IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

CEDAR HILLS INVESTMENT COMPANY, LLC, Plaintiff, v. SIMON PROPERTY GROUP, LIMITED PARTNERSHIP, ***Serve at:*** *CT Corporation System* *120 South Central Avenue* *Clayton, MO 63105* And BATTLEFIELD MALL, LLC, ***Serve at:*** *CT Corporation System* *120 South Central Avenue* *Clayton, MO 63105* Defendants.	)	Case No. _____

PLAINTIFF'S COMPLAINT FOR DAMAGES

COMES NOW Plaintiff Cedar Hills Investment Company, LLC ("Cedar Hills") for its Complaint for Damages against Defendants Simon Property Group, Limited Partnership, ("Simon"), and Battlefield Mall, LLC, ("Battlefield"), and in support thereof alleges as follows:

NATURE OF ACTION

1. This is an action for damages brought by a landlord under a commercial real estate lease against a tenant for a breach of the lease arising from tenant's improper and systematic miscalculation and underpayment of certain items of rent owed to landlord. Landlord also seeks recovery of attorney and litigation fees and costs under the terms of the lease.

PARTIES

2. Plaintiff is a Missouri Limited Liability Company in good standing, organized and existing under the laws of the State of Missouri.

3. Plaintiff's members are individuals who are citizens of North Carolina, California, South Dakota, and Missouri.

4. Defendant Simon is a Delaware Limited Partnership created under Delaware law and authorized to do business in the State of Missouri as a foreign limited partnership. Defendant Simon's registered agent is CT Corporation System, located at 120 South Central Avenue, Clayton, Missouri 63105.

5. Defendant Simon is an S&P 100 company and international investor and operator of retail shopping center properties that owns or operates numerous malls and shopping centers across the United States and Puerto Rico, including within the State of Missouri. Defendant Simon owns or operates various other properties across North America, Europe, and Asia.

6. Defendant Simon consists of one general partner: Simon Property Group, Inc.

7. Simon Property Group, Inc. is a Delaware corporation incorporated under Delaware law with its principal place of business at 225 West Washington Street, Indianapolis, Indiana, 46204.

8. Defendant Battlefield is a Delaware Limited Liability Company created under Delaware law and authorized to do business in the State of Missouri as a foreign limited liability company. Defendant Battlefield's registered agent is CT Corporation System, located at 120 South Central Avenue, Clayton, Missouri 63105.

9. Upon information and belief, Defendant Battlefield is owned by Simon or Simon Property Group, Inc., and none of Defendant Battlefield's members is a citizen of North Carolina, California, South Dakota, or Missouri.

JURISDICTION AND VENUE

10. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332, as Plaintiff alleges multiple causes of action arising under Missouri state contract law, each of which individually creates an amount in controversy in excess of $75,000. Moreover, diversity of citizenship exists between Plaintiff and each Defendant, as each member of Plaintiff is of different citizenship than each and every general and limited partner of Defendant Simon and every member of Defendant Battlefield.

11. This Court has personal jurisdiction over both Defendants, as both Defendant Simon and Defendant Battlefield regularly conduct business in the State of Missouri by operating the retail shopping center located in Greene County Missouri at issue in this Complaint.

12. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the present claims occurred in Greene County, Missouri, which is located within the Western District of Missouri.

FACTS COMMON TO ALL COUNTS

13. On or about May 1, 1993, Battlefield Mall Limited Partnership ("Tenant") executed the "Amendment and Restatement of Lease" (the "Lease"), with trustees acting on behalf of the Francis H. McClernon, Sr. Revocable Living Trust, and Mary Helen McClernon Revocable Living Trust, respectively, as well as Francis H. McClernon, Jr., Rose R. McClernon, Charles Allen Schneider Jr., and Mary Ellen Schneider (collectively, "Landlord").

14. Under the Lease, Landlord agreed to lease to Tenant a ground lease consisting of real property and premises located in Greene County (the "Battlefield Mall"). The Lease's term spanned February 1, 1966 to December 31, 2056.

