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NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

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DEC 10 2007

Case No: 06-CV-0274

Dept.: I

DOUGLAS COUNTY
DISTRICT COURT CLERK

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BARBARA J. GRIFFIN
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IN THE NINTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

DENNIS McDUFFEE and JOLIE
McDUFFEE, individually and as Managing
Members of M.M.M.J., L.L.C., a Nevada
Limited Liability Company,

Plaintiffs,

v.

DENNIS KEEFE, an individual; DANIEL
FIESLER, an individual; and DOES I through
X,

Defendants.

NOTICE OF ENTRY OF
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND JUDGMENT

PLEASE TAKE NOTICE that the *Findings Of Fact, Conclusions Of Law, And Judgment* in the above-referenced matter was entered by this Court on 6 December 2007. A true and correct copy of said *Findings Of Fact, Conclusions Of Law, And Judgment* is attached hereto and incorporated herein as *Exhibit 1*.

Dated this 10th day of December, 2007.

BROOKE · SHAW · ZUMPFT

By:


MICHAEL L. MATUSKA
State Bar No. 5711
W. CHRIS JENKINS
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(775) 782-7171

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I certify that I am an employee of the law office of Brooke · Shaw
3 · Zumpft, and that on the th 10 day of December, 2007, I served a true and correct copy of the
4 preceding document entitled *Notice Of Entry of Findings Of Fact, Conclusions Of Law, And*
5 *Judgment* as follows:

6 Caren Jenkins, Esq.
7 Jenkins Law Office
8 432 W. Plumb Lane
9 Reno, NV 89509

10 **BY U.S. MAIL:** I deposited for mailing in the United States mail, with postage fully
11 prepaid, an envelope containing the above-identified document at Minden, Nevada, in the ordinary
12 course of business, addressed to:

13 **BY PERSONAL SERVICE:** I personally delivered the above-identified document
14 by hand delivery to the offices of the person(s) named above.

15 **BY FACSIMILE:** No. (775) 324-9971.

16 **BY MESSENGER SERVICE:** I delivered the above-identified document to Reno-
17 Carson Messenger Service for delivery to the address named above.

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20 Janet B. Cordero

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EXHIBIT 1

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BARBARA J. GRIFFIN

DOUGLAS COUNTY DISTRICT COURT CLERK

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P. GREGORY DEPUTY

IN THE NINTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

DENNIS McDUFFEE and JOLIE McDUFFEE, individually and as Managing Members of M.M.M.J., L.L.C., a Nevada Limited Liability Company,

Plaintiffs,

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND JUDGMENT

v.

DENNIS KEEFE, an individual; DANIEL FIESLER, an individual; and DOES I through X,

Defendants.

This matter came before the court for trial on October 31st and November 1st, 2007. Plaintiffs DENNIS McDUFFEE, JOLIE McDUFFEE, and M.M.M.J., LLC (hereinafter collectively referred to as the "Plaintiffs" and/or "McDuffees"), were represented by their counsel of record, Michael L. Matuska, Esq., Brooke Shaw Zumpft, and Defendants DENNIS KEEFE ("Keefe") and DANIEL FIESLER ("Fiesler") appeared through their counsel of record, Caren Jenkins, Esq.

The Plaintiffs called the following witnesses: James R. Hales, Esq., Alexandria Ardster; Jerry Maddox, Daniel Fiesler, Dennis Keefe, Jolie McDuffee and Dennis McDuffee.

The Defendants called the following witnesses: Daniel Fiesler, Dennis Keefe, Jolie McDuffee and Dennis McDuffee.

The following exhibits were admitted into evidence for the Plaintiffs:

