

1 **JURISDICTION**

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3 This court has jurisdiction over this core proceeding. 28 U.S.C. § 157 (A), (B), (C),
4 (M) and (O).

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6 **STATEMENT OF UNCONTESTED FACTS**

7
8 The following facts have been agreed to by the parties:

9 1. Plaintiff Westfest, LLC is an Arizona limited liability company with its
10 principal place of business located in Maricopa County, Arizona.

11 2. Defendant Bashas' Inc. is an Arizona corporation, authorized and conducting
12 business throughout Arizona.

13 3. Westfest is the lessor under the February 15, 2007 Ground Lease executed by
14 Westfest and Bashas' for the premises commonly referred to as Bashas' Store No. 170. Bashas' owns
15 the building and all furniture, fixtures and equipment ("FF&E") at the subject premises, and leases
16 the ground from Westfest.

17 4. On or about February 8, 2010, Bashas' filed its Third Omnibus Motion to
18 Approve Assumption of Certain Unexpired Nonresidential Real Property Leases, without
19 Modification (Store Nos. 17, 19, 27, 31, 33, 35, 36, 39, 42, 46, 60, 78, 98, 144, 160, 161, and 170)
20 (the "Lease Assumption Motion"; Admin. ECF No. 1251).

21 5. Pursuant to the Lease Assumption Motion, Bashas' asked the Court to approve
22 the assumption of the Lease, without modification.

23 6. In the exercise of its business judgment, Bashas' decided to cease operations and
24 close Store 170 effective March 27, 2010.

25 7. After the filing of the Lease Assumption Motion, and the expiration of the
26 objection period provided in the Bar Date Notice filed on February 8, 2010 at Admin. ECF
27 No. 1252, and after closure of the Store, Westfest asserts that additional defaults occurred under the
28 terms of the Lease. Bashas' Notice of Filing Amended Exhibit to: Third Omnibus Motion to

1 Approve Assumption of Certain Nonresidential Real Property Leases, without Modification filed
2 on June 17, 2010 at Admin. Dkt. #1968 did not relate to these alleged additional defaults.

3 8. Westfest filed its Reservation of Rights relating to the Lease Assumption
4 Motion on June 22, 2010 at Admin. ECF No. 2013.

5 9. Westfest did not object to Bashas' assumption of the Lease, but did seek to
6 reserve its rights and claims relating to the closure of Store 170.

7 10. On August 12, 2010, Bashas' uploaded a Stipulated form of Order Approving
8 Assumption of Non-Residential Real Property Lease, Without Modification (Relating to Store 170)
9 at Admin. ECF No. 2372 (the "Lease Assumption Order") that states:

10 Notwithstanding the foregoing, all issues, rights, and claims of the parties,
11 arising under the lease relating to the closure of Store 170, are specifically
12 reserved, and the Court retains jurisdiction to consider such issues.

13 The Lease Assumption Order further addressed the stipulated cure amount as follows:

14 The amount necessary to cure pre- and post-petition amounts due under the
15 Lease on Store 170 is \$99,947.48, which reconciles and resolves all amounts
16 due under the Lease through and including December 31, 2009.

17 The Lease Assumption Order, including the language set forth above, was entered by the Court on
18 August 25, 2010 at Admin. ECF No. 2420.

19 11. Bashas' has paid Landlord all cure amounts related to post-petition rent and
20 expenses, and will pay Landlord the balance of \$80,363.58 related to pre-petition rent and expenses
21 on or before February 28, 2011, pursuant to the terms of the Debtors' Confirmed Plan. The Debtors'
22 Plan of Reorganization was confirmed by Order of this Court on August 13, 2010 and became
23 effective August 28, 2010 (the "Effective Date").