15. Section 12.11 of the Lease provides that the Lease and its covenants and conditions bind both Landlord and Tenant and "the respective permitted successors and assigns of Landlord and Tenant."

16. On or about September 9, 1997, Landlord conveyed its interest under the Lease to Plaintiff.

17. On or about December 1, 1993, Tenant assigned its interest under the Lease to Defendant Simon, and Defendant Simon assumed Tenant's obligations under the Lease.

18. On or about June 30, 2003, Defendant Simon assigned its interest under the Lease to Defendant Battlefield, and Defendant Battlefield assumed Defendant Simon's obligations under the Lease.

19. Plaintiff did not release Defendant Simon from liability under the Lease.

20. Under the Lease, both Defendant Simon and Defendant Battlefield remain liable for unpaid rent to Plaintiff.

21. As tenant under the Lease, Defendants operate the Battlefield Mall and lease portions of the property to various sub-tenants who, in turn, conduct business in the Battlefield Mall.

22. As operator of the Battlefield Mall, Defendants collect rent, fees, and other charges from their sub-tenants according to the terms of individual leases they entered into with each sub-tenant.

23. Under the Lease, Defendants agreed to pay rent to Plaintiff according to a formula set by the Lease's terms.

24. Under Lease Section 2.02(A), Defendants agreed to pay Plaintiff "Base Rent" equal to $360,000 per year, payable in monthly installments of $30,000 per month on or before the first day of each month.

25. In addition, Defendants agreed to pay Plaintiff additional annual "Percentage Rent" as calculated in Sections 2.02(B) & (C) of the Lease based on the receipts Defendants received from sub-tenants.

26. Under 2.02(B), Percentage Rent for a given year is equal to 20% of the amount by which Defendant's "Gross Rent" during the preceding calendar year exceeded $3,700,000.

27. Under 2.02(C), "Gross Rent" includes:

> (1) All gross receipts received by [Defendant]…(i) for the rental or use of space (including store, office, parking and storage space) in and about the Property or any portion thereof under any Space Lease and from any Space Tenant, or otherwise (ii) in consideration of the entering into, modification, cancellation or surrender of any Space Lease…(iii) for the use of any portion of the Property under licenses, concessions, permits or similar agreements, (iv) for the admission to or use of any facilities forming a part of or appurtenant to the Property, (v) for concessions, vending or other coin-operated machines (including pay telephones) on the Property, and (vi) from any kiosk located on the Property.

28. Section 1.01(L) defines "Space Tenants," as "any tenant, subtenant, licensee, concessionaire or other user, occupant or lessee of the Property or any portion thereof under any Space Lease, and any other user or occupant of the Property or any portion thereof (other than [Defendants] as tenant under this Lease and a "Seasonal Tenant" as defined in Section 2.02(C))." Receipts received from Space Tenants are included in Defendants' Gross Rent.

29. Under 2.02(C), "Seasonal Tenants" are those who rent under a "temporary, seasonal or similar type lease, license, or occupancy agreement…the term of which is ninety days or less." In calculating Gross Rent, Defendants include only 78% of the receipts they receive from Seasonal Tenants.

30. Section 2.02(C) provides that "Gross Rent" is calculated by subtracting "Excluded Items" from Defendants' gross receipts. Put another way, this Section allows Defendants to exclude certain receipts from Defendants' calculation of Gross Rent if such receipts are considered "Excluded Items" under the Lease. Specifically the Lease provides:

> Gross Rent shall not include reimbursements, contributions or charges paid by Space Tenants or…[Seasonal Tenants] for common area maintenance [("CAM")], taxes, insurance, sprinkler, utilities, heating, ventilating and air conditioning [("HVAC")], Merchant's Association or Promotional Fund and other substantially similar payments made by Space Tenants or Seasonal Tenants for reimbursement of [Defendant's] costs of the operation and maintenance of the premises leased to them.