1. Lease Agreement (with Addendums);
2. Purchase Contract (03/15/05);



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1. 3. Transcript of Proceedings (03/10/06);
2. 4. Order (09/18/06);
3. 5. Standard Business Opportunity Purchase Agreement (06/09/06);
4. 6. Credit Report;
5. 7. Addendum To Application For Restricted Gaming License (Landlord Sworn
6. Statement) (06/07/06);
7. 8. Affidavit of Jerry Maddox;
8. 9. Letter from James R. Hales, Esq. (06/07/06);
9. 10. Letter from James R. Hales, Esq. w/Assignment of Lease attached (06/12/06);
10. 11. Fax from James R. Hales, Esq. (06/21/06);
11. 12. Email from Caren Jenkins, Esq. (06/22/06);
12. 13. Fax from Caren Jenkins, Esq. (06/22/06);
13. 14. Letter from James R. Hales, Esq. (06/22/06);
14. 15. Letter from James R. Hales, Esq. (06/23/06);
15. 16. Phone message for James R. Hales, Esq. from Caren Jenkins, Esq. (06/27/06);
16. 17. Letter from James R. Hales, Esq. (06/27/06);
17. 18. Letter from Caren Jenkins, Esq. (06/28/06);
18.
19. 26. Order (Case No. 06-1013) (09/28/06);
20.
21. 31. Notice from Douglas County Code Enforcement Officer (09/27/05); and
22. 32. Excerpts from Appraisal (date missing).
23. 33. Marked version of floor plan
24. 34. Fax confirmation sheet from Caren Jenkins

25. Plaintiffs did not move for admission of Exhibits 19 (Consent of Lessor), 27 (Fiesler
26. deposition transcript), 28 (Keefe's Interrogatory Responses, 29 (Keefe's Amended Interrogatory
27. Responses, or 30 (Buckaroos' Lease). Plaintiffs moved for admission of a series of affidavits

1 (Exhibits 20-25) that were filed in the underlying case, No. 06-CV-0019. Admission of these
2 affidavits was denied.

3 The following exhibits were admitted into evidence for the Defendants:

- 4 B. 6/9/06 Letter from James Hales to Jenkins re: June rent, copy of check
- 5 D. Records from Sound Measuring Device
- 6 E. Calendar, dates of excessive noise, March 2006 – September 2006
- 7 L. 9/27/06 Letter from Jenkins to Hales re property damages, invoices and checks for
8 same
- 9 N. 7/25/06 Letter from Marchand to Keefe re proposed business
- 10 O. Commercial Lease for Buckaroo's Saloon and Addenda (Executed Lease – Keefe
11 0483-0488)
- 12 Q. Draft lease and related correspondence
- 13 R. Graphic representations

14 Based on the evidence and testimony presented, the argument of counsel, and for good
15 cause appearing therefor, this Court hereby Orders, Adjudges, and Decrees as follows:

16 **I. FINDINGS OF FACT.**

17 **A. BACKGROUND.**

18 1. Defendant Keefe purchased the Adaven Hotel from Emma and Robert Reed. Mr.
19 Keefe resides in Alameda, California.

20 2. Shortly after purchasing the hotel, Mr. Keefe appointed Mr. Fiesler as the resident
21 manager. Defendant Daniel Fiesler ("Fiesler") was previously convicted of assault on a minor.

22 3. The Adaven Hotel consists of apartments and a manager's office upstairs, and two
23 commercial establishments downstairs. One of the commercial establishments was operated as
24 "Nelson's Restaurant", and the other establishment was operated as a bar. It is primarily the bar
25 that is at issue in this case.

26 4. Prior to the McDuffee's involvement, the bar that operated at the Adaven Hotel
27 was known as "Jezebels". Plaintiffs purchased "Jezebels" from Richard Kudrna for \$45,000 in
28 June, 2003, and operated a bar known as "McDuff's Tavern". Shortly after taking possession,

1 the McDuffees spent about \$40,000 to remodel the bar, including \$6,000 for a custom made oak
2 liquor display bar that was affixed to the wall. "McDuffy's Tavern" operated under a commercial
3 lease that had commenced in 1995, and had been renewed and assigned a number of times.

4 5. As part of the McDuffee's remodel, they removed the security cameras that Mr.
5 Kudrna had installed, including one over the cash register.

6 6. In 2005, the McDuffees closed their "Arby's" restaurant" and brought the security
7 cameras from that restaurant to the McDuffy's Tavern". One was installed over the cash register
8 on the oak liquor display bar, and the other was installed over the safe in the office. Those
9 cameras were "hard wired" with cables to a video monitor in the office..