24 12. Section 29 of the Lease states the following:

25 **29. Cessation of Business Operations.**

26 29.1 In the event Tenant's Grocery Use is not operated on the Leased
27 Premises for a period of sixty (60) consecutive days..., Tenant shall send, prior
28 to such cessation, Landlord written notice ("Tenant's Closure Notice") that
Tenant intends to permanently cease supermarket operations on the Leased
Premises....Tenant, with such notice, shall state (i) Tenant's Opinion of the fair

1 market value of Tenant's Building and the Site Work on the Leased Premises
2 ("Fair Market Value") and (ii) an itemized list of Tenant's furniture, fixtures,
3 and equipment (collectively, referred to as "Tenant's Fixtures") including the
4 book value of Tenant's Fixtures, which shall remain on the Leased Premises
5 if the Ground Lease is terminated pursuant to this Section 29. Landlord shall
6 have the right to terminate this Ground Lease by sending Tenant written notice
7 of its election to terminate the Ground Lease within ninety (90) days after the
8 date of Landlord's receipt of the Tenant's Closure Notice referenced above (a
9 "Landlord's Cancellation Notice"). To be effective, a Landlord's Cancellation
10 Notice must specify either (I) that Landlord accepts the Fair Market Value of
11 Tenant's Building and the Site Work as set forth in the Tenant's Closure Notice
12 or (II) Landlord's own estimate of the Fair Market Value of Tenant's Building
13 and Site Work, and must include a deposit in the amount of the greater of (X)
14 ten percent (10%) of the total of (i) [Fair Market Value] and (ii) the book value
15 of Tenant's furniture, fixtures and equipment, as set forth in Tenant's Closure
16 Notice or (Y) \$250,000 (the "Earnest Money Deposit"), which Earnest Money
17 Deposit shall be non-refundable for any reason except a Tenant default under
18 this Section 29, and which shall be deposited with the Escrow Agent, as such
19 term is defined below. If Tenant has not received Landlord's notice and a
20 written notification from Escrow Agent confirming its receipt of the Earnest
21 Money Deposit within said ninety (90) day period, Landlord's right to
22 terminate this Ground Lease shall cease and be of no force and effect and
23 Tenant may use the leased Premised for any use not prohibited to Tenant under
24 Article 15 (Shopping Center Use Restrictions), and may assign this Ground
25 Lease or sublet the Leased Premises in accordance with Article 18
26 (Assignment and Subletting).

15 13. Section 4 of the Lease provides as follows:

16 4. Tenant's Fixtures.

17 4.1 Tenant may install on the Leased Premises any trade fixtures and
18 equipment Tenant deems desirable, and they shall remain Tenant's personal
19 property. Tenant may remove any such trade fixtures and equipment at any
20 time during the terms of this Ground Lease, but shall repair any damage to
21 structural portions of Tenant's Building caused by removal of such trade
22 fixtures and equipment.

23 4.2 If, upon termination of this Ground Lease, Tenant's Building is heated
24 in whole or in part with heat reclaimed from refrigeration compressors
25 installed by Tenant, Tenant may remove the compressors, refrigeration coils,
26 and associated controls but shall not remove any duct work or air handling
27 equipment that could be used by Landlord in installing an alternative heating
28 system.

25 14. Pursuant to Section 29 of the Lease, on or about February 15, 2010 Bashas' sent
26 a letter to Westfest, informing Westfest of the cessation of operations scheduled for March 27, 2010
27 (the "First Closure Notice").

1 15. The First Closure Notice included Bashas' opinion of the fair market value of
2 Tenant's Building and site work on the Leased Premises of \$2.2 million and attached an itemized
3 list of Tenant's Fixtures "which shall remain on the Lease [sic] Premises if the Ground Lease is
4 terminated as provided in Section 29 of the Lease." The book value of the Tenant's Fixtures was
5 identified by Bashas' as being approximately \$1,172,260.89.

6 16. On April 27, 2010 the Landlord responded to the February 15, 2010 letter
7 stating that he was "seriously considering his option to purchase the building and fixtures and
8 acknowledged that the purchase of the FF&E would be at Bashas' book value. The Landlord also
9 asked if all the fixtures identified in the First Closure Notice was still in the Store.