31. Under Section 2.02(C), Defendants agreed that they could deduct such Excluded Items from their Gross Rent calculation only "to the extent that each such charge [to Defendants' sub-tenants] is separately stated and approximates the sum of (y) the actual cost to [Defendants] of supplying such services or reimbursing [Defendants] for actual costs paid by [Defendants] in connection therewith, and (z) a reasonable fee for administering the same."

32. In the event Defendants receive receipts from their sub-tenants for Excluded Items that exceed Defendants' actual expenditures on such items, the Lease requires Defendants to include such excess in the Gross Rent calculation.

33. Lease Section 2.01(A) makes clear that the Lease "shall be deemed and construed to be a net lease" and that Defendants shall pay rent to Plaintiff "absolutely net…free of any charges, impositions or deductions of any kind and without abatement, deduction or set-off…except as expressly otherwise set forth." As a result, the only receipts the Lease allows Defendants to exclude under any aspect of rent calculation are those expressly enumerated as Excluded Items.

34. Under Section 2.02(D), Defendants agreed to submit to Plaintiff a report of their Excluded Item calculations each year. Specifically, Defendants must, on or before April 1 of each calendar year, "deliver to [Plaintiff] a certification by an independent certified public accountant showing all Excluded Items and all Gross Rent received by [Defendants] during the preceding calendar year."

35. Section 2.02(D) requires these reports to include "the aggregate amount of all such Gross Rent and the amount and source of each payment of Gross Rent received by [Defendants]."

36. Section 2.02(D) also requires Defendants to provide Plaintiff a rent roll with these reports that lists "all Space Leases and Seasonal Leases in effect during the calendar year and contain[s] such information…as shall be required to confirm the Gross Rent (and exclusions therefrom) [Defendants claim] [they] received during such calendar year."

37. Section 2.02(D) further provides that such required information must include "amounts received from each Space Tenant and Seasonal Tenant as minimum or base rent and percentage or overage rent, the total receipts received by each Space Tenant and seasonal Tenant and the individual items of those total receipts that are excluded from Gross Rent."

38. Under Section 2.04 of the Lease, Defendants agreed to pay a late charge of $500 as additional rent if they failed to pay any installment of Base Rent or Percentage Rent within five days of the date such payment was due.

39. The Lease also requires Defendants to pay interest on past-due payments at the "Default Rate" as defined in Section 2.04 of the Lease.

40. Section 12.17 of the Lease authorizes an award of attorneys' fees and costs to the prevailing party in an action between the Plaintiff and Defendants.

41. At all times relevant to this Complaint, Plaintiff fulfilled and complied with all of its obligations and covenants under the Lease, and has satisfied all conditions precedent to filing this action.

42. Except for the report described in paragraph 34 above, Defendants have never provided Plaintiff with any of the reports of Excluded Item calculations with sufficient detail as required by the Lease.

43. Plaintiff has requested that such information be provided to Plaintiff.

44. Defendants have refused to furnish this information to Plaintiff for lease years 2008 to 2015, and have instructed the auditor not to provide this information to Plaintiff.

COUNT I
BREACH OF CONTRACT DUE TO DEFENDANTS' IMPROPERLY CHARACTERIZING "NON-SEASONAL" TENANTS AS "SEASONAL" FOR PURPOSES OF CALCULATING DEFENDANTS' RENT OBLIGATIONS

45. Plaintiff incorporates and re-alleges each of the foregoing paragraphs herein as though set forth in full.

46. Section 2.02 of the Lease states that Gross Rent includes 78% of the gross receipts Defendants receive from any Seasonal Lease.

47. Per the Lease's terms, a tenant holds a Seasonal Lease only if the terms of its lease last ninety days or fewer.

48. From on or about January 1, 2017 to December 31, 2017, Defendants designated at least 134 of their sub-tenants as having Seasonal Leases for purposes of calculating Defendants' Gross Rent obligations.

