Lot.

d. "For tenants whose leases entitle them to use additional parking spaces but do not specify the exact quantity of additional parking spaces that may be utilized, a $135.00 monthly fee will be charged for each additional parking space required"' and

e. "All payments shall be required to be made prior to the first day of the month for parking tags and stickers to be valid for the given month."

Compl. at ¶ 22; **Exh. 3** at 7-8. The New Rules as they relate to parking would require Plaintiff to pay an additional $91,860.00 per year in connection with its lease of space at the Property which, given that Plaintiff's current base rent is approximately $191,000 per year, would contemplate a 48% increase in what Plaintiff currently pays in connection with its lease of space at the Property. Compl. ¶23.

II. Argument

By its Complaint in the above-captioned matter, the Plaintiff has made a request for preliminary and permanent injunctive relief enjoining Defendants from enforcing the New Rules to the extent they require payment for parking (Count I), requested a declaratory judgment that the New Rules—to the extent they require payment for parking—are unlawful and unenforceable (Count II), and asserted claims for breach of contract and anticipatory breach of contract (Counts III-IV). Plaintiff is entitled to its requested preliminary injunctive relief because, if the New Rules are enforced, Plaintiff it will suffer irreparable harm for which there is no adequate remedy at law, and Plaintiff has a likelihood of success on the merits of its claims.

a. Plaintiff is Entitled to a Preliminary Injunction Enjoining Defendants from Enforcing the New Rules to the Extent They Require Payment for Parking.

A preliminary injunction is appropriate where the requesting party establishes that (1) there is an immediate danger or irreparable harm; (2) there is no adequate remedy at law; and (3)

the party seeking the injunction is likely to succeed on the merits of its claims. ATV Watch v. N.H. Dep't of Res. & Econ. Dev., 155 N.H. 434, 437 (2007). The courts also occasionally consider the balance of equities in determining whether it is appropriate to grant a request for preliminary injunctive relief. Unifirst Corp. v. City of Nashua, 130 N.H. 11, 13 (1987). Because, as described in more detail below, Plaintiff can satisfy all three of the ATV elements, and because the balance of equities favors the issuance of the requested relief, Plaintiff's request for a preliminary injunction should be granted.

i. Immediate Danger of Irreparable Harm

There is an immediate danger of irreparable harm to Plaintiff if the New Rules as they relate to payment for parking are enforced. Specifically, enforcement of the New Rules as they relate to parking would present Plaintiff with three options: (1) pay the unlawful fees; (2) allow its employees' vehicles to be towed; or (3) find parking elsewhere.

Option 1 would result in immediate irreparable harm to Plaintiff because Plaintiff's budget was created (as all its budgets have been created over the past twenty years) based on Plaintiff's understanding that the cost of parking was encompassed within its base rent. Absent drastic cuts in other areas (e.g. layoffs, relocation to a different space, cuts to employee benefits), an effort by Plaintiff to absorb the additional $91,800 per year ($7,655/month) that would be required by the New Rules (a 48% increase in the amount Plaintiff currently pays for its space at the Property, given that Plaintiff's current annual rent is approximately $191,000 per year) would threaten the existence of Plaintiff's business. See Potts NH RE, LLC v. Northgate Classics, LLC, No. 12-cv-82-SM, 2012 U.S. Dist. LEXIS 75165, at *20-21 (D. N.H. May 10, 2012) ("[I]t has also been recognized that some economic losses can be deemed irreparable. For instance, 'an exception exists where the potential economic loss is so great as to threaten the existence of the

movant's business.'" (quoting Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1382 (6th Cir. 1995)). For the same reason, Option 3—payment for parking elsewhere (assuming parking elsewhere is available)—would also result in irreparable harm to Plaintiff.

Option 2, allowing its employees cars to be towed, would also result in irreparable harm to Plaintiff. It is not unreasonable to expect that employees whose cars are repeatedly towed while they are trying to work will consider simply leaving Plaintiff's employment and finding work elsewhere. Plaintiff has invested significant resources in training and retaining its employees, many of whom are longtime employees who have gained an understanding of Hoyle Tanner's operations and their own responsibilities that can only be attained with experience. In short, in the event the New Rules are enforced, Hoyle Tanner is at risk of losing employees that are, put simply, irreplaceable. The loss of these employees (particularly more than one of them) would irreparably harm Hoyle Tanner's business.

In addition, case law cited by the Defendants—Potts NH RE, LLC—supports that the irreparable harm requirement is met if there is a showing that damages would be incalculable. See Potts NH RE, LLC, 2012 U.S. Dist. LEXIS 75165, at *34-35 (cited at page 10 of Defendants' Verified Objection to Request for Preliminary Injunction). Here, the damages Hoyle Tanner would suffer are incalculable—the First Circuit has held that injuries resulting from "less commodious parking . . . are sufficiently problematic as to defy precise dollar quantification." K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 915 (1989).

ii. No Adequate Remedy at Law

There is no adequate remedy at law for the harm Plaintiff is likely to suffer if the New Rules as they relate to parking are enforced. New Hampshire Supreme Court jurisprudence

expounding upon this element is very limited. However, there are several instructive decisions from the New Hampshire Superior Court and from other jurisdictions.

First, in the case of Soukup v. Brooks, No. 06-E-141, 2006 N.H. Super. LEXIS 35 (July 31, 2006), Judge Houran held that where the subject of the litigation "is rights in real estate, there is a presumptive lack of an adequate, alternative remedy at law and of irreparable harm by use without right which cannot be redressed by a damage award." Id. at *5 (decision attached hereto as **Exhibit 4**). The subject of this litigation is rights in real estate—specifically, Plaintiff's right to enjoy the benefits granted to it pursuant to the Lease. Therefore, there is a presumptive lack of an adequate, alternative remedy at law and a presumption that the harm cannot be redressed by a damage award. Moreover, this litigation involves Plaintiff's parking rights and injuries resulting from "less commodious parking . . . are sufficiently problematic as to defy precise dollar quantification." K-Mart Corp. 875 F.2d, at 915.

Moreover, as noted above, a 48% increase in what Plaintiff pays for the lease of space at the Property would naturally have serious impacts on Plaintiff's business, as would the loss of key employees. In Frost v. N.H. Banking Department, No. 217-2010-CV-288, 2010 N.H. Super. LEXIS 24 (June 29, 2010), Judge McNamara held that "[n]o proceeding at law can afford an adequate remedy for the destruction of one's business." Id. at *12 (decision attached hereto as **Exhibit 5**) (citing Engine Specialties, Inc. v. Bombardier, Ltd., 454 F.2d 527, 531 (1st Cir. 1972) ("An injunction is proper to prevent the threatened extinction of a business."); Semmes Motors Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970) (recognizing that the destruction of a business is an irreparable injury which can be appropriately remedied with injunctive relief). Because both the requirement that it pay 48% more in connection with its lease than its budget allows and the loss of key employees could very foreseeably cause Plaintiff to have to close its

doors, there is no adequate remedy at law for the harm Plaintiff would suffer if the New Rules as they relate to payment for parking are not enjoined.

iii. Likelihood of Success on the Merits

Plaintiff is likely to succeed on the merits of the claims it has asserted in its Complaint based on the plain language of the Lease, the parties' intentions at the time the Lease was negotiated, and the lengthy course of dealing between Plaintiff and ODC.