10 17. By letter dated April 29, 2010 Bashas' informed Landlord that FF&E listed in
11 the First Closure Notice had been overinclusive and that certain equipment proprietary to Bashas'
12 had been removed from the premises and that they would be generating a list of equipment that
13 would remain at the premises and available for purchase pursuant to the Lease.

14 18. On June 3, 2010, Bashas' sent another letter to Westfest (the "Second Closure
15 Notice"), intending to "supersede the prior letter [] dated February 15, 2010" on the basis that the
16 First Closure Notice was "overly inclusive" and was a "mix-up on the list of fixtures and equipment"
17 that Bashas' intended to leave on the Leased Premises. The Second Closure Notice did not alter the
18 fair market value of the Building or the Site Work. In the Second Closure Notice, Bashas' extended
19 an additional 90 day period beginning from Westfest's receipt of the Second Closure Notice, during
20 which Westfest could issue the Landlord Cancellation Notice and elect to terminate the Lease
21 pursuant to Section 29.1 of the Lease. The ninety days for the Landlord to issue its Cancellation
22 Notice under the Second Closure Notice expired September 2, 2010.

23 19. Westfest responded to the Second Closure Notice with a letter dated June 10,
24 2010, asserting that Bashas' was in default for having removed a portion of the Tenant's Fixtures
25 identified in the First Closure Notice.

26 20. On June 30, 2010, Bashas' sent another letter to Westfest wherein Bashas'
27 ratified and confirmed the Second Closure Notice that was sent on June 3, 2010. In addition, Bashas'

1 offered to allow Westfest to purchase the Tenant Fixtures listed in either the First Closure Notice
2 or the Second Closure Notice.

3 21. After the cessation of business operations in late March, 2010, Bashas' has not
4 reopened Store 170.

5 22. Section 9.3(E) of the Lease provides that:

6 Tenant, as to Tenant's Building, and Landlord, as to all other buildings in the
7 Shopping Center, shall maintain or cause to be maintained the exterior of its
8 building(s) in a quality and condition comparable to that of first class shopping
9 centers of comparable size and nature located in the same geographical area
as the Shopping Center.

10 23. Section 27.1 of the Lease provides, in part, that Bashas' is obligated to, "at its
11 sole cost and expense, keep and maintain Tenant's Building in good and sanitary order, condition,
12 and repair, ordinary wear and tear excepted..."

13 24. On September 27, 2010 Westfest sent Bashas' a letter asserting a breach of
14 Lease Section 27.1 due to the electrical service: "the electrical service does not meet code, as the
15 main service is inoperative and only partial service in place. Please let this letter serve as notice that
16 this is a breach of the Lease under Section 27.1 ('Tenant shall, at its sole cost and expense comply
17 with all the requirements of all municipal, state and federal authorities now in force')." .

18 25. On October 7, 2010 Bashas' sent Landlord a letter which stated, in part, that
19 "with respect to the electrical facilities within our building, this will confirm for you that we have
20 fixed the problem on a temporary basis, so that the current low level usage of the building is in
21 Compliance with Code. We acknowledge that the electrical system will need to be reworked for
22 any new user of the building. We expect this will happen when we find a new user for the space,
23 as part of tenant improvements for the new user."

24 26. On October 26, 2010, Westfest responded to Bashas' that the electrical service
25 was not in good condition and repair, and that this constituted a default under Section 27.1 of the
26 Lease.

27 27. Section 19.1 of the Lease requires notice and an opportunity to cure before a
28 party can be found in default: "A party shall be deemed to be in default of this Ground Lease only

2. Maintaining a temporary and minimally operational electrical system while awaiting decision as to what a new tenant(s)' specific needs may be?
3. Temporarily boarding up windows to prevent vandalism to the windows themselves, and to also prevent unlawful entry onto the vacant premises?

