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d/b/a World Mission Prayer Center

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

CANAAN TAIWANESE CHRISTIAN CHURCH, a California non-profit religious corporation, Plaintiff, vs. ALL WORLD MISSION MINISTRIES, a California non-profit religious corporation D/B/A WORLD MISSION PRAYER CENTER, and DOES 1 through 20, inclusive, Defendants.	Case No. 1-11-CV-197542 **DEFENDANT'S TRIAL BRIEF** Date: May 18, 2011 Time: 9:00 a.m. Dept.: 2 Judge: Hon. Patricia M. Lucas

INTRODUCTION

This case arises out of a dispute between Canaan Taiwanese Christian Church ("Church") and All World Mission Ministries ("Mission") over three parcels of land. These parcels of land are located at 1904 Silverwood Avenue, 184 Farley Avenue and 196 Farley Avenue, all located in Mountain View, Santa Clara County, California ("premises"). Church entered into negotiations to sell the premises to Mission in 2008. Mission made a down payment in a nonrefundable sum of $225,000.00. Mission had some difficulty, however, in securing a loan through the bank for the property, and Church and Mission then entered into a financing agreement where Mission would make installment payments of $1,500,000.00 over a term of three years on the property, as well as make interest payments based on the total

purchase price over that three year period. Per this agreement, Mission would have possession and use of the property as long as these payments were made. The parties incorrectly termed this a "Lease Agreement" with an option to purchase the property. However, it is clear from the lease itself in conjunction with the so-called "Option Agreement" that this is in fact an installment purchase agreement requiring the payment of interest on the remaining purchase price.

Although Church purported to terminate the "Lease Agreement" on September 9, 2010, Church did not bring an eviction proceeding until March, 2011. The reason for this is simple: per the "Lease Agreement" and the "Option Agreement," the "Option Consideration" could and must be used to make the payments of "Rent," which are in reality mortgage payments on the property. As long as Church was able and, in fact, obligated to use the $700,000.00 deposit on the property to cover the mortgage, Church was content to allow Mission to remain on the property. The subsequent conduct of the parties shows that the "Rent" was never an issue. While Church and Mission entered into new purchase agreements in October, 2010, those agreements only provide that the balance of "Rent" owed would be paid three days before close of escrow. In reality, any "Rent" defaults would be paid out of the $700,000.00 deposited by Mission in February, 2009, and Mission would make up those defaults by paying the default amounts three days before close of escrow.

The latest 3-day notice ("Notice") purported to be served on March 10, 2011, is invalid. The notice contends that the lease is terminated, yet states that the tenant must pay "Rent" in the amount of $130,671.56 or the lease agreement would be terminated. By giving Mission the option of paying "rent" or quitting the premises, Church has in effect either reinstated the "Lease Agreement" or entered into a new month to month lease with Mission. Furthermore, Church is required to use the $700,000.00 "Option Payment" that was made at the beginning of the Lease to cover any defaults in "Rent." Church still has the initial payment that was made in consideration for the "Lease Agreement" and the "Option Agreement." The "Option Agreement" states that Church must use that money to satisfy any back "rent" amounts. Thus, any amount Church claims is owed by Mission as "Rent" is already paid, and Mission has

satisfied the requirement imposed by Church, i.e., to pay the back "Rent." Since the Notice is phrased in the alternative ("pay rent or quit"), and Church has paid "Rent," Church need not quit the premises.

It is anticipated that Church will argue that the "Option Agreement" was terminated as of May 8, 2010. *See*, Exhibit "F." However, a subsequent agreement to purchase the property was entered into between the parties on October 29, 2010. As an addendum to that purchase agreement, the parties agreed to reinstate the default obligations under the "Option Agreement" on October 30, 2010. Per those obligations, Church had to deduct all defaults in interest payments from the "Initial Option Consideration" of $700,000.00. Consistent with the "Option Agreement" obligations, the parties also agreed that any defaults in interest payments would be paid to Church three days before the close of escrow. Clearly, the intent of the parties was to treat the initial deposit of $700,000.00 alternately as a deposit towards the purchase price and as prepaid interest on Church's mortgage. In the event of default, Mission would repay the interest owed as part of the purchase price.