First, the plain language of the Lease provides that the assigned spaces are "permanent parking" for Plaintiff's employees. **Exh. 1** at § 27. It also provides that Plaintiff "shall be entitled" to additional parking spaces, as required, in the Additional Lot. Id. This type of language is inconsistent with the concept that Defendants can charge for parking. While Plaintiff's parking rights are subject to the landlord's "reasonable rules and regulations," that language must be interpreted in the context of the surrounding contractual language, pursuant to which the phrase "reasonable rules and regulations" cannot be reasonably interpreted to allow Defendants to charge for parking.

In Robbins v. I.R.E. Real Estate Fund, Ltd., 608 SO.2d 844 (Fla. Ct. App. 1992), a landlord attempted to unilaterally impose fees for parking against its tenant based in part on a provision in the lease which allowed it to impose "reasonable rules and regulations governing the use of the parking areas[.]" Id. at 845. The tenants objected, claiming that the lease did not grant the landlord the right to impose fees and noting that no fees had ever been charged for parking. Id at 845-46. The court agreed with the tenants, finding that "[i]t is unassailable that the leases simply do not authorize the landlords to impose parking charges, and in fact, no charges were made until the re-configuration." Id. at 846. The court went on to say that "[b]ecause free parking was a given and the leases were silent with respect to the authority to

impose parking charges and were drafted by the landlords, to require the tenants to pay parking charges under such circumstances constitutes a judicial reformation of an unambiguous contract provision." Id. Given the nearly identical factual scenario presented, the reasoning in Robbins is equally applicable here.

Moreover, the February 16, 2017 email from Mr. Binnie supports that Defendants' initial interpretation of the Lease's parking provisions was consistent with that of Plaintiff. As noted above, in that email, Mr. Binnie requests that Plaintiff agree to "amend the lease" to, among other things, require Plaintiff to "pay a reasonable rate for the additional 65 parking spaces that Hoyle Tanner & Associates uses beyond their 14 per the lease." **Exh. 2**. This statement contains two admissions on the part of Defendants: first, Mr. Binnie admits that Plaintiff is entitled to fourteen parking spaces pursuant to the lease; second, he admits that in order to require Plaintiff to pay for the spaces it uses in the Additional Lot, an amendment to the Lease is required. Id. This is precisely Plaintiff's argument on the merits.

The intentions of the parties to the Lease further support that Plaintiff has a likelihood of success on the merits. It has always been Plaintiff's understanding that the cost of parking under the Lease was encompassed in its base rent, and Plaintiff negotiated the Lease based on that understanding. Compl. at ¶¶ 14-16. Given the course of dealing between Plaintiff and ODC over the course of nineteen years—during which no fee was ever charged for parking, it can be safely assumed that ODC's interpretation of the Lease is consistent with Plaintiff's interpretation of the Lease. Id. at ¶ 16.

Defendants' argument that Plaintiff's parking rights are a revocable license also falls flat. Defendants rely principally on two cases in support of this argument: Quality Discount Market Corporation v. Laconia Planning Board, 132 N.H. 734 (1990) and South Center

Department Store v. South Parkway Building Corporation, 153 N.E.2d 241 (Ill. App. 1958). Quality Discount involved neighboring parcels. On one parcel, owned by the Phelpses, a store called Wayside Furniture was situated. Id. at 735. The owner of the other parcel made a very narrow agreement, in writing, "to permit the use by customers of Wayside Furniture of parking facilities" on its lot. Id. The defendant thereafter purchased the Wayside Furniture parcel from the Phelpses. Id. at 736. Based on the language of the grant, the court held that it conveyed a personal license to the Phelpses, which expired when the Phelpses sold the lot. Id. at 741. This case does not support the Defendants' position that the Plaintiff's parking rights under the Lease constitute a revocable license. First, the grant language at issue in Quality Discount is not in any way similar to the language of Section 27 of the Lease. Even if it were, and the argument could reasonably be made that the parking rights granted by Section 27 are personal to Hoyle Tanner such that they expire when Hoyle Tanner departs the Property, Hoyle Tanner has not departed the Property. Quality Discount is inapposite.

South Center, a 1958 case out of the Illinois Court of Appeals, similarly fails to support Defendants' argument. South Center involved the lessee's right to use the lessor's parking lot "so long as it is operated by or for the Lessor for parking purposes." Id. at 242. The lessor entered into a lease with a third party, who took over operating the parking lot. Id. at 242-43. The court found that the condition that the parking lot be "operated by the Lessor for parking purposes" was no longer satisfied, such that the right to use the parking lot expired. Id. at 244-45. Like the decision in Quality Discount, this decision was made based on the specific language of the grant at issue, which is readily distinguishable from the language at issue in Section 27 of the Lease. The Defendants have not argued that Plaintiff's parking rights are subject to some condition that is no longer met, such that the rights can now be revoked. South Center does not

support Defendants' argument that Section 27 of the Lease creates a revocable license as opposed to an enforceable contractual right.

The remaining cases Defendants cite in support of their argument that the language of the Lease creates a license are likewise unpersuasive. See Lott v. Guiden, 211 A.2d 72 (Pa. Super. 1965) (finding that lease language providing that tenant was entitled to use "land that may from time to time be set aside for . . . free parking" allowed lessor to eliminate parking spaces (emphasis supplied)); Telesca v. M.L. Bruenn Co., 335 N..Y.S. 2d 875 (N.Y. Sup. Ct. 1972) (involving a lease that did not grant tenant any parking rights whatsoever, and a situation in which tenant asserted that it had acquired parking rights by implication); Koursiaris v. Astoria N. Dev. Inc., 153 A.D.2d 639 (N.Y. Sup. Ct. 1988) (involving a lease that did not grant parking rights and a situation in which tenant asserted right to parking based on the fact that prior landlord had provided parking). Defendants' argument that Section 27 of the Lease creates a revocable license fails.

For the foregoing reasons, Plaintiffs are likely to succeed on the merits of their claims.

iv. Balance of Equities

The balance of equities supports an order granting Plaintiff's request for a preliminary injunction. As noted above, Plaintiff will suffer irreparable harm in the event Defendants are not enjoined from enforcing the New Rules to the extent they require payment for parking.