Issue 1: Did Bashas' breach the lease by amending the list of personal property which was intended to remain on the premises, and which the landlord had an option to purchase?

Westfest complains that Bashas' had no right to unilaterally amend a list of equipment and personalty that Westfest might elect to purchase, once Bashas' decided to close Store 170. The critical lease provision is Section 29.1 (Ex. 1). The portion applicable to the instant dispute provides that once Bashas' notifies Westfest that it intends to cease operations, it must give Westfest the opportunity to purchase both the building and any contents "which shall remain on the Leased Premises."

On or about February 15, 2010, Bashas' gave notice of its intent to cease operations on or about March 27, 2010 and advised Westfest that an itemized list of furniture, fixtures and equipment ("FF&E) which Bashas' intended to leave on the premises, was worth \$1,172,260.89 (Ex. 7). By contract, Westfest then had to exercise the right to purchase such equipment within 90 days (May 15, 2010).

It is undisputed that Westfest did not exercise the option, by May 15, 2010. Had it done so, the issues in this case might have gotten a little more muddled.

Over two months after delivering its February 15 letter, not having heard from Westfest, Bashas' sent an email to Westfest seeking some indication of how Westfest intended to proceed. This communication occurred on April 22, 2010. (Ex. 9.)

1 However, on April 27, 2010, without affirmatively exercising the option to purchase
2 the FF&E, or otherwise indicating that it intended to exercise the option, Westfest began demanding
3 that Bashas' leave all of the February 15 itemized FF&E in the store (Ex. 10).

4 On April 29, 2010, Bashas' responded by noting that the list provided on February 15
5 would be amended, and a new list of items available for purchase would be provided (Ex. 11).

6 On May 6, 2010, Westfest sidestepped answering the question as to whether it would
7 actually exercise the options available to it. Instead, Westfest maintained that Bashas' had no right
8 to alter the February 15 list, while at the same time refusing to commit as to whether Westfest
9 desired to, in fact, purchase the FF&E and the building (Ex. 12). Westfest continued this course of
10 action through May 13, 2010 (Ex. 13).

11 By May 15, 2010, having not exercised its right to exercise the option to purchase
12 either the real and/or personal property specified in Bashas' February 15, 2010 letter, Westfest's
13 option expired.

14 Nevertheless, Bashas', on June 3, 2010, amended the FF&E list, which reduced the
15 fair market value to \$721,243.06 (Ex. 14). Bashas' unilaterally reopened the now-expired 90-day
16 option period for another 90 days--to approximately September 3, 2010 (Ex. 14).

17 By September 3, 2010, Westfest had again failed to exercise the option under the
18 renewed offer.

19 In the interim, on June 20, 2010, in an effort to assuage Westfest's concern that it had
20 been somehow victimized by Bashas' removal of some of the FF&E listed in the February 15 letter,
21 attorneys for Bashas' advised Westfest that:

22 If you would in fact rather purchase all of the Tenant Fixtures listed in the
23 original closure notice, Basha's will agree to return all of the removed Tenant
24 Fixtures to the Premises, and to sell them to you at the book value included in
the Initial Closure Notice [referring to the February 15, 2010 letter, Ex. 7].

25 (Ex. 16.)

26 Westfest failed to take up the offer, preferring instead to argue that an "incurable"
27 breach had occurred, instead of simply accepting the full benefit of that very same property of which
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1 Westfest felt it had been wrongfully deprived, or even by accepting the terms of the February 15
2 letter . (See Ex. 17, September 27 letter; Ex. 19.)

3 Once again, Westfest, by never notifying Bashas' of its actual intent to exercise the
4 contractual option by September 3, was left with no further remedies. (See Ex. 26.)

5 In view of the foregoing facts, the court finds and concludes that Bashas' did not
6 breach the lease. Moreover, Westfest, by failing to ever exercise its options, became contractually
7 time-barred from asserting breaches, especially in view of the fact that the issue over fixtures and
8 personalty, about which it complains, was fully offered on June 30, 2010, but never thereafter
9 accepted (Ex. 16). Westfest, by virtue of its inactions on multiple fronts, is estopped from
10 contending that another has breached the contract.