10 7. The McDuffees were aware of wireless security cameras on the outside of the
11 Adaven Hotel above the deck that faced the parking lot. The feed from those cameras was
12 received on a monitor in Mr. Fiesler's apartment upstairs at the Adaven Hotel. The McDuffees
13 did not know that those cameras also transmitted an audio feed to Mr. Fiesler's monitor and
14 thought that the only cameras in their bar were the ones that they had installed.

15 8. The parties experienced numerous conflicts over the lease and the operation of
16 "McDuffy's Tavern", including (1) Mr. Fiesler's repeated complaints about excessive noise from
17 the bar, some of which were made to the sheriff's office; (2) problems with accounting, charges
18 and payments for common area maintenance ("CAM") charges; (3) problems with the sewer line
19 backing up, and the subsequent closing of the parking lot for about 90 days to fix the problem; (4)
20 obstructing the main entrance for a week to make deck repairs; (4) Mr. Keefe parked a travel
21 trailer in the parking lot, which he sometimes lived in; (5) Mr. Keefe occasionally used the
22 parking lot to display movies on a projection screen; and (6) Mr. Fiesler filed an assault charge
23 against Mr. McDuffee which was dismissed after Mr. Fiesler declined to appear for a deposition
24 on the matter.

25 9. One of the primary sources of conflict stemmed from the McDuffees' two attempts
26 to sell their bar. Both times, Mr. Keefe rejected the buyer and refused to grant an assignment of
27 the lease or a new lease.

28 ///



1 10. Finally, Mr. Keefe filed a Complaint For Unlawful Detainer, Case No. 06-CV-
2 0019. That matter came before the Court for a hearing on 10 March 2006, based on Mr. Keefe's
3 Motion For An Order For A Preliminary Writ of Restitution. That hearing turned into a negotiated
4 settlement conference. At the conclusion of the hearing, the parties entered into a number of
5 stipulations on the record before the Court that were designed to govern the operations of the bar
6 and approval of a new buyer if the McDuffees elected to sell.

7 11. The written Order was not entered until 18 September 2006. The delay was due to
8 a number of factors, including the parties' disagreement over the form of the Order; the vacation
9 schedule of the court reporter that delayed producing the court recorded transcript; and the
10 summer vacation schedules of the attorneys and eventually the presiding judge. Ultimately, the
11 Court accepted and entered the written Order presented by the McDuffees' counsel, James R.
12 Hales, Esq.. This Court does not find any conflict between the stipulations reflected in the
13 transcript of March 10th, 2006 and the written Order, but offers this background to explain that the
14 written Order had not been entered when much of the current dispute was unfolding.

15 12. The McDuffees continued to experience problems after the 10 March 2006 hearing,
16 and decided to close their bar in May, 2006. They continued to pay rent through June, 2006, and
17 opened for one special event in June. They did not pay rent for July or August, 2006, and gave
18 notice that they were vacating the premises in August, 2006.

19 **B. THE SALE TO JERRY MADDOX.**

20 13. The settlement agreement that resulted from the 10 March 2006 hearing, and the
21 written Order that followed, allowed the McDuffees to find a new tenant for the premises. If the
22 buyer met certain qualifications, the landlord was presumed to approve the assignment.

23 14. On or about 6 June 2006, the McDuffees entered into a contract with Jerry Maddox
24 whereby Mr. Maddox would purchase the McDuffees' business and take an assignment of the
25 lease for Fifty Thousand Dollars (\$50,000.00). Mr. Maddox paid the entire purchase price.

26 15. On or about 7 June 2006, the McDuffees informed Mr. Keefe of their desire to
27 assign the lease to Mr. Jerry Maddox. Mr. Hales included a copy of the purchase contract and Mr.
28 Mr. Maddox' credit report that was obtained by Mr. McDuffee. Mr. Hales and Mr. McDuffee



1 took the position that Mr. Maddox met the qualifications for automatic approval. In fact, his FICO
2 score exceeded 680, but the report indicated one account was sent to collection within the last
3 eight (8) years.

4 16. On 12 June 2006, Mr. Hales forwarded the assignment for Mr. Keefe to sign.

5 17. On 21 June 2006, Mr. Hales sent another letter to Mr. Keefe's attorney, Caren
6 Jenkins, informing her that Mr. Keefe's approval of the assignment of lease was overdue.