By contrast, neither the public nor Defendants will suffer harm by the issuance of such an order. First, Defendants' argument that the Additional Lot is oversubscribed is belied by the facts on the ground. The first come, first serve parking arrangement that is currently in place in that lot has been working for the past twenty years. Attached hereto as **Exhibit 6** are photographs of the Additional Lot, taken at 10:00am and at 3:00pm on a weekday, which show

numerous empty parking spaces. There is no reason the first come, first serve parking arrangement currently in place respecting the Additional Lot cannot remain in place until this dispute is resolved.

In arguing that the Additional Lot is oversubscribed, the Defendants are essentially arguing that they have no choice but to breach the tenants' leases because they promise more parking than is available. If that is true, Hoyle Tanner most certainly has a likelihood of success on the merits of its breach of contract claims. In any event, even if it's true that the Defendants can't avoid breaching the lease, that doesn't justify an unlawful increase in the tenants' rent—that would not create additional spaces, it would only enrich Defendants and/or deprive tenants of their parking rights under their leases. The Defendants could assign parking spaces to the tenants without charging for those spaces. Of course, Plaintiff would maintain that the assignment of spaces that interferes with its parking rights constitutes a breach of the Lease. To the extent the lots are oversubscribed, that problem was created by the landlord, not the tenants, and the tenants should not be prejudiced for it. Defendants are sophisticated businesses that should have done their due diligence prior to purchasing the Property, and should not have done so if they knew they could not comply with the lease terms.

III. Conclusion

For the foregoing reasons, Plaintiff respectfully requests that this Honorable Court grant its request for preliminary injunctive relief enjoining the Defendants from enforcing the New Rules to the extent the New Rules require Plaintiff to pay for parking. For the convenience of the Court, Plaintiff attaches a Proposed Order as **Exhibit 7** to this Memorandum.

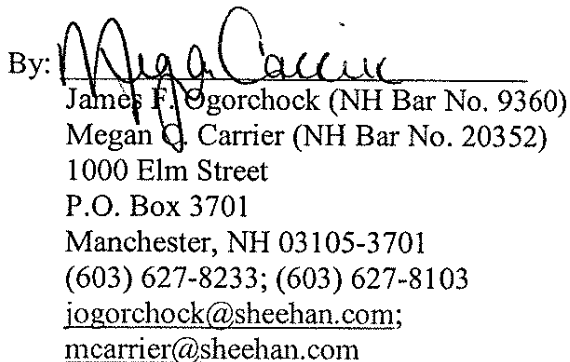
Respectfully submitted,

HOYLE, TANNER & ASSOCIATES, INC.

By its attorneys,

SHEEHAN, PHINNEY, BASS & GREEN, PA

Dated: October 6, 2017



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CERTIFICATE OF SERVICE

I certify that on 10/5/2017, I caused a copy of the foregoing to be e-mailed to:

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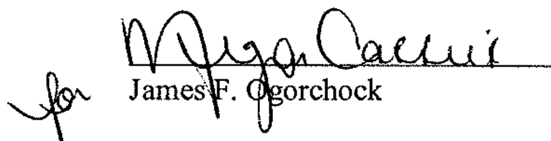

for James F. Ogorchock

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS SUPERIOR COURT

Docket No. 216-2017-CV-00665
216-2017-CV-00703

Hoyle Tanner & Associates, Inc.
McLean Communications, LLC

v.

150 Realty, LLC
Harbour Links Estates, LLC

DEFENDANTS' OBJECTION TO HOYLE TANNER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants 150 Realty, LLC and Harbour Links Estates, LLC hereby object to Plaintiff Hoyle Tanner & Associates, Inc.'s ("HTA") Motion for Partial Summary Judgment (the "Motion") on Count II of HTA's Complaint.

I. INTRODUCTION

In February 2017, when Defendants purchased three properties in the Manchester millyard (150 Dow Street, 89 Dow Street, and 100 Dow Street), they encountered an unregulated and uncontrolled parking condition. Leases negotiated by the prior owner, One Dow Court, LLC, grant conflicting rights to the same parking areas. Tenant demand for parking spaces is more than twice the parking capacity, and parking shortages prevent the lease of vacant space. To reduce parking pressure, particularly in lots surrounding 89 Dow Street, Defendants have voluntarily paid to provide offsite parking for tenants whose leases entitle them to park at the millyard properties.

To further remedy these problems, Defendants exercised their authority under the tenant leases to establish updated parking rules and regulations for the millyard properties. The updated rules call for Defendants to invest hundreds of thousands of dollars in capital

improvements (not required by the tenant leases) to manage and upgrade the parking areas, and introduce a schedule of monthly fees for assigned parking spaces. When they purchased the millyard properties, Defendants reasonably believed that their authority under the tenant leases to establish rules and regulations for parking includes the ability to charge reasonable parking fees. HTA's lease does not prohibit such fees, and leases with several other tenants are explicit that fees to obtain parking can be charged back to the tenants.

HTA and four other tenants have filed suit to challenge the updated parking rules. These tenants assert competing claims to the same parking resources, and seek relief that would conflict with Defendants' rights, and with parking provisions in leases of non-litigating tenants.

HTA has now moved for partial summary judgement on Count II of its Complaint. Count II seeks a declaratory judgment on the validity of parking fees.[1] Under the updated rules, HTA would be assessed monthly fees for spaces that are assigned (reserved) for HTA under its lease at 150 Dow Street, and for additional assigned spaces that HTA requests at 89 Dow Street. HTA's Complaint does not seek a ruling on, and its Motion does not address, the number of spaces HTA is entitled to use at 89 Dow Street, or Defendants' ability to assign spaces at 89 Dow Street to other tenants.

HTA is not entitled to summary judgment on Count II. HTA's lease does not, as HTA alleges, unambiguously bar the assessment of parking fees. Leases with other tenants are explicit that parking is free of charge; the HTA lease contains no such language. Nor does the HTA lease suggest or imply that the cost of parking is included in the tenant's base rent. Instead, the lease expressly authorizes the lessor to establish rules and regulations for parking.

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[1] Two other tenants, McLean Communications, LLC and At Comm Corp., filed similar motions for partial summary judgment on this same issue. Because of differences in these tenants' leases, Defendants have filed separate objections to each motion for partial summary judgment.

HTA has not identified any basis under New Hampshire law to hold that this authority does not include the ability to adopt reasonable fees for parking.