49. Thirty-eight of these sub-tenants, despite being designated "Seasonal," actually held leases with terms that exceeded ninety days.

50. Many of these sub-tenants Defendants claimed to be "Seasonal" had been in Battlefield Mall for multiple years or operated out of permanent store fronts.

51. Although these sub-tenants failed to meet the definition of a "Seasonal Tenant" under the Lease, Defendants reported receipts from these sub-tenants as "Seasonal" and counted only 78% of their total receipts toward the Gross Rent calculation.

52. Defendants have mischaracterized non-seasonal sub-tenants as "Seasonal" in their Gross Rent calculations every calendar year since at least April 1, 2009. During each such year, Defendants counted only 78% of each mischaracterized sub-tenant's receipts toward Defendants' Gross Rent.

53. Defendants' failure to include the full amount of each sub-tenant's receipts in their Gross Rent, constitutes a breach of the Lease.

54. Further, Defendants ongoing failure to furnish information to Plaintiff related to tenant designation or Excluded Items, despite Plaintiff's multiple requests, constitutes a breach of the Lease.

55. Such breach caused Plaintiff to suffer damages in unpaid rent exceeding $378,108, plus all applicable interest and late charges.

COUNT II
BREACH OF CONTRACT ARISING FROM DEFENDANTS' FAILURE TO SEPARATELY STATE EXCLUDED ITEMS IN CALCULATING GROSS RENT

56. Plaintiff incorporates and re-alleges each of the foregoing paragraphs herein as though set forth in full.

57. In calculating the Gross Rent, Defendants' ability under the Lease to deduct revenues from sub-tenants is subject to a condition precedent, namely, that when Defendants

submitted the invoice to their sub-tenants, Defendants separately stated each charge they seek to exclude from the Gross Rent calculation.

58. The Lease requires Defendants to submit annual statements to Plaintiff that list the total receipts Defendants received from each sub-tenant and specify the individual items Defendants seek to exclude from Gross Rent.

59. The Lease requires these statements to describe excluded items with a level of specificity sufficient to allow Plaintiff to confirm the items included in Defendants' calculation of Excluded Items.

60. The Lease's requirement that Defendants "separately state" each Excluded Item, serves a specific purpose contemplated by the parties. Namely, the parties intended that the provision bestow on Plaintiff a right to obtain assurances that the amounts Defendants purported to charge sub-tenants for Excluded Items could be objectively measured. Such measurement would be used to determine whether such charges were proper, including whether any charges exceeded Defendants' actual cost of supplying such services.

61. On or about April 1, 2005, Defendants began to discontinue their practice of separately stating individual charges for insurance, sprinkler, HVAC, and utilities in their bills to sub-tenants. Instead, Defendants lumped these individual charges into the CAM category on such bills.

62. As Defendants explained in an email to the accounting firm for the mall, "around 2005 [they] implemented the fixed CAM methodology. As leases expired, the [sub-]tenants were converted from a prorate CAM charge to a fixed CAM charge, which included insurance, sprinkler, HVAC and facility fees (if applicable). The expenses related to these recoveries were also included in the common area costs."

63. As sub-tenants began to pay Defendants a bulk CAM charge in lieu of individual charges, Defendants gradually began to report their Excluded Items to Plaintiff in a similar fashion. In the statements of Excluded Items sent to Plaintiff, Defendants began to remove the individualized reports of their recoveries for insurance, sprinkler, HVAC and utilities from their respective line item entries and, instead, aggregated them all under the pre-existing line item category for CAM.

64. From on or about April 1, 2005 to present, Defendants' reports migrated progressively greater amounts of their claimed Excluded Items from their respective individualized categories to the charges purportedly included in CAM.

65. By mixing charges of different types and dumping them into an ever-expanding CAM category, Defendants failed to "separately state" each such charge as required by the Lease.

66. Defendants' failure to separately state each of these Excluded Items in their reports deprived Plaintiff of its right and ability to audit such charges and confirm that they approximated the "actual cost to [Defendants] of supplying such services," as required by the Lease.