The amount of "rent" owed on the premises is incorrectly calculated in the Notice. The total monthly "rent" owed to Church was $16,875.00. This amounts to $562.50 per day, which is the amount claimed in Church's complaint. The Notice states that "rent" had not been paid since September 1, 2010. Because the Notice was served on March 10, 2011, the back "rent" would have to be calculated from September 1, 2010 through March 9, 2011. This is a period of 190 days. The actual "rent" owed, based on the papers Church filed with the Court, would in fact be $106,875.00. Church provides no information as to how the $130,671.56 amount demanded in the Notice was calculated. The amount is clearly erroneous, and the Notice is invalid.

The Notice is rather unclear as to the statutory basis for the eviction. On the one hand, it demands payment of rent or the surrender of the premises. On the other, it incorrectly states that Mission is a "tenant at sufferance." A tenant at sufferance is one who holds over after the natural termination of a lease agreement, and not through a default of the lease. The natural termination date of the agreement would be December 31, 2011. Thus, Mission is not a tenant

at sufferance. Furthermore, the Notice states that it is served pursuant to Civil Code §1161a(b), which provides for a holdover after the sale of the property to a third party. Church has not alleged such a case in its complaint. Because the Notice fails to strictly comply with the statutory unlawful detainer scheme, it is fatally defective, and Church cannot bring this action based upon that Notice.

Church still has $700,000.00 paid to it by Mission which covers the entire "Rent" claimed to be owed. Church can still use that money to cover the "Rent." This unlawful detainer action has nothing to do with nonpayment of "Rent" and everything to do with a failure to close escrow, which is an improper basis for an unlawful detainer action.

FACTUAL BACKGROUND

On August 12, 2008, Church and Mission entered into purchase sales agreements to purchase three parcels of real property: a commercial property located at 1904 Silverwood Avenue, Mountain View, CA, a residential property located at 184 Farley Avenue, Mountain View, CA and a residential property located at 196 Farley Avenue, Mountain View, CA. *See*, Exhibit "A," p. 1, line G. and Exhibit "B," p. 1, line F. The total purchase price for the commercial property was set at $3,300,000.00. *See*, Exhibit "A," p. 1, line G. The total purchase price for the residential properties was set at $1,900,000.00. *See*, Exhibit "B," p. 1, line F. The total purchase price for all properties was therefore $5,200,000.00. Mission paid $225,000.00 as a deposit towards the purchase price.

Mission later renegotiated its contract with Church, and was able to enter into a financing agreement whereby Mission would take possession of the premises and pay interest on the total amount of $5,200,000.00 as "Rent" under a "Lease Agreement." *See*, Exhibit "C," p. 2, paragraph 3(b).

Simultaneously with signing the "Lease Agreement" on February 27, 2009, the parties entered into an Option Agreement. *See*, Exhibit "D." The Option Agreement provided that Mission had already deposited $225,000.00 towards the purchase price of the church properties. *See*, Exhibit "D," p. 1, paragraph "C." The Option Agreement also provided that the Agreement was to restructure the transaction contemplated under the prior purchase

agreements, providing Mission with additional time to purchase the property. *See*, Exhibit "D," p. 1, paragraph "D." Mission paid $700,000.00, including the initial $225,000.00 deposit, as the "Initial Option Consideration." *See*, Exhibit "D," p. 2, paragraph 5(a)(i). Thereafter, Mission was to pay an additional $1,500,000.00 each year for the period of three years set by the "Lease Agreement." *See*, Exhibit "D," p. 2, paragraph 5(a)(ii).

Mission improved the property and continued to pay the interest as "Rent" each month during the term of the "Lease Agreement." However, Church delivered a three day notice to terminate the "Lease Agreement" due to their allegation that Mission failed to make one of the $1,500,000.00 Option Payments pursuant to the Option Agreement. *See*, Exhibit "I."