HTA alternatively argues that, if the lease is ambiguous, evidence of the parties' intent when the lease was negotiated demonstrates that parking was included in base rent. HTA has not carried its burden of proof on this issue. HTA relies solely on an affidavit of Christopher Mulleavey, who joined HTA in 1998. The lease, however, was negotiated and signed in 1997. Mr. Mulleavey could not have personal knowledge of what HTA and ODC intended and understood when the lease was negotiated. ODC gave Defendants no indication that free parking was promised to HTA, or that parking fees could not be charged. No discovery has been conducted in this case, and it would be premature to rule on the issue of the parties' intent at the summary judgment stage.

II. RELEVANT FACTS

A. Parking Conditions at the Millyard Campus

HTA leases commercial space at 150 Dow Street in Manchester, pursuant to an October 14, 1997 lease (the "Lease") with the prior owner of the property, One Dow Court, LLC ("ODC"). See attached Affidavit of Steven Binnie ("Binnie Aff."), ¶ 3. In February 2017, ODC sold 150 Dow Street and two contiguous properties in the Manchester millyard – 89 Dow Street[2] and 100 Dow Street (collectively the "Millyard Campus") – to Defendants. Id., ¶ 2. Defendants succeeded to ODC's rights under the Lease. Id., ¶ 3

The Millyard Campus has a total parking capacity of 625 spaces – 225 spaces at 150 Dow Street, 300 spaces at 89 Dow Street, and 100 spaces at 100 Dow Street. Id., ¶ 4.

[2] 89 Dow Street is part of a property that has a separate address of 801-815 Canal Street. For simplicity, use of the term "89 Dow Street" in this Objection shall mean both 89 Dow Street and 801-815 Canal Street.

However, actual tenant demand for parking exceeds 1250 parking spaces, or double the 625 space capacity. Id., ¶ 5. The parking shortage exists, in part, because ODC indiscriminately issued and re-issued parking tags to allow tenants' employees and customers to use common spaces at the Millyard Campus. Id. ODC also entered into leases granting conflicting rights to the same parking areas, as discussed below. Parking shortages have prevented Defendants from leasing space to new tenants, and approximately 33 percent of the Millyard Campus is unoccupied. Id., ¶ 8.

ODC's leases with the Millyard Campus tenants vary with respect to parking rights conveyed. For example, the lease with Dyn, Inc. (now Oracle), is explicit that Dyn is afforded assigned (reserved) spaces at 150 Dow Street "at no charge," and at 89 Dow Street and other lots "at no cost to LESSEE." Id., ¶ 6(b). In contrast, the HTA Lease provides for 14 assigned spaces at 150 Dow Street, and "additional parking, as required" at 89 Dow Street, but does not state that parking shall be provided free of charge, or that base rent covers costs associated with parking. See HTA Lease, § 27(b).[3] All of HTA's parking rights are subject to the lessor's "reasonable rules and regulations." Id., § 27(c).

With regard to "additional parking" at 89 Dow Street, the HTA Lease does not require the lessor to reserve a minimum number of spaces at 89 Dow Street for the lessee, or entitle the lessee to any assigned (reserved) spaces that location. As a result, HTA is limited to using, in common with other tenants, available unassigned spaces at 89 Dow Street.

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[3] The HTA Lease is included as Exhibit 2 to HTA's memorandum of law in support of its Motion.

B. Tenants' Conflicting Demands For Parking

Parking problems at the Millyard Campus are exacerbated by tenants' competing demands for parking at 89 Dow Street, when such demands conflict with express terms of leases negotiated by ODC. Binnie Aff., ¶ 6. For example:

- HTA has alleged that, in addition to the 14 spaces assigned under its Lease at 150 Dow Street, it is entitled to 51 of the 300 spaces at 89 Dow Street, although its Lease does not designate or guarantee a minimum number of spaces at 89 Dow Street. Id., ¶ 6(a).
- ODC's lease with Dyn, a tenant of 150 Dow Street, grants Dyn the right to 328 spaces at the Millyard Campus, including 40 assigned (reserved) spaces at 150 Dow Street. The lease also affords Dyn the right to 166 assigned (reserved) spaces at 89 Dow Street. Id., ¶ 6(b).
- At Comm and McLean Communications, both tenants of 150 Dow Street, contend their leases entitle each of them to 24 spaces at 89 Dow Street. However, a provision in the leases provides that At Comm and McLean may only use spaces at 89 Dow Street that are not "presently" or "in the future" assigned to other tenants. Id., ¶ 6(c).
- ITNH, a tenant of 150 Dow Street, is entitled under its lease to 4 assigned spaces at 150 Dow Street. ITNH has contended that it is entitled to 20 additional spaces at 89 Dow Street, even though the ITNH lease states that ITNH may only use spaces at 89 Dow Street that are not "presently" or "in the future" assigned to other tenants. Id., ¶ 6(d).

- FitLab is a fitness club that leases space at 89 Dow Street. FitLab's lease does not provide for a specified number of spaces at 89 Dow Street. However, FitLab alleges its customers (which number in the thousands) have a right to use, in common, all 300 spaces at 89 Dow Street, and that spaces at 89 Dow Street may not be assigned to other tenants. Id., ¶ 6(e).
- Manchester Acupuncture is a tenant of a storefront space in the 89 Dow Street complex. Manchester Acupuncture's lease allows the tenant to park, in common with other tenants, in the parking area "immediately adjacent to" its leased premises, i.e., its storefront space. However, Manchester Acupuncture alleges that its employees and customers are entitled to use any of the parking areas around 89 Dow Street, and it alleges that tenants of 150 Dow Street should not be permitted to use those parking areas. Id., ¶ 6(f).

To reduce parking pressure, particularly in lots surrounding 89 Dow Street, Defendants have voluntarily paid to provide offsite parking for tenants whose leases entitle them to park at the Millyard Campus. Id., ¶ 9. For example, Dyn is entitled under its lease to a total of 328 spaces, including up to 166 assigned spaces at 89 Dow Street. Id., ¶ 6(b). Defendants currently pay approximately $40,000 per year to provide off-site parking to Dyn. Id., ¶ 9. Defendants also pay approximately $50,000 per year to provide off-site parking to other tenants whose leases entitle them to park at the Millyard Campus. Id.

C. Updated Parking Rules

To address the free-for-all approach to parking, Defendants updated the parking rules for the Millyard Campus. The updated rules, which were to take effect on October 1, 2017, call for Defendants to invest hundreds of thousands of dollars in capital improvements that far exceed

the lessor's maintenance requirements under the tenant leases. These improvements include the installation of additional parking area lighting, the construction of parking gates and implementation of electronic "key fobs," and the hiring of personnel to manage the parking areas. Id., ¶ 10.