67. Because these charges were not separately stated, Defendants were not entitled to deduct them from the Gross Rent calculation.

68. As a result of aggregating non-CAM charges within the CAM category of their statements, Defendants have underpaid the rent they owed Plaintiff and thereby breached their obligations under the Lease.

69. Further, Defendants ongoing failure to furnish information to Plaintiff related to Defendants' calculation of Excluded Items, despite Plaintiff's multiple requests, constitutes a breach of the Lease.

70. Defendants' breach caused Plaintiff to suffer damages in unpaid rent exceeding $417,675, plus all applicable interest and late fees.

COUNT III
BREACH OF CONTRACT FOR DEDUCTING FROM THE GROSS RENT CALCULATION REVENUES DEFENDANTS RECEIVED FROM THEIR SUB-TENANTS FOR GENERAL ADMINISTRATIVE EXPENSES

71. Plaintiff incorporates and re-alleges each of the foregoing paragraphs herein as though set forth in full.

72. For the year ending December 31, 2017, Defendants deducted from the Gross Rent calculation revenues they received from their sub-tenants for general administrative expenses, which had been included in the CAM charges that Defendants submitted to their sub-tenants.

73. For the year 2017, Defendants deducted from the Gross Rent "general administration" expenses that totaled $384,208.

74. Defendants' expenses in the "general administration" category consisted primarily of Defendants' payment of wages to their executive, middle management, and lower-level employees who work at Defendants' headquarters in Indianapolis, Indiana, and provide services to all of Defendants' malls.

75. On information and belief, during other years of the Lease term, Defendants also excluded from the Gross Rent calculation revenues they received from their sub-tenants for similar general administration expenses.

76. The Lease does not expressly define what is included in "common area maintenance." However, the four corners of the document reveal the parties did not intend for it to include general administration expenses from employee salaries at other locations.

77. The plain, ordinary, and usual meaning of "common area maintenance" is "maintenance of the common areas" of the mall at issue.

78. The wages of Defendants' employees, located in their corporate headquarters in Indianapolis, Indiana, are not expenses related to maintaining the common areas of the mall in Springfield, Missouri.

79. As such, the Lease does not permit Defendants to include Defendants' employee's wages into CAM costs that could be then deducted from the Gross Rent calculation.

80. By including such wages in CAM and excluding those amounts from their Gross Rent calculation, Defendants underpaid the rent they owed Plaintiff and, thereby, breached their obligations under the Lease, causing Plaintiff to suffer damages in excess of $75,000.

81. In the alternative, even if the Lease did allow Defendants to exclude general administrative expenses for employee salaries from Gross Rent, Defendants were not entitled to do so here because Defendants failed to separately state such charges with the level of detail required under the Lease.

82. Further, Defendants ongoing failure to furnish information to Plaintiff related to Defendants' calculation of Excluded Items, despite Plaintiff's multiple requests, constitutes a breach of the Lease.

COUNT IV
BREACH OF CONTRACT FOR DEDUCTING FROM THE GROSS RENT CALCULATION REVENUES DEFENDANTS RECEIVED FROM THEIR SUB-TENANTS FOR CAPITAL EXPENDITURES

83. Plaintiff incorporates and re-alleges each of the foregoing paragraphs herein as though set forth in full.

84. For the year ending December 31, 2017, Defendants deducted from the Gross Rent calculation revenues they received from their sub-tenants for capital expenditures, which had been included in the CAM charges that Defendants submitted to their sub-tenants.

85. For the year 2017, Defendants deducted from the Gross Rent "capital expenditures" costs that totaled $918,408.

86. Defendants' "capital expenditures" included expenditures for renovations and other items that were to be capitalized and depreciated.

87. On information and belief, during other years of the Lease term, Defendants also excluded from their Gross Rent calculation revenues they received from their sub-tenants for similar capital expenditures.