Following this notice, Church allowed Mission to remain on the properties and continue to do business. The parties entered into a new purchase agreement on October 29, 2010, for the commercial property despite Church's notice of termination. *See*, Exhibit "J." A new purchase agreement was entered into between the parties for the purchase of the residential properties on October 30, 2010. *See*, Exhibit "K" and Exhibit "L." Mission remained on the property, and Church allowed the mission to remain on the property, until March 9, 2011. From September 9, 2010, through March 9, 2011, Mission attempted to pay the interest as "rent," but Church would not accept these "rent" payments. However, Church did not initiate any action against Mission for any breach of the "Lease Agreement" until March 10, 2011. *See*, Exhibit "N."

Instead, due to an alleged violation by Mission of the new purchase agreements, Church served two notices. One notice dated March 9, 2011, was by mail, and purported to terminate the purchase agreement. *See*, Exhibit "M." A second notice dated March 10, 2011, stated that All World had three days to pay the back "rent" owed since September 9, 2010, or quit the premises. *See*, Exhibit "N."

LEGAL ANALYSIS AND ARGUMENT

An unlawful detainer is a summary legal proceeding with its own procedure separate from a common civil action. This procedure is authorized either under Code of Civil Procedure §1161 or §1161a. However, the procedure is limited to three situations. The first

situation, authorized by Code of Civil Procedure §1161, is where the parties have entered into a valid lease agreement, where one party is the landlord and the other party is the tenant. The second situation is where an owner files an action against an employee, agent, or licensee whose relationship has terminated. The third situation arises where a purchaser files a lawsuit against a former owner and possessor at an execution sale, a sale by foreclosure or a sale under a power of sale in a mortgage or deed of trust. The second and third situations are governed by Code of Civil Procedure §1161a.

Church has alleged a landlord/tenant relationship pursuant to Code of Civil Procedure §1161. On March 10, 2011, Church served a three-day notice to pay rent or quit upon Mission, demanding rent in the amount of $130,671.56. This action, therefore, appears to be brought pursuant to Code of Civil Procedure §1161(2) for a failure to pay rent. However, the Notice is unclear, as it alleges also a "tenancy at sufferance," and states that it was served pursuant to Code of Civil Procedure §1161a(b), which governs the unlawful detainer of a prior owner pursuant to the sale of property. Among other things, Code of Civil Procedure §1161a(b) requires that the property be sold, which is clearly not the case here.

An unlawful detainer action can only be brought where the statutory requirements for bringing such an action are strictly followed:

> "It has long been recognized that the unlawful detainer statutes are to be strictly construed and that relief not statutorily authorized may not be given due to the summary nature of the proceedings.... The statutory requirements in such proceedings '"must be followed strictly, otherwise a landlord's remedy is an ordinary suit for breach of contract with all the delays that remedy normally involves and without restitution of the demised property."'"

Chester v. Nilsson (1994) 27 Cal.App.4th 516, 526.

As part of the strict requirements a plaintiff must follow in an unlawful detainer action, the plaintiff's notice must absolutely comply with the notice requirements as provided by the unlawful detainer statutes:

> "A valid three-day pay rent or quit notice is a prerequisite to an unlawful detainer action.... Because of the summary nature of an unlawful detainer action, a notice is valid only if the lessor strictly complies with the statutorily mandated notice requirements."

Bevill v. Zoura (1994) 27 Cal.App.4th 694, 697.

Because the burden of proof is on the plaintiff to establish proper notice in an unlawful detainer action, a defendant may bring a challenge to the sufficiency of that notice at any time. *Id.* at 698. In this case, the Notice is improper because it erroneously states twice that it was served pursuant to Code of Civil Procedure §1161a(b), it asserts inconsistently that Mission is a holdover tenant and a tenant at sufferance and that Mission owes a sum of rent due in the amount of $130,671.56, it states an amount of rent due in excess of what Mission actually owes, and in fact Mission has paid the sum of $700,000.00 which, per the terms of the agreements between the parties, must be used to offset any rent owed by Mission to Church.