The updated rules also introduce a fee schedule for assigned parking spaces. In addition to off-setting the cost of the capital improvements, the fees are intended to delineate actual tenant need for parking, discourage tenants from demanding an excessive number of spaces, and allow for the reasonable apportionment of the limited parking resources in a manner consistent with the varied and often competing provisions of the tenant leases. Id., ¶ 11. Under the fee schedule, tenants may obtain additional assigned spaces (i.e., assigned spaces beyond those specified in the tenants' leases) for a monthly fee of $135 per space. In addition, spaces currently assigned under the leases are assessed a monthly fee of $55 per space. (The fees do not apply to tenants whose leases state that parking is provided free of charge.) Id., ¶ 12.

In HTA's case, the updated parking rules do not prevent HTA from continuing to use available common/unassigned spaces at 89 Dow Street, free of charge. A fee of $135 per space would apply only if HTA wanted to obtain more than the 14 assigned spaces under the Lease.

When they purchased the Millyard Campus, Defendants reasonably understood that pursuant to their ability under the tenant leases to adopt parking rules and regulations, they could introduce a schedule of parking fees that would apply to tenants whose leases did not state that parking was free. Id., ¶ 13. Neither ODC's owner, Ralph Sidore, nor anyone else, gave Defendants reason to believe that parking fees could not be assessed. Defendants understood the only tenants that could not be charged for parking are tenants whose leases are explicit that parking is provided free of charge. Id.

Defendants' understanding that they could charge for parking is consistent with the fact that leases with a number of tenants (including McLean, At Comm, and ITNH) state that if the tenant needs additional parking, the lessor will obtain, at the lessee's cost, parking permits from the City of Manchester. Id. The parking fees under the updated rules are consistent with fees charged by the City for parking, and by nearby private parking garages. Id.

III. PROCEDURAL HISTORY

HTA's Complaint, filed September 11, 2017, asserts claims for injunctive relief (Count I); declaratory judgment regarding the validity of the parking fees (Count II); breach of contract (Count III); and anticipatory breach of contract (Count IV). HTA has moved for summary judgment solely as to Count II. HTA's Complaint and Motion for partial summary judgment does not address other contested issues, including:

- The interpretation of the Lease provision allowing HTA to use "additional parking, as required" at 89 Dow Street;
- The number of spaces HTA is entitled to use at 89 Dow Street; and
- Defendants' ability to assign spaces at 89 Dow Street to other tenants.

On October 6, Defendants moved to dismiss or stay this proceeding in favor of arbitration. On November 28, while Defendants' motion was pending, HTA filed the instant Motion. On December 11, the Court issued an Order denying Defendants' motion to dismiss or stay. Discovery in this case is in its nascent stages. Since December 11, Defendants have propounded discovery requests on HTA, but to date no documents have been produced, and no depositions have been conducted.

In total, five tenants of Defendants (HTA, McLean, At Comm, ITNH, Manchester Acupuncture) have filed suit to contest the updated parking rules.[4] Defendants have filed demands for arbitration against each of these five tenants, as well as against a sixth tenant, FitLab. As noted above, these tenants assert competing demands for the same parking resources. For this reason alone, the Court should deny HTA's motion for partial summary judgment so that HTA's rights are not placed above those of other tenants or Defendants.

IV. ARGUMENT

A. Legal Standard

The purpose of the summary judgment statute, RSA 491:8-a, is to determine whether there is any genuine issue of material fact which requires a formal trial on the merits. See, e.g., Coburn v. First Equity Assocs., 116 N.H. 522, 524 (1976). "An issue of fact is 'material' for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." Van De Mark v. McDonald's Corp., 153 N.H. 753, 756 (2006).

When deciding a motion for summary judgment, "the trial court is required to construe the pleadings, discovery, and affidavits in the light most favorable to the non-moving party to determine whether the proponent has established the absence of a dispute over any material fact and the right to judgment as a matter of law." Panciocco v. Lawyers Title Ins. Corp., 147 N.H. 610, 613 (2002) (emphasis added).

"'[A]n argument between parties about the meaning of a[n] [ambiguous] contract is typically an argument about a 'material fact,' and summary judgment is normally unwarranted unless 'the [extrinsic] evidence presented about the parties' intended meaning [is] so one-sided

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[4] Like HTA and McLean, ITNH and Manchester Acupuncture filed suit in this Court. At Comm filed suit in Rockingham County Superior Court, which recently granted At Comm's motion to transfer the case to this Court.

that no reasonable person could decide [to] the contrary.'" Den Norske Bank AS v. First Nat. Bank of Boston, 75 F.3d 49, 53 (1st Cir. 1996). (Emphasis added).

The party moving for summary judgment must submit in support of its motion "'an affidavit based upon personal knowledge of admissible facts as to which it appears affirmatively that the affiants will be competent to testify.'" Granite State Mgmt. & Res. v. City of Concord, 165 N.H. 277, 290 (2013) (quoting RSA 491:8-a, II). Affidavits containing "expressions of purely personal opinion" are insufficient to entitle at party to summary judgment. Id. Further, the "'affidavits should set forth evidentiary, and not ultimate, facts and should set forth the facts with particularity, mere general averments being insufficient.'" Id. (quoting 49 C.J.S. *Judgments* § 332, at 404-05 (2009)).

B. HTA Is Not Entitled to Summary Judgment on Count II

1. The Lease Terms Do Not Support HTA's Position

HTA first argues that the plain language of the Lease bars the assessment of any parking fees. However, HTA cannot point to any Lease provision that guarantees free parking, states that parking fees are included in the base rent, or states that parking fees cannot be assessed. In this regard, the HTA Lease contrasts sharply with provisions in other leases. As noted, ODC's lease with Dyn is explicit that the tenant is afforded assigned (reserved) spaces at 150 Dow Street "at no charge," and at 89 Dow Street and other lots "at no cost to LESSEE." Binnie Aff., ¶ 6(b). Thus, when ODC intended leases to provide free parking for tenants, it expressly included language to accomplish this result.

Further, the HTA Lease explicitly makes the lessee's parking rights "subject to LESSOR'S reasonable rules and regulations." HTA Lease, § 27(c). HTA has not cited to any principal of New Hampshire law to support its argument that a fee for parking cannot

reasonably be considered a rule or regulation. Any number of rules or regulations could result in a fee or cost to a tenant. Here, the parking fees are not, as HTA contends, a means to generate profit in lieu of a rent increase. They are an integral part of a comprehensive set of parking rules, and are intended to offset the cost of capital improvements and control demand.

HTA does not cite any New Hampshire authority that supports its narrow interpretation of the "rule or regulation" provision. The interpretation of whether the fees charged by Defendants are a "reasonable rule or regulation" is an issue of disputed material fact, and, therefore not appropriate for summary judgment.