7 18. On or about 22 June 2006, after the ten day period to approve the assignment of
8 lease had run, Ms. Jenkins contacted Mr. Hales by e-mail. The e-mail requested additional
9 financial information and assurances. The purported reason for the additional information was the
10 proposed assignee's "recent bankruptcy".

11 19. Mr. Hales immediately responded to the 22 June 2006 letter by rejecting the
12 request and insisting that Mr. Keefe provide the assignment.

13 20. Ms. Jenkins responded again on 22 June 2006 with a fax that insisted on additional
14 financial information.

15 21. On 23 June 2006, Mr. Hales sent another letter to Keefe's attorney that warned that
16 they were "dangerously close to losing this buyer."

17 22. Thereafter, on 26 June 2006, Ms. Jenkins left a message for Mr. Hales in which she
18 represented that Mr. Keefe would sign the assignment if the McDuffees deposited \$7,500 to
19 \$10,000 in escrow to cover the McDuffees' disputed obligations under the lease.

20 23. Mr. Hales responded to this new demand on 27 June 2006 by informing Ms.
21 Jenkins that his client had placed \$10,000 into Mr. Hales' trust account to cover these alleged
22 obligations.

23 24. Ms. Jenkins responded with a fax on 28 June 2007 in which she stated that the
24 assignment has been signed and was being sent to her office.

25 25. Mr. Keefe claims that he signed the Consent of Lessor form on 28 June 2006, after
26 the McDuffees deposited the \$10,000 into escrow, and that he had it notarized the next day.
27 However, that document was not provided to Mr. Maddox, the McDuffees, or their attorney before
28 Mr. Maddox withdrew from the purchase contract on or about 6 July 2006 and demanded a refund



1 of his money. The McDuffees complied with Mr. Maddox' request, terminated the purchase
2 contract, and refunded his money.

3 26. Mr. Maddox explained that he had moved from Seattle to purchase the bar, that he
4 was without income while the transaction was pending, and that he needed the landlord's consent
5 to proceed with his applications for a liquor license and restricted gaming license. He finally
6 decided that he could not have his money tied up any longer. No one ever told Mr. Maddox that
7 there was a problem with his credit report and no one asked him to explain the negative entries on
8 that report.

9 **C. SURVEILLANCE CAMERAS.**

10 27. The McDuffees alleged that they thought Mr. Fiesler and Mr. Keefe were spying on
11 them, but they did not know how. They thought they had removed all of the cameras when they
12 remodeled in 2003, and did not install new security cameras until they installed their own "hard
13 wired" security cameras in 2005. The McDuffees received confirmation of their suspicions in
14 approximately May, 2003, when Mike Singleton told Mr. McDuffee that his girlfriend used to live
15 in the Adaven Hotel and had seen feed from the bar on Mr. Fiesler's monitor.

16 28. In his deposition on 3 July 2007, Mr. Fiesler denied that he had ever intercepted
17 video images from "McDuffy's Tavern" and testified that nobody else had access to the monitor.

18 29. At trial, Mr. Fiesler and Mr. Keefe both testified that Mr. Fiesler's monitor could
19 occasionally and inadvertently receive low quality images from the camera that the McDuffees
20 installed over the cash register in their bar if the McDuffees operated their camera system on the
21 same channel as the Adaven's outside security cameras. Mr. Keefe also testified that he told this
22 to the McDuffees.

23 30. The McDuffees deny that they were ever informed that Mr. Fiesler received images
24 from inside of McDuffy's Tavern. The Court accepts the McDuffy's testimony and finds that Mr.
25 Fiesler was receiving images from a separate camera that was hidden inside of McDuffy's Tavern.
26 This finding is based on a number of factors.

27 31. Mr. Keefe described his experience with electronics and video equipment, and was
28 quite clear that Mr. Fiesler would not have the capability of receiving images from hard wired



1 cameras. There is no basis to dispute the McDuffees' testimony that their cameras were "hard
2 wired" to the monitor in their office.

3 32. Alexandria Artzer was an independent, credible, third party witness who gave a
4 clear description of the events she witnessed. She testified that she was under the age of 21 when
5 she lived at the Adaven Hotel in 2005, and could not legally go in the bar. Her boyfriend, Mike
6 Singleton, knew the McDuffees and went to the bar. She clearly described an occasion where she
7 asked Mr. Fiesler to turn on the monitor to see if her boyfriend was in the bar. The fact that he
8 accommodated her request proves that he had the capability to monitor activities inside the bar.