A. PURSUANT TO THE DEFAULT PROVISIONS IN THE "OPTION AGREEMENT," MISSION DID NOT OWE CHURCH ANY "RENT" AS OF MARCH 10, 2011.

1. The "Initial Option Consideration" Served the Dual Purpose of a Down Payment Towards the Purchase Price on the Property and as Prepaid "Rent."

When Church and Mission entered into the "Lease Agreement" and the "Option Agreement" on February 27, 2009, Mission paid as "Initial Option Consideration" the amount of $700,000.00. "Option Agreement," paragraph 5(a)(i). Mission agreed to pay an amount of "Rent" based upon an amortized rate of interest of 4.5%, subject to change with Church's bank interest rate on its mortgage. "Lease Agreement," paragraph 3(b). The "Initial Option Consideration" was also to be considered an "Option Payment." *See*, last sentence of the "Option Agreement," paragraph 5(a).

Paragraph 5(d) of the "Option Agreement" provides:

> "Upon a Payment Default under the Lease, Owner shall have the right to deduct the delinquent Rent (as defined in the Lease) and the applicable Late Charge (as defined in the Lease) which has accrued as a result of the Payment Default from the Option Payments received by Owner. Owner **shall** deduct the delinquent Rent and the Late Charge from the Option Payments received by Owner on the sixth (6th) after the Payment Date on which the payment was due if Optionee has not paid such Rent and the applicable Late Charge by such date." [Emphasis added]

See, Exhibit "D," p. 3, paragraph 5(d).

The "Payment Date" is defined in the "Lease Agreement" as the first day of the month. *See*, Exhibit "C," p. 2, paragraph 3(b). While "Payment Default" is not defined in the "Lease Agreement," there is a provision entitled "Delinquent Payment," which states that if any installment of "Rent" or any other charge due from Mission is not received by Church within seven days of the "Payment Date," a "Late Charge" of 5% would be applied to the sum due under the "Lease Agreement." *See*, Exhibit "C," p. 3, paragraph 4.

Because paragraph 5(d) requires Church to deduct "Rent" from the $700,000.00 "Initial Option Consideration" 6 days after the "Payment Date," and the "Late Charge" does not apply until the seventh day after the "Payment Date," the "Late Charge" never applies and the "Rent" is never truly delinquent. The "Initial Option Consideration" thus serves two purposes: it is both a down payment towards the total purchase price of the property, and it is prepaid "Rent" to be deducted on the sixth day after the "Rent" is due unless Mission makes a separate payment of "Rent" before that sixth day.

Of course, the "Lease Agreement" provides a consequence for not making the monthly payment and instead deducting the "Rent" from the "Initial Option Consideration." Whenever Church used the "Initial Option Consideration" to cover the "Rent," the balance owed on the purchase price increased. Because the "Rent" was in fact a mortgage payment on the balance owed on the purchase price, the "Rent" increased based upon the new remaining balance. Hence, even though Mission technically could not default on the "Rent," the term was not illusory as the interest rate would increase every time Mission failed to make a "Rent" payment, and Mission would suffer a setback in that it would owe more purchase money on the property.

Therefore, pursuant to the February 27, 2009, "Option Agreement," Church has the obligation to deduct any delinquent "Rent" payments from the "Initial Option Consideration." Church still has $700,000.00 in "Initial Option Consideration" from which to deduct the full amount of delinquent "Rent," which Church claims is equal to $130,671.56. If Church's allegations are to be completely believed, Church has not been paid "Rent" since September 1, 2010, and yet waited until March 10, 2011, to demand the back "Rent." In reality, the "Rent"

is covered by the $700,000.00 "Option Consideration." The intent of the parties is clear: this "Rent" was to be used to cover the mortgage payments on the property. As long as Church has the $700,000.00 "Option Consideration," it can and is obligated to use that money to pay its mortgage. Church waited over six months to bring this eviction proceeding. Church is clearly not concerned with the payment of "Rent," but instead is concerned with the failure to close escrow on February 15, 2011.