Other courts have recognized that the reasonableness of requirements imposed by a lessor under a lease "rules and regulations" provision is a question of fact, and therefore not appropriate for summary judgment. See 1600 Penn Corp. v. Computer Sciences Corp., No. CIV.A. 06-CV-5329, 2008 WL 4443016, *10 (E.D. Penn. Sept. 30, 2008). In 1600 Penn, a commercial lease granted the landlord the "right to establish reasonable rules and regulations" governing the building in which the tenant conducted its medical records processing and storage operations. Id. at *1, *10. After a dispute arose over the tenant's use of the building, the landlord announced it was implementing "new rules and regulations" which would require the tenant to prepare extensive site management plans, safety and security measures, alarm monitoring procedures, HVAC operational plans, and more. Id. at *2. The tenant refused to comply with the new rules and regulations, arguing they "were beyond" the landlord's authority and would add new terms to the parties' lease. The landlord filed suit for breach of contract; both parties moved for summary judgment. In denying both motions, the District Court held: "As a general matter, reasonableness is a question of fact to be decided by the jury and is dependent upon the numerous circumstances surrounding the transaction." Id. The Court

concluded material facts were disputed – the landlord alleged the rules were necessary due to ongoing safety concerns, while the tenant alleged the landlord's purported concerns "were unfounded." Id.

HTA relies on a 1992 Florida case, Robbins v. I.R.E. Real Estate Fund, Ltd., 608 So. 2d 844 (Fla. Ct. App. 1992). Robbins is not binding on this Court, and it is inapposite because it was not decided on a motion for summary judgment. The court based its decision in part on "evidence that the absence of parking charges was a material inducement in their original execution of the leases." 608 So. 2d at 846. HTA has submitted no such evidence here (as discussed below).

Moreover, other authority recognizes that a lessor can charge for parking even when the lease is silent with respect to the lessor's ability to charge for parking. For example, in MPM Hawaiian, Inc. v. World Square, 666 P.2d 622 (Hawaii Ct. App. 1988),[5] the court held that where a lease granted the landlord "exclusive management and control" of a shopping center parking lot, the landlord could implement a parking validation system that included an hourly fee. The court held that there was nothing in the lease that required the lessor "to designate an adequate free parking area" for the tenants. Id.; see also Hop v. Skyline Village Mobile Home Community, No. C8-88-491, 1988 WL 64498 (Minn. App. Ct. June 28, 1988) (mobile home park owner's amendment of parking policy to charge a $20 per month fee for additional vehicles was not a "substantial modification" of the lease); Cooley v. Bettigole, 1 Mass. App. Ct. 515 (1973) (lessor could implement parking scheme that included chit system with refundable fees where the lease called for free parking).

[5] This case is reported as having been reversed and remanded without explanation, but has been cited positively, including for this proposition in 56 A.L.R. 3d 596, *Construction and operation of parking-space provision in shopping center lease.*

2. HTA Has Not Proved the Parties' Intent

HTA alternatively argues that if the Lease is ambiguous, "the intentions of the parties to the Lease control" and support HTA's position. Memo, p. 8 (emphasis added). HTA has not established the absence of a dispute on the issue of the parties' intent.

As shown, Defendants reasonably understood when they purchased the Millyard Campus that their authority to impose parking rules and regulations included the ability to introduce a schedule of parking fees. Binnie Aff., ¶ 13. ODC gave no indication that parking fees could not be assessed, or that tenants had been promised free parking (other than tenants whose leases are explicit that parking is provided free of charge). Id. Further, the leases themselves support Defendants' understanding. Some leases are explicit that parking is provided free of charge; no other leases state that parking fees cannot be assessed. Further a number of leases recognize that the tenants must pay fees (to the City) if they require additional parking. Id., 14.

HTA relies on an affidavit from its current President/CEO, Christopher Mulleavey, to argue it was HTA's "understanding that the cost of parking under the Lease was encompassed in its base rent" and that it "negotiated the Lease based on that understanding." HTA Memo, p. 8. In his affidavit, Mr. Mulleavey asserts he is "familiar with the negotiations of the Lease including Hoyle Tanner's understanding of its terms and Hoyle Tanner's intentions in entering into it." Mulleavey Aff., ¶ 3. Mr. Mulleavey further asserts that he was "involved in negotiating" the Lease. Id., ¶ 6. The Lease was executed on October 14, 1997. However, according to HTA's website, Mr. Mulleavey "joined the firm as a transportation engineer in 1998." Binnie Aff., ¶ 15. Accordingly, Mr. Mulleavey could not have personal knowledge of the Lease negotiations. Moreover, the Mulleavey affidavit is notable for the complete absence

of any allegations concerning the intent of the original lessor, ODC. The affidavit does not cite a single act or statement made by ODC to suggest that parking fees were included in base rent and would never be changed.

Further, allegations regarding Mr. Mulleavey's subjective belief as to what HTA intended and understood are not relevant to the interpretation of the Lease. When language in a lease or other contract is ambiguous, the language must be determined based on what the parties, "under an objective standard, mutually understood the ambiguous language to mean." General Linen Services, Inc. v. Franconia Inv. Assoc., L.P., 150 N.H. 595, 597 (2004) (emphasis added). The Supreme Court has explained "[l]ooking at the parties' subjective intentions alone accomplishes no more than restating their conflicting positions, and therefore cannot provide an appropriate standard for resolving the dispute in this case." N.A.P.P. Realty Trust v. CC Enterprises, 147 N.H. 137, 140 (2001). Accordingly, allegations concerning HTA's subjective intent are insufficient to carry HTA's burden of proof on summary judgment.

The fact that Defendants, as the successor owners, cannot now testify as to the intentions of the parties at the time of the formation of the Lease in 1997 does not preclude Defendants from obtaining discovery on this issue. HTA's conclusory statement that it was HTA's "understanding" that parking was included in base rent does not resolve the disputed material fact of whether Defendants may charge parking fees. Defendants have recently sought discovery from HTA on the very issue of lease negotiations between HTA and ODC, and it would be inappropriate to resolve this disputed factual issue on a motion for summary judgment. Indeed, Defendants have the right to seek discovery and bring genuine issues of material fact to the court's attention, and summary judgment should not be entertained until such discovery is conducted. See, e.g., Carl v. McClain Industries, Inc., No. Civ. 00-233-M,

2001 WL 716128 at *4 (D.N.H. June 12, 2001) (denying motion for summary judgment as premature and holding that "Although Rule 56(b) allows a motion for summary judgment at any time, some support exists for the proposition that a motion for summary judgment is premature if there has been *no* time for discovery, and discovery could be useful in opposing the motion") (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) ("the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery") (emphasis added)); Heino v. US Bank, N.A., Slip Copy, No. 16-cv-128-LM, 2016 WL 7116017 at *4-5 (D.N.H. Dec. 6, 2016) (denying motion for summary judgment as premature when nonmovant had no opportunity to conduct discovery).