11 One final point needs to be addressed. That is the issue as to whether, once Bashas'
12 provided its first list on February 15, 2010, it was thereafter prohibited from amending or changing
13 the list. Had Westfest accepted the original list, Westfest might have a plausible argument for a
14 completed contract. But it never did so. Nothing in Section 29.1 prohibits modifications or
15 adjustments to the FF&E list, once given. After all, the property belonged to Bashas'. It could
16 choose what to offer for sale and what to remove. No provision of the contract states that once the
17 list was provided, that any change thereto--prior to acceptance of the option--created an "incurable"
18 breach.

19 Had Westfest wished to completely seal the agreement and argue that the original list
20 had been accepted, it should have accepted the option when offered. Instead, Westfest attempted
21 to simply divert the issue.

22 The court finds fully in favor of Bashas' and against Westfest on this issue.
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1 **Issue 2: Has Bashas' breached the lease by maintaining a temporary and minimally**
2 **operational electrical system while awaiting decision as to what a new tenant(s)'**
3 **specific needs may be?**
4

5 Westfest maintains that Bashas' has breached Section 27.1 of the lease (Ex. 1), because
6 the state of the electrical service to the building is currently inadequate to service a new tenant of,
7 for example, the size of another grocery store.

8 That section, entitled "Building Maintenance," states

9
10 Tenant shall, at its sole cost and expense, keep and maintain Tenant's Building
11 in good and sanitary order, condition and repair, ordinary wear and tear
12 excepted, and shall suffer no waste with respect thereto, ordinary wear and tear
13 excepted. Tenant shall, at its sole cost and expense, comply with all the
14 requirements of all municipal, state and federal authorities now- (sic) in force,
15 pertaining to the Leased Premises which apply to and bind Tenant. Upon the
16 termination of this Ground Lease, Tenant shall leave any building
17 improvements on the Leased Premises in a broom-clean condition.

18 The leased premises are currently unoccupied, and have been since Bashas' ceased operations at the
19 property. No new tenant or tenants have yet been identified for replacement occupancy. Depending
20 upon the type of tenant or tenants who will use the property, their respective electrical needs may
21 differ. Currently, the electrical system is not unsafe, nor poses a life or safety risk. It is simply
22 inadequate for whatever needs a future tenant or tenants will require.

23 Both experts, Mr. Walker and Mr. Rowley, acknowledged the inadequacy of the
24 electrical system in its current state, to properly support new tenants, as did Bashas' itself (*see* Exs.
25 22, 23 and 19). However, A.N. John Basha's letter of October 7, 2010 states that the current
26 condition is only "temporary," and due to "the current low level of usage the building is in
27 compliance with the Code" (Ex. 19). But most importantly, that letter states that Bashas' accepts
28 responsibility for reworking the electrical system "for any new uses of the building" (Ex. 19), once
those future needs are identified.

Section 27.1 of the lease does not require the wasteful expenditure of monies to
improve an outmoded electrical system until it is determined exactly what those future tenants' needs

1 might be. Bashas' response to this issue was both reasonable and not in violation of the intent of
2 Section 27.1.

3 Bashas' did not breach Section 27.1 with respect to its obligations concerning the
4 electrical system. When required to do so, Bashas' has agreed that it will update the system to
5 conform to the needs of the new tenant or tenants. Deferring that obligation until those specific
6 needs are determined is neither unreasonable nor a breach of the lease.

7 The court finds fully in favor of Bashas' and against Westfest on this issue.
8

9 **Issue 3: Has Bashas' breached the lease by temporarily boarding windows to prevent**
10 **vandalism to the windows themselves, and which also serve to prevent unlawful**
11 **entry onto the vacant premises?**
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13 Westfest argues that Bashas' has breached the lease provisions of Section 9.3(E) which
14 require the exterior of the building to be maintained in a condition comparable to first class shopping
15 centers in the same geographical area. The lease contains no definition as to what a "first class"
16 shopping center in the immediate vicinity might be.