2. Although Church Purported to Terminate the "Option Agreement" on May 8, 2010, the Parties Revived Church's Obligation to Pay Defaults in "Rent" Pursuant to the "Option Agreement" When They Entered Into New Purchase Agreements on October 30, 2010.

It cannot be disputed that Church sent a notice purporting to terminate the "Option Agreement" on May 8, 2010. *See*, Exhibit "F." However, the parties subsequently entered into new purchase agreements on October 30, 2010, wherein they agreed to revive certain elements of the previous "Lease Agreement" and "Option Agreement." *See*, Exhibit "J," addendum dated October 30, 2010. One of those elements was Church's obligation to deduct delinquent "Rent" from the "Option Agreement."

On October 30, 2010, the parties signed an Addendum to the new agreements for the purchase of the premises. *See*, Exhibit "J," addendum dated October 30, 2010. Two obligations pertaining to the "Lease Agreement" and the "Option Agreement" were explicitly referred to, the first being Mission's obligation to pay "Rent" and the second being Church's obligation to deduct delinquent "Rent" from the "Option Agreement." By the time these purchase agreements were entered into, Church had purportedly terminated Mission's "Lease Agreement."

At the time of the May 8, 2010, termination, Mission was current on "Rent," but Church terminated the "Lease Agreement" based upon Mission's alleged failure to pay the "Annual Option Payment" of $1,500,000.00. *See*, Exhibit "F." However, the Addendum states: "DEFAULTS OF RENT: TO BE PAID TO SELLER WITHIN 3 BUSINESS DAYS, BEFORE OF CLOSE OF ESCROW." *See*, Exhibit J, addendum dated October 30, 2010, number 5. If the intent of the parties was indeed to treat the "Lease Agreement" as terminated,

there could be no defaults in "Rent." The only plausible explanations are that these new agreements were either intended to establish occupancy pursuant to the purchase agreements with a continuing requirement to pay interest on the remaining balance, or that a new, month to month tenancy was established. In fact, Church has consistently treated the new agreements as creating a new month to month tenancy.

Paragraph 7 of Church's complaint states:

> "Plaintiff permitted Defendants (including employees and agents of World Mission) to remain on the Property during the term of the Sale Agreements but Defendant has not paid any rent to Plaintiff during such term, which rent was to be applied to the price paid by World Mission under the Sale Agreement."

This paragraph of Church's verified complaint alleges the existence of a lease, under which Mission was to owe rent to Church. Indeed, Church served a three day notice demanding rent due during the period of September 1, 2010 through March 10, 2011. Rent could only be due if there was a valid and existing month to month lease between the parties. *See, Aviel v. Ng* (2008) 161 Cal.App.4th 809, 820.

In addition, the October 30, 2010, addendum provides: "8. IF CASE OF DEFAULTS, THE TERMS TO REMAIN THE SAME." *See*, Exhibit J, addendum dated October 30, 2010, number 8. If Mission failed to pay "Rent," the terms as to what would happen in case of a default were to remain the same, i.e., Church would be obligated to deduct the defaulted "Rent" from the "Initial Option Consideration" as though the "Option Agreement" remained in force.

3. <u>Mission Did Not Owe Church Any Rent on March 10, 2011</u>.

Pursuant to the terms of the parties' agreements, if Mission in fact defaulted on a "Rent" payment, Church was to deduct the amount of the "Default Payment" from the "Initial Option Consideration" of $700,000.00 on the sixth day after the "Payment Date," i.e., the seventh day of each month. The total value of the claimed back "Rent" in the Notice is $130,671.56, which is less than $700,000.00. Because Church was obligated to deduct any "Payment Default" by deducting the "Rent" from the "Initial Option Consideration," the amount of "Rent" owed should be $0.00 with the remaining "Option Consideration" being

$569,328.44. Therefore, the entirety of the "Rent" is in fact paid, and the Notice is nonsensical in that it demands that Mission pay an amount that has already been paid or that Mission must surrender the premises to Church.