HTA relies on the fact ODC never charged for parking. But this prior course of conduct does not resolve the disputed material fact of whether Defendants may now charge for parking under the Lease pursuant to their ability to impose "reasonable rules and regulations." Moreover, any argument that Defendants have "waived" their right to impose fees for parking pursuant to the Lease's "rules and regulations" fails in light of Section 37 of the Lease, which states that "failure of lessor . . . to exercise any right of lessor herein contained, shall not be construed as a waiver or a relinquishment for the future, of such covenant, term, condition or right." HTA Lease, §37. See, e.g., Subaru Distributing Corp. v. Subaru of America, Inc., No. 98 CIV. 5566(CM), 2002 WL 413808 (S.D.N.Y. March 18, 2002) (prior failure to enforce contract term protected by no waiver clause).

C. HTA Is Not Entitled to Summary Judgment on Other Issues

HTA's Motion attempts to distinguish cases cited in Defendants' earlier pleadings, in which courts treated the right to use common parking areas as a revocable license. Memo., p. 6-8. However, these cases are not relevant to the issue now before the Court on summary

judgment, which again is the validity of rules assessing fees for assigned parking spaces. As noted, HTA has not sought judgment on the number of spaces HTA can reasonably require at 89 Dow Street, and whether Defendants can assign spaces at 89 Dow Street to other tenants. Furthermore, HTA's Motion does not attempt to demonstrate the absence of genuine factual disputes on the issues.

Factual disputes do exist. For example, the evidence shows that some number of spaces at 89 Dow Street have always been assigned to (reserved for) other tenants. When Defendants purchased the Millyard Campus, signs posted at 89 Dow Street restricted use of parking area to customers of 89 Dow Street's tenants. Thus, HTA did not have an unrestricted right to park at 89 Dow Street when ODC was the owner.

Moreover, determining the scope of HTA's rights to park at 89 Dow Street cannot be performed in a vacuum, without considering rights conferred under leases that ODC entered into with other tenants. As noted, those leases conflict with respect to the tenants' rights to parking at 89 Dow Street. Were HTA granted the 51 spaces it demands at 89 Dow Street, Defendants could not comply with other tenants' demands for parking at the same location.

V. CONCLUSION

For the reasons set forth above, Plaintiff is not entitled to partial summary judgment, and its Motion should be denied.

VI. REQUEST FOR A HEARING

Defendants respectfully request an opportunity to be heard on their objection to Plaintiff's Motion for Partial Summary Judgment.

Respectfully submitted,

150 REALTY, LLC and
HARBOUR LINKS ESTATES, LLC

By their attorneys,

Dated: January 5, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on the above date a copy of the foregoing has been delivered via email and U.S. Mail to counsel of record.

Christopher H.M. Carter

#57385563

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February 08, 2018

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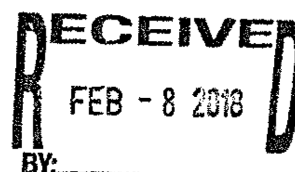

Case Name: **Hoyle Tanner & Associates, Inc. v 150 Realty, LLC, et al**
Case Number: **216-2017-CV-00665** ***216-2017-CV-00703; 216-2017-CV-00943***

You are hereby notified that the following order was entered in the above matters:

RE: MOTION FOR INTERLOCUTORY APPEAL:
"January 23, 2018 After review, motion denied." (Brown, J.)

RE: MOTIONS FOR PARTIAL SUMMARY JUDGMENT:
See copy of order attached - Brown, J.

W. Michael Scanlon
Clerk of Court

(539)

C: James F. Ogorchock, ESQ; Megan C. Carrier, ESQ; Jamie Sue Myers, ESQ; Christopher H.M. Carter, ESQ; Joseph Allen Foster, ESQ; Rachel A. Hampe, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Hoyle, Tanner & Associates, Inc., and McLean Communications, LLC

v.

150 Realty, LLC, and Harbour Links Estates, LLC

Docket No. 216-2017-CV-00665, 00703

ORDER

Currently before the Court are plaintiffs' motions for summary judgment on count II of their respective complaints, where they seek a declaratory judgment that defendants' attempt to impose a parking fee is unenforceable under the terms of their leases. Defendants object. Upon consideration of the pleadings, arguments, and applicable law, the Court finds and rules as follows.

Factual Background

For the purposes of this motion, the Court finds the following relevant facts in the light most favorable to defendants, as the nonmoving parties. Hoyle, Tanner & Associates, Inc. ("HTA"), and McLean Communications, LLC ("McLean"), have leased space at 150 Dow Street in Manchester, New Hampshire ("the property") since January 1, 1998, and September 1, 2001, respectively. (See McLean's Mot. Summ. J. Ex. 1–2; HTA's Mot. Summ. J. Ex. 1–2.) When plaintiffs entered into their respective leases, One Dow Court, Inc. ("ODC") was their landlord. Section 27 of each lease contains substantially similar provisions regarding parking rights. Section 27 of McLean's lease reads:

a) Permanent parking for employees of LESSEE shall be limited to six (6) assigned parking spaces, located immediately adjacent to the 150 Dow Street building, and up to twenty four additional spaces located in the parking lot east of the buildings at 79-89 Dow Street and 801-815 Canal Street in Manchester.

b) LESSEE's parking rights are subject to LESSOR's reasonable rules and regulations.

c) LESSEE's employees shall have the right to use, in common with other tenants of LESSOR, the parking lot owned by LESSOR and located just east of LESSOR's building at 79-89 Dow Street, provided they do not occupy spaces that are presently or become in the future, marked with a specific tenant's name. In addition, when requested to do so by LESSEE, LESSOR shall obtain parking permits from the City of Manchester, if available, and provide them to LESSEE at cost.

(McLean's Ex. 2, ¶ 27.) Similarly, Section 27 of HTA's lease reads:

a) Permanent parking for employees of LESSEE shall be limited to six (6) assigned parking spaces, located immediately adjacent to the 150 Dow Street building.

b) LESSEE shall be entitled to additional parking, as required, in the lot located between Gold's Gym and Sanel Auto Parts on Dow Street.

c) LESSEE's parking rights are subject to LESSOR's reasonable rules and regulations.

(HTA's Ex. 2, ¶ 27.) Both plaintiffs were subsequently assigned additional spaces. It is undisputed that prior to 2017, neither plaintiff was ever charged a fee for parking in addition to the base rent. Plaintiffs also attested that they believed the leases, when negotiated, "contemplated that base rent included parking." (HTA's Ex. 1, ¶ 6; McLean's Ex. 1, ¶ 6.)