9 33. Ms. Artzer also described a clear image with sound, not a broken image without
10 audio as described by Mr. Keefe and Mr. Fiesler.

11 34. Ms. Artzer also described a view angle from across the bar, not the view from the
12 camera over the cash register.

13 35. Ultimately, however, it does not matter whether Mr. Fiesler was intercepting feed
14 from one of the McDuffees cameras or receiving feed from a separate, hidden camera. He knew
15 he should not be doing so because he told Ms. Artzer not tell anyone what they had done, and
16 denied these events outright in his deposition. Mr. Keefe also knew that it was wrong for Mr.
17 Fiesler to view images from "McDuffy's Tavern" because he told Mr. Fiesler to change monitor
18 channels when these images came on. However, Mr. Keefe did nothing to eliminate Mr. Fiesler's
19 ability to receive the images from "McDuffy's Tavern".

20 **II. MOTION TO DISMISS.**

21 At the conclusion of Plaintiffs' case-in-chief, the Defendants presented an oral motion to
22 dismiss the claims for Civil Conspiracy, Intentional Infliction of Emotional Distress, and Trespass.

23 The motion to dismiss the claim for Civil Conspiracy is granted. The McDuffees failed to
24 carry their burden of proof that the Defendants acted in concert to accomplish an unlawful
25 objective for the purpose of harming the Plaintiffs. *See Consolidated Generator-Nevada, Inc. v.*
26 *Cummings Engine Co.*, 114 Nev. 1468, 971 P.2d 1251 (1999); *Dow Chemical Co. v. Mahlum*, 114
27 Nev. 1468, 970 P.2d 98 (1998).

28 ///

1 The motion to dismiss the claim for Intentional Infliction of Emotional Distress is also
2 granted. The McDuffees both testified about the stress to Mr. McDuffee. He developed a sleep
3 disorder for which his doctor prescribed sleeping pills, and a facial skin disorder called Alopecia,
4 both of which were attributed to the stress from the continued conflict with the Defendants.
5 However, the McDuffees' testimony alone is insufficient to prove this cause of action without
6 substantiation from medical records.

7 The motion to dismiss the claim for Trespass is granted in part and denied in part. The
8 McDuffees' claim for Trespass actually covers issues of a physical trespass, breach of the
9 covenant of quiet enjoyment, and trespass by way of the unauthorized monitoring and security
10 camera. Although Mr. Fiesler entered "McDuffy's Tavern" a number of times, there was no
11 indication that his entries were unauthorized. For the most part, the entries were for business
12 purposes of collecting rent or delivering notices. On one occasion, Mr. McDuffee found a panel
13 had been removed that separated his bar from a common area washroom. Although suspicious,
14 this mere inference of a physical trespass through the opening is insufficient to establish a physical
15 trespass.

16 However, the McDuffees submitted sufficient evidence to defeat the motion to dismiss on
17 the breach of the covenant of quiet enjoyment and trespass with the unauthorized monitoring and
18 security cameras.

19 III. CONCLUSIONS OF LAW.

20 1. The McDuffees' First Cause of Action is for bad faith breach of contract for
21 violating the lease and the stipulations and Order by refusing the assignment to Jerry Maddox.
22 Mr. Keefe explained that he did not think he had to respond because he thought the lease was not
23 in good standing and the approval would not be presumed based on the negative entry in the credit
24 report. Mr. Keefe is correct that approval of the assignment was not automatic due to the account
25 that was sent to collection as reflected on the credit report. However, under the terms of the
26 stipulations, Mr. Keefe still had to respond by Monday, 19 June 2006, which was ten (10) days
27 after his counsel received notice from Mr. Hales of the pending sale. Also, Par. 5 of the lease
28 concerning assignment provides in pertinent part as follows:

1 5. **ASSIGNMENT AND SUBLETTING.** *Lessee shall not*
2 assign this lease or sublet the portion of the premises without prior written
3 consent of the Lessor, which shall not be unreasonably withheld . . .