Mission's obligations to pay "Rent" have already been met, and therefore Mission need not surrender the premises. If Church wants Mission to surrender possession, it must serve an ordinary 30 day notice to quit for the commercial property, and a 60 day notice to quit for the two residential properties as Mission and its staff have occupied the residential properties for more than one year. Nonpayment of "Rent" cannot be the basis for eviction. The "Rent" has been paid.

B. EVEN IF BACK "RENT" WERE OWED PURSUANT TO THE AGREEMENTS OF THE PARTIES, THE THREE DAY NOTICE OVERSTATES THE AMOUNT OWED, RENDERING IT INVALID.

The Notice requires Mission to pay $130,671.56 as "Rent" for the period of September 1, 2010 and March 10, 2011. This is a period of 190 days. Pursuant to the "Lease Agreement," Mission was to pay $16,875.00 per month as "Minimum Rent" and other expenses as "Additional Rent." *See*, Exhibit "C," p. 2, paragraphs 3(b) and 3(c). In order to claim "Additional Rent," Church was required to provide Mission with invoices calculating the "Additional Rent." *See*, Exhibit "C," p. 2, paragraph 3(c). Church did not attach any invoices to the three day notice, nor did it specifically demand "Additional Rent." Hence, the only "Rent" that could be claimed to be owed is the "Minimum Rent" under the "Lease Agreement."

The actual "rent" owed, based on the papers Church filed with the Court, would in fact be $106,875.00. Church claims a rental value of $562.50 per day, which is $16,875.00 divided by 30. *See*, Plaintiff's Complaint, p. 2, paragraph 16. Hence, the "Rent" that could actually be owed if the Court were to disregard Church's obligation to pay the delinquent "Rent" from the "Option Consideration" would be $106,875.00, or $562.50 x 190.

Where a three day notice demands "Rent" in excess of the amount due, the notice is invalid and cannot be the basis for an unlawful detainer action:

> "A three-day notice must contain 'the amount which is due.' (§1161, subd. 2.) A notice which demands rent in excess of the amount due does not satisfy this requirement."
>
> *Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 697.
>
> "A valid three-day pay rent or quit notice is a prerequisite to an unlawful detainer action.... Because of the summary nature of an unlawful detainer action, a notice is valid only if the lessor strictly complies with the statutorily mandated notice requirements."
>
> *Ibid.*

Because the Notice overstates the amount of "Rent" owed, it is invalid. This is true even where a notice provides for several breaches of the lease agreement, and not only ones which simply ask for back rent:

> "This means that where, as here, forfeiture of the tenant's lease for non-payment of rent is one of the objectives of the action, the exact amount of rent claimed to be due must be stated in the notice to pay rent or quit."
>
> *Baugh v. Consumers Associates, Limited* (1966) 241 Cal.App.2d 672, 674.

Because a valid three-day notice is a prerequisite to an unlawful detainer action, Church may not evict Mission based upon the March 10, 2011, notice.

C. THE NOTICE IS INVALID BECAUSE IT IS HOPELESSLY AMBIGUOUS.

1. The Notice Incorrectly States that it is Served Pursuant to Code of Civil Procedure §1161a(b), Which Only Applies to an Eviction Based on the Sale of Property to Another Party.

The Notice states twice that it is served pursuant to Code of Civil Procedure §1161a(b). Code of Civil Procedure §1161a(b) does not apply to this case, as it only applies in cases where the property is sold. The section lists five alternatives: where the property is sold pursuant to a writ of execution, where the property is sold pursuant to a writ of sale, where the property is sold under a power of sale, where the property has been sold and title is perfected, or in a foreclosure sale. None of these scenarios exist in this case – the property has not been sold by Mission, nor has it been foreclosed upon.