In 2017, defendants purchased the property from ODC. On August 18, 2017, defendants notified plaintiffs that they were introducing new building rules and

regulations ("the new rules"), which provided, among other things, that beginning on October 1, 2017:

> a) [A]ll tenant employees parking cars on the Campus must display at all times a valid front parking tag hanging from the vehicle's rear view mirror, as well as a valid rear window parking sticker;
>
> b) Any vehicle that is parked in any parking spot on the Campus that does not display a valid front parking tag and rear window parking sticker . . . will be towed, at the owner's expense, regardless of whether the vehicle is parked in a specifically assigned spot for a specific tenant;
>
> c) For tenants whose leases designate a specific number of parking spaces that will be available for use but does not specify that those spaces shall be 'free' of charge, a $55.00 monthly fee for each designated space will be charged;
>
> d) For tenants whose leases entitle them to use additional parking spaces but do not specify the exact quantity of additional parking spaces that may be utilized, a $135.00 monthly fee will be charged for each additional parking space required; and
>
> e) All payments shall be required to be made prior to the first day of the month for parking tags and stickers to be valid for any given month.

(Id. Ex. 3, p. 7–8.)

Legal Standard

In deciding whether to grant summary judgment, the Court considers the pleadings, affidavits, and other evidence, as well as all inferences properly drawn from them, in the light most favorable to the non-moving party. See Amica Mut. Ins. Co. v. Mutrie, 167 N.H. 108, 111 (2014). In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath sufficient to indicate that a genuine issue of material fact exists." Brown v. Concord Grp. Ins. Co., 163 N.H. 522, 527 (2012). An issue of fact is "material" for purposes of summary judgment if it affects

the outcome of the litigation under the applicable substantive law. Macie v. Helms, 156 N.H. 222, 224 (2007) (quoting VanDeMark v. McDonald's Corp., 153 N.H. 753, 756 (2006)). "If there is no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, the grant of summary judgment is proper." Town of Barrington v. Townsend, 164 N.H. 241, 244 (2012) (quoting Bates v. Vt. Mut. Ins. Co., 157 N.H. 391, 394 (2008)); see also RSA 491:8-a, III.

Legal Analysis

As stated above, plaintiffs now move for a declaratory judgment that defendants' imposition of a parking fee is inconsistent with the plaintiffs' lease agreements and, therefore, unenforceable. Defendants counter, arguing summary judgment is inappropriate because: (1) nothing in plaintiffs' leases "bar the assessment of any parking fees"; (2) plaintiffs' rights are "subject to LESSOR's reasonable rules and regulations," which defendants contend gives them the authority to impose a parking fee in the instant case; (3) the issue of whether the fees charged by defendants are reasonable rules and regulations is a disputed material fact; and (4) in the event the Court finds the leases ambiguous, there are disputed material facts regarding the parties' intent. (Defs.' Obj. p. 10–13.)

Although defendants contend that nothing in plaintiffs' leases bar the assessment of parking fees, the Court is unpersuaded. "The proper interpretation of a lease is ultimately a question of law for [the Court] to determine." S. Willow Properties, LLC v. Burlington Coat Factory of New Hampshire, LLC, 159 N.H. 494, 501 (2009). "As with any contract, [the Court] interpret[s] a lease by giving its terms their reasonable meaning." Id. Here, the Court finds the leases unambiguously do not authorize

defendants to impose parking charges. The leases state plaintiffs **shall** be entitled to use certain specified parking spaces. This entitlement is neither conditioned on the payment of some fixed fee, nor is it subject to any contractual authority of the landlord to impose parking fees at a later date. Therefore, the Court finds the leases do not permit defendants to impose the contested parking fees. See Martin L. Robbins, M.D., P.A. v. I.R.E. Real Estate Fund, Ltd., 608 So. 2d 844, 845–46 (Fla. Dist. Ct. App. 1992), disapproved of on other grounds by Careers USA, Inc. v. Sanctuary of Boca, Inc., 705 So. 2d 1362 (Fla. 1998) (finding, under similar circumstances, that "the absence of a lease provision authorizing the landlords to impose parking charges cannot be regarded as [a] mere oversight in the leases . . . . It is unassailable that the leases simply do not authorize the landlords to impose parking charges").

Defendants next contend they are authorized to impose the parking fees based on Section 27 of the leases, which states plaintiffs' parking rights are "subject to lessor's reasonable rules and regulations." (Defs.' Obj. p. 10.) The Court is equally unpersuaded. Defendants have cited no legal authority supporting their argument that section 27's reference to "reasonable rules and regulations" would authorize them to unilaterally impose a parking fee. The Court finds such an imposition would constitute a substantive amendment to the respective leases, as it would add a material term to the leases without first affording plaintiffs the opportunity to bargain with defendants with regard to said term.

Defendants also argue that "[o]ther courts have recognized that the reasonableness of requirements imposed by a lessor under a lease['s] 'rules and regulations' provision is a question of fact, and therefore not appropriate for summary

judgment." (Defs.' Obj. p. 11.) In support of this argument, defendants cite 1600 Penn Corp. v. Computer Scis. Corp., No. CIV.A. 06-CV-5329, 2008 WL 4443016, at *10 (E.D. Pa. Sept. 30, 2008). Although it is true that the determination of "reasonableness" is often a question of fact, see Arcidi v. Town of Rye, 150 N.H. 694, 702 (2004), the Court finds 1600 Penn distinguishable from the instant case. In 1600 Penn, the parties were directly disputing whether the landlord's rules and regulations were reasonable. Id. Here, the issue is not whether the fees themselves are reasonable; rather, it is whether defendants' imposition of a fee constitutes a "reasonable rule or regulation." Because the Court finds it is not, 1600 Penn is inapplicable.

Because the Court finds the leases clear and unambiguous, the Court need not consider defendants' arguments regarding: (1) the terms of Dyn's lease, (see Defs.' Obj. p. 10); or (2) defendants' intent when they purchased the property,[1] as such evidence is barred by the rule against parol evidence. See Lapierre v. Cabral, 122 N.H. 301, 305 (1982) ("In the absence of an ambiguity, the plain meaning rule prohibits the admission of parol evidence that would contradict the plain meaning of the terms of the contract.").

Accordingly, for the foregoing reasons, plaintiffs' motions for declaratory judgment are GRANTED.

SO ORDERED.

2/8/18
Date

Kenneth C. Brown
Presiding Justice

[1] The Court does note that it struggles to see what relevance defendants' intention when they purchased the property has to the proper interpretation of the leases themselves, which defendants were not parties to at the time they were entered into.