4 Good standing is not the issue and the stipulations and Mr. Keefe failed to prove that the
5 McDuffee's lease was not in good standing. Moreover, the stipulation and Order were intended to
6 clarify the reasonableness requirement. Ultimately, however, all of these concerns are irrelevant
7 as Mr. Keefe says that he approved and signed the assignment. He and his counsel simply failed
8 to transmit the actual assignment to the McDuffee's attorney and their buyer in a timely manner.
9 The McDuffees are, therefore, entitled to judgment on their First Cause of Action for breach of
10 contract. These facts do not, however, constitute bad faith.


11 The McDuffees objected to Mr. Keefe's testimony about the credit report on the basis that
12 he did not raise the credit report as an issue in the pleadings or his trial statement and the initial
13 objection was based solely on the bankruptcy that was more than eight (8) years old. They further
14 contended that the credit report is hearsay and is unreliable for the purpose of proving whether Mr.
15 Maddox actually had an account sent to collection, and that the assignment to Mr. Maddox should
16 be deemed approved. This Court accepts the credit report at face value. This issue does not affect
17 the outcome of this case in light of the findings and conclusions as stated above.

18 **2. Trespass.**

19 "The covenant of quiet enjoyment generally is interpreted to secure the lessee against the
20 acts or hindrance of the lessor and thus requires that the lessor refrain from voluntarily impairing
21 the character and value of the leased premises." *Ripps v. Kline*, 70 Nev. 510, 514, 275 P.2d 381
22 (1954). "One in peaceable possession may maintain an action for trespass against another who
23 interferes with his quiet enjoyment." *Charleston Joint Venture v. McPherson*, 417 S.E.2d 544,
24 549 (S.C. 1992). Regardless of whether the Defendants installed the hidden surveillance camera
25 or not, they maintained the camera and used it to view images from McDuffy's Tavern. In so
26 doing, they breached the McDuffees' right to exclusive use and quiet enjoyment of the leased
27 premises.

28 ///

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1 It does not help the Defendants to argue that they intercepted images from the McDuffees'
2 security camera. That would be the same violation and breach, and tantamount to an admission of
3 trespass to the McDuffees' personalty.

4 3. In order to prove a cause of action based on intentional interference with
5 prospective economic advantage, a party must show the following: (1) a prospective contractual
6 relationship exist(ed) between plaintiff and a third party, (2) defendant knew of this relationship,
7 (3) defendant intended to harm plaintiff by preventing the relationship, (4) defendant had no
8 privilege or justification, and (5) defendant's conduct resulted in actual harm to plaintiff. *See,*
9 *Consolidated Generator-Nevada, Inc. v. Cummings Engine Co., Inc.*, 114 Nev. 1304, 1311, 971
10 P.2d 1215 (1998); *see also, Wichinsky v. Mosa*, 109 Nev. 84, 87-88, 847 P.2d 727 (1993). Mr.
11 Keefe's reasons for refusing to deliver the assignment may have violated the lease and the Order,
12 but the evidence did not demonstrate that Mr. Keefe acted with the intent to harm the McDuffees.

13 4. To recover for the tort of invasion of privacy, a plaintiff must prove the following
14 elements: (1) an intentional intrusion (physical or otherwise); (2) on the solitude or seclusion of
15 another; (3) that would be highly offensive to a reasonable person. *PETA v. Bobby Berosini, Ltd.*,
16 111 Nev. 615, 630-631, 895 P.2d 1269 (1995), *overruled on other grounds, City of Las Vegas*
17 *Downtown Redevelopment Agency v. Hecht*, 113 Nev. 644, 940 P.2d.134 (1997). "McDuffy's
18 Tavern" was a private establishment, and the McDuffees and their customers had a reasonable
19 expectation that their assembly and conduct inside of the bar would be free from unknown
20 surveillance and monitoring. The surveillance would be highly offensive to a reasonable person
21 and was clearly offensive to the McDuffees.

22 5. Contempt is defined as the "[d]isobedience or resistance to any lawful writ, order,
23 rule or process issued by the court or judge at chambers." NRS 22.010(3). In this case, the Order
24 was issued from the bench on 10 March 2006 based on the stipulations of the parties, and reduced
25 to a written Order on 18 September 2006. Although Mr. Keefe breached the stipulations and
26 Order by failing to respond to the request for assignment, delaying the delivery of the executed
27 Consent of Lessor, and breached the lease by unreasonably withholding consent, those breaches
28 do not amount to contempt.



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1 Nevertheless, Mr. Keefe agreed to pay one-half (1/2) of the fees incurred by Mr. Hales to
2 revise the lease, and he failed to do so. This Court reviewed Mr. Hales' draft revisions and
3 allowed him to supplement his testimony with a declaration on the amount of fees incurred. Mr.
4 Hales' efforts and the fees incurred are appropriate, and Mr. Keefe has to pay one-half of those
5 fees.

6 **IV. COUNTERCLAIMS.**

7 Mr. Keefe filed three (3) counterclaims: (1) bad faith breach of lease for excessive noise
8 from "McDuffy's Tavern"; (2) bad faith breach of lease for damages to the premises when the
9 McDuffees vacated the premises; and (3) bad faith breach of lease for future damages in the form
10 of lost rental income if Mr. Keefe was not able to fully mitigate his damages with substitute rental
11 income.

12 **1. Excessive Noise.**

13 According to the terms of the lease and the stipulations and Orders, the McDuffees were
14 not to play music after midnight or allow excessive noise to disturb the tenants upstairs. Through
15 the stipulations and Order, the parties agreed that Mr. Keefe would install a sound monitoring
16 device (actually, a decibel meter) that would allow an objective reading of the noise level. The
17 parties ultimately agreed that the maximum allowable noise would be 90 decibels.

18 Mr. Keefe failed to provide sufficient evidence of excessive noise or music after midnight.
19 At some point after the 10 March 2006 hearing, Mr. Fiesler and Mr. Keefe decided to rely
20 primarily on Mr. Fiesler's notations on a handwritten calendar. In fact, the handwritten calendar
21 was not very reliable, and many of the dates that Mr. Fiesler referenced on the calendar were after
22 the McDuffees had already stopped operating the bar.

23 During this litigation, Mr. Keefe printed out hundreds of pages of reports from the sound
24 monitoring device. Mr. Keefe assembled a short stack of the most relevant pages as Exhibit R.
25 Those pages, and apparently the others in the large stack, contained his handwritten notations of
26 the date of the recording. One of the handwritten dates was in 2005, crossed out and re-written
27 with a 2006 date, and one of the dates was in 2007. Those were clearly errors, but the errors
28 raised doubts about the reliability of the handwritten notations. The other dates were also after the

1 McDuffees had stopped operating the bar, and the relevance of the documents was not clear. The
2 sound monitoring reports also did not differentiate between music and ambient noise.

3 Regardless, the occasional spikes of noise over 90 decibels were *de minimis*, and could
4 not be the cause of any monetary damage to Mr. Keefe. In fact, Mr. Keefe did not claim any
5 monetary damages for excessive noise. Likewise, the complaints about noise, even if true, did not
6 provide Mr. Keefe with a reason to withhold consent of the assignment to Mr. Maddox.

7 **2. Condition of the bar.**

8 Mr. Keefe also testified about the condition of the bar when the McDuffees abandoned the
9 premises. However, his information was derived almost entirely from information and documents
10 provided by Barbara Marchand and Steven Orlando, who operate a new bar known as
11 "Buckaroos" in the premises where "McDuffy's Tavern" was operated. Neither Ms. Marchand
12 nor Mr. Orlando testified at trial. Apparently, Mr. Keefe agreed to give the new tenants free rent
13 for one month, a value of \$2,000, as consideration for their work in refurbishing the premises.
14 The report from Ms. Marchand and Mr. Orlando, attached to Defendants' Exhibit L, was admitted
15 into evidence for the limited purpose of establishing Mr. Keefe's reasons for giving the rent credit,
16 not for the truth of the information on damages contained in that report.

17 The only admissible evidence of possible damage came from Mr. McDuffee himself. Mr.
18 McDuffee explained that he used his grandmother's sink to replace a sink that was falling off the
19 wall when he took possession of the premises, and took the replacement sink when he left. He
20 also explained that he had to cut his slot machines out of the old plywood or particle wood bar, but
21 that the face plates could be replaced and the bar reused if someone were inclined to do so. There
22 was no evidence that the old bar still had any value, or that anybody would want to use the old bar,
23 and the damage caused, if any, was *de minimis*.

24 **3. Future rents.**

25 Because Mr. Keefe breached the lease and stipulations and Order, the McDuffees were
26 justified in closing "McDuffy's Tavern" and withholding further rent payments. Their further
27 performance under the lease is excused as a result of Mr. Keefe's breach.

28 ///

1 **4. Other charges.**

2 Mr. Keefe testified to allegations of unpaid CAM charges. He was allowed to do so, over
3 the objection of the McDuffees, even though the complaint and the trial statement mentioned
4 nothing about such charges. Mr. Keefe failed to carry his burden of proof on this issue, as well.

5 Mr. Keefe also testified that the McDuffees failed to pay rent for June, 2006. This
6 allegation was not in the pleadings or trial statement, and was contradicted by Mr. Fiesler, who
7 stated that he received the June rent for Mr. Keefe, and by Defendants' Exhibit B. Exhibit B was a
8 letter from Mr. Hales on 9 June 2006 enclosing a replacement check for the June rent.

9 **V. JUDGMENT.**

10 Based on the foregoing, Judgment shall be and is hereby entered as follows:

11 1. In favor of the Plaintiffs and against Defendant Keefe on the First Cause of Action
12 for breach of contract in the amount of \$50,000, together with interest at the statutory rate from 19
13 June 2006, until paid;

14 2. In favor of the Plaintiffs and against the Defendants, jointly and severally, on their
15 Second Cause of Action for trespass for \$15,000, together with interest at the legal rate from the
16 date of service of the summons and complaint until paid;

17 3. In favor of the Defendants and against the McDuffees on their Third Cause of
18 Action for Interference with Prospective Economic Advantage;

19 4. In favor of the Plaintiffs and Against the Defendants, jointly and severally, on their
20 Sixth Cause of Action for Intrusion (Violation of Privacy) in the amount of \$15,000, together with
21 interest at the legal rate from the date of service of the summons and complaint until paid. This is
22 the same \$15,000 adjudged under the Second Cause of Action for trespass, and should only be
23 paid once;

24 5. For the Defendants and Against the Plaintiffs on the Petition for Order to Show
25 Cause Re: Contempt;

26 6. Plaintiffs' Fourth Cause of Action for Intentional Infliction of Emotional Distress
27 and Fifth Cause of Action for Civil Conspiracy shall be and are hereby dismissed in conformance
28 with the Order at trial granting the Defendants' oral motion to dismiss;

1 7. In favor of the Plaintiffs and against the Defendants on each of the counterclaims
2 asserted by Defendant Keefe;

3 8. Mr. Keefe shall be and is hereby directed to pay the amount of \$539 (\$1078 / 2) to
4 James R. Hales, Esq. for his efforts in revising the lease as agreed at the 10 March 2006 hearing
5 and confirmed in the 18 September 2006 Order;

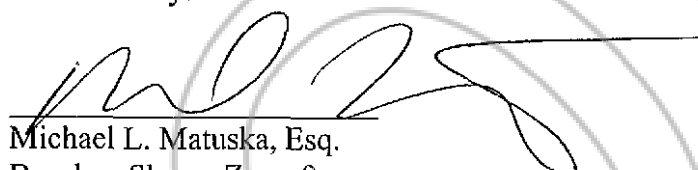
6 9. The lease between the parties shall be and is hereby deemed terminated as of 19
7 June 2006, and Plaintiffs have no further obligations to Mr. Keefe under that lease after that date.

8 Dated this 6 day of ^{Dec.} November, 2007.

9
10 
11

DISTRICT COURT JUDGE

12
13 Submitted by:

14 
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23 **Dennis McDuffee and Jolie**
24 **McDuffee, individually and**
25 **As Managing Members of**
26 **M.M.M.J., L.L.C., a Nevada**
27 **Limited Liability Company**
28

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FILED: 12/19/2007
DISTRICT COURT



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The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: 12/17/07

Barbara J. Griffin, Clerk of the 9th Judicial District Court of the State of Nevada, In and for the County of Douglas,

By [Signature] Deputy