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2. **The Notice Alleges Both that Mission Owes "Rent" and that Mission is a "Tenant at Sufferance."**

A tenant cannot both owe "rent" and be a "tenant at sufferance." A tenancy at sufferance is a legal definition, whereby the tenant holds over after the natural term of the lease has ended. A tenancy at sufferance is not created due to a default of the lease. Code of Civil Procedure §1161(1). Here, the natural term of the lease would have ended on December 31, 2011. Hence, Church cannot be attempting to evict Mission due to a tenancy at sufferance.

Furthermore, a tenant at sufferance is one which has "naked possession." *Aviel v. Ng* (2008) 161 Cal.App.4th 809, 820. The tenant is on the property not subject to any agreement with the parties. The Notice is ambiguous because it acknowledges that Mission is a tenant at sufferance by agreement of the parties, where it states: "As such, and, within three (3) days after service on you of this notice, you must either pay such amount or, pursuant to this Notice, your tenancy at sufferance shall be immediately terminated...." *See*, Exhibit "N." This is an oxymoron.

Furthermore, a "tenant at sufferance" does not owe rent during a period in which he is a tenant at sufferance. The landlord may sue the tenant at sufferance for the holdover damages, but cannot demand a payment of rent. A landlord may only demand rent if there was an agreement to pay rent. Therefore, by asserting in the Notice that Mission owes a sum of money as "Rent," Church is acknowledging an agreement between the parties that Mission pay such "Rent."

Because the Notice is ambiguous for the above reasons, it has not strictly complied with the unlawful detainer statutes as it is required in order for the unlawful detainer action to be valid. *See, Chester v. Nilsson* (1994) 27 Cal.App.4th 516, 526. As such, the March 10, 2011, Notice cannot support this unlawful detainer action.

D. CHURCH CANNOT RELY ON THE EARLIER SERVED THREE DAY NOTICE TO QUIT.

By serving the March 10, 2011, Notice, Church has waived its rights to proceed with an unlawful detainer based upon the earlier served September 9, 2010, notice to quit. First,

Church explicitly stated in its March 9, 2011, letter purportedly terminating the sales agreements that the instant lawsuit would be based upon the March 10, 2011, Notice:

> "...Seller shall...serve upon Buyer a new three day notice to pay rent or quit for each of the properties constituting the Premises (the **"Three Day Notices"**)....
> ...
> In such case, Seller shall immediately proceed with an unlawful detainer and eviction proceeding based on the Three Day Notices."

See, Exhibit "M," pages 2-3.

The Three Day Notices are thus defined as the March 10, 2011, Notice, and are stated to be the basis of the current proceeding. Any claim that this action is based on the earlier September 9, 2010, notice to quit is therefore waived.

By demanding a payment of "Rent," Church has also waived any past notices to quit. Church cannot serve a Notice to Quit, then later demand "Rent" for a period after the expiration of the notice period set by that Notice to Quit:

> "When a lessor, as did the lessor in this case, claims or collects rent in an action, or otherwise, as the result of a legal proceeding, or otherwise, he waives his existing right to effect a termination. The letter of January 4, 1933, which has been substantially excerpted, cannot be considered as a reiteration or extension of either of the previous notices. The object of a notice to quit is to lay the foundation for a forfeiture. The terms of the notice here involved are therefore strictly construed. Its terms were not extended by the letter, and the respective rights of the parties are governed by the precise terms of the notice."

Grand Central Public Market v. Kojima (1936) 11 Cal.App.2d 712, 717-718.

The precise terms of the March 10, 2011, Notice are that Mission may pay "Rent" in order to avoid a forfeiture of the lease. If this Notice is invalid for the reasons above, Church may not return to a previously served "Notice to Quit," which was served before the new agreements were entered into in October, 2010, in order to take the position that even though Church stated in its Notice that Mission could avoid forfeiture by paying "Rent," Church could still forfeit any lease agreement between the parties through the September 9, 2010, notice to quit. Furthermore, Church indicates that there is an oral or other lease that was entered into after the September 9, 2010, notice. Therefore, Church cannot rely on that notice to quit in order to evict Mission.