88. Capital expenditures are costs incurred through the addition of a permanent structural improvement that will enhance a property's value and do not fall within the definition of "common area maintenance."

89. As a result, the Lease does not permit Defendants to deduct receipts that they received from their sub-tenant for capital expenditures.

90. By including such capital expenditures in CAM and excluding those amounts from their Gross Rent calculation, Defendants underpaid the rent they owed Plaintiff and, thereby, breached the Lease, causing Plaintiff to suffer damages in excess of $75,000.

91. In the alternative, even if the Lease did allow Defendants to exclude capital expenditures from Gross Rent, Defendants were not entitled to do so here because Defendants failed to separately state such charges with the level of detail required under the Lease.

92. Further, Defendants' ongoing failure to furnish information to Plaintiff related to Defendants' calculation of Excluded Items, despite Plaintiff's multiple requests, constitutes a breach of the Lease terms.

COUNT V
BREACH OF CONTRACT FOR DEDUCTING FROM THE GROSS RENT CALCULATION REVENUES DEFENDANTS RECEIVED FROM THEIR SUB-TENANTS FOR MAINTAINING THE FOOD COURT

93. Plaintiff incorporates and re-alleges each of the foregoing paragraphs herein as though set forth in full.

94. For the year ending December 31, 2017, Defendants deducted from the Gross Rent calculation revenues they received from their sub-tenants for the costs of maintaining the food court in the mall. These revenues totaled $137,317 for 2017.

95. On information and belief, during other years of the Lease term, Defendants also excluded from their Gross Rent calculation revenues they received form their sub-tenants for the costs of maintaining the food court.

96. The four corners of the Lease reveal the parties did not intend for "common area maintenance" to include expenses related to the food court as it operates in Battlefield Mall.

97. Under the Lease, ownership of Battlefield Mall is split. One side of the mall is owned by Plaintiff while Defendants own the other side.

98. The food court is located on Defendants' side of the mall and occupies a very limited physical area separate from the area owned by Plaintiff.

99. Because it is not part of the common area, expenses related to the food court are not "common area maintenance" as contemplated by the parties to the Lease.

100. As a result, it was improper and a breach of the Lease for Defendants in calculating their Gross Rent to deduct receipts that they received from their sub-tenants for maintaining the food court.

101. In the alternative, even if the Lease did allow Defendants to exclude food court expenses from Gross Rent, Defendants were not entitled to do so here because Defendants failed to separately state such charges with the level of detail required under the Lease.

102. Further, Defendants' ongoing failure to furnish information to Plaintiff related to Defendants' calculation of Excluded Items, despite Plaintiff's multiple requests, constitutes a breach of the Lease terms.

WHEREFORE, Plaintiff Cedar Hills respectfully prays for relief and judgment against Defendants as follows:

a) Entry of final judgment that Defendants breached their obligations to Plaintiff under the Lease;

b) An award of compensatory damages to Plaintiff resulting from Defendants' breach of the Lease in an amount to be determined by the trier of fact;

c) An award to Plaintiff of late charges under the Lease incurred by Defendants' breach of the Lease in an amount to be determined by the trier of fact;

d) An award of pre-judgment and post-judgment interest as permitted by law;

e) An award of Plaintiff's reasonable attorneys' fees and costs incurred in litigating the present action, as provided for under the Lease;

f) An award of such other relief as this Court deems fair and just.

Respectfully submitted,

LEWIS RICE LLC

By: /s/ Robert W. Tormohlen
Robert W. Tormohlen, #40024
Scott A. Wissel, #49085
Christopher M. Helt, #70999
1010 Walnut, Suite 500
Kansas City, Missouri 64106
(816) 421-2500
(816) 472-2500 (fax)
rwtormohlen@lewisricekc.com
sawissel@lewisricekc.com
chelt@lewisricekc.com
ATTORNEYS FOR PLAINTIFF CEDAR HILLS INVESTMENT COMPANY, LLC