17 The lease contains a provision which allows Bashas' to cease operations (Ex. 1 at
18 Section 29.1). This Bashas' did on March 27, 2010. No party contends that ceasing operations was,
19 in any way, a breach of the lease.

20 However, in April 2010, Ms. Cindy Winters, of Eagle Commercial Realty Services
21 (the apparent property manager) wrote to Bashas' and advised that five large storefront windows had
22 been "acid etched and need replacement" (Ex. 8). Acid etching is a form of vandalism, and
23 apparently was done by gangs in the area.

24 Responding to Ms. Winters' concerns, Bashas' proceeded to replace the damaged
25 windows, and then proceeded to board them up so that the same problem would not occur again,
26 requiring another needless and expensive fix. The boarding up also prevented unlawful breaking
27 and unlawful entry, and further protected the personalty remaining in the abandoned store
28 (testimony of A.N. Basha, Jr.).

1 A photograph of the exterior reveals that all Bashas' signage has been removed, and
2 that the four large boarded up windows and at least one entry door are of a complementary color to
3 the exterior (Ex. 21). The boarded windows are not unsightly nor unkempt. Mr. Richard Decker
4 of Westfest testified that this siding makes the property "look abandoned." The problem with that
5 testimony is that the property is, indeed, abandoned; there is no signage, and no sign of traffic in and
6 out of the store. While the pictures do not show it, it is assumed that the parking lot is also empty.
7 The fact that the building is abandoned is telegraphed to the public in multiple ways.

8 To require a ground tenant, who is authorized to cease operations under a lease, to
9 continue to maintain the exterior as if it were still a going concern, as Westfest maintains, is to read
10 too much into the lease provision of Section 9.3(E). Interpreting the provision in the context of the
11 entire agreement would mean that boarding up an abandoned building's glass windows in order to
12 protect them, and the store's interior contents, is not inconsistent with a reasonable use. This is
13 especially true in the absence of any evidence showing that other shopping centers in this
14 "challenging" geographic area (meaning gang-ridden) leave their vacant spaces open to vandalism,
15 and continually repair their "tagged" and etched windows each time a new vandalism occurs, over
16 and over again.

17 To interpret the provision as Westfest argues is unreasonable, when the contract is
18 construed as a whole, and Westfest's argument that Bashas' breached this provision of the lease fails.

19 On this issue, the court fully finds in favor of Bashas' and against Westfest.
20

21 ATTORNEYS' FEES

22

23 The landlord/Plaintiff, Westfest, has sought an award of attorneys' fees in its
24 complaint. The lease between the parties provides that the prevailing party shall be awarded its fees
25 and costs (Ex. 1 at Section 23). As the court has found in Bashas' favor on all issues, the court will
26 award judgment in favor of Bashas' and against Westfest for its reasonable attorneys' fees and
27 taxable costs. Bashas' shall file an affidavit of fees and detailed listing of taxable costs within ten
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1 days. Westfest shall have ten days to file a response. Bashas' may reply within five days thereafter.
2 Unless the court feels that oral argument is necessary, it will thereafter issue its ruling.

3
4 **PROPOSED FORM OF JUDGMENT**

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6 Bashas' shall lodge, within 15 days, a proposed form of judgment, setting forth the
7 relief granted under the issues presented for resolution. It shall leave a blank for the insertion of the
8 amount for attorneys' fees and costs.

9
10 DATED AND SIGNED ABOVE.

11 COPIES to be sent by the Bankruptcy Notification
12 Center ("BNC") to the following:

- 13 Craig Solomon Ganz, Attorney for Westfest
- 14 Brenda Whinery, Attorney for Debtors/Defendant
- 15 Office of the U.S. Trustee