Furthermore, because the "Option Consideration" is, in reality, the entire purchase price of the property, the three day notice to quit is improperly based upon a failure to make an installment of the purchase price, which has been held to be an improper basis for an eviction. *Greene v. Municipal Court* (1975) 51 Cal.App.3d 446, 451.

E. THIS ACTION IS AN IMPROPER ATTEMPT TO USE THE UNLAWFUL DETAINER PROCEEDINGS TO EVICT MISSION BASED UPON A FAILURE TO CLOSE ESCROW BY A DATE CERTAIN.

The true basis for Church's eviction is the fact that escrow did not close on February 15, 2011, as per the agreement of the parties. *See*, Exhibit "J," page 1. Church makes a series of inconsistent allegations regarding the relationship between the parties between September 1, 2010, and March 10, 2011. Church states on the one hand that Mission is a "tenant at sufferance," but also states that Mission owes Church "Rent." Church states that Mission is a holdover tenant, but also states that there may be an oral or other lease agreement during this period. Furthermore, Church and Mission entered into agreements in October, 2010, for the purchase of the property. Nowhere in those agreements does Church state that Mission needs to vacate the property, and indeed in paragraph 7 of Church's Verified Complaint, Church acknowledges that it allowed Mission to remain on the premises pursuant to the purchase agreements.

Church's true goal in this litigation is to evict Mission for a failure to pay escrow. A failure to pay escrow is a breach of a purchase agreement, and has been held to be an improper basis for an unlawful detainer action, even where such an action involves a lease agreement. *Marvell v. Marina Pizzeria* (1984) 155 Cal.App.3d Supp. 1, 11. Because the true breach upon which this lawsuit is based is a failure to close escrow by February 15, 2011, this action cannot be supported as an unlawful detainer lawsuit.

CONCLUSION

Because the March 10, 2011, Notice cannot support an unlawful detainer action, and because the failure to close escrow is an improper basis for an unlawful detainer lawsuit, this action fails to meet the statutory requirements for an unlawful detainer lawsuit. Therefore, Church cannot be successful in its prosecution of this action pursuant to the unlawful detainer

statutes. Church's remedy is to file an ordinary civil lawsuit with all the ordinary rights of the parties that such a lawsuit would entail and allowing Mission to bring all the defenses ordinarily allowed in a breach of contract action. *See, Chester v. Nilsson* (1994) 27 Cal.App.4th 516, 526.

DATED: May 17, 2011

LAW OFFICES OF RICHARD C.J. WAHNG

By: _____
Christopher R. Thomas
Attorneys for Defendant

PROOF OF SERVICE

I am employed in the County of Alameda, California. I am over the age of eighteen years and not a party to the within action. My business address is 152 Anza Street, Suite 201, Fremont, CA 94539.

On this date I served the below listed documents on all parties in this action by placing true copies thereof in sealed envelopes addressed as shown below.

DOCUMENTS

DEFENDANT'S TRIAL BRIEF

ADDRESSES

SSL Law Firm, LLP
Maria V. Bernstein, Esq.
Jan Gruen, Esq.
575 Market Street, STE 2700
San Francisco, CA 94105
jan@ssllawfirm.com
maria@ssllawfirm.com

_____(MAIL SERVICE) I placed each such sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Fremont, California, following ordinary business practices. I am familiar with the practice of the law firm for collection and processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited with the United States Postal Service the same day as it placed for collection.

XXX (EMAIL) I emailed a true copy of each above-referenced document to all parties listed in the "address" section of this same document.

_____ (VIA FACSIMILE) I faxed a true copy of each above-referenced document to all parties listed in the "address" section of this same document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this day at Fremont, California.

Dated: May 17, 2011

Emma